Advancing Accountability?

Orientalism, Impunity and International Crimes

A TWAIL Approach to Functional Immunity in Foreign Domestic Courts

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Abstract

The development of functional immunity gained new attention with the outbreak of war on the European continent. Victims of war may pursue the right to access to justice in foreign domestic courts to enhance effective redress. However, civil and criminal individual liability of state officials complicit in alleged international crimes may be blocked by functional immunity. Following TWAIL, customary international law is highly influenced by the historical development of international law in the colonial era. Orientalist values of civilisation, sovereignty and superiority continue to affect contemporary law application. By building on TWAIL scholarship, this thesis attempts to examine the impact of imperialism, orientalism and (neo-)colonial values in the development of functional immunity with respect to international crimes and determine the ramifications for access to justice of victims of war. Critical content analysis of jurisprudence in foreign domestic courts determine that the nature of customary international law facilitates a selective application of functional immunity with respect to the defendants' nationality. The analysed state practice indicates selective application for Israeli defendants on the one side, and Arab and African defendants on the other based on western values of colonial superiority and the perception of sovereignty. Functional immunity from prosecution becomes a politicised tool of Israeli impunity obstructing access to justice of Palestinian victims of war. This thesis emphasises the importance of studying contemporary law application from an interdisciplinary perspective to understand practices in foreign domestic courts and the ramifications for victims of war.

Keywords: functional immunity, foreign domestic courts, international crimes, TWAIL, Israel, Palestine, impunity, orientalism, accountability, customary international law development

Contents

List of Abbreviations

CIL	Customary International Law
ECCHR	European Center for Constitutional and Human Rights
ECtHR	European Court of Human Rights
FSIA	Foreign Sovereign Immunity Act
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILA	International Law Association
ILC	International Law Commission
MAG	Military Advocate General
NGO	Non-governmental organisation
OPT	Occupied Palestinian Territory
PA	Palestinian Authority
TWAIL	Third World Approaches to International Law
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
WWII	Second World War

Introduction

The position of civilian victims of war in legal procedures gained renewed attention as the war in Ukraine developed in recent months. With the illegal Russian invasion and alleged committed international crimes, many Ukrainian civilians turned victims of war. Since then, the legal interest in civilian victims of war saw an upsurge in the Western world, as a threat resurfaced on the European continent and war is 'close to home' again. The questions where the Russian state itself or Russian officers and state officials could be prosecuted for international crimes, such as war crimes and crimes against humanity, and where Ukrainian victims of war could have effective access to justice are highly relevant in this moment.[1] The prosecution of (former) Russian state officials is considered in various ways, for instance in Ukraine,[2] before an international court or by establishing a special tribunal,[3] as well as prosecution before foreign domestic courts by means of universal jurisdiction.[4] Germany, for instance, announced an investigation into Russian war crimes on 8 March 2022.[5] Additionally, European states Estonia, Lithuania, Poland, Slovakia, Sweden as well as Switzerland gave notice of investigations in March and April of the same year.[6]

The rekindled focus on the prosecution of alleged perpetrators of international crimes before national courts via universal jurisdiction is associated with the legal doctrine of immunities. Immunities of states or state officials may thwart the prosecution of international crimes, resulting in impunity. In specific, functional immunity impedes the prosecution of (former) individual state officials. Functional immunity, or immunity *ratione materiae*, concerns the immunity from prosecution of persons relating to specific acts of state performed in official capacity.[7] The attribution of functional immunity is thus deriving from the state

[1] Diane Orentlicher, "How States Can Prosecute Russia's Aggression With or Without "Universal Jurisdiction"," *Just Security*, 24 March 2022, available at: https://www.justsecurity.org/80818/how-states-can-prosecute-russias-aggression-with-or-without-universal-jurisdiction/.
[2] Anthony Deutsch, "Ukraine prepares war crimes charges against Russian military personnel, including pilots," *Reuters*, World, 26 April 2022, available at: https://www.reuters.com/world/europe/ukraine-prepares-war-crimes-charges-against-russian-military-personnel-including-2022-04-26/.
[3] Kevin Jon Heller, "The Best Option: An Extraordinary Ukrainian Chamber for Aggression," *Opinio Juris*, 16 March 2022, available at: https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/.
[4] Bojan Pancevski, "Germany Opens Investigation into Suspected Russian War Crimes in Ukraine," *The Wall Street Journal,* 8 March 2022, available at: https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-08/card/germany-opens-investigation-into-suspected-russian-war-crimes-in-ukraine-bNCphaIWE30f2REH8BCi.
[5] Pancevski, "Germany Opens Investigation."
[6] Erika Kinetz, "How Would Those Accused of Ukraine War Crimes Be Prosecuted?," *PBS: Frontline*, 25 March 2022, available at: https://www.pbs.org/wgbh/frontline/article/what-are-war-crimes-russia-ukraine/.
[7] Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," *European Journal of International Law* 21, no. 4 (November 2010): 825.

official's exercise of official conduct that is attributable to a State.[8] Functional immunity therefore does not arise from the status of the person as a state official. Consequently, functional immunity must be distinguished from immunity *ratione personae*, or personal immunity, that can be attributed to a person based on the office they hold and not in relation to committed acts.

The application of functional immunity, a rule of customary international law (CIL), and the development of this field is determined by *opinio iuris* and state practice. International lawyers increasingly contribute to the academic debate on the interpretation of functional immunity in recent years, as is visible in various symposia in academic journals.[9] The general view in the international law community on functional immunity with respect to international crimes has progressed into one that restricts the application of functional immunity in case of core international crimes, like the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance as described in Article 7(1) of the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction (hereinafter Draft Articles) of 2017 by the International Law Commission (ILC).[10] Although criticised, the Draft Articles recognised a trend of the progressive interpretation of a restricted functional immunity in respect to international crimes.[11]

Recent invocation of functional immunity by former state officials in domestic courts indicates that state practice is inconsistent in situations of alleged international crimes. A disparity is apparent in domestic judicial rulings on alleged international crimes involving Israeli former state officials in contrast to Arab and African officials. The ongoing *Ziada* case in the Netherlands and the closed *Koblenz* trials in Germany are among the latest, respectively. In *Ziada v. Gantz and Eshel*, a Palestinian-Dutch citizen to the Netherlands brought a civil case before the district court of The Hague against two powerful former Israeli officials on the basis of *forum neccessitatis*.[12] In December 2021, the Court of Appeal of The Hague followed the

[8] Gian Maria Farnelli, "A Controversial Dialogue between International and Domestic Courts on Functional Immunity," *The Law & Practice of International Courts and Tribunals* 14, no. 2 (2015): 260.
[9] For instance, see: "Symposium: Revisiting Immunity," *European Journal of International Law* 21, no. 4 (2010): 815-881; "Symposium on Domestic Courts as Agents of Development of International Law," *Leiden Journal of International Law* 26, no. 3 (2013): 531-665; "Symposium on the Present and Future of Foreign Official Immunity," *American Journal of International Law Unbound* 112 (2018): 1-37.
[10] Article 7(1): "Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; (f) enforced disappearance." *See* Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, International Law Commission, Report on the Work of Its 69th Session, *A/72/10* (11 September 2017), available at: https://legal.un.org/ilc/reports/2017/english/chp7.pdf, 176.
[11] Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, International Law Commission, Report on the Work of Its 69th Session, *A/72/10* (11 September 2017), 178.
[12] *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:559 (Dutch version). For the English version, see: ECLI:NL:RBDHA:2020:667.

District Court's decision and argued that the two former Israeli state officials enjoyed functional immunity from prosecution, effectively dismissing Ziada's claim in light of his right to reparations.[13] According to Ryngaert, the Court held a regressive view on functional immunity.[14]

At the same time, two German courts decided in three separate criminal cases that functional immunity was not extended to Afghan and Syrian perpetrators complicit in international crimes. In the 2021 case against a former Afghan lieutenant, the German Federal Court of Justice confirmed the 2019 Munich court's conviction and included a ruling on the lieutenant's complicity in torture and sent the case back to the lower court for final sentencing.[15] Additionally, the *Koblenz* trials concern two former Syrian officials: low ranking intelligence officer Eyad A. and high-ranking government official Anwar R.[16] The two perpetrators were separately convicted for crimes against humanity in February 2021 and January 2022, respectively to four and a half years prison time and a life sentence, unable to invoke functional immunity.[17] The conviction of Anwar R. is a pioneering case, as it constitutes the first time a Syrian higher government official is sentenced in a foreign domestic court for crimes against humanity and was consequently not protected by functional immunity.[18]

When effective access to justice is insufficient by way of redress before national courts and international courts such as the International Criminal Court (ICC), victims of war may turn to foreign domestic courts. This route to enhance access to justice is especially valuable to Syrian and Palestinian civilian victims of war, as Assad's Syria and Israel either reject the ICC whatsoever or prevent cooperation in ongoing ICC investigations.[19] Foreign domestic

[13] *Ziada v. Gantz and Eshel*, Court of Appeal The Hague, 7 December 2021, ECLI:NL:GHDHA:2021:2374 (Dutch version).
[14] Cedric Ryngaert, "Functional immunity of foreign State officials in respect of international crimes before the Hague District Court: A regressive interpretation of progressive international law," *EJIL: Talk! Blog of the European Journal of International Law*, 2 March 2020, available at: https://www.ejiltalk.org/functional-immunity-of-foreign-state-officials-in-respect-of-international-crimes-before-the-hague-district-court-a-regressive-interpretation-of-progressive-international-law/.
[15] Bundesgerichtshof (Federal Court of Justice), 28 January 2021, 3 StR 564/19; AP News, "German court: No immunity for foreign officials' war crimes," *AP News*, 28 January 2021, available at: https://apnews.com/b031269c6575b2fa0b77d2a7343929eb.
[16] ECCHR, "First criminal trial worldwide on torture in Syria before a German court," *ECCHR*, Al-Khatib trial, available at: https://www.ecchr.eu/en/case/first-criminal-trial-worldwide-on-torture-in-syria-before-a-german-court/.
[17] ECCHR, "Syria trial in Koblenz: Life sentence for Anwar R for crimes against humanity," *ECCHR*, 13 January 2022, available at: https://www.ecchr.eu/en/press-release/syria-verdict-anwar-r/.
[18] Eurojust, "Syrian official sentenced to life for crimes against humanity with support of joint investigation team assisted by Eurojust," *Eurojust*, news, 13 January 2022, available at: https://www.eurojust.europa.eu/news/syrian-official-convicted-crimes-against-humanity-with-support-joint-investigation-team.
[19] Vito Todeschini and Asser Khattab, "What Justice Can International Law Bring to Syrians?," *Opinio Juris*, 15 March 2021, available at: http://opiniojuris.org/2021/03/15/what-justice-can-international-law-bring-to-syrians/;

proceedings may advance the implementation of the right to reparations for victims of international crimes in line with international humanitarian law (IHL) norms.[20] However, the compliance of this right may, in addition to procedural and political obstacles, be impeded by selective application of functional immunity due to the imperialist nature of international law.

The critical school of Third World Approaches to International Law (TWAIL) stipulates that international law is fundamentally rooted in imperialist ideology and founded in the context of the colonial enterprise of the European world.[21] Imperialist narratives, orientalist values, and neo-colonial policy affect contemporary international law development.[22] For this reason, the application of CIL by national courts is not devoid of implicit bias flowing from the heritage of orientalism, colonialism and values of superiority. Double standards in state practice may generate a selective application of functional immunity for alleged perpetrators of international crimes with varying backgrounds. In this scenario, the nationality of the defendant either being an Arab, African, European or Israeli state official is of significance for the application of functional immunity, acknowledging the status of the Arab and African states as former colonies and, on the other hand, Israel as a superior settler-colonial state.[23] Selective application, in turn, determines the overall development of functional immunity as a rule of CIL dependent on *opinio iuris* and state practice as well as the position of victims of war.

This thesis examines how imperialist, orientalist and (neo-)colonial values and sentiments affect the development of functional immunity from prosecution with respect to international crimes and determines the consequences for effective access to justice of war victims. By analysing recent jurisprudence by domestic courts in the Netherlands, Germany, the United States and Belgium on functional immunity and international crimes, this study aims to get a deeper understanding of the selective application of functional immunity and determine the role of domestic courts in legal development with regard to former Israeli state officials on the one hand, and Arab and African officials on the other. Additionally, this study examines

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BBC News, "Israel 'will not co-operate' with ICC war crimes investigation," *BBC*, news, 9 April 2021, available at: https://www.bbc.com/news/world-middle-east-56687437.

[20] Liesbeth Zegveld, "Remedies for victims of violations of international humanitarian law," *International Review of the Red Cross* 85, no. 851 (2003): 497-526.

[21] Antony Anghie, "The Evolution of International Law: Colonial and Postcolonial Realities," *Third World Quarterly* 27, no. 5 (2006): 739.

[22] B. S. Chimni, "Customary International Law: A Third World Perspective," *American Journal of International Law* 112, no. 1 (2018): 1–46; Vasuki Nesiah, "Decolonial CIL: TWAIL, Feminism, and an Insurgent Jurisprudence," *AJIL Unbound* 112 (2018): 313-318.

[23] Gershon Shafir, "Theorizing Zionist Settler Colonialism in Palestine," in *The Routledge Handbook of the History of Settler Colonialism,* ed. Edward Cavanagh and Lorenzo Veracini (London: Routledge, 2016), 339-352; Rachel Busbridge, "Israel-Palestine and the Settler Colonial 'Turn': From Interpretation to Decolonization," *Theory, Culture & Society* 35, no. 1 (2018): 94-95.

how values and state interests influence the development of functional immunity. Moreover, following TWAIL scholarship this thesis considers material sources of the law and recognises orientalist values, western superiority and sovereignty in legal development and its ramifications of the position of Palestinian victims of war in legal proceedings.

This study constitutes a critical analysis of qualitative content. The research approach in this thesis is based on TWAIL scholarship. This study applies theories of neo-colonialism and orientalism within the TWAIL framework to analyse the legal reasoning as well as the procedural choices made by courts and states resulting in the selective application of the law on functional immunity in cases of Israeli and, respectively, Arab and African defendants. This thesis shows that an implicit bias is present in the state apparatus, including the judiciary, and the values of western superiority and sovereignty rooted in orientalism and neo-colonialism are significant to understand the law development on functional immunity. This thesis shows that the prosecution of perpetrators and the position of civilian victims of war is dependent on values and ideology with respect to nationality and superiority. This thesis concludes that state practice involving Arab and African defendants is considered of less significance than those involving Israeli defendants which steers the general development of the law.

This research contributes to the academic debate on the development of customary international law, and court application of functional immunity in specific, in various ways. Existing research on the development of CIL is mainly focused on how *opinio iuris* and state practice became blurred,[24] how domestic courts act as agents of development,[25] or with respect to the friction between state immunity, sovereignty and the right to a fair trial.[26] Moreover, research on the development of functional immunity is, aside from analysis of ILC procedures,[27] predominantly targeted at historical or critical accounts of future development.[28] This thesis furthermore adds to the academic field on functional immunity of prosecution

[24] Harmen van der Wilt, "State Practice as Element of Customary International Law: A White Knight in International Criminal Law?" *International Criminal Law Review* 20, no. 5 (2020): 784–804.
[25] Rosanne van Alebeek, "National Courts, International Crimes and the Functional Immunity of State Officials," *Netherlands International Law Review* 59, no. 1 (2012): 5-41; Rosanne van Alebeek, "Domestic Courts as Agents of Development of International Immunity Rules," *Leiden Journal of International Law* 26, no. 3 (2013): 559–78.
[26] Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford, UK: Oxford University Press, 2008).
[27] Rosanne van Alebeek, "The 'International Crime' Exception in the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction: Two Steps Back?" *AJIL Unbound* 112 (2018): 27–32.
[28] André Nollkaemper, "Internationally Wrongful Acts in Domestic Courts," *American Journal of International Law* 101, no. 4 (2007): 760-799; Riccardo Pisillo Mazzeschi, "The functional immunity of State officials from foreign jurisdiction: A critique of the traditional theories," *Questions of International Law Zoom Out 17* (2015): 3-31; Dire Tladi, "The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?" *Leiden Journal of International Law* 32, no. 1 (2019): 169–187.

concerning international crimes for multiple reasons. Instead of following the above one-dimensional approaches to functional immunity, this thesis fills a research gap by analysing national jurisprudence on functional immunity from an interdisciplinary TWAIL approach. No research exists on the connection between orientalism and neo-colonialism and the conduct of domestic courts as agents of functional immunity development. Finally, no research has been undertaken on the impact of domestic jurisprudence on functional immunity from the perspective of civilian victims of war. Research on this matter is relevant for civilian victims of war as it reveals the significance of the alleged perpetrator's background for access to justice and compliance of the right to reparations of victims.

This thesis proceeds as follows: chapter one starts with the introduction of research methodology followed by a reflection on researcher positionality. Chapter two critically discusses international law and CIL from a TWAIL perspective and outlines theories on orientalism and imperialism. Chapter three then examines the position of Palestinian victims of war and options of redress. Furthermore, chapter four discusses the development of functional immunity in foreign domestic courts and outlines jurisprudence. Chapter five applies the TWAIL scholarship to the analysis of jurisprudence with regard to Israeli, Arab and African defendants, respectively. Lastly, chapter six connects the findings from the analysis to the development of functional immunity at large.

1. Research Design

The first chapter will introduce TWAIL as the research approach and the method of critical content analysis. Additionally, this chapter discusses the process of data gathering. The last paragraph confers a reflection of the researcher's positionality in relation to this study.

1.1 A TWAIL approach to content analysis

The research approach to this thesis is based on the scholarship of Third World Approaches to International Law (TWAIL). TWAIL must be understood as a distinctive way of thinking of and analysing international law, and involves the "formulation of a particular set of concerns and analytic tools with which to explore them."[29] TWAIL is based on the notion that the study of international law only makes sense "in the context of the lived history of the peoples of the Third World," according to Anghie and Chimni.[30] The essence of TWAIL is to unveil asymmetric relationships and show who and what narratives are included or excluded in the development of international law, and analyse for who it is developed.[31] As a historically aware methodology, Gathii asserts that TWAIL challenges "the simplistic visions of an innocent third world and a colonizing and dominating first world," while acknowledging that contemporary forms of domination cannot be isolated from older, colonial domination.[32] However, there is not one concrete definition or authoritative voice of what TWAIL research should be. Instead, TWAIL constitutes an overlapping term for both the political movement and academic scholarship on questions of (neo-)colonialism and imperialism and what these notions mean for the 'universality' of international law.[33] Chimni points towards the reasons for current attention to CIL in the TWAIL domain and mentions, amongst others, the direct application by domestic courts and the diminished presence by and influence from third world states to this source of international law.[34] Following the TWAIL methodology identified by Burgis-Kasthala, this

[29] Antony Anghie and B. S. Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflict," *Studies in Transnational Legal Policy* 36 (2004): 185.
[30] Anghie and Chimni, "Third World Approaches," 186.
[31] Justine Bendel, "Third World Approaches to International Law: Between theory and method," in *Research Methods in International Law: A Handbook*, ed. Rossana Deplano and Nicholas Tsagourias (Northampton: Edward Elgar Publishing, 2021), 402-405.
[32] James Thuo Gathii, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography," *Trade, Law and Development* 3, no. 1 (2011): 34.
[33] Gathii, "TWAIL: A Brief History," 27; Bendel, "Third World Approaches to International Law," 403; Makau Mutua and Antony Anghie, "What is TWAIL?" *Proceedings of the Annual Meeting (American Society of International Law)* 94 (April 2000): 36.
[34] Chimni, "Customary International Law," 7-8.

thesis utilises TWAIL methodology for a legal analysis "informed with a historical sensibility for the marginalised and a suspicion about universalising narratives."[35]

TWAIL facilitates an interdisciplinary approach to contents under study and enables the engagement with the discipline of postcolonial studies and the knowledge of orientalism and (neo-)colonialist values and practices in international law while conducting legal analysis. An interdisciplinary approach to legal research may focus on how law and the legal system work in practice and captures the inner motives and meanings behind the law and legal phenomena.[36] This approach, furthermore, can be put to practice when a research question goes beyond the strict scope of the body of legal rules and meaning due to political forces.[37] Furthermore, as asserted by Reynolds and Xavier, a TWAIL approach to the question of access to justice in the field of international criminal justice is perceived as an important method to interpret legal practice due to the significant political dynamics in this field resulting in 'operational selectivity'.[38] As the nature of this study's subject prescribes, the research question is thus comprehended through interdisciplinary legal-political lenses.

This thesis makes use of a combination of research methods for the critical analysis of qualitative content. In this research, the TWAIL approach aligns with critical content analysis with regard to the legal development of functional immunity from prosecution before foreign domestic courts in case of alleged international crimes. Both the methods of doctrinal legal research and non-doctrinal research are applied to the study.[39] The doctrinal part constitutes the determination of the existing law and jurisprudence on functional immunity. Non-doctrinal research method allows for the inclusion of other social and political factors to consider.[40] In this thesis, the non-doctrinal research, moreover, seeks to explain the historical impact of colonialism on the development of the law and its consequences for the access to justice of victims of war.

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[35] Michelle Burgis-Kasthala, "Scholarship as Dialogue? TWAIL and the Politics of Methodology," *Journal of International Criminal Justice* 14, no. 4 (2016): 934.
[36] Reza Banakar, "Reflections on the Methodological Issues of the Sociology of Law," *Journal of Law and Society* 27, no. 2 (2000): 274; Aikaterini Argyrou, "Making the Case for Case Studies in Empirical Legal Research," *Utrecht Law Review* 13, no. 3 (2017): 96.
[37] Banakar, "Reflections on the Methodological Issues," 282-283; Argyrou, "Making the Case for Case Studies," 96.
[38] John Reynolds and Sujith Xavier, "'The Dark Corners of the World' TWAIL and International Criminal Justice," *Journal of International Criminal Justice* 14, no. 4 (2016): 959-983.
[39] Ian Dobinson and Francis Johns, "Qualitative Legal Research," in *Research Methods for Law*, ed. Mike McConville and Wing Hong Chui (Edinburgh, UK: Edinburgh University Press, 2007), 18-21.
[40] Dobinson and Johns, "Qualitative Legal Research," 20.

1.2 Data collection

This thesis draws upon primary legal sources and secondary (political) sources as guided by the interdisciplinary nature of the research subject. Legal sources account for historical and contemporary jurisprudence on functional immunity in foreign domestic courts, customary law on functional immunity and the ILC Draft Articles of 2017. To gather the jurisprudence, I thoroughly consulted, amongst others, the ICRC Database on national implementation of IHL,[41] the Nuhanovic Foundation's Database,[42] analytical overviews of cases in recent academic books and articles,[43] reports on casework by non-governmental organisations (NGOs),[44] and newspaper reporting. Aside from legal content, I will refer to statements and addresses by states and state officials from Israel, the United Kingdom, the United States, Germany and the Netherlands. In addition, I consulted academic and non-academic sources that are interacting with the primary legal sources. Aside from written texts, this thesis draws on visual content. The documentary *Gaza: De Rechtszaak* by Zembla for Dutch broadcasting agency BNNVARA, as well as academic panel discussions organised by the Nuhanovic Foundation on the *Ziada* case in the Netherlands were consulted during the research period.[45]

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[41] ICRC, "IHL Database: National Implementation of IHL," *ICRC*, available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/vwLawsByTopics.xsp.

[42] Nuhanovic Foundation, "IHL violations in Palestine," *Nuhanovic Foundation*, Knowledge hub: Database, available at: https://www.nuhanovicfoundation.org/pages/knowledge-hub/database/ihl-violations-in-palestine.

[43] For instance, *see* Salma Karmi-Ayyoub, "Prosecuting Israeli Perpetrators of International Crimes under Universal Jurisdiction Laws: Prospects for Success?" *The Palestine Yearbook of International Law* 19, no. 1 (2020): 96-135; Wolfgang Kaleck, "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008," *Michigan Journal of International Law* 30, no. 3 (2009): 927-980; Van Alebeek, *The Immunity of States and Their Officials;* Rebecca Zaman, "Playing the Ace? Jus Cogens Crimes and Functional Immunity in National Courts," *Australian International Law Journal* 17, no. 5 (2010): 53-87; Akande and Shah, "Immunities of State Officials," 815–852.

[44] Center for Constitutional Rights, "Historic Cases," *Center for Constitutional Rights*, What we do, available at: https://ccrjustice.org/home/what-we-do/historic-cases; Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction: PCHR's work in the occupied Palestinian territory*, PCHR Report, 8 April 2010, available at: https://reliefweb.int/attachments/ab036174-0c1d-3f73-8bd7-0e28842d9cea/2618AC5050A989D8C12576FF003BCFFA-Full_Report.pdf; Amnesty International, *Germany: End Impunity Through Universal Jurisdiction*, Amnesty International Publications, 2008, available at: https://www.amnesty.org/en/wp-content/uploads/2021/06/eur230032008en.pdf.

[45] BNNVARA, "Gaza: De Rechtszaak," *BNNVARA*, Zembla, 2 March 2020, available at: https://www.bnnvara.nl/zembla/artikelen/gaza-de-verloren-zaak; YouTube, "Panel Discussion: The Ziada case at The Hague Court of Appeal | Nuhanovic Foundation," Nuhanovic Foundation: Centre for War Reparations, 22 September 2021, available at: https://www.youtube.com/watch?v=yupUs2X3t88; YouTube, "Panel Discussion: Access to justice for Palestinians in the Occupied Territories | 2nd December 2021," *Nuhanovic Foundation: Centre for War Reparations*, 3 December 2021, available at: https://www.youtube.com/watch?v=NfEWS0LSmmQ; YouTube, "Comments on the Judgement in Ziada vs Gantz/Eshel by Mr. Ziada's Lawyer Prof. Liesbeth Zegveld," *Nuhanovic Foundation: Centre for War Reparations*, 9 December 2021, available at: https://www.youtube.com/watch?v=b-IKJAPLV5U.

1.3 Research positionality

When conducting academic research, it is of utmost importance to determine and reflect on unconscious biases and assumptions of the researcher which could steer or even mildly influence research conduct. The way a person observes and experiences the world impacts the practice of a researcher.[46] The goal of complete objectivity in a study is, in line with postmodernist thinking, therefore impossible.[47] For this reason, it is crucial to reflect on the researcher I am. As a Western, white female student at a Dutch university conducting research on orientalism and colonialism in international law, I bring my own (unconscious) bias to this study. My personal history as well as previous professional and academic experience impact the research that is now in front of you. Accordingly, my academic schooling as a jurist and Arabist with extensive knowledge of and professional experience in the field of international law in the Middle East, and Palestine in specific, are of significance to this current study.

The consultation of a particular academic method in research is "a choice that should be as self-conscious as possible," as Slaughter and Ratner argue.[48] Choices on methodology are vastly influenced and shaped by prevailing paradigms and professional identities, as asserted by Burgis-Kasthala.[49] Acknowledging the above, I am well aware that I, as a Western researcher, deliberately chose the TWAIL approach to undertake this study. TWAIL is primarily consulted and developed by researchers from the 'Third World' – a geographical region I prefer to refer to as the 'Global South', as I am aware of the colonial connotation in the terminology. However, since TWAIL scholars use the 'Third World' explicitly, I will do so in this thesis in regard to the TWAIL prism.

[46] Jasper Tijmstra and Hennie Boeije, *Wetenschapsfilosofie in de context van de sociale wetenschappen* (Den Haag: Boom Lemma, 2011), 32.
[47] Michiel Leezenberg and Gerard de Vries, *History and Philosophy of the Humanities: An Introduction* (Amsterdam: Amsterdam University Press, 2019), 291-292.
[48] Anne-Marie Slaughter and Steven R. Ratner, "The Method Is the Message," *American Journal of International Law* 93, no. 2 (1999): 423.
[49] Burgis-Kasthala, "Scholarship as Dialogue?" 925.

2. TWAIL and International Law Development

In this chapter, I will first elaborate on the politics of international law. I will show how politics affect the application of international law and international justice, especially in the case of Palestine. In the second paragraph, I will discuss the colonial roots of international law from a TWAIL perspective. In this vein, I will highlight contemporary challenges in international law rooted in the TWAIL key concepts of neo-colonialism, orientalism and imperialism. In the third paragraph I further elaborate on TWAIL in contemporary international law development and zoom in on CIL.

2.1 The Politics of International Law

2.1.1 Law is always political

In this study, I approach the legal notion of functional immunity from prosecution by acknowledging the fundamental belief that law is politics. Following the work of Koskenniemi, who wrote extensively on this subject,[50] the assumption of law is politics becomes significant to understand contemporary international law. International law, as Koskenniemi reveals, is an expression of politics.[51] This notion is, however, contested.[52] Nevertheless, the authoritative voice of Koskenniemi is generally recognised as being of utmost significance to the critical study of international law.[53] International law is formed by humans, inherently biased, who execute state interests and power relations in an international context in the name of the state. No higher power exists that controls this process: it is based on political motivation and the intent of states to cooperate in formulating the bodies of law for states to obey in various law disciplines, such as human rights and international criminal or humanitarian law. The United Nations, although an umbrella organisation, does not hold said power, as its power is deriving

[50] For instance, *see* Martii Koskenniemi, *The Politics of International Law* (Oxford: Hart Publishing, 2011); Martti Koskenniemi, "Speaking the Language of International Law and Politics: Or, of Ducks, Rabbits, and Then Some," in *Mobilising International Law for 'Global Justice'*, ed. Jeff Handmaker and Karin Arts (Cambridge: Cambridge University Press, 2018); Martii Koskenniemi, "The Politics of International Law – 20 Years Later," *European Journal of International Law* 20, no. 1 (2009): 7-19; Martii Koskenniemi, "Variations of world order: The structure of international legal argument," in *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006), 474-512.
[51] Koskenniemi, *The Politics of International Law*, v.
[52] For instance, *see* Anthony Carty, "Language Games of International Law: Koskenniemi as the Discipline's Wittgenstein," *Melbourne Journal of International Law* 13, no. 2 (2012): 859-878; Mark A. Pollack, "Is International Relations Corrosive of International Law: A Reply to Martti Koskenniemi," *Temple International & Comparative Law Journal* 27, no. 2 (2013): 339-376.
[53] Wouter Werner, Marieke de Hoon, and Galán Alexis, *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge: Cambridge University Press, 2017), 1-2.

from political commitment and cooperation of Member States in law-making procedures.[54] Koskenniemi furthermore finds it impossible to imagine the creation of decisions in law which would not imply political choice as part of this process.[55] Consequently, since the nineteenth century jurists have pursued but failed to establish complete objectivity in law due to the inherent political nature of the law.[56]

Koskenniemi's argument builds on the academic legacy of twentieth century jurists Morgenthau and Lauterpacht on the relationship between international politics and law.[57] Morgenthau's argument focused on the idea that the world is political, and law played a marginal role focused on minor interests. Lauterpacht, however, believed that the world is predominantly legal, leaving little room for politicians to decide on issues.[58] In the view of Koskenniemi, both scholarships, although contradictory, hold a sense of truth in it: it all depends on your perspective and (professional) background. Illustrative for the dynamic relation between law and politics is Koskenniemi's reference to the *duck-rabbit* illusion, as introduced by Wittgenstein, on how one's perspective to an issue can change the narrative. Koskenniemi argues, following Wittgenstein, that law and politics together form one entity, for we also only see one *duck-rabbit*, and not *half-a-duck* or *half-a-rabbit*.[59] With that, the two vocabularies of law and politics and corresponding institutions are existing at the same time. Depending on the situation and which actors are involved, it is decided by the actors – either legal *ducks* or political *rabbits* – which of the two vocabularies should be dominant.[60] It all depends on what perspective is chosen – and who is able to choose the perspective. In other words, who holds the power to choose what narrative will be the norm. Koskenniemi calls this doctrine the 'politics of re-description'.[61] To hold the power to re-describe thus constitutes a political power only available to the most powerful states, entities and individuals in the field.

The politics of re-description affect the development of international law. The development of law is no absolute, objective activity. Instead, development is determined by subjectivity and bias of legal experts. With this bias comes the intent to convince and persuade other states of one's arguments.[62] Consequently, legal experts exploit the politics of re-

[54] Hans Köchler, "The United Nations Organization and Global Power Politics: The Antagonism between Power and Law and the Future of World Order," *Chinese Journal of International Law* 5, no. 2 (2006): 323; Ruth B. Russell, ""Power Politics" and the United Nations," *International Journal* 25, no. 2 (1970): 321.
[55] Koskenniemi, *The Politics of International Law*, 61.
[56] Koskenniemi, *The Politics of International Law*, 62.
[57] Koskenniemi, "Speaking the Language of International Law and Politics," 22-26.
[58] Koskenniemi, "Speaking the Language of International Law and Politics," 24-26.
[59] Koskenniemi, "Speaking the Language of International Law and Politics," 26-28.
[60] Koskenniemi, "Speaking the Language of International Law and Politics," 28.
[61] Koskenniemi, "Speaking the Language of International Law and Politics," 40-41.
[62] Koskenniemi, "Speaking the Language of International Law and Politics," 43.

description to persuade others to conform to the state's morals, values, and argumentation in the process of the development of international law, affiliated with geopolitical incentives of the state. Having said that, only states that hold power will be able to utilise this doctrine, for only the powerful can decide what normative narrative is dominant in the international arena. The application of the doctrine on the politics of re-description is present in, for instance, how Western countries deal with principles of international migration and refugee law, such as the principle on non-refoulement.[63] Europe's border control organisation Frontex violates this principle by conducting so-called illegal pushbacks, deporting refugees to non-EU countries without prior legal procedure.[64] Western European states have strongly lobbied to deter 'waves of migrants' from entering their countries.[65] With the politics of re-description, moreover, the focus on the principle on non-refoulement as a right of refugees is recentred to the "control and managing of migration flows" conducted by Council of Europe Member States, as illustrated by a Resolution on Pushback Policies.[66]

2.1.2 The politics of international justice

Following the Koskenniemi argument on law and politics as one entity with a dominant language depending on the power of involved actors, the question arises what language is spoken in the field of international justice. Koskenniemi questions the intent of international prosecution: "are international criminal tribunals about legal punishment or show trials?; the enforcement of law or of Western/imperial bias?; legal or victor's justice?"[67] In historical proceedings on war crimes committed in former Yugoslavia and Rwanda, or in proceedings before the ICC, the questions opted by Koskenniemi were at stake when determining the legitimacy of the trial in the first place.[68] As Koskenniemi argues, to include narratives of imperialism in the conceptual framework of international justice constitutes politicisation.

[63] The principle on non-refoulement is a fundamental right in international law that prohibits the deportation of refugees to a country where they risk inhumane treatment, torture or persecution; Prakken D'Oliveira, "EU agency Frontex charged with illegal pushbacks," *Prakken D'Oliveira*, news, 2021, available at: https://www.prakkendoliveira.nl/en/news/news-2021/eu-agency-frontex-charged-with-illegal-pushbacks.
[64] Prakken D'Oliveira, "EU agency Frontex charged with illegal pushbacks."
[65] Silvia D'Amato and Sonia Lucarelli, "*Talking Migration*: Narratives of Migration and Justice Claims in the European Migration System of Governance," *The International Spectator* 54, no. 3 (2019): 1.
[66] Council of Europe Parliamentary Assembly, Resolution 2299, On Pushback policies and practice in Council of Europe member States, 28 June 2019, available at: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28074.
[67] Koskenniemi, "Speaking the Language of International Law and Politics," 29.
[68] Koskenniemi, "Speaking the Language of International Law and Politics," 29-30.

However, refraining from it is just as political as engaging with it.[69] The choice itself is thus highly political.

Political, social, historical, economic, and cultural factors are too often not considered in the international justice framework as argued by Handmaker and Arts.[70] For instance, colonial relations and neo-colonial state imperatives play a role in the interests of states and the imperial biased view to strategically support or deny the United Nations Security Council (UNSC) vote on a possible trial before the ICC. These dynamics are perceptible when looking at persons brought before the ICC. No American or Western European state official has seen the inside of the ICC as an alleged perpetrator of war crimes. Instead, up to 2016 the Court has sentenced mere African leaders for complicity in international crimes.[71] Consequently, academics and states have accused the ICC of upholding Western imperialist principles as a neo-colonial political tool for western control, shielding Western states from prosecution of international crimes.[72] For instance, alleged American war crimes committed in Iraq would, legally speaking, make for a legitimate case before the ICC, if not for the prevention of ICC investigations via political strategic veto rights of the permanent five members in the UNSC.[73] The same could be said of Russia's conduct in Syria.[74] More importantly, both Russia and the United States are no State Parties to the Rome Statute after withdrawing their signatures.[75] Although the Office of the Prosecutor has looked into the situation of American crimes in Afghanistan on multiple occasions, the Pre-Trial Chamber found in 2019 that an investigation "would not be in the interests of justice."[76] This demonstrates why the procedures in the UNSC and before the ICC are considered highly political.

The Office of the Prosecutor's investigation into war crimes in the situation in the State of Palestine, however, may challenge this imperialist narrative, now that the Court is

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[69] Koskenniemi, "Speaking the Language of International Law and Politics," 31.

[70] Jeff Handmaker and Karin Arts, "Taking Seriously the Politics of International Law: A Few Concluding Remarks," in *Mobilising International Law for 'Global Justice'*, ed. Jeff Handmaker and Karin Arts (Cambridge: Cambridge University Press, 2018), 240.

[71] International Criminal Court, "Cases," *ICC*, available at: https://www.icc-cpi.int/cases.

[72] Shannon Fyfe, "The Office of the Prosecutor: Seeking Justice or Serving Global Imperialism?" *International Criminal Law Review* 18, no. 6 (2018): 988-1014; Lea Schneider, "The International Criminal Court (ICC)–A Postcolonial Tool for Western States to Control Africa?" *Journal of International Criminal Law* 1, no. 1 (2020): 90-109.

[73] Michael Mandel, *How America gets away with murder: Illegal wars, collateral damage and crimes against humanity* (London: Pluto Press, 2004); William A. Schabas, "United States hostility to the International Criminal Court: It's all about the security council," *European Journal of International Law* 15, no. 4 (2004): 701-720.

[74] Todeschini and Khattab, "What Justice Can International Law Bring to Syrians?"; United Nations General Assembly, *Human Rights Council*, A/HRC/43/57, 28 January 2020, 43rd session, agenda item 4, Human rights situations that require the Council's attention, available at: https://undocs.org/A/HRC/43/57.

[75] International Criminal Court, "The States Parties to the Rome Statute," *ICC*, available at: https://asp.icc-cpi.int/states-parties.

[76] International Criminal Court, "Afghanistan," *ICC*, available at: https://www.icc-cpi.int/afghanistan.

concentrating on the Israeli state, a settler-colonial entity, as alleged perpetrator of international crimes.[77] The effects of imperialism and neo-colonialism in prosecution, moreover, can also be extended to the analysis of the prosecution of international crimes in domestic courts of third countries.[78]

2.1.3 Law, Politics and Palestine

Law is always political when it comes to Palestine.[79] Renowned scholar and jurist Noura Erakat illustrates that, in the context of Palestine, international law has been politicised ever since the Balfour declaration of 1917.[80] With the declaration, the at that time British coloniser of Palestine enabled the settler-colonisation of Palestine by European Jews.[81] The law has always been exploited for geopolitical interests, even before the state of Israel was created in 1948 by the expulsion of over 750.000 Palestinian indigenous people, about 80 per cent of the population at that time, also known as the *Nakba*, or catastrophe.[82] Erakat's main argument concerns the Israeli employment of the notion of *sui generis* to justify its colonial policy of oppression over Palestinian natives. Since 1948, Israel claims that the situation on the ground constitutes to *sui generis*, meaning a state of exception that allows for a different interpretation of the law, shielding Israel's Apartheid policy and conduct on the ground from legal regulation by existing international law.[83] Erakat's findings reiterate other academic work on Israel's state of emergency policy.[84]

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[77] International Criminal Court, "Situation in the State of Palestine," *ICC*, State of Palestine, available at: https://www.icc-cpi.int/palestine.

[78] Handmaker and Arts, "Taking Seriously the Politics of International Law," 241.

[79] For extensive academic literature on this matter, see for instance: Sanford R Silverburg. *Palestine and international law: essays on politics and economics* (Jefferson, N.C.: McFarland & Co, 2002); Noura Erakat, *Justice for Some. Law and the Question of Palestine* (Stanford: Stanford University Press, 2019); Michael Kearney and John Reynolds, "Palestine and the Politics of International Criminal Justice," in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*,' ed. William Schabas, Yvonne McDermott and Niamh Hayes (Farnham, UK: Ashgate Publishing Ltd., 2013), 407-434; Francis A. Boyle, *Palestine, Palestinians and International Law* (Atlanta: Clarity Press, 2003); Francesca Albanese and Lex Takkenberg, *Palestinian Refugees in International Law*, second edition, (Oxford, UK: Oxford University Press, 2020).

[80] Erakat, *Justice for Some. Law and the Question of Palestine*, 25-33.

[81] Ilan Pappe, *The Ethnic Cleansing of Palestine* (London, UK: Oneworld, 2006), 13; Nur Masalha, *Palestine: A Four Thousand Year History* (London, UK: Zed Books), 291; Rashid Khalidi, *The Hundred Years' War on Palestine: A History of Settler Colonial Conquest and Resistance, 1917–2017* (London, UK: Profile Books, 2020), 11.

[82] Khalidi, *The Hundred Years' War on Palestine*, 55-95.

[83] Erakat, *Justice for Some. Law and the Question of Palestine*, 17.

[84] For instance, *see* David Lloyd, "Settler colonialism and the state of exception: The example of Palestine/Israel," *Settler Colonial Studies* 2, no. 1 (2012): 59-80; John Quigley, "Israel's Forty-Five Year Emergency: Are There Time Limits to Derogations from Human Rights Obligations," *Michigan Journal of International Law* 15, no. 2 (1994): 491-518; Smadar Ben-Natan, "The dual penal empire: Emergency powers and military courts in Palestine/Israel and beyond," *Punishment & Society* 23, no. 5 (2021): 741-763; Yehouda Shenhav and Yael Berda, "The Colonial Foundations of the State of Exception: Juxtaposing the Israeli Occupation of the Palestinian Territories with Colonial Bureaucratic History," in *The Power of Inclusive Exclusion: Anatomy*

Israel's interpretation of the notion of *sui generis*, the state of exception, allows Israel to impose colonial era practices on the Palestinian indigenous people in occupied territory, the second-class inhabitants, placing them outside the standard law framework for Israeli citizens.[85] In practice, different sets of law determine Palestinian and Israeli lives in the occupied Palestinian Territory (oPt), namely military law for Palestinians and Israeli law for Israeli settlers as seen in the Emergency Regulation Laws from 1967.[86] This practice constitutes to the crime of Apartheid, as recently illustrated by Amnesty International and Human Rights Watch, in addition to a multitude of Israeli and Palestinian human rights organisations.[87] Interestingly, the Israeli government recently collapsed after the Knesset, the Israeli parliament, failed to pass the five-yearly extension of this emergency law which maintains the situation of Apartheid in June 2022.[88] With this policy, Israel essentially eliminates Palestinians from the law – a classic example of biopolitics in the colonial setting. Introduced by Foucault and further developed by settler-colonial studies scholars Wolfe and Morgensen, biopolitics constitutes the means by which the colonising entity uses political power to control and regulate the colonised, in this case the law.[89] Consequently, Israel claims to act according to emergency principles, effectively safeguarding itself from criticism. Following Koskenniemi's argument on how the one in power will decide what perspective is chosen, Israel enables its conduct, which is illegal according to, for example the laws of occupation, by its interpretation and politically exploiting the notion of re-description of the law. This again shows that law is politics.

Contemporary legal scholarship on Palestine-Israel in the international arena illustrate that the application of international law to Israel is inherently political. Exemplary for this are the politicised dynamics at the level of the UN and the ICC. UNSC resolutions condemning Israeli violations are passed at a slow rate due to vetoes, shielding Israel from accountability.

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of Israeli Rule in the Occupied Palestinian Territories, ed. Michal Givoni, Sara Hanafi and Adi Ophir (Princeton, MIT Press, 2009), 337-367.

[85] Erakat, *Justice for Some. Law and the Question of Palestine*, 17.

[86] John Dugard and John Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territory," *European Journal of International Law* 24, no. 3 (2013): 908-911.

[87] Amnesty International, "Israel's apartheid against Palestinians: Cruel system of domination and crime against humanity," *Amnesty International*, Research, 1 February 2022, available at: https://www.amnesty.org/en/documents/mde15/5141/2022/en/; Human Rights Watch, "A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution," *Human Rights Watch*, Report, 27 April 2021, available at: https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution. For Israeli and Palestinian accounts on the facts on the ground, see for instance reports by B'Tselem and Al-Haq.

[88] Bethan McKernan, "Israel's coalition on brink of collapse after losing settler law vote," *The Guardian*, 7 June 2022, available at: https://www.theguardian.com/world/2022/jun/07/israels-coalition-on-brink-of-collapse-after-losing-settler-law-vote.

[89] Patrick Wolfe, "Settler colonialism and the elimination of the native," *Journal of Genocide Research* 8, no. 4 (2006): 387-409; Scott Lauria Morgensen, "The Biopolitics of Settler Colonialism: Right Here, Right Now," *Settler Colonial Studies* 1, no. 1 (2011): 52.

For instance, the United States, outspoken supporter of Israel, vetoed the international community's interference into Israeli human rights violations a stark amount of 43 times between 1972 and 2017.[90] In 2016, the United States' Obama administration surprisingly abstained from voting and Resolution 2334 was passed, condemning the illegal Israeli settlements in the oPt.[91] Additionally, the Human Rights Council has condemned international law violations on many occasions. Next, the ICC, moreover, is prone to 'operational selectivity' when it concerns Israel, as argued by Reynolds and Xavier, and stipulate that such selectivity stems from geopolitical biases at play.[92] Considerably, the ICC procedure to investigate war crimes in Israel and the oPt has received extensive backlash and criticism from Israel and its major supporters, such as the United States.[93] Law is not only political in international courts for Palestinians. While bringing cases before domestic courts in order to gain justice, Palestinians find themselves also confronted with the politics of law in domestic courts.[94]

2.2 TWAIL and the Colonial Roots of International Law

2.2.1 *European* international law

To understand contemporary dynamics between international law and international politics, it is crucial to recognise that international law is historically connected to Western European imperialism and colonialism.[95] International law is founded in the context of the colonial enterprise of the European world.[96] TWAIL stipulates that international law is positioned as 'universal', notwithstanding the fact that it is a creation of Europe and European traditions.[97] In the colonial era, Spanish jurist Francis de Vitoria established laws on the rights of indigenous peoples in the Spanish colonial era contingent on European societal norms and values.[98] Vitoria articulated a body of law in order to predominantly deal with the relation between the Spanish colonisers and the 'Indian' indigenous people in the Americas.[99] Spain then utilised the European norms, projected as universal, to legitimate oppression and domination and to justify

[90] Erakat, *Justice for Some. Law and the Question of Palestine*, 1.
[91] Erakat, *Justice for Some. Law and the Question of Palestine*, 1.
[92] Reynolds and Xavier, "'The Dark Corners of the World'," 959.
[93] BBC News, "Israel 'will not co-operate'."
[94] Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 107-124.
[95] Antony Anghie, "Francisco De Vitoria and the Colonial Origins of International Law," *Social & Legal Studies* 5, no. 3 (1996): 332.
[96] Anghie, "The Evolution of International Law," 739.
[97] Anghie, "The Evolution of International Law," 739.
[98] Anghie, "Francisco De Vitoria," 321-323.
[99] I strongly dislike the term 'Indian' in the colonial context, as it is rooted in racist ideology. In this specific sentence I however do refer to this term, as Anghie used it in his work. I prefer terminology such as 'indigenous people' over 'Indian people'.; Anghie, "Francisco De Vitoria," 322.

the conquest of indigenous communities and their land.[100] Consequently, a more adequate description, as Anghie states, would have been "*European* International law."[101] As Erakat illustrates, the seeds of international law were thus planted to establish 'objective' legality which would justify colonial violence and domination by the West.[102]

The European identity of international law is visible in, for instance, the founding and universalisation of the legal principle of sovereignty. Westphalian sovereignty, initially only extended to European states, reflecting the principle of non-interference in another state's domestic affairs first established with the 1648 Peace of Westphalia.[103] It is furthermore established that, at that time, 'uncivilised' people lacked the ability to have sovereignty - or it was at least inferior to that of 'civilised' peoples.[104] In the process of the imperialist expansion, societies in the non-European world were included in the Westphalian sovereignty of the European state.[105] In other words, the Western states in power deemed indigenous societies ineligible to gain their own sovereignty at the same time, and were instead, according to a quintessential colonial scheme, incorporated in the European state's sovereignty. Colonised states acquired an equal classification of sovereign statehood only later through decolonisation.[106] Decolonisation gradually occurred after the First World War, when scholars and states began to criticise the colonial discipline for its imperialist character.[107] It is for this reason that in the context of international law, the 'post' in postcolonialism refers to the period after decolonisation, marking the ending of the period of legally authorised European colonialism.[108]

2.2.2 Orientalism in international law

Imperialism, orientalist values and racist ideology lay at the heart of international law since its founding. Following the school of TWAIL, the European vocabulary of 'modernity',

[100] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 21.
[101] Anghie, "The Evolution of International Law," 740.
[102] Erakat, *Justice for Some. Law and the Question of Palestine*, 6-7.
[103] Henry Kissinger, *World Order* (New York, US: Penguin Press, 2014), 1-3.
[104] Ralph Wilde, "From Trusteeship to Self-Determination and Back Again: The Role of the Hague Regulations in the Evolution of International Trusteeship, and the Framework of Rights and Duties of Occupying Powers," *Loy. L.A. Int'l & Comp. L. Rev* 31 (2009): 94.
[105] Anghie, "The Evolution of International Law," 740.
[106] Anghie, "The Evolution of International Law," 740.
[107] Anghie, "The Evolution of International Law," 746.
[108] Diane Otto, "Postcolonialism and Law," *Third World Legal Studies* 1998 (1998-1999): vii.

'civilisation' and 'progress' were detrimental for the way colonial subjects were assessed.[109] The European colonisers utilised binaries such as barbaric-mannered, primitive-intellectual, weak-strong, uncivilised-civilised, and advanced-backward to shape a picture of the indigenous people in the Americas, Africa and the Middle East.[110] This way, the European Self was created based on this value system and the West was perceived as superior and thus worthy of 'legitimate' control and power over the Other.

The notion of Othering to establish a sense of superiority that unilaterally legitimises control and domination is later coined as 'orientalism' by Edward W. Said. In his 1978 seminal work *Orientalism*, Said elaborates on the historical and contemporary portrayal of the Middle East and Arab population by the West.[111] Said stipulates that by assessing the morals, values and idea of the Orient, or the Other, the West created a contrasting image which defined the successful European state.[112] The distinction between the West and East is utilised to promote Western imperialism as a legitimate strategy.[113] The superiority of the West then and now manifests in orientalist portrayal of the Middle East and 'backward' Arabs in, for example, cinema, Western popular culture and literature.[114]

The process of orientalising the Other by the West conceptualises the values of modernity, liberalism, human rights and democracy as distinct Western culture.[115] As a consequence, the values behind orientalism, as seen in the introduced binaries above, lay at the heart of the contemporary Western and European civilisation – and thus of international law. Western superiority rooted in orientalism is discernible in how international law is founded. In specific, orientalism is present in the positivist approach to international law we know today. Illustratively, powerful entities established a separation between 'civilised' and 'uncivilised' peoples, as seen in the Treaty of Paris (1856), and the self-acclaimed superior powers excluded

[109] Luis Eslava and Sundhya Pahuja, "Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law," *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 45, no. 2 (2012): 196.
[110] Eslava and Pahuja, "Beyond the (Post)Colonial," 196; Anghie, "The Evolution of International Law," 743-744.
[111] Edward W. Said, *Orientalism*, rev, ed. (1978; repr., London: Penguin Books, 2003).
[112] Said, *Orientalism*, 1-2.
[113] Ilia Xypolia, "Eurocentrism and Orientalism," in *The Encyclopedia of Postcolonial Studies*, ed. Sangeeta Ray and Henry Schwarz (Wiley, 2016): 11-36.
[114] *See* Matthew H. Bernstein, Matthew Bernstein, and Gaylyn Studlar. *Visions of the East: Orientalism in film* (New Brunswick, NJ: Rutgers University Press, 1997); Naomi Rosenblatt, "Orientalism in American popular culture," *Penn History Review* 16, no. 2 (2009): 51-63; Perry Nodelman, "The other: Orientalism, colonialism, and children's literature," *Children's Literature Association Quarterly* 17, no. 1 (1992): 29-35.
[115] Xypolia, "Eurocentrism and Orientalism," 11-36.

the 'uncivilised' from the law community.[116] The contemporary positivist method builds on a historical process in which imperial powers defined the international legal community.[117]

2.3 TWAIL and Customary International Law

In TWAIL scholarship, it is generally assumed that neo-colonial beliefs, orientalist and imperialist sentiments affect the contemporary development of international law.[118] The beginning of the postcolonial world, embodied by decolonisation, ultimately kickstarted a neo-colonial reality. As Anghie puts it: "the end of formal colonialism, while extremely significant, did not result in the end of colonial relations."[119] Imperialism remains an integral part of international relations, as states exploit international law in order to expand intrinsic imperial policies in the capitalist world, such as the civilising mission of the West in conflict-ridden areas through intervention while protecting the Western exploitation of local resources.[120] Consequently, state interests and former colonial ties determine the application and development of contemporary international law.

Neo-colonialism is present in multiple facets of contemporary international law. The application of the legal principle of humanitarian intervention, for example, did receive criticism for maintaining a neo-colonial take on conflict resolution, for the sovereignty of a very often non-Western state is violated.[121] Furthermore, one of the main postcolonial, or neo-colonial, critiques of international law concerns the 'universality' of international law.[122] Illustratively, Renteln and Brown argue that the notion of 'universal human rights' as employed by the United Nations predominantly consists of western norms and values, although presented as universal.[123] For example, the imperialist interests of Western states in the development of international women's rights law remains significant. Western norms and values appear to be detrimental for the development of important United Nations resolutions and treaties, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[124] Scholars criticised CEDAW for its western-centric perception of what is 'right'

[116] Chimni, "Customary International Law," 17.
[117] Chimni, "Customary International Law," 17.
[118] Chimni, "Customary International Law," 1–2; Nesiah, "Decolonial CIL," 313-318.
[119] Anghie, "The Evolution of International Law," 748-749.
[120] Anghie, "The Evolution of International Law," 751.
[121] Chimni, "Customary International Law," 37.
[122] Eslava and Pahuja, "Beyond the (Post)Colonial," 199.
[123] Alison Dundes Renteln, "The Concept of Human Rights," *Anthropos* 83, no. 4/6 (1988): 343; Chris Brown, "Universal human rights: A critique," *The International Journal of Human Rights* 1, no. 2 (1997): 41.
[124] Convention on the Elimination of All Forms of Discrimination against Women, 12 December 1979, 1249 U.N.T.S. 20378.

for women as well as for a lacking translation of 'universalised' human rights standards into local contexts.[125]

2.3.1 TWAIL and customary international law development

TWAIL challenges the contemporary, largely ahistorical accounts of CIL. CIL is familiar with the colonial and western-centric nature and development of international law at large. TWAIL scholarship stipulates that European colonial, orientalist and imperialist roots of international law were foundational for the inception and contemporary CIL development. CIL is, above all, a western construct.[126] Imperial state interests and European values were and still are of significance to CIL.[127] Historically, only the few powerful Western states that were part of the international legal community contributed to the foundation and development of CIL.[128] Despite the legal revolution on European treaty development in the nineteenth century, European states continued the development of customary rules. This occurred predominantly in terrains of critical value to the colonial project, such as the law of the sea and the law of war exercised by navy and military powers, rules on territorial rights, and principles of sovereignty and state responsibility.[129] Additionally, Chimni furthermore refers to the development of CIL and the impact of imperialism in the rise of European capitalism since the nineteenth century.[130] When capitalism stagnantly grew, the ideas and norms of capitalism influenced how customs and values developed, and therefore how CIL was formed. Illustratively, TWAIL prescribes that *pacta sunt servanda* was established in order to create stability for the ones in power.[131]

Contemporary CIL remains strongly connected to the imperial capitalist interests of the Western world, in particular in international investment law, where the interest of universalising capitalism is sustained. As Chimni illustrates, contemporary capitalism is secured through "the creation of rules that go to lend it both stability and legitimacy."[132] Adding to that, TWAIL

[125] Sally E. Merry, "Disjunctures between Global Law and Local Justice," in *Human Rights and Gender Violence: Translating International Law into Local Justice* ed. Sally E. Merry (Chicago: University of Chicago Press, 2006), 103.
[126] Chimni, "Customary International Law," 44.
[127] Chimni, "Customary International Law," 12.
[128] Oscar Schachter, "New Custom: Power, Opinio Juris, And Contrary Practice," in *Theories of International Law at The Threshold of the 21st Century: Essays in Honor of Krzysztof Skubiszewski*, ed. Jerzy Makarczyk (The Hague, London, Boston: Kluwer Law International, 1996), 531, 536-537.
[129] David J. Bederman, "The Sea," in *The Oxford Handbook of The History of International Law*, ed. Bardo Fassbender and Anne Peters (Oxford, United Kingdom: Oxford University Press, 2012), 359; Chimni, "Customary International Law," 19.
[130] Chimni, "Customary International Law," 4.
[131] Chimni, "Customary International Law," 5.
[132] Chimni, "Customary International Law," 5.

believes that rules in the domains of IHL, ICL, and IHRL are created following the same paradigm of legitimising western capitalist and imperialist interests.[133]

According to TWAIL, the current ahistorical account of CIL is articulated by the dominant positivist method to international law which ignores regional and global social structures, stemming from the imperialist nature of international law.[134] Anghie asserts that the previous mentioned positivist distinction of 'civilised' and 'uncivilised' also informs the CIL doctrine.[135] The positivist approach to CIL advanced in the political and cultural milieu of European states with customs and values which excluded practice of non-European states, i.e. 'uncivilised' and unsovereign peoples.[136] TWAIL stipulates that through this positivist method, the development of contemporary CIL excludes historically important dynamics stemming from orientalist and imperialist policy and belief systems. In other words, TWAIL tends to challenge CIL and the western positivist method, saturated with the distinction between civilised superior people and the uncivilised, as the basis for a contemporary understanding of the CIL doctrine. As Chimni concludes, the development of the CIL doctrine must be viewed in light of the "emergence of Europe as a legal community, common European values, the positivist method and the needs of nineteenth century imperialism."[137]

2.3.2 TWAIL, *opinio iuris* and state practice

TWAIL challenges the positivist approach to the formative sources of contemporary CIL for the negligence of significant historical contextual elements, such as the colonial and imperialist roots and contemporary neo-colonial dynamics in legal development. Historically, CIL contained both formal and material sources which interacted with one another. Formal sources constitute "processes through which international law rules become legally relevant," otherwise known as state practice and *opinio iuris*.[138] Material sources entail the "political, sociological, economic, moral or religious origins of the legal rules," according to ILC special rapporteur Michael Wood.[139] For example, ethical values of democracy, modernity, liberalism, imperialism, environmentalism, and human rights that are connected to state polity and

[133] Chimni, "Customary International Law," 5.
[134] Chimni, "Customary International Law," 4.
[135] Anghie, *Imperialism, Sovereignty and the Making of International Law*, 54.
[136] Chimni, "Customary International Law," 17.
[137] Chimni, "Customary International Law," 20.
[138] Chimni, "Customary International Law," 7, 14.
[139] International Law Commission, First Report on Formation and Evidence of Customary International Law by Special Rapporteur Michael Wood, *UN Doc. A/CN.4/663* (May 17, 2013), 12, n. 56. The distinction was endorsed in later reports. *See* Chimni, "Customary International Law," 14.

structure would be considered material sources.[140] These material sources give contextual meaning and significance to a rule by looking at existing discourses, values and bias at play and by, for instance, recognising (historical) geo-political and diplomatic interests of states.

TWAIL stipulates that the distinction between formal and material sources, as advanced by western scholarship and endorsed by the ICJ, ILC, and the International Law Association (ILA) ignores critical historical context.[141] In specific, the distinction veils the role of power, culture, values, and state interests in the determination of CIL sources.[142] The positivist move to exclude material sources, furthermore, is perceived as a tool to safeguard western neo-colonial preferences and cover up the imperialist interests of states in an increasingly neo-colonial capitalist world.[143] That is to say, this approach to CIL serves capitalist and imperial interests of (former) colonial powers in a neo-colonial world.[144] The movement to separate formal and material sources of CIL aligned with the protection of neoliberal, capitalist interests of predominantly Western states in the mid-eighties.[145] For instance, customary development of investment law strategically veiled material sources in order to serve Western investment lawyers entitled to certain standards abroad too.[146]

TWAIL scholar Chimni opposes the distinction between formal and material sources in contemporary CIL for it eliminates the significance of the colonial origins of the law and its contemporary consequences to oppressed people.[147] Chimni argues that state practice and *opinio iuris* as formal sources cannot be fully considered as objective formative to customary law without acknowledging the material sources of CIL. The formal sources of CIL were "identified and given meaning in the context of the relationship between European nations with a broadly shared culture and the stage of economic development."[148] Chimni illustrates how formal and material sources are historically tied together by referring to the notion of 'civilised

[140] John Tasioulas, "Customary International Law and the Quest for Global Justice," in *The Nature Of Customary Law: Legal, Historical And Philosophical Perspectives*, ed. Amanda Perreau-Saussine and James Bernard Murphy (Cambridge, UK: Cambridge University Press, 2009), 325-326.
[141] See *Continental Shelf (Libya v. Malta),* International Court of Justice, *1985 ICJ Rep. 13,* 21 March 1984, para. 27; International Law Commission, Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee, *UN Doc. A/CN.4/L.872* (2016), 1; International Law Association, "Final Report of Commission on Formation of Customary (General) International Law: Statement of Principles Applicable to the Formation of General Customary International Law," London Conference 2000, available at https://perma.cc/5CJ8-UTR2, 13, 40; Chimni, "Customary International Law," 2, 6-7, 46.
[142] Chimni, "Customary International Law," 6-7.
[143] Chimni, "Customary International Law," 6-7.
[144] Nesiah, "Decolonial CIL," 316.
[145] Chimni, "Customary International Law," 12.
[146] Chimni, "Customary International Law," 11; Jean d'Aspremont, "International Customary Investment Law: Story of a Paradox," *ACIL Research Paper* 19, no. 8 (2011): 6-10.
[147] Chimni, "Customary International Law," 7, 14.
[148] Chimni, "Customary International Law," 14.

nations', an orientalist term which facilitated and justified imperialism and colonisation, in Article 38(1) of the ICJ Statute on the recognition of sources of international law.[149] On the basis of Article 38(1), the Court acknowledges general principles of law as a source *only* if they are recognised by 'civilised' states, dismissing all other, 'uncivilised' colonised nations. In other words, the formal sources of international law were historically inherently intertwined with political and moral biases and a western-valued appreciation of the world, i.e. material sources.

Chimni asserts that Western international law scholars tend to conceal the common roots of colonialism and the superiority claim in formal and material sources, which would disclose the highly racist and imperialist foundation of contemporary customary law development altogether. This veil is a result of the entanglement between colonialist narratives in formal and material sources in the neo-colonial era of today.[150] Significantly, the distinction made between the formal and material sources advanced at the initiation of the decolonisation process, and thus requires the consideration of colonial roots in the contemporary interpretation of development.[151] A more prominent focus on *opinio iuris* is, according to TWAIL, a way to circumvent the neglect to material sources in state practice established by predominantly Western biased states.[152] This way, a reliance on ethical deliberations becomes more significant in contemporary CIL, responding to the overall development of state practice in Western courts.[153]

The main objective for the implementation of this distinction, consequently, was to discard the CIL doctrine from its historical significance, mainly the imperialist association with Western (neo-)colonial projects.[154] The distinction must be rejected in order to unveil the "harm done to subaltern peoples and actors."[155] To conclude, Chimni argues that the formal and material sources of CIL cannot be separated from one another and consequently, contemporary formal sources must be reviewed by taking into account the material sources and acknowledging historical values in contemporary law.

[149] "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: [..] c. the general principles of law recognized by civilized nations." Article 38(1) of the Statute of the International Court of Justice, available at: https://www.icj-cij.org/en/statute; Chimni, "Customary International Law," 15.
[150] Chimni, "Customary International Law," 15.
[151] Chimni, "Customary International Law," 15.
[152] Chimni, "Customary International Law," 45.
[153] Chimni, "Customary International Law," 18.
[154] Chimni, "Customary International Law," 44.
[155] Chimni, "Customary International Law," 46.

3. The Politics of War Victims' Access to Justice

In this chapter, I discuss the position of victims of war in the context of international law and elaborate on the legal definition of a victim of war and the right to access to justice and remedies. In addition, I discuss the obstacles encountered by victims in the pursuit to remedy following the right to access to justice with specific attention to Palestinians. Furthermore, this chapter situates various ways of legal mobilisation of victims of war in the international arena and national context.

3.1 Victims of war and access to justice

3.1.1 Victims of war

The legal position of civilian victims of warfare gained more attention by legal experts of international law over the years. Since the increased focus on human rights expanded into all compartments of international law, the plight of victims' reparations and accountability of perpetrators of international crimes advanced substantially.[156] This movement is largely due to the codification of IHRL.[157] The development of legal instruments on reparations for victims confirms this increased attention. Illustratively, the UN General Assembly (UNGA) adopted Resolution 60/147 on 16 December 2005 and, with that, codified a 20-year development on reparations.[158] The Resolution dictates basic principles and guidelines on the right to remedy and reparation for victims of violations of IHRL as well as serious violations of IHL.[159] Despite the non-binding nature of the Resolution, also known as the Van Boven Principles,[160] the UNGA recommends Member States to seriously consider the principles and guidelines and to bring them to the attention of the judiciary and legislative bodies.[161] The UNGA adopted Resolution 60/147 recognising "the victims' right to benefit from remedies and reparation" guided by various international treaties and conventions that stipulate these rights.[162]

[156] Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge, UK: Cambridge University Press, 2012), 125-126.
[157] Evans, *The Right to Reparation in International Law for Victims of Armed Conflict,* 30-31.
[158] United Nations General Assembly Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *A/RES/60/147 (2005)*, available at: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/147.
[159] United Nations General Assembly Resolution 60/147.
[160] Marten Zwanenburg, "The Van Boven/Bassiouni Principles: An Appraisal," *Netherlands Quarterly of Human Rights* 24, no. 4 (2006): 641–668; United Nations OHCHR, "Theo van Boven, former Special Rapporteur on torture (2001-2004)," OHCHR, available at: https://www.ohchr.org/en/special-procedures/sr-torture/theo-van-boven-former-special-rapporteur-torture-2001-2004.
[161] United Nations General Assembly Resolution 60/147, para. 2.
[162] United Nations General Assembly Resolution 60/147, para. 2.

The main purpose of contemporary IHL is to protect (potential) victims of war and to limit or prevent the suffering caused by war.[163] The question arises who exactly are considered war victims in legal terms. According to IHL norms, victims of war may be defined as "those who suffer because they are affected by an armed conflict."[164] Victims of IHL violations, moreover, embody a distinct category of war victims defined by the legal restrains of IHL.[165] UN Resolution 60/147, focused on this specific victim category, furthermore conveys the following definition: "victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law."[166] Notably, the Resolution extends the classification of victim, where appropriate and in accordance with national law, to the "immediate family or dependents of the direct victim and persons who have suffered harm."[167]

3.1.2 The right to access to justice

Access to justice of individual victims of war, as one of the remedies mentioned in Resolution 60/147, is a fundamental principle of rule of law and human rights.[168] Without the possibility of access to justice, victims of war are unable to hold the perpetrator accountable and challenge discrimination, racism and fully exercise their rights.[169] Additionally, without the right to access to justice victims may not have adequate tools to pursue action when rights have been compromised and therefore work towards accountability of perpetrators by their own initiative, leading to impunity.[170] The principle of access to justice is established in spirit of the humanisation of IHL reflected by the focus on humans, mainly the civilian victims of war.[171] The notion of humanisation in IHL expanded since 1949 during the European post-war era, and especially did so in line with the growing influence of IHRL on IHL.[172] By focussing more on

[163] Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Cheltenham, UK: Edward Elgar Publishing, 2014), 12-13; Zegveld, "Remedies for victims of violations of international humanitarian law," 501.
[164] Zegveld, "Remedies for victims of violations of international humanitarian law," 501.
[165] Zegveld, "Remedies for victims of violations of international humanitarian law," 502.
[166] United Nations General Assembly Resolution 60/147, Principle 8, 5.
[167] United Nations General Assembly Resolution 60/147, Principle 8, 5.
[168] United Nations, "Access to Justice," United Nations and the Rule of Law, available at: https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/.
[169] United Nations, "Access to Justice."
[170] Michael M. Karayanni, "Access to Justice Ascends to International Civil Litigation: The Case of Palestinian Plaintiffs before Israeli Courts," *Civil Justice Quarterly* 33, no. 1 (2014): 65.
[171] Kolb, *Advanced Introduction to International Humanitarian Law,* 12-14.
[172] Kolb, *Advanced Introduction to International Humanitarian Law,* 12-14.

humans, in specific victims in war, the perspective shifted from an inter-state approach towards one centres the rights of civilians and the protection of civilians from grave violations of IHL. All in all, the right to access to justice developed against the backdrop of the prevention of impunity and the pursuit of accountability of perpetrators concerning grave violations of international crimes.

Victims pursue the right to remedy and reparation in the context of access to justice in international courts as well as foreign national courts in both criminal and civil proceedings.[173] The ICJ was largely involved in the development of the individual right to reparation in the context of international armed conflict. The ICJ affirmed in its Advisory Opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the individual right to reparations, obliging Israel to compensate individual victims.[174] In the subsequent *Bosnia Genocide* case of 2007, however, the ICJ was less rigid in its argumentation on state obligations on providing restitution and compensation of victims, resulting in academic criticism targeted at the inconsistency in jurisprudence of the ICJ.[175] Bilkova asserted in 2007 that the right to claim reparations slowly but steadily extends to the legal practice of individual victims of international humanitarian law violations in individual claims.[176] Since then, civil case law gradually aligned with these observations and developed the execution of the right to reparations progressively in general. In the Netherlands, for instance, *Mothers of Srebrenica v. the Netherlands*, *Nuhanovic v. the Netherlands* and *Widows South Sulawesi v. the Netherlands* illustrate that individual victims can hold the right to reparations in cases concerning international crimes by state actors in the state's own court.[177]

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[173] As asserted by Zegveld, the right to reparation is not the only remedy victims seek. Victims may also seek other remedies, such as rehabilitation, acknowledgment of suffering and restitution. *See* Zegveld, "Remedies for victims of violations of international humanitarian law," 501.

[174] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* International Court of Justice, Advisory Opinion, *General List No. 131,* 9 July 2004, para. 145, 152–153; Evans, *The Right to Reparation in International Law for Victims of Armed Conflict,* 30.

[175] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* International Court of Justice, *ICJ Rep. 191,* 26 February 2007; Evans, *The Right to Reparation in International Law for Victims of Armed Conflict,* 30.

[176] Veronika Bilkova, "Victims of War and Their Right to Reparation for Violations of International Humanitarian Law," *Miskolc Journal of International Law* 4, no. 2 (2007): 9.

[177] *Mothers of Srebrenica v. the Netherlands,* Supreme Court of the Netherlands, 19 July 2019, ECLI:NL:HR:2019:1223 (Dutch version); Nuhanovic Foundation, "Hasan Nuhanovic vs. the Dutch State," Nuhanovic Foundation Centre for War Reparations, available at: http://www.nuhanovicfoundation.org/en/hasan-nuhanovic-vs-the-dutch-state/hasan-nuhanovic-vs-the-dutch-state/; Nuhanovic Foundation, "Widows South Sulawesi vs. the Dutch State," Nuhanovic Foundation Centre for War Reparations, available at: http://www.nuhanovicfoundation.org/en/widows-south-sulawesi-vs-the-dutch-state/widows-south-sulawesi-vs-the-dutch-state/.

3.1.3 Obstacles to access to justice

Victims of war seeking remedy are confronted with obstacles in the effective implementation of access to justice in practice. Although there is almost complete consensus that victims of war enjoy individual rights like access to justice following IHL, as Zegveld argued in 2003, these rights "appear to be hardly justiciable and hence difficult to transform into a right to a remedy or reparation."[178] In other words, to have the right to remedy does not necessarily mean that an individual can effectively invoke this right in practice. In general, international law scholars deem it difficult for victims to execute their right to reparation and obtain compensation in a claim before a court.[179]

Proceedings initiated by victims following their right to access to justice in foreign courts are based on the principle of universal jurisdiction in criminal proceedings and, respectively, forum of necessity in civil suits. Universal jurisdiction facilitates all states to prosecute foreign perpetrators of international crimes in their courts, even when the state does not have a connection, or nexus, with the alleged perpetrator, the victim or the crime itself.[180] It was originally developed to address piracy and protect the international trade by prosecuting pirates, and ultimately extended to prosecute traders of enslaved people and war criminals to prevent impunity.[181] Two limitations to the exercise of universal jurisdiction are the principle of subsidiarity and the requirement of the presence of the accused in the court's jurisdiction.[182] The subsidiarity principle dictates that no other effective legal procedure may have taken place in a court of the perpetrator or victim's origin. The civil counterpart to universal jurisdiction is forum of necessity, or *forum neccessitatis*.[183] This forum too may be acquired by a claimant when obstacles would prevent jurisdiction in another court.[184]

Various obstacles stand in victims' way to execute their right to access to justice in foreign courts by means of universal jurisdiction. Technical obstacles include immunities, statutes of limitation and amnesties, as illustrated by Zegveld.[185] Immunity from prosecution

[178] Zegveld, "Remedies for victims of violations of international humanitarian law," 500.
[179] Natalino Ronzitti, "Access to Justice and Compensation for Violations of the Law of War," in *Access to Justice as a Human Right*, ed. Francesco Francioni (Oxford, UK: Oxford University Press, 2007), 206-207.
[180] Kenneth C. Randall, "Universal Jurisdiction under International Law," *Texas Law Review* 66, no. 4 (1988): 785.
[181] Randall, "Universal Jurisdiction under International Law," 785-788.
[182] Fannie Lafontaine, "Universal Jurisdiction – the Realistic Utopia," *Journal of International Criminal Justice* 10, no. 5 (2012): 1277.
[183] Alex Mills, "Rethinking jurisdiction in international law," *British Yearbook of International Law* 84, no. 1 (2013): 222.
[184] Sagi Peari, "Three Objections to Forum of Necessity: Global Access to Justice, International Criminal Law, and Proper Party," *Osgoode Hall Law Journal* 55, no. 1 (2018): 225-226.
[185] Zegveld, "Remedies for victims of violations of international humanitarian law," 501.

constitutes a core cause of hindrance to access to justice. Immunity from civil prosecution of states and international organisations in foreign states are prominent obstacles victims encounter while pursuing access to justice.[186] In addition, personal and functional immunity of state officials and functionaries are rendered barriers to access to justice for victims in both criminal and civil proceedings due to the nature or status of the perpetrator.[187] Aside from immunities, the procedural elements of universal jurisdiction may hamper access to justice, which I will discuss in the next paragraph in relation to Palestinian victims.[188]

Political obstacles may furthermore be in the way of victims' access to justice, usually resulting in a denial of the right to access to justice.[189] Political obstacles come in different forms in practice, such as political pressure, lobbying and judicial interference in a procedure in a foreign domestic court. Paulsson refers to the consequence of these political obstacles as the denial of justice.[190] Lastly, the politicisation of perpetrators and victims by states is an obstacle to the access to justice of victims of war. Illustratively, Stolk asserts how the 'ideal' perpetrator is construed in international criminal trials' opening statements.[191] The application of the law in foreign domestic courts, furthermore, may depend on where the alleged perpetrator is from, as argued by Handmaker.[192]

3.2 Legal mobilisation of war victims

3.2.1 International courts

Victims of international crimes have multiple ways to pursue a remedy and reparation following their individual right to access to justice. Individual claims as part of procedures before international courts is one recourse option, as illustrated above by the ICJ jurisprudence. However, no individual can initiate an investigation, for the court's jurisdiction is limited to inter-state affairs and advisory opinions on referred legal questions.[193] In addition, individual victims may turn to ongoing investigations or investigations in preparation by the Office of the Prosecutor of the ICC. In procedures regarding individual criminal responsibility before the

[186] Ronzitti, "Access to Justice and Compensation for Violations of the Law of War," 207-210.
[187] Ronzitti, "Access to Justice and Compensation for Violations of the Law of War," 213-214.
[188] Lafontaine, "Universal Jurisdiction – the Realistic Utopia," 1277.
[189] Ronzitti, "Access to Justice and Compensation for Violations of the Law of War," 214-215.
[190] Jan Paulsson, *Denial of Justice in International Law* (Cambridge, UK: Cambridge University Press, 2005), 131-175.
[191] Sofia Stolk, "A Sophisticated Beast? On the Construction of an 'Ideal' Perpetrator in the Opening Statements of International Criminal Trials," *European Journal of International Law* 29, no. 3 (2018): 677–701.
[192] Liesbeth Zegveld and Jeff Handmaker, "Universal Jurisdiction: State of Affairs and Ways Ahead. A policy paper," *Institute of Social Studies*, Working Paper 532 (2012): 13.
[193] ICJ, "How the Court Works," International Court of Justice, available at: https://www.icj-cij.org/en/how-the-court-works.

ICC, victims may additionally pursue a civil claim of reparations.[194] Criminal investigations before the ICC, however, cannot be initiated by individual victims.[195] Consequently, the procedures before international courts, like the ICJ and the ICC, may not be the most effective legal recourse for victims of war that aim to execute their right to remedy.

3.2.2 National courts

Procedures in domestic courts, on the other hand, might be a more effective way for victims of international crimes to pursue justice. Victims may turn to national courts of the state where the alleged international crime took place, or in a domestic court of a third state. In case the right to access to justice is severely hampered in their own state's court, victims may resort to foreign domestic courts resulting from universal jurisdiction and *forum neccessitatis*.[196] This means that a victim of international crimes may initiate a criminal procedure with an additional claim to damage compensation, as well as a civil procedure on reparations in a foreign national court. In procedures in foreign national courts, obstacles to access to justice of war victims concern the procedural elements of universal jurisdiction, mainly the principle of subsidiarity and the absence of the alleged perpetrator.[197] This principle is, however, not a requirement in all countries' universal jurisdiction laws and, as Lafontaine illustrates, it is questioned whether this is in fact a requirement under international law for the exercise of universal jurisdiction at all.[198] In criminal proceedings, the required presence of the accused in the jurisdiction of the forum state may too hinder access to justice for war victims.[199]

[194] Article 75 of the Rome Statute of the International Criminal Court, 1 July 2002.
[195] According to Article 13 of the Rome Statute of the International Criminal Court, the ICC Office of the Prosecutor may only start an investigation into alleged international crimes either if the UN Security Council refers a situation to the Office, when a Member State to the Rome Statute requests an investigation, or when the Office of the Prosecutor decides to do so on its own initiative; ICC, "Office of the Prosecutor," *ICC*, About the Court, available at: https://www.icc-cpi.int/about/otp.
[196] Mills, "Rethinking jurisdiction in international law," 222.
[197] Lafontaine, "Universal Jurisdiction – the Realistic Utopia," 1277.
[198] Harmen van der Wilt, "Universal Jurisdiction under Attack: An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States," *Journal of International Criminal Justice* 9, no. 5 (2011): 1050.
[199] Lafontaine, "Universal Jurisdiction – the Realistic Utopia," 1277; Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 111.

3.3 Palestinian victims of war

3.3.1 Palestinian access to justice in the settler-colonial context

The right to access to justice of Palestinian victims of international crimes must be considered in the Israeli settler-colonial context.[200] International and national organisations monitor and report on structural Israeli violations of international law on a daily basis.[201] In addition to the Israeli occupation of the oPt, including East Jerusalem, Gaza and the West Bank, widespread accusations of Israeli aggression and the crime of apartheid become more central to contemporary legal analysis of the situation. Palestinians are, in contrast to Israeli settlers, ruled by a military legal system which maintains the subjugation over the Palestinian natives. The militarisation by laws and restrictions of the rights of the natives is a distinct settler-colonial tactic.[202] The settler-colonial reality, furthermore, entails another crucial consideration to the execution of the right to access to justice of an oppressed population. This reality generates a structure wherein Palestinian victims of war are exposed to a legal system instilled upon them by the Israeli occupying state, the settler-colonial entity that allegedly conducted said violations of international law in the first place. Access to justice for Palestinian victims, therefore, cannot be seen without acknowledging the power dynamic stemming from the settler-colonial context and its consequences for the execution of this right.

The settler-colonial Israeli judicial system severely hampers the execution of the right to access to justice of Palestinian victims of Israeli international crimes in Israeli courts. As asserted by Karayanni, the Israeli judicial system and its treatment of access to justice in practice show that Palestinians, as the occupied people, do not belong in the Israeli judicial system like Israelis do.[203] Countless of publications by international, Israeli and Palestinian human rights organisations and international lawyers determine that Palestinian access to justice in civil claims on compensation for the harm suffered by Israeli international crimes are rendered almost completely unavailing due to Israeli legislation exempting itself from

[200] Settler colonialism is, according to Veracini "a specific mode of domination where a community of exogenous settlers permanently displace to a new locale, eliminate or displace indigenous populations and sovereignties, and constitute an autonomous political body." *See* Lorenzo Veracini, "Settler Colonialism," in *The Palgrave Encyclopedia of Imperialism and Anti-Imperialism*, ed. Immanuel Ness and Zak Cope (Houndmills, UK: Palgrave Macmillan, 2019), 1. For extensive analysis on the Israeli settler-colonial reality and facts on the ground, *see* Shafir, "Theorizing Zionist Settler Colonialism in Palestine," 339-352; Busbridge, "Israel-Palestine and the Settler Colonial 'Turn'," 94-95; Lorenzo Veracini, "Israel-Palestine Through a Settler-colonial Studies Lens," *International Journal of Postcolonial Studies: Interventions* 21, no. 4 (2019): 568-581.

[201] For instance, see reports and legal analyses by organisations UN OCHA, OHCHR Palestine, Amnesty International, Human Rights Watch, ICRC, Al-Haq, B'Tselem, Gisha and Yesh Din. See also: Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 108.

[202] Lloyd, "Settler colonialism and the state of exception," 69.

[203] Karayanni, "Access to Justice," 68-69.

liability.[204] With the amended Civil Wrongs Law of 1952, for instance, Israel blocks efforts of civil remedy on the procedural and practical level, especially since the Second Intifada.[205] To illustrate, Israel designated Gaza as 'enemy territory' in 2007 and amended the Law in 2012, effectively dismantling the eligibility for compensation of all Gazans, as demonstrated in the July 2022 ruling by the Israeli Supreme Court in the case of al-Nabaheen.[206]

Furthermore, renowned Israeli organisation B'Tselem asserted in a 2017 report that Israeli policy effectively obstructs compensation for Palestinians, resulting in a 95 per cent decrease in the amount of Palestinian victims that initiated a claim between 2002 and 2017.[207] The report followed after B'Tselem's unconventional decision to stop its legal support in complaints of Palestinian victims before Israeli courts in 2016. B'Tselem decided so after it conducted research over a 25-year period on complaints and investigations, which showed that in the vast majority of cases, no one was held accountable, and cases were closed without charges pressed.[208] Many additional reports also point towards the systemic failure to adequately investigate wrongdoings of Israeli soldiers by the Israeli military.[209] Moreover, B'Tselem deemed Israeli's military law enforcement system, which exclusively addresses Palestinians, a whitewash mechanism for its settler-colonial practice of occupation.[210]

[204] For instance, see the reports by Al Mezan (https://reliefweb.int/report/occupied-palestinian-territory/barriers-access-justice-2-al-nabaheen-legal-fact-sheet), Adalah (https://www.adalah.org/uploads/oldfiles/Public/files/English/Publications/Articles/2013/Obstacles-Palestinians-Court-Fatmeh-ElAjou-05-13.pdf), Al-Haq (https://www.alhaq.org/advocacy/6756.html), Amnesty International (https://www.amnesty.org/en/documents/mde15/5141/2022/en/), B'Tselem (https://www.btselem.org/download/201703_getting_off_scot_free_eng.pdf), and the expert legal opinion in the Ziada case (http://www.nuhanovicfoundation.org/en/ziada-case/#legal-expert-opinion).

[205] For extensive discussion of the obstacles, *see* Fatmeh El-'Ajou, "Obstacles for Palestinians in Seeking Civil Remedies for Damages before Israeli Courts," Adalah Briefing Paper, May 2013, available at: https://www.adalah.org/uploads/oldfiles/Public/files/English/Publications/Articles/2013/Obstacles-Palestinians-Court-Fatmeh-ElAjou-05-13.pdf.

[206] WAFA, "Israel's Supreme Court bans Gaza residents from any redress and remedy in Israel, gives immunity to the state," *WAFA News Agency*, 7 July 2022, available at: https://english.wafa.ps/Pages/Details/129990.

[207] B'Tselem, "Israel effectively bars compensation to Palestinians: Claims for damages down 95%," *B'Tselem*, no accountability, 5 March 2017, available at: https://www.btselem.org/press_releases/201703_getting_off_scot_free.

[208] B'Tselem, *Getting Off Scot-Free: Israel's Refusal to Compensate Palestinians for Damages Caused by Its Security Forces*, B'Tselem Report, February 2017, available at: https://www.btselem.org/download/201703_getting_off_scot_free_eng.pdf, 5.

[209] For instance, *see* Human Rights Watch, "Promoting Impunity: The Israeli Military's Failure to Investigate Wrongdoing," *Human Rights Watch Report* 17, no. 7e (2005): 1-125; Dan Owen, "Thousands of homes destroyed in Gaza. Over 200 killed. Only one investigation," *+972 Magazine*, 9 June 2022, available at: https://www.972mag.com/military-investigations-dahiya-gaza/.

[210] B'Tselem, *Getting Off Scot-Free*, 5.

3.3.2 Palestinian access to justice in the international context

Acknowledging the above, Palestinian victims of war seeking redress instead may turn to international and foreign domestic courts for effective enactment of their right to access to justice. The ongoing ICC investigation into international crimes that unfolded since 2014 in the State of Palestine, facilitates Palestinian victims to receive reparations in a potential future conviction of alleged perpetrators. At the time of writing this thesis, victims of Israeli war crimes are able to partake in the ongoing investigation by the Prosecutor's Office following the participatory rights before the court.[211]

A variety of obstacles, nonetheless, stand in the way of effective execution of the right to access to justice of Palestinians in international courts. As discussed above, the chances of effective enforcement of the right to access to justice in international courts is dependent on inherently political factors. In addition, individual victims cannot resort to international courts on their own: they may only claim reparations as an additional party. Whether the current ICC investigation will lead to effective conviction of perpetrators and to reparation of victims is hard to predict under the current circumstances. As mentioned, Israel is rejecting any cooperation with the ICC and has long campaigned against the ICC by pressuring the Palestinian Authority (PA) to prevent it from joining the Court altogether.[212] Israel campaigned intensively to thwart legal consequences before the ICC by calling Palestine's accession to the Rome Statute 'lawfare'.[213] Illustrative for the politicisation of execution of the right to access to justice is the threat by United States senator Lindsey Graham, avid supporter of Israel, to cut aid to Palestinians when the Palestinian government planned its referral to the Court back in 2015.[214]

3.3.3 Palestinian access to justice in foreign domestic courts

Palestinian victims of international crimes may start civil and criminal proceedings against (former) Israeli state officials and pursue reparation claims before foreign domestic courts. Responding to the situation of impunity in the Israeli legal system due to the nature of the Israeli

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[211] ICC, "Information for Victims. State of Palestine," *ICC,* State of Palestine, available at: https://www.icc-cpi.int/victims/state-palestine.

[212] Barak Ravid, "Palestinians refuse clause in UN draft barring criminal charges against Israel," *Haaretz*, 27 November 2012, available at: http://www.haaretz.com/israel-news/palestinians-refuse-clause-in-un-draft-barring-criminal-charges-against-israel.premium-1.480931; Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 106.

[213] Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 106; Kevin Jon Heller, "No, Going to the ICC Is Not "Lawfare" by Palestine," *Opinio Juris*, 22 January 2015, available at: http://opiniojuris.org/2015/01/22/no-going-icc-not-palestinian-lawfare/.

[214] Allyn Fisher-Ilan, "U.S. senator threatens aid cut to Palestinians over ICC move," *Reuters*, 19 January 2015, available at: https://www.reuters.com/article/idUSKBN0KS24Z20150119.

state, the international neglect to prevent violations, and the lacking access to justice on the local level, Palestinians make use of universal jurisdiction and *forum neccessitatis* to bring cases before foreign domestic courts. Palestinian victims of war brought cases before predominantly European and American courts on the basis of their right to access to justice in recent history, all unsuccessful in contrast to proceedings concerning non-Israelis.[215] The alleged Israeli perpetrators before courts in countries like Belgium, the United Kingdom, Spain and the Netherlands vary between high level ranking functionaries, such as former prime minister Ariel Sharon and former Foreign Minister Tzipi Livni, as well as lower ranking state officials and military generals.[216]

Technical obstacles

Palestinians encounter both technical and political obstacles in the pursuit of their right to access to justice in foreign domestic courts. On the technical level, Palestinian victims find themselves obstructed by procedural obstacles stemming from the universal jurisdiction doctrine such as the subsidiarity principle and the presence of the accused. Palestinians are faced with obstacles where they are obliged to submit evidence and prove that access to justice is hampered in the local context in order to establish universal jurisdiction to comply with the subsidiarity principle. Although a great number of reports point towards the lacking access to justice of Palestinians in the local context in practice, as mentioned above, it remains difficult to prove so due to the nature of Israel as an Apartheid state and its image of a 'democratic' society with a functioning legal system, as the cases of *Al-Daraj* and Kilani demonstrate.

The *Al-Daraj* case (2008-2010) against former Israeli Defence Minister Ben-Eliezer and six other Israeli officials in Spain exposes the difficulty in demonstrating the lack of effective remedy for Palestinians in a local context.[217] Initially, the Investigative Judge of the Spanish National Court ruled that the Court had jurisdiction as Israeli authorities were not willing to critically investigate the Al-Daraj attack and launched an investigation in 2009.[218] After both

[215] For instance, the UK arrested Rwandan intelligence chief Karenzi Karake in London in 2015. *See* BBC News, "Rwandan spy chief Karenzi Karake arrested in London," *BBC News*, 23 June 2015, available at: https://www.bbc.com/news/uk-33230130; Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 98-100.
[216] Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 98-99.
[217] The six other state officials respectively are former military advisor Michael Herzog, former IDF Chief of Staff Lieutenant-General Moshe Yaalon, former Shin Bet Director Avi Dichter, former Israel Air Force Commander General Dan Halutz, former head of the IDF Operation Branch Major-General Giora Eiland, and former Southern Command Chief Doron Almog. *See* Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction*, 129; Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 108.
[218] The Al-Daraj attack in Gaza involved a one-tonne bomb killing the relatives of the six claimants in 2002. *See* Giles Tremlett, "Spain investigates claims of Israeli crimes against humanity in Gaza," *The Guardian*, World, 29 January 2009, available at: https://www.theguardian.com/world/2009/jan/29/spain-israel-gaza-crimes-humanity;

the Prosecutor and Israel appealed the judge's decision, the Spanish National Court upheld its decision and decided to continue the investigation recognising that a previous Israeli inquiry into the attack did no intent to determine criminal liability.[219] However, the Appeal Court closed the investigation, asserting that the Israeli inquiry had been consistent with procedural guarantees and therefore violated the subsidiarity principle.[220] The Spanish Supreme Court, furthermore, upheld the decision by the Appeal Court and closed the procedure.[221] Palestinian victims of war were required to undertake extra effort to present the deficiencies in the settler-colonial Israeli judicial system framed as a functioning democratic institution. The Palestinian victims had to demonstrate that the 'quasi-investigative steps' sporadically carried out by Israel after military operations, like it did after the *Al-Daraj* attack, are not the same as "independent, effective and impartial investigations."[222]

In December 2014, the European Center for Constitutional and Human Rights (ECCHR) submitted a criminal complaint to the German Federal Prosecutor on behalf of Ramsis Kilani, who lost six family members in an Israeli airstrike that hit the Al-Salam tower where the family was shielding from Israeli air raids.[223] At the same time, a criminal complaint was filed in Israel. The Israeli Military Advocate General (MAG) decided not to investigate the Kilani case, in alignment with its general practice, because there was no "reasonable suspicion of criminal misconduct."[224] The Israeli Military Prosecution decision was appealed to no avail. The German Federal Prosecutor decided in August 2021, after a seven-year time span, to refrain

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Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction*, 129; *Benjamin Ben-Eliezer et al*, Juzgado Central de Instrucción nº 4 (Central Investigative Judge No. 4 of the Audiencia Nacional), *No. 57/2008*, 29 January 2009.

[219] *Benjamin Ben-Eliezer et al*, Audiencia Nacional, Sala de lo Penal, Sección 2ª (National Court, Criminal Chamber, Section 2a), Judgment, *No. 118/2009*, 4 May 2009; for analysis, *see* Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction*, 129.

[220] *Benjamin Ben-Eliezer et al*, Audiencia Nacional, la Sala de Apelación (National Court, Appeal Chambers), 30 June 2009; Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction*, 129; Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 110-111.

[221] *Benjamin Ben-Eliezer et al*, Tribunal Supremo, Sala de lo Penal, Sección 1 (Supreme Court, Criminal Chamber, Section 1), Appeal Judgment, *No. 1979/2009*, 4 March 2010 (in Spanish), http://estaticos.elmundo.es/documentos/2010/04/13/auto_gaza.pdf.

[222] Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 111.

[223] The German criminal complaint concerning war crimes was not yet directed against specific members of the Israeli army and government, but instead focused on the crime as German law prescribes. The prosecutor then investigates the liability of suspects, *see* ECCHR, "Statement on the German Federal Prosecutor's decision not to open investigations in the Kilani case," *ECCHR*, Gaza Airstrike 2014, 30 May 2022, available at: https://www.ecchr.eu/en/press-release/statement-german-federal-prosecutors-decision-not-to-open-investigations-kilani-case/; ECCHR, "Israeli air strikes in Gaza: No justice for the Kilani family," *ECCHR*, Gaza War Crimes, available at: https://www.ecchr.eu/en/case/israeli-airstrikes-in-gaza-justice-in-the-kilani-case/; B'Tselem, "Bombing of an office building in a-Rimal neighborhood, Gaza City," *B'Tselem*, The Gaza Strip, 28 January 2015, available at: https://www.btselem.org/gaza_strip/2015_black_flag/dirbas_and_kilani_families.

[224] ECCHR, "Statement on the German Federal Prosecutor's decision."

from opening an investigation in the case concerning the German-Palestinian Kilani family.[225] Germany has a legal obligation under the principle of compulsory prosecution, the *legalitätsprinzip*, to open formal investigations and prosecute war crimes committed against German citizens, even when these are committed abroad.[226] The German Prosecutor's decision to not open an investigation is in breach of this principle and, as the ECCHR argues, as it is an execution of 'double standards' of legal doctrine.[227] Additionally, the German Prosecution argued that the previous Israeli investigation determined that no investigative steps were required. The ECCHR, moreover, rebutted this notion and argued that the Prosecution ignored crucial elements of the Israeli legal system and the non-independence of the MAG in cases that concern alleged Israeli perpetrators and Palestinian victims.[228]

Aside from the subsidiarity principle, the required presence of a suspect on the territory of the state where the criminal procedure is initiated hampers the access to justice of Palestinian victims. On 5 September 2003, Swiss Attorney Marcel Bosonnet submitted criminal complaints against four former Israeli officials to the Swiss Military Attorney General concerning individual criminal responsibility in war crimes on behalf of Palestinian victims.[229] The Swiss Military General Prosecutor, however, did not initiate the criminal procedure, due to the absence of the accused on Swiss soil at the time the complaints were filed, a requirement for universal jurisdiction in Switzerland.[230]

Political obstacles

A pattern of Israeli obstruction by means of interference, lobby and political pressure is apparent in cases against Israeli state officials. Political interference is believed to have made police refrain from acting according to issued arrest warrants in criminal cases, made public prosecutors of forum states decide to close cases, strategically delay investigations and

[225] ECCHR, "Statement on the German Federal Prosecutor's decision."
[226] Amnesty International, *Germany: End Impunity Through Universal Jurisdiction*, 14; ECCHR, "Statement on the German Federal Prosecutor's decision."
[227] ECCHR, "Statement on the German Federal Prosecutor's decision."
[228] The ECCHR in specific referred to a report by the United Nations High Commissioner for Human Rights, titled *Ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory including East Jerusalem*, UN Doc. *A/HRC/37/41*, 19 March 2018, para. 11-14. *See ECCHR, "Statement on the German Federal Prosecutor's decision not to open investigations in the Kilani case."*
[229] The complaints were brought against former Israeli Minister of Defence Benjamin Ben-Eliezer, former IDF Chief of Staff Shaul Mofaz, former Commander IDF Southern Command Doron Almog, and former Director Israeli General Security Services Avi Dichter. Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction*, 118; Al Jazeera, "Israeli ministers face war crimes charges," *Al Jazeera*, News, 5 September 2003, available at: https://www.aljazeera.com/news/2003/9/5/israeli-ministers-face-war-crimes-charges; Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction*, 118-119.
[230] Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction*, 118.

modified domestic universal jurisdiction laws.[231] The Israeli interference in issued arrest warrants can be illustrated by three cases. In the first, the Bow Street Magistrates Court of Central London issued a secret arrest warrant for war crimes against Doron Almog, former commander of the Israeli army's southern command, on Saturday 10 September 2005.[232] The arrest warrant was issued after Palestinian victims submitted a complaint against Almog for the war crimes committed against them, i.e. the demolition of their houses and the killing of their relatives during a bombing raid by Israel in Gaza in 2002.[233] The warrant alleged that Almog, who planned to arrive in the UK on 11 September, ordered the demolition of 59 homes near Rafah, Gaza, in an act of collective punishment.[234]

Legal sources confirm that before the Court issued the warrant, the Court decided that Almog did not enjoy immunity at that time.[235] The arrest of the alleged perpetrator, however, was severely hampered. It is strongly believed that the Israelis were tipped off about the arrest warrant, as the Israeli embassy informed Almog of the impending arrest at the airport upon arrival by British detectives and warned him not to disembark the plane.[236] On top of that, as police documents reveal, Scotland Yard disregarded the arrest order and did not attempt to arrest Almog when he remained on the plane, claiming it feared a gun battle with Israeli marshals.[237] In addition, the police claimed they were unsure about the legal consequences of boarding the plane, although on UK soil.[238] The London Court withdrew the warrant when Almog was no longer in its jurisdiction.[239] British Foreign Secretary Straw, moreover, apologised to his Israeli counterpart for the attempted arrest of Almog when he affirmed the arrest warrant withdrawal.[240] This practice has led to severe criticism of the UK handling of the situation, questioning the intentions of the United Kingdom's government in this matter.[241]

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[231] Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 112-113, 118-122.
[232] Vikram Dodd and Conal Urquhart, "Israeli evades arrest at Heathrow over army war crime allegations," *The Guardian*, UK News, 12 September 2005, available at: https://www.theguardian.com/uk/2005/sep/12/israelandthepalestinians.warcrimes.
[233] Dodd and Urquhart, "Israeli evades arrest at Heathrow"; Al Jazeera, "UK court respite for Israeli general," *Al Jazeera*, News, 20 September 2005, available at: https://www.aljazeera.com/news/2005/9/20/uk-court-respite-for-israeli-general.
[234] Dodd and Urquhart, "Israeli evades arrest at Heathrow."
[235] Dodd and Urquhart, "Israeli evades arrest at Heathrow."
[236] Vikram Dodd, "Terror police feared gun battle with Israeli general," *The Guardian*, 19 February 2008, available at: https://www.theguardian.com/uk/2008/feb/19/uksecurity.israelandthepalestinians; Dodd and Urquhart, "Israeli evades arrest at Heathrow;" Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 121-122; Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction*, 122.
[237] Dodd, "Terror police feared gun battle."
[238] Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 122.
[239] Al Jazeera, "UK court respite for Israeli general."
[240] BBC News, "Straw apology on Israeli arrest," *BBC News*, 22 September 2005, available at: http://news.bbc.co.uk/2/hi/uk_news/politics/4270664.stm.
[241] "Several Members of Parliament and civil society actors, including European Jews for a Just Peace, the International Federation for Human Rights (comprised of 141 affiliated international organizations), Amnesty

The second case involves Moshe Yaalon, former Chief of Staff of the Israeli Army. The Auckland District Court in New Zealand issued an arrest warrant against Yaalon, who was visiting the country, on 27 November 2006. The Court ruled there were "good and sufficient reasons" to justify his arrest for his involvement in committing war crimes, following New Zealand's obligations under the Geneva Convention.[242] The Attorney-General overruled the Court's decision and stopped the proceeding one day later.[243] It is believed that the decision to annul the arrest warrant was influenced by Israeli pressure.[244]

A third incident occurred after an arrest warrant was issued by the Westminster magistrates' Court against Tzipi Livni, former Israeli Foreign Minister, following a complaint filed by Palestinian victims in 2009.[245] The arrest warrant was withdrawn after Livni decided not to visit the UK anymore in recognition of the arrest warrant.[246] Israeli president Shimon Peres called the arrest warrant a "serious mistake" by Britain and Israeli Prime Minister Benjamin Netanyahu described it as an "absurdity."[247] After the British Prime Minister and Foreign Minister reportedly spoke to their Israeli counterparts, they expressed "complete opposition" to the arrest warrant.[248] The British Prime Minister reportedly broke off climate talks in Copenhagen in order to call Livni and bring reassurance that she was "most welcome in Britain any time."[249]

International and Anthony Hurndall (father of Tom Hurndall, the journalist and peace activist shot by Israeli forces in Gaza on 13 January 2004), have questioned the rectitude of allowing Almog to evade trial, and the implications this action has had for the victims and for the integrity of the British/international justice system." *See* Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction*, 122; Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 121-122.

[242] David Eames and Ruth Berry, "Government overrules war-crimes arrest order," *New Zealand Herald*, 30 November 2006, available at: https://www.nzherald.co.nz/nz/government-overrules-war-crimes-arrest-order/DNV56UZPGHYIC5RXEZ6LYFCJCE/.

[243] Eames and Berry, "Government overrules war-crimes arrest order;" Talia Dekel, "Ya'alon adamant after arrest warrant," *Jerusalem Post*, 30 November 2006, available at: https://www.jpost.com/international/yaalon-adamant-after-arrest-warrant; Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction: PCHR's work in the occupied Palestinian territory*, 125-126.

[244] *See* Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction*, 125-126; Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 119; Eames and Berry, "Government overrules war-crimes arrest order."

[245] Ian Black and Ian Cobain, "British court issued Gaza arrest warrant for former Israeli minister Tzipi Livni," *The Guardian*, 14 December 2009, available at: https://www.theguardian.com/world/2009/dec/14/tzipi-livni-israel-gaza-arrest; Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 99, 116-118.

[246] Ian Black, "Tzipi Livni arrest warrant prompts Israeli government travel 'ban'," *The Guardian*, 15 December 2009, available at: https://www.theguardian.com/world/2009/dec/15/tzipi-livni-arrest-warrant-israeli.

[247] Ian Black, "Gordon Brown reassures Israel over Tzipi Livni arrest warrant," *The Guardian*, 16 December 2009, available at: https://www.theguardian.com/world/2009/dec/16/tzipi-livni-israel-arrest-warrant.

[248] Black, "Gordon Brown reassures Israel."

[249] Adrian Blomfield, "Brown calls Livni to express regret at arrest warrant," *The Telegraph*, 16 December 2009, available at: http://www.telegraph.co.uk/news/worldnews/middleeast/israel/6827382/Brown-calls-Livni-to-express-regret-at-arrest-warrant.html; Black, "Gordon Brown reassures Israel."

In addition to the neglect and withdrawal of issued arrest warrants, Palestinian access to justice is prevented by political interference during investigations.[250] An example of interference at the investigative level is the case against the former head of the Israeli Security Services Ami Ayalon in May 2008. In the criminal complaint, including a request for urgency, submitted to the Dutch prosecutor by lawyers on behalf of a Palestinian victim, Ayalon was accused of torture. The Dutch prosecution's office delayed an investigation into possible enjoyment of immunity by Ayalon and, with that, evaded the ability to arrest Ayalon on Dutch soil, while he was in the country for five days in 2008.[251] On the sixth day, the Procurators-General decided that Ayalon did not enjoy immunity.[252] By that time Ayalon had left the country and therefore Dutch jurisdiction. Israeli media exposed that "discreet talks between Israel and Holland prevented the arrest of […] Ami Ayalon."[253] Israeli officials reportedly contacted Dutch authorities to prevent the arrest of Ayalon.[254] This practice was questioned in Parliament by Dutch political parties SP and GroenLinks.[255] Additionally, Handmaker expressed concern to the selective and politicised application of the law "depending on the country where the alleged perpetrator is from, as illustrated in the Netherlands in the complaint against Ayalon."[256]

Furthermore, alteration of universal jurisdiction legislation in Belgium, Spain, and the United Kingdom occurred following Israeli pressure in proceedings where Palestinian victims pursued civil reparation or criminal prosecution of Israeli state officials in foreign courts.[257] The tightening of the universal jurisdiction rules in domestic law has led to a reduced access to justice of all victims of war, including Palestinian victims. Exhaustive lobbying by Israel and the United States steered domestic law modifications of universal jurisdiction in Belgium following the case against Ariel Sharon in 2001 on the Sabra and Shatila massacres and a case against George W. Bush for war crimes during the Gulf War.[258] Additionally, Spanish domestic law on universal jurisdiction historically did not require the presence of the suspect within the

[250] Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 118-125.
[251] Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 112, 121-122.
[252] Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction*, 126-128.
[253] Itamar Eichner, "Minister Ayalon evaded arrest in Holland," *Ynet News*, 7 October 2008, available at: http://www.ynetnews.com/articles/0,7340,L-3606332,00.html; Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 122.
[254] Eichner, "Minister Ayalon evaded arrest in Holland."
[255] For the written parliamentary questions, *see* Vragen van de leden Van Bommel (SP) en Azough en Diks (beide GroenLinks) aan de ministers van Buitenlandse Zaken en Justitie over Israëlische minister zonder portefeuille, 9 Oktober 2008, available at: https://groenlinks.nl/nieuws/nederland-laat-mensenrechtenschenders-ongemoeid.
[256] Zegveld and Handmaker, "Universal Jurisdiction: State of Affairs and Ways Ahead. A policy paper," 13.
[257] Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 114.
[258] The Ariel Sharon case will be discussed in chapter four. Kaleck, "From Pinochet to Rumsfeld," 932-936; Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 117.

country's jurisdiction in order to open a criminal procedure.[259] The Israeli lobby actively engaged in the 2009 *Ben-Eliezer et al* case, and former Defence Minister Ehud Barak, after calling the case "delusional", stated that he intended to "appeal to the Spanish foreign minister, the Spanish Minister of Defence and, if need be, the Spanish prime minister, who is a colleague of mine, in the Socialist International, to override the decision."[260] In response, the Spanish Foreign Minister reportedly notified his Israeli counterpart on his intention to have the law changed.[261] Israeli political pressure, accompanied by pressure from the US and China, ultimately led to a change in the Spanish domestic law in 2009, limiting jurisdiction over international crimes by requiring a 'Spanish connection'.[262] Finally, British law on universal jurisdiction was altered in 2011 after pressure following the Almog and Livni cases. The British Prime Minister and Foreign Minister promised to change the law after the arrest warrant for Livni was issued.[263] Additionally, the British ambassador was summoned in view of the Livni case, a high-level meeting with the British Foreign Minister in Israel was postponed, an official Israeli delegation to the UK was withdrawn and the Israeli ambassador publicly pressed for the modification of UK law.[264] Since September 2011, private applications for arrest warrants now require consent by the Director of Public Prosecutions, decreasing effective access to justice by only allowing civilian initiatives within the limits of state approval in line with (geo)political interest.[265] Accordingly, former Chief of General Staff Shaul Mofaz was not arrested during a visit to the UK in 2015. The British government did not issue an arrest warrant, even though it hadn't granted immunity to the former defence minister after an Israeli request.[266] This succeeded a 2002 case against Mofaz, when Palestinian victims submitted a complaint.[267] The

[259] Kaleck, "From Pinochet to Rumsfeld," 954-958; Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 115.
[260] Ben Harding, "Spanish court investigates 2002 Israeli Gaza attack," *Reuters*, World News, 29 January 2009, available at: https://www.reuters.com/article/uk-spain-israel-warcrimes-sb-idUKTRE50S5U420090129; Haaretz, "Israel urges Spain to Halt 'cynical' Gaza war crimes probe," *Haaretz*, 4 May 2009, available at: https://www.haaretz.com/2009-05-04/ty-article/israel-urges-spain-to-halt-cynical-gaza-war-crimes-probe/0000017f-e870-dc91-a17f-fcfd1cf00000.
[261] Human Rights Watch, "The world needs Spain's universal jurisdiction law," *Human Rights Watch*, 27 May 2009, available at: https://www.hrw.org/news/2009/05/27/world-needs-spains-universal-jurisdiction-law.
[262] Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 115.
[263] Black, "Gordon Brown reassures Israel."
[264] Black, "Tzipi Livni arrest warrant"; Harriet Sherwood, "Israel sparks legal row during William Hague visit," *The Guardian*, 3 November 2010, available at: http://www.theguardian.com/world/2010/nov/03/israel-war-crimes-row-william-hague; Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 116.
[265] *See* Crown Prosecution Service, *War Crimes/Crimes Against Humanity Referral Guidelines*, August 2015, available at: https://www.cps.gov.uk/publication/war-crimescrimes-against-humanity-referral-guidelines; Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 116.
[266] Barak Ravid, "Britain Refuses to Grant Immunity to ex-Israeli Defense Minister Mofaz During London Visit," *Haaretz*, 20 June 2015, available at: https://www.haaretz.com/2015-06-20/ty-article/.premium/britain-refuses-to-give-immunity-to-mofaz/0000017f-e390-d75c-a7ff-ff9d75930000.
[267] BBC News, "Arrest call for Israeli ex-army chief," *BBC News*, 29 October 2002, available at: http://news.bbc.co.uk/2/hi/uk_news/2373191.stm.

complaint then did not lead to an arrest warrant or end up in court, as the UK Crimes Against Humanity Unit decided that Mofaz at that time had diplomatic immunity whilst acting as Defence Minister.[268] Significantly, the Unit's decision recognised that a review was necessary after Mofaz would leave its official position, which did not happen in 2015.[269]

The biggest contemporary obstacle to Palestinian access to justice in foreign domestic courts remains the enjoyment of immunity from prosecution under international law by the alleged Israeli perpetrators. The next chapter is dedicated to the legal notion of immunity and in specific functional immunity from prosecution, the focus of this thesis. In the chapter, I will elaborate on what functional immunity entails and in what way it is differentiated from state and personal immunity, on what values it was first established, how it is developed, and how it is blocking access to justice for Palestinians in foreign domestic courts and upholding Israeli impunity.

[268] Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction*, 117-118.
[269] Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction*, 117-118.

4. Functional Immunity and International Crimes

In this chapter, I elaborate on the origins, values and characteristics of immunities and functional immunity in specific. I will discuss the various fora confronted with functional immunity and the different state actors that may enjoy it. In the second paragraph outlines the development of functional immunity in case of international crimes. I assert how states, courts and the ILC attribute to the development. The third paragraph examines contemporary jurisprudence on functional immunity and international crimes before foreign domestic courts. Finally, I zoom in on Palestinian victims and alleged Israeli perpetrators and show a disparity in law application comparing to Arab and African perpetrators.

4.1 Functional immunity

4.1.1 Immunities in international law

The international legal community in general considers immunities as an exception to and restriction of the territorial jurisdiction of states.[270] In the context of international law, legal actors, such as states and state officials, may be granted immunities to protect their conduct or status from outside interference in order to perform their normal conduct of work.[271] Immunity acts as a procedural roadblock to protect the accused entity from prosecution, as illustrated in *Jurisdictional Immunities* and *Arrest Warrant*.[272] The legal meaning of the term 'immunity' thus pertains to the exemption of the normal situation of prosecution in judicial procedures.[273] Immunities in the field of international law, including functional immunity, are primarily regulated by CIL. The development of functional immunity is thus subjected to state practice and *opinio iuris*, which I will discuss in the next paragraph.

4.1.2 Distinguishing immunities

CIL prescribes different immunities for specific circumstances, depending on the actor and the executed conduct. The most established is state immunity, which directly derives from the principle of state sovereignty. Following the general principle of international law on sovereign

[270] André Nollkaemper, *Kern van het internationaal publiekrecht*, sixth edition (Den Haag, The Netherlands: Boom Juridische uitgevers, 2014), 258.
[271] Matthias Kloth, *Immunities and the Right of Access to Court Under Article 6 of the European Convention on Human Rights* (Leiden, The Netherlands: Martinus Nijhoff, 2010), 1.
[272] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, International Court of Justice, Judgment, *ICJ Rep. 2012*, 3 February 2012; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice, Judgment, *ICJ Rep. 3*, 14 February 2002.
[273] Kloth, *Immunities and the Right of Access to Court*, 1.

states, *par in parem non habet imperium*, sovereign states cannot exercise jurisdiction over one another.[274] State immunity before foreign courts entails immunity of the entire state itself.[275] The CIL doctrine on state immunities is, according to the European Court of Human Rights (ECtHR), generally accepted by the community of nations.[276] Additionally, state immunity is recognised as a concept that aims to promote mutual respect and good relations between states.[277] However, scholars hold dissenting opinions on the justification of state immunity and question the generally presumed superior value of state immunity in comparison to other values of international law, such as accountability.[278] Higgins, for instance, points out that the elevation of the value of immunity is problematic, as it essentially constitutes an exception to the normal legal doctrine on the accountability of wrongdoings and the prevention of impunity.[279] Additionally, Orakhelashvili acknowledges that the rationale behind state immunity is, aside from legal doctrine, sometimes politically or ideologically motivated, which inherently causes disturbances.[280]

State immunity protects the state from prosecution both in criminal and civil procedures in foreign states in case of alleged international crimes.[281] In 2002, the ECtHR decided in the *Al-Adsani* case, by a narrow majority of nine votes to eight, that the claimant, a Kuwaiti-British national, could not pursue its civil claim in UK courts to remedies against the state Kuwait for the torture he was subjected to in Kuwait.[282] In other words, according to the ECtHR, states enjoy immunity from civil claims for remedies even in case of the international crime of torture.[283] State liability is, however, not the same as individual liability. State immunity and immunity of individuals are therefore two separate domains, as is recognised in Article 58 of the ILC Articles on State Responsibility and Article 24(4) of the Rome Statute. In practice this means that when a State stands trial before a court, its functionaries or citizens are not, and *vice*

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[274] Beth Van Schaack, "*Par in Parem Imperium Non Habet* Complementarity and the Crime of Aggression," *Journal of International Criminal Justice* 10, no. 1 (2012): 149.
[275] Alexander Orakhelashvili, "State immunity from jurisdiction between law, comity and ideology," in *Research Handbook on Jurisdiction and Immunities in International Law*, ed. Alexander Orakhelashvili (Cheltenham, UK: Edward Elgar Publishing, 2015), 152-153.
[276] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, ECtHR, *no. 65542/12,* 11 June 2013, para. 158.
[277] *Al-Adsani v. United Kingdom*, ECtHR, *no. 35763/97*, 21 November 2001, para. 56.
[278] Orakhelashvili, "State immunity from jurisdiction," 154-155.
[279] Rosalyn Higgins, "Certain Unresolved Aspects of the Law of State Immunity," *Netherlands International Law Review* 29, no. 2 (1982): 271.
[280] Orakhelashvili, "State immunity from jurisdiction," 155.
[281] Micaela Frulli, "Some Reflections on the Functional Immunity of State Officials," *The Italian Yearbook of International Law* 19 (2009): 1; Hazel Fox, *The Law of State Immunity*, 2nd edition (Oxford, UK: Oxford University Press, 2008), 141.
[282] *Al-Adsani v. United Kingdom*, ECtHR, *no. 35763/97*, 21 November 2001, para. 54; Zaman, "Playing the Ace?" 62-63.
[283] *Al-Adsani v. United Kingdom*, ECtHR, *no. 35763/97*, 21 November 2001.

versa. Additionally, the former ILC Special Rapporteur on immunity of State officials stressed that even though individual immunities of state officials share values with State immunity, they must be distinguished from one another.[284] As a matter of fact, it may occur that a state is immune from prosecution, while a state official, an individual, will not be immune from prosecution and is deemed liable for prosecution or the payment of compensation.[285]

State officials may invoke immunity in procedures before foreign domestic courts. Individual immunity is divided into two categories: personal immunity and functional immunity. Personal immunity, or immunity *ratione personae*, may be attributed to a person, based on the office they hold.[286] It arises from the *status* of persons as state officials – not from what they do, or which acts they commit. The immunity ends when a person leaves its official position. It is generally accepted that only high-ranking officials like the Heads of States, Heads of Governments and Foreign Affairs Ministers may enjoy this *status*-based type of immunity.[287] All other lower-ranking state officials thus do not enjoy personal immunity. Following the *Arrest Warrant* case of the International Court of Justice (ICJ), personal immunities are established for the proper maintenance of a system wherein peaceful cooperation and co-existence among states is guaranteed and, in specific, the ability of Foreign Affairs Ministers to move freely between countries without interference in their conduct.[288] In light of this doctrine, the ICJ established that high-ranking officials cannot be subjected to criminal proceedings before domestic courts as they enjoy personal immunity.[289] Special mission immunity and diplomatic immunity also stem from personal immunity.[290]

4.1.3 Functional immunity

Functional immunity, or immunity *ratione materiae*, is often approached as a corollary of state immunity.[291] As opposed to *status*-based personal immunity, functional immunity concerns the

[284] Special Rapporteur Escobar Hernández, Preliminary report on the immunity of State officials from foreign criminal jurisdiction, *UN Doc. A/CN.4/654*, 31 May 2012, para. 49.
[285] Ronzitti, "Access to Justice and Compensation for Violations of the Law of War," 213.
[286] Akande and Shah, "Immunities of State Officials," 818.
[287] Arthur Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers," *Collected Courses of the Hague Academy of International Law* 247, no. 3 (1994): 13; Akande and Shah, "Immunities of State Officials," 820.
[288] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice, Judgment, *ICJ Rep. 3*, 14 February 2002, para. 75.
[289] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice, Judgment, *ICJ Rep. 3*, 14 February 2002, para. 41.
[290] For instance, diplomatic immunities are codified in the Vienna Convention on Diplomatic Relations, *see* Articles 29 and 31 of the Vienna Convention on Diplomatic Relations (1961); Orakhelashvili, "State immunity from jurisdiction," 152; Akande and Shah, "Immunities of State Officials," 818.
[291] Van Alebeek, *The Immunity of States and Their Officials*, 103; Nollkaemper, *Kern van het internationaal publiekrecht*, 265.

activities of state officials.[292] Functional immunity is attached to specific *conduct* and may be granted to state officials who perform acts of state conducted in official capacity.[293] In other words, functional immunity may be granted to a person based on official conduct that is attributable to a State.[294] The functional immunity doctrine never intended to establish a distinction between ranks.[295] In contrast to personal immunity, functional immunity may be invoked by all former and current state officials acting in official capacity on behalf of the state, no matter their rank or position within the government.[296] Since this type of immunity is attached to the execution of official conduct and not a status, state officials may still enjoy immunity after they leave office.[297] Defendants may pursue to enjoy functional immunity in both civil and criminal procedures. The invocation tends to be more common in civil proceedings.[298]

Acknowledging the above, the question arises whether functional immunity is applicable in case of international crimes. The main point of discussion concerns the notion of 'act of state', and whether an international crime may be regarded as a sovereign act.[299] In other words, could an international crime be conducted by a state actor in official capacity? And could functional immunity then still be invoked? These questions may be approached from different angles, including ethical and positivist perspectives. It is thus unsurprising that contradicting perspectives surface in the international law community.[300] Akande and Shah identify the grey area of functional immunity in case of international crimes and reflect on the uncertainty on the room for applicability considering the accepted circumstances under which state officials enjoy immunities before domestic courts.[301] In contrast, Frulli believes it is already universally acknowledged that functional immunity cannot be invoked in case of international crimes, both in domestic and international courts.[302] Van Alebeek, furthermore,

[292] Nollkaemper, *Kern van het internationaal publiekrecht*, 265.
[293] Akande and Shah, "Immunities of State Officials," 825.
[294] Farnelli, "A Controversial Dialogue," 260.
[295] Aziz Epik, "No Functional Immunity for Crimes under International Law before Foreign Domestic Courts. An Unequivocal Message from the German Federal Court of Justice," *Journal of International Criminal Justice* 19, no. 5 (2021): 1276.
[296] Additionally, persons that are not state officials, but nevertheless act on behalf of a state, may also invoke functional immunity. *See* Akande and Shah, "Immunities of State Officials," 825.
[297] Micaela Frulli, "On the Existence Of A Customary Rule Granting Functional Immunity To State Officials And Its Exceptions: Back To Square One," *Duke Journal Of Comparative & International Law* 26 (2016): 480.
[298] Akande and Shah, "Immunities of State Officials," 826.
[299] For instance, Zaman, Akande and Shah, and Frulli refer to this issue in their work on immunities, see: Zaman, "Playing the Ace?" 61; Akande and Shah, "Immunities of State Officials," 828; Frulli, "Some Reflections," 1.
[300] It goes beyond the scope of this thesis to outline the extensive debate on these questions. However, for the understanding of the relation between functional immunity and international crimes, I believe it is of significance to instead highlight the main contradicting positions on this matter.
[301] Akande and Shah, "Immunities of State Officials," 816-817.
[302] Frulli, "Some Reflections," 1.

asserts that States themselves agreed that international crimes do not qualify as official acts in the context of functional immunity.[303] Furthermore, Courts also commented on this issue. In 1962, the Israeli Supreme Court in *Eichmann* established that international crimes are "completely outside the 'sovereign' jurisdiction of the state."[304] Additionally, the Dutch Court of Appeal decided in *Bouterse* that the execution of grave crimes cannot be qualified as the official tasks of a Head of State.[305] Adding to that, in *Pinochet No. 3* the House of Lords asserted that the international crime of torture could not be categorised as an 'act of state', recognising that immunity is not superior to the protection of *jus cogens* values.[306] Moreover, it is generally acknowledged that international crimes, like war crimes, do not fall within the scope of state conduct at times of war, as the international humanitarian law principles illustrate.[307] It therefore would be an unsound consequence to characterise war crimes within the official conduct executed by state officials in official capacity. Additionally, the International Law Commission (ILC) has worked towards a restriction of functional immunity in case of international crimes in recent years.[308]

4.1.4 Functional immunity in civil and criminal procedures

For this thesis' research on the development of functional immunity, it may appear logical to separate civil cases from criminal cases considering the enjoyment of the right to access to justice of victims in cases regarding functional immunity in foreign domestic courts. Nonetheless, I decide not to separate the two. As Fox and Zaman assert, an argument for the separation of the two procedural fields may be derived from the idea that a state official's tortious liability cannot be separated from the State's liability, contrary to the criminal responsibility of the state official.[309] However, the substantial overlap between the two categories in regard to the foundational elements of due process make it a strong case not to distinguish civil and criminal cases, as Paulsson argues.[310] Ryngaert also points towards the

[303] Van Alebeek, "National Courts," 5-6.
[304] *Attorney General v. Adolf Eichmann,* Supreme Court of Israel, Judgment, *no. 336/61*, 29 May 1962, para. 14 under b.
[305] "Het plegen van zeer ernstige strafbare feiten als waarom het hier gaat, kan immers niet tot de officiële taken van een staatshoofd worden gerekend," *see Decembermoorden Suriname*, Court of Appeal Amsterdam, 20 November 2000, ECLI:NL:GHAMS:2000:AA8395, para. 4.2.
[306] Farnelli, "A Controversial Dialogue," 277-278.
[307] International crimes are violations of the *ius in bello*, i.e. international humanitarian law. *See* the Geneva Conventions and the Rome Statute of the International Criminal Court; Antonio Cassese, *International Criminal Law* (Oxford, UK: Oxford University Press, Second Edition, 2008), 65-66.
[308] This judicial development will be discussed in paragraph 4.2.2.
[309] Fox, *The Law of State Immunity*, 514-515; Zaman, "Playing the Ace?" 60.
[310] Paulsson, *Denial of Justice in International Law*, 133.

artificial distinction between civil and criminal cases in relation to functional immunity and refers to *Jones v. United Kingdom*.[311] In *Jones*, judge Kalaydjieva expressed the following in its dissenting opinion: "Like Lord Justice Mance [...] I find it difficult to accept that general differences between criminal and civil law justify a distinction in the application of immunity in the two contexts."[312] The very fact that the access to justice-based claim to remedies is, aside from civil cases, an additional way of redress in criminal proceedings supports this line of thinking. As I will show, the development of functional immunity in criminal cases is, in practice, heavily intertwined with civil procedures. Illustratively, in the *Ziada* case, the District Court of The Hague implicitly confirmed the entanglement between civil and criminal procedures on functional immunity, as it explicitly and extensively referred to the ILC Draft Articles on *criminal* jurisdiction in said case, which was a *civil* procedure.[313] For these reasons, this thesis does not differentiate between civil and criminal cases concerning alleged international crimes before foreign domestic courts.

4.2 The development of functional immunity

4.2.1 State practice and *opinio iuris*

Functional immunity is a norm of CIL, and the development of functional immunity therefore follows the characteristics of customary law. The objective element of state practice and the subjective element of *opinio iuris* are leading for the CIL development.[314] The consensus on the two elements for the emergence of a customary law norm was affirmed by the ICJ in *North Sea Continental Shelf*, *Continental Shelf*, and *Nicaragua*.[315] In spite of the apparent consensus, however, the two elements of state practice and *opinio iuris* are often approached with different appraisals of meaning and value in recent years.[316] As Chimni points out, the International Law Association (ILA) appraised a different value to the constituent features of customary law than the International Law Commission (ILC). Where the ILA values state practice as the most important component, the ILC instead stresses on the significance of a 'two-element

[311] Cedric Ryngaert, "Functionele immuniteit van vreemde gezagsdragers in de context van internationale misdrijven: Een uitdaging voor Nederlandse rechtbanken," *Nederlands Juristenblad* 23 (2020): 1658.
[312] *Jones v. United Kingdom*, ECtHR, *no. 34356/06 and 40528/06*, 14 January 2014, para. 62.
[313] Ryngaert, "Functionele immuniteit van vreemde gezagsdragers," 1658; *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:559 (Dutch version).
[314] Chimni, "Customary international law," 2.
[315] *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, International Court of Justice, *1969 ICJ Rep. 3*, 20 February 1969; *Continental Shelf (Libya v. Malta)*, International Court of Justice, *1985 ICJ Rep. 13*, 21 March 1984, para. 27; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, International Court of Justice, *1986 ICJ Rep. 14*, 27 June 1986.
[316] Chimni, "Customary international law," 2.

approach'.[317] A third interpretation by scholars puts greater emphasis on *opinio iuris* and may be qualified as a 'modern' perception of CIL.[318]

State practice entails the 'general practice' of a norm which is accepted as law, that is *opinio iuris*.[319] State practice comprises all acts of state organs which may also be evidence of *opinio iuris*.[320] In other words, domestic jurisprudence as conduct by a state organ, the judiciary, may be perceived as both state practice and *opinio iuris*.[321] Van der Wilt examined this phenomenon and concluded that the two components have become blurred, as the role of national jurisprudence for CIL development gained great momentum in recent years.[322] The element of state practice is inherently a political element. States have impact on what will be understood as state practice and therefore state practice becomes a political tool. This comes to light with the notion of 'negative' state practice. As Ryngaert argues, a prosecutor can decide not to pursue a criminal procedure because functional immunity could be in the way of prosecution.[323] It would, however, not be regarded as state practice as it would not result in case law. 'Negative' state practice would not be visible, as it often does not entail any public communication on functional immunity by the Prosecutor when a procedure is discontinued.[324] Notably, the ILC received criticism for the lacking attention to 'negative' state practice during the meetings on the 2017 Draft Articles.[325]

4.2.2 Agents of development: States, courts and the ILC

Functional immunity is developed by various actors. States play a vital role in the development, as actors of both state practice and *opinio iuris* and their role and political impact in the ILC must not be underestimated. Courts are leading for the development through jurisprudence. Functional immunity cases are conducted in international, regional and national courts. However, foreign domestic courts are crucial for contemporary development of international

[317] International Law Association, "Final Report of Commission on Formation of Customary (General) International Law," 13; International Law Commission, *Report on the Work of Its 64th Session, A/69/10* (2014), available at: https://legal.un.org/ilc/reports/2014/, para. 242; Chimni, "Customary international law," 2.
[318] Roozbeh (Rudy) B. Baker, "Customary International Law: A Reconceptualization," *Brooklyn Journal of International Law* 41, no. 2 (2016): 446.
[319] Andreas Follesdal, "The Significance of State Consent for the Legitimate Authority of Customary International Law," in *The Theory, Practice, and Interpretation of Customary International Law*, ed. Panos Merkouris, Jörg Kammerhofer, and Noora Arajärvi (Cambridge, UK: Cambridge University Press, 2022), 105.
[320] Van Alebeek, "Domestic Courts as Agents of Development," 562.
[321] André Nollkaemper, *National Courts and the International Rule of Law* (Oxford, UK: Oxford University Press, 2011), 268.
[322] Van der Wilt, "State Practice as Element of Customary International Law," 1.
[323] Ryngaert, "Functionele immuniteit van vreemde gezagsdragers," 1657.
[324] Ryngaert, "Functionele immuniteit van vreemde gezagsdragers," 1657.
[325] International Law Commission, *Report on the Work of Its 69th Session, A/72/10* (2017), 169.

immunity rules.[326] To understand the development of functional immunity, however, the knowledge of international and regional jurisprudence is significant, as these shaped the legal doctrine on functional immunity.[327] For this reason, it is crucial to be aware which courts hold this power, and which do not, while contemplating on existing jurisprudence on functional immunity. For instance, when considering regional courts, we look at European court jurisprudence by definition – no other regional court's jurisprudence is considered as strongly as the ECtHR. Additionally, when we look at jurisprudence from domestic courts, it is apparent that jurisprudence from almost exclusively Western (European) states like the United Kingdom, France, Spain, Germany, the United States and the Netherlands – *nota bene* all former or current settler-colonial entities – is considered the norm. Essentially, Western states decide what constitutes state practice by producing case law. The absence and neglect of domestic jurisprudence by foreign domestic courts from Global South states as a source of state practice must be seen in light of relatively recent formal independence of these states and its practices after independence were not valued the same.[328] This resulted in a bias to Western state practice when speaking of general state practice.[329] It is for this reason that contemporary state practice is criticised for its consequences to the Global South and oppressed people.[330]

International Law Commission

The ILC is a significant actor for the development of functional immunity. The ILC was established by the United Nations General Assembly (UNGA) in 1947 in order to "promote the progressive development of international law and its codification."[331] Although the work by the ILC is not binding, the ILC is perceived as an authoritative and respected institution for CIL development. The ILC consists of 34 experts and its members are elected every four years. UN Member States may nominate a legal expert holding the state's nationality to join Drafting Committee's on specific themes.[332] The standard work conduct of the ILC involves

[326] Van Alebeek, *The Immunity of States and Their Officials*, 6.
[327] International and regional courts' jurisprudence is crucial for the development of functional immunity, even though some of these cases did not concern functional immunity in specific. Instead, state or personal immunity where the issue.
[328] Vasuki Nesiah, "Decolonial CIL: TWAIL, Feminism, and an insurgent jurisprudence," *The American Journal of International Law Unbound* 112, no. 1 (2018): 315-316.
[329] Nesiah, "Decolonial CIL: TWAIL, Feminism, and an insurgent jurisprudence," 316.
[330] Chimni, "Customary International Law," 20-22.
[331] Article 1 of the Statute of the International Law Commission, adopted by the United Nations General Assembly in Resolution 174(II), 21 November 1947; Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 25.
[332] International Law Commission, "Membership," *International Law Commission*, available at: https://legal.un.org/ilc/ilcmembe.shtml.

governments to put forward legal experts to be involved in the codification process of the ILC. The ILC's election may thus be subjected to political considerations of states in the decision to partake in the codification, or not. Additionally, in the drafting process, the ILC may request State interpretations on issues. It illustratively did so when attempting to define 'international crimes' between the fifties and the nineties.[333] The United States, United Kingdom and the Netherlands opposed the inclusion of the crime of Apartheid, in line with their strong refusal to condemn Apartheid in South Africa at that time.[334] This, in turn, let to the inclusion of a mere four crimes, at that moment familiar with the ICC, instead of the suggested twelve.[335]

The ILC has in compliance with its mandate considered the question on immunity of state officials from foreign criminal jurisdiction since 2007.[336] The ILC Drafting Committee has drafted Articles on the issue since 2013. Before the Committee drafted the Articles, it requested responses by States on their position towards functional immunity on a voluntary basis. Illustratively, the Netherlands has repeatedly expressed support to the limitation of functional immunity in case of international crimes in 2015, 2016, 2017, 2019, and 2021, as the Dutch government believes that "international crimes inherently fall outside the scope of acts in official capacity."[337] This indicates a political commitment of the Netherlands to maintain influence on the development of the CIL norm.

In the Draft Articles of 2017, the ILC addresses functional immunity under Article 7, concerning "crimes in respect of which immunity does not apply."[338] The Article restricts the enjoyment of functional immunity in case of international crimes. Article 7(1) reads as follows: "Immunity shall not apply in relation to the following crimes: (a) genocide, crimes against humanity, war crimes, torture and enforced disappearances; (b) crimes of corruption; (c) crimes that cause harm to persons, including death and serious injury, or to property, when such crimes

[333] Reynolds and Xavier, "'The Dark Corners of the World'," 981.
[334] John Reynolds, "'Third World Approaches to International Law and the Ghosts of Apartheid," in *The Challenge of Human Rights: Past, Present and Future*, ed. David Keane and Yvonne McDermott (Cheltenham, UK: Edward Elgar, 2012), 204-209; Asad G. Kiyani, "International Crime and the Politics of Criminal Theory: Voices and Conduct of Exclusion," *NYU Journal of International Law and Politics* 48, no. 1 (2015): 150.
[335] Kiyani, "International Crime and the Politics of Criminal Theory," 203.
[336] International Law Commission, "Analytical Guide to the Work of the International Law Commission. Immunity of State officials from foreign criminal jurisdiction," *International Law Commission*, mandate, available at: https://legal.un.org/ilc/guide/4_2.shtml#mandate.
[337] Statement by Dr. René Lefeber (Legal Adviser of Foreign Affairs, Kingdom of The Netherlands), United Nations General Assembly 72nd Session, Sixth Committee, Agenda item 82, Report of the International Law Commission, available at: https://www.un.org/en/ga/sixth/72/pdfs/statements/ilc/netherlands_1.pdf; For access to all comments of the Netherlands, see: International Law Commission, "Analytical Guide to the Work of the International Law Commission. Immunity of State officials from foreign criminal jurisdiction," *International Law Commission*, Comments by Governments, available at: https://legal.un.org/ilc/guide/4_2.shtml#govcoms.
[338] Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, International Law Commission, Report on the Work of Its 69th Session, *A/72/10* (11 September 2017), available at: https://legal.un.org/ilc/reports/2017/english/chp7.pdf, 164-165.

are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed."[339] In Article 7(2), the restriction on the enjoyment to immunity is not extended to persons who enjoy personal immunity.[340] The ILC decided on the approach to functional immunity as laid down in Article 7 based on the presence of a "discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of certain types of behaviour that constitute crimes under international law" and referred to a broad selection of jurisprudence to support this claim.[341] It did so by majority vote, which is rather exceptional for the ILC.[342] Twenty-one votes were cast in favour of the adoption of the Article, one abstention and eight votes were against the adoption.[343] Despite the explanation for its justification, the ILC received internal and external criticism with respect to the discerned 'trend' of limiting functional immunity in case of international crimes from international lawyers.[344] The ILC continues the development of functional immunity every year. Illustratively, the ILC Drafting Committee adopted a first reading of new Draft Articles in May 2022.[345]

International Courts

Historically, international tribunals were authoritative in the emergence of jurisprudence on functional immunity and international crimes. The Nuremberg Tribunal was the first in history to deny the functional immunity defence and recognised individual liability for international crimes on the basis of Articles 6, 7 and 8 of the Charter of the International Military Tribunal of 1945, otherwise known as the Nuremberg Charter.[346] The International Criminal Tribunal for the Former Yugoslavia (ICTY), moreover, decided in *Blaškić* (1997) that functional

[339] Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, International Law Commission, Report on the Work of Its 69th Session, *A/72/10* (11 September 2017), 164.
[340] Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, International Law Commission, Report on the Work of Its 69th Session, *A/72/10* (11 September 2017), 164.
[341] Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, International Law Commission, Report on the Work of Its 69th Session, *A/72/10* (11 September 2017), 178-179.
[342] The meeting notes of the International Law Commission on the adoption of Article 7 may be accessed here: International Law Commission, Provisional summary record of the 3378th meeting, 69th Session (second part), *A/CN.4/SR.3378* (18 August 2017), available at:
https://legal.un.org/ilc/documentation/english/summary_records/a_cn4_sr3378.pdf.
[343] International Law Commission, Provisional summary record of the 3378th meeting, 69th Session (second part), *A/CN.4/SR.3378* (18 August 2017), 13.
[344] See the meeting notes for internal disagreement: International Law Commission, Provisional summary record of the 3378th meeting, 69th Session (second part), *A/CN.4/SR.3378* (18 August 2017); For an analysis of the individual experts' opinions, *see* Van Alebeek, "The 'International Crime' Exception," 27–32.
[345] Immunity of State officials from foreign criminal jurisdiction: Texts and titles of the draft articles adopted by the Drafting Committee on first reading, International Law Commission, Seventy-third Session, *A/CN.4/L.969* (31 May 2022), available at: http://legal.un.org/docs/?symbol=A/CN.4/L.969.
[346] Article 7 of the Nuremberg Charter was later developed into a customary international law norm in international jurisprudence. Farnelli, "A Controversial Dialogue," 267.

immunity could not be enjoyed by the responsible state officials in case of international crimes in both national and international procedures.[347] It did so in line with already developed jurisprudence of domestic courts and the community interest to end impunity.[348] As Farnelli asserts, the ICTY established that punishment of *jus cogens* violations of international crimes prevailed over state interest.[349]

The ICC maintains a complete exclusion of immunity by Head of States under its jurisdiction following the Rome Statute. In article 27(2), functional immunity explicitly does not bar the Court's exercise of its jurisdiction.[350] Furthermore, the ICJ decided that incumbent Congolese Minister of Foreign Affairs enjoyed personal immunity in the *Arrest Warrant* case.[351] The fact that personal immunity was established led to the non-consideration of functional immunity. In 2012, the ICJ decided that Germany, alleged of international crimes, enjoyed State immunity in the civil case *Jurisdictional Immunities*. It argued there was no exception to state immunity in case of international crimes.[352] The ICJ again did not rule on functional immunity in this case.[353] While the ICJ demonstrates support to an absolute immunity of States, this interpretation received extensive criticism by international law scholars.[354]

European Courts

In *Jones* (2014), the ECtHR examined the in 2006 existing CIL on functional immunity.[355] The ECtHR decided that the enjoyment of functional immunity from jurisdiction by state officials

[347] *Prosecutor v. Blaškić (Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)*, ICTY, Judgment, *IT-95-14*, 29 October 1997, paras. 38 and 41.
[348] See the *Pinochet (No. 3)* and *Fidel Castro* cases as discussed in the next paragraph on foreign domestic jurisprudence on functional immunity in case of international crimes; Farnelli, "A Controversial Dialogue," 268.
[349] Farnelli, "A Controversial Dialogue," 268.
[350] "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." *See* Article 27(2) of the Rome Statute of the International Criminal Court.
[351] For an elaboration on the *Arrest Warrant* case, see paragraph 4.1.2 on personal immunity; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice, Judgment, *ICJ Rep. 3*, 14 February 2002.
[352] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, International Court of Justice, Judgment, *ICJ Rep. 2012*, 3 February 2012, para. 92-97; Farnelli, "A Controversial Dialogue," 272-273.
[353] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, International Court of Justice, Judgment, *ICJ Rep. 2012*, 3 February 2012, para. 91.
[354] Farnelli, "A Controversial Dialogue," 273; Rosanne van Alebeek, "Jurisdictional Immunities of the State (Germany v. Italy): on Right Outcomes and Wrong Terms," *German Yearbook of International Law* 55 (2012): 281; Jure Vidmar, "Rethinking Jus Cogens After Germany V. Italy: Back to Article 53?" *Netherlands International Law Review* 60, no. 1 (2013): 1.
[355] In the case, the Court acknowledged the conduct by the United Kingdom when it granted immunity to the Kingdom of Saudi Arabia and its State officials in civil proceedings concerning the crime of torture. *Jones v. United Kingdom*, ECtHR, *no. 34356/06 and 40528/06*, 14 January 2014, para. 196.

with respect to the crime of torture applied to civil proceedings.[356] Significantly, the Court did not rule on the extension of such immunity to criminal proceedings.[357] Despite its ruling, the ECtHR acknowledged that there is "emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign state officials."[358] The Court also recognised the expected development of functional immunity by means of state practice and *opinio iuris*, as movement towards exception was already evident at that time.[359] *Opinio iuris* was indeed already existent, as international lawyers criticised the judgment by the Court for its interpretation of functional immunity and its consequences for access to justice of victims of torture.[360]

Foreign Domestic Courts

Finally, the role of foreign domestic courts in the development of international immunity rules is significant. As asserted by van Alebeek, the authoritative role of domestic courts must be understood in light of developments in IHRL and ICL, without a simultaneous development of international institutional enforcement mechanisms for those rules.[361] In comparison to international courts, domestic courts have worked around the idea that they cannot prosecute foreign state officials and jurisprudence indicates an erosion of the immunity *ratione materiae* rule over the years.[362]

A dichotomy is discernible between the approach in post-Second World War (WWII) jurisprudence and post-Cold War jurisprudence. After WWII, domestic courts already regarded functional immunity as a CIL norm. The first time a domestic court recognised and rejected the notion of functional immunity was in the *Eichmann* trial.[363] The Israeli Supreme Court dismissed the argumentation of the defendant on the limitation of his accountability on the basis of 'acts of states' in the appeal case and held Eichmann liable on fifteen counts and sentenced Eichmann to death in 1962.[364] The Court established that functional immunity could not be

[356] *Jones v. United Kingdom*, ECtHR, *no. 34356/06 and 40528/06,* 14 January 2014, para. 202.
[357] Cedric Ryngaert, "Functional immunity of foreign State officials."
[358] *Jones v. United Kingdom*, ECtHR, *no. 34356/06 and 40528/06,* 14 January 2014, para. 213.
[359] *Jones v. United Kingdom*, ECtHR, *no. 34356/06 and 40528/06,* 14 January 2014, para. 213.
[360] For instance, *see* Paul David Mora, "Case Note: Jones v. the United Kingdom: Article 6(1) ECHR and the Immunities of States and Their Officials for Acts of Torture," *Cambridge Journal of International and Comparative Law* 3, no. 2 (2014): 608-615; Cedric Ryngaert, "Jones v United Kingdom: The European Court of Human Rights Restricts Individual Accountability for Torture," *Utrecht Journal of International and European Law* 30, no. 79 (2014): 47–50; Claire Overman, "Jones and Others v UK: Immunity or Impunity?" *Oxford Human Rights Hub*, 19 January 2014, available at: http://humanrights.dev3.oneltd.eu/?p=4042.
[361] Van Alebeek, *The Immunity of States and Their Officials,* 1.
[362] Farnelli, "A Controversial Dialogue," 275-276.
[363] *Attorney General v. Adolf Eichmann*, District Court of Jerusalem, Judgment, *no. 40/61*, 11 December 1961.
[364] *Attorney General v. Adolf Eichmann,* Supreme Court of Israel, Judgment, *no. 336/61,* 29 May 1962, para. 14.

invoked as the acts were "completely outside the 'sovereign' jurisdiction of the state" and therefore Eichmann couldn't "seek shelter behind the official character of their task or mission, or behind the 'laws' of the state by virtue of which they purported to act."[365]

After the Cold War, the approach to functional immunity in domestic courts further recognised exceptions to the rule in regard to international crimes committed by former state officials. The UK House of Lords established in the 1999 landmark case of *Pinochet (No. 3)* that former Heads of State do not enjoy functional immunity in criminal cases before foreign domestic courts in case of the crime of torture, an international crime.[366] The Court held that acts of torture cannot be considered official acts, as this interpretation would be contradictory to the scope and definition of the crime.[367] The House of Lords argued that when *jus cogens* violations occur, like the crime of torture, functional immunity could not be enjoyed and the domestic court therefore had universal jurisdiction to hold the former Chilean Head of State, Senator Augusto Pinochet at the time of the trial, accountable.[368] The House of Lords thus maintained that sovereign immunity is not superior to the protection of *jus cogens* values.[369] Following *Pinochet (No. 3)*, the House of Lords established that functional immunity must be distinguished from state immunity, and, additionally, did not separate civil and criminal liability, as Farnelli asserts.[370]

In the subsequent *Fidel Castro* and *Muammar Gaddafi* cases against incumbent Heads of State, the Spanish Audiencia Nacional and the French Cour de Cassation, respectively,

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[365] "In any event, there is no basis for the doctrine when the matter pertains to an act prohibited by the law of nations, especially when they are international crimes in the class of `Crimes against Humanity' (in the wide sense). Of such heinous acts it must be said that they are completely outside the `sovereign' jurisdiction of the state that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot seek shelter behind the official character of their task or mission, or behind the `Laws' of the state by virtue of which they purported to act. […] In other words, international law postulates that it is impossible for a state to sanction an act that violates its severe prohibitions, and from this follows the idea which forms the core of the concept `international crime': that a person who was a party to such a crime must bear individual responsibility for his conduct. Otherwise, the penal provisions of international law would be frustrated." *Attorney General v. Adolf Eichmann,* Supreme Court of Israel, Judgment, *no. 336/61,* 29 May 1962, para. 14 under b.

[366] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, UK House of Lords, *UKHL 17*, 24 March 1999, [2000] 1 A.C. 147, 92-93; Zaman, "Playing the Ace?" 53-54; Van Alebeek, *The Immunity of States and Their Officials,* 2.

[367] "The definition of torture, both in the Convention and section 134, is in my opinion entirely inconsistent with the existence of a plea of immunity ratione materiae. The offence can be committed only by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is co-extensive with the offence." *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, UK House of Lords, *UKHL 17*, 24 March 1999, [2000] 1 A.C. 147, 92-93.

[368] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, UK House of Lords, *UKHL 17*, 24 March 1999, [2000] 1 A.C. 147.

[369] Farnelli, "A Controversial Dialogue," 277-278.

[370] Farnelli, "A Controversial Dialogue," 277-279.

continued this line and affirmed that Heads of State cannot enjoy functional immunity in case of international crimes both in civil and criminal procedures, but still can hold personal immunity while acting as incumbent Head of State.[371] Furthermore, in 2000 the Amsterdam Court of Appeal decided in *Bouterse* that Desi Bouterse, former Military ruler in Suriname, could not enjoy functional immunity because of the specific acts of the case, which, according to the Court, could not be classified as 'official conduct'.[372] Moreover, in the next paragraph, I will discuss contemporary jurisprudence by foreign domestic courts on the enjoyment of functional immunity by former state officials in relation to alleged international crimes, building on the just established principled interpretation on functional immunity.

4.3 Functional immunity in foreign domestic courts

4.3.1 Contemporary cases concerning alleged international crimes

In the last fifteen years or so, the development of functional immunity took place in foreign domestic courts in both criminal and civil proceedings. Relevant cases on functional immunity and alleged international crimes committed by state officials were mainly held in courts in the Netherlands, Germany and the United States as focus countries to functional immunity development. The discussed cases in this sub-paragraph show that jurisprudence indicates that functional immunity from prosecution does not extend to international crimes. The cases that concern victims in procedures against alleged Israeli perpetrators, however, show a significantly different outcome, in specific with respect to Palestinian victims. When Israeli state officials are, in fact, actually brought before court, in contrast to cases discussed in chapter three, Israeli defendants always enjoy functional immunity in both civil and criminal cases. In other words, the established exception to functional immunity in respect to *jus cogens* violations is not extended to Israeli state officials. I will discuss the cases, all concerning former state officials, in chronological order. The cases that involving Palestinian victims will be discussed separately for analytical purposes.

In *Belhas v. Ya'alon,* the United States Appeal Court upheld a District Court's ruling and dismissed a civil claim against a former Israeli state official for complicity in war crimes.[373] In the procedure, seven Lebanese victims brought a civil claim against Moshe Ya'alon, former

[371] *Castro*, Audiencia Nacional, no. 1999/2723, 4 March 1999; *Gaddafi*, Cour de Cassation, France, *no. 1414*, 13 March 2001; discussed in Farnelli, "A Controversial Dialogue," 279.
[372] *Decembermoorden Suriname*, Court of Appeal Amsterdam, 20 November 2000, ECLI:NL:GHAMS:2000:AA8395, para. 4.2.
[373] *Belhas v. Ya'alon*, United States Court of Appeals District of Columbia Circuit, *No. 07-7009*, 15 February 2008, available at: https://ccrjustice.org/sites/default/files/assets/Decision%20in%20Belhas%20v%20Ya'alon%202.15.08.pdf.

Head of the Israeli Army Intelligence (1995-1998), for alleged complicity in war crimes.[374] The District Court argued that Ya'alon, at that time living in the United States, was acting "under color of Israeli law" in official capacity.[375] For this consideration, the Court relied on a letter submitted by the Israeli Ambassador, describing the acts at stake, alleged war crimes, as "sovereign actions" and "official state acts."[376] The Court decided that Ya'alon enjoyed immunity under the Foreign Sovereign Immunity Act (FSIA) and argued that foreign state officials fall within the scope of foreign state immunity.[377] In other words, the Court does not distinguish between state immunity and functional immunity of individual state officials. Accordingly, the Court of Appeal upheld the District Court's ruling on Ya'alon's immunity in 2008.[378]

In the 2008 criminal case of *H./OM*, the Dutch Supreme Court upheld the conviction of a former Afghan state official for the international crime of torture by the Appeal Court and preserved the defendant's sentence of twelve years to prison.[379] The perpetrator in this case was the former Head of the Afghan military security and former Deputy Minister of Afghan national security between 1983 and 1990, a high-level Afghan state official, and as such "a very powerful and influential person" as the Appeal Court asserted.[380] The Supreme Court maintained that the Afghan perpetrator was liable for the complicity in torture and the violation of the laws and customs of war with respect to three Afghan victims.[381] In line with the Appeal judgment, the Supreme Court decided that the Afghan perpetrator did not enjoy immunity from prosecution for the conduct executed as the former Head of the military security and former

[374] The case was initiated with respect to the 1996 bombing of a United Nations compound in Qana, Lebanon which killed and injured hundreds of UN staff and civilians seeking refuge in the compound. *Belhas v. Ya'alon*, United States District Court for the District of Columbia, *No. 05-2167*, 14 December 2006, available at: https://ccrjustice.org/sites/default/files/assets/Belhas_DismissalOpinion_12_06.pdf, 3.
[375] *Belhas v. Ya'alon*, United States District Court for the District of Columbia, *No. 05-2167*, 14 December 2006, 6.
[376] *Belhas v. Ya'alon*, United States District Court for the District of Columbia, *No. 05-2167*, 14 December 2006, 9.
[377] *Belhas v. Ya'alon*, United States District Court for the District of Columbia, *No. 05-2167*, 14 December 2006, 10.
[378] *Belhas v. Ya'alon*, United States Court of Appeals District of Columbia Circuit, *No. 07-7009*, 15 February 2008, 19.
[379] *H./OM*, Court of Appeal The Hague, 29 January 2007, ECLI:NL:GHSGR:2007:AZ7143; *H./OM*, Supreme Court of the Netherlands, 8 July 2008, ECLI:NL:HR:2008:BC7418.
[380] *H./OM*, Court of Appeal The Hague, 29 January 2007, ECLI:NL:GHSGR:2007:AZ7143, para. 13. In-text quote translated from Dutch transcript: "De verdachte was in de periode van eind 1983 tot en met eind 1990 in Kabul, in Afghanistan, ten tijde van het door de Sovjets gesteunde communistische bewind, het hoofd van de militaire inlichtingendienst, de KhAD-e-Nezami, en onderminister van het ministerie van staatsveiligheid (WAD) en was aldus een zeer machtig en invloedrijk persoon."
[381] *H./OM*, Court of Appeal The Hague, 29 January 2007, ECLI:NL:GHSGR:2007:AZ7143, para. 13; *H./OM*, Supreme Court of the Netherlands, 8 July 2008, ECLI:NL:HR:2008:BC7418, para. 12-13.

deputy minister of national security.[382] The Supreme Court did not explicitly limit its considerations to one type of immunity of the former Afghan state official. Instead, it spoke of immunity from jurisdiction in general.[383] Ryngaert stressed that the confirmation of the Appeal judgment indicates that the Supreme Court rejected all forms of immunity, including functional immunity.[384] The Supreme Court thus established that higher-level state officials do not enjoy functional immunity with respect to the international crime of torture.

In *Samantar v. Yousuf*, The United States Supreme Court upheld the Appeal Judgment and maintained that Mohamed Ali Samantar, former Prime Minister of Somalia, could not enjoy functional immunity. In this civil procedure, seven Somali-American claimants were seeking damages before the District Court for their suffering stemming from Samantar's complicity in alleged violations of international law such as arbitrary arrest and detention, torture and rape.[385] The former Somalian state official, now living in the United States, argued a line of defence invoking functional immunity.[386] The District Court, first, entitled Samantar with the immunity based on the FSIA for the acts executed on behalf of the Somali government.[387] However, the Court of Appeal reversed the previous judgment and decided that Samantar could not enjoy immunity, as the FSIA did not apply to individuals and even if it were, the individual, unlike Samantar, would have to be a state official at the time of proceedings.[388] On 1 June 2010, the

[382] *H./OM*, Supreme Court of the Netherlands, 8 July 2008, ECLI:NL:HR:2008:BC7418, paras. 6.6 and 7.2. Original transcript in Dutch: "Het middel faalt reeds op de grond dat de verdachte noch aan zijn toenmalige hoedanigheid van directeur van de staatsveiligheidsdienst van Afghanistan noch aan die van plaatsvervangend minister van staatsveiligheid immuniteit van jurisdictie als hiervoor onder 6.6 bedoeld toekomt."

[383] *H./OM*, Supreme Court of the Netherlands, 8 July 2008, ECLI:NL:HR:2008:BC7418, paras. 6.6 and 7.2. Original transcript of para. 6.6 in Dutch: "Anders dan ter terechtzitting in hoger beroep en in het middel is aangevoerd, biedt art. 8 Sr geen grondslag voor het op de genoemde volkenrechtelijke gronden buiten toepassing laten van de rechtsmachtregeling van art. 3 (oud) WOS. Art. 8 Sr houdt weliswaar in dat de toepasselijkheid van de Nederlandse rechtsmachtbepalingen wordt beperkt door de uitzonderingen in het volkenrecht erkend, doch bevat - naar mede volgt uit de geschiedenis van de totstandkoming van deze bepaling (H.J. Smidt, Geschiedenis van het Wetboek van Strafrecht, deel I, 1891, blz. 147) - niet meer dan een wettelijke erkenning van aan het volkenrecht ontleende immuniteit van jurisdictie."

[384] Ryngaert, "Functionele immuniteit van vreemde gezagsdragers," 1656.

[385] *Samantar v. Yousuf*, United States District Court for the Eastern District of Virginia (Alexandria Division), *No. 1:04cv1360*, 1 August 2007, available at: https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/Samantar_Opinion_106.pdf, 1.

[386] *Samantar v. Yousuf*, United States District Court for the Eastern District of Virginia (Alexandria Division), *No. 1:04cv1360*, 1 August 2007, 5.

[387] *Samantar v. Yousuf*, United States District Court for the Eastern District of Virginia (Alexandria Division), *No. 1:04cv1360*, 1 August 2007, 12.

[388] *Samantar v. Yousuf*, United States Court of Appeals for the Fourth Circuit, *No. 07-1893*, 8 January 2009, available at: https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/Samantar_Judgment_Reversal_65.pdf, 18-22. Original transcript on p. 21: "In sum, we conclude that even if an individual foreign official could be an "agency or instrumentality under the FSIA," sovereign immunity would be available only if the individual were still an "agency or instrumentality" at the time of suit. Dole Food guides our resolution of this issue, regardless of whether the purported agency or instrumentality is a corporation owned by a foreign government or an individual foreign official; we see nothing in the statute or its underlying purpose to suggest otherwise. Samantar was certainly no

Supreme Court, furthermore, upheld the Appeal Court's decision following the same considerations and send the case back to the District Court for further proceedings.[389] Interestingly, the United States government argued in its *amicus curiae* that it did not recognise the government of Somalia, a sovereign country.[390] The District Court then ruled that Samantar could not invoke functional immunity neither from common law principles or from the FSIA and held Samantar liable as a superior and awarded 21 million USD to the Somali claimants.[391] Samantar did not accept and appealed the decision. The Court of Appeals decided on 2 November 2012 that Samantar as a former Prime Minister is not entitled to functional immunity in civil proceedings for acts committed in official capacity that constitute *jus cogens* violations.[392] At the same time, the US government recognised the Somali government.[393] At last, the Supreme Court declined to review the Appeals Court's 2012 judgment in 2015 after the Obama administration reportedly interfered in the matter.[394]

In December 2017, just after the ILC Draft Articles were published, the District Court of The Hague sentenced a former member of the Derg, the military regime in Ethiopia at that time, to life imprisonment in *Eshetu A./OM*.[395] The Court convicted the former Ethiopian state official for his complicity in grave violations of war crimes, torture and killing that took place between 1978 and 1981.[396] Eshetu A., one of 120 Derg members, held a powerful position as the permanent representative of the Derg in Gojjam and exerted strong influence on orders concerning prisoners.[397] The Prosecutor initiated a criminal procedure because the defendant

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longer a Somali government official at the time the plaintiffs brought this action and is therefore not entitled to immunity under the FSIA."

[389] *Samantar v. Yousuf*, United States Supreme Court, *No. 08-1555*, 1 June 2010, available at: https://www.supremecourt.gov/opinions/09pdf/08-1555.pdf, 19-20.

[390] *Samantar v. Yousuf*, United States Supreme Court, *No. 08-1555*, 1 June 2010, 2.

[391] *Samantar v. Yousuf*, United States District Court for the Eastern District of Virginia (Alexandria Division), *No. 1:04cv1360 (LMB/JFA*), 28 August 2012, available at: https://casetext.com/case/yousuf-v-samantar-7, para. 4, 38.

[392] *Samantar v. Yousuf*, United States Court of Appeals for the Fourth Circuit, 699 F.3d 763, *No. 11-1479*, 2 November 2012, available at: https://www.ca4.uscourts.gov/opinions/published/111479.p.pdf, 22.

[393] Lawrence Hurley, "U.S. top court refuses to shield former Somali official from suit," *Reuters*, 9 March 2015, available at: https://www.reuters.com/article/idUSKBN0M51DI20150309.

[394] *Samantar v. Yousuf*, United States Supreme Court, *No. 13-1361*, 9 March 2015, available at: https://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-1361.htm; Hurley, "U.S. top court refuses to shield former Somali official from suit."

[395] *Eshetu A./OM*, The Hague District Court, 15 December 2017, ECLI:NL:RBDHA:2017:14782.

[396] *Eshetu A./OM*, The Hague District Court, 15 December 2017, ECLI:NL:RBDHA:2017:14782, para. 20.3-23. Original transcript in Dutch: "De verdachte heeft zich tijdens het conflict in Ethiopië schuldig gemaakt aan zeer ernstige misdrijven, te weten oorlogsmisdrijven. De verdachte is, in verschillende deelnemings- dan wel aansprakelijkheidsvormen, schuldig aan arbitraire vrijheidsberoving, opsluiting onder mensonterende omstandigheden, marteling, het opleggen en uitvoeren van buitengerechtelijke gevangenisstraffen aan een groot aantal personen en het op gruwelijke wijze doden van een grote groep mensen."

[397] Excerpts from the original Dutch transcript of paragraph 13.4: "De verdachte was één van de 120 leden van de Derg. […] Na een training in Moskou is hij omstreeks 1976 naar Gondar gestuurd en vervolgens naar Gojjam, waar hij in 1977/1978 als provinciaal vertegenwoordiger van de Derg was gestationeerd. Hij was daar - als enige Derg vertegenwoordiger - voorzitter van het revolutionair coördinerend campagnecomité. […] De verdachte was

was on Dutch soil, a requirement for the execution of jurisdiction. In addition to the life-long sentence, the Court ruled the payment of compensation by the Ethiopian perpetrator following the additional civil claims to remedy of five Ethiopian victims.[398] The Court's judgment does not explicitly consider the enjoyment of immunity by the defendant, nor did the defendant's lawyer argue for the defendant's immunity. Nonetheless, since the Prosecutor decided to bring this case to the court, it may be argued that the Prosecution examined beforehand whether immunity was applicable. This practice is in accordance with the Dutch government's policy, as can be read in the ILC's Special Rapporteur's Sixth Report on Immunity of State officials: "The possibility that the prosecutor may determine immunity seems to have led the Netherlands to assert in its written comments that "there is little relevant practice" [relating to the invocation of immunity], since the Public Prosecutor would usually first assess whether any immunities will apply before bringing criminal charges."[399] Consequently, one may conclude that the former Ethiopian state official did not enjoy any immunities, therefore also no functional immunity.

In 2019, a few years after the *Samantar v. Yousuf* civil case was finalised, the United States Appeal Court granted immunity in a civil procedure, this time to a former Israeli state official. In the case, the Appeal Court upheld a judgment by the District Court on functional immunity in *Doğan v. Barak.*[400] In this civil case, the parents of a US national from Turkish descent argued that their son was extrajudicially killed by the Israeli army in a war crime, and sued former Israeli defence minister Ehud Barak for damages.[401] Barak moved to dismiss the

op meerdere dagen aanwezig bij de *exposure meetings* in februari 1978 in Debre Marcos. De verdachte had daar de leiding en hield daar een speech waarin hij vertelde over hoe de *exposure meetings* zouden gaan. […] Ook past dit bij wat getuigen verklaren over de wijze waarop de verdachte invulling gaf aan zijn functie, te weten dat de verdachte de ultieme autoriteit van Gojjam was en hij de volledige macht had. De verdachte was aanklager, jury en rechter tegelijkertijd. Hij had de macht mensen te arresteren, te doden en vrij te laten. De burger-bestuurder in de provincie had geen macht. […] Maar wellicht het meest overtuigende bewijs voor zijn betrokkenheid bij de bepaling van het lot van de gevangenen zijn wel de brieven gericht aan het hoofd van de verschillende gevangenissen in Gojjam met in de brief of bijbehorende bijlage (lijsten met) de namen van personen tegen wie revolutionaire maatregelen moesten worden uitgevoerd. Het kan dus niet anders of het moet het hoofd van de gevangenis duidelijk zijn geweest dat het nemen van die maatregel de opdracht van de verdachte was."

[398] *Eshetu A./OM*, The Hague District Court, 15 December 2017, ECLI:NL:RBDHA:2017:14782, para. 23.

[399] International Law Commission, Sixth report on immunity of State officials from foreign criminal jurisdiction, Special Rapporteur Concepción Escobar Hernández, *A/CN.4/722* (12 June 2018), available at: https://digitallibrary.un.org/record/1636856, 36, footnote 193; Ryngaert, "Functionele immuniteit van vreemde gezagsdragers," 1656.

[400] *Doğan v. Barak*, United States Court of Appeals For the Ninth Circuit, *No. 16-56704*, 2 August 2019, available at: https://ccrjustice.org/sites/default/files/attach/2019/07/71_8-2-19_Dogan%20Opinion%20web.pdf, 19.

[401] Curtis A. Bradley, "Conflicting Approaches to the U.S. Common Law of Foreign Official Immunity," *American Journal of International Law* 115, no. 1 (2021): 13.

claim on an immunity defence.[402] The Barak dismissal was supported by the United States, which filed a suggestion of immunity.[403] In 2016, the District Court acted in accordance with the immunity claim and dismissed the case, concluding that Barak is granted immunity and thus rejected to rule according to the *Samantar v. Yousuf* judgment on the exception to functional immunity in case of a *jus cogens* violation.[404] The Court decided that the executed conduct, to which Barak was allegedly complicit, could in this case not constitute a *jus cogens* violation, as they were, according to an official Israeli claim, "actions as within the scope of his authority."[405] In appeal, the defence and the US government urged the Appeal Court to dismiss the case and argued that foreign state officials may invoke immunity for all 'official acts'. The claimants' lawyers, furthermore, referred to the precedent of *Samantar v. Yousuf*, which established that torture and extrajudicial killing cannot be considered official acts.[406] In 2019, the Appeal Court maintained that Barak enjoyed functional immunity, ruling that exercising jurisdiction in this case "would be to enforce a rule of law against the sovereign state of Israel."[407]

In 2021, the German Federal Public Prosecutor General appealed a 2019 judgment of the Higher Regional Court of Munich concerning a former Afghan lieutenant in the German Federal Court of Justice (Bundesgerichtshof).[408] The Afghan defendant was accused of coercion, mistreatment of three imprisoned Taliban fighters, and of the desecration of the body of one killed Taliban commander in Afghanistan between 2013 and 2014.[409] The Munich Court had sentenced the former lieutenant of the Afghan National Army to prison for two years.[410]

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[402] *Doğan v. Barak*, United States District Court Central District of California, *No. 2:15-cv-08130-ODW*, 13 October 2016, available at: https://ccrjustice.org/sites/default/files/images/2017/05/10.13.16%20Order%20granting%20MTD.pdf, 1.

[403] "The United States has recommended that the Court grant Barak immunity from suit because Plaintiffs' action is one that "expressly challenge[s] Barak's exercise of his official powers as an official of the Government of Israel." (ECF No. 48.) To avoid "embarrass[ing] the [Executive Branch] by assuming an antagonistic jurisdiction," Lee, 106 U.S. at 209, and to afford the political branches the much needed discretion to resolve the issue through diplomacy, the Court should follow the Executive's suggestion." See *Doğan v. Barak*, United States District Court Central District of California, *No. 2:15-cv-08130-ODW*, 13 October 2016, 13.

[404] *Doğan v. Barak*, United States District Court Central District of California, *No. 2:15-cv-08130-ODW*, 13 October 2016, 24-25.

[405] *Doğan v. Barak*, United States District Court Central District of California, *No. 2:15-cv-08130-ODW*, 13 October 2016, 20-21.

[406] Hadsell Stormer Renick & Dai LLP, "HSR Attorney Dan Stormer Argues Before Ninth Circuit In Landmark Case, Dogan V. Barak," *Hadsell Stormer Renick & Dai LLP*, 14 April 2018, available at: https://www.hadsellstormer.com/newsroom/2018/april/hsr-attorney-dan-stormer-argues-before-ninth-cir/.

[407] *Doğan v. Barak*, United States Court of Appeals For the Ninth Circuit, *No. 16-56704*, 2 August 2019, 12.

[408] Oberlandesgericht Munchen (Munchen Higher Regional Court) München, Judgment, *No. 8 St 5/19*, 26 July 2019; Bundesgerichtshof (German Federal Court of Justice), Judgment, No. *3 StR 564/19*, 28 January 2021.

[409] Tom Syring, "Judgment on Foreign Soldiers' Immunity for War Crimes Committed Abroad (BGH)," *International Legal Materials* (2021): 1.

[410] Bundesgerichtshof (German Federal Court of Justice), Judgment, No. *3 StR 564/19*, 28 January 2021, para. 1.

The Prosecutor decided to appeal pursuing an additional conviction for the international crime of torture, on top of the Munich Court's conviction of common crimes under the German Criminal Code.[411] In the appeal, the former lieutenant of the Afghan National Army was additionally accused of torture against three prisoners of the Afghan army.[412] To the surprise of both jurists and the Prosecution, which did not refer to it in their submission, the Federal Court decided to take up the task to question whether the former state official enjoyed functional immunity in case of international crimes.[413] The Federal Court asserted that both state practice and *opinio iuris* are present regarding the exclusion of functional immunity in case of international crimes.[414] Interestingly, the Court explicitly stated that its conclusion was consistent with the German government's point of view on the matter.[415]

The Federal Court decided in this landmark judgment that "under customary international law criminal prosecution for the war crime of torture and serious humiliating or degrading treatment […] before a domestic court is not precluded by functional immunity if the crimes have been committed by at least a lower ranking foreign state official in their official capacity."[416] The Court, furthermore, established that functional immunity must be considered *ex officio* as "German jurisdiction is a general procedural prerequisite," even when functional immunity is not invoked by the defendant.[417] In other words, the Court decided that all convictions of former state officials for international crimes "implicitly includes the declaration that functional immunity does not constitute a bar to prosecute and convict the accused," as Epik illustrates.[418] In final, the German Federal Court asserted that, according to CIL, functional immunity cannot be invoked by 'at least' lower-ranking state officials in case of international crimes, limiting its judgment to the present case. The Court was criticised for its distinction between lower and high-ranking state officials, as CIL does not distinguish between them as

[411] Aziz Epik, "No Functional Immunity," 1264.
[412] Bundesgerichtshof (German Federal Court of Justice), Judgment, No. *3 StR 564/19*, 28 January 2021, para. 3 and 7.
[413] See Epik, "No Functional Immunity," 1264; Claus Kreß, Peter Frank and Christoph Barthe, "Functional Immunity of Foreign State Officials Before National Courts: A Legal Opinion by Germany's Federal Public Prosecutor General," *Journal of International Criminal Justice* 19, no. 3 (2021): 700-701; Gerhard Werle, "Comment on the German Federal Court of Justice's Judgment of 28 January 2021," *Juristenzeitung* 76, no. 14 (2021): 733.
[414] Bundesgerichtshof (German Federal Court of Justice), Judgment, No. *3 StR 564/19*, 28 January 2021, para. 23.
[415] Bundesgerichtshof (German Federal Court of Justice), Judgment, No. *3 StR 564/19*, 28 January 2021, para. 37; Claus Kress, "On Functional Immunity of Foreign Officials and Crimes under International Law," *Just Security*, 31 March 2021, available at: https://www.justsecurity.org/75596/on-functional-immunity-of-foreign-officials-and-crimes-under-international-law/.
[416] Bundesgerichtshof (German Federal Court of Justice), Judgment, No. *3 StR 564/19*, 28 January 2021, at key findings, para. 1 and 13. English translation as quoted from Epik, *see* Epik, "No Functional Immunity," 1265.
[417] Bundesgerichtshof (German Federal Court of Justice), Judgment, No. *3 StR 564/19*, 28 January 2021, 12.
[418] Epik, "No Functional Immunity," 1273.

far as functional immunity is concerned.[419] The Court only explicitly contrasts lower-ranking officials with personal immunity enjoying incumbent Heads of States, Heads of Governments and Foreign Ministers.[420] With that, it does not decide on former Heads of States, Heads of Governments and Foreign Ministers, or other high-ranking officials who do not enjoy personal immunity. Significantly, by doing so, the Court does not rule out inapplicability of functional immunity to high-ranking state officials.[421] In conclusion, the Federal Court ruled the defendant complicit in torture and sent the case back to the Munich court for final sentencing.[422]

The development continued in German Courts, in specific in the *Koblenz* trials of 2021 and 2022. The *Koblenz* trials, also referred to as *Al-Khatib* named after the infamous Syrian prison, regard two former Syrian officials under the Assad government: low-ranking intelligence officer Eyad A. and high-ranking senior government official Anwar R.[423] The two perpetrators did not enjoy functional immunity from prosecution and were separately convicted for crimes against humanity committed against Syrian victims. In both cases, the victims of war crimes enjoyed effective access to justice and played a pivotal role in the prosecution of the two former Syrian state officials. Victims and relatives of those who were killed testified in court and acted as joint plaintiffs in the case and held closing statements.[424] On 24 February 2021, one month after the judgment on the former Afghan lieutenant, the Koblenz Higher Regional Court sentenced Eyad A. to four years and six months of prison time.[425] Eyad A. was found guilty of assisting the inhumane treatment and torture of 30 Syrian prisoners.[426] The conviction of Eyad A. is final, as the defendant's appeal was rejected by the Federal Court of Justice on 20 April 2022.[427] On 13 January 2022, the same Court sentenced Anwar R., a senior member

[419] Epik, "No Functional Immunity," 1276.
[420] Bundesgerichtshof (German Federal Court of Justice), Judgment, No. *3 StR 564/19*, 28 January 2021, para. 40; Kress, "On Functional Immunity."
[421] Kress, "On Functional Immunity."
[422] AP News, "German court: No immunity for foreign officials' war crimes."
[423] ECCHR, "First criminal trial worldwide on torture in Syria."
[424] ECCHR, "First criminal trial worldwide on torture in Syria." See under 'what is the difference between a witness and joint plaintiff?'.
[425] Oberlandesgericht Koblenz (Koblenz Higher Regional Court), Judgment, No. *1 StE 3/21*, 24 February 2021; Oberlandesgericht Koblenz, "Urteil gegen einen mutmaßlichen Mitarbeiter des syrischen Geheimdienstes wegen Beihilfe zu einem Verbrechen gegen die Menschlichkeit," *Rheinlandpfalz*, 24 February 2021, available at: https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/urteil-gegen-einen-mutmasslichen-mitarbeiter-des-syrischen-geheimdienstes-wegen-beihilfe-zu-einem-ver/.
[426] Oberlandesgericht Koblenz, "Urteil gegen einen mutmaßlichen Mitarbeiter."
[427] Bundesgerichtshof (German Federal Court of Justice), Judgment, No. *3 StR 367/21*, 20 April 2022; Oberlandesgericht Koblenz, "Urteil gegen einen Mitarbeiter des syrischen Geheimdienstes wegen Beihilfe zu einem Verbrechen gegen die Menschlichkeit rechtskräftig," *Rheinlandpfalz*, 5 May 2022, available at: https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/urteil-gegen-einen-mitarbeiter-des-syrischen-geheimdienstes-wegen-beihilfe-zu-einem-verbrechen-gegen/.

of the Syrian intelligence service, to life imprisonment.[428] Anwar R. was convicted for crimes against humanity in the form of torture, killing, manslaughter, serious deprivation of liberty, rape and sexual assault.[429] The Syrian perpetrator was found guilty of the murder of 27 members of the political opposition to the Syrian regime, resulting from torture and inhumane conditions of imprisonment between 2011 and 2012.[430]

The conviction of Anwar R. is a pioneering case, as it constitutes the first time a high-ranking government official from Syria is convicted in a foreign domestic court for crimes against humanity and consequently not protected by either personal or functional immunity.[431] Unfortunately, both judgments are not available to the public. Therefore, I could not access the exact considerations by the Court to examine the defendants' defences or assess whether the Court deliberated on the invocation of functional immunity *ex officio*. It is, furthermore, not mentioned in the official statements of the Court.[432] Regardless, by convicting the two Syrian state officials, the Koblenz Higher Court at least implicitly rejected the invocation of functional immunity by Eyad A. and Anwar R. The Koblenz Higher Court therefore went one step further then the Federal Court in the case concerning the Former Afghan Lieutenant of 2021 with the conviction of a high-ranking state official. The case of Anwar R. reinforces the argument that functional immunity cannot be invoked by all former state officials before foreign courts when it concerns acts, performed in official capacity, that constitute international crimes.[433]

Lastly, in *Afghan detention officer/OM*, the District Court of The Hague sentenced an Afghan defendant to prison for twelve years for war crimes in April 2022.[434] In the recent criminal case, the Court established that the Afghan defendant, a civil servant, worked as a supervisor at the Pul-e-Charki prison in Afghanistan between 1984 and 1988, at the time of the

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[428] Oberlandesgericht Koblenz (Koblenz Higher Regional Court), Judgment, No. *1 StE 9/19*, 13 January 2022; Oberlandesgericht Koblenz, "Lebenslange Haft u.a. wegen Verbrechens gegen die Menschlichkeit und wegen Mordes – Urteil gegen einen mutmaßlichen Mitarbeiter des syrischen Geheimdienstes," *Rheinlandpfalz*, 13 January 2022, available at: https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/lebenslange-haft-ua-wegen-verbrechens-gegen-die-menschlichkeit-und-wegen-mordes-urteil-gegen-ein-1/; ECCHR, "Syria trial in Koblenz."

[429] Oberlandesgericht Koblenz, "Lebenslange Haft u.a. wegen Verbrechens gegen die Menschlichkeit."

[430] Oberlandesgericht Koblenz, "Lebenslange Haft u.a. wegen Verbrechens gegen die Menschlichkeit"; Eurojust, "Syrian official sentenced to life."

[431] Eurojust, "Syrian official sentenced to life."

[432] *See* Oberlandesgericht Koblenz, "Urteil gegen einen mutmaßlichen Mitarbeiter"; Oberlandesgericht Koblenz, "Lebenslange Haft u.a. wegen Verbrechens gegen die Menschlichkeit."

[433] Caroline Sweeney, "Justice Prevails over Realpolitik at Koblenz: International Law offers a Rare Glimmer of Hope after a Decade of Disappointments for Syrians," *Opinio Juris*, 14 February 2022, available at: http://opiniojuris.org/2022/02/14/justice-prevails-over-realpolitik-at-koblenz-international-law-offers-a-rare-glimmer-of-hope-after-a-decade-of-disappointments-for-syrians/.

[434] *Afghan detention officer/OM*, The Hague District Court, 14 April 2022, ECLI:NL:RBDHA:2022:3410 (Dutch Version); *Afghan detention officer/OM*, The Hague District Court, 14 April 2022, ECLI:NL:RBDHA:2022:4976 (English Version), para. 28.

alleged crimes.[435] The Court established that the defendant, who was in charge of the prison section where political prisoners were held, was responsible for the detention conditions, actively interfered in the prison order and was involved in violence against prisoners.[436] The Court convicted the former Afghan state official, who was on Dutch soil during the procedure, for complicity in grave violations of the laws and customs of war, mainly arbitrary detention, cruel and inhumane treatment and outrage of personal dignity of at least 18 Afghan victims.[437] The defendant's lawyer did not include a line of defence on immunities. In this case, too, the Court did not explicitly consider the immunity of the defendant in its deliberations. This indicates that, in line with the above discussed Dutch policy, the Prosecution first assessed the possibility and decided on the non-applicability of all immunities in this case.

4.3.2 Palestinian victims, functional immunity and international crimes

Palestinian victims pursued a great number of criminal and civil procedures against both high and lower-ranking foreign officials as alleged perpetrators of international crimes before foreign domestic courts in Europe, the United Kingdom, the United States and New Zealand.[438] Most of the time, the challenged foreign officials were Israelis, with one exception to this trend in the *El-Hojouj* case, where the perpetrators were Libyans. The following chronological discussion of jurisprudence shows that former Israeli state officials, alleged perpetrators of international crimes, always enjoy functional immunity, in contrast to defendants of other nationalities as discussed in paragraph 4.3.1. It is apparent that in the cases discussed in this sub-paragraph, Palestinians predominantly pursued their right to access to justice by means of

[435] *Afghan detention officer/OM, The Hague District Court,* 14 April 2022, ECLI:NL:RBDHA:2022:4976 (English Version), para. 11, para. 25: "The defendant worked as a supervisor in the Pul-e-Charkhi prison in Afghanistan from 1983 to 1988. At that time, Afghanistan was involved in a non-international armed conflict, in other words, a civil war. Alleged opponents of the regime were widely rounded up and detained as political prisoners. The defendant was in charge of the section of the Pul-e-Charkhi prison where these political prisoners were held."
[436] *Afghan detention officer/OM, The Hague District Court,* 14 April 2022, ECLI:NL:RBDHA:2022:4976 (English Version), para. 14: "On the basis of the foregoing, the court establishes that the defendant was not only responsible for the detention conditions and the order in the prison by virtue of his position, but also actively interfered with this. On the one hand, by inspecting the cells and by making decisions regarding, among other things, toilet visits, receiving visitors, airing, food, visiting a doctor and covering windows and on the other, because of his involvement in violence in prison, as described above. It can therefore be established that the defendant knew what happened in the prison. He was also aware of who was being detained in the prison and he knew about the judicial process of the prisoners. He knew that shortly before their trial, prisoners were given a pen and paper to write their defence, but when asked refused to provide law documents. He could also be presumed to have known that no lawyers visited the prison to prepare the prisoners for their trial."
[437] *Afghan detention officer/OM, The Hague District Court,* 14 April 2022, ECLI:NL:RBDHA:2022:4976 (English Version), para. 25, 28.
[438] At the time of the procedure, the United Kingdom was still a member of the European Union. However, since the United Kingdom is not anymore at time of writing, I choose to separate them in this sentence.

civil procedures. This must be seen in light of the pattern of obstruction in criminal proceedings initiated by Palestinians on political and procedural grounds, as discussed in chapter three.

The first time Palestinians sought redress via universal jurisdiction in a foreign domestic court for international crimes allegedly committed by an Israeli official involved the incumbent Israeli prime minister Ariel Sharon and former military commander Amos Yaron. 28 Palestinian victims of the Sabra and Shatila massacres in Lebanon initiated a complaint before the Belgium Court in 2001.[439] The decision by the Belgian Court to investigate the alleged involvement of Sharon and Yaron in the 1982 massacres in the Beirut neighbourhoods provoked a diplomatic emergency when the Belgian Consulate in Tel Aviv was attacked and the Belgium Prime Minister was insulted by Sharon's allies during a visit to Israel.[440] The Court of Cassation, the Belgium Supreme Court, ultimately decided to close the case against Sharon, recognising that Sharon was still Prime Minister at that time and thus had personal immunity.[441] The question on possible functional immunity of Sharon was thus not considered in said case. However, the Court significantly acknowledged the room for possible prosecution of Sharon for war crimes after his term in office would end.[442] The Court allowed for a lower Belgium court to continue a case against Yaron, recognising that a suspect did not need to be physically present in Belgium for investigations and trial.[443] In spite of the Supreme Court's decision, Belgium made changes to its universal jurisdiction legislation, limiting the scope of applicability after Israeli diplomatic pressure and Yaron was never convicted.[444]

Karmi-Ayyoub asserted in early 2020 that at least ten other cases against Israeli officials were brought to court since the *Sharon* case.[445] In a civil procedure, Palestinian victims brought

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[439] Chibli Mallat, "Special Dossier on the "Sabra And Shatila" Case in Belgium. Introduction: New Light on the Sharon Case," *The Palestine Yearbook of International Law Online* 12, no. 1 (2002): 183; Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 98.

[440] Mallat, "Special Dossier on the "Sabra And Shatila" Case," 186; Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 98.

[441] *Re Sharon and Yaron*, Court of Cassation of Belgium (Second Chamber), 127 ILR 110, *42 ILM 2003 596*, 12 February 2003; Van Alebeek, *The Immunity of States and Their Officials*, 268; Chibli Mallat, Michael Verhaeghe, Luc Walleyn and Laurie King-Irani, "Sharon Trial: 12 February 2003 decision of Belgian Supreme Court," *Electronic Intifada*, 19 February 2003, available at: https://electronicintifada.net/content/sharon-trial-12-february-2003-decision-belgian-supreme-court-explained/4413.

[442] ICRC, "Sharon & Yaron case, Appeal Court, 26 June 2002 & 10 June 2003 and Cour of Cassation, 14 February 2003 & 24 September 2003," *ICRC*, IHL Database: National Implementation of IHL, available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/e62debb9290042b6c12576770046e382?openDocument; Marlise Simons, "Sharon Faces Belgian Trial After Term Ends," *The New York Times*, 13 February 2003, available at: https://www.nytimes.com/2003/02/13/world/sharon-faces-belgian-trial-after-term-ends.html.

[443] Simons, "Sharon Faces Belgian Trial After Term Ends."

[444] Kaleck, "From Pinochet to Rumsfeld," 933-936; Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 98.

[445] I do not discuss all of the cases mentioned in the article by Karmi-Ayyoub in this section. Not all those cases concern functional immunity, some were therefore already discussed in chapter three, *see* Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 98.

a tort claim before a New York District Court against Avraham Dichter, former director of Israel's General Security Service (GSS), better known as Shin Bet. The plaintiffs, Palestinian relatives of family members who were killed or injured in July 2002, sought compensation and punitive damages for alleged international crimes under the U.S. Alien Tort Statute.[446] In 2007, the District Court of New York dismissed the *Matar v. Dichter* case, finding that Dichter enjoyed "foreign sovereign immunity" under the FSIA.[447] It must be noted that Dichter was no longer in office at the time of the procedure. The Court rejected the claimant's arguments on an exception of immunity in case of *jus cogens* violations, stating that a previous denial of immunity under the FSIA only occurred in cases concerning acts not executed in 'official capacity' of state officials.[448] In its judgment, the Court followed the line of the Israeli government and adopted that Dichter was acting in the course of his official duties and essentially equated Dichter, a former state official, with the State of Israel.[449] Strikingly, the judge referred to Israel as a "strategic United States ally" on multiple occasions and referred to negative consequences for the inter-state diplomacy if the claims were attributed.[450] Furthermore, the Court of Appeals denied the plaintiffs' appeal in 2009, sustaining the District Court's immunity argument stemming from 'common-law principles'.[451] Noticeably, the United States' government filed an *amicus curiae* in the Appeal case, conveying the State's position on the recognition of Dichter's enjoyment of functional immunity from prosecution with the intention to influence the Court's determination on the immunity question.[452] This judgment was criticised for its interpretation of the CIL notion of functional immunity.[453] Notably, the 2009 *Matar v. Dichter* judgment succeeded the *Pinochet* (*No. 3)*, *Bouterse*, and

[446] *Matar v. Dichter*, United States District Court Southern District of New York, Judgment, *05 Civ 10270 (WHP)*, 2 May 2007, available at: https://ccrjustice.org/sites/default/files/assets/Matar%20v.%20Dichter_Decision.pdf, 1-3.
[447] *Matar v. Dichter*, United States District Court Southern District of New York, Judgment, *05 Civ 10270 (WHP)*, 2 May 2007, 11.
[448] *Matar v. Dichter*, United States District Court Southern District of New York, Judgment, *05 Civ 10270 (WHP)*, 2 May 2007, 11.
[449] "Dichter plainly acted pursuant to his official duties and, therefore, the FSIA confers immunity on him no less than it would the State of Israel itself." *See* page 13. *Matar v. Dichter*, United States District Court Southern District of New York, Judgment, *05 Civ 10270 (WHP)*, 2 May 2007, 11-13; Center for Constitutional Rights, "Matar et al v. Dichter," *Center for Constitutional Rights*, Historic Cases, available at: https://ccrjustice.org/home/what-we-do/our-cases/matar-et-al-v-dichter.
[450] For instance, see pages 16, 17, 18, 19 and 20 in *Matar v. Dichter*, United States District Court Southern District of New York, Judgment, *05 Civ 10270 (WHP)*, 2 May 2007.
[451] *Matar v. Dichter*, United States Court of Appeals for the Second Circuit, Judgment, *07-2579-cv*, 16 April 2009, available at: https://ccrjustice.org/sites/default/files/assets/Second%20Circuit%20Dichter%20Decision.pdf, 17.
[452] To read the United States government *amicus curiae* brief, *see* https://ccrjustice.org/sites/default/files/assets/Matar%20v%20%20Dichter,%20US%20for%20Defendants%20Amicus%20Brief%2012.19.07.pdf.
[453] Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction*, 124-125.

H./OM judgments, which restricted the applicability of functional immunity, and came before the ILC Draft Articles of 2017.

In 2012, The District Court of The Hague awarded compensation to Palestinian doctor Ashraf El-Hojouj for material and immaterial damages suffered in a Libyan prison.[454] El-Hojouj issued a civil complaint for compensation against twelve Libyan state officials who were complicit in torture and inhumane treatment he suffered while wrongly imprisoned.[455] The Court ordered the twelve Libyan perpetrators of the international crime of torture in absentia to the payment of a remedy of one million euros in total.[456] In *El-Hojouj v. Libyan Officials*, the Court established it had jurisdiction following the forum of necessity as laid down in article 9 under c of the Dutch Civil Procedure Law, acknowledging that it would be "unacceptable" to ask of El-Hojouj to start this procedure before a Libyan court.[457] The Court did not explicitly consider the notion of functional immunity in its judgment and, with that, it implicitly recognised in its practice that the former state officials did not enjoy functional immunity. It is of significance that in this case the victim, a Palestinian, successfully found redress in a foreign court. The Palestinian victim pursued a claim against lower-ranking Libyan state officials, and not Israeli state officials. The *El-Hojouj* case was, at that time, considered ground-breaking, as it was the first time the principle of universal jurisdiction was successfully utilised by a Palestinian in a civil procedure before a domestic court concerning an international crime committed by former state officials in a different country.[458]

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[454] *El-Hojouj v. Libyan Officials*, The Hague District Court, 21 March 2012, ECLI:NL:RBSGR:2012:BV9748; Prakken d'Oliveira, "Press Statement," *Bohler (now Prakken d'Oliveira)*, 27 March 2012, available at: https://www.prakkendoliveira.nl/images/nieuws/2012/120327_-_press_statement_benghazi_hiv-procedure.pdf.

[455] *El-Hojouj v. Libyan Officials*, The Hague District Court, 21 March 2012, ECLI:NL:RBSGR:2012:BV9748, para. 2.4; Prakken d'Oliveira, "Press Statement;" BBC News, "Dutch court compensates Palestinian for Libya jail," *BBC*, Middle East, 28 March 2012, available at: https://www.bbc.com/news/world-middle-east-17537597.

[456] *El-Hojouj v. Libyan Officials*, The Hague District Court, 21 March 2012, ECLI:NL:RBSGR:2012:BV9748, para. 3.1.

[457] *El-Hojouj v. Libyan Officials*, The Hague District Court, 21 March 2012, ECLI:NL:RBSGR:2012:BV9748, para. 2.1, 2.2. Official Dutch transcript of paragraph 2.1: "Aangezien er sprake is van een geschil met een internationaal karakter, dient te worden beoordeeld of de Nederlandse rechter rechtsmacht heeft. Eiser heeft daartoe gesteld dat de Nederlandse rechter op grond van artikel 9 aanhef en onder c van het Wetboek van Burgerlijke Rechtsvordering (hierna: Rv) bevoegd is van de zaak kennis te nemen, omdat het onaanvaardbaar is van hem te vergen dat hij deze zaak aan het oordeel van een rechter in Libië onderwerpt." Official Dutch transcript of paragraph 2.2: "De rechtbank overweegt dat uitgangspunt is dat voor de internationale bevoegdheid van de Nederlandse rechter beslissend is de situatie en omstandigheden in Libië op het tijdstip van het aanhangig maken van de procedure, derhalve op of rond 27 juli 2011 (de datum van de dagvaarding). Gelet op hetgeen eiser in dit verband in zijn dagvaarding en in de akte houdende toelichting heeft aangevoerd, dat – nu gedaagden niet zijn verschenen – niet is weersproken en de rechtbank niet onrechtmatig of ongegrond voorkomt, is de rechtbank van oordeel dat zij op grond van artikel 9 aanhef en onder c Rv, bevoegd is van de zaak kennis te nemen."

[458] BBC, "Dutch court compensates."

4.3.3 Zooming in: the *Ziada* case

In the ongoing case of *Ziada v. Gantz and Eshel*, a Palestinian-Dutch citizen to the Netherlands brought a civil case before the District Court of The Hague against two former Israeli state officials.[459] The Palestinian-Dutch claimant attempted to sue Benjamin Gantz, the former Israeli Army's Chief of General Staff, and Amir Eshel, former Commander in Chief of the Israeli Air Force, in order to receive compensation for his damages.[460] According to Ismail Ziada, the Israeli officials are accountable and hold liability for compensation for the bombing of the Ziada family house in Gaza City on 20 July 2014, killing six members of the family plus one visitor.[461] According to Ziada's lawyer Liesbeth Zegveld, the bombing of the residential building constitutes a war crime.[462] The Ziada family does not have access to court in Israel due to many anti-Palestinian discriminatory obstacles in the Israeli legal system, which enables a plea for redress before a foreign domestic court on the basis of *forum neccessitatis*, as argued by the claimant's lawyer Zegveld.[463]

The deliberations by the Courts must be seen in light of the political considerations at stake in this procedure. Notably, Israeli deputy attorney-general Roy Schondorf warned for "tensions" between Israel and The Netherlands if the case would find continuance.[464] The Israeli Justice Ministry, furthermore, reportedly stated that the Israeli government had directly pressured the Dutch Court to dismiss the case.[465]Additionally, Benjamin Gantz was at the time of the initial procedure a presidential candidate running for the Israeli elections of 2019, and thus a high-profile character in Israeli politics.[466]

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[459] *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:559 (Dutch version); *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:667 (English version). From now on, I will refer to the English language version.

[460] *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:667, para. 2.2, 2.3 and 4.5; Kate Clark, "Ziada v. Gantz and Eshel. A Frontier Case on the Position of Civilian Victims of War," *Journal of International Criminal Justice* 18 (2020): 1232.

[461] *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:667, para. 2.2; Clark, "Ziada v. Gantz and Eshel," 1231; Piet de Blaauw, "Nederlandse relatie met Israël onder druk door unieke rechtszaak," *NOS*, Nieuwsuur, 11 October 2019, available at: https://nos.nl/nieuwsuur/artikel/2305691-nederlandse-relatie-met-israel-onder-druk-door-unieke-rechtszaak.

[462] Prakken d'Oliveira, "Writ of Summons," 2018, available at: http://www.nuhanovicfoundation.org/user/file/2018_writ_of_summons_ziada_case.pdf, 1.1.

[463] *See* Article 9 under b and c of the Dutch Civil Proceedings Law; *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:667, para. 2.3; Prakken d'Oliveira, "Writ of Summons," 7.

[464] De Blaauw, "Nederlandse relatie met Israël onder druk;" Josef Federman, "Israel wants Dutch case against ex-army chief dropped," *AP News*, 11 February 2019, available at: https://apnews.com/article/israel-elections-international-news-international-law-gaza-strip-eb484aa8428144c89cdb3ec95c408beb.

[465] Federman, "Israel wants Dutch case against ex-army chief dropped;" De Blaauw, "Nederlandse relatie met Israël onder druk."

[466] Stephanie van den Berg, "Dutch court to hear case against Israel's Gantz," *Reuters*, 16 September 2019, available at: https://www.reuters.com/article/us-netherlands-israel-gantz/dutch-court-to-hear-case-against-israels-gantz-idUSKBN1W12JZ; De Blaauw, "Nederlandse relatie met Israël onder druk."

The District Court decided on 29 January 2020 that the two Israeli state officials enjoy functional immunity from prosecution, established the Court did not have jurisdiction and consequently dismissed the civil claim.[467] In this case, the defendants' lawyers held a defence on immunity and the Court considered the applicability of functional immunity. The Court based its argumentation predominantly on *Jurisdictional Immunities* and *Jones* and argued that the current state of CIL stipulates that functional immunity is enjoyable in civil procedures, even when it concerns alleged international crimes.[468] With that, the Court disregards that *Jones* asserted the state of functional immunity in 2006 and denies the development in foreign domestic courts since then which moves the enjoyment of functional immunity to a state of exception. Critically, the judgment seems to be deviating from the development of jurisprudence in recent years. In specific, with that the Court discarded the civil rulings on compensation in *Samantar v. Yousuf* and *El-Hojouj*, regarding Somalian and Libyan perpetrators, and attaches more values to the denial of compensation in *Belhas v. Ya'alon and Dogan v. Barak*, with respect to Israeli perpetrators.

Secondly, by mainly building on *Jurisdictional Immunities*, a case with respect to state immunity as opposed to individual immunity, the Court undermines its argumentation on the applicability of functional immunity regarding state officials.[469] Thus, the Court refrains from properly distinguishing the jurisprudence on state immunity and functional immunity in its argumentation, and with that the state officials from the *actual* State of Israel, rejecting the recognised notion of the separate doctrines. Instead, it determines functional immunity as a direct "derivative of state immunity."[470] However, as discussed before, state officials are not the state itself and *vice versa*. States do not commit war crimes, individuals do. State immunity therefore does not need to be considered in a procedure in regard to former state officials. For these reasons, the judgment received extensive criticism from the international law community and was considered a 'regressive interpretation' of the law by Ryngaert.[471]

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[467] *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:667, para. 4.55 and 4.61. 4.61 reads: "The conclusion is that the court must declare itself incompetent, because [defendant I] and [defendant II] enjoy functional immunity from jurisdiction. The court is unable to assess the other matters in dispute."

[468] *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:667, para. 4.13 - 4.17.

[469] Clark, "Ziada v. Gantz and Eshel," 1239; Ryngaert, "Functionele immuniteit van vreemde gezagsdragers," 1658.

[470] *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:667, para. 4.59.

[471] For instance, *see* Ryngaert, "Functional immunity of foreign State officials"; Ryngaert, "Functionele immuniteit van vreemde gezagsdragers"; Clark, "Ziada v. Gantz and Eshel"; Jeff Handmaker, "Legal mobilization to end impunity for international crimes by Jeff Handmaker," *International Institute of Social Studies Blog*, 16 September 2019, available at: https://issblog.nl/2019/09/16/legal-mobilization-to-end-impunity-for-international-crimes-by-jeff-handmaker/.

The Court deliberations on 'official acts' in the functional immunity doctrine must be seen in light of the non-proper distinguishing between state and individual immunity. The Court follows the assertion on 'official acts' as submitted by Israel in a Diplomatic Nota to the Dutch Foreign Ministry in 2018.[472] With that, the Court denies reviewing the conduct in the present case in view of the general perception that *jus cogens* violations cannot constitute official acts. Instead, it considers that military operations at large must be seen as *acta irue imperii*, or official conduct, no matter the lawfulness.[473] As Clark notes and Ryngaert finds disconcerting, the Court fails to take into account the very reason for the establishment of individual responsibility in state-authorised military operations, namely, to distinguish *unlawful* from lawful conduct of state officials.[474]

Additionally, the Court stated that the current development of functional immunity - especially since the Draft Articles were published, which the ILC already considered a 'trend' in 2017, may not be categorised as state practice.[475] However, as Ryngaert has illustrated, the Court now justified the invocation of functional immunity despite of the ILC's acknowledgment of the immunity exception, *because* of the discernible trend of state practice on the exception, which did not need a consensus in practice.[476] Besides, by deciding that the rule on functional immunity in Article 7 of the Draft Articles does not constitute a "sufficiently detailed rule of customary international law," the Court also seems to reject an exception to

[472] "[…] To answer this question, the court assumes the following facts as having been established: v) The State of Israel has confirmed this in a Diplomatic Memo of 18 October 2018 to the Dutch Ministry of Foreign Affairs (hereinafter: the Diplomatic Memo): "It is the State of Israel's position that actions undertaken by Mr. [defendant I] en Mr. [defendant II] during these hostilities were performed exclusively in their official capacity as General Chief of Staff and Israeli Air Force Commander respectively and in accordance with their autohority under Israeli law." vi) The State of Israel asserted the functional immunity from jurisdiction of [defendant I] and [defendant II] in the Diplomatic Memo: "The State of Israel unequivocally asserts the immunity of Mr. [defendant I] and Mr. [defendant II] with regards to these official acts." See *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:667, 4.5.

[473] "State immunity only applies to acts carried out in the exercise of state authority (*acta iure imperii*), not to the acts of a State in interactions with private individuals on an equal basis (*acta iure gestiones*), such as regular commercial transactions. The nature of the act determines to which category it belongs. By their very nature, military operations carried out by a national army of a State are viewed as *acte iure imperii*: "the core area of State sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security." This applies to both military operations in a State's territory and in occupied territories." See *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:667, 4.8.

[474] Clark, "Ziada v. Gantz and Eshel," 1239; Ryngaert, "Functional immunity of foreign State officials."

[475] *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:667, para. 4.43. "A trend is not a general State practice. Since there is no general State practice nor an *opinio iuris*, Article 7 paragraph 1 DAISFJ does not codify a rule of customary international law. This also follows from the remark of the Special Rapporteur that: "*the draft articles, similar to other projects of the Commission, contained elements of both codification and progressive development and that they should be assessed in that light.*" Incidentally, there is also no ground to assume that under customary international law functional immunity from jurisdiction is limited when prosecuting international crimes before national courts."

[476] Ryngaert, "Functionele immuniteit van vreemde gezagsdragers," 1656.

functional immunity in criminal procedures.[477] Despite its position on state practice, the Court visibly acknowledged the significance of the development of functional immunity in criminal procedures for the development in civil procedures through its extensive reference to the ILC Draft Articles. With that, the Court decides that in the *current* international customary law there is insufficient state practice and does not rule out any developments that will establish an exception to functional immunity in regard to international crimes in both civil and criminal proceedings.[478] On top of that, the Court discards the opinion of the Dutch government, a source of *opinio iuris*, on the invocation of functional immunity by foreign state officials in case of international crimes.[479] The Court disregards the state opinion as it would not reflect CIL.[480] Noticeably, it is generally accepted that states and their courts are not acting fully independent from one another.[481] This is in stark contrast with the judgment by the German Federal Court of Justice in the case regarding a former Afghan Lieutenant (2021), where the Court explicitly stated that its conclusion was consistent with the German government's point of view on the matter.[482]

In December 2021, after the Former Afghan lieutenant and Eyad A. could not enjoy functional immunity and were convicted in Germany, the Court of Appeal The Hague upheld the District Court's decision and maintained its interpretation on functional immunity. The Appeal Court confirmed it did not have jurisdiction over the procedure and recognised that the two Israeli state officials enjoyed functional immunity from prosecution, effectively dismissing

[477] *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:667, para. 4.51; Ryngaert, "Functionele immuniteit van vreemde gezagsdragers," 1658.
[478] *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:667, para. 4.41, 4.48, 4.49.
[479] "In 2016 the Dutch government informed the ILC as follows: "The Netherlands further considers that functional immunity does not extend to the commission of international crimes committed by those concerned in their official capacity. See for example the decision of the Court of Appeals of Amsterdam of 20 November 2000, paragraph 4.2 (…)." This is not so much an exception to immunity but rather a confirmation that functional immunity only applies to acts performed in the course of a person's official (governmental) function and that the commission of international comes, by definition, cannot be an official function." In 2017 the Dutch government repeated: "It is the position of the Kingdom of the Netherlands that international crimes fall inherently outside the scope of acts in official capacity and therefore should not be susceptible to the plea of immunity." In 2019 the Dutch government made it known that: "The Netherlands recognizes that immunity ratione materiae is not absolute, and that exceptions exist to immunity ratione materiae. This would be the case with the commission of international crimes." See *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:667, para. 4.45.
[480] "The court will not delve deeper into the opinion of the Dutch court and the discussion on the Dutch criminal law practice as alleged by [claimant], as these do not reflect the current status of customary international law. As has been stated above, a limitation to functional immunity from jurisdiction is not accepted under customary international law in the prosecution of international crimes by national courts. The court must apply customary international law and is not bound by the opinion of the Dutch government." See *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:667, para. 4.48.
[481] Paulsson, *Denial of justice in international law*, preface.
[482] Bundesgerichtshof (German Federal Court of Justice), Judgment, No. *3 StR 564/19*, 28 January 2021, para. 37; Kress, "On Functional Immunity."

Ziada's claim and right to reparations.[483] Appeal Court again based its considerations on *Jurisdictional Immunities*, a case with respect to state immunity.[484] The Court first determined that "apart from the fact that the claim in the present case is directed against officials of the State of Israel in person, the cases are very similar."[485] In line with the District Courts decision, the Appeal Court again did not strictly distinguish functional immunity, which exclusively concerns individual state officials, from state immunity.[486] It argued that there is "sufficient reason" for the immunity of the State of Israel to be extended to the defendants.[487] Furthermore, the Appeal Court considered that a separate approach to functional immunity in civil and criminal law is justifiable, *because* of this sufficient reason to extend Israeli State immunity to the state officials, at least in the present case.[488] The reason for this, according to the Court, is that this particular case "concerns a military operation that is based on official policy of the State of Israel, and not, for example, on an individual action by a single government official."[489] With this deliberation, the Court again does not consider the consequences for unlawful conduct for functional immunity with respect to judicial precedents.

The Appeal Court recognised the recent development on functional immunity as an exception and refers to the judgment of 28 January 2021 regarding the former Afghan lieutenant before the German Federal Court of Justice. However, the Court is of the opinion that these

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[483] *Ziada v. Gantz and Eshel*, Court of Appeal The Hague, 7 December 2021, ECLI:NL:GHDHA:2021:2374 (Dutch version); *Ziada v. Gantz and Eshel*, Court of Appeal The Hague, 7 December 2021, ECLI:NL:GHDHA:2021:2374 (Unofficial English translation by Nuhanovic Foundation), available at: https://assets.website-files.com/5eefcd5d2a1f37244289ffb6/61e6e766cb0b0000fdcb9fdd_Ziada%202%20Appeal%20UNOFFICIAL%20ENG%20trans.pdf.

[484] *Ziada v. Gantz and Eshel*, Court of Appeal The Hague, 7 December 2021, ECLI:NL:GHDHA:2021:2374, para. 3.3.

[485] "De vraag is of de in dit arrest gegeven regels ook van toepassing zijn op een civiele vordering tegen functionarissen van de vreemde Staat, zoals [geïntimeerde 1] en [geïntimeerde 2] . Afgezien van het feit dat de vordering in het onderhavige geding zich richt tegen functionarissen van de Staat Israël in persoon, zijn de zaken zeer vergelijkbaar. Ook in deze zaak gaat het om (gestelde) oorlogsmisdrijven (in de *Jurisdictional Immunities*-zaak erkend, in de onderhavige zaak betwist). Dat het optreden van het Israëlische leger handelingen *jure imperii* zijn is, evenmin als in de *Jurisdictional Immunities*-zaak, niet in geschil. Weliswaar overweegt het IGH in paragraaf 91 dat het geen uitspraak doet over de immuniteit van functionarissen van de Staat, maar die overweging is beperkt tot strafrechtelijke vervolging, die in de onderhavige zaak niet aan de orde is." See *Ziada v. Gantz and Eshel*, Court of Appeal The Hague, 7 December 2021, ECLI:NL:GHDHA:2021:2374, para. 3.4.

[486] *Ziada v. Gantz and Eshel*, Court of Appeal The Hague, 7 December 2021, ECLI:NL:GHDHA:2021:2374, para. 3.19.

[487] "Ook naar het oordeel van het hof zijn er tussen het strafrecht en het civiele recht zodanige verschillen dat een verschil in de behandeling van functionele immuniteit tussen strafrecht en civielrecht gerechtvaardigd is omdat, in ieder geval in de onderhavige zaak, er voldoende aanleiding is om de immuniteit van de Staat Israël door te trekken naar [geïntimeerde 1] c.s. In deze zaak gaat het immers om een militaire operatie die een berustte officieel beleid van de Staat Israël en niet op, bijvoorbeeld, een individuele actie van een enkele overheidsfunctionaris." See *Ziada v. Gantz and Eshel*, Court of Appeal The Hague, 7 December 2021, ECLI:NL:GHDHA:2021:2374, para. 3.19.

[488] *Ziada v. Gantz and Eshel*, Court of Appeal The Hague, 7 December 2021, ECLI:NL:GHDHA:2021:2374, para. 3.19.

[489] English translation of paragraph 3.19 from Nuhanovic Foundation. *Ziada v. Gantz and Eshel*, Court of Appeal The Hague, 7 December 2021, ECLI:NL:GHDHA:2021:2374, para. 3.19.

developments cannot be extended to this civil procedure, which "concerns very high-ranking military personnel who were carrying out official policy of the State of Israel, such that a judgment on their conduct would necessarily also amount to a judgment upon the conduct of the State of Israel."[490] Notably, the Court referred to the inconvenience the State of Israel must experience now that their former state officials were brought before a foreign court and considered that Israel might feel strongly obliged to support them in legal and financial means.[491] The Court continues by asserting that even though the State of Israel is no party in the procedure, its interest is at stake indirectly.[492] Following the appeal judgment, Ziada decided to bring his case to the Dutch Supreme Court.[493] At time of writing this thesis, no date has been set for this final procedure. The Supreme Court's deliberations will be of utmost attention to international lawyers, considering the 2022 precedent of the conviction of the high-ranking Syrian state official Anwar R. in Germany.

[490] English translation of paragraph 3.24 from Nuhanovic Foundation. *Ziada v. Gantz and Eshel*, Court of Appeal The Hague, 7 December 2021, ECLI:NL:GHDHA:2021:2374, para. 3.24. Dutch transcript of paragraph 3.24: "Het hof is niet blind voor het leed van [appellant]. Noch is het hof blind voor de ontwikkelingen die in het strafrecht ten aanzien van de immuniteit van functionele jurisdictie plaatsvinden, zoals onder meer blijkende uit het arrest van het BGH van 28 januari 2021 over de immuniteit van een laaggeplaatste militair in het leger van een vreemde Staat. Voor zover er al aanleiding zou zijn om deze ontwikkeling door te trekken naar het civiele recht, is dat bij de huidige stand van zaken toch in ieder geval niet aan de orde in een zaak als de onderhavige, waarin het gaat om zeer hooggeplaatste militairen die het officiële beleid van de Staat Israël hebben uitgevoerd, waardoor een oordeel over hun optreden noodzakelijkerwijs tevens een oordeel over het optreden van de Staat Israël zou zijn."

[491] "Het hof komt in de onderhavige zaak tot een vergelijkbare conclusie, waarbij het nog opmerkt dat de vreemde Staat, wiens (hoge) ambtsdragers in Nederland in een civiel geding worden betrokken, zich heel wel gedwongen kan voelen om deze functionarissen in hun verdediging bij te staan en de kosten daarvan voor zijn rekening te nemen. Ook dat zou in strijd zijn met het beginsel dat de Staat immuniteit van jurisdictie geniet." See *Ziada v. Gantz and Eshel*, Court of Appeal The Hague, 7 December 2021, ECLI:NL:GHDHA:2021:2374, para. 3.7.

[492] *Ziada v. Gantz and Eshel*, Court of Appeal The Hague, 7 December 2021, ECLI:NL:GHDHA:2021:2374, para. 3.7.

[493] Ali Abunimah, "Benny Gantz war crimes case will go to Dutch supreme court," *Electronic Intifada*, Rights and Accountability, 10 February 2022, available at: https://electronicintifada.net/blogs/ali-abunimah/benny-gantz-war-crimes-case-will-go-dutch-supreme-court.

5. A TWAIL Approach to Functional Immunity

This chapter connects the theoretical framework of TWAIL to the discussed proceedings against former Israeli, Arab and African state officials in foreign domestic courts. I elaborate on the TWAIL approach to the formative sources of CIL and apply these considerations to the doctrine of functional immunity. The negligence to material elements in development of the functional immunity doctrine upholds the idea of western-biased objective and neutral positivist formal sources. The consideration of material elements breaks with the dominant bias in favour of sustaining superiority of power in CIL. Consequently, as the analysis of the data will demonstrate, foreign courts do not consider political, moral and ideological elements in proceedings against former state officials, or states for that matter, that are identified to be on the 'right' side of the value system, i.e. the western, (neo-)colonial side of the world. In other words, the positivist method to functional immunity results in a selective application of the law to maintain a system of domination and superiority.

In the next three paragraphs, the TWAIL perspective on functional immunity will be applied to the discussion of jurisprudence by foreign domestic courts with regard to functional immunity and international crimes. These paragraphs present the main findings and show that the western value system stemming from orientalism, imperialism and postcolonialism impact the conduct by foreign domestic courts as actors of functional immunity development. The TWAIL inspired analysis of the data demonstrate that the imperialist and orientalist foundation of CIL is present in the development of the functional immunity doctrine by foreign domestic courts. Courts as sources of both *opinio iuris* and state practice specifically exclude (historically) significant material considerations, such as (geo-)political, moral and ideological aspects with respect to the value of western superiority. This positivist method of negligence results in the selective application of functional immunity which maintains the imperial values and interests of 'superior' nations, like Israel, at the expense of Palestinian victims. The three main findings concern the selective application of functional immunity dependent on the alleged perpetrator's nationality, the non-differentiation between state officials and the *actual* state, and the inconsistent classification of international crimes as 'official acts'. As the data will show, the proceedings with regard to Israeli state officials stand in stark contrast to the treatment of the discussed Arab and African state officials, upholding the value of superiority of one at the expense of another, as well as the civilised-uncivilised distinction.

5.1 Selective application with respect to the defendant's nationality

This paragraph contains a TWAIL critique of the perceived instrumentality and selective application of functional immunity with respect to the nationality of a defendant in the discussed cases. The thirteen cases on the invocation of functional immunity studied in paragraphs 4.3.1, 4.3.2 and 4.3.3 indicate a selective application by foreign domestic courts with respect to the nationality of alleged perpetrators. The data signal that in the Courts' application of functional immunity it matters from which country the alleged perpetrators of international crimes are from. In the framework of TWAIL and postcolonial theory, the settler-colonial Israeli state falls within the "civilised" denominator and Arab and African states are to be considered "uncivilised" as former colonised states. For this reason, a distinction is to be made between the affected alleged perpetrators of international crimes in the thirteen cases. Five proceedings involve Israeli officials on the one hand,[494] and Arab and African state officials in the remaining eight cases on the other hand, respectively from Afghanistan, Somalia, Ethiopia, Syria and Libya.[495] It is apparent that the data demonstrate that the courts' applicability of functional immunity in the discussed cases is exactly in alignment with this historical dichotomy in state classification as, for example, seen in the Treaty of Paris, discussed in chapter two.

Israeli defendants

Five of the thirteen discussed cases involve former Israeli state officials allegedly complicit in international crimes. In these five proceedings, the domestic courts granted functional immunity to Israeli former state officials, or functional immunity was recognised as a serious option after diplomatic immunity would cease to exist. Noticeably, over the years most of the cases where functional immunity was invoked concerned civil proceedings as figure one highlights. In the most recent proceedings against Israeli defendants, a pattern of constituting civil claims is visible which must be seen in light of impunity in criminal procedures before foreign domestic courts, as chapter three and four demonstrated. Significantly, Israel is a settler-colonial state occupying the native Palestinian people.

[494] The five cases involving Israeli defendants are: *Sharon and Yaron, Belhas v. Ya'alon, Doğan v. Barak, Matar v. Dichter,* and *Ziada v. Gantz and Eshel.*
[495] The eight cases concerning Arab and African defendants are: *H./OM, El-Hojouj v. Libyan officials, Samantar v. Yousuf, Eshetu A./OM, Former Afghan Lieutenant, Eyad A., Anwar R., and Afghan detention officer/*OM.

Case	Year	Court	Procedure	Defendant	Victims	Functional immunity
Sharon and Yaron	2001	Belgium	Criminal	Israeli	Palestinian	Future option
Belhas v. Ya'alon	2008	United States	Civil	Israeli	Lebanese	Yes
Matar v. Dichter	2009	United States	Civil	Israeli	Palestinian	Yes
Doğan v. Barak	2019	United States	Civil	Israeli	Turkish-American	Yes
Ziada	2020, 2021	Netherlands	Civil	Israeli	Palestinian	Yes

Figure 1 Cases involving Israeli defendants discussed in paragraph 4.3.1, 4.3.2 and 4.3.3.

Arab and African defendants

The eight other discussed cases account for criminal and civil proceedings against former state officials from Arab and African states. These eight criminal and civil proceedings involve Afghan, Somalian, Ethiopian, Syrian and Libyan former state officials, as demonstrated in figure two. Significantly, in all these cases, the foreign domestic courts did not grant immunity to former state officials from Global South countries and sentenced the perpetrators to prison time and a (additional) payment of civil claims to the victims. Significantly, the five countries are all former colonised by Western states. These former state officials are from a variety of ranks. Illustratively, the cases involved a former prime minister from Somalia, high ranking government officials like deputy ministers, and a lower ranking intelligence officer.

Case	Year	Court	Procedure	Defendant	Victims	Functional immunity
H./OM	2008	Netherlands	Criminal	Afghan	Afghan	No
El-Hojouj	2012	Netherlands	Civil	Libyans	Palestinian	No
Samantar v. Yousuf	2012	United States	Civil	Somalian	Somalian	No
Eshetu A./OM	2017	Netherlands	Criminal	Ethiopian	Ethiopian	No
Former Afghan Lieutenant	2021	Germany	Criminal	Afghan	Afghan	No
Eyad A.	2021	Germany	Criminal	Syrian	Syrian	No
Anwar R.	2022	Germany	Criminal	Syrian	Syrian	No
Afghan detention officer/OM	2022	Netherlands	Criminal	Afghan	Afghan	No

Figure 2 Cases involving Arab and African defendants discussed in paragraph 4.3.1, 4.3.2 and 4.3.3.

The thirteen discussed proceedings are closely linked to one another, as they all involved claims for compensation or accusations of alleged complicity of former state officials in international crimes. From these proceedings, an inconsistency is deductible in the data with respect to the enjoyment of functional immunity and the nationality of alleged perpetrators of international crimes. In all cases where a court granted the enjoyment of functional immunity to the defendant, it concerned former Israeli state officials. This is in contrast to the cases where former state officials did not enjoy immunity. In these cases, the defendants held Arab and African nationalities.

Civilisation, democracy and sovereignty

The influence of orientalism and superiority sentiments and the historic classification between 'civilised' and 'uncivilised' nations is perceptible in the pattern where foreign domestic courts shield Israeli former state officials from prosecution in case of alleged international crimes by means of granting functional immunity. Evidently, the procedures took place in domestic courts from only Western states. These states are all (former) colonial powers, notably the United States, Belgium, the Netherlands, and Germany. Adding to that, these countries have tight relations with Israel, as is apparent in, for instance, *Matar v. Dichter* and *Ziada* where the Courts referred to the strong relations with Israel. In *Matar v. Dichter*, the US District Court pointed out on multiple occasions that Israel is a "strategic United States ally" and the attribution of a claim would harm diplomatic relations.[496] Additionally, the Dutch Appeal Court in *Ziada* is aware of the inconvenience the State of Israel must experience and points out that Israel might feel strongly obliged to support the defendants Gantz and Eshel by means of legal and financial assistance.[497]

These historical and contemporary realities can, according to the TWAIL framework, not be ignored. Specifically, the connection of these (former) colonial power with the settler-colonial Israeli state may not be disregarded. The historical distinction between 'civilised' and 'uncivilised' is reflected in the courts' judgments. With this disparity in the application, the former Arab and African state officials are deemed ineligible for the enjoyment of functional immunity. In comparison, former Israeli state officials are considered worthy of immunity, in the eyes of the courts, as they are considered to be part of a 'civilised' nation. In this regard, the courts do not consider the contextual elements of the settler-colonial reality in these cases.

In addition, the cases with regard to Israeli defendants indicate that Israel is considered to be more of a robust democracy and sovereign state than in the other cases involving Arab and African defendants. Illustratively, the judgment in the *Al-Daraj* case articulated the perception that Israel is a democracy maintaining a western-style judicial system with a functioning rule of law, as Karmi-Ayyoub asserts.[498] In this context, the Spanish judiciary considered it in inappropriate to pursue a universal jurisdiction case against alleged Israeli

[496] *Matar v. Dichter*, United States District Court Southern District of New York, Judgment, *05 Civ 10270 (WHP)*, 2 May 2007, 16-20.
[497] "Het hof komt in de onderhavige zaak tot een vergelijkbare conclusie, waarbij het nog opmerkt dat de vreemde Staat, wiens (hoge) ambtsdragers in Nederland in een civiel geding worden betrokken, zich heel wel gedwongen kan voelen om deze functionarissen in hun verdediging bij te staan en de kosten daarvan voor zijn rekening te nemen. Ook dat zou in strijd zijn met het beginsel dat de Staat immuniteit van jurisdictie geniet." See *Ziada v. Gantz and Eshel*, Court of Appeal The Hague, 7 December 2021, ECLI:NL:GHDHA:2021:2374, para. 3.7.
[498] Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 110-111.

perpetrators.[499] Palestinian victims of war were required to undertake extra effort to present the deficiencies in the settler-colonial Israeli judicial system, which is framed as a functioning democratic institution. The Palestinian victims had to demonstrate that the 'quasi-investigative steps' sporadically carried out by Israel after military operations, like it did after the *Al-Daraj* attack, are not the same as "independent, effective and impartial investigations."[500] In contrast, the case of *Samantar v. Yousuf* initially indicated a denial of Somalian sovereignty when the US government, in its *amicus curiae*, refused to recognise the government of Somalia and the Court did not grant the former Prime Minister functional immunity.[501]

Palestinian victims

Additionally, the data reveal an inconsistency in the access to justice of Palestinian victims depending on the nationality of the defendant. The data indicate that the nationality of the alleged perpetrator of international crimes against Palestinian victims matters in recent cases, as outlined in figure three. When Palestinian victims seek redress for alleged international crimes, former Israeli state officials enjoy functional immunity – and, discernibly, former Libyan state officials do not. The visible trend in recent preference of Palestinian victims to seek redress in civil claims before foreign domestic courts must be seen in light of the lacking access to justice of Palestinian victims of international crimes in both the local context and in criminal proceedings before foreign domestic courts, as discussed in chapter three.

Case	Year	Court	Procedure	Defendant	Victims	Functional immunity
Sharon and Yaron	2001	Belgium	Criminal	Israeli	Palestinian	Future option
Matar v. Dichter	2009	United States	Civil	Israeli	Palestinian	Yes
El-Hojouj	2012	Netherlands	Civil	Libyans	Palestinian	No
Ziada	2020, 2021	Netherlands	Civil	Israeli	Palestinian	Yes

Figure 3 Cases involving Palestinian victims as discussed in paragraph 4.3.2 and 4.3.3.

The development of functional immunity with respect to international crimes in civil proceedings concerning Israeli state officials must be viewed with regard to the development in criminal cases. For the analysis of the above data, it is critical to understand that former Israeli state officials, alleged perpetrators of international crimes, are protected from

[499] *Benjamin Ben-Eliezer et al*, Audiencia Nacional, la Sala de Apelación (National Court, Appeal Chambers), 30 June 2009; *Benjamin Ben-Eliezer et al*, Tribunal Supremo, Sala de lo Penal, Sección 1 (Supreme Court, Criminal Chamber, Section 1), Appeal Judgment, *No. 1979/2009*, 4 March 2010; Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 111.
[500] Karmi-Ayyoub, "Prosecuting Israeli Perpetrators," 111.
[501] *Samantar v. Yousuf*, United States Supreme Court, *No. 08-1555*, 1 June 2010, 2.

prosecution in criminal proceedings on various grounds, as discussed in chapter three. For this reason, the Palestinian victims of alleged international crimes have only one way left to pursue justice in foreign domestic courts, namely through civil claims challenging the invocation of functional immunity. From a TWAIL perspective, this observation is significant for the consideration of foreign domestic courts in civil proceedings. The trend of discontinuance in criminal cases as shown in figure four has consequences for the oppressed Palestinian people, diminishing options to seek redress. The judgments in the cases concerning Israeli officials in *Belhas v. Ya'alon, Doğan v. Barak, Sharon and Yaron, Matar v. Dichter* and *Ziada*, are in line with the state practice established in earlier criminal cases specifically concerning Israeli state officials. With that, the courts take a different direction in these cases than in proceedings not involving Israeli state officials where former state officials indeed were arrested, convicted and sentenced without political obstacles hampering this process.

Case	Year	Country	Procedure	Accused	Victims	Dismissal reason
Ben-Eliezer et al	2008	Spain	Criminal	Israeli	Palestinians	Subsidiarity
Kilani	2021	Germany	Criminal	Israeli	Palestinians	Subsidiarity
Ben-Eliezer et al	2003	Switzerland	Criminal	Israeli	Palestinians	Territoriality
Almog	2005	United Kingdom	Criminal	Israeli	Palestinians	Arrest warrant
Moshe Yaalon	2006	New Zealand	Criminal	Israeli	Palestinians	Arrest warrant
Tzipi Livni	2009	United Kingdom	Criminal	Israeli	Palestinians	Arrest warrant
Ami Ayalon	2008	Netherlands	Criminal	Israeli	Palestinians	Interference in investigation
Shaul Mofaz	2002, 2015	United Kingdom	Criminal	Israeli	Palestinians	No arrest warrant / immunity

Figure 4 Criminal cases with respect to Israeli state officials as discussed in paragraph 3.3.3.

Notably, this is the matter in both civil and criminal cases – especially from the perspective of the victim, as for them, the difference in procedure is, in most countries, negligible, for a civil claim can also be additionally pursued in criminal cases as discussed in chapter three. The latter is, however, dependent on the willingness of a state to open an investigation, follow up on arrest warrants and bring cases before courts against a former Israeli state official, which, as we have seen, is not the case with respect to former Israeli state officials.

5.2 Differentiating former state officials from the *actual* State

This paragraph contains a TWAIL critique of the lacking differentiation between former state officials and the *actual* State by foreign domestic courts in cases involving Israeli state officials with respect to allegations of international crimes. In the discussed cases concerning Israeli

state officials, all courts neglected to critically distinguish Israeli former state officials from the actual State and dismissed the individual criminal responsibility and civil liability of state officials in contrast to cases involving Arab and African defendants. The data show that domestic courts consider Israeli state officials as the extender of the Israeli State itself. These court findings are contrasting with the deliberations in cases regarding Arab and African state officials, where a clear distinction is set in place between state officials and the actual State. In other words, immunity of Israeli state officials is treated more like state immunity.

The cases involving former state officials from Arab and African states indicate a differentiation between state immunity and individual functional immunity. The historically important Nuremberg Tribunal established this distinction by determining individual international criminal responsibility, later reiterated in *Eichmann* and *Pinochet (No. 3)*. In *Eichmann,* the Israeli Supreme Court convicted a former state official of Nazi-Germany, and with that, separated his individual liability from the State.[502] In *Pinochet No. 3*, which set the tone for the contemporary interpretation of functional immunity in cases regarding international crimes, the House of Lords explicitly referred to Pinochet as having individual liability as former Head of State, i.e. not the State.[503] Additionally, a clear distinction is drawn between the State and state officials in the discussed contemporary cases. In the civil proceeding of *Samantar v. Yousuf*, the United States courts held that Samantar, as former Prime Minister of Somalia, was not liable for the invocation of functional immunity under both the FSIA and customary law, in contrast to the State itself.[504] Furthermore, in *Former Afghan Lieutenant*, the German Federal Court specifically refers to the individual immunity of the Afghan former state official and does not put the State and the individual on the same footing.[505]

In the discussed cases involving former state officials from Israel, the Courts consistently treat the former state officials and functional immunity in the context of the actual state and state immunity. In *Belhas v. Ya'alon*, the US Court does not distinguish between state immunity and individual functional immunity with respect to an Israeli state official, as it

[502] *Attorney General v. Adolf Eichmann*, District Court of Jerusalem, Judgment, *no. 40/61*, 11 December 1961.
[503] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, UK House of Lords, *UKHL 17*, 24 March 1999, [2000] 1 A.C. 147; Zaman, "Playing the Ace?" 53-54; Van Alebeek, *The Immunity of States and Their Officials*, 2.
[504] *Samantar v. Yousuf*, United States Court of Appeals for the Fourth Circuit, *No. 07-1893*, 8 January 2009, available at: https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/Samantar_Judgment_Reversal_65.pdf, 18-22; *Samantar v. Yousuf*, United States Court of Appeals for the Fourth Circuit, 699 F.3d 763, *No. 11-1479*, 2 November 2012, available at: https://www.ca4.uscourts.gov/opinions/published/111479.p.pdf, 22.
[505] Bundesgerichtshof (German Federal Court of Justice), Judgment, No. *3 StR 564/19*, 28 January 2021, at key findings, para. 1 and 13. English translation as quoted from Epik, *see* Epik, "No Functional Immunity," 1265.

argued that foreign state officials fall within the scope of foreign state immunity.[506] Secondly, in *Matar v. Dichter*, the US Court argues that Dichter enjoys functional immunity "no less than it would the State of Israel itself."[507] Furthermore, in *Doğan v. Barak*, the US Appeal Court maintained that Barak enjoyed functional immunity, ruling that exercising jurisdiction in this case "would be to enforce a rule of law against the sovereign state of Israel."[508] And lastly, in *Ziada v. Gantz and Eshel*, the Dutch Appeal Court followed the District Court and did not strictly distinguish functional immunity, which exclusively concerns state officials, from state immunity.[509] The Court asserted that there is "sufficient reason" for the immunity of the State of Israel to be extended to the defendants.[510] The Appeal Court argued that the case "concerns very high-ranking military personnel who were carrying out official policy of the State of Israel, such that a judgment on their conduct would necessarily also amount to a judgment upon the conduct of the State of Israel."[511]

The data reveal a pattern wherein Israeli state officials are considered to be the *actual* State. These findings are in contradiction to the immunity doctrine and the distinction between state and individual immunities as established in Article 58 of the ILC Articles on State Responsibility and Article 24(4) of the Rome Statute. When a state official is brought before a court, a State is not – and *vice versa*. As discussed in chapter four, the liability of the State and (former) state officials are not automatically corresponding to one another. In fact, as Ronzitti established, it may occur that a State is immune, but a state official is not and has individual liability.[512] Accordingly, in contrast to personal immunity, which is only applicable to Heads of States, Heads of Governments and Foreign Ministers, the functional immunity doctrine never intended to establish an order in rank for its enjoyment.[513] The rank of an former state official

[506] *Belhas v. Ya'alon*, United States District Court for the District of Columbia, *No. 05-2167*, 14 December 2006, 10.
[507] *Matar v. Dichter*, United States District Court Southern District of New York, Judgment, *05 Civ 10270 (WHP)*, 2 May 2007, 13.
[508] *Doğan v. Barak*, United States Court of Appeals For the Ninth Circuit, *No. 16-56704*, 2 August 2019, 12.
[509] *Ziada v. Gantz and Eshel*, Court of Appeal The Hague, 7 December 2021, ECLI:NL:GHDHA:2021:2374, para. 3.19.
[510] "Ook naar het oordeel van het hof zijn er tussen het strafrecht en het civiele recht zodanige verschillen dat een verschil in de behandeling van functionele immuniteit tussen strafrecht en civielrecht gerechtvaardigd is omdat, in ieder geval in de onderhavige zaak, er voldoende aanleiding is om de immuniteit van de Staat Israël door te trekken naar [geïntimeerde 1] c.s. In deze zaak gaat het immers om een militaire operatie die een berustte officieel beleid van de Staat Israël en niet op, bijvoorbeeld, een individuele actie van een enkele overheidsfunctionaris." See *Ziada v. Gantz and Eshel*, Court of Appeal The Hague, 7 December 2021, ECLI:NL:GHDHA:2021:2374, para. 3.19.
[511] *Ziada v. Gantz and Eshel*, Court of Appeal The Hague, 7 December 2021, ECLI:NL:GHDHA:2021:2374, para. 3.24.
[512] Ronzitti, "Access to Justice and Compensation for Violations of the Law of War," 213.
[513] Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers," 13; Akande and Shah, "Immunities of State Officials," 820; Aziz Epik, "No Functional Immunity," 1276.

therefore should not matter for the applicability of functional immunity. The Dutch Supreme Court followed these considerations in *H./OM* when it upheld the Appeal Courts conviction of a high-level Afghan state official for international crimes.[514]

Moreover, the German Federal Court disregarded the principles behind the functional immunity doctrine in the 2021 *Former Afghan Lieutenant* case when it determined that "at least" lower-ranking officials cannot invoke functional immunity.[515] Significantly, a year later, another German Court established that high-ranking former Syrian state official Anwar R. was unable to enjoy functional immunity.[516] With this judgment, the Court again broadened the exception to the invocation of functional immunity to all ranks in accordance with the functional immunity doctrine.[517] In spite of these developments regarding Arab and African officials, in the cases concerning Israeli state officials, the rank of the defendant consistently remains to be of significance. The data reveal that, in case of Israeli officials, the Courts establish that the conduct of high-ranking former Israeli state officials are to be considered as the *actual* state. This indicates that, according to Western courts, the sovereignty of the Israeli state is greater and extended to high-level former officials in contrast to Arab and African states.

The state practice on the protection of Israeli state officials in both criminal and civil procedures before foreign domestic courts conform to a pattern of orientalist and imperialist values. The data reveal that Israeli state officials are shielded from prosecution as they are believed to be the same as the *actual* state. State sovereignty of the Israeli state prevents individual liability. In contrast to the Israeli state officials, Afghan, Syrian, Libyan, Ethiopian and Somalian state officials were, rightly so, not equated with the actual State and held individual criminal or civil liability. This indicates that sovereignty of Arab and African states is deemed less worthy. Acknowledging Israel's status as a settler-colonial state, the Israeli sovereignty shows a sense of superiority in comparison to former colonised states. The Court deliberations on the immunities of former state officials reflect these historical and contemporary geopolitical realities. The judgments preserve the imperial superiority of Israel at the expense of predominantly Palestinian victims of alleged international crimes.

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[514] *H./OM*, Supreme Court of the Netherlands, 8 July 2008, ECLI:NL:HR:2008:BC7418, paras. 6.6 and 7.2. Original transcript in Dutch: "Het middel faalt reeds op de grond dat de verdachte noch aan zijn toenmalige hoedanigheid van directeur van de staatsveiligheidsdienst van Afghanistan noch aan die van plaatsvervangend minister van staatsveiligheid immuniteit van jurisdictie als hiervoor onder 6.6 bedoeld toekomt."

[515] Bundesgerichtshof (German Federal Court of Justice), Judgment, No. *3 StR 564/19*, 28 January 2021, at key findings, para. 1 and 13. English translation as quoted from Epik, *see* Epik, "No Functional Immunity," 1265, 1276.

[516] Oberlandesgericht Koblenz (Koblenz Higher Regional Court), Judgment, No. *1 StE 9/19*, 13 January 2022.

[517] Oberlandesgericht Koblenz, "Lebenslange Haft u.a. wegen Verbrechens gegen die Menschlichkeit"; Sweeney, "Justice Prevails over Realpolitik at Koblenz."

5.3 Israeli international crimes as official acts

This paragraph contains a TWAIL critique of the consideration of international crimes as official acts when it concerns Israeli state officials. The data indicate that, in contrast to Arab and African defendants, Courts do not determine international crimes as official acts with respect to Israeli former state officials. The data show that domestic courts consider Israeli state officials as acting within the scope of official acts for the very reason that Israel itself describes the alleged international crimes as official acts. These findings are in contrast with the deliberations in the other cases with respect to Arab and African state officials where alleged international crimes are either considered to be contradicting to the framework of official acts or implicitly considered as immunity is not granted. In conclusion, Courts inconsistently determine officials acts, approaching Israeli alleged international crimes differently from Arab and African alleged international crimes.

In the historically significant cases of *Bouterse and Pinochet (No. 3),* the Courts established that international crimes do not fall within the scope of official acts. In *Pinochet (No. 3)* the House of Lords asserted that the international crime of torture could not be categorised as an act of state, recognising that immunity is not superior to the protection of *jus cogens* values.[518] Adding to that, the Dutch Court of Appeal decided in *Bouterse* that the execution of grave international crimes cannot be qualified as the official tasks of a Head of State.[519] In contemporary cases regarding Arab and African officials, a pattern that builds on these findings is discernible. In *H./OM,* the Supreme Court implicitly acknowledges that international crimes cannot constitute to official acts by upholding the conviction of the Afghan high-ranking former state official for the international crime of torture. The same implicit acknowledgment of the exclusion of international crimes in the framework of 'official acts' occurred in *El-Hojouj*, *Eshetu A./OM, Eyad A., Anwar R.* and *Afghan detention officer/OM* when Courts determined that defendants did not enjoy functional immunity and convicted the former state officials to life in prison for complicity in international crimes. Adding to that, in *Samantar v. Yousuf,* the Appeal Court explicitly decided that former Somali Prime Minister Samantar could not enjoy functional immunity in civil proceedings for acts committed in official capacity that constitute *jus cogens* violations.[520] In *Former Afghan Lieutenant,* the

[518] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, UK House of Lords, *UKHL 17*, 24 March 1999, [2000] 1 A.C. 147; Farnelli, "A Controversial Dialogue," 277-278.
[519] "Het plegen van zeer ernstige strafbare feiten als waarom het hier gaat, kan immers niet tot de officiële taken van een staatshoofd worden gerekend," *see Decembermoorden Suriname*, Court of Appeal Amsterdam, 20 November 2000, ECLI:NL:GHAMS:2000:AA8395, para. 4.2.
[520] *Samantar v. Yousuf*, United States Court of Appeals for the Fourth Circuit, 699 F.3d 763, *No. 11-1479*, 2 November 2012, 22.

German Federal Court concluded that state practice and *opinio iuris* established that functional immunity is not applicable in case of international crimes, as they do not fall within the scope of official capacity.[521]

However, in cases concerning Israeli defendants, the alleged international crimes are consistently considered as official acts. The Dutch and United States' Courts based these deliberations on information provided by the Israeli government. In *Belhas v. Ya'alon*, for instance, the Court asserted that Ya'alon acted "under color of Israeli law" in official capacity.[522] The Court relied on a letter submitted by the Israeli Ambassador, describing the acts, alleged war crimes, as "sovereign actions" and "official state acts."[523] In *Matar v. Dichter*, the Court argued that "Dichter plainly acted pursuant to his official duties" and with that assessment followed the submitted position of Israel on the matter.[524] Subsequently, in *Doğan v. Barak* the Court decided that the executed conduct, to which Barak was allegedly complicit, could in this case not constitute a *jus cogens* violation, as they were, according to an official Israeli claim, "actions as within the scope of his authority."[525] The Barak dismissal was supported by the United States, which filed a suggestion of immunity.[526] By dismissing the case, the Court rejected the *Samantar v. Yousuf* civil precedent on the exception to functional immunity in case of a *jus cogens* violation.[527] In *Ziada v. Gantz and Eshel*, the District Court asserted that the defendants executed official acts in accordance with the Diplomatic Nota submitted by Israel to the Dutch Foreign Ministry.[528] It continued to consider military

[521] Bundesgerichtshof (German Federal Court of Justice), Judgment, No. *3 StR 564/19*, 28 January 2021, para. 23, at key findings, para. 1 and 13.
[522] *Belhas v. Ya'alon*, United States District Court for the District of Columbia, *No. 05-2167*, 14 December 2006, 6.
[523] *Belhas v. Ya'alon*, United States District Court for the District of Columbia, *No. 05-2167*, 14 December 2006, 9.
[524] *Matar v. Dichter*, United States District Court Southern District of New York, Judgment, *05 Civ 10270 (WHP)*, 2 May 2007, 11-13.
[525] *Doğan v. Barak*, United States District Court Central District of California, *No. 2:15-cv-08130-ODW*, 13 October 2016, 20-21.
[526] "The United States has recommended that the Court grant Barak immunity from suit because Plaintiffs' action is one that "expressly challenge[s] Barak's exercise of his official powers as an official of the Government of Israel." (ECF No. 48.) To avoid "embarrass[ing] the [Executive Branch] by assuming an antagonistic jurisdiction," Lee, 106 U.S. at 209, and to afford the political branches the much needed discretion to resolve the issue through diplomacy, the Court should follow the Executive's suggestion." See *Doğan v. Barak*, United States District Court Central District of California, *No. 2:15-cv-08130-ODW*, 13 October 2016, 13.
[527] *Doğan v. Barak*, United States District Court Central District of California, *No. 2:15-cv-08130-ODW*, 13 October 2016, 24-25.
[528] "[…] To answer this question, the court assumes the following facts as having been established: v) The State of Israel has confirmed this in a Diplomatic Memo of 18 October 2018 to the Dutch Ministry of Foreign Affairs (hereinafter: the Diplomatic Memo): "It is the State of Israel's position that actions undertaken by Mr. [defendant I] en Mr. [defendant II] during these hostilities were performed exclusively in their official capacity as General Chief of Staff and Israeli Air Force Commander respectively and in accordance with their autohority under Israeli law." vi) The State of Israel asserted the functional immunity from jurisdiction of [defendant I] and [defendant II] in the Diplomatic Memo: "The State of Israel unequivocally asserts the immunity of Mr. [defendant I] and Mr.

operations at large as *acta irue imperii*, or official conduct, no matter the lawfulness.[529] Notably, this is a distinct concept from state immunity. The Appeal Court added that this case concerns "a military operation that is based on official policy of the State of Israel, and not, for example, on an individual action by a single government official."[530]

The data thus reveal a pattern wherein alleged international crimes by former Israeli state officials are considered to be official acts, whereas, on the other hand, equivalent conduct by former Arab and African state officials does not fall within the scope of official acts. This selective interpretation in case of Israeli state officials contravene the general assumptions in the international legal community on international crimes within the framework of functional immunity as discussed in chapter four.[531] Additionally, it is generally accepted that international crimes, like war crimes, are of violations of *ius in bello* and therefore do not fall within the scope of state conduct at times of war as illustrated by international humanitarian law principles.[532] Consequently, to consider that war crimes would fall within the scope of official conduct is therefore an unsound determination, not in alignment with the general perception of these principles.

The discussed state practice indicates a contemporary influence of values, such as democracy and imperialism, stemming from orientalist and imperial ideology. The data show that conduct by former Israeli state officials does not constitute as international crimes in foreign domestic courts, shielding them from prosecution under the guise of functional immunity. In contrast to the discussed Arab and African former state officials, the Courts follow the appreciation of Israel on the conduct. The Courts adopt the Israeli narrative on their assessment of official conduct. By doing so, the Courts neglect to consider the settler-colonial reality, wherein a coloniser is reviewing its own conduct, in spite of the facts on the ground, i.e. Apartheid, occupation and the oppression of the Palestinian people. The consequence of

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[defendant II] with regards to these official acts." See *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:667, 4.5.

[529] "State immunity only applies to acts carried out in the exercise of state authority (*acta iure imperii*), not to the acts of a State in interactions with private individuals on an equal basis (*acta iure gestiones*), such as regular commercial transactions. The nature of the act determines to which category it belongs. By their very nature, military operations carried out by a national army of a State are viewed as *acte iure imperii*: "the core area of State sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security." This applies to both military operations in a State's territory and in occupied territories." See *Ziada v. Gantz and Eshel*, The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:667, 4.8.

[530] *Ziada v. Gantz and Eshel*, Court of Appeal The Hague, 7 December 2021, ECLI:NL:GHDHA:2021:2374, para. 3.19.

[531] *See* Frulli, "Some Reflections," 1; Van Alebeek, "National Courts," 5-6; Akande and Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," 816-817.

[532] See the Geneva Conventions and the Rome Statute of the International Criminal Court; Cassese, *International Criminal Law*, 65-66.

disregarding these material sources is that the Courts uphold the superiority of the settler-colonial entity. From a TWAIL perspective, the negligence of the settler-colonial reality is especially of significance to the victims' right to access to justice, for it affirms the power dynamics between an oppressor and oppressed people. To conclude, the data indicate that the state of Israel is valued as superior in its designation of what constitutes official conduct, in comparison to Arab and African states. In this way, the doctrine of functional immunity becomes a tool for Israeli impunity.

6. Zooming out: Functional Immunity in a Neo-Colonial Reality

In this final chapter, I discuss the implications of the findings emerging from the data for the development of functional immunity. The data show a selective application of the functional immunity doctrine in foreign domestic courts with regard to defendants' nationalities. This gives rise to legal inconsistency on the one hand, and political consistency on the other. In contrast to Arab and African defendants, functional immunity shields Israeli former state officials from prosecution of complicity in international crimes. Functional immunity becomes a politicised tool for Israeli impunity of international crimes.

6.1 Legal inconsistency

The analysed data reveal a pattern of legal inconsistency in the selective application of the enjoyment of functional immunity by former state officials in foreign domestic courts. As discussed in chapter four, the values behind functional immunity prescribe that it constitutes a way to protect state functionaries from prosecution for acts of states, i.e. normal conduct of work. Accordingly, functional immunity was not established to shield perpetrators from prosecution in case of international crimes, as they do not constitute to normal activity of the state. The application of functional immunity with respect to Israeli former state officials therefore contravenes with fundamental values of the legal concept as well as key jurisprudence. The data show an inconsistent approach by courts to functional immunity in case of Israeli officials on the one side, and Arab and African officials on the other. A disparity is present in the application of the law as it considers Israeli conduct as official acts in contrast to Arab and African conduct. The different deliberations of state sovereignty by courts and the inconsistent differentiation between former state officials and the *actual* state highlight this disparity. To conclude, proceedings concerning Israeli defendants are treated differently from those that involve Arab and African defendants, affecting the development of state practice of functional immunity.

The indeterminacy of the doctrine reveals that the selective application of functional immunity is rooted in orientalist western values with respect to superiority, sovereignty, democracy and civilisation. The data show that state practice concerning Arab and African state officials is not considered to hold the same value as cases with respect to Western or colonial powers. The data highlight double standards in the application of the law, reflecting the ideological superiority and unsurpassed sovereignty of the settler-colonial state of Israel, in contrast to the former colonised nations of Ethiopia, Somalia, Afghanistan, Libya, and Syria.

The selective application of functional immunity has consequences for the development of functional immunity at large. In addition to the Israeli alignment with the western value system, interests of imperial, (neo-)colonial and powerful states are paramount to the development of the CIL norm. The application of the law by the Western foreign domestic courts inspired by sentiments of western, imperial superiority and power influences contemporary development of the doctrine. In other words, by developing state practice with regard to functional immunity that maintains the civilised-uncivilised dichotomy, foreign domestic courts play a role in preserving western bias on colonial superiority and sovereignty. The data show that the Western courts assert there is not enough state practice by means of domestic courts' jurisprudence on the restrictive application of functional immunity in case of alleged Israeli international crimes. However, the analysis highlights there *is* state practice on the exclusion of functional immunity, but only in case of Arab and African former state officials, yet not with respect to Israeli former state officials. This indicates that a sense of superiority and the imperial maintenance of dominance of one group over another is deductible in the studied jurisprudence.

6.2 Political consistency

Aside from legal inconsistency, the analysed data show a pattern of political consistency with respect to Israeli alleged perpetrators of international crimes. In all discussed cases involving Israeli defendants, the Israeli state either diplomatically or politically intervened, pressured the state during the investigation, or on the modification of national universal jurisdiction laws. Adding to that, the domestic courts' states all hold close relations with the settler-colonial state Israel, as former colonial powers. Accordingly, the data reveal an unconscious bias towards Israeli sovereignty as greater than Arab and African sovereignty. With that, Courts circumvent the invocation of functional immunity and maintain to indirectly support Israeli impunity as a settler-colonial power.

The state practice on functional immunity shows a disparity between the approach to Israeli, Arab and African defendants. This disparity is explainable in relation to the positioning of the states in relation to the community of values, for Israel is considered part of the western value community. Historically, European Zionism and Israeli settler-colonialism, which lay at the basis of the founding of the State of Israel in 1948, is strongly connected to Europe and European politics, as is, for example, visible in the Balfour Declaration of 1917. The European colonial values of superiority and sovereignty is therefore of significance in relation to Israel today. Contemporary Israeli policy tends to show and support shared values, as it claims to be the 'only democracy in the Middle East', which has been debunked on various accounts,

including by renowned Israeli scholar Ilan Pappe.[533] The attempt to align with western values can additionally be seen in Israel's contentious claim to have 'the most moral army in the world', while the Israeli Defence Force (IDF) partakes in settler-colonial aggression.[534] Furthermore, the Israeli tendency to be affiliated with the western value system is perceptible in its participation in EU events albeit being on the Asian continent. Illustratively, Israel participated 44 times in the Eurovision Song Contest since 1973, echoing the European forum's shared established values and European identity.[535] Adding to that, Israel is a member of the UEFA European football confederation since 1994 and Israeli national and club teams participate in various European tournaments.[536]

6.3 Israeli impunity and Palestinian victims

Elucidating from the jurisprudence by domestic courts, States eschew state responsibility to challenge and prosecute international crimes committed in different territory. As mentioned, it is generally accepted that States cannot disavow this responsibility by arguing that courts act independent from the government.[537] States forsake their moral and legal duty to prevent and address impunity in the international community. Significantly, the data show that States only neglect their duty in cases concerning Israeli nationals. Defendants from Arab and African nations are critically investigated, prosecuted, or a civil penalty is imposed. Consequently, the historic sentiments of imperialism affect the probability of either justice or impunity with

[533] Ilan Pappe, "7. Israel is the Only Democracy in the Middle East," in *Ten Myths About Israel* (London, UK: Verso, 2017); Orit Bashkin, "3. The Only Democracy in the Middle East," in *Impossible Exodus: Iraqi Jews in Israel* (Redwood City: Stanford University Press, 2017): 103-150; Lev Luis Grinberg, *Politics and Violence in Israel/Palestine: Democracy versus Military Rule* (London, UK: Routledge, 2009); Martin Beck, "Israel: A Democratic State?" *E-International Relations*, 25 August 2019, available at: https://www.e-ir.info/2019/08/25/israel-a-democratic-state/; Ben White, "Israel is the only democracy in the Middle East? Netanyauy's comments have shattered that illusion," *The Independent*, 11 March 2019, available at: https://www.independent.co.uk/voices/netanyahu-israel-elections-palestine-middle-east-otzma-yehudit-a8817701.html.

[534] James Eastwood, "Introduction: 'The Most Moral Army in the World'," in *Ethics as a Weapon of War: Militarism and Morality in Israel* (Cambridge: Cambridge University Press, 2017), 4; "For example, Israeli defense minister Ehud Barak described the Israeli military as "the most moral army in the world" in pledging legal aid to soldiers accused of war crimes in January 2009 (Ha'Aretz, 27 January 2009, http://www.haaretz.com/ hasen/spages/1058509.html). Similarly, then prime minister Ehud Olmert described Israel as having the "most moral army" in the world in a cabinet meeting in June 2006 (Jerusalem Post, 11 June 2006, http://www.jpost.com/Israel/Article. aspx?id=24499)." in Muhammad Ali Khalidi, ""The Most Moral Army in the World": The New "Ethical Code" of the Israeli Military and The War on Gaza," *Journal of Palestine Studies* 39, no. 3 (2010): 6, 19.

[535] Christina Kiel, "Chicken dance (off): competing cultural diplomacy in the 2019 Eurovision Song Contest," *International Journal of Cultural Policy* 26, no. 7 (2020): 973-987; Daniel Mahla, "Distinguished Member of the Euro(trash) Family? Israeli Self-Representation in the Eurovision Song Contest," *Israel Studies* 27, no. 2 (2022): 171-194.

[536] Richard Williams, "Why does Israel's football team play in Europe," *Sky News*, 18 May 2015, available at: https://news.sky.com/story/why-does-israels-football-team-play-in-europe-10359083.

[537] Paulsson, *Denial of Justice in International Law*, preface.

respect to alleged international crimes committed by Israeli officials. Ultimately, this has impact on the position of victims of international crimes in legal redress in court, especially for Palestinians living under settler-colonial rule. To conclude, functional immunity from prosecution in case of international crimes becomes a politicised tool of Israeli impunity which prevents the access to justice of Palestinian victims of war.

Conclusion

The development of functional immunity gained new attention with the outbreak of war on the European continent. Victims of war may pursue the right to access to justice in foreign domestic courts to enhance effective redress. However, civil and criminal individual liability of state officials complicit in alleged international crimes may be blocked by the customary international law norm of functional immunity from prosecution. According to TWAIL scholarship, CIL is highly influenced by the historical development of international law in the colonial era. The orientalist values on civilisation, sovereignty and superiority continue to affect contemporary law application. The nature of international law facilitates a selective application of functional immunity dependent on the defendants' background resulting in impunity.

This research examined the impact of imperialism, orientalism and (neo-)colonial values in the development of functional immunity with respect to international crimes and determined the consequences for effective access to justice of war victims. By analysing jurisprudence from domestic courts in the Netherlands, Germany, the United States and Belgium, this study aimed to get a deeper understanding of the selective application of functional immunity. In specific, this research determined the approach to functional immunity of foreign domestic courts with respect to Israeli defendants in contrast to Arab and African defendants. Adding to that, this study assessed the ramifications of selective application on the position of Palestinian victims of war in legal proceedings.

This thesis showed legal inconsistency and political consistency in the application of functional immunity with regard to Israeli former state officials on the one hand, and Arab and African officials on the other hand. The jurisprudence by the foreign domestic courts under study reflect the values of orientalism, imperialism and neo-colonialism. The civilised-uncivilised distinction is apparent in the discussed jurisprudence. In all discussed proceedings involving Arab and African former state officials, functional immunity was not applied. In contrast, in all discussed cases with respect to Israeli former state officials, functional immunity was invoked. The data show a disparity in the differentiation between former state officials and the *actual* state with respect to Israeli defendants. Furthermore, the data show a pattern of inconsistent appraisal of alleged international crimes as official acts. Israeli conduct is considered official acts in contrast to conduct by Arab and African officials.

In addition, this thesis highlights the political consistency in the discussed proceedings involving Israeli state officials. The data reveal an unconscious bias towards Israeli sovereignty as greater than Arab and African sovereignty, reflecting the civilised-uncivilised distinction.

This disparity is explainable in relation to the positioning of the states in relation to the community of values, for Israel considered part of the western value community. The settler-colonial state of Israel is in alignment with the western and European tradition of colonial domination and superiority.

The selective application of functional immunity in case of Israeli defendants has ramifications for the overall development of the legal doctrine. The data show that jurisprudence on Arab and African former state officials is considered less significant than proceedings involving Israeli defendants. By developing state practice with regard to functional immunity that maintains the civilised-uncivilised dichotomy, foreign domestic courts play a role in preserving western bias on colonial superiority and sovereignty. The orientalist values in the development of the law, furthermore, maintain a system of western superiority.

The selective application of functional immunity conditions the access to justice of Palestinian victims of war. The impunity for Israeli international crimes in foreign domestic courts further diminishes the options for effective redress for Palestinians seeking accountability under settler-colonial rule. Functional immunity from prosecution in case of international crimes becomes a politicised tool of Israeli impunity which prevents the access to justice of Palestinian victims of war. This thesis showed that an implicit bias is present in the state apparatus, including the judiciary, and the values of western superiority and sovereignty rooted in orientalism and neo-colonialism are significant to understand the law development on functional immunity. This thesis shows that the prosecution of perpetrators and the position of civilian victims of war is dependent on values and ideology with respect to nationality and superiority. This thesis concludes that state practice involving Arab and African defendants is considered of less significance than those involving Israeli defendants which steers the general development of the law. In conclusion, this thesis emphasises the importance of studying contemporary law application from an interdisciplinary perspective to understand practices in foreign domestic courts and the ramifications for victims of war.

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