

*Małgorzata Biszczanik**

THE INADMISSIBILITY OF JURISDICTIONAL IMMUNITY OF PERSONS RESPONSIBLE FOR THE COMMISSION OF INTERNATIONAL CRIMES IN TERMS OF DOMESTIC UNIVERSAL JURISDICTION PROCEEDINGS**

Abstract: *This article addresses the complex issue of immunity for State officials from foreign criminal jurisdiction, with a focus on the ILC's role in codifying and ensuring the compatibility of international legal acts. It underscores the calls for exceptions to functional immunity, particularly concerning ius cogens norms, and it highlights how the current framework often impedes accountability for international crimes. However, the ILC's limitation of Art. 7 to immunity racione materiae, excluding jurisdictional immunities, presents a legislative gap that hampers prosecution under universal jurisdiction. This underscores the need for international codification and progressive development to reconcile immunity doctrines with the imperative of accountability for serious international crimes. The article highlights the lack of a clear international position due to: (1) the absence of uniform definitions for immunity racione personae, racione materiae and jurisdictional immunity, (2) the identification of various exceptions limiting the invocation of immunities in domestic and third-State courts and (3) the inconsistent interpretation of immunity exclusions for ius cogens violations. It argues for harmonising legal norms at the international level to adequately initiate and conduct criminal proceedings by specifying the circumstances that exclude jurisdictional, racione materiae and racione personae immunities, thus re-establishing criminal accountability for international crimes.*

Keywords: international crimes, limitation of procedural immunity, procedural immunity, racione materiae immunity, universal jurisdiction

* Doctoral School in Law Discipline, Department of Administrative Law and Public Policy, Faculty of Administration and Social Sciences, Warsaw University of Technology (Poland); email: m.biszczanik2@gmail.com; ORCID: 0000-0001-9930-7528.

** This article was prepared within the framework of the research project no. 2021/43/D/HS5/00674 titled International Jurisprudence in Domestic Courts financed by the Polish National Science Centre.

INTRODUCTION

There is an ongoing debate in international legal and political circles about whether State officials should retain immunity for crimes with international implications. The key issue is whether such immunity should be waived for serious violations of international norms. Retaining immunity may hinder accountability and violate principles of international security, raising concerns about the legal system's effectiveness in enforcing accountability. This raises understandable concerns about the effectiveness of the legal system in holding individuals accountable for such acts.

At the International Law Commission (ILC), there are numerous opinions suggesting that there should be exceptions to the established immunities of State officials in situations where they commit crimes that seriously violate the norms of international law, noting that these offences are *ultra vires*, or beyond official powers. This justifies excluding both immunity *ratione materiae* and jurisdictional immunity. However, there are doubts about limiting the exclusion to immunity *ratione materiae*, which relates to acts performed in an official capacity (so-called "official acts"). The debate includes calls for broader immunity waivers. The current framework of immunity often ensures not being accountable for actions directly related to the fulfilment of officials acts, creating a loophole that hinders accountability for international crimes. This issue requires further attention and potential modification in discussions on State officials' immunity.

1. THE CONCEPT AND NATURE OF IMMUNITIES

The concept of immunity is broadly complex and ambiguous. The term is derived from the Latin term "*immunitas*", meaning exemption from all burdens and obligations imposed on a particular subject of law. It also denotes a negation to the Latin word "*munia*", denoting civic and social obligations.¹ Consequently, immunity constitutes a privilege enjoyed by a certain category of persons, placing them in a different procedural situation to all other persons due to the nature of the functions they perform; this results in limited admissibility or complete inadmissibility of criminal prosecution of these persons, constituting a clear exception to the principle of the universality of criminal proceedings. As the essence of immunities can be examined on several levels, it should be pointed out that the doctrine of international law divides immunities into (1) immunities *ratione personae* (substantive immunities) and (2) immunities *ratione materiae* (functional immunities).

This does not mean that immunity *ratione materiae* is the only form of functional immunity. Functional immunity is granted to public officials performing acts on behalf of their State and is tied to official acts during their term of office.

¹ A.C. Murray, *Immunity, Nobility, and the Edict of Paris*, 69(1) *Speculum* 18 (1994), pp. 18–19; X. Yang, *State Immunity in International Law*, Cambridge University Press, Cambridge: 2012, pp. 6–15.

Although broader than immunity *ratione personae*, functional immunity is linked to the nature of the acts rather than the official performing them. Traditionally, these immunities continue even after the official's term ends, so as to ensure State sovereignty and the principle of *par in parem non habet iudicium*. However, this immunity should be waived if a State official commits an international crime that (1) prevents full protection of individual rights and (2) violates international security. The ILC, which drafts and codifies international law, rightly points out that legal protection cannot be provided for acts not codified in international or national regulations. Indeed, in the last seven reports submitted by the rapporteur on State officials' immunity from foreign criminal jurisdiction,² the opinion was expressed that there should be exceptions to the principle of functional immunity, and that the very nature of immunities cannot determine the scope of application of *ius cogens* norms. As a result, perpetrators of international crimes should be held accountable, especially when safeguarding the legal rights violated by these crimes outweighs upholding the principle of immunity.

This implies that national courts should have universal jurisdiction over such acts. If immunity conflicts with norms like *ius cogens*, which prioritise protecting the legal goods violated by international crimes, then immunity guarantees should not apply, and jurisdictional immunity preventing criminal court jurisdiction should be abolished. This in turn suggests that immunities may either outright prohibit criminal prosecution, preventing the initiation and conduct of criminal proceedings, or impose procedural barriers to prosecution for certain individuals.

Traditional immunity temporarily shields specific actors from criminal liability. However, it is crucial to differentiate between immunity that prevents someone from being held criminally responsible – thus affecting the admissibility of criminal proceedings – and immunity that excludes criminal court jurisdiction. Whilst immunities *ratione personae* and *ratione materiae* are in fact circumstances that exclude criminal punishment – temporarily or permanently – they do not in essence constitute a technical limitation of criminal proceedings. The difference lies in the fact that jurisdictional immunities do not, in their essence, constitute subject and object coverage, but their *ratio legis* is related to the possibility of actualising the sanctioned and sanctioning norm during criminal proceedings. The need to distinguish them is closely linked to the technical possibility of initiating and continuing

² During its 59th session in 2007, the ILC added “immunity of State officials from foreign criminal jurisdiction” to its agenda. Mr Roman A. Kolodkin served as Special Rapporteur for the initial reports, with subsequent reports being led by Ms Concepción Escobar Hernández. Twelve draft articles proposed by Ms Hernández, including Art. 7 on immunity from foreign criminal jurisdiction of State officials, were adopted by the ILC. See UNGA, *Sixth Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Concepción Escobar Hernández, Special Rapporteur*, 12 June 2018, A/CN.4/722 with annexes, available at: <https://digitallibrary.un.org/record/1636856?v=pdf> (accessed 30 August 2024).

criminal proceedings, although it is pointed out that they do not prevent all stages of criminal proceedings, particularly investigation, the collection of evidence and the service of an indictment.³ Jurisdictional immunities thus exclude *in concreto* the jurisdiction of national criminal courts (immunity from jurisdiction *sensu stricto*) on the grounds that they constitute a statutory exception to the principle of the universality of the criminal process. Considerable doubts arise in the legal analysis of jurisdictional immunities *sensu largo*, covering the scope of immunities *sensu stricto* and criminal proceedings before international courts and national courts of third countries in the exercise of universal jurisdiction in connection with the commission of an act of an international character by an entitled party. It is pointed out that “the existence of jurisdiction is the starting point for the establishment of immunity, whilst the existence of universal jurisdiction does not distract from the importance of immunity as a means to protect the principle of national sovereignty and equality.”⁴ It is considered that the content of jurisdictional immunity *sensu largo* is the inadmissibility or limited admissibility of criminal prosecution of a State’s representative. The possibility of holding the perpetrator liable must be preceded by the consent of the competent entity of the State of origin of the perpetrator of an international criminal act.⁵ This results in a procedural condition that precludes conducting proceedings against a person with such immunity if jurisdictional immunity has not been waived. Whilst such a meaning may be granted to immunity *ratione personae*, it only has a material scope when it is directly connected with the exercise of a specific State mandate.⁶

2. THE CONCEPT OF JURISDICTIONAL IMMUNITY

Jurisdictional immunity, like immunity *ratione materiae*, should be capable of being limited or excluded, in order to guarantee the proper course of initiating and conducting criminal proceedings. Protection granted in this way is analogous to immunity *ratione materiae*, i.e. of a functional and therefore relative nature, to which limitations and exceptions can only be established by statutory provisions, and in which the practice of individual States also varies. The issue of immunity of State officials from foreign criminal jurisdiction (jurisdictional immunity) must

³ Case C-3/20 *Criminal Proceedings against AB and Others*, EU:C:2021:969.

⁴ H. Ren, Z.X. Jin, *The Limitations and Exceptions to Immunity of States Officials from Foreign Criminal Jurisdiction: On ILC Draft Article 7*, 12 *Beijing Law Review* 287 (2021), p. 294.

⁵ D. Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors*, OECD, Paris: 2010, p. 32.

⁶ ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 11 April 2000, ICJ Rep 2002, p. 3.

therefore be codified at the international level; it is also one aspect to be progressively developed within the framework of international law.

The ILC has expressed numerous opinions that there should be exceptions to the established immunities of State officials if they commit a crime that seriously violates the norms of international law. At the same time, these offences constitute *ultra vires* acts – separate from official acts. As a result, the commission of *ultra vires* acts not only warrants excluding immunity *ratione materiae* and jurisdictional immunity, but also justifies holding the State representative criminally liable in proceedings before a third State's court in cases of alleged international crimes. Since jurisdictional immunity creates a negative procedural condition when a criminal act is found to have been committed in connection with the perpetrator's office, the issue of *ultra vires* acts is particularly relevant. If the factual circumstances fail to meet the criteria for an international crime, doubts may arise, necessitating the anticipation of potential procedural obstacles. In such cases, the customary principle of international law that justifies exclusion due to immunity may not be applicable.

The crucial determinant is the legal framework being international law rather than domestic criminal law. It is noteworthy that even if the act is deemed an ordinary, non-international crime under such circumstances, jurisdictional immunity does not impede prosecution. Consequently, general criminal offences stemming from the same act may also be prosecutable when an *ultra vires* act occurs. This approach was also outlined in the most recent judgment of 21 February 2023 of the German Federal Court of Justice,⁷ which indicated that functional immunity does not apply to crimes under international law, regardless of the status and rank of the perpetrator, and that its exclusion is clearly part of international ordinary law. The omission of functional immunity for foreign sovereigns in instances of international crimes is an unquestionable aspect of customary international law.

Unlike the broad immunity *ratione personae* afforded by international law to top State officials like heads of state during their tenure, which shields them from prosecution by foreign States without exceptions, this functional immunity lacks such protection even for crimes under international law. In other words, it does not exempt individuals from accountability for acts whose criminal culpability stems directly from established customary international law. The decision follows a judgment of the German Federal Court of Justice of 28 January 2021⁸ on the

⁷ Bundesgerichtshof [Federal Court of Justice], judgment of 21 February 2024, AK 4/24: “Die allgemeine Funktionsträgerimmunität gilt bei völkerrechtlichen Verbrechen nicht, und zwar unabhängig vom Status und Rang des Täters. Der Ausschluss dieser funktionellen Immunität fremder Hoheitsträger bei Völkerstraftaten gehört zum zweifelsfreien Bestand des Völkergewohnheitsrechts.”

⁸ Bundesgerichtshof [Federal Court of Justice], judgment of 28 January 2021, 3 StR 564/19: “inwieweit eine funktionelle Immunität einer Strafverfolgung allein wegen allgemeiner Straftaten entgegenstünde, wie sie etwa das Oberlandesgericht hinsichtlich der Misshandlung der Gefangenen angenommen hat.” See also

issues of (1) whether it is possible to identify a rule under customary international law that prevents national courts from exercising domestic jurisdiction against State officials for crimes of international law and (2) whether a case of this kind can be declared procedurally inadmissible. There is no standard of international law indicating that jurisdictional immunity can be explicitly waived in the case of an international crime (this will be described in the following subsections), but it is worth pointing out that customary international law must respond to real needs for the protection of personal rights. Consequently, the prosecution of war crimes by national authorities before a national court should not be excluded by functional immunity *sensu stricto* – which certainly includes jurisdictional immunity – if the crime was committed by a State official in the exercise of their official function, i.e. in the context of official acts. Thus, there is no serious doubt about excluding immunity from jurisdiction in this respect, if it is assumed that international crimes are *ultra vires* acts.

2.1. Exclusion of jurisdictional immunity based on Art. 7 on immunity from foreign criminal jurisdiction of State officials

Although the question of *ultra vires* acts, when it comes to immunity *ratione personae*, may arise only after the person concerned no longer holds their position, and from the outset (i.e. whilst still in office) under immunity *ratione materiae*, it is important to determine in which situation the question of jurisdictional immunity applies. On the one hand, it is pointed out that international crimes cannot be effectively distinguished from official acts; on the other hand, their scope is closely linked to the due international protection of legally protected goods. As such, however, immunity from international criminal jurisdiction seems to differ fundamentally from immunity from domestic criminal jurisdiction.⁹ The widely accepted consensus on functional immunity holds that it does not protect State officials from prosecution under universal jurisdiction. However, this consensus has been questioned on a number of occasions, in particular by the German courts. For example, the Higher Regional Court of Koblenz indicated in the Al-Khatib trial that domestic law does not cover the exclusion of functional immunity in the case of war crimes, and that the absence of international law norms for excluding jurisdictional immunity is a procedural condition precluding the initiation and conduct of criminal proceedings.¹⁰

Recently, however, this consensus has also been challenged at the international level. It was also related to the lack of a demonstrable difference between official acts

F. Jeßberger, A. Epik, *Immunität für Völkerrechtsverbrechen vor staatlichen Gerichten – zugleich Besprechung BGH, 2022(1) Juristische Rundschau 10 (2022)*, pp. 12–15.

⁹ UNGA, *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur*, 29 May 2008, A/CN.4/601, available at: <http://www.legal-tools.org/doc/97bd3b/> (accessed 30 August 2024).

¹⁰ Oberlandesgericht Koblenz [Higher Regional Court Koblenz], judgment of 13 January 2022, 1 StE 3/21.

and *ultra vires* acts. This issue was recognised by the ILC and included in its work programme in its Sixth Report on immunity of State officials from foreign criminal jurisdiction, indicating the need to provide exceptions only for immunities *ratione materiae*, as opposed to immunities *ratione personae*.¹¹ The above report was the culmination of the ILC's intensive discussions on the genesis, scope, exceptions and procedures surrounding the issue, including the establishment of the material scope of Art. 7 on State officials' immunity from foreign criminal jurisdiction, confirming the substantive and procedural principles of limitations and exceptions to the granting of jurisdictional immunity. This also represented a kind of culmination of the problems identified by the ILC related to the perceived tendency to consider an international crime an obstacle to the application of jurisdictional immunity.¹² The initial part of the provision delineates six crimes: genocide, crimes against humanity, war crimes, apartheid, torture and enforced disappearances.¹³ According to the subsequent section, officials accused of committing these crimes cannot claim immunity *ratione materiae*. However, concerns arise because the provision only addresses immunity *ratione materiae*, which limits the accountability of officials to acts carried out during their tenure (referred to as official acts). This suggests that functional immunities may not extend to crimes under international law. Consequently, domestic courts may be constrained in prosecuting individuals beyond State's authority, enabling those acting within State power to evade punishment. Nonetheless, immunity *ratione materiae* may persist even for international crimes if it is established that the conduct fell within the State's authority and is not covered by international law. An official's immunity does not necessarily cover unlawful acts, and the gravity of the crime should not affect the official nature of the act.

Although the commission of a crime of an international nature constitutes a serious violation of the universal values of the international community, which are protected by universal jurisdiction, the limitation of Art. 7 only to immunity *ratione materiae* constitutes a legislative error. Besides, such a position would also contradict the view of the ICC Pre-Trial Chamber, which indicated that "immunity of either former or sitting heads of state cannot be invoked to oppose a prosecution by an international court."¹⁴ Immunity *ratione materiae* covers acts committed in

¹¹ Y. Zhong, *Criminal Immunity of State Officials for Core International Crimes Now and in the Future*, 20 Fichl Polity Brief Series 1 (2014), pp. 1–2; UNGA, *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur*, 10 June 2010, A/CN.4/631, p. 32.

¹² UNGA, *Fifth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction by Concepción Escobar Hernández, Special Rapporteur*, 16 June 2016, A/CN.4/701, pp. 24, 34, available at: <https://digitallibrary.un.org/record/863249?v=pdf> (accessed 30 August 2024).

¹³ UNGA, *Sixth Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Concepción Escobar Hernández, Special Rapporteur*, 12 June 2018, A/CN.4/722 with annexes, p. 43, available at: <https://digitallibrary.un.org/record/1636856?v=pdf> (accessed 30 August 2024).

¹⁴ ICC, Corrigendum of 13 December 2011 to the Decision Pursuant to Article 87(7) of the Rome Statute

the performance of official duties and does not cease with the termination of the function. However, in order for a legally protected good to be protected and for a substantive law to be effective, there must be a corresponding procedural law. It is therefore not surprising that “the absence of any procedural [jurisdictional] immunity (...) is an essential corollary of the absence of any substantive immunity or defence”¹⁵ and that procedural (jurisdictional) immunity serves as the foundation upon which other forms of immunity are based.¹⁶ However, such a limitation of jurisdictional immunity in the case of immunity *ratione materiae* must also have grounds in international law. If the procedure in Art. 7 was to be applied, it would be possible for an official to be held liable during their term of office for the listed offences, but the substance of immunity *ratione materiae* cannot be separated from the scope of application of immunity from jurisdiction. It shall be underlined that any immunity of a functional nature, including precisely jurisdictional immunity, must be taken into account under Art. 7. According to the above provision, although a State official could currently be subject to criminal prosecution, it is not possible to initiate and adequately pursue criminal proceedings before a national or foreign court under universal jurisdiction due to the fact that the ILC limited the scope of Art. 7 only to immunity *ratione materiae*, without taking into account jurisdictional immunities. Thus, Art. 7 greatly reduces the authority of third-country courts under the application of universal jurisdiction.

2.2. Jurisdictional immunity in proceedings applying universal jurisdiction

A practical problem arises when national law enforcement authorities apply universal jurisdiction to initiate proceedings. This is because it appears that acts of national law may provide for a procedural condition that stipulates immunity from jurisdiction when the obliged party possesses immunity exempting a given person or act from the jurisdiction of the criminal courts. The norms of criminal law constitute a *lex generali*, whereas the norms of international law constitute a *lex specialis*, so that the current deficiencies in international law – the failure to indicate exceptions to the possibility of raising functional immunities – prevent the proper conduct of

on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, p. 17, para. 36.

¹⁵ Draft Code of Crimes Against the Peace and Security of Mankind, Art. 7, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf (accessed 30 August 2024).

¹⁶ D.S. Koller, *Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgement as it Pertains to the Security Council and the International Criminal Court*, 20(1) American University International Law Review 7 (2004), p. 24.

criminal proceedings within the framework of universal jurisdiction, apart from Art. 7 being limited to a single functional immunity: immunity *ratione materiae*.

However, it is important to point to exceptional behaviour on the part of national courts, which have limited immunity from jurisdiction, by indicating that it is not possible for internationally criminal acts to be the subject of proper criminal proceedings.¹⁷ Such consideration of immunities led to convictions against two then-incumbent leaders of the Forces Démocratiques de Libération du Rwanda.¹⁸ By finding that the acts committed could be classified as *ultra vires*,¹⁹ despite a subject matter scope identical to that of immunity *ratione personae*, the national court had the authority to issue a conviction that did not take jurisdictional immunity into account. Similarly, jurisdictional immunity, as with immunity *ratione personae*, was excluded in the Al-Gharib judgment of aiding and abetting torture and forced imprisonment as crimes against humanity²⁰ and in the conviction for committing genocide against the Yazidis.²¹ Similarly, the German Federal Court of Justice, in its judgment of 28 January 2021, recalled that according to the generally recognised definition reflected in Art. 38(1)(b) of the ICJ Statute, a rule of customary international law is one that is upheld by the uniform practice of a number of States (so-called *usus*) – so that there must be a consistent State practice and *juris opinio* indicating the need to exclude functional immunity – also jurisdictional immuni-

¹⁷ R. Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106(7) *Yale Law Journal* 2009 (1997), pp. 2038–2039.

¹⁸ Oberlandesgericht Stuttgart [Higher Regional Court Stuttgart], judgment of 28 September 2015, 5-3 StE 6/10.

¹⁹ Attributing *ultra vires* acts solely to the State is misguided, given the shift from State culpability to holding individuals accountable. State officials can be held responsible because their actions are distinct from those of the State and because universal jurisdiction provides flexibility. It is questionable to only judge *ultra vires* acts after an official leaves office and faces criminal charges in another State. If the accused claims the acts were official, the other State can challenge this, and the burden of proof falls on the accused. *Ultra vires* acts, not part of official duties, are subject to foreign criminal jurisdiction once the official's immunity ends. Despite Art. 7, the definition of *ultra vires* acts remains unclear, complicating the assessment of whether such acts fall within official duties. Immunity should not shield against legal accountability for *ultra vires* actions, especially when involving international crimes. Legal action is crucial to ensuring accountability. See M. Tomonori, *The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct*, 29(3) *Denver Journal of International Law & Policy* 261 (2001), pp. 261–287; R. Pedretti, *Ultra Vires Action and Individual Criminal Responsibility*, in: R. Pedretti (ed.), *Immunity of Heads of State and State Officials for International Crimes*, Brill, Leiden: 2015, pp. 311–335; P. Gaeta, *Does President Al Bashir Enjoy Immunity from Arrest?*, 7(2) *Journal of International Criminal Justice* 315 (2009), pp. 315–332; N. Boschiero, *The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593*, 13(3) *Journal of International Criminal Justice* 625 (2015), pp. 625–653.

²⁰ Oberlandesgericht Koblenz [Higher Regional Court Koblenz], judgment of 24 February 2012, 1 StE 3/21; Oberlandesgericht Koblenz [Higher Regional Court Koblenz], judgment of 13 January 2022, 1 StE 9/19.

²¹ Oberlandesgericht Frankfurt/Main [Higher Regional Court Frankfurt/Main], judgment of 30 November 2021, 5-3 StE 1/20-4-1/20.

ty – for international crimes.²² A perpetrator raising jurisdictional immunity to a crime of international significance would be a violation of custom and human dignity due to the possibility of simultaneously raising other immunities granted by international custom or international agreements.²³ After all, there is no doubt that the commission of international crimes is not linked to official acts.

Such a position, moreover, enjoys growing support, as is evident in the joint individual opinion in the *Arrest Warrant* case.²⁴ Consequently, it can be pointed out that the exclusion of jurisdictional immunity should be allowed to guarantee that perpetrators do not invoke any deficiencies in proceedings already conducted within universal jurisdiction. In this context, the concern is not the sovereign actions of a foreign State which is not involved in the legal proceedings overall, but rather the personal criminal responsibility of an individual for international crimes committed while representing a foreign State. Without the independent action of national courts in applying universal jurisdiction, this would pose a significant challenge to the justice system. However, the failure to guarantee exemptions from immunity from jurisdiction at the level of international law is currently against the protection of individual rights, and constitutes an abuse of the law.²⁵ It is contrary to the principles of fairness and justice, which lie at the heart of the legal system.

CONCLUSIONS

There is an urgent need for a comprehensive international framework to address jurisdictional immunity that would ensure consistency and justice globally. This framework should regulate the limitation or waiver of immunity for State officials, especially in cases of serious international law violations that affect human rights. *Ultra vires* acts, separate from official State actions, should also be excluded from immunity. However, current legal gaps make it difficult to hold State officials accountable for international crimes. Robust international regulations must be established to regulate the potential limitation or waiver of immunity for persons exercising State functions. Codified international law should clearly state that criminal liability for international crimes cannot be limited. The lack of clear legal norms hinders criminal proceedings under universal jurisdiction. This issue is

²² A. Epik, *No Functional Immunity for Crimes under International Law before Foreign Domestic Courts: An Unequivocal Message from the German Federal Court of Justice*, 19(5) *Journal of International Criminal Justice* 1263 (2021), p. 1269.

²³ See also A. Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 144(10) *European Journal of International Law* 144 (1999), pp. 164–165.

²⁴ ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Rep 2002, at 79.

²⁵ Bundesgerichtshof [Federal Court of Justice], judgment of 18 July 2005, 2 BvR 2236/04. See also Kassationshof [Court of Appeal], judgment of 6 October 2004, 6S.64/2004.

essentially a legal loophole, and it requires attention and possible modification in order to ensure effective enforcement of liability for serious violations of international law. Excluding functional immunity for international crimes is part of customary international law, and Art. 7 should not impede punishment. A *de lege ferenda* proposal is to clearly establish in codified international law that criminal liability for international crimes cannot be limited. The *ultra vires* nature of such acts precludes any limitation of liability. The absence of clear legal norms leads to a lack of international consensus and can obstruct the initiation and due process of criminal proceedings under universal jurisdiction.