NautaDutilh

Supreme Court of the Netherlands
Case number: 22/00753
Date of sitting: 21 October 2022

DRAFT 22 August 2022

1
Written observations
of mrs. F.E. Vermeulen and B.F.L.M. Schim,

in the case:

1. **Benjamin Gantz**, resident in Israel,
2. **Amir Eshel**, resident in Israel,
collectively referred to as '**Israeli officials**',
defendants in appeal to the Supreme Court,
lawyers: F.E. Vermeulen and B.F.L.M. Schim,

against

Ismail Shaban Hassan Ziada,
residing in The Hague,
hereinafter referred to as "**Ziada**",
plaintiff in appeal to the Supreme Court,
lawyer: R.T. Wiegerink.

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Esteemed members of the Supreme Court,

1 INTRODUCTION

1.1 Background

1. The Israeli Officials have been sued before the Dutch civil court in this case in connection with acts allegedly committed by them in their former capacities as Lieutenant General and Chief of the General Staff of the Israeli Army (Mr. Gantz) and Major General and Commander of the Israeli Air Force (Mr. Eshel) respectively. These acts concern a military operation called Operation Protective Edge, which took place in the Gaza Strip in July and August 2014. This operation was authorised by the Government of the State of Israel and carried out by the Israeli army.[1] The objective of this operation was to protect Israeli civilians by putting an end to the intense and continuous rocket attacks that took place from the Gaza Strip towards Israel during that period. In carrying out this operation, the Israeli Air Force carried out an airstrike on a building in Al-Bureij in the Gaza Strip on 20 July 2014, with the aim of eliminating an active command and control centre of the Hamas terrorist organisation. Among others, three military officers and a senior Hamas military official were killed in the airstrike.[2] Close relatives of Ziada were also killed in the airstrike.

2. Before the Dutch court, Ziada claims damages, not from the State of Israel, but from the Israeli Officials. In doing so, Ziada attempts to circumvent the State of Israel's international legal immunity. The State of Israel has issued a diplomatic memorandum to the Dutch government informing it that the actions on which Ziada bases his present claims against the Israeli Officials, were exclusively carried out in their official capacities. The air strike is considered a sovereign act by the State of Israel.[3] The State of Israel has invoked state immunity on behalf of the Israeli Officials. Against this background, the Israeli Officials invoke immunity from jurisdiction in these proceedings. They have done so with understanding and respect for the plaintiff's suffering associated with the loss of his family members. It is beyond dispute that the loss of family members is an extremely tragic and sad event. The defendants in this appeal to the Supreme Court emphasise again that their legal argument maintained before the Supreme Court does not in any way seek to trivialise the loss of Ziada.

[1] Inc. Concl. no. 1.1, 1.2, 1.5 and §§ 3 and 5, Plta EA no. 1.1, MoA no. 2 and 7 and Plta HB no. 1.3.
[2] Inc. Concl. no. 9.228 and Plta HB no. 1.3.
[3] See para. 2.6.

3. The core of the argument of the Israeli Officials has remained unchanged in this appeal to the Supreme Court, i.e. that it is not up to the Dutch court to judge the military actions the State of Israel performed in order to protect its citizens against rocket attacks from Gaza, just like the Israeli court may not enter into an assessment of the military actions of the Netherlands and its military officials in, for instance, Afghanistan, Iraq or the former Yugoslavia. The District Court and the Court of Appeal upheld this argument and found the Israeli officials' reliance on immunity from jurisdiction - their so-called functional immunity[4] - to be well-founded. Both the District Court and the Court of Appeal concluded in well-researched rulings, based on an analysis of international sources, that positive customary international law does not provide an exception to functional immunity in this case.

4. The District Court and the Court of Appeal thereby assumed, only for the purpose of assessing the immunity defence, that there was an international crime involved in carrying out the bombing on 20 July 2014. The two fact-finding judges did not make a decision on this issue. The reasoned contentions put forward by the Israeli Officials to dispute Ziada's allegation of an (international) crime were not addressed by the judges and thus not rejected.[5] Neither did the court nor the Court of Appeal give an opinion on the question whether the Dutch court has jurisdiction, apart from the immunity issue. Ziada based the jurisdiction of the Dutch court on article 9 sub c Dutch Code of Civil Procedure (*forum necessitatis*). The Israeli Officials have disputed with reasons that Ziada cannot go through a judicial process in Israel with sufficient guarantees before an unprejudiced and independent judge.[6] The fact-finding judges did not address these contentions either and therefore did not dismiss them.

5. The appeal to the Supreme Court raises, on essentially the same grounds as in the main proceedings, a question of particular importance. International immunity is regularly raised before the Supreme Court. This is the

Commented [u1]: דבל"א: אנחנו תוהות האם זה משהו שכדאי להעלות, כי בראייתנו האמירה הזו מעט נוקשה ועשויה להתפרש בצורה ביקורתית כלפי הפעילות המבצעית של הולנד. אם זו החלטה סגנונית שלדעת עו"ד בהולנד משהו שיכול לדבר אל ביהמ"ש, אולי אפשר להשאיר, אבל נציע לשקול לוותר.

Commented [DK2R1]: אני נוטה להסכים שכדאי לשקול לוותר. בכל מקרה מציעה להוריד את הדוגמאות בסיפא.

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[4] NB: Since 17 May 2020, so during the proceedings in the appeal, the Respondent 1, Mr Gantz, has held the office of Alternate Prime Minister and Minister for Defence. At the time of writing of these written observations, Mr Gantz ~~no longer~~ holds the ~~former position~~office of Minister for Defence. [check: if we understand correctly, this is currently the case. Please confirm. Is there any likelihood of a change during the Supreme Court proceedings? – Yes, elections will be held in Israel on November 1st. If a new government will be formed, there is a possibility of change in the positions held by Mr. Ganz] In view of the importance of an expeditious and efficient disposition of the present appeal to the Supreme Court as well as procedural economy, these written observations will only deal with the legal issues raised in the fact-finding instances and/or raised by Ziada. It should be emphasized, however, that nothing in these written observations should be construed as an implied or express waiver of any additional immunities from jurisdiction enjoyed by Mr Gantz under applicable international law.

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[5] Inc. Concl. no. 5.10, 9.210, 9.211, 9.228 and 9.229.

[6] Inc. Concl. § 9, Plta EA no. 1.6 to 1.10 and § 3 and MvA no. 105.

first case before the Supreme Court in which an exception to functional immunity is defended in a civil action against *officials of* a foreign power on the basis of the seriousness and nature of the conduct attributed to those foreign officials. As the international sources cited by the District Court and the Court of Appeal already illustrate, in international and foreign national case law, international bodies such as the International Law Commission (hereinafter: "**ILC**" for short) and international professional literature there has been a lot of discussion about this issue for quite some time. The fact that the issue is of special importance does not alter the fact that the answer to the central question is unequivocal: there is actually no ground for an immunity exception, as will be argued. The defendants in appeal to the Supreme Court explain this once again, building to a large extent on the extensively substantiated and documented legal submissions made by the Israeli Officials in both fact-finding instances, to which reference will be made many times.

Commented [DK3]: האם אנחנו רוצים להציג את זה כנושא תקדימי ועקרוני? מציעה לשקול להציג כניסיון לערער על כלל בסיסי במשפט הבינלאומי המנהגי

Commented [IA4]: The ILC has only discussed exceptions to immunity from foriegn criminal jurisdcition. Suggest to find a way to calrify this. Maybe with a footnote.

Commented [DK5]: אני לא בטוחה שמשרת אותנו להציג ככה. מציעה למחוק או לומר ששנוי במחלוקת במקום

1.2 The judgment of the Court of Appeal

6. In the current appeal to the Supreme Court, the judgment of the Court of Appeal of The Hague is submitted for review. The Court of Appeal's reasoning is as follows.

7. The Court of Appeal has taken as its point of departure the judgment of the International Court of Justice (hereinafter, for the sake of brevity: "**ICJ**") in the so-called *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*[7] (hereinafter, for the sake of brevity: the "***Jurisdictional Immunities*** case"). That judgment concerned a civil case against a State. The Court of Appeal correctly stated in paragraphs 3.3 and 3.4 that the ICJ has ruled in that case that even if it is established that war crimes have been committed, there is no exception to the immunity from jurisdiction of the State addressed, and that this is not changed by an appeal to *ius cogens* or by the absence of an alternative course of justice. Apart from the fact that the claim in the present proceedings is directed against officials of the State of Israel in person, the cases are very similar in the opinion of the Court of Appeal. Furthermore, the Court of Appeal has correctly established that the actions of the Israeli army are *de jure imperii*.

Commented [DK6]: מציעה למקד לדמיון בשאלת החסינות

8. Subsequently, the Court of Appeal established in paragraphs 3.5 - 3.7 that the immunity of the State of Israel for these acts extends *de jure imperii* to the Israeli Officials and that the Israeli Officials can invoke functional

[7] ICJ 3 February 2012, https://www.icj-cij.org/en/case/143/judgments

immunity. To this end, the Court established the background and scope of functional immunity. The immunity of officials of a State for acts performed in the exercise of their functions as a rule of customary international law is not in itself disputed. Immunity from jurisdiction of public officials is not for the benefit of those officials, but for the benefit of the State they represent. Functional immunity is therefore a derivative of the immunity of the State itself. The rationale behind functional immunity is thus the same as the rationale behind immunity of the State itself, namely that the courts of one State should not judge the actions of another State (*par in parem non habet imperium*). If Ziada's statement that the bombing of his family's house was a war crime is found to be correct, this would not only have important legal consequences for the Israeli Officials but also for the State of Israel, to whom the actions of the Israeli Officials should be attributed, according to the Court. The Court of Appeal also notes that the foreign State, whose (high-ranking) officials in the Netherlands are involved in civil proceedings, may very well feel compelled to assist these officials in their defence and to bear the costs thereof. That would also be contrary to the principle that the State enjoys immunity from jurisdiction.

Commented [DK7]: מציעה להשמיט לאורך הטקסט או לכל הפחות לציין שאנו סבורים שהאבחנה אינה נדרשת בפעם הראשונה שמוזכרת או בקשר לפסק הדין של ה-BGH

9. The next step in the reasoning of the Court of Appeal is the rejection in paragraphs 3.8 - 3.17 of Ziada's argument that in civil cases an exception to immunity of (former) government officials must be made in the case of war crimes and crimes against humanity. In this context, the Court extensively discussed case law of the ECHR, including the cases *Jones and Others v. UK* and *J.C. and Others v. Belgium*.[8] Furthermore, the Court of Appeal has discussed foreign case law, including the judgment of the House of Lords in the case that gave rise to *Jones et al. v. UK*, and judgments of the High Court of New Zealand, the Supreme Court of Canada, various US Courts of Appeals and a judgment of the US District Court for the District of Columbia. Based on these rulings, the court concludes that they do not support an exception as argued by Ziada. The Court of Appeal also discussed judgments of the Seoul Central District Court, the District Court of The Hague,[9] and the Italian Constitutional Court, which Ziada relied upon. However, in the opinion of the court, the authority of these judgments is limited and they do not provide evidence of state practice. Finally, the Court looked at international sources: judgments of the Yugoslavia Tribunal, work of the ILC, the point of view of the Dutch government on the trial of international crimes against the ILC, as well as the practice of the Public Prosecution Service to prosecute

Commented [DK8]: כנ"ל

[8] ECHR 2 June 2014, cases 34356/06 and 40528/06 (*Jones and Others v. UK*) and ECHR 12 October 2021, no. 11625/17 (*J.C. and Others v. Belgium*).
[9] District Court of The Hague 21 March 2012, ECLI:NL:RBSGR:2012:BV9748.

international war crimes in the Netherlands. However, these are sources that relate to criminal law and the Court of Appeal does not consider them decisive for the question at issue in these proceedings, namely whether immunity from jurisdiction can be claimed in a civil law case.

10. The conclusion of the Court of Appeal from the above is that in the vast majority of cases the case law in civil cases does not recognise an exception to (functional) immunity for international crimes. Against this background, there is insufficient reason to look to criminal law for the scope of this rule in civil-law cases. The Court of Appeal adds that this is not altered by the fact that a distinction between civil cases and criminal cases may not be considered satisfactory in all respects from a legal systematic point of view, for instance because certain legal systems provide for the possibility to also bring a claim for damages in a criminal case. What matters most for the interpretation of customary international law is what judges decide in practice.

11. For the sake of completeness - after all, according to the Court of Appeal there is no reason to look to criminal law - the Court of Appeal in paragraphs 3.18 and 3.19 superfluously discussed case law and other sources of international law in which a relevant difference between criminal and civil law was explicitly recognised. The Court of Appeal has ruled that also in its opinion a distinction is justified. In this context, in paragraphs 3.20 and 3.21 the Court explicitly rejected some of Ziada's arguments.

12. As a final step in its reasoning, the Court of Appeal rejected in paragraph 3.22 Ziada's argument that recognition of functional immunity of the Israeli Officials constitutes a disproportionate restriction of his right to effective access to justice guaranteed by Article 6 of the ECHR. In doing so, the Court of Appeal referred to the judgment of the ECHR in *Jones and Others v. UK*, from which it follows, according to the Court of Appeal, that since functional immunity is a clear rule of customary international law, a successful reliance on that immunity does not constitute an impermissible restriction on Article 6 of the ECHR and that, furthermore, no separate weighing of interests needs to take place. Furthermore, the Court of Appeal considered that the question whether an alternative remedy is available to the plaintiff does not play a role in the question whether a government official enjoys functional immunity from jurisdiction. In this respect the court of appeal referred to the *Jurisdictional Immunities* judgment of the ICJ and the judgments *Jones and Others v. UK* and *J.C. and Others v. Belgium* of the ECHR.

13. All this leads the Court of Appeal in paragraph 3.23 to the conclusion that there is no reasonable doubt - and therefore no question of a 'grey area' - that customary international law implies that in civil proceedings against a government official no exception to functional immunity should be made because of the seriousness of the facts on which the claim is based.

1.3 The appeal to the Supreme Court fails

14. The Court of Appeal could not come to any other conclusion. The absence of both a general state practice and *opinio juris* to support an exception to functional immunity of public officials can only lead to the conclusion that customary international law does not recognise such an exception. As at first instance and on appeal, in the current appeal to the Supreme Court, Ziada does not bring forward anything that would constitute evidence of either the legally required general state practice or the required *opinio juris*. In fact, Ziada wants the Supreme Court to ignore the absence of a general state practice and *opinio juris* under the guise of a 'task in developing the law' of the national courts, against the background of 'a development' in international law to take functional immunity less strictly in criminal cases.[10] Both at first instance and on appeal, Ziada thereby abandons positive law and the firmly entrenched methodology for establishing the rules and the content of customary international law: customary international law does not know any 'grey area' in relation to functional immunity that the national court may use by forming the law itself (cf. subsection 3.8[11]).

15. ~~The Court of Appeal rightly did not take upon itself the "task in developing the law" as envisaged by Ziada.~~ The Court of Appeal has correctly stated - not challenged before the Supreme Court - that for the interpretation of customary international law (in the words of the Court of Appeal) it matters first and foremost what judges decide in practice. The practice of judges, together with all other available sources, make it clear that customary international law as it currently stands does not recognise an exception to functional immunity of (former) government officials on the basis of the gravity of the alleged conduct - and certainly not in civil cases. All things considered, Ziada's reference to a task of national courts in developing the law and his reference to "a development" in international law implicitly recognises this as well.

Commented [u9]: דבל"א: אנחנו מציעות למחוק את המשפט הזה. הוא מעט חזרתי עם האמור לעיל ונחרץ מידי לדעתנו.
תיאורטית, ביהמ"ש העליון עשוי להחליט שהוא רוצה לקחת חלק בפיתוח הדין ולייצר פרקטיקה שסוטה מהפרקטיקה הקיימת ולהתיר חריג לחסינות. לדעתנו לא כדאי "להחליט" בשביל ביהמ"ש העליון האם ביהמ"ש לערעורים פעל נכונה או שלא בהקשר הזה, ונכון יותר פשוט להיצמד למה שקבע ביהמ"ש לערעורים בפועל, שהוא טוב לנו כשלעצמו, כפי שהדברים מובאים בהמשך הפסקה. ממילא בהמשך, בפס' 34 ואילך, אנחנו מסבירים בצורה מפורטת וטובה מדוע פיתוח הדין כמוצע ע"י זיאדה הוא ככלל לא "task" שביהמ"ש אמור לקחת על עצמו.

[10] See in particular part 1.
[11] Yours truly, Nos 22 to 39.

16. Ziada's appeal to the Supreme Court therefore fails. The Israeli Officials explain this in more detail below. As stated above, they will do this in line with the already extensively substantiated and documented legal submissions in both instances of fact, on which their Supreme Court defence builds.

1.4 Reading guide; two routes for dismissal

17. Since Ziada's grounds of appeal open in section 1 with complaints relating to the methodology for determining customary international law, the Israeli Officials address this topic first in Chapter 2~~22~~ first. The central contention of the Israeli Officials is that the national court does not have the task of developing customary international law as envisaged by Ziada.

Commented [DK10]: מציעה להימנע מאמירה חד משמעית שאין להם תפקיד, ולהציג בצורה פוזיטיבית שעליהם להתבסס על פרקטיקה ומחויבות משפטית ולא על דין רצוי כפי שמוצג בסעיף 35

18. Sections 2 and 3 rest (largely) on the premise that an exception to functional immunity of public officials as referred to is indeed accepted in criminal cases and argue that this line should be extended from criminal law to civil law. The Israeli Officials explain in Chapter 3~~33~~ that customary international law - if its content is correctly determined in accordance with the applicable methodology - does not know an exception that would prevent a successful reliance on functional immunity in this case.

19. The Israeli Officials *first of all* argue that the prevailing positive customary international law does not have any exception at all as advocated by Ziada, neither in criminal nor in civil cases. This is explained in § 3.2~~3.23.2~~. With this, the Israeli Officials agree with the approach taken by the District Court. After analysing the available sources, and in particular the work of the ILC in the context of the Draft Articles on Immunity of State officials from Foreign Criminal Jurisdiction, the District Court concluded in its judgment that under customary international law, no limitation of functional immunity from jurisdiction is accepted in the adjudication of international crimes by national courts (para. 4.48). In the absence of a sufficiently crystallized rule of customary international law in the adjudication of international crimes by national courts, there can be no question of any extension or application by analogy in civil cases (para. 4.51). This means that the Israeli Officials may invoke their functional immunity (para. 4.55).

20. *Secondly,* according to the Israeli Officials, an exception as referred to does not apply in any case in civil cases, which is explained in §

3.33.33.3. In this respect it could be left open whether in criminal cases an exception is made to the functional immunity of government officials of foreign states, because in any case such an exception does not apply in civil cases. The Court of Appeal followed this route in the judgment currently under appeal, by ruling in paragraph 3.17 that in the vast majority of cases the case law in civil cases does not accept an exception to (functional) immunity of government officials for international crimes. Against this background, in the opinion of the Court of Appeal there is insufficient reason to look to criminal law for the scope of this rule in civil cases. In addition, the Court of Appeal added in paragraphs 3.17, 3.18 and 3.19 that there are sources that make a relevant distinction between criminal cases and civil cases.

21. This gives the Supreme Court two routes through which it can dismiss this case. The Supreme Court may agree with the District Court that in general no exception applies as argued by Ziada, in which case the premise of sections 2 and 3 is already unsound. The Supreme Court may, like the Court of Appeal, also leave this question open and rule that in any case no exception applies in civil cases. Also in that case the appeal to the Supreme Court will fail.

22. In connection with the possibility of relying on functional immunity, it is also relevant that the Court of Appeal held that, when assessing whether a reliance on functional immunity is successful, no significance is attached to the question of whether Ziada has access to an alternative forum in which he can bring his claim. This judgment is also challenged by Ziada in the current appeal to the Supreme Court. The Israeli Officials briefly explain in § 3.43.43.4 that the Court of Appeal's judgment is correct.

23. The Israeli Officials briefly discuss article 6 ECHR in Chapter 4. Both the District Court and the Court of Appeal ruled on good grounds that the successful reliance by the Israeli Officials on their functional immunity does not violate Article 6 ECHR. In his appeal to the Supreme Court, Ziada raises this point again (especially subsection 3.5).

24. In Chapter 555, the Israeli Officials briefly address the individual complaints as far as necessary.

2 DETERMINATION OF CUSTOMARY INTERNATIONAL LAW

25. The Israeli Officials address the method of identifying a rule of customary international law and its content. Section 1 addresses this issue

and accuses the Court of Appeal of misunderstanding its task in the formation of customary international law. Section 1 is based on an error of law concerning the method of identifying customary international law.

26. In factual instances, the Israeli Officials referred to expert opinions of Sir Michael Wood and G.R. den Dekker.[12] The Israeli Officials refer (in the footnotes) to those opinions as "**Opinion MW 1**", "**Opinion MW 2**" and "**Opinion MW 3**", respectively "**Opinion GRD 1**" and "**Opinion GRD 2**". These opinions set out, with many references, how national courts should proceed under international law in determining customary international law. Section 1 invites a reflection on this methodology.

2.1 Methodology: establishing general state practice and *opinio juris*

27. Article 38(1) of the Statute of the ICJ is often taken as the starting point. This provision reads:

> "1 The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

28. Under b., this provision expresses that the existence of a rule of common law presupposes the presence of two elements: *general practice*, which is *accepted as law*. These two elements are referred to in the remainder of this written explanation as general state practice and *opinio juris*.

29. The case law of the ICJ confirms that both the element of a general state practice and the element of *opinio juris* must be present in order to speak of a rule of positive customary law:[13]

> "It follows that the Court must determine, in accordance with Article 38 (1) (b) of its Statute, the existence of "international custom, as evidence of a general practice accepted as law" conferring immunity on States and, if so, what is the

[12] Productions I-8, I-12 and I-13, respectively I-7 and I-11.
[13] *Jurisdictional immunities* case, para. 55.

scope and extent of that immunity. To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular, as the Court made clear in the North Sea Continental Shelf cases, the existence of a rule of customary international law requires that there be "a settled practice" together with opinio juris [...]."

and:[14]

"The essential point in this connection - and it seems necessary to stress it - is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the opinio juris; - for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."

30. This two-element approach is widely supported in the international community.[15] In particular the Draft Conclusions on Identification of Customary International Law (hereinafter, for the sake of brevity, "**DCICIL**") of the ILC should be noted.[16] The DCICIL concern the means of identifying the existence and content of a rule of customary international law.[17] They were adopted, with commentary, by the ILC at its 70th session in 2018 and adopted by the United Nations General Assembly by resolution of 20 December 2018. Conclusion 2 DCICIL reads:

"Conclusion 2
Two constituent elements
To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as

[14] *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, ICJ 20 February 1969, from paragraph 77, https://www.icj-cij.org/public/files/case-related/52/052-19690220-JUD-01-00-EN.pdf
[15] Opinion MW 1, p. 4. et seq. with reference to case law and literature.
[16] Downloadable under https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf and with comment under https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf .
[17] DCICIL, Conclusion 1.

law (opinio juris)."

31. The commentary to this conclusion states:

"(1) [...] the identification of a rule of customary international law requires an inquiry into two distinct, yet related, questions: whether there is a general practice, and whether such general practice is accepted as law (that is, accompanied by opinio juris). In other words, one must look at what States actually do and seek to determine whether they recognize an obligation or a right to act in that way. This methodology, the "two-element approach", underlies the draft conclusions and is widely supported by States, in case law, and in scholarly writings. It serves to ensure that the exercise of identifying rules of customary international law results in determining only such rules as actually exist. [...]
(2) [...] To establish that a claim concerning the existence or the content of a rule of customary international law is well-founded thus entails a search for a practice that has gained such acceptance among States that it may be considered to be the expression of a legal right or obligation [...].
(3) [...] Where the existence of a general practice accepted as law cannot be established, the conclusion will be that the alleged rule of customary international law does not exist. [...]
(4) [...] the presence of only one constituent element does not suffice for the identification of a rule of customary international law. Practice without acceptance as law (opinio juris), even if widespread and consistent, can be no more than a non-binding usage, while a belief that something is (or ought to be) the law unsupported by practice is mere aspiration; it is the two together that establish the existence of a rule of customary international law. [...]"

32. The answer to the question whether a certain rule of customary international law exists and what its content is, depends on the existence of a general state practice and *opinio juris*. The answer to that question should therefore not be based on notions of what would be desirable law, nor on considerations of a political, socio-economic or legal-systemic nature, for example.[18] The methodology to be followed in law aims at ensuring: "that the exercise of identifying rules of customary international law results in determining only such rules as actually exist." The commentary to conclusion 3 DCICIL also urges caution and care in this regard: "the assessment of any and all available evidence must be careful and contextual. Whether a general practice that is accepted as law (accompanied by opinio juris) exists must be carefully investigated in each case, in the light of the relevant circumstances." The commentary to the DCICIL stresses the importance that the methodology for identifying a rule of customary

[18] Opinion MW 1, p. 4, with reference to sources.

international law is correctly applied, as "a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination as well as that of customary international law more broadly".[19] This importance of credibility and acceptability is essential to customary international law.

33. As noted in the commentary on conclusion 2, the two-element approach enjoys broad international support among states, in international and national case law and in authoritative literature.[20] This broad support among states is already evident, for example, from the support for the DCICIL in the General Assembly. In the Netherlands, too, there is broad support for the two-part test method.[21] The Advisory Committee on International Law (Commissie van Advies inzake Volkenrechtelijke Vraagstukken), for example, wrote in response to the draft of the DCICIL that "this inductive form of legal discovery clearly deserves to be given priority, also in the opinion of the CAVV".[22] According to its reaction to the advice of the CAVV[23] and the response of the Netherlands to the draft of DCICIL,[24], the Dutch government seems to be ~~is~~ of the same opinion.

Commented [IA11]: Suggest to be more careful about experssing the views of the Dutch government.

2.2 National courts cannot develop ~~has no task in developing~~ customary international law without sufficient opinio juris and state practice

Commented [IA12]: Maybe a translation issue, but it seems like overly strong wording.

Commented [u13]: דבל"א: אנחנו דווקא חשבנו שהניסוח המקורי עדיף, הוא מספיק עמום, ומאפשר מקום ליציקת תוכן בהמשך בשאלה מה אנחנו סבורים שתפקידו של ביהמ"ש בפיתוח הדין המנהגי.

Commented [DK14R13]: מסכימה עם יעחו"ק שהכותרת נחרצת מדי ושאין מקום לאמירה חד משמעית שאין להם תפקיד. אפשר גם כותרת כללית המתייחסת לתפקיד בתי המשפט בפיתוח המשב"ל מכיוון שבהמשך מסבירים מה אנו סבורים שתפקידו בהקשר זה.

34. Section 1 argues that national courts have a distinct task in the development of customary international law and that a change in customary international law is effected by one national court starting and others following. Section 1 is based on a fundamentally incorrect understanding of law concerning the role of national courts and tribunals in the development of customary international law.[25]

35. It is not controversial that national case law is, as Conclusions 5 and 6 DCICIL underline, one of the many sources for a general state practice, and according to Conclusion 10 DCICIL also one of the many sources for the existence of *opinio juris*. Judgments such as, for example, the judgment of the ICJ in *Jurisdictional Immunities* illustrate this.[26] However,

[19] Commentary by DCICIL, general commentary under (2). Cf. Opinion MW 1, p. 15.
[20] Opinion MW 1, p. 4. et seq. with reference to case law and literature.
[21] CAVV, *Opinion on the identification of customary international law*, 2019, p. 5, Kooijmans/Brus et al, *Public International Law in a Snapshot*, § 2.1.
[22] See its opinion, p. 5.
[23] *Parliamentary Papers II*, 2017-2018, 34 775 V, no. 51.
[24] https://legal.un.org/ilc/sessions/70/pdfs/english/icil_netherlands.pdf.
[25] The Israeli Officials pointed this out in MoA § B.I. (especially from no. 29 onwards). See also Opinion MW 2, p. 3-6.
[26] *Jurisdictional immunities* case par. 81 ff.

this does not alter the fact that the judicial opinion on the existence and content of the relevant rule of customary international law must be based on the general state practice and *opinio juris* as they exist at that time. The national court may not, ignoring the status quo, base its judgment on the content of customary international law on its own considerations of what would be a desirable development of that customary law.

36. In this connection, it should also be borne in mind that the case law of national courts is one of the many sources from which the status quo as it exists at any given time must be deduced, as is evident from Conclusions 5, 6 and 10 DCICIL. In addition to case law, the following are sources of state practice: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts. In assessing the *opinio juris*, relevant sources of information include, in addition to case law, "public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; treaty provisions; and conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference."

37. It should be added that the Dutch Government, in response to the opinion of the CAVV on the draft DCICIL, observed that the judgments of national courts may play a role in the identification of *opinio juris* when such judgments are not overruled by the executive. Thus, the Government is seemingly making an essential nuance here: a particular ruling of a national court is not significant for the identification of customary international law if the executive has overruled that ruling. Furthermore, the government notes, as does the CAVV, that one should beware of placing too much emphasis on national case law as relevant form or evidence.[27]

~~38.~~ The simple way as envisaged by Section 1 in which a national court could initiate a legal development in customary international law, independently or even against existing customary international law, fails to take account of the foregoing and would inevitably put pressure on the system of customary international law and the acceptability of customary international law to states that is served by this system. It also inevitably entails the risk of violating international law. For example, if a national court, under the guise of developing the law, accepts a certain rule of cus-

[27] *Parliamentary Papers II*, 2017-2018, 34 775 V, no. 51, p. 3.

tomary international law where, taking into account the relevant evidence, there is no general state practice and/or *opinio juris*, this court has simply violated binding customary international law. ~~This not only means a significant risk of embarrassing the state or straining diplomatic relations between states, but also means that the state in question is liable under international law for a breach of international law.~~

38.

39. It is against the background of possible 'political problems' and other potential implications ~~a possible liability towards a foreign state~~ that an explicit reference to Section 13a of the General Provisions Act has been included in Article 1 of the Dutch Code of Civil Procedure, with the intention of drawing the attention of the person applying the law more emphatically to the existence of international law immunities from jurisdiction.[28]

40. There could be risks associated with a national court holding which is not in line with customary international law. ~~risk of liability is not merely theoretical or imaginary~~. On 29 April 2022, Germany brought an action before the ICJ against Italy for breach of Germany's state immunity, including a demand for monetary reparations for any related damages .[29] This claim is an extension of the ICJ's ruling in the *Jurisdictional Immunities* case. In spite of this ruling by the ICJ, the Italian judiciary has maintained that Germany cannot invoke state immunity in civil cases related to World War II events and Italian judges have accepted jurisdiction in spite of Germany's invocation of state immunity.[30] Germany is holding Italy liable for all the damage it has suffered and will continue to suffer as a result of Italy's breach of customary international law.

41. Subsection 1.1 erroneously argues that if a national court had no task in the development of customary international law as advocated by Ziada, customary international law would be static and new customary international law could never arise. Legal development is indeed possible, albeit that a rule of positive customary international law can only be said to exist once a general state practice and *opinio juris* have developed. This development can and will often have to first come from other state bodies than the judiciary. For example, governments can initiate a development

Commented [IA15]: Does not seem to be neccassry. We would not want other states to argue that beacuse an Israeli court ruled against CIL this means that Israel violated CIL and is exposed to liability for a breach of international law.

Commented [DK16R15]: וד התייחס לזה בחוות הדעת הראשונה. אולי אפשר להסתמך על הנוסח שם או רק להפנות אליו .

Failure by the courts of the forum State to give effect to the immunity from civil jurisdiction of foreign State officials or former officials, and to do so *in limine litis*, is an internationally wrongful act which gives rise to the international responsibility of the forum State

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[28] HR 1 December, 2017, ECLI:NL:HR:2017:3054, *NJ* 2019/137 (*Republic of Iraq & Central Bank of Iraq/X.*), with reference to *Parliamentary Papers II* 2008-2009, 32 021, no. 3, p. 39.

[29] Germany's application can be downloaded from https://www.icj-cij.org/public/files/case-related/183/183-20220429-APP-01-00-EN.pdf (for the reparations claim see para 434(5)). The application for interim relief has been withdrawn.

[30] In addition, attachment of certain assets of the Federal Republic of Germany has been authorised by some Italian courts.

of the law by their conduct and statements. States can also bind themselves to a certain rule by means of treaties, and if that rule is widely supported by states (e.g. by acceding to it or expressing support for it), a general state practice and *opinio juris* can develop. The two element test may mean that in some cases it is not easy and may take some time for a particular customary international law rule to be recognised as such, but that is inherent to customary international law. Customary international law governs the legal relations between states and must be acceptable to states, which is why the two element test exists.

42. Certainly where the rules of state immunity of jurisdiction are concerned - functional immunity of state officials is a form of state immunity - it is of great importance that its determination is made with methodologically correct application of the two element test, because of the legitimacy and acceptability to other states of that determination. State immunity is a fundamental rule of international law, as explained in more detail in § 3.13.13.1. A judgment on the scope of state immunity, including whether or not a particular exception applies under customary international law, necessarily involves a judgment on the extent of state sovereignty and the sovereign equality of states.

43. The question of customary international law, which is central to this case, differs fundamentally from a case like Urgenda.[31] In Urgenda, the starting point is that the ECHR fundamentally asks for an 'evolving interpretation' of the human rights convention as a 'living instrument' on the one hand, and an interpretation based on international integration on the other. This interpretation is coherent with public international law. In legal literature, especially from a constitutional perspective, the so-called reflex effect of non-binding international soft law applied in Urgenda has been criticised. Much can be said about this, but for this case it suffices to state that the establishment of customary international law is, for the reasons stated above, of a completely different order, because it takes place in a substantially different public international law context.

Commented [u17]: דבל"א: למיטב בדיקתנו, קייס זה לא מופיע בכתב הטענות של זיאדה, בכתב ההגנה שלנו לערכאת הערעורים, או בפסיקה בערכאת הערעורים. להבנתנו המטרה העיקרית של הפסקה היא לאפשר לביהמ"ש לאבחן בין "פרשנות מתפתחת" (לגיטימית) שנובעת מכך שדברי חקיקה הם מסמכים נושמים, לבין פיתוח פרוגרסיבי של המשפט המנהגי, שזה לא משהו שאמור לקרות באופן שמוצע ע"י זיאדה - אך נציע לחדד מעט יותר את האבחנה שמבקשים לבצע, משום שאחרת הרלוונטיות של הפסקה לא מאוד ברורה.

3 NO EXCEPTION TO FUNCTIONAL IMMUNITY ON ACCOUNT OF SERIOUSNESS OF THE ALLEGED CONDUCT

3.1 State immunity and functional immunity

3.1.1 State immunity; background and scope

[31] HR 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41.

44. The functional immunity of public officials (immunity *ratione materiae*) is the central issue in this case. This doctrine is part of state immunity from jurisdiction and must be seen against that background.

45. The rule that a state has no jurisdiction over another state in respect of its *acta jure imperii* has long been accepted in the international community.[32] This rule tends to be seen as a corollary to the principles of state sovereignty and equality of states, which are fundamental to international law: *par in parem non habet imperium*. As such, the doctrine of state immunity is fundamental to relations between states. Reference is made to Opinion MW 1, p. 8 ff. and Opinion GRD 1, p. 3 ff.[33] The ICJ considered in the *Jurisdictional immunities* case:[34]

> "The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. [...] Exceptions to the immunity of the State represent a departure from the principle of sovereign equality."

46. The ECHR has also repeatedly ruled along these lines.[35] State immunity as a rule of customary international law is also expressed, for example, in the preamble of the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004 (the "**UN Convention**"):[36]

> "The jurisdictional immunities of States and their property are generally accepted as a principle of customary international law".

47. In line with the broad general practice of states and *opinio juris* on this point, the Supreme Court has repeatedly held that the right of states to

[32] See e.g. P. Guggenheim, *Lehrbuch des Völkerrechts*, Basel: Verlag für Recht und Gesellschaft, 1948, Band 1, p. 171 and H. Kelsen/R. W. Tucker, *Principles of International Law*, New York: Rinehart and Winston Holt, 1966, p. 357.

[33] See further a.o. CAVV, *Opinion on the United Nations Convention on Jurisdictional Immunities of States and their Property*, p. 2 and 3, J. Crawford, *Brownlie's Principles of Public International Law*, Oxford: Oxford University Press, 8th edition, 2012, p. 448-449, R. Higgins, 'Equality of States and Immunity from Suit: A Complex Relationship', J. E. Nijman & W. G. Werner (ed.), *Netherlands Yearbook of International Law* 2012, § 6.1 and R. Pedretti, *Immunity of Heads of State and State Officials for International Crimes*, Leiden: Brill Nijhoff, 2014, p. 7.

[34] ICJ 3 February 2012, para. 57.

[35] ECHR 2 June 2014, cases 34356/06 and 40528/06 (*Jones and Others v. UK*), with reference to ECHR 21 November 2001, no. 31253/96 (*McElhinney v. Ireland*), ECHR 21 November 2001, no. 37112/97 (*Fogarty t. UK*), ECHR 12 December 2002, no. 59021/00 (*Kalogeropoulou and Others v. Greece & Germany*), ECHR 23 March 2010, no. 15869/02 (*Cudak v. Lithuania*) and ECHR 29 June 2011, no. 34869/05 (*Sabeh El Leil v. France*). See also and ECHR 12 October 2021, no. 11625/17 (*J.C. et al. v. Belgium*).

[36] This Convention in not yet in force but some of its basic principles can be considered as reflective of wide-spread international practice.

immunity from jurisdiction - when it comes to the typically public acts of states (the so-called '*acta iure imperii*') - is part of customary international law.[37]

48. The purpose of the immunity enjoyed by a state is to prevent it from being subjected to proceedings, and thus to an assessment of its actions, by the courts of another state. The very fact of being subjected to proceedings before a foreign court affects the sovereignty of a state and the equality of states: one state should not judge the actions of another. The ICJ expressed it this way in the *Jurisdictional Immunities* case:[38]

"Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process."

49. Furthermore, the background to and scope of state immunity means that a successful reliance on it requires the national court to decline jurisdiction. Thus it is an obligation under customary international law for a national court to decline jurisdiction. According to Dutch law, Cf. Articles 5 and 6 of the UN Convention, ~~which~~ are ~~must be regarded as~~ a reflection of customary international law in this respect.[39] As a rule of Dutch law, article 13a of the General Provisions Act explicitly provides in this respect that the jurisdiction of the court is limited by the exceptions recognised in international law.

Commented [IA18]: As noted above, for Israel some of the exceptions to immunity under this Convention are not considered as CIL. Accrodingly, the general assertion that these “must be CIL” would not be in line with our positions in Israeli courts.

50. It follows that the question of state immunity is not a substantive question of law, but a procedural question.[40] It concerns the *jurisdiction* of the national court and does not relate to the substance of the case. This is how the ICJ ruled in the *Warrant* case *(Democratic Republic of the Congo v. Belgium)* of 14 February 2002 (regarding immunity *ratione personae*):[41]

Commented [DK19]: מציעה לשקול להוריד את הדוגמא להערת שוליים, היות ומתייחסת לחסינות פרסונלית בהליך פלילי

"The immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they

[37] Cf. HR 26 October 1973, *NJ* 1974/361, HR 22 December 1989, *NJ* 1991/70 (*Van der Hulst/VS*), HR 25 November 1994, ECLI:NL:HR:1994:ZC1554, *NJ* 1995/650 (*Morocco/Trappenberg*) and HR 1 December 2017, ECLI:NL:HR:2017:3054, *NJ* 2019/137.

[38] ICJ 3 February 2008, para. 82.

[39] The Supreme Court has accepted that some provisions of the UN Convention reflect applicable customary international law. See HR 28 June 2013, ECLI:NL:HR:2013:45, *NJ* 2014/453, HR 30 September 2016, ECLI:NL:HR:2016:2236, *NJ* 2017/190, HR 1 December, 2017, ECLI:NL:HR:2017:3054, *NJ* 2019/137 and HR 15 July 2022, ECLI:NL:HR:2022:1084.

[40] Opinion MW 1, p. 12 and Opinion GRD 1, p. 5. See also, among others, P.D. Mora, 'The Immunities of State Officials in Civil Proceedings Involving Allegations of Tortur'e, *Austl. INT'l L.J.* 2017, p. 30, I. Wuerth, 'Pinochet's Legacy Reassessed', *AM. J. INT'l L.* 2012, p. 740 and Z. Douglas, 'State Immunity for the Acts of State Officials', *British Yearbook of International Law* 2012, p. 283.

[41] https://www.icj-cij.org/en/case/121/judgments, para. 60. Similarly, ECHR 21 November 2001, no. 31253/96 (*McElhinney v. Ireland*), ECHR 21 November 2001, no. 35763/96 (*Al-Adsani v. UK*), ECHR 21 November 2001, no. 37112/97 (*Fogarty v. UK*) and ECHR 12 October 2021, no. 11625/17 (*J.C. c.s. v. Belgium*).

might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While
Jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

And in the *Jurisdictional Immunities* case:[42]

"the law of immunity is essentially procedural in nature [...]. It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful. [...]
The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. [...] recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a ius cogens rule, or rendering aid and assistance in maintaining that situation [...]. "

3.1.2 Functional immunity; immunity on behalf of the State

51. A necessary component (or as the Court of Appeal puts it in paragraph 3.7, a corollary) of State immunity is the functional immunity of public officials (immunity *ratione materiae*). The immunity of public officials means that a state has no jurisdiction to judge the actions of a (former) public official of another state when it concerns actions that are attributable to that other state as *acta iure imperii*. The immunity from jurisdiction of a state for *acta iure imperii* thus extends to its public officials who perform the acts in question on behalf of the state. It follows that, in such cases, the national court must also decline jurisdiction in respect of the foreign state's public servant.

52. This form of immunity is a necessary component (or a necessary corollary) of state immunity, since the only way for a state to act is for individuals to act on its behalf.[43] If this form of immunity were not accepted,

[42] Par. 58 and 93.
[43] Opinion MW 1, p. 10 and Opinion GRD 1, p. 3 and 4. Cf. X. Yang, *State Immunity in International Law*, Cambridge 2012, p. 433: "As far as current law on State immunity is concerned, it is generally accepted that, where a State enjoys immunity, then that immunity extends to its officials, if they have acted with the authority

state immunity could be circumvented quite easily by holding officials of the state concerned liable. The Court of Appeal has correctly recognised this in paragraphs 3.6 and 3.7. In the case *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* of 4 June 2008[44] the ICJ has implicitly acknowledged the existence of functional immunity. The ECHR has explicitly recognised this form of immunity in *Jones et al. v. UK*:[45]

"Since an act cannot be carried out by a State itself but only by individuals acting on the State's behalf, where immunity can be invoked by the State then the starting-point must be that immunity ratione materiae applies to the acts of State officials. If it were otherwise, State immunity could always be circumvented by suing named officials."

53. The Commentary to the Draft Articles on Jurisdictional Immunities of States and Their Property, Article 2(1)(b)(v) - which corresponds to Article 2(1)(b)(iv) of the UN Convention - notes:[46]

"Proceedings may be instituted, not only against the government departments or offices concerned, but also against their directors or permanent representatives in

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of the State. [...] It now appears generally established that officials acting in their official capacity or in the course of their duties are to be entitled to the same immunity as the States they represent, since their acts are treated as the public/sovereign/governmental acts of the State. Such immunity also extends to individuals and institutions who act at the request of a foreign State in situations where that State would enjoy immunity [...]', H. Fox & P. Webb, *The Law of State Immunity*, Oxford: Oxford University Press, 2015, p. [...]: 'Immunity ratione materiae, also known as functional immunity, attaches to a person who acts on behalf of a State in relation to conduct performed in their official capacity. This immunity extends beyond the period in which they were exercising their functions. Former officials can invoke this immunity with respect to their official acts performed while in office. As discussed above, former Heads of State and other high-ranking officials who benefit from immunity ratione personae while in their post can claim immunity ratione materiae once they leave office. It is generally accepted that immunity ratione materiae applies to State officials, regardless of their position in the State hierarchy', C. Wickremasinghe, in: M.D. Evans (ed.), *International Law*, Oxford: Oxford University Press, 2018 p. 366: '[...] under the doctrine of State immunity, in principle all State officials (and former State officials) enjoy immunity ratione materiae from foreign jurisdiction for their official acts. The rationale for this is that a State as an entity can only act through the agency of individuals working on its behalf. The official acts of those individuals can engage the international responsibility of the State, and they can only be challenged in a way that is consistent with international law. In broad terms a national court of one State is therefore precluded from adjudicating the official acts of State officials of another State' and C. Keitner, 'Immunities of Foreign Officials from Civil Jurisdiction', in: T. Ruys, N. Angelet & L. Ferro (ed.), *The Cambridge Hand-book of Immunities and International Law*, Cambridge: Cambridge University Press, 2019, p. 526 "The basic proposition that certain incumbent senior officials are beyond the reach of foreign (although not necessarily international criminal) proceedings remains relatively uncontroversial. So, too, is the basic proposition that the exercise of certain core State functions, and of administrative or ministerial functions, should not render an individual official liable to foreign legal proceedings either during or after his/ her term in office - either because the exercise of such functions is so inextricably bound up with the legitimate exercise of a State's sovereignty that the act itself must remain outside the scope of ex-amination by a foreign legal system (in the case of certain core governance functions), or because the individual himself/ her-self cannot be deemed individually legally responsible for the act (in the case of administrative or ministerial functions). "

[44] https://www.icj-cij.org/en/case/136/judgments, par. 188 ff.

[45] ECHR 2 June 2014, cases 34356/06 and 40528/06 (*Jones and others v. UK*), para. 202. Cf. BGH 26 September 1978, https://research.wolterskluwer-online.de/document/f778b56c-1efe-4d2a-91e3-829714b26fc4, BGH 28 January 2021, ecli:de:bgh:2021:280121u3str564.19.0, para. 17, Cour de Cassation 13 January ecli:fr:ccass:2021:cr00042 and Cour de Cassation 3 March 2021, ecli:fr:ccass:2021:c100183.

[46] P. 18, downloadable at https://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf

their official capacities. Actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they represent. The foreign State, acting through its representatives, is immune ratione materiae. Such immunities characterized as ratione materiae are accorded for the benefit of the State and are not in any way affected by the change or termination of the official functions of the representatives concerned. Thus, no action will be successfully brought against a former representative of a foreign State in respect of an act performed by him in his official capacity."

54. The immunity of the public official is therefore for the benefit of the state concerned. It is the foreign state that invokes the immunity of its official against the state before whose court the official in question has been summoned. As the ECHR puts it in *Jones et al. v. UK*:[47]

"the immunity which is applied in a case against State officials remains "State" immunity: it is invoked by the State and can be waived by the State. Where, as in the present case, the grant of immunity ratione materiae to officials was intended to comply with international law on State immunity, then, as in the case where immunity is granted to the State itself, the aim of the limitation on access to a court is legitimate."

55. The Court of Appeal correctly considered in paragraphs 3.6 and 3.7 that the immunity of public officials (*ratione materiae*) is recognised in Article 2 (1) (b) (iv) of the UN Convention, which according to the Israeli Officials must also be considered as a reflection of customary international law in this respect.[48] Under this provision, "representatives of the State acting in that capacity" are included in the definition of "State", so that they enjoy immunity equal to the state in whose name they are acting or have acted. From the Commentary to the aforementioned Draft Articles of the ILC (see no. 535353 above), which may be regarded as an explanatory memorandum to the UN Convention,[49] it may be inferred that this is intended to give shape to the functional immunity of public officials.

Commented [IA20]: This corresponds with our view as well for this particular subprovisions of the Convention, but as noted, Israel does not view all the provisions, inlcuding the excpetions, as reflective of CIL. This is an important point for us so please try and avoid generalizations about the status of the Convention when possibe (unless you refer to Dutch law).

56. The Court of Appeal also correctly (uncontested in this appeal to the Supreme Court) observes first that the immunity of public officials as a rule

[47] Par. 200.
[48] The Supreme Court has accepted that some provisions of the UN Convention reflect applicable customary international law. See HR 28 June 2013, ECLI:NL:HR:2013:45, *NJ* 2014/453, HR 30 September 2016, ECLI:NL:HR:2016:2236, *NJ* 2017/190, HR 1 December, 2017, ECLI:NL:HR:2017:3054, *NJ* 2019/137 and HR 15 July 2022, ECLI:NL:HR:2022:1084.
[49] See Report of the General Assembly of 22 March 2005, A/C.6/59/SR.13, para. 35, also cited in CAVV, *Opinion on the United Nations Convention on Jurisdictional Immunities of States and their Property*, p. 25.

of customary international law is not in itself controversial.[50] All things considered, the current appeal is not aimed at arguing that functional immunity of public officials does not exist, but rather that an exception applies in civil cases if there are (alleged) war crimes.

3.1.3 Supreme Court case law on immunity

57. Over the past decade, the Supreme Court has ruled in several judgments on questions of state immunity from jurisdiction and the related doctrine of immunity of international organisations.

58. For the case at hand it is relevant that the Supreme Court in HR 1 December, 2017, ECLI:NL:HR:2017:3054, *NJ* 2019/137 (*Republic of Iraq & Central Bank of Iraq/X.*), in brief, held that the reference to Article 13a of the General Provisions Act in Article 1 of the Dutch Code of Civil Procedure is intended to draw the attention of the party applying the law more emphatically to the existence of international legal immunities from jurisdiction, in order to prevent the Dutch court from assuming jurisdiction in violation of the international law immunity obligations of the Dutch State. According to the Supreme Court, this is consistent with the fact that the Dutch court (not only) is authorised, but is obliged to investigate of its own accord in cases in which a foreign state or an international organisation does not appear in court as defendant or respondent, whether the foreign state or international organisation is entitled to immunity from jurisdiction. With this, the Supreme Court tightened the reins and explicitly reversed its previous case law in HR 25 November 1994, *NJ* 1995/650 (*Morocco/De Trappenberg*) and HR 26 March 2010, *NJ* 2010/526 (*Azeta/Chile*).

59. HR 13 April 2012, ECLI:NL:HR:2012:BW1999, *NJ* 2014/262 (*Stichting*

[50] Opinion MW 1, p. 9 ff. and Opinion GRD 1, p. 3 and 4. Cf. in addition to the established case law of the ECHR and the national case law mentioned in paragraphs 3.8 to 3.11, inter alia, Cour de Cassation 23 November 2004, 04-84.265, Cour de Cassation 29 January 2010, 09-84.818, Cour de Cassation 19 March 2013, ECLI:FR:CCASS:2013:CR01086, Cour de Cassation 16 October 2018, ECLI:FR:CCASS:2018:CR02127, BGH 26 September 1978, BGH 28 January 2021, ecli:de:bgh:2021:280121u3str564.19.0, paragraph 17 and Bundesgericht 25 July 2012, BB.2011.140, paragraph 5.3.2 (https://entscheide.weblaw.ch/cache.php?link=25.07.2012_bb.2011.140&sel_lang=en). See also e.g. already H. Kelsen/R.W. Tucker, a.w., p. 358-359: "Since a state manifests its legal existence only through acts performed by human beings in their capacity as organs of the state, that is to say, through acts of state, the principle that no state has jurisdiction over another state must mean that a state must not exercise jurisdiction through its own courts over acts of another state unless the other state consents. Hence the principle applies not only in case a state as such is sued in a court of another state but also in case an individual is the defendant or the accused and the civil or criminal delict for which the individual is prosecuted has the character of an act of state [...] Hence the principle that no state has jurisdiction over another state excludes individual - civil or criminal - responsibility for acts of state. Such responsibility can be established only with the consent of the state for the act of which an individual is to be made responsible. "Cf. Yang, a.w., p. 433, Fox & Webb, a.w., p. [...], Wickremasinghe, a.w., p. 366, Keitner, a.w., p. 526 and N. Horbach, R. Lefeber & O. Ribbelink (ed.), *Handboek internationaal recht*, The Hague: T.M.C. Asser Instituut, 2007, p. 251.

Mothers of Srebrenica c.s. / State & United Nations) concerned the question whether the UN could rely on immunity in connection with the events surrounding the fall of the enclave of Srebrenica. The Supreme Court ruled that the immunity of the UN is the most far-reaching immunity from jurisdiction, in the sense that it cannot be sued before any national court of the countries that are party to the Convention on the Privileges and Immunities of the United Nations. It is important that the Supreme Court explicitly considered that the immunity accrues to the UN regardless of the extraordinary seriousness of the allegations on which the claim against the UN is based (paragraph 4.3.14).

60. Just as in HR 13 April 2012, ECLI:NL:HR:2012:BW1999, *NJ* 2014/262 (*Stichting Mothers of Srebrenica et al./State)*, in HR 18 December 2015, ECLI:NL:HR:2015:3609, *NJ* 2016/264 (*ESA*) and HR 20 January 2017, ECLI:NL:HR:2017:57, *NJ* 2017/235 (*European Patent Organisation*), it was considered that a civil law action cannot set aside the reliance on immunity from jurisdiction on the sole ground that that action is based on a particularly serious violation of a norm of international law, or even on a norm of *ius cogens*.[51]

61. The present case of the Israeli Officials concerns the functional immunity of government officials of a foreign state. To that extent, it concerns a matter on which the Supreme Court has not yet expressly ruled. In the past, however, the Supreme Court has shown no inclination in civil cases to accept exceptions to immunities too freely and has, on the contrary, adopted a strict line in this regard, whereby immunity from jurisdiction is respected.

Commented [DK21]: אולי כדאי להימנע מהצגה כעניין תקדימי? אלא כמשהו טריויאלי, מנוגד לכלל מנהגי ברור?

3.2 There is no exception to functional immunity...

Commented [DK22]:

Commented [DK23R22]: מציעה לשקול להציג קודם כל את הכלל הפוזיטיבי בפסיקה שמשרתת אותנו המוצג בפרק 3.3. לפני שמתייחסים לטענות של זיאדה

62. Sections 2 and 3 fail already because they have as their premise that persons who normally enjoy functional immunity do not enjoy such immunity in the case of international crimes because of their individual liability. Such individual responsibility would "supersede" the immunity of foreign public officials. In this regard, the sections refer to a "development" in criminal law according to which immunity of public officials is set aside. However, this is not a rule of positive customary international law, whether in a civil or a criminal case. A development is not positive law.

3.2.1 General comments

[51] Cf. Opinion GRD 1, p. 5 ff.

63. State immunity is not subject to an exception in the case of an international crime. It follows from the fact that functional immunity is a component (or corollary) of state immunity and is intended to prevent one state from passing judgment on the actions of another, that functional immunity of a public official is also not subject to an exception of the kind just referred to. If this were otherwise, the immunity of a state could still be quite easily circumvented by addressing not the state but its official. Criminal law is no different from civil law in this respect. Given its nature and scope, the immunity of a public official should run parallel to that of the state. The fact that criminal liability of a state is not conceivable, but that of a public official is, does not make this any different.[52]

Commented [DK24]: מציעה לשקול להוריד את הסיפא, לאור זאת שבהמשך אנו רוצים לעמוד על ההבחנות בין ההליכים, ולהותיר כאמירה כללית. בכל מקרה, מציעה להציג ככלל מצוי במשב"ל ולא כדבר רצוי, כי זה גם סותר את הטענות שלנו לגבי פיתוח המשב"ל.

64. By placing the emphasis on personal liability, Sections 2 and 3 consistently disregard the distinction between the question of immunity and the question of individual responsibility. It bears repeating that immunity as a procedural question must be distinguished from the substantive law side of a case. The individual responsibility of a person under criminal law in the case of international crimes is a question of substantive law. It can only be considered if the question of immunity is answered negatively. If that question is answered affirmatively, that does not mean that no individual responsibility exists or can exist, or that a violation of a given standard of *ius cogens* is accepted as lawful. See also no. 505050 above.[53]

65. It should be borne in mind that merely accepting the criminal responsibility of a public official and accepting universal jurisdiction for certain crimes considered by the international community to be very serious, is quite different from categorically rejecting the (possibility of) functional immunity from jurisdiction enjoyed by such a public official under customary international law. The one does not follow logically from the other.

66. The fact that functional immunity of public officials does not apply in the case of proceedings before an international criminal tribunal, such as the Yugoslavia Tribunal, the Rwanda Tribunal or the International Criminal Court, should not be taken to mean that individual responsibility 'prevails' over immunity and/or that immunity cannot be invoked before a national court.[54] The sources cited by the District Court in paragraphs 4.25

[52] Cf. ILC, *Third report on peremptory norms of general international law (jus cogens)*, A/CN.4/714, pp. 53 and 54: "There is, however, the problem of the logic of the *Jurisdictional Immunities* of State case. That logic would seem to apply to immunity in the context of both civil and criminal matters. In other words, there is no *a priori* reason why the rule enunciated in Jurisdictional Immunities of the State would apply to civil but not criminal matters." This report does note, however, that question marks can be placed on this, in itself, logical reasoning.
[53] Cf. Opinion MW 1, pp. 12 and 13 and Opinion MW 2, pp. 8 to 10.
[54] Opinion MW 1, pp. 14 and 15 and Opinion MW 2, pp. 8-10. See also Yang, a.w., p. 434.

through 4.35 make this clear. For example, the ICJ considered in the *Arrest Warrant* case:

> "The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter. [...] It finds that these rules likewise do not enable it to conclude that any such exception exists in customary international law in regard to national courts."

67. An international criminal tribunal is created by international law, and is not part of any state but is separate from it. There is therefore no question of a state being subjected to the jurisdiction of another state, while an international criminal tribunal is created, inter alia, to resolve exactly matters of this sort~~the limitations national courts face in international cases~~.[55]

Commented [RBd25]: We would like to avoid suggesting that Ziada should go to the ICC.

68. Finally, it must be said that it is a misconception to point out in this context that state immunity has become less strict in recent decades with the loss of immunity for acts *jure gestionis*. The fact that immunity does not apply to the latter category of acts is no reason to accept an exception to state immunity for *acta jure imperii* by denying public officials immunity. After all, it is with regard to *acta jure imperii* that state immunity is still accepted. The fact that immunity cannot be invoked by a state in respect of *acta jure gestionis* is explainable by the fact that, in that case, the state is acting on an 'equal footing' with a private individual and that, therefore, no actions of that state in the exercise of its sovereignty are submitted to the courts of another state for review. With *acta jure imperii* this is different.

Commented [u26]: דבל"א: לדעתנו, יש מקום לשקול לוותר על הפסקה הזו. למיטב בדיקתנו, היא לא עולה מפורשות בכתב הטענות של זיאדה, ולהעלות את הדבר מיוזמתו לא בהכרח מחזק משמעותית את עמדתנו. נציע לשקול להשמיט.

3.2.2 Draft Articles on Immunity of State officials from foreign criminal jurisdiction are no basis for exception

69. In the context of his objections to the first instance judgment under 3 and 4, Ziada referred to the ILC's Draft Articles on Immunity of State officials from Foreign Criminal Jurisdiction (the "**DAISFJ"**), which deal with the immunity of state officials from criminal jurisdiction. These draft articles have since been adopted (in June this year) by the ILC on first reading. The Israeli Officials assume that Ziada will again refer to the DAISFJ in support of the central premise of Sections 2 and 3 in his current appeal to the Supreme Court. Article 7 DAISFJ reads

[55] Opinion MW 1, p. 14 and 15.

"Immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:
[...]
(c) war crimes;".

70. This article does not reflect a general state practice and *opinio juris* to the effect that an exception such as that advocated by Ziada constitutes positive customary international law. The work of the ILC makes this clear.

71. With reference to Opinion MW 2 no. 34 to 40[56] and Opinion GRD 2, p. 5, the Israeli Officials have given ample explanation of this in MoA no. 51 and Plta HB no. 3.1 and 3.28. In particular, the opinion of Wood, who as a member of the ILC has participated and continues to participate in the work regarding the DAISFJ, is of great weight in this regard.[57] For now, the Israeli Officials point out the following.

Commented [IA27]: As you might have seen, Wood would no longer be a member of the ILC as of 1/12023 (FYI in case the proeccedings go not beyond that date).

72. The draft Article 7 DAISFJ was provisionally adopted at first reading in 2017 following a vote within the ILC. The ILC normally works by consensus and it is unusual - and a clear indication that the issue is controversial - for a vote to take place.[58] About one third of the members did not vote in favour of the draft article.

73. Article 7 DAISFJ was indeed controversial. This article has also been described as "one of the most controversial subjects that the Commission had ever addressed".[59] In particular, a point of debate was that this draft article was not based on existing general state practice and *opinio juris*. The draft commentary on draft Article 7, as it was provisionally adopted after the vote, does not state that this article is in line with already existing general state practice and *opinio juris*. On the contrary, it states that "immunity from foreign criminal jurisdiction ratione materiae shall not apply under *the present draft articles*" (ital. attorney) and thus not under currently applicable law, while acknowledging that[60]

"the Commission considers that it must pursue its mandate of promoting *the progressive development* and codification of international law by applying both the

[56] See also Opinion MW 1, pp. 22-27 and Opinion MW 3, pp. 8-9.
[57] See also its 'Lessons from the ILC's work on 'Immunity of State Officials': Melland Schill Lecture, 21 November 2017', in: : F. Lachenmann & R. Wolfrum (ed.), *Max Planck Yearbook of United Nations Law*, Leiden: Brill/Nijhoff 2019, p. 39 ff., where the work of the ILC is described chronologically and conveniently, followed by a representation of the reactions to it by the various States within the General Assembly.
[58] Wood, a.w., p. 36 ff. explains the working method of the ILC. See also p. 52 ff. on the exceptional nature of a vote.
[59] Remarks by the German delegation to the 27 October 2017 meeting of the Sixth Committee of the General Assembly, A/C.6/72/SR.24, p. 13.
[60] https://legal.un.org/ilc/reports/2017/english/chp7.pdf. See p. 11 and 12. See also Wood, a.w., p. 61 and 62.

deductive method and the inductive method" (ital. attorney). This could be understood as indicating that Article 7 is considered by the ILC itself as progressive development of international law (ultimately subject to the consent of states as reflected in state practice and opinio juris) and not as a reflection of the current law itself.

74. The controversial nature of Article 7 is confirmed by the reaction in the Sixth (Legal) Committee of the General Assembly of various states to the draft article before it was adopted at first reading. See also Opinion MW 2, p. 12 et seq. and Wood, a.w., p. 55 et seq. The reaction was mixed, with the majority of States (including those that supported the inclusion of Article 7 per se) taking the position that this draft article did not reflect prevailing customary international law (*lex lata*) and was not based on existing general state practice and *opinio juris*. A not insignificant minority of States considered that the article goes even further than what could be called a "progressive development" ("new law"). Reference is made to the debate in the General Assembly:[61]

"Several delegations urged the Commission to indicate to what extent the draft articles constituted an exercise in codification (reflecting lex lata) and where they engaged in progressive development of international law (reflecting lex ferenda). Moreover, several delegations disputed the suggestion that the draft articles, and in particular the recently adopted draft article 7 (crimes under international law in respect of which immunity ratione materiae shall not apply), reflected customary international law.
[...] Some delegations asserted that the Commission had gone beyond codification (lex lata) and progressive development (lex ferenda) to propose "new law". A number of delegations pointed out that, in order to provide guidance to domestic courts and authorities, the Commission would have to rely on existing law."

and: "A number of delegations called for greater focus on the opinio juris and practice of States, particularly from diverse regions, as well as views expressed by States. Although some delegations appreciated the Special Rapporteur's acknowledgment that certain draft articles were proposed as progressive development of international law, other delegations expressed caution against formulating new norms. "

75. In MoA nos. 56 to 64, the reactions of Germany, Australia, France, the US, the UK and Switzerland to the draft article 7 DAISFJ are quoted. The

[61] A/CN.4/713, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/036/48/PDF/N1803648.pdf?OpenElement and A/CN.4/734, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/026/16/PDF/N2002616.pdf?OpenElement

quotes given there will not be repeated here. It is important to note, however, that these countries take the position that there is no question of codifying a currently existing rule of customary international law. Other countries that have stated the same are: Azerbaijan, Canada, China, Egypt, Israel, Japan, Malaysia, Uzbekistan, Russia, Sri Lanka, Sudan and Belarus. To these can be added: India, Ireland, Iran, Poland, Singapore and Spain.[62] In § 3.2.3~~3.2.33.2.3~~ below, the Israeli Officials will return to this.

> **Commented [IA28]:** Also Slovakia (A/C.6/72/SR.23, p. 34).

76. On 3 June 2022, the ILC adopted the DAISFJ at its first reading, without a vote, including the draft Article 7.[63] However, the controversy within the ILC has not been resolved, but continues to exist, as can be seen from the commentary on Article 7:

> "(1) The consideration of draft article 7 has given rise to a long debate since 2016. This debate reflected the different positions held by the members of the Commission on an issue of great relevance, namely the existence or non-existence of limitations and exceptions to immunity ratione materiae [...].
> (3) While the Commission provisionally adopted draft article 7 and the related annex by recorded vote during its sixty-ninth session (2017), in its seventy-third session (2022) draft article 7 and the related annex were adopted without a vote. However, some members recalled that they had voted against draft article 7 in 2017, setting out their reasons in explanations of vote, and stated that the fact that no vote had taken place in 2022 did not mean that either the law or their legal positions had changed in any way. [...]
> (11) [...] the Commission considers that it must pursue its mandate of promoting the progressive development and codification of international law by applying both the deductive method and the inductive method. It is on this premise that the Commission has included in draft article 7 a list of crimes to which immunity ratione materiae shall not apply [...].
> (12) However, some members disagreed with this analysis. First, they opposed draft article 7, which had been adopted by vote [...] Furthermore, these members took the view that the Commission, by proposing draft article 7, was conducting a "normative policy" exercise that bore no relation to either the codification or the progressive development of international law. For those members, draft article 7 is a proposal for "new law" that cannot be considered as either lex lata or desirable progressive development of international law."

77. It should be noted that the commentary as adopted does not state that Article 7 reflects customary international law already in force, that it only

[62] Plta HB Israeli Officials No. 3.18.
[63] See the report of the 73rd session of the ILC, provisional English version available for download under https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf.

speaks of a "trend" and that the ILC, in justification of the inclusion of Article 7, has explicitly referred to its task which includes "promoting the progressive development" of international law.

78. It should be borne in mind that a second reading must take place within the ILC. Only then will the DAISFJ be a final product of the ILC. After a second reading, the draft articles (should they be adopted) must still be submitted to the General Assembly, with a recommendation for follow-up action. As mentioned, Article 7 DAISFJ was highly controversial in the General Assembly earlier, with a large portion of States viewing the draft article not as a codification of existing law but as the formation of "new law", which goes beyond a "progressive development". It therefore remains to be seen whether the DAISFJ, and in particular Article 7 thereof, would find sufficient support in the General Assembly if adopted unchanged after second reading. Even if there were to be sufficient support, it remains to be seen whether Article 7 would be accepted on a sufficiently large scale to be seen as reflecting general state practice and *opinio juris*.

79. In short, the adoption at first reading of the DAISFJ does not yet make it a rule of customary international law that the functional immunity of public officials from foreign criminal jurisdiction is an exception in the case of war crimes.

3.2.3 No general states practice and *opinio juris*

80. Ultimately, it comes down to state practice and *opinio juris*. Here, the Israeli Officials reiterate the reactions of Germany, Australia, France, USA, UK and Switzerland and other states to the draft article 7 DAISFJ mentioned in no. 757575. These reactions are not only relevant because they make it clear that this article does not reflect current international law. These reactions can be regarded as relevant forms in which state practice and *opinio juris* are evidenced. In order to establish relevant state practice and *opinio juris*, acts of governments are also relevant (Conclusion 5 DCICIL). According to conclusions 6(2) and 10(2) DCICIL, "conduct in connection with resolutions adopted by an international organization", respectively "public statements made on behalf of States" are relevant in identification of customary international law .

81. As an example, the following qualifications of draft Article 7 by some

states should be noted:[64]

- Germany: "did not reflect the current state of customary international law [...] the Commission should not portray its work as a codification of existing customary international law when there was no sufficient State practice to support that premise".[65]
- US: "could not be said to represent customary international law or even the progressive development of existing law".[66]
- Australia: "in its current form, [...] did not reflect any real trend in State practice and, even less, existing customary international law".[67]
- UK: "did not have sufficient support in State practice to be regarded as established customary international law [...] could not be considered to reflect existing international law (lex lata) or even the Commission's settled view of existing international law on the topic".[68]
- France: "In view of the insufficiency of State practice and opinio juris, the exceptions to immunity ratione materiae listed in draft article 7 did not constitute rules of customary international law".[69]
- Switzerland: "must be [...] solidly based on extensive and virtually uniform State practice and opinio juris [...] After careful review of the different sources cited in support of draft article 7 [...] that high threshold had not been reached".[70]
- Russia: "Neither the Commission's report nor the report of the Special Rapporteur [...] provided evidence, in particular from State practice, that exceptions to immunity ratione materiae currently existed in international law."[71]
- Israel: "corresponded neither to customary international law in force nor to any "trend" in that direction. Accordingly, the draft articles should not include any exceptions or limitations to immunity from foreign criminal jurisdiction and draft article 7 should be completely altered, if not deleted".[72]
- Ireland: "might not be fully grounded in widely accepted State practice [...] Although the Special Rapporteur had stated that the Commission was not engaged in crafting "new law", Ireland took

[64] It is not the intention to give an exhaustive list. In the SO no. 56-64 the reactions of Germany, Australia, France, the US, the UK and Switzerland are quoted extensively.
[65] A/C.6/72/SR.24, p. 14.
[66] A/C.6/72/SR.21, p. 5.
[67] A/C.6/73/SR.30, p. 8.
[68] A/C.6/72/SR.24, p. 9 and 10.
[69] A/C.6/72/SR.23, p. 8.
[70] A/C.6/72/SR.22, pp. 12 and 13.
[71] A/C.6/72/SR.19, p. 7.
[72] A/C.6/73/SR.30, p. 5.

note of the comments by some Commission members that the text did not reflect existing international law or identifiable trends".[73]

- Spain: "State practice was scarce, and the necessary legal consensus did not exist, as could be seen in the fact that, on at least two occasions, the International Court of Justice had avoided giving an opinion on whether or not the issue was of a customary nature."[74]

82. That there is no "settled practice" and no *opinio juris* is again confirmed in the report of the 73rd session of the ILC.[75] Paragraph 9 of the Commentary on Article 7 DAISFJ refers in footnote 1012 to national case law and in footnote 1013 to national legislation on the basis of which members of the ILC argue there is a "discernible trend" towards not accepting reliance on functional immunity for certain international crimes. However, paragraph 12 by contrast refers, in footnote 1015, to counter-arguments by members of the ILC, on the basis of which they have argued that that case-law is limited in number, often does not explicitly address functional immunity, in some cases is superseded by later legislation or higher case-law, or in some cases was *obiter dictum*. In footnote 1016, it is pointed out that the ILC members just referred to also argued that very little of the domestic legislation actually deals explicitly with the question of functional immunity, while also all treaties specifically dealing with certain international crimes do not contain an explicit exception to functional immunity.

~~82.~~83. Most notably, apart from the Pinochet example,[76] the cases cited do not indicate that the foreign state has asserted the immunity of the foreign officials before the courts or persecutorial authorities (as discussed above the immunity of the officials is the immunity of the foreign state). This very likely rendered it unnecessary for the relevant domestic to adjudicate on the applicability of the foreign officials' immunity, especially in forums where the courts are not obligated to consider this question if the parties do not raise it.

[TBD: We have now drafted the above text with a somewhat higher level of abstraction and without going into the details of each source cited by the ILC. This

[73] A/C.6/72/SR.24, p. 5.
[74] A/C.6/72/SR.24, p. 7.
[75] Provisional English version available for download under https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf
[76] According to Wuerth "*"[Pinochet]... is the sole case in which a national court has denied functional immunity for human rights-related reasons when immunity was clearly invoked by the state entitled to do so"*. Ingrid Wuerth, *Pinochet's Legacy Reassessed*, 106 A.J.I.L 731, 736 (2012). Nothing in the ILC's rapporteur's report issued in 2016, or as of the time of the appeal before this court indicates that this has changed.

is of course a choice. We could elaborate on all the sources cited by the supporters of an exception, but then (i) this part would gain much more weight, also in the balance with paragraph 3.3, (ii) the question is whether it would yield enough to justify the investment. We would like to hear your thoughts on this.]

Commented [u29]: דבל"א: אנחנו מסכימות שאין מקום להוסיף ולפרט בעניין, הן לאור הטענות שמעלים עו"ד, והן משום שלמיטב בדיקתנו זיאדה לא העלה טענות בעניין עבודת ה-ILC בכתב הטענות שלו לערכאה זו, ומדובר בטענה שהוא העלה בטענותיו לערכאה הראשונה (כפי שגם מפורט לעיל) – ולכן אין צורך לפרט יתר על המידה בעניין.

~~83.~~84. In short, there is no general state practice and *opinio juris*.[77]

3.2.4 National case law: further illustration of absence of general state practice and *opinio juris*

[is there any other criminal case law on this point that has accepted functional immunity, other than CdC?]

~~84.~~85. As an illustration of the foregoing and for the sake of completeness, two judgments delivered very shortly after each other by supreme courts of two neighbouring countries have been referred to in these proceedings: Cour de Cassation 13 January 2021, ECLI:FR:CCASS:2021:CR00042, and BGH 28 January 2021, ECLI:DE:BGH:2021:28012U3STR564.19.0.

Commented [MM30]: Check with our domestic counsel in the relevant jurisdictions. Check sarooshis book

~~85.~~86. The BGH ruling concerned an officer of the Afghan army who was prosecuted in Germany for war crimes, including torture. The BGH raised the question of functional immunity ex officio and ruled that an exception to functional immunity applies to criminal law in the case of war crimes. Therefore, this defendant could not invoke immunity and the German criminal court could assume jurisdiction. It is noteworthy that in this case it is likely that Afghanistan did not assert immunity for its officer due to the nature of the circumstances of the case and the time in which the act was committed.

Commented [MM31]:

Commented [MM32R31]: How do we know what the afghanistan reasoning was in not asserting immunity? Cite the source(preferably quote it if its a public dip note)

Commented [IA33R31]: זאת הערה שלנו ולכן ניסחנו בזהירות. מדובר בתיק שבו חייל אפגני לשעבר הורשע בכך שהוא תלה גופה של לוחם טליבאן על הקיר בבית הכלא. החייל ביקש מקלט מדיני בגרמניה בשנת 2015 ממה שראינו בדיווחים על ההליך לא נראה שאפגניסטן טענה לחסינות ובוודאי שעכשיו לא תטען לחסינות של החייל.
https://gpil.jura.uni-bonn.de/2020/04/officer-of-afghan-national-army-convicted-of-war-crimes-for-desecrating-the-corpse-of-a-taliban-commander-in-front-of-civilians/

~~86.~~87. By comparison, two weeks earlier the Cour de Cassation had ruled loud and clear that no exception to functional immunity applies. That case concerned criminal complaint proceedings against George W. Bush and other American officials, including more "lower" ranking officials.[78] The Cour de Cassation ruled on their functional immunity (ital. attorney):

> "La coutume internationale s'oppose à ce que les agents d'un Etat, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, puissent faire l'objet de poursuites, pour des actes entrant dans cette catégorie, devant les juridictions pénales d'un État étranger.

[77] Cf. also Yang, a.w., p. 429 and 440.
[78] Cited in Plta HB Israeli Officials No. 3.14.

[...] Il appartient à la communauté internationale de fixer les éventuelles limites de ce principe, lorsqu'il peut être confronté à d'autres valeurs reconnues par cette communauté, et notamment celle de la prohibition de la torture.

[...] *En l'état du droit international, les crimes dénoncés, quelle qu'en soit la gravité, ne relèvent pas des exceptions au principe de l'immunité de juridiction*."

~~87.~~88. The French cassation court thereby confirmed its decision of 16 October 2018, ECLI:FR:CCASS:2018:CR02127, in which it held that

"en l'état du droit international, les infractions susvisées, quelle qu'en soit la gravité, ne relèvent pas des exceptions au principe de l'immunité des représentants de l'Etat dans l'expression de sa souveraineté."

Commented [MM34]: 90. "paragraph this confirms..." Perhaps rephrase. We dont concede there isnt state practice supporting our position – all of the UJ complaints that states did not move forward with may be based on their understanding that functional immunity applies even if we do not have these decisions

~~88.~~89. Furthermore, the Court of Cassation had already ruled in its judgment of 13 March 2001[79] that the seriousness of the alleged conduct does not justify an exception to the personal immunity (immunity *ratione personae*) of a foreign head of state. This was confirmed in 2020.[80]

~~89.~~90. This confirms once again that there is no *general* state practice that is "virtually uniform", any more than there is *opinio juris*. On the contrary, there are significant divisions on both counts.[81]

~~90.~~91. In addition to the above, as already explained in Plta HB no. 3.16 to 3.23 and Opinion MW 3, p. 5 and 6, the BGH ruling is based on methodologically flawed reasoning. The Israeli Officials point out the following.

Commented [MM35]: Are there articles crticizing the reasoning?

a. In paragraphs 26 to 34, the BGH ignores relevant state practice which indicates the opposite of its view. For example, the above-mentioned statements of various states are not addressed. The BGH also wrongly ignores (paragraph 19) that in criminal cases it is generally not known when a prosecution is not brought because of immunity from jurisdiction. Only in "salient" cases, in particular former heads of state or former members of government, does a decision not to prosecute tend to become public.

[79] https://www.legifrance.gouv.fr/juri/id/JURITEXT000007070643/

[80] Cour de Cassation 2 September 2020, ECLI:FR:CCASS:2020:CR01213: "Mais attendu qu'en prononçant ainsi, alors qu'en l'état du droit international, le crime dénoncé, qu'en soit la gravité, ne relève pas des exceptions au principe de l'immité de juridiction des chefs d'Etat étrangers en exercice, la chambre d'accusation a méconnu le principle susvisé".

[81] As an aside, some ILC reports and several publications have referred to older case law of the Cour de Cassation as a relevant source for a state practice indicating the acceptance of an exception to functional immunity. However, this older case law is now clearly outdated.

There are, incidentally, important examples of this that are relevant for state practice.[82] See also Plta HB Israeli Officials no. 3.19. The BGH dismisses this all too easily with the remark that the judgments in which immunity was denied are large in number and of substantial importance. This does not yet make for general state practice and *opinio juris*.

Commented [MM36]: Nice!

b. The BGH refers exclusively to international and national case law that corroborates its position.[83] As stated in no. 666666 above, nothing can be derived from the case law of international courts for the question of immunity before a court of a foreign state. When it comes to national case law, the BGH's analysis does not provide sufficient grounds for the existence of the legally required general state practice and *opinio juris*. This is all the more true when the BGH refers to case law of the Cour de Cassation, which has ruled just the opposite. In Plta HB no. 3.20, the Israeli Officials also explained that the Spanish case referred to by the BGH in paragraphn 30 does not concern immunity, but extraterritorial jurisdiction of the Spanish criminal court. The Italian case cited in paragraph 31 contains only *obiter dicta*. The Swiss judgment referred to by the BGH in paragraph 32 is, like the BGH, not based on a sound analysis of general state practice and *opinio juris*. Moreover, the Governments of Spain and Switzerland have taken the position that Article 7 DAISFJ does not reflect applicable customary international law, so that less value can be attached to the rulings in question when assessing *opinio juris*. See no. 373737, 757575 and 818181. The BGH ignores this. [Check: if we look at it correctly, the Corte di Cassazione ruling, in which the earlier case law is reversed, refers to a claim for damages in the context of criminal proceedings. i.e.: not a criminal matter].

Commented [MM37]: Which case is being referred to here? Perhaps doub

Commented [MM38]: Perhaps reprhase "ignores" to sound more diplomatic. Were there any later decisions in which this decision was cited. How did/is Germany addressing this at ILC. Perhaps MFA can reach out to them.

When Germany faced civil liability in US courts for the holocaust, they claimed that US courts should grant comity to decisions of German administrative bodies – and won –would it be helpful to use this as an analogy – (ask Itai- he read the decision and if cited we need to check with Hila Tene as its politically sensitive for our victims)

Commented [IA39R38]: It could be a good short reference. The cite is:
Germany v. Philipp 592 US_(2021), Docket No. 19-351

c. Furthermore, the BGH misses the point when it discusses article 7 DAISFJ and the work of the ILC in paragraphs 35 to 37, as discussed in § 3.2.23.2.23.2.2 above. Regarding the work of the ILC, the BGH states in paragraph 35, correct in itself, that this has not yet been completed. But then the BGH wrongly states

[82] Wuerth, a.w., p. 748 refers to decisions by the French Prosecution Service not to prosecute Donald Rumsfeld, by the German Prosecution Service not to prosecute Jiang Zemin and statements by the Swiss Ministry of Justice that George W. Bush would enjoy immunity. This concerned a former Head of State or a former Minister, so that personal immunity was not at issue, but functional immunity. In addition, MvA no. 70 referred to a judgment from the UK in which a warrant for the arrest of Barak was refused on the grounds of immunity.

[83] Fox & Webb, a.w., p. [...] point out the risk of selective use of case law: "At the same time, one needs to be alert to a national court's practice of the selective use of favourable decisions of a foreign jurisdiction and the neglect of unfavourable ones to support its own rulings".

that no functional immunity in respect of war crimes can be derived therefrom and that this does not detract from the rule of customary international law derived from "a uniform practice and belief" that criminal prosecution of foreign government officials of low rank is permissible. Thus, the BGH turns the reasoning around. It is generally accepted that functional immunity is a rule of positive customary international law, as a necessary component (derivative) of state immunity. This immunity in itself is not controversial. Then this immunity is the starting point and the exception to it must be apparent from general state practice and *opinio juris* - not the other way around.[84]

d. Moreover, the BGH is not correct in the way in which it deals with the controversy to which the work of the ILC in the context of the DAISFJ has led. The BGH rightly notes in itself in paragraph 36 that there is a controversy and points out that "vordergründig" (on a superficial reading) this could indicate that the majority of states that had spoken out accept functional immunity for war crimes. But after having made this observation, the BGH *only* mentions the critical comments of the *German* representative to the ILC, and then cites statements by the German Federal President and the Minister of Foreign Affairs and concludes that the conclusion cannot be drawn from the German rejection of Article 7 DAISFJ that, *in Germany's opinion,* none of its provisions reflect customary international law. The opinions of other states are thus completely ignored by the BGH.

[Have you considered addressing the German case concerning the Syrian official in Koblenz – Raslan? From Jan. 2022? Ziada doesn't seem to mention it in the appeal but if she can raise this in her reply/the oral hearing or the court can address it ex-officio (as it was a very famous ruling) it might be good to consider addressing the case in some way. In that case it is very clear there was no assertion of immunity by Syria as Ralsan defected from the Syrian army].

~~91.~~92. Against this background, there is no need to dwell any further on the Dutch cases brought up by Ziada in the lower courts – these judgments are insufficient to be able to speak of a general state practice and *opinio*

[84] See ILC Second report on immunity of State officials from foreign criminal jurisdiction, A/CN.4/631, para. 54: "the Special Rapporteur is dealing here with such exceptions to immunity as are founded in customary international law. There can be no doubt that it is possible to establish exemptions from or exceptions to immunity through the conclusion of an international treaty. Immunity [...] is a rule existing in general customary international law. The hypothesis of the existence of exceptions to it in customary international law, i.e. the existence of or even tendency toward the emergence of a corresponding customary international legal norm (norms) has to be proven, accordingly, on the basis of the practice and opinio juris of States. "See also: Wuerth, a.w., p. 744, Opinion MW 2, p. 6. Cf. X. Yang, a.w., p. 426, 427 and 433.

juris. For the sake of completeness, the following should be noted briefly.

~~92.~~93. As stated by the Israeli Officials,[85] the weight that can be assigned to the Bouterse case is limited. The Court of Appeal of Amsterdam has only ruled in a sweeping statement that "the commission of very serious criminal offences such as those at issue here cannot be counted among the official duties of a Head of State."[86] The Court of Appeal did not perform a proper analysis of state practice or *opinio juris*, while the reasoning followed that the committing of serious offences cannot be regarded as part of the official duties of a (high-ranking) government official, is highly debatable and has not been followed by foreign courts. In addition, the Supreme Court annulled the order of the Court of Appeal and nothing can be deduced from that judgment as to whether or not a reliance on immunity would hold good – the Supreme Court appeal as lodged in the interests of the law did not aim to do so.

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~~93.~~94. In the case of the head of Afghanistan's intelligence service[87] , the Supreme Court was referring to immunity "by virtue of his then being the director of Afghanistan's state security service [and] having immunity from jurisdiction as the deputy minister of state security". Clearly, the Supreme Court was not referring to functional immunity. Be that as it may, the Supreme Court had not made any analysis of state practice and *opinio juris* in its ruling and its reasoning is rather concise.[88]

Commented [MM40]:

Commented [MM41]: Please print this case for me. So what type of immunity is being dicussed? Is it very celar?

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~~94.~~95. In subsection 3.4 (footnote 34) and in the factual instances, Ziada still referred to the Eshetu Alemu case, which had then only been adjudicated at first instance. On 8 June 2022, the Court of Appeal of The Hague ruled on the appeal.[89] However, in its judgment the Court of Appeal did not rule on the question of the immunity of the accused, which can be explained by the fact that the State of Ethiopia had not invoked immunity and that this was not brought up by the defence and the Public Prosecution Service either. Therefore, nothing can be derived from this case for

[85] MoA no. 81.
[86] Amsterdam Court of Appeal 20 November 2000, ECLI:NL:GHAMS:2000:AA8395, *NJ* 2001/51.
[87] HR 08 July 2008, ECLI:NL:HR:2008:BC7418, *NJ* 2011/91.
[88] In his opinion (no. 10.8), A-G Bleichrodt also discussed functional immunity and stated, with reference to the Nuremberg and Tokyo Tribunals, that this form of immunity did not protect defendants against individual liability for war crimes after the Second World War. This ignores the fact that in assessing a claim to immunity, a distinction must be made between international tribunals and national courts.
[89] ECLI:NL:GHDHA:2022:973.

the present question of whether or not an exception exists to the functional immunity of a government official.

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~~95.~~96. More generally, one should beware of regarding the mere fact that a prosecuting authority or a national court asserts jurisdiction in a case involving a foreign public official as evidence of a relevant state practice.[90] The mere assertion of jurisdiction does not tell us much, because the question of immunity may very well not arise or have arisen in such a case. That may be the case in particular if the foreign state in question does not invoke immunity, whereas functional immunity should be invoked by the state in question (no. 54~~5454~~ above). There can be many reasons why the state in question does not invoke immunity.[91] It may be, for example, that the foreign state is not aware of the criminal proceedings against a (former) official, or it may be that this state refrains from invoking immunity for reasons of its own.[92] It is also conceivable that the state in question does not object to or agrees with the prosecution, in which case no state practice can be inferred either from the claim (and acceptance) of jurisdiction.[93]

3.3 ...and in any case not in civil cases

~~96.~~97. And even if an exception to functional immunity of public officials might be accepted for criminal law, that cannot help Ziada, because the Court of Appeal correctly held that such an exception does not apply to civil cases in any case.

Commented [MM42]: I agree. we do not want to concede an exception for criminal law cases

Commented [u43]: דבל"א: אנחנו חושבות שיש מקום להוסיף פה חידוד לנוסח, ולהבהיר שלדעתנו גם במקרים של תיקים פליליים אין חריג, אבל שלמטרות הדיון אנחנו מניחים שגם לו היה, זה לא רלוונטי ולא מסייע לטענותיו של זיאדה – עשינו את זה בחלקים אחרים של המסמך, אך אנחנו חושבות שיש מקום לחדד את זה גם כאן.

3.3.1 *Jurisdictional Immunities* case; inconsistency of exception

~~97.~~98. In the *Jurisdictional Immunities* case, which concerned a civil matter, the ICJ explicitly rejected, in relation to state immunity, the existence of an exception as argued by Sections 2 and 3:[94]

"The Court must nevertheless inquire whether customary international law has developed to the point where a State is not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict. Apart from the

[90] Cf. Wuerth, p. 745 ff.
[91] Cf. Wuerth p. 750 ff.
[92] This may be related, for example, to such factors as the position that the officer in question held or the importance of the case for the State concerned. Regime change and state succession may also play a role, for example.
[93] Unless the absence of objection or consent on the part of the State concerned is motivated by the belief that invoking immunity is not legally possible in the circumstances.
[94] See also Opinion MW 1, p. 18-20 and Opinion GRD 1, p. 5-12.

decisions of the Italian courts which are the subject of the present proceedings, there is almost no State practice which mICJt be considered to support the proposition that a State is deprived of its entitlement to immunity in such a case.
[...]
In addition, there is a substantial body of State practice from other countries which demonstrates that customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated.
[...]
That practice is particularly evident in the judgments of national courts.
[...]
The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. "

~~98.~~99. The ICJ ruled that in the absence of a general practice of states, customary international law does not provide an exception to state immunity because of the seriousness of the conduct(s) complained of in civil cases. Since the functional immunity of public officials is a component (or derivative) of state immunity, and is intended to prevent the circumvention of a state's immunity by engaging its officials in legal proceedings, it readily follows that functional immunity of public officials is not an exception in civil cases either.

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~~99.~~100. Acceptance of such an exception would also lack logic. The purpose of state immunity is to prevent the actions of a state from being judged by a court of a foreign state. It would therefore be illogical and unacceptable if a national court, when assessing whether an appeal to a state's immunity is successful, could (still) assess whether the actions of that state constitute an international crime. In the *Jurisdictional Immunities* case, the ICJ considered:[95]

"At the outset, however, the Court must observe that the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem. Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature. Consequently, a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear

[95] Par. 82. See also e.g. Higgins, a.w., p. 140 and 141.

the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim."

~~100.~~101. This applies in full when state immunity is invoked in the form of immunity of public officials. The purpose of functional immunity of public officials is also to prevent one state from being subjected to an assessment of its actions (a trial) by a (judge of a) different state. The Court of Appeal has correctly acknowledged this in paragraphs 3.3 through 3.7.

Commented [MM45]: Perhaps quote the decision or is it not necessary?

~~101.~~102. It is also significant that, if the work of the ILC in the context of the DAISFJ even were to provide grounds for an exception to functional immunity of public officials to be accepted under current positive customary international law (see § 3.2.2~~3.2.23.2.2~~ above), and it does not, that exception ~~is limited to~~ relates only to immunity in appropriate foreign criminal jurisdiction cases. This was expressly reflected in the reports of the ILC, as well as repeatedly mentioned by the special rapporteur and by various states when discussing Article 7 and the idea of exception to immunities in criminal proceedings.[96] After all, the DAISFJ relates exclusively to criminal cases and (therefore) not to civil cases. Positions taken by the Dutch government in respect of the DAISFJ and preparatory reports also relate exclusively to criminal cases and not to civil cases. The same applies to state practice of national prosecution authorities. If a general state practice can be derived from this,[97] it is limited to criminal cases.

~~102.~~103. Finally, as the Court of Appeal correctly observed in paragraph 3.21.2 (uncontested in the current appeal to the Supreme Court), it can

[96] See for example the clarification made by the ILC itself in the commentary to Article 1 (6), highlighting this limitation: (6) "Thirdly, the Commission decided to confine the scope of the draft articles to immunity from "foreign" criminal jurisdiction....". See also in the ILC report of 2012: "...the scope of the topic, which had to be maintained as such, was immunity of State officials from foreign criminal jurisdiction. Accordingly, it was not concerned with the immunity of the State official from the jurisdiction of international criminal tribunals, nor from the jurisdiction of his or her own State, nor from civil jurisdiction" (A/67/10, 2012, chap. VI, paras. 82–139), and the 2013 Special Rapporteur: "… it would seem advisable to take a dual approach, considering both inclusive and exclusive issues, which can be summarized as follows: (a) The draft articles deal only with criminal jurisdiction, not immunity from civil or administrative jurisdiction;" A/CN.4/661, 2013 para 21. With respect to states' comments, see the statement made by the China: "Many of the examples… were related to legislation on State immunity or decisions in civil proceedings and were irrelevant to the immunity of State officials from foreign criminal jurisdiction." A/C.6/72/SR.23 (para. 57)

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[97] Opinion MW 2, pp. 8-11.

only be concluded from the work of the Institut du Droit International within the framework of the Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State,[98] and within the framework of the Resolution on Universal Civil Jurisdiction with regard to Reparation for International Crimes,[99] that according to currently applicable positive customary international law, no exception to functional immunity of government officials of foreign states applies in civil cases. The resolutions in question are not intended to reflect positive law, but to encourage states to go further.[100]

Commented [MM46]: Clarify the last sentence

3.3.2 ECHR case law: consistent and continuous rejection of exception to functional immunity in civil cases

~~103.~~104. The case law of the ECHR on functional immunity of public officials shows a consistent line from *Jones et al. v. UK*[101] and has been confirmed repeatedly.[102] This line of case law of the ECHR implies that a public official of a foreign state enjoys immunity and that no exception is made to this rule because of the seriousness of the accusation made (e.g. torture or sexual abuse). This case law fits in seamlessly with the consistent case law on state immunity, in which the ECHR does not accept such an exception either.[103] The ECHR came to this conclusion taking into account the work of the ILC on the DAIFSJ and what Sections 2 and 3 describe as a "development" (trend) in criminal law. In *Jones and Others v. UK,* the ECHR considered this background:

> "while there is in the Court's view some 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, the bulk of the authority is [...] to the effect that the State's right to immunity may not be circumvented by suing its servants or agents instead. [...] However, State practice on the question is in a state of flux, with evidence of both the grant and the refusal of immunity ratione materiae in such cases. [...] International opinion on the question may be said to be beginning to evolve, as demonstrated recently by the discussions around the work of the ILC in the criminal sphere. This work is ongoing and further developments can be expected."

~~104.~~105. Thus, in *Jones and Others v. UK,* the ECHR recognised that

[98] https://www.idi-iil.org/app/uploads/2017/06/2009_naples_01_en.pdf
[99] https://www.idi-iil.org/app/uploads/2017/06/2015_Tallinn_01_en-1.pdf
[100] Opinion MW 2, pp. 8-10.
[101] ECHR 14 January 2014, no. 34356/06 and 40528/06.
[102] See Opinion MW 1, pp. 16-21, Opinion MW 2, pp. 7-8 and Opinion GRD 1, pp. 5ff and 12ff.
[103] E.g. ECHR 21 November 2001, no. 31253/96 (*McElhinney t. Ireland*), ECHR 21 November 2001, no. 37112/97 (*Fogarty t. UK*) and ECHR 12 December 2002, no. 59021/00 (*Kalogeropoulou and Others v. Greece & Germany*).

there was an initial development, but did not accept that under positive customary international law, an exception to functional immunity of public officials should be made. The ECHR merely signalled that further development was possible. However, the ECHR has affirmed its decision in *Jones and Others v. UK* in its subsequent case law and has repeatedly held that no exception to immunity is made on grounds of the seriousness of the allegations made. For example, ECHR 11 June 2013, no. 65542/12 (*Stichting Mothers of Srebrenica and Others v. Netherlands*) held that the immunity from jurisdiction of the UN is also not subject to an exception in case of particularly serious violations of international law and *ius cogens*. In addition, in paragraph 3.8 the Court of Appeal referred to *J.C. c.s. v. Belgium*,[104] to which may be added ECHR 27 January 2022, no. 21119/19 (*Association des familles des victimes du Joola v. France*), rendered after the judgment of the Court of Appeal in this case. In *J.C. c.s. v. Belgium*, the ECHR considered:

Commented [MM47]: Is maya reviewing the french text? I prefer we cite to the english translation unless there is a strategic reason to use the french.

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"Dans la mesure où les requérants allèguent que l'immunité de juridiction des États ne peut être maintenue dans des cas où sont en jeu des traitements inhumains ou dégradants, la Cour rappelle qu'elle a déjà examiné à plusieurs reprises des arguments similaires. Elle a toutefois conclu chaque fois que dans l'état du droit international, il n'était pas permis de dire que les États ne jouissaient plus de l'immunité juridictionnelle dans des affaires se rapportant à des violations graves du droit des droits de l'homme ou du droit international humanitaire, ou à des violations d'une règle de ius cogens. Elle a conclu dans ce sens au sujet des actes allégués de torture [...], de crimes contre l'humanité [...], et de génocide [...]. Dans l'affaire Jones et autres, la Cour s'est référée à l'arrêt de la Cour internationale de justice dans l'affaire Allemagne c. Italie [*Jurisdictional Immunities* case, attorney], qui avait « clairement » établi qu'au mois de février 2012 « aucune exception tirée du ius cogens à l'immunité de l'État ne s'était encore cristallisée » [...]. Alors que dans ce domaine un développement du droit international coutumier ou conventionnel dans le futur n'est pas exclu [...], les requérants n'ont pas apporté des éléments permettant de conclure que l'état du droit international ait développé depuis 2012 à un point tel que les constats de la Cour dans les affaires précitées ne seraient plus valables."

~~105.~~106. This is unambiguous. Where in 2014 the ECHR saw the beginning of a development towards a form of acceptance of an exception to functional immunity and in 2021 still did not rule out such a development in the future, in 2021 the ECHR still could not conclude that international law *had actually* developed in such a way that its earlier case law would no longer apply. The judgment of the ECHR is obvious, and could not

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[104] ECHR 12 October 2021, no 11625/17.

have been otherwise, in view of what has been set out in § 3.2.2~~3.2.2~~3.2.2 and the case law of national courts.

3.3.3 National case law

~~106.~~107. The Court of Appeal has discussed in paragraphs 3.9 through 3.11 judgments of the British House of Lords,[105] the New Zealand High Court,[106] the Canadian Supreme Court,[107] the American Court of Appeals for the Ninth Circuit,[108] the American Court of Appeals for the Second Circuit[109] and of the American District Court of Columbia.[110] The Court of Appeal observed quite rightly that the mentioned judgments unambiguously state that customary international law does not provide an exception to functional immunity of government officials on account of a violation of *ius cogens,* at least in civil cases. See also Opinion MW 1, pages 15-23 and Opinion MW 3, pages 6 and 7. The Israeli Officials have nothing to add to this. Nor do they have anything to add to the considerations in paragraphs 3.18 and 3.19 about case law in which a distinction is made between civil and criminal cases, including the above-mentioned judgment of the BGH (which admittedly accepted an exception in criminal law on erroneous grounds, but rightly did not accept it in civil cases (paragraphs 16, 17 and 39)).

~~107.~~108. The Israeli Officials do point to HR 18 December 2015, ECLI:NL:HR:2015:3609, *NJ* 2016/264 (*ESA*) and HR 20 January 2017, ECLI:NL:HR:2017:57, *NJ* 2017/235 (*European Patent Organisation*). In those judgments, with reference to *Stichting Mothers of Srebrenica and Others v. the Netherlands*, it was held that a civil-law action cannot set aside the reliance on immunity from jurisdiction on the sole ground that that action is based on a particularly serious violation of a norm of international law, or even a norm of *ius cogens*.

~~108.~~109. It must be conceded that after the *Jurisdictional Immunities* case, some national courts issued rulings in which an exception was made to

[105] House of Lords 14 June 2006 (*Jones and Others v Saudi Arabia and Others*), https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones-1.htm
[106] High Court of New Zealand 21 December 2006 (*Sam Fang and Others v Zeimin Jiang and Others*), https://forms.justice.govt.nz/search/Documents/pdf/jdo/2c/alfresco/service/api/node/content/workspace/SpacesStore/a22741a3-c65a-4f8d-b418-ebdd246830b6/a22741a3-c65a-4f8d-b418-ebdd246830b6.pdf
[107] Supreme Court of Canada 10 October 2014 (*Estate of the late Zahra Kazemi and Stephan Hashemi v Islamic Republic of Iran*), https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14384/index.do
[108] United States Court of Appeals for the Ninth Circuit August 2, 2019 (*A. Dogan v. Barak*), https://cases.justia.com/federal/appellate-courts/ca9/16-56704/16-56704-2019-08-02.pdf?ts=1564765414
[109] United States Court of Appeals for the Second Circuit 16 April 2009 (*R. Matar/A. Dichter*), https://cases.justia.com/federal/appellate-courts/ca2/07-2579/07-2579-cv_opn-2011-03-27.pdf?ts=1410916575
[110] United States District Court for the District of Columbia 19 July 2018 (*Doe 1 and Others v Buratai and Others*), https://cases.justia.com/federal/District-courts/District-of-columbia/dcdce/1:2017cv01033/186875/47/0.pdf?ts=1532079403

state immunity in connection with the seriousness of the conduct complained of. This is referred to in Sections 2 and 3. However, this case law gives no (or only very limited) ground to a general state practice or *opinio juris*, if only because this case law is based on provisions of the own national Constitution and not on a rule of customary international law.

~~109.~~110. Subsections 3.8 and 3.9 refer to the judgment of the Italian Constitutional Court of 22 October 2014, which judgment was submitted in the proceedings by Ziada and was only mentioned in the appeal pleading nos. 95 to 97. The Court of Appeal apparently searched for the judgment itself and found an English translation, the link to which is mentioned in paragraph 3.15, footnote 22. In paragraph 3.15 - not challenged in the current appeal - the Court of Appeal ruled that the meaning of this judgment for the present case is limited. In that context the Court of Appeal established - also unchallenged in this appeal to the Supreme Court - that the Italian Constitutional Court ruled that granting immunity is in conflict with the Italian Constitution and, in particular, the right to protection of fundamental human rights and access to justice enshrined therein. Furthermore, the Court of Appeal noted that the Italian Constitutional Court did not question the ICJ's interpretation of customary international law, but only whether the rule thus interpreted was contrary to the Italian Constitution. To this, the Israeli Officials add that it is clear from the Italian Constitutional Court's ruling (paragraph. 1.2, third alinea) that the Italian Corte di Cassazione, whose rulings were central to the ICJ's ruling in the *Jurisdictional Immunities* case, amended its case law in response to that ruling with the aim of bringing its case law in line with that of the ICJ. The Italian Constitutional Court's judgment quotes the following passage from this revised case law of the Corte di Cassazione:[111]

> "the doctrines put forward by the Court of Cassation in Judgment No. 5044/2004 have remained isolated and have not been upheld by the international community, of which the ICJ is the highest manifestation. Therefore the principle [...] can no longer be applied".

~~110.~~111. Thus, Italian case law is not unambiguous. This confirms once again that, as the Court of Appeal rightly (uncontested in this appeal to the Supreme Court) observed in paragraph 3.15, the authority of the judgment of the Italian Constitutional Court is limited. The judgment gives no ground for general state practice or *opinio juris*.

Commented [MM50]: This may be politically sensitive for israel to say phrased this way - consider rephrasing

[111] The ruling of the Italian Constitutional Court refers to the judgments of the Corte di Cassazione with case numbers 32139/2012 and 4284/2013. The (lawyers of the) Israeli Officials have not been able to find a version of these rulings on the Internet in a language they understand.

~~111.~~112. Subsection 3.8 refers to a judgment of the Seoul District Court, which concerned a claim for damages against Japan based on crimes committed against humanity (the case concerned "comfort women"). The Court of Appeal has considered in paragraphs 3.12 and 3.14 that this judgment has only limited authority, because it is contradicted by a judgment of the same court with an opposite result. It should be added that in that judgment it was ultimately the Korean Constitution that was decisive, just as in the judgment of the Italian Constitutional Court.[112] So there is no mention of customary international law. Incidentally, the Israeli officials are aware that the judgment rejecting the reliance on immunity is currently before the Seoul High Court. As far as they are aware, the latest state of affairs is that the latter institution intends to invite experts to give their views on whether or not an exception to state immunity applies.

~~112.~~113. For the sake of completeness, the Israeli Officials would like to point out here another ruling from the Brazilian Supremo Tribunal Federal, dated August 2021.[113] The case concerns a Brazilian fishing boat, the Changri-Lá, which was sunk by a German submarine in Brazilian waters in 1943. Ten fishermen lost their lives. The relatives of one victim filed a claim for damages against Germany in the Brazilian courts. The majority opinion within the Supremo Tribunal Federal rejected Germany's invocation of state immunity. The reasoning followed is that there is a war crime and that under the Brazilian Constitution the protection of fundamental rights must prevail, so that Germany's immunity must be set aside. It is important to note that, like the judgments of the Italian Constitutional Court and the Seoul District Court just mentioned, the Supremo Tribunal Federal bases its judgment on the national Constitution and not on a rule of customary international law. In this regard, it is also noteworthy in the judgment of the Supremo Tribunal Federal that it considers that the judgment of the ICJ in the *Jurisdictional Immunities* case does not operate erga omnes and is only binding on the parties to that proceeding.[114] This case, and the Italian cases (which are subject to litigation before the ICJ initiated by Germany, as discussed above), present rare outliers on the question of exceptions to foreign sovereign. It is also important to note that the case in Brazil relates to an event which took place in Brazilian waters and not outside the forum state.

Commented [MM51]: Lets consider if we should mention this as this is not a tactic we would want the court to adopt in this case

Commented [IA52R51]: הבעיה שאם לא מזכירים את זה וזכפלד תזכיר אז זה נראה כאילו אנחנו מתעלמים מעניין חשוב. אני לא בטוח שזה כזה נורא בתקווה שנוכל למצוא מומחים שיתמכו בנו.

Commented [IA53]: The hearing was supposed to be held on 1 September. We are tyring to find out if it took place and what transpired. If you have a way to look into this it could also be useful.

Commented [IA54]: We spoke to a Judge in the Brazilian Federal Courts on the case. He told us he doesn't agree with the decision and that there was criticism of this case in academic circles. We asked him to send us writings if he can find some, but if you can also try and locate some writings it might be helpful.

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[112] Plta HB Israeli Officials no. 3.5 and 3.6. See also Opinion MW 3, p. 6 and 7.
[113] Brazilian-Portuguese version available for download at https://portal.stf.jus.br/processos/downloadPeca.asp?id=15347973404&ext=.pdf. An English-language discussion of this statement can be found at https://www.ejiltalk.org/the-immunity-saga-reaches-latin-america-the-changri-la-case/.
[114] See on this L.C. Lima & A.T. Saliba, 'The Immunity Saga Reaches Latin America. The Changri-la Case', https://www.ejiltalk.org/the-immunity-saga-reaches-latin-america-the-changri-la-case/

~~113.~~114. Other civil case law of national courts from after the *Jurisdictional Immunities* case in which an appeal to immunity was rejected because of the seriousness of the conduct(s) alleged is not known to the Israeli Officials.

~~114.~~115. For the record, the Israeli Officials would like to draw attention to Supreme Court (UK) 6 July 2022 (*Basfar v Wong*),[115] which dealt with the question of whether a member of the Saudi diplomatic staff in London could invoke diplomatic immunity in connection with a claim for subsequent payment and damages from a migrant worker who was employed as a domestic servant and claimed to be a victim of human trafficking and modern slavery. The Supreme Court, in a majority decision, ruled that the immunity claim did not stand. This case is not relevant to the question currently before the Supreme Court, because it did not concern functional immunity of a government official, but diplomatic immunity. Diplomatic immunity has a different background and scope than functional immunity.[116] Above all, the Supreme Court based its reasoning on the exception in Article 31(1) opening words and (c) of the Vienna Convention on Diplomatic Relations: except in the case of: commercial activity exercised [...] outside his official functions. This wording was interpreted as including the alleged exploitation of this employee, as this took place for personal profit.[117] It is also important that the Supreme Court considered that it did not base its reasoning on a human rights argument and that the applicability of the exception referred to does not depend on the answer to the question whether the act in question is contrary to international law or constitutes a violation of human rights.

Commented [IA55]: We are not sure this case is singifcantlly relevant.As you explained, the question was the interpetation of Article 31(3) of the Diplomatic Convention. Maybe not mention it or just briefly refer to the case in a footnote. In any case, if you think it is important to refer to it, it would be very useful to also refer to the very strongly worded dissenting opinion which made the correct point that the decision de-facto opens up litigation against diplomats by domestic staff as long as they **claim** that they were subject to human trafficikng.

~~115.~~116. In short, the civil case law of national courts from after the *Jurisdictional Immunities* case, in which reliance on functional immunity has been rejected because of the seriousness of the conduct(s) complained of, is very limited in number and is not based on an interpretation of customary international law. In fact, customary international law is virtually ignored or 'swept away' by giving precedence to the national Constitution over the rules of immunity as they apply under customary international law and as formulated in the *Jurisdictional Immunities* case. This means that the national judgments referred to have no or only very limited significance as relevant state practice in determining customary international law. In each case, the conclusion is inescapable that these judgments constitute a violation of customary international law. See also nos. 1~~138~~ and

[115] https://www.supremecourt.uk/cases/docs/uksc-2020-0155-judgment.pdf
[116] Cf. the preamble to the Vienna Convention on Diplomatic Relations: the function of diplomatic immunity is "to ensure the efficient performance of the functions of diplomatic missions as representing States".
[117] Cf. Article 42 of the Vienna Convention on Diplomatic Relations.

40~~4040~~ above. As mentioned above, Germany brought an action against Italy before the ICJ.

~~116.~~117. The only conclusion that can reasonably be drawn from all the above is that there is no general state practice and *opinio juris* that gives (or could give) ground to a rule of customary international law that a government official of a foreign state cannot invoke the functional immunity from jurisdiction accorded to him in a civil case because of the fact that he is accused of a war crime. The absence of such a general state practice and *opinio juris* is the decisive factor here. This cannot be ignored or changed for the sake of policy considerations and/or considerations of a legal-systematic nature. As the Court of Appeal rightly (and unchallenged in this appeal to the Supreme Court) considered in paragraph 3.17 above, what is of importance is first and foremost what the courts tend to decide in practice. And that is that (at least) in civil cases they do not recognize an exception to functional immunity.

> **Commented [MM56]:** Perhaps soften phrasing if case law goes against our position in the future

3.3.4 To the extent relevant: distinction between civil and criminal cases objectively justifiable

~~117.~~118. Section 3 argues in several places that there is no fundamental distinction between criminal and civil law, so that the 'development' in criminal law should be extended to civil law.[118] This argument already fails because, as set out in § 3.2~~3.23.2~~, no exception to functional immunity of public officials can be accepted, either in criminal or civil cases. In so far as this may be otherwise, functional immunity *does* apply in civil cases and no exception is made to it. The Court of Appeal rightly considered in paragraphs 3.8 through 3.17 that the vast majority of case law in civil cases does not recognise such an exception. In doing so, the Court of Appeal rightly considered (see Chapter 2 above) - unchallenged in this appeal to the Supreme Court - that this is not altered by the fact that a distinction between criminal cases and civil cases may not be found satisfactory in all respects from a legal systematic perspective. After all, for the interpretation of customary international law it is important what judges decide in practice - general state practice and *opinio juris* are decisive.

~~118.~~119. This is the very reason why Ziada's argument about the lack of a principled distinction between criminal and civil cases fails.

~~119.~~120. For the sake of completeness, the Israeli Officials explain that the

[118] In particular, subsection 3.4, but also subsections 3.5 and 3.6 seem to assume this.

Court of Appeal's consideration in paragraph 3.19 that there are such differences between criminal and civil law that a difference in the treatment of functional immunity between criminal and civil law is justified is correct.[119]

~~120.~~121. First of all, immunity is the starting point and a fundamental principle of international law. There is nothing inconsistent or illogical about an exception to a principle being subject to limitations, especially when it is a rule expressing the sovereign equality of states. The law is replete with carefully delineated and circumscribed exceptions to principles or principal rules. It is perfectly justifiable for states to uphold values and norms that the international community considers fundamental, and for states to prosecute certain crimes, such as torture. If this means that the principle of immunity of state officials is overridden when a state prosecutes, it does not mean that immunity must also be overridden in order for one or more victims to have access to the courts of that same state in order to bring a civil claim for compensation. There is nothing to prevent an exception to the fundamental principle of immunity being considered justified solely for the benefit of states - the actors in the international community - for the sole purpose of enabling them to bring a criminal prosecution.

~~121.~~122. The Court of Appeal has correctly attributed significance to the circumstance that a criminal prosecution is exclusively instituted by a state (whether or not through one of its organs), so that "vexatious charges" can be filtered out.[120] In criminal cases, an organ of the state (namely, the prosecuting authority) assesses whether a sufficient factual basis exists for a criminal prosecution and whether the facts can be legally qualified as an international crime. This control mechanism, including the exercise of prosecutorial discretion regarding which cases to prosecute in this field ensures that a case of pursued by the prosecution has sufficient merit to justify the breach of a state's immunity by the criminal prosecution, as well as the related tension that may arise in relations between the states involved. This is an essential difference to civil cases. In civil courts, actions can be brought by the mere filing of civil complaint, including actions that are completely without any chance of success and/or that serve only (or to a large extent) a publicity or poltical purpose.

~~122.~~123. Another essential difference which the Court of Appeal rightly refers to in paragraph 3.19 is the fact that civil actions can be brought

Commented [u57]: דבל"א: אנחנו חושבות שהשימוש במונח "**It is perfectly justifiable**" בטקסט מעט נחרץ מידי.
נציע במקום לעשות שימוש בנוסח שהופיע בשלד:
"if one State commits certain crimes against interests that are considered as fundamental to the international community, **one might justify** that other States - being the actors in the international community - initiate criminal proceedings against the officials of that State and for that purpose bypass the functional immunity of those officials. However, this by no means implies that immunity is also bypassed to ensure access to civil courts to allow victims the opportunity to sue for compensation of damages. Where immunity is the starting point and a principle of fundamental importance to international relations, one may very well only allow an exception to immunity only for criminal proceedings". (ההדגשות לא במקור).

מרלין - מסכימה

Commented [MM58]: Another important factor is the exercise of proescutorial discretion/when to defer to decisions of foreign jurisdictions not to prosecute and how to use limited resources in cases which occurred abroad

[119] Cf. Opinion MW 1, pp. 13 and 14, Opinion GRD 1, p. 9 ff, J. Foakes, *The position of heads of state and senior officials in international law*, Oxford: Oxford University Press, 2014, pp. 141 and 142.
[120] See the sources in the previous footnote.

against both a public official and the state, whereas criminal proceedings can only be brought against the responsible public official; criminal liability of a foreign state does not exist. This means that civil cases can lead to a greater breach of immunity and put pressure on relations between states to a greater extent than criminal cases.

~~123.~~124. In this context, it must also be borne in mind that a civil court must apply the rules of conflict of laws and, subsequently, the substantive civil law designated as applicable by those rules. In the case of international crimes, on account of the nature of the case that law will not be the national law of the court but foreign law; thus in this case the applicable law would not be Dutch law. This leads to the complication of applying the foreign law, with a correspondingly complicating risk of incorrect application. In addition, in a civil case not only the question must be answered whether a subjective right (fundamental right, physical integrity or personality right) has been infringed, but also questions such as the existence of a justification,[121] attribution, damage and causal connection. A criminal prosecution, on the other hand, will be judged by a national court applying its national criminal law.

~~124.~~125. It may be that, as Subsection 3.4 observes, the reason for not granting immunity by the criminal courts lies in the nature of the acts of which there is a suspicion, namely alleged international crimes, and those same alleged acts would be the basis of a civil action. But it does not at all follow that an unjustified distinction is made by waiving immunity in favour of a state for the sole purpose of a criminal prosecution.

~~125.~~126. The argument in Subsections 3.1 and 3.4 that common law systems are not so familiar with the so-called 'action civile' and that this action civile would blur the distinction between civil and criminal law does not stand up in this context. First of all, if common law systems are indeed not so familiar with the action civile, as the subsections would have us believe, then the only correct conclusion to be drawn from this is that this legal concept cannot justify an exception to a rule of customary international law. Unfamiliarity of this legal concept in the common law systems logically means that it is not conceivable that it will lead to any relevant state practice in the states with a common law system. Rules of customary international law, including those relating to immunity, do not depend on the existence or non-existence of a particular legal figure in one or more national legal systems.[122]

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[121] In this connection, relations of command and authority may be relevant, and national law may differ substantially in this respect.
[122] Opinion GRD 1, p. 8 and 9.

Commented [MM59]: Perhaps calrify

Commented [u60]: דבל"א: בהמשך ישיר לטיעון המובא בפסקה זו, אפשר להוסיף את הטיעון שנזכר בכתבי הטענות הקודמים שלנו: "in civil cases, a judgment given against a (foreign) official will, generally speaking, ultimately be borne by the State in question. Either because the claim is recovered directly from the State or because the State is required by its laws or policies to reimburse its officials if a judgment is enforced against them personally.173 A sentence imposed by a criminal court, however, cannot, by its very nature, be served by any other than the convicted person".

Commented [MM61]: We dont want to also keep saying that hardships also exists in criminal cases and specficially reference them

Commented [RBd62]: We are not sure this is a viable argument. At least in common law countries, including Israel in this context, there is no inherent difficulty in applying foreign law. That is the whole point of PIL rules (see for example the 2015 Hague Principles on Choice of Law in International Commercial Contracts).

Commented [DK63]: משתמע שזה הכלל. אולי במקרים הבודדים או גם אם נקבל את הטענה ש...

Commented [MM64]: Clarify

Commented [MM65]: Review tommorow with the arguments referenced. Most state practice under this system involved putting in safeguards to limit access to direct complaints to a magistrate

~~126.~~127. Secondly, the introduction of the action civile meant only that a civil claim could be joined to a criminal case. This serves efficiency and makes it easier for the victim to obtain compensation. In many jurisdictions, the action civile is in a sense subordinate to the criminal case, for example, in that the claim for damages can only be assessed if a statement of evidence and a statement of criminal liability have been or will be pronounced. Whether the introduction of the action civile has led to a blurring of the distinction between criminal and civil law in the relevant jurisdictions is therefore highly questionable - the grounds of appeal to the Supreme Court fail to provide any explanation at all. In any event, it is impossible to see that no meaningful distinction can be made between criminal and civil cases as regards the application of the rules of immunity of public officials.

Commented [MM66]: Have Michele in Belgium or Joaquin review these paragraphs

~~127.~~128. Thirdly, there is no national case-law indicating that the existence of an action civile in the jurisdiction concerned has been a reason to reject immunity in whole or in part, or that this action civile has even been considered relevant in the assessment. One can point to the case law of the Cour de Cassation, cited in nos. 87~~87~~86 and 88~~88~~87 above. French law does recognise an action civile, but its existence has not even played a role in the rejection of an exception to functional immunity of public officials. One can also point to *J.C. v. Belgium* and *Association des Victimes du Joola v. France.* These concerned a Belgian and a French judgment respectively, both jurisdictions having an action civile, which was also invoked by the victims in those cases. This played no role whatsoever in the ECHR's assessment of the possibility of invoking immunity.

Commented [MM67]: Can we stand by such a broad statement?

Commented [MM68]: Maybe we should cite to the case we won with the estelle? Also signficant that the prosecutor of the state can weigh in on immunity. Consider showing paragraph on france to our french lawyers.

3.4 Absence of alternative forum not relevant under customary international law

~~128.~~129. Ziada has argued in the factual instances and in subsections 3.9 and 3.5 that no other forum (than the Dutch courts) is available to him to which he can submit his present claim, so that a reliance on functional immunity does not hold.[123] Subsection 3.9 refers in this respect to case law on the question of immunity of international organisations (other than the UN).[124] In factual instances, the Israeli Officials have disputed, with ample substantiation, that no independent legal procedure with sufficient guarantees is available for Ziada in Israel.[125] The Court of Appeal has left

[123] CvA Inc. § 3.2 and chapters 4 and 5 and CoJ no. 176-190.
[124] Reference is made to HR 24 December 2021, ECLI:NL:HR:2021:1956, *NJ* 2022/205 (*Supreme Site Services*).
[125] Inc. Concl. § 9, Plta EA no. 1.6 to 1.10 and § 3 and MvA no. 105.

this question open and has ruled correctly in section 3.22 that the question whether an alternative remedy (legal remedy) is available to the plaintiff does not play a role in the question whether a state enjoys immunity from jurisdiction. There is no reason why this should be different for the functional immunity from jurisdiction of its officials, which is derived from the immunity of the State, according to the Court of Appeal. As far as subsections 3.5 and 3.9 challenge these findings with sufficient certainty and precision, the following applies.

~~129.~~130. The judgment that the presence or absence of an alternative forum is irrelevant in assessing a claim of state immunity is rightly undisputed in this appeal to the Supreme Court and thus stands. The ICJ ruled in the *Jurisdictional Immunities* case:[126]

> "The Court cannot accept Italy's contention that the alleged shortcomings in Germany's provisions for reparation to Italian victims entitled the Italian courts to deprive Germany of jurisdictional immunity. The Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress. Neither in the national legislation on the subject, nor in the jurisprudence of the national courts which have been faced with objections based on immunity, is there any evidence that entitlement to immunity is subjected to such a precondition."

~~130.~~131. Since functional immunity is a component (or corollary) of state immunity, it readily follows that the functional immunity of a public official also does not depend on the answer to the question whether an alternative forum is available to the plaintiff. After all, otherwise the immunity of the state could be circumvented by merely suing the public official. The reference in subsection 3.9 to case law on the question of the immunity of international organisations[127] disregards this. Moreover, the background and scope of the immunity of international organisations is essentially different, because the immunity of an international organisation is inspired by the interest that the international organisation has in ensuring that it can carry out its tasks independently and unhindered under all circumstances.[128] This immunity is therefore not dictated by the fundamental principles of the sovereignty of states and their sovereign equality.

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[126] Par. 101.
[127] Reference is made to HR 24 December 2021, ECLI:NL:HR:2021:1956, *NJ* 2022/205 (*Supreme Site Services*).
[128] HR 20 January 2017, ECLI:NL:HR:2017:57, *NJ* 2017/235 (*European Patent Organisation*) and HR 24 December 2021, ECLI:NL:HR:2021:1956, *NJ* 2022/205 (*Supreme Site Services*). Cf. ECHR 18 February 1999, no. 26083/94 (*Waite & Kennedy v. Germany*) and ECHR 11 June 2013, no. 65542/12 (*Stichting Mothers of Srebrenica and Others v. the Netherlands*).

Furthermore, in the event of a successful application of functional immunity of public officials, the courts of the state concerned may still be seised. There is no such court in an international organisation, because when an international organisation is set up it rarely makes provision for legal proceedings against its acts, with the exception of internal mechanism for resolving disputes such as those related to labour and employment claims. Any analogy is therefore flawed.

~~131.~~132. The presence or absence of an alternative forum is also irrelevant to the assessment of whether a successful reliance on immunity and the consequent declining of jurisdiction by a court constitutes an impermissible restriction on the right of access to the courts guaranteed by Article 6 ECHR.

4 ARTICLE 6 ECHR DOES NOT PRECLUDE IMMUNITY

~~132.~~133. The Court of Appeal has ruled in paragraph 3.22 on correct grounds that the successful reliance by the Israeli officials on their functional immunity does not violate the right to access to justice guaranteed in Article 6 ECHR. The ECHR held in *Jones et al. v. UK*:[129]

> "As to the proportionality of the restriction, the need to interpret the Convention so far as possible in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity, has led to the Court to conclude that measures taken by a State which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1. The Court explained that just as the right of access to a court is an inherent part of the fair-trial guarantee in Article 6 § 1, so some restrictions must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity. [...] Where, as in the present case, the grant of immunity ratione materiae to officials was intended to comply with international law on State immunity, then, as in the case where immunity is granted to the State itself, the aim of the limitation on access to a court is legitimate.
>
> [...] Since measures which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court, the sole matter for consideration in respect of the applicants' complaint is whether the grant of immunity ratione materiae to the State officials reflected such rules. [...]. "

[129] ECHR 2 June 2014, cases 34356/06 and 40528/06.

~~133.~~134. In short, granting immunity to government officials of a foreign state in order to implement rules of customary international law serves a legitimate purpose and does not, in principle, constitute a *disproportionate burden*. This rule is in line with what the ECHR previously held with respect to a successful reliance on state immunity[130] and this rule has been confirmed in subsequent case law of the ECHR such as the judgments in *Stichting Mother of Srebrenica v. the Netherlands*, *J.C. and Others v. Belgium* and *Association des familles des victimes du Joola v. France*.[131] The Supreme Court has adopted this rule in HR 11 September 2009, ECLI:NL:HR:2009:BI6317, *NJ* 2010/523 and HR 30 September 2016, ECLI:NL:HR:2016:2236, *NJ* 2017/190 (*Morning Star International Corporation v Republic of Gabon*).[132]

~~134.~~135. The answer to the question whether the granting of immunity violates Article 6 ECHR does not depend on whether the plaintiff can bring his claim before another competent court. In line with the case law of the ICJ (see § 3.43.4~~3.4~~) the ECHR ruled on this in *J.C. and Others v. Belgium*:[133]

> "La Cour rappelle à cet égard que la compatibilité de l'octroi de l'immité de juridiction à un État avec l'article 6 § 1 de la Convention ne dépend pas de l'existence d'alternatives raisonnables pour la résolution du litige."

~~135.~~136. This confirms what the ECHR had previously ruled in *Stichting Mothers of Srebrenica v. the Netherlands* and ECHR 5 February 2019, no. 16874/12 (*Ndayegamiye-Mporamazina v. Switzerland*), which rulings concerned UN and state immunity.

~~136.~~137. Subsection 3.5 quotes from the Guide on Article 6 of the European Convention on Human Rights. This quotation is suggestive, and frankly somewhat misleading. The quotation is presented in such a way as to suggest that immunity and/or immunity of public officials should be limited on the basis of the rationale behind Article 6 of the ECHR. This suggestion is incorrect. The consistent case law of the ECHR has been described above and in § 3.3.23.3.2~~3.3.2~~ and is also not contradicted in the Guide, but is correctly represented as the currently applicable state of

[130] ECHR 21 November 2001, no. 31253/96 (*McElhinney t. Ireland*), ECHR 21 November 2001, no. 37112/97 (*Fogarty t. UK*), ECHR 12 December 2002, no. 59021/00 (*Kalogeropoulou and Others v. Greece & Germany*).
[131] ECHR 11 June 2013, no. 65542/12 (*Stichting Mothers of Srebrenica and Others v. the Netherlands*) and ECHR 27 January 2022, no. 21119/19 (*Association des familles des victimes du Joola v. France*).
[132] Cf. for France Cour de Cassation 13 January 2021, ECLI:FR:CCASS:2021:CR00042 and Cour de Cassation 1 July 2020, ECLI:FR:CCASS:2020:SO00547.
[133] Par. 71.

the law. The text that the subsection quotes is taken from ECHR 21 November 2001, no. 31253/96 (*McElhinney v. Ireland*) and ECHR 29 June 2011, no. 34869/05 (*Sabeh El Leil v. France*), where the ECHR has ruled no more than that it must be able to examine any restriction on access to the courts for incompatibility with Article 6 ECHR.

~~137.~~138. In that connection, the Israeli Officials note that the present case does not involve an alleged infringement of the rights and freedoms guaranteed by European Union law within the meaning of Article 47 of the Charter of Fundamental Rights of the European Union.

5 THE COMPLAINTS IN THE GROUNDS OF APPEAL TO THE SUPREME COURT

5.1 Section 1; method for establishing customary international law

~~138.~~139. Section 1 seeks to have the Supreme Court initiate a 'progressive *development*' in customary international law. It is noteworthy in this connection that Sections 2 and 3 refer in several places to 'a development' in international law, which entails the recognition in criminal law of an exception to the functional immunity of public officials in the case of international crimes. In Ziada's view, this development is a reason to accept such an exception in civil law as well. By this "development" Ziada is obviously not referring to a currently existing status quo in customary international law that is expressed in general state practice and opinio juris. In short, with his appeal to a law forming task of the national court and his reference to a "development" Ziada implicitly acknowledges that the current practice of states and opinio juris does not currently provide a basis for the exception he advocates.

~~139.~~140. A "progressive" step is therefore needed to achieve this exception. It follows from Chapter ~~2~~22 above that it does not fit within the methodology of customary international law for such a progressive development to be initiated by a national court, even if it concerns the highest court of a state. As the Court of Appeal correctly considered in paragraph 3.17 with reference to the Special Rapporteur for the ILC, for the establishment of customary international law it is primarily what judges decide in practice that is important:[134]

"Second, and more importantly, as agreed at the commencement of the consideration of the topic, what should guide the Commission should be State practice

[134] Third report on peremptory norms of general international law (jus cogens), A/CN.4/714, para. 130.

Commented [IA69]: Note that the current Special Rapportuer (Hernandez) was not recleted for another term to serve as an ILC member. Like Wood, she would no longer be an ILC member as of 1/1/2022. We are yet unware who will take her place altough we heard about one option.

and not theoretical considerations. It is particularly important to observe, in this regard, that some cases upholding immunity in civil matters have noted that different rules may apply to criminal matters. To the extent that State practice, in the form of national court cases, supports the distinction, the Commission should follow that practice."

~~140.~~141. The Court of Appeal has thus *rejected* the task of the national court in the progressive development of the law independent of sufficient state practice and opinion juris, as argued by the subsection. This rejection has not been contested in this appeal to the Supreme Court and is therefore definitive. This already brings the curtain down on Section 1 in its entirety.

~~141.~~142. Contrary to what Subsection 1.1 apparently assumes, customary international law is also not static in the sense that it is unchangeable and that no new customary international law could ever come into being. See also § 2.2~~2.2~~2.2 above. That the two element test may mean that the development of a rule of customary international law is not straightforward, is something else and inherent in the nature of customary international law.

Commented [MM70]: Do we need to get into the weeds of this issue strategically?

Commented [RBd71]: This sentece is difficult to undertsnad. Maybe a translation issue.

~~142.~~143. A distorted picture of the methodology of customary international law is also painted where Subsection 1.1 argues that "merely looking to the past does not do justice to the formation of customary law". The two element test does not (exclusively) look to *the past*. If at any moment the content of customary international law must be determined, then the practice of states and the *opinio juris* at *that moment* are decisive. It is something entirely different, however, that in assessing these two elements, for obvious reasons, great significance is attached to the past, such as past acts and expressions by governments of states in various relevant forums, or past judicial decisions and work of authoritative international commissions or institutions, such as the ILC or the IDI.

~~143.~~144. In addition, the subsection thinks incorrectly and too easily about how a legal development in customary international law could be initiated by a national court: it contends that 'A change in customary international law starts with the national courts. One begins, and other courts will follow (eventually to the highest level)." That is not how it works. See § 2.2~~2.2~~2.2.

~~144.~~145. Furthermore, Section 1 fails for lack of interest. The judgment of

Commented [IA72]: Unclear. Maybe a translation issue.

the Court of Appeal on the question whether under customary international law an exception applies to the functional immunity of (former) public officials on the basis of the seriousness of the conduct alleged is a purely legal judgment. The test applied by the Supreme Court is whether this judgment is *incorrect*. The test is not whether a correct method of law formation or development was applied. Even if the *method* used to arrive at the contested judgment is incorrect, that judgment may still be correct in itself, so that there is no ground for the Supreme Court to overturn the contested judgment. The finding of the Court of Appeal that is central to the current appeal, is simply correct.

Commented [MM73]: Good procedural and substative point – should this point me made or emphasized earlier?

~~145.~~146. Subsection 1 also fails completely for lack of factual basis in the contested judgment. After all, the section complains that the Court of Appeal assumes that "only in the event of a practice in which practically all case law points in the same direction, there can be talk of development". The considerations of the Court of Appeal in paragraphs 3.3 - 3.24 give no reason to assume that the Court of Appeal has tested whether there is *development* - certainly not in the sense that Subsections 2 and 3 ascribe to this term. The Court of Appeal simply assessed what the status quo of customary international law was at the time it rendered its judgment. Moreover, in doing so the Court of Appeal tested, entirely in line with the methodology of customary international law, whether there is a general state practice and an *opinio juris* apparent from national case law. In this respect it is important that a state practice must be general, which means that "it must be sufficiently widespread and representative, as well as consistent" according to Conclusion 8(1) DCICIL. See also no. 29~~2929~~ above.

~~146.~~147. Subsection 1.1 also lacks factual basis as it supposes that the Court of Appeal failed to appreciate that in identifying customary international law, significance must be attached to the work of the ILC. The Court of Appeal has attached significance to this in paragraph 3.16 by considering that it concerns a source that relates to criminal law, which, according to the Court of Appeal, is not decisive for the question whether immunity can be invoked in a civil-law case. Apart from that, the work of the ILC in the context of the DAISFJ only makes clear that there is no general state practice and *opinio juris* on an exception. See § 3.2.2~~3.2.23.2.2~~.

~~147.~~148. Subsection 1.2 builds on Subsection 1.1 and therefore fails. For the sake of completeness: Subsection 1.2 does not meet the requirements of certainty and precision that follow from Article 407 subsection 2

Dutch Code of Civil Procedure. It is unclear to the Israeli Officials what is meant by "a holistic approach to the invention and formation of law". For that matter, it is hard to see that such an approach (whatever it may contain) would be mandatory for law in general and customary international law in particular. On the contrary, see Chapter 222 above.

148.149. It is hard to see how the Court of Appeal could have misjudged the question put to it, as the subsection finally argues. The Court of Appeal gave an answer to the question that is not to Ziada's liking, but that is something different.

5.2 Section 2; Individual responsibility v. immunity

Commented [MM74]: Have this section reviewed by Reeves at Arnold and Porter as this issue is also coming up now in recent cases and we want our pleadings to be consistent

149.150. Section 2 refers to the fact that in paragraphs 3.2 - 3.4 the Court of Appeal referred to and gave weight to the rules regarding state immunity when answering the question whether the Israeli Officials can rely on functional immunity. A common thread in the section is that an appeal is made to individual responsibility of the Israeli Officials, apparently with the assumption that on that basis functional immunity cannot be invoked by the latter. This premise is incorrect, as has been explained in § 3.2.13.2.13.2.1 above. Just as in the proceedings at first instance and on appeal[135] , Ziada confuses individual responsibility with the question of functional immunity. For this reason alone, Section 2 fails completely.

150.151. Subsection 2.1 complains that the Court of Appeal wrongfully applied only the rules regarding state immunity when answering the question whether the Israeli Officials can invoke functional immunity. Against the backdrop of the - purely hypothetical - assumption that there are international crimes committed by the Israeli Officials, Subsection 2.1 reproaches the Court of Appeal that "it wrongfully did not base its judgment on the starting point of the development of individual responsibility and the claim instituted by Ziada against [the Israeli Officials] (and not: against the State of Israel) [...]."

151.152. Apart from the incorrectness of the premise on which the subsection is based, the subsection fails due to lack of factual basis in the judgment of the Court of Appeal in so far as it assumes that the Court of Appeal has based its judgment concerning functional immunity merely on the *Jurisdictional Immunities* case of the ICJ and the rule given there that concerned state immunity. The Court of Appeal took that judgment as its

[135] CvA Inc. § 2.4 to 2.6 and MvG, grievance 3.

starting point, extrapolated the rule given therein to the doctrine of functional immunity of state officials and examined whether an exception should be made to the latter doctrine in connection with the seriousness of the conduct alleged. In doing so, the Court of Appeal did not exclusively attribute significance to the aforementioned judgment of the ICJ, but to a multitude of case law and other sources that precisely refer to the doctrine of functional immunity, namely case law of the ECHR and foreign courts, statements of the Dutch government in an international context, practice of the Public Prosecution Service and work of both the ILC and the IDI. The conclusion from this is clear: ~~at least for civil cases,~~ there is no general state practice and *opinio juris* that provides grounds for an exception in civil case as advocated by Ziada. Again, the fact that Subsection 2.1 refers to "(the *development* of) customary international law" (ital. attorney) only underlines the correctness of this conclusion.

~~152.~~153. In so far as Subsection 2.1 implies that the Court of Appeal extrapolated the rule from the *Jurisdictional Immunities* case that no exception is made because of the seriousness of the conduct alleged, to the doctrine of functional immunity, it fails because this decision of the Court of Appeal is entirely correct. Functional immunity of public officials is part, or if you like: necessary corollary, to the immunity of states. See § 3.13~~3.13.1~~ above.

~~153.~~154. Subsection 2.2 builds on Subsection 2.1, or at least is an elaboration of the latter. After all, the subsection relies on "the existing international consensus on the breach of immunity in individual cases of international crimes, or at least the development thereof" and complains that the Court of Appeal should have given an opinion on the lawfulness of the acts committed by the Israeli Officials and could not have concluded that there was immunity. After all, according to the subsection, in order to answer the immunity question in a case such as this, the answer to the question of whether there are war crimes is the key question in the context of the reliance on immunity.

~~154.~~155. The subsection fails for the same reasons that Subsection 2.1 fails. For the sake of completeness, it should be noted that it is not clear to the Israeli Officials what Subsection 2.2 refers to by "existing international consensus". Does it refer to a general state practice, *opinio juris* or both? It is important to note that a distinction does exist between the two elements of the two element test. Apart from that, there is no 'consensus'.

~~155.~~156. The argument in Subsection 2.2 that "it is (only) a interlocutory

substantive judgment, which is only relevant for the purpose of answering the immunity question" is a fallacy. The interlocutory nature of a decision that a court, in assessing an immunity claim, would give on the presence or absence of war crimes does not, of course, alter the fact that that court is investigating and assessing the case before it, and thereby subjecting a foreign state (through its government officials) to a substantive assessment. The subsection acknowledges this by referring to a "preliminary *substantive* assessment" (ital. attorney). In short, in view of the scope of the doctrine of state immunity, which therefore also includes the functional immunity of state officials, this doctrine also precludes a preliminary judgment in the context of an assessment of a claim to immunity as advocated by the subsection.

Commented [DK75]: לשקול להפנות לציטוט מה-Jurisdictional Immunities of the state:
If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skillful construction of the claim.

~~156.~~157. Incidentally and finally, the subsection is worded in such a way that the Court should have given an opinion on "the lawfulness of the acts committed by [the Israeli Officials]". This is certainly not required for a~~A~~ successful reliance on functional immunity ~~certainly does not require that the relevant acts of a public official be lawful~~. Nor is a substantive assessment made in the context of an assessment of an immunity claim.

~~157.~~158. Subsection 2.3 opposes the consideration of the Court of Appeal in paragraph 3.4 that it is not disputed that the actions of the Israeli army are *acta jure imperii*. The subsection assumes that with this consideration the Court of Appeal meant that it is not disputed that the actions of the Israeli Officials, from the perspective of immunity, should merely be regarded as actions of the State of Israel. This interpretation of the Court of Appeal's contested consideration is incorrect and the subsection therefore fails already due to lack of factual basis. With this consideration the Court of Appeal has only given a qualification of the actions of the Israeli army. No more than that. For the rest Subsection 2.3 builds on Subsection 2.1, which fails.

~~158.~~159. Subsection 2.4, like the previous subsections, touches on the individual responsibility of government officials and is to that extent a repetition of moves. In Subsection 3.7 the Court of Appeal considered that if Ziada's assertion that the bombardment of his family's house was a war crime were to be found correct, this would also have important legal consequences for the State of Israel, to which the actions of the Israeli Officials should be attributed. According to the Court of Appeal, this is not altered by the fact that the State of Israel may not be obliged to compensate the Israeli Officials for an awarding judgment and that such a judg-

ment will not be enforced against the State of Israel. Subsection 2.4 complains that the latter judgment is legally incorrect or incomprehensible, pointing out that according to Ziada's allegations, in the event of a judgment in this case, no measures would be taken against the State of Israel and the State of Israel would not be impeded in its actions in any way.

~~159.~~160. The subsection fails. The doctrine of individual responsibility does not prevent the actions of a public official from being attributed to the state on whose behalf that official acts.[136] It is therefore a given that that state would be subject to an assessment ("trial") if a foreign court were to rule on the actions of that official and/or that that state could suffer legal consequences as a result. Therefore, the Court of Appeal did not demonstrate an error of law in its reasoning. Above all, the subsection fails to recognise that state immunity, including functional immunity of state officials, is inspired by the basic idea that one state has no jurisdiction to judge the actions of another state. It is therefore not at all a question of whether a possible conviction can be enforced against a state or whether that state is prevented from acting.

~~160.~~161. Apart from this, and if necessary alternatively, the subsection fails due to lack of interest. After all, the Court of Appeal has ruled in paragraph 3.7 that a foreign state whose (high-ranking) office holders in the Netherlands are involved in civil proceedings, may very well feel compelled to assist these officials in their defence and to bear the costs thereof. That would also be contrary to the principle that the state enjoys immunity from jurisdiction, according to the Court of Appeal. This judgment already independently supports the conclusion that the immunity of the State of Israel extends to the Israeli Officials so that they can invoke functional immunity. This judgment has not been contested by Ziada in this appeal to the Supreme Court and is therefore final.

Commented [IA76]: Unclear. Maybe a translation issue.

Commented [MM77]: Are we responding to a specific argument here?

5.3 Section 3; reliance on functional immunity well founded

~~161.~~162. The central theme of Section 3 is the Court of Appeal's finding that the Israeli Officials can successfully invoke immunity from jurisdiction. The thread running through this section is the premise (rejected by the Court of Appeal) that in the event of war crimes, in civil cases an exception should be made to the functional immunity of government officials in all cases.. Against the background of this central proposition, Zi-

[136] In his Memorandum No. 41 et seq., Ziada himself assumed that in the case of individual liability, there is double imputation.

ada in Section 3 argues that the Court of Appeal misinterpreted customary international law by allowing reliance on immunity in the present case. As explained in Chapter 333, this central argument of Ziada is incorrect. To that extent, Section 3 fails completely. For the sake of completeness the following applies.

162.163. The Israeli Officials treat Subsections 3.1 and 3.3 jointly, as they both deal with the same theme. The Israeli Officials understand the subsections as also having to be seen against the background of Ssubsection 1.1 and its appeal to the Supreme Court to initiate a 'progressive' development of customary international law. Partly against that - incorrect, see Chapter 222 – background, in a fairly transparent manner, Subsections 3.1 and 3.3 attempt to dismiss as 'older judgments' *Jones and Others v. UK* and the case law of the various national courts cited in paragraphs 3.9 and 3.10 of the judgment, which unmistakably constitute evidence to the contrary of the existence of an exception as advocated by Ziada. The unspoken implication is apparently that those judgments are "outdated" and should therefore be disregarded.

163.164. This attempt must fail. Apart from the fact that it is not made clear by which standard it could be determined whether a judgment is 'old' and which of the judgments mentioned in paragraph 3.9 are indeed 'older', this qualification does not at all mean that the judgment is irrelevant for the determination of general state practice and *opinio juris* at any point in time. On the contrary, the judgment *Jones and Others v. UK*, cited in Subsection 3.1, has been repeatedly confirmed by the ECHR. The case law of the British House of Lords, the New Zealand High Court, the Canadian Supreme Court and various American courts cited in paragraphs 3.10 and 3.11 of the judgment is consistent and clear: at least in civil cases, no exception is made to functional immunity of public officials in civil cases on the grounds of the seriousness of the conduct complained of. The few contraindications in foreign case law either have no or limited authority in view of their content, or are of no or limited weight, as the Court of Appeal has also established in paragraphs 3.9 through 3.15. These decisions are - rightly - not contested as such in this appeal to the Supreme Court. See also § 3.2.43.2.43.2.4 above.

164.165. Subsection 3.1 also notes that "identifying individual office holders with the State when answering the immunity question in the case of an international crime is contrary to core principles of international law concerning the individual responsibility of torturers." It is not entirely clear whether this is intended to raise a separate complaint. Be that as it

may, contrary to what the subsection assumes, the Court of Appeal did not apply a form of identification of the Israeli Officials with the State of Israel. The Court of Appeal has simply ruled that with respect to government officials such as the Israeli Officials in this case, there is no exception to immunity as advocated by Ziada. Moreover, Ziada again confuses the question of immunity with individual responsibility.

Commented [MM78]: What does this mean

~~165.~~166. The reference in Subsection 3.1 to the fact that common law jurisdictions are less familiar with the action civile than civil law jurisdictions does not hold water. See nos. 126~~126125~~ to 128~~128127~~ above.

~~166.~~167. Subsection 3.2 challenges the conclusion in paragraph 3.7 that the assumption of civil jurisdiction in the present case, even if Ziada only holds the Israeli Officials liable, constitutes a breach of state immunity. Among other things, the complaint implies that this judgment implies that no government action of a foreign state can be challenged before the Dutch courts, because after all, in the event of liability of individual officials, a link with the state on whose behalf the Officials act can always be made.

~~167.~~168. This complaint fails. If a public official of a foreign State is sued in his capacity before the Dutch court and his reliance on functional immunity is successful, the actions of the foreign state concerned cannot indeed be judged by a Dutch court as a result. It cannot be seen that in this respect the Court of Appeal has shown an incorrect interpretation of the law in Subsection 3.7. On the contrary, that the actions of the foreign state cannot be judged by a Dutch court is precisely the intention of and inherent in immunity of foreign states and their government officials. It is worth repeating that it is not the intention that the immunity of a foreign state can be circumvented by suing its officials. However, this is exactly what Ziada is trying to do with his present claims against the Israeli Officials.

~~168.~~169. As an aside, and for the sake of completeness, it should be noted that the subsection misrepresents the issues insofar as it seeks to insinuate that functional immunity of public officials represents a "legal vacuum" in the sense that none of their actions could ever be scrutinised before any court. Obviously, immunity cannot be invoked before the courts of the state on whose behalf the public officials acted. Furthermore, the possibility of relying on immunity is limited to acts which are considered to be acts *jure imperii* of the state concerned. And even in that case, it is required that the state concerned invokes immunity. In the absence of the

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latter, the state officials concerned cannot, of course, invoke immunity either. This is very well reflected in the cases cited by the Special Rapporteur in its reports to the ILC. The fact is that despite the lack of exceptions to foreign official immunity from criminal jurisdiction, there have been cases where state officials have been brought to justice in foreign states, when the state of the official has not invoked immunity. This wholly undermines the "legal vacuum" argument.

169.170. The subsection also argues that the assumption of civil jurisdiction in this case does not constitute a breach of state immunity. However, the Court of Appeal ruled otherwise in sections 3.5 to 3.7 and thus rejected Ziada's argument. This does not show a legal error, nor is it insufficiently substantiated - insofar as this judgment has been contested in this appeal to the Supreme Court. See also no. 159159158 up to and including 161161160 above. Ziada's allegations made in the factual instances that the subsection refers to do not alter this. The assertion made by the subsection that the Dutch courts previously upheld a civil claim says nothing about the question whether in this case the immunity of the State of Israel is violated. Therefore, it is not an essential argument and the Court of Appeal did not have to address it.[137] Furthermore, the subsection again confuses the question of functional immunity with the question of individual responsibility.

170.171. Subsection 3.4 complains that "the Court of Appeal has ruled in paragraphs 3.16-3.21 that the nature of the acts at issue does not allow the immunity to be breached and that it has not extended the line developed in criminal law of breaching immunity in the case of war crimes and crimes against humanity to civil law." Apparently, the subsection intends to put forward, at least in part, a complaint about reasoning. To that extent the subsection already fails, because the contested judgment is a judgment on the law which cannot be successfully contested with a complaint regarding reasoning.

171.172. Furthermore, the Court of Appeal did not commit an error in law by not accepting an exception to the functional immunity of Israeli Officials in this civil case. The allegations from the factual instances to which the subsection refers do not make this different.

[137] Incidentally, the subsection refers here to the judgments Rb. Den Haag 15 December 2017, ECLI:NL:RBDHA:2017:14782 (*Eshetu-Alemu*) and Rb. Den Haag 21 March 2012, ECLI:NL:RBSGR:2012:BV9748 (*El Hajouj*). However, the first case was a criminal case in which, moreover, immunity was apparently not invoked. The second case mentioned was addressed by the court of appeal in paragraph 3.13. The court of appeal ruled that there were no considerations in the judgment on the point at issue here, so it cannot be considered authoritative or evidence of state practice.

~~172.~~173. With regard to the contentions about (in short) the lack of a principled distinction between criminal and civil cases, see § 3.3.4~~3.3.4~~~~3.3.4~~ above. Above all, the Court of Appeal ruled in paragraph 3.17 that in the vast majority of cases the case law in civil-law cases does not recognise an exception to (functional) immunity for international crimes and that there is insufficient reason to look to criminal law for the scope of this rule in civil-law cases. The subsection does not contest this judgment with the required degree of certainty and precision. The same applies to the consideration of the Court of Appeal in paragraph 3.17 that a distinction between civil cases and criminal cases may not be considered satisfactory in all respects from a legal systematic point of view, but for the interpretation of customary international law it is important in the first place what judges decide in practice. This already implies that the arguments put forward by the sub-party cannot lead to a successful appeal to the Supreme Court.

~~173.~~174. As to the contention that individual responsibility of public office holders for international crimes does not constitute an unacceptable breach of state immunity, see nos. 159~~159~~~~158~~ to 161~~161~~~~160~~ and 170~~170~~~~169~~ above.

~~174.~~175. Subsection 3.5 complains that the Court of Appeal did not attach any significance to the fact that individual responsibility, in view of the right to access to justice, can also be assumed in civil proceedings, because the ECHR under Article 6 leaves a margin of appreciation to States to implement their own policy in this field. This complaint fails already because the Court of Appeal has ruled that the Israeli Officials are entitled to invoke immunity, so that the Court of Appeal could not give a judgment on individual responsibility. Furthermore, this complaint fails because individual responsibility as a substantive law issue is separate from the question of access to justice guaranteed by Article 6 ECHR. Apparently, immunity and individual responsibility are again being confused with each other. Furthermore, the complaint fails, because it is irrelevant whether the *margin of appreciation* of Article 6 ECHR allows a State to reject an appeal to the immunity of a public official. The question that the Court of Appeal had to answer is whether Article 6 of the ECHR precludes a declaration of incompetence if immunity is invoked.

~~175.~~176. The answer to the latter question, according to the consistent case law of the ECHR, is unequivocally "no". See also Chapter 4~~4~~~~4~~ above. By contrast, customary international law requires the national court to decline jurisdiction as soon as a public official of a foreign state is sued in

that capacity in connection with an act *jure imperii* of that state and that state has invoked its immunity in that connection. See also no. 49~~4949~~ above. In accordance with the consistent case-law of the ECHR, such a waiver does not constitute an impermissible restriction of the right of access to the courts guaranteed by Article 6 ECHR.

~~176.~~177. The complaint that the *margin of appreciation* allows a Member State to reject an application for immunity also misses the point in that, if immunity is rejected, there is no restriction of access to justice at all. The *margin of appreciation* would not apply in that case.

~~177.~~178. In paragraph 3.22, the Court of Appeal correctly referred to this case law of the ECHR, applied it and concluded that the successful reliance on immunity by the Israeli Officials did not constitute an impermissible restriction of the right of access to justice and was not disproportionate. Therefore, the complaint of Subsection 3.5 that the Court did not conduct a proportionality test fails due to lack of factual basis.

~~178.~~179. The subsection also argues that the Court of Appeal has not (sufficiently) taken into account Ziada's assertion that there is no alternative forum available to which he can submit his claim. This complaint has already failed due to a lack of factual basis, because the Court of Appeal has rejected this assertion in paragraph 3.22 with reference to the *Jurisdictional Immunities* judgment and case law of the ECHR. This rejection has not been challenged in this appeal to the Supreme Court in a sufficiently clear and precise manner. See also § 3.4~~3.43.4~~ above.

~~179.~~180. Subsection 3.6 complains that the Court of Appeal wrongly considered in paragraph 3.19 that in this case[138] there are sufficient reasons to extend the immunity because (i) it concerns a military operation that was based on official policy of the State of Israel and (ii) there are differences between criminal and civil law, such as the fact that in criminal law the State is the prosecutor and in civil law it is not, and that there is the possibility of *vexatious charges* that can be filtered out in criminal law.

~~180.~~181. The subsection fails in its entirety for lack of interest, because it is directed against an obiter dictum. After all, the Court of Appeal already ruled in paragraphs 3.7 through 3.17 that in the vast majority of cases the case law in civil-law cases does not recognise an exception to (functional) immunity for international crimes. Against this background, there is in-~~sufficient reason to look to criminal law on the scope of this rule in civil~~

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Commented [MM81]: add some more detail as to why the court ruled that way in one sentence and futher clarify the last sentence

Commented [IA82]: Unclear. Maybe a tranlsation issue.

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[138] The subsection speaks of "insufficient reason", but that is apparently a misnomer.

flaw cases. It is therefore entirely superfluous that the Court of Appeal in paragraphs 3.18 and 3.19 discussed case law on functional immunity in which a relevant difference between criminal and civil law was explicitly recognized. This only serves to confirm the conclusion already drawn in paragraphs 3.7 through 3.17.

181.182. Apart from that, and if necessary alternatively, the subsection fails for lack of factual basis. There is no reason to suppose that the Court of Appeal in paragraph 3.19 derived from the fact that it concerns a military operation that is based on official policy of the State of Israel, that there could be no question of a criminal offence. The Court of Appeal only ruled on the question whether the Israeli Officials can successfully invoke immunity. The complaint that the Court of Appeal would have misjudged the correct framework for assessing whether there is functional immunity in the case of international crimes is merely a reprise of Section 2.

182.183. The Israeli Officials understand Subsection 3.7 as a complaint on reasoning against paragraph 3.20 to the effect that the Court of Appeal gave an incomprehensible interpretation to Ziada's assertion that the prosecution of war crimes is mandatory. Just like Subsection 3.6, Subsection 3.7 fails for lack of interest because it challenges an obiter dictum. See also no. 181181180 above. Apart from that, the contested finding is (part of) a *legal judgment*, which cannot be successfully contested with a complaint on reasoning. Besides: the considerations of the Court of Appeal in paragraph 3.20 give no reason to suppose that the Court of Appeal has misunderstood the purport of Ziada's assertion. With respect to the subsection's reference to Article 146 of the Geneva Convention, it should also be noted that this provision does not change the fact that no prosecution is brought if, after assessing the available evidence and the dossier, the prosecuting authority concludes that the evidence is insufficient or that the facts cannot be qualified as a crime.[139] This is also what the Court of Appeal is referring to in the first sentence of paragraph 3.20.

183.184. Subsection 3.8 takes as its point of departure that there is no "clearly crystallized rule advocating immunity from jurisdiction for pub-

[139] Cf. the commentary on Article 129 of the Geneva Convention relative to the Treatment of Prisoners of War: "5127 The decision whether to prosecute an alleged perpetrator should be taken by competent authorities in line with national legal requirements. National laws regarding standards of suspicion or grounds for arrest and detention will apply. The wording of Article 129(2) - 'bring such persons ... before its own courts' - does not imply an absolute duty to prosecute or to punish. The competent authorities mICJt conclude that there are not sufficient reasons to believe that the alleged perpetrator committed the grave breach or that there is simply not enough evidence available to secure a conviction".

Commented [IA85]: Unclear. Maybe a translation issue.

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Commented [MM87]: Check with Noams team GC references and fn

lic officials", or that there is a "grey area regarding the content of customary international law". However, the Court of Appeal found in paragraph 3.6 that the immunity of state officials for acts performed in the exercise of their duties as a rule of customary international law is not in itself controversial. In paragraphs 3.17 and 3.23 the Court of Appeal ruled that in civil-law cases the vast majority of cases the case law does not acknowledge an exception to (functional) immunity for international crimes, respectively that there is no reasonable doubt - and that to that extent there is no 'grey area' - that customary international law as it currently stands implies that in civil-law proceedings against a government official no exception to functional immunity should be made because of the seriousness of the facts underlying the claim. In the opinion of the Court of Appeal, there is therefore no question of a rule that has not been clearly crystallised or of a grey area. These judgments have not been contested as such and with the required definiteness and precision and are therefore final. The judgments from South Korea and Italy cited by the subsection have been assessed by the Court of Appeal in paragraph 3.12 - 3.15 and have been found of insufficient weight. Again, these findings are not being challenged in this appeal to the Supreme Court. See also § 3.3.3~~3.3.3~~~~3.3.3~~ above. The subsection therefore fails.

~~184.~~185. Moreover, the Court of Appeal was entirely correct in concluding that there is no rule that has not been clearly crystallised or of a grey area. Apart from that, in this appeal to the Supreme Court no complaint is directed against the premise in paragraph 3.6 of the judgment that the immunity of state officials for acts performed in the exercise of their duties as a rule of customary international law is not in itself controversial. Given that premise, if one were to find that it is not clear whether a certain alleged exception to that immunity (in itself uncontroversial) exists, this can only lead to the conclusion that that alleged exception does not exist.

~~185.~~186. Subsection 3.9 is a reprise of Subsection 3.5, which fails. See no. 179~~179~~~~178~~ above. Incidentally, the subsection apparently fails to recognise that functional immunity of public officials is part (or a necessary corollary) of state immunity. See § 3.1~~3.1~~~~3.1~~ above.

~~186.~~187. Subsection 3.10 fails for want of interest, since it is directed against an obiter dictum. See also no. 181~~181~~~~180~~ above. Furthermore, the subsection fails for lack of factual basis. Contrary to what the subsection apparently assumes, the Court of Appeal did not rule that functional immunity could only be set aside in the case of actions of a low-ranking

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military officer. The Court of Appeal only considered that this is in any case not the case for very high-ranking military officers such as the Israeli Officials.

6 CONCLUSION

~~187.~~188. On the basis of the foregoing, the Israeli Officials conclude that the appeal to the Supreme Court should be **dismissed**, costs in law.

Lawyer

List of sources cited

[to be filled in]