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Court of Appeal The Hague

07-12-2021

07-12-2021

200,278,760/01

First instance: ECLI:NL:RBDHA:2020:559, Ratification/confirmation of international law

Appeal

Functional immunity from jurisdiction; claim against (former) commanders of the Israeli army; exception to immunity for violation of human rights? United Nations Convention on Jurisdictional Immunities of States and their Property.

Locations Rechtspraak.nl

COURT OF THE HAGUE

Department of Civil Law

Case number : 200.278.760/01
Court case/role number: C/09/554385/HA ZA 18/647

Judgment of 7 December 2021

regarding

[appellant] ,

residing at [residence] , appellant,

hereinafter referred to as: [appellant] ,

lawyer: mr. L. Zegveld in Amsterdam,

vs

1 [respondent 1] ,

residing at [residence] ,

hereinafter referred to as: [respondent 1] ,

2 [defendant 2] ,

residing at [residence] ,

hereinafter referred to as: [respondent 2] ,

respondents,

hereinafter jointly referred to as: [respondent 1] cs, lawyer: mr. CG van der Plas in Amsterdam.

The lawsuit

By summons on appeal of 23 April 2020, [appellant] appealed against the judgment of the District Court of The Hague of 29 January 2020. In his statement of appeal (with exhibits 47 to 72), [appellant] raised six grounds of appeal against the contested judgment. , which [defendant 1] et al. contested in a statement of defense (with exhibits I-11 to I-12 inclusive). On September 23, the parties argued the case before the Court of Appeal by their lawyers as well as, for [respondent 1] et al, by Th.OM Dieben, lawyer in Amsterdam, on the basis of pleadings submitted to the Court of Appeal. On that occasion, the parties also submitted exhibits ([appellant] exhibits 73 to 84, [defendant 1] et al., exhibits I-13 to I-15). Finally, a judgment was requested.

Assessment of the appeal

1. Short summary of this statement

1.1 [Appellant] is originally from the Palestinian territories. He now lives in the Netherlands and has Dutch nationality. Several close relatives of [appellant] were killed in a 2014 bombing of targets in the Gaza Strip, which was carried out by the Israeli army. In these proceedings, [appellant] wants [respondent 1] and [respondent 2], who held high positions in the Israeli army at the time of the bombardment, personally compensate the damage suffered by [appellant] as a result. According to [appellant], [respondent 1] and [respondent 2] were guilty of crimes against humanity and war crimes.

1.2

[Defendant 1] and [Defendant 2] take the position that the Dutch court is not competent to rule on their conduct. They invoke immunity from jurisdiction. Immunity from jurisdiction means that the courts of one State have no jurisdiction over the conduct of another State or the officials of that other State.

1.3 The court rules in favor of [respondent 1] and [respondent 2]. International customary law entails that they can invoke immunity from jurisdiction. No exception is made in respect of alleged crimes against humanity or war crimes. Accordingly, the Court of Appeal has no jurisdiction to adjudicate on [appellant's] claim.

2. The facts and the main issues in this case

2.1 [Appellant] is originally from the Palestinian territories. His family lives in the Gaza Strip. [appellant] himself has lived in The Hague with his family since 2005. He has Dutch nationality.

2.2 In July and August 2014, the Israeli army (Israeli Defense Forces or IDF) conducted a military operation in the Gaza Strip, Operation Protective Edge (OP). As part of this military operation, the Israeli Air Force carried out a bombing raid on 20 July 2014 in which the house of [appellant]'s family

was destroyed. As a result, six relatives of [appellant] lost their lives, including his mother and three brothers.

2.3 [Defendant 1] and [Defendant 2] were commanders of the Israeli army at the time of the bombing (General Chief of Staff) respectively commander of the Israeli Air Force (Air Force Commander). They no longer hold these positions.

2.4 [appellant] takes the position that [respondent 1] cs are personally responsible and liable for the damage he suffered as a result of the bombing. According to [appellant], [respondent 1] cs have violated the international law of war by bombing his family's house. [appellant] demands a declaratory judgment that [respondent 1] cs have acted unlawfully towards him and are jointly and severally liable for the damage that he has suffered and will suffer as a result of that wrongful act. In addition, [appellant] claims that the compensation to be paid to him by [respondent 1] et al. be set at € 536,603, plus the statutory interest.

2.5 [Defendant 1] et al. invoked the lack of jurisdiction of the Dutch court before all defenses. According to [respondent 1] et al. they enjoy immunity from jurisdiction, because the bombing was carried out in the exercise of the public responsibilities of the State of Israel and they were acting exclusively in their official capacity as government officials of the State of Israel. The air raid as part of which the bombing was part was a sovereign act of the State of Israel. On the basis of international customary law, [defendant 1] et al. enjoy (functional) immunity from jurisdiction before the Dutch court as foreign office holders. [defendant 1] et al. dispute that they have committed an international crime

2.6 In a diplomatic note to the Ministry of Foreign Affairs dated October 18, 2020, Israel invoked the immunity from jurisdiction of [Defendant 1] and [Defendant 2], writing in particular as follows:

> "It is the State of Israel's position that actions undertaken by Mr. [defendant 1] and Mr. [respondent 2] during these hostilities were performed exclusively in their official capacity as General Chief of Staff and Israeli Air Force Commander respectively and in accordance with their authority under Israeli law. The State of Israel unequivocally asserts the immunity of Mr. [defendant 1] and Mr. [defendant 2] with regards to these official acts.
>
> (…)
>
> Although brought against Mr. [defendant 1] and Mr. [respondent 2] personally, the lawsuit challenges the legality of alleged actions and policies of the Government of the State of Israel as carried out by its agents in the exercise of government authority, and is in essence a suit filed against the State of Israel itself . As such, the State of Israel views the write as a direct challenge of Israel's immunity from judicial proceedings in foreign nations in an attempt to bypass Israel's sovereign immunity under international and Dutch law. Allowing this case to proceed despite the assertion of immunity under international law by the State of Israel would be unprecedented.
>
> In light of the above, the Government of Israel wishes to make known its position with regard to the application of foreign sovereign immunity in this case, and the consequential immunity of its officials for their official acts."

2.7 The district court declared that it has no jurisdiction to hear the claim of the [appellant]. In summary, the court considered the following:

(a) art. 13a General Provisions Act (Wet AB) provides that the jurisdiction of the (Dutch) court is limited by the exceptions recognized in international law, the immunities of jurisdiction recognized in international customary law belong within these exceptions;

(b) this case concerns whether [respondent 1] et al. enjoy functional immunity from jurisdiction as (former) office holders of the State of Israel under customary international law;

(c) the district court assumes provisionally that the conduct of which the [appellant] accuses of [respondent 1] cs can be qualified as international crimes;

(d) Unlike in international courts such as the International Criminal Court and the International Criminal Tribunal for the former Yugoslavia, where individual (criminal) liability of government officials for international crimes has been accepted, the situation is different for national courts, because those courts are subject to the customary principle of equality between states; thus functional immunity is the starting point for national courts;

(e) the question of whether there is an exception to that premise for international crimes must be answered in the negative, as there is no limitation under customary international law on functional immunity from jurisdiction when adjudicating international crimes by national courts;

(f) The question whether developments in or rules of customary international law relating to functional immunity from jurisdiction before national courts in criminal law can be applied by analogy in civil proceedings; this can be left open because there exists is no sufficiently crystalized rule of customary international law applicable to the situation of the adjudication of international crimes before national courts;

(g) [Defendant 1] and [Defendant 2] enjoy functional immunity from jurisdiction in these proceedings under customary international law. In this case Art. 13a AB Act emphatically provides that the Dutch court has no jurisdiction; the judge therefore has no scope to apply the margin of appreciation allowed by art. 6 ECHR, in order to grant access to justice nonetheless;

(h) recognition of functional immunity from jurisdiction of [respondent 1] cs in this case is also not in conflict with art. 6 ECHR: the granting of state immunity and the functional immunity that derives from it because this immunity is based upon a rule of international customary law.

3. The grievances and the assessment thereof

3.1 When discussing the grievances, the court of appeal will, like the district court, provisionally assume that [Defendant 1] and [Defendant 2] committed international crimes when carrying out the bombing on 20 July 2014. This does not mean, as [appellant] assumes,1 that either the district court or the court of appeal have issued a 'provisional judgement' on these acts. It means only that the court of appeal has not yet made any judgment as to the classification of these acts, but will first explore whether - if the qualification of these acts posited by the [appellant] is correct - [respondent 1] et al. can invoke immunity from jurisdiction.

3.2 The grievances will be dealt with jointly as much as possible. They essentially raise the question whether [respondent 1] and [respondent 2] are entitled to immunity from jurisdiction in these civil proceedings on the basis of their former positions as senior officials in the Israeli army. It is therefore about so-called functional immunity. The court will first of all examine what international law provides with regard to this subject.

3.3 The point of departure for the Court is the judgment of the International Court of Justice (IGH) of 3 February 2012 regarding Jurisdictional Immunities of the State.2 That case concerned the

question of whether Italian victims of war crimes committed by German officials in the Second World War could claim compensation from the Federal Republic of Germany (FRG) before the Italian court. It was not in dispute in that case that the harmful acts were to be classified as war crimes, nor that they involved acts acta jure imperii (acts of the State in the exercise of its public function) of the FRG. The ICJ considered, referring to its judgment on Judgment Warrant,3

> "58. (…) 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."

And furthermore:

> "61. (…) the Court must approach the question raised by the present proceedings, namely whether that immunity is applicable to acts committed by the armed forces of a State (…) in the course of conducting an armed conflict."

Italy had argued that immunity from jurisdiction of the FRG should be rejected because (i) the acts of the German armed forces constituted war crimes and crimes against humanity, (ii) the violated norms of international law jus cogens and (iii) no other remedy was available to the claimants so that jurisdiction of the Italian courts was 'a matter of last resort' (para. 80). The ICJ rejects these arguments. With regard to argument (i) that the acts of the German armed forces were war crimes and crimes against humanity, the ICJ considered:

> 83. "(…) 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 decisions of the Italian courts which are the subject of the present proceedings, there is almost no State practice which might be considered to support the proposition that a State is deprived of its entitlement to immunity in such a case. (…)
>
> 84. 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.
>
> (…)
>
> 91. 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. In reaching that conclusion, the court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case."

With regard to the jus cogens argument (ii) the ICJ considered:

> "93. This argument therefore depends upon the existence of a conflict between a rule, or rules, of jus cogens, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labor and the

deportation of prisoners of war to slave labor are rules of jus cogens, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. 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. (…)"

And with regard to argument (iii) that no other remedy was available:

"101. (…) 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. States also did not include any such condition in either the European Convention or the United Nations Convention. (…)"

3.4 The Jurisdictional Immunities case concerned a civil claim against a foreign State. The judgment of the ICJ makes it clear 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 invoking jus cogens or the lack of an alternative legal remedy. The question is whether the rules laid down in this judgment also apply to a civil claim against officials of the foreign State, such as [respondent 1] and [respondent 2] . Apart from the fact that the claim in the present case is directed against officials of the State of Israel in person, the cases are very similar. This case also concerns (alleged) war crimes (in the Jurisdictional Immunities case admitted, disputed in the present case). That the actions of the Israeli army are acts jure imperii, is not in dispute, any more than it was in the Jurisdictional Immunities case. It is true that the ICJ emphasizes in paragraph 91 that it was not ruling on the immunity of officials of the State, but its observation there [ed: that the question whether and to what extent immunity might apply in criminal proceedings against an official of the state was not at issue in that case] is not relevant for the present case.

3.5 [Defendant 1] et al. argue that functional immunity is derived from the immunity of the State. The State can only act through natural persons. The immunity of a State thus also extends to the acts of its officials. If it were otherwise, the immunity of a State can always be circumvented by litigating against its officials. On the other hand, [appellant] argues that he only addresses [respondent 1] and [respondent 2], not the State of Israel, and that a court decision awarding his claim would be enforced against them only. According to [appellant] there is therefore no question of circumvention of state immunity.

3.6 The Court of Appeal states first and foremost that the immunity of officials of the State for acts they have performed in the performance of their duties (functional immunity, or immunity rational materiae) is not in itself controversial as a rule of customary international law.4 art. 2 paragraph 1 under (b) (iv) of the (not yet entered into force, but generally regarded as authoritative)United Nations Convention on Jurisdictional Immunities of States and Their Property (hereinafter: the UN Convention) therefore stipulates that the term "State" also includes: "representatives of the State acting in that capacity". Although the treaty text does not explicitly state that the same applies to former officials, it certainly is the case under customary international law.5

Immunity from jurisdiction of government officials is not for the benefit of such officials, but for the benefit of the State they represent, and such State may therefore waive the immunity of such official. (6)

3.7 Functional immunity is therefore a derivative of the immunity of the State itself. Lord Millet(7) put it this way:

> "Immunity rational materiae is very different [from immunity rational personae, court]. This is a subject matter immunity. It operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another, and only incidentally confers immunity on the individual. (…) The immunity finds its rationale in the equality of sovereign states and the doctrine of non-interference in the internal affairs of other states (…)."

The rationale behind functional immunity is therefore the same as [that behind] the immunity of the State itself, namely that the courts of one State should not adjudicate on the conduct of another State (*par in parem non habet empire*). Against this background, it is difficult to see why, now that there is no exception to the immunity from jurisdiction for the State itself in civil proceedings for – in short – war crimes (see the Jurisdictional Immunities case), such an exception would apply to the (former) officials of that State. In this regard it is important that the UN Convention does not bring "representatives of the State acting in that capacity" within the definition of State, only in Art. 2 paragraph 1 (b) (iv) but also in art. 6(2)(b) [which] provides that, inter alia, proceedings shall be deemed to have been instituted against a foreign State if that State "is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities" of that State. Certainly, as far as it concerns the 'interests or activities' [of the State in question], this applies to the present case. If [appellant's] statement that the bombing of his family's house was a war crime were to be found to be correct, that would have important legal consequences not only for [respondent 1] and [respondent 2], but also for the State of Israel. to whom the deeds of [respondent 1] and [respondent 2] are to be imputed.8 The fact that Israel may not be required to indemnify [Defendant 1] and [Defendant 2] for a granting award and that such a judgment will not be enforced against Israel is irrelevant. The negative consequences just mentioned for Israel would continue.

Compare the ruling in the Kazemi case of the Canadian Supreme Court, in which Justice Le Bel considered: (9)

> "[89] The appellants argue that a civil suit against the two individual respondents - even if it were successful - would not necessarily lead to an award of damages against the state, and therefore Iran would not necessarily suffer any financial loss. In their view, the proceedings against Mr. Mortazavi and Mr. Bakhshi would have the effect of jeopardizing only the personal patrimony of those two individuals (…).
>
> [90] Even if the appellants were correct in their contention, a matter of which I am not convinced, their argument is premised on a misunderstanding of the purposes of state immunity. Avoiding both the enforcement of an award of damages against a state and the state's indemnification of its agents are but two of the many purposes served by state immunity. In practice, suing a government official in his or her personal capacity for acts done while in government has many of the same effects as suing the state, effects that the SIA seeks to avoid. Allowing civil claims against individual public officials would in effect require our courts to scrutinize other states' decision making as carried out by their public officials. The foreign state would suffer very similar reputational consequences (…)."

The Court of Appeal comes to a similar conclusion in the present case, noting that the foreign State, whose (high) office holders in the Netherlands are involved in civil proceedings, may well feel compelled to assist these officials in their defence. and bear the costs thereof. That too would be contrary to the principle that the State enjoys immunity from jurisdiction. The conclusion is that, although the State of Israel is not a party to these proceedings, its interests are indirectly indeed at stake. In the circumstances of this specific dispute it is therefore not obvious that a difference should be made between immunity from jurisdiction of the State of Israel on the one hand and [respondent 1] et al. on the other.

3.8 National and international case law also does not support the statement that in civil cases an exception should be made from the immunity from jurisdiction of (former) government officials for war crimes or crimes against humanity. The European Court of Human Rights (ECtHR), in its judgment on Jones vs United Kingdom (10), concluded that (in the relevant civil case alleging that the government officials in question allegedly tortured the plaintiff)

> "(..) the grant of immunity to the State officials in this case reflected generally recognized rules of public international law."

The ECtHR considered:

> "213. Having regard to the foregoing, while there is in the Court's view some emerging support in favor 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. (…)"

In its judgment of 12 October 2021, in which victims of sexual abuse made claims against the Vatican, the ECtHR considered that no arguments have been put forward from which it can be deduced that the state of international law has since changed compared to 2012, when the Jones judgment t. United Kingdom was pointed out.(11)

3.9 In the case that gave rise to the ECtHR judgment in Jones t. United Kingdom, the House of Lords ruled that government officials charged in a civil case could claim immunity.12 It considered that there is no rule of customary international law that makes an exception to the immunity in principle accorded to government officials. The High Court of New Zealand endorsed the reasoning and result reached by the House of Lords.13 The Supreme Court of Canada14 ruled to the same effect in a case in which, in addition to the Republic of Iran, a number of government officials were also charged on the grounds of torture. The Supreme Court considered (in its own summary of the ruling):

> "There continues to be very strong support for the conclusion that immunity from civil suits extends to public officials engaging in acts of torture, and it is not yet possible to conclude that either a consistent state practice or jurisprudence to the contrary effect exists.
>
> (…)
>
> While the prohibition of torture is certainly a jus cogens norm from which Canada cannot derogate and is also very likely a principle of fundamental justice, the peremptory norm prohibiting torture has not yet created an exception to state immunity from civil liability in cases of torture committed abroad. At this point in time, state practice and opinion juris do not suggest that Canada is obligated by the jus cogens prohibition on torture to open its courts so that its citizens may seek civil redress for

torture committed abroad. Consequently, failing to grant such access would not be a breach of the principles of fundamental justice."

This statement is primarily based on the Canadian State Immunity Act, but that does not prevent this ruling from being considered an indication of prevailing customary international law. The Supreme Court also assessed the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms, which includes the right of access to justice.

3.10 Case law in the United States largely follows the same line. The Doğan case against Barak concerned a claim against (former) Israeli Defense Minister Ehud Barak. Doğan's parents held Barak liable for the fact that their son was killed in an Israeli army action off the coast of the Gaza Strip. The United States Court of Appeals for the Ninth Circuit15 considered that, as a former Defense Minister, Barak was in principle entitled to immunity from jurisdiction and that no exception could be made for a violation of jus cogens. In doing so, the Court of Appeals referred to the ruling of the Court of Appeals for the Second Circuit in Matar v. Poet.(16)

In its ruling, the Ninth Circuit distinguished the case from the Fourth Circuit's ruling on Yousuf v. Samantar17, which included an exception to the immunity of a former government official for violation of jus cogens. The case Yousuf v. Samantar (17) was different, according to the Ninth Circuit, because in that case there was no state recognized by the United States that had invoked immunity from Samantar. The Ninth Circuit therefore concludes:

> "As far as we can tell, no court has ever carved out an exception to foreign official immunity under the circumstances here. We also decline to do so."

3.11 In its ruling of 19 July 2018, the US District Court for the District of Columbia also recognized the immunity of Nigerian government officials in a civil case and made no exception in connection with juice cogens.(18)

3.12 In a case involving claims by Korean comfort women against the State of Japan, the Seoul Central District Court ruled on January 8, 2021, accepting an exception to Japan's immunity for crimes against humanity.(19) In a ruling dated April 21, 2021, that same court rejected such an exception and upheld Japan's immunity.(20) In doing so, the court considered that the claimants were not entirely deprived of the possibility of recovering damages, because an agreement concluded in 2015 between South Korea and Japan offered an 'alternative remedy'.

3.13 [appellant] has referred to the following civil-law decisions in support of his position that an exception to the functional immunity of [respondent 1] cs must be made. In the first place, he refers to a ruling by the District Court of The Hague regarding El-Holoui.(21) This concerned a case against 12 Libyan government officials who allegedly tortured the claimant. The court granted the claim in absentia, after having considered and accepted its jurisdiction under art. 9 sub c Rv. The judgment does not consider the functional immunity of the defendants and a possible exception to this on the grounds of torture. Even if it were assumed that the court should have tested immunity, or, that that was customary, that does not mean that the court actually did so. That the judgment contains no considerations on this point, but does contain considerations on the subject of its jurisdiction under art. 9 sub c Rv, shows that the court did not confront this issue. This judgment cannot therefore be regarded as authoritative or as evidence of state practice in respect of the point at issue here.

3.14 The judgment of the Seoul District Court of January 8, 2021 has already been briefly discussed above. This judgment was followed by a judgment of the same court with an opposite outcome. The authority of the first ruling is therefore also limited.

3.15 [appellant] further refers to the decision of the Italian Constitutional Court of 22 October 2014.(22) This ruling concerned the question of whether, in a civil case, immunity from jurisdiction of the FRG for war crimes committed during the Second World War is contrary to the Italian Constitution. The Constitutional Court ruled that granting immunity was indeed contrary to the rights enshrined in the Italian Constitution to the protection of fundamental human rights and access to justice. Importantly, the Constitutional Court does not interpret the ICJ's interpretation (as expressed in the Jurisdictional Immunities- case) of customary international law, but only examined whether the rule of customary international law thus interpreted is contrary to the Italian Constitution (3.1). In short, the ruling of the Constitutional Court means that complying with the ruling of the ICJ violates specific provisions of the Italian Constitution. Since the Constitutional Court did not rule on the interpretation of customary international law, but based its ruling mainly on Italian constitutional law, the significance of this ruling for the present case is limited.

3.16 [Appellant] has also invoked (national and international) judgments in criminal cases (23), including rulings from international tribunals such as the ICTY (Yugoslavia Tribunal) (24). In addition, [appellant] refers to the work of the International Law Commission (ILC)25, the position of the Dutch government on the adjudication of international crimes against the ILC (25), as well as on the practice of the Public Prosecution Service to prosecute international war crimes in the Netherlands. These are sources that relate to criminal law. Indeed, Art. 7 paragraph 1 of the Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction of the ILC also relates to criminal cases26 and the same is true of the position of the Dutch government with regard to the ILC's draft. The Court of Appeal does not consider these criminal law sources to be determinative for the question at issue in these proceedings, namely whether [respondent 1] et al. can claim immunity from jurisdiction in this civil law case.

3.17 As discussed above, the judiciary in civil cases does not recognize an exception to (functional) immunity for international crimes in the vast majority of cases. Against this background, there is insufficient reason to consult criminal law for the scope of this rule in civil law cases. In (international) legal practice, functional immunity from jurisdiction in criminal matters is also often explicitly distinguished from functional immunity in civil proceedings, on the basis of the differences between the two forms of justice (see nos. 3.18-3.19 below). That such a distinction may not be considered satisfactory in all respects from a legal system point of view, for example, because certain legal systems provide for the possibility of also filing a claim for compensation in a criminal case, does not alter this. For the interpretation of customary international law, it is primarily important what judges decide in practice. Dire Tladi, the Special Rapporteur to the ILC on *jus cogens*, posits: (27)

> "Second, and more importantly, as agreed at the commencement of the consideration of the topic, what should guide the Commission should be State practice 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. [footnote not cited, court] To the extent that State practice, in the form of national court cases, supports the distinction, the Commission should follow that practice."

As considered above, judges in civil cases generally do not recognize an exception to functional immunity in international crimes.

3.18 Court decisions on functional immunity that explicitly recognize a relevant difference between criminal law and civil law are the following. In Al-Adsani, the ECtHR distinguishes the criminal liability

of an individual from the civil liability of the State.(28) Also the IGH in Jurisdictional Immunities (par. 91, see quote above under 3.3) in a civil law case and the Bundesgerichtshof (29) in a criminal case, they emphatically point out in their judgments that they do not rule on the situation in, respectively, a criminal or a civil case.

3.19 In the opinion of the Court of Appeal too, there are such differences between criminal law and civil law that a difference in the treatment of functional immunity between criminal law and civil law is justified because, at least in the present case, there is sufficient reason for the immunity of the State of Israel to be extended to [defendant 1] cs. After all, this case concerns a military operation that is based on official policy of the State of Israel and not, for example, on an individual action by a single government official. Lord Millet in Pinochet (no.3) (30) considered in this regard:

> "I see nothing illogical or contrary to public policy in denying the victims of state sponsored torture the right to sue the offending state in a foreign court while at the same time permitting (and indeed requiring) other states to convict and punish the individuals responsible if the offending state declines to take action."

Chief High Court Judge Randerson considered:

> "I do not find there to be unjustified asymmetry between criminal and civil proceedings arising from the Torture Convention and Pinochet (No. 3). There are obvious grounds for distinction between criminal and civil proceedings in respect of alleged acts of torture. Criminal proceedings may only be brought against individuals responsible and are ordinarily brought by the state. In contrast, civil proceedings may be brought against both the state and the individuals and may be brought by private persons."

See also the Canadian Supreme Court32 in which Justice Le Bel notes that a relevant difference is that in a criminal prosecution 'vexatious charges can be filtered out. Justice Le Bel additionally notes:

> "While an exception to immunity for jus cogens violations exists in the criminal context, no such exception has developed in the civil context. My colleague Justice Abella as well as Breyer J. of the United States Supreme Court take issue with this distinction, essentially arguing that the existence of universal criminal jurisdiction contemplates the existence of universal civil jurisdiction as well (…). In my view, principled grounds justify the distinction between the exception to immunity in the civil versus the criminal context. These include the "long pedigree" of exceptions to immunity in criminal proceedings, and the "screening mechanisms" that are available to governments in criminal suits as compared to civil suits (…)."33

3.20 The assertion of [appellant] that prosecuting war crimes is obligatory ignores the fact that the assessment of whether something is a war crime (as provable by a criminal court judge) and whether the suspicion is strong enough to bring the case to court, lies, in criminal law, with the Public Prosecution Service, a government agency independent of the parties. The situation is undeniably different in civil proceedings.

3.21.1 [appellant] points to a number of sources in which, according to him, civil law is aligned with criminal law. For example, he refers to a passage from the Recommendation of the CAVV on the immunity of foreign office holders from 2011 (page 45), which reads as follows:

> "The office holders who, in view of the answers to the first and second questions, enjoy full criminal immunity, also enjoy full civil immunity, unless a treaty that applies to them

> determines otherwise. Termination of full criminal immunity (as with the cessation of office) means termination of the entire civil law immunity." (34)

Given the context of this passage, however, it is clear that it concerned personal immunity.

3.21.2 [Appellant] also invokes the Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State (2009) adopted by the IDI, of which art. III paragraph 1 reads:

> "[n]o immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes."

It is correct in itself that this provision also covers, in principle, immunity in civil proceedings. Pursuant to art. I.2 of this Resolution, 'jurisdiction' is defined as: "the criminal, civil and administrative jurisdiction of national courts of one State as it relates to the immunity of another State or its agents". However, in Lady Fox's report preceding this Resolution, it was made clear that the law in force at the time was different:

> "As well as immunity from criminal jurisdiction of the national court, the question has arisen whether persons acting on behalf of the State should continue to enjoy immunity from civil jurisdiction when claims are brought for repair for violation of human rights as a result of the commission of an international crime. Whilst the removal of immunity from criminal jurisdiction may be justified on the basis of the personal criminal intent of the individual which is a necessary element in the proof of an international crime, to allow the removal of immunity from civil jurisdiction from the individual who acts on the State's behalf must indirectly result in the removal of immunity of the State from civil jurisdiction and consequently indirectly achieve a result which as explained above the current law relating the State immunity does not at present allow. The maintenance of a distinction between criminal and civil jurisdiction is also justified on the ground that unlike civil claims for repair a criminal prosecution is instituted or under the control of the forum State."

The same report notes that the committee concerned wanted to go further than just formulating the applicable law.(36)

3.21.3 In addition, [appellant] refers to the Resolution on the Universal Civil Jurisdiction with regard to Reparation for International Crimes (2015) (37), which states, among other things:

> "Victims of international crimes have a right to appropriate and effective reparation from persons liable for the injury (art. 1 paragraph 1). They have a right to an effective access to justice to claim reparation (art. 1 paragraph 2). The immunity of States should not deprive victims of their right to reparation (art.5)"

From the report preceding the adoption of this Resolution in its final form, it appears that in the draft for this Resolution Art. 5 was formulated as follows:

> "State immunity shall not deprive of its effects the State's obligation to repair the prejudice caused to victims of international crimes."

However, the members of the IDI thought this was going too far, because the provision in this form did not correspond to state practice. The word 'shall' was therefore replaced by 'should'.38 It is therefore not a question of applicable law, but of an incentive to the States. All this means that the work of the IDI does not carry sufficient weight in this case.

3.22 [appellant] further argues (in ground 6) that recognition of functional immunity of [respondent 1] cs is a disproportionate limitation of his right to effective access to justice as provided by Art. 6 ECHR. [appellant] argues that the margin of appreciation that art. 6 leaves to the contracting states, can be used for a balancing of interests, in which the seriousness of the conduct alleged against [respondent 1] et al. and the lack of an alternative legal remedy are taken into account. This argument fails. As considered above, there is a clear rule of customary international law that [respondent 1] cs enjoy functional immunity in civil proceedings. From the case Jones vs United Kingdom (see no. 3.8) it appears that, in such a case, the ECtHR does not consider that any impermissible restriction of art. 6 ECHR [rights] exists, and that no additional weighing of interests need take place. See in particular par. 201 of this judgment, in which the ECtHR considered:

> "Since measures which reflect generally recognized 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 [italics court] matter for consideration in respect of the applicant's complaint is whether the grant of immunity rational material to the State officials reflected such rules."

From the judgment of the ICJ in the Jurisdictional Immunities case (see no. 3.3 above) it follows that the question of whether an alternative remedy is available to the claimant does not play a role in the question of whether a State enjoys immunity from jurisdiction. It cannot be seen why this would be any different for the functional immunity from jurisdiction of its officials, derived from the immunity of the State. Nor did the ECtHR39 attach any significance to the question of whether an alternative legal remedy was available, although the lack thereof had been invoked. In addition, [appellant's] assertion that there is no alternative legal remedy because, in short, a fair trial in Israel cannot be expected, would necessarily require an appraisal of the legal system of the State of Israel.

The effect of the immunity of a foreign State is, however, that it is not for the judge of the forum to make such an appraisal.

3.23 In conclusion, the Court of Appeal is of the opinion that there is no reasonable doubt – and thus, to that extent also no question of a 'grey area' – that customary international law, as it presently stands, means that in civil proceedings against a government official, no exception to functional immunity should be made, on the basis of the seriousness of the facts on which the claim is based. This means that [appellant's] assertion that jurisdiction is the starting point and that [respondent 1] et al. must prove the exception to this (immunity), need not need be discussed. The immunity of [respondent 1] et al. in the present proceedings is sufficiently established.

3.24 The court is not blind to the [appellant]'s suffering. Nor is the court blind to developments in criminal law with regard to the immunity from functional jurisdiction, as is apparent from the judgment of the BGH of 28 January 2021 on the immunity of a low-ranking soldier in the army of a foreign State.40. In so far as there might already be some justification for extending this development to civil law, as things currently stand, this is in any case not applicable to a case such as the present one, which concerns very high-ranking military personnel who were carrying out official policy of the State of Israel, such that a judgment on their conduct would necessarily also amount to a judgment upon the conduct of the State of Israel.

4. Conclusion

4.1 The conclusion is that the grounds of appeal fail and that the judgment appealed from will be affirmed.

4.2 As the unsuccessful party, [appellant] will be ordered to pay the costs of the appeal.

Decision

The Council:

- confirmed the judgment of the District Court of The Hague of 29 January 2020;

- orders [appellant] to pay the costs of the appeal proceedings, estimated to date on the part of [respondent 1] et al. at € 332 in court fees and € 3,342 in salary of the lawyer and at € 163,-- to salaris for the lawyer, to be increased by

€ 85,-- if this judgment has not been complied with amicably within fourteen days of notification and this judgment has subsequently been served, and determines that these amounts must be paid within 14 days. days after the day of the decision or, with regard to the amount of €85, after the date of service, failing which these amounts will be increased by the statutory interest as referred to in Section 6:119 of the Dutch Civil Code. from the end of the said period of 14 days until the day of payment;

- declares this judgment provisionally enforceable with regard to the order to pay costs.

This judgment was given by mrs. SA Boele, EM Dousma-Valk and RJB Schutgens, and pronounced in open court on 7 December 2021, in the presence of the Registrar.

1 Statement of Grounds Nos. 19-20.

2 IGH February 3, 2012, Jurisdictional Immunities from the State (Germany v. Italy: Greece intervening), Judgment, ICJ Reports 2012, p. 99; by the ECtHR in its judgment of 14 January 2014, Jones eat UK, Nos. 34356/06 and 40528/06, par. 198 as 'authoritative as regards the content of customary international law'.

3 IGH, Judgment Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, ICJ Reports 2020, p. 3.

4 X. Yang, State Immunity in International Law, Cambridge 2012, p. 433 ff; J. Crawford, Brownlie's principles of public international law, Oxford 2019, p. 477, C. Wickremasinghe, in: International Law (MD Evans ed.), Oxford 2018 p. 366; ECtHR 14 January 2014,Jones eat UK, nrs. 34356/06 and 40528/06, par. 202 and 204; Lord Bingham in Jones v. Ministry of Interior for the Kingdom of Saudi Arabia

and others, House of Lords June 14, 2006, [2006] UKHL 26, paras. 10 and 13.

5 R. O'Keefe and Christian Tams (eds.), The United Nations Convention on Jurisdictional Immunities of States and Their Property, A Commentary, Oxford 2013, p. 52.

6 C. Wickremasinghe, in: International Law (MD Evans ed.), Oxford 2018 p. 372; ECtHR 14 January 2014,Jones eat UK, nrs. 34356/06 and 40528/06, par. 200.

7 Speech Lord Millet in: Regina v. Bartle and the Commissioner of Police for the Metropolis and others ex parte Pinochet and Regina v. Evans and another and the Commissioner of Police for the Metropolis and others ex parte Pinochet, March 24, 1999, [1999] UKHL 17

8 cf. Lord Bingham inJones v. Ministry of Interior for the Kingdom of Saudi Arabia and others, House of Lords June 14, 2006, [2006] UKHL 26, para. 31; Kazemi Estate v. Islamic Republic of Iran, 2014 SCC 62, October 10, 2014, Justice LeBel

opinion para. 90.

9 Kazemi Estate v. Islamic Republic of Iran, 2014 SCC 62, October 10, 2014, Justice LeBel opinion para. 89-90.

10 ECtHR 14 January 2014, Jones eat UK, nrs. 34356/06 and 40528/06, par. 215.

11 ECtHR October 12, 2021, JC eat Belgium (no. 11625/17) par. 64.

12 Jones v. Ministry of Interior for the Kingdom of Saudi Arabia and others, House of Lords June 14, 2006, [2006] UKHL 26.

13 High Court of New Zealand of 21 December 2006, Sam Fang et al. v. Zemin Jiang et al., CIV 2004-404-5843.

14 Kazemi Estate v. Islamic Republic of Iran, 2014 SCC 62, October 10, 2014 p. 180-182.

15 United States Court of Appeals for the Ninth Circuit, August 2, 2019, DC No. 2:15-cv-08130-ODW-GJS.

16 United States Court of Appeals for the Second Circuit, April 16, 2009, 07-2579 resume. In this case, the Second Circuit ruled that Dichter (former head of the Israeli Security Service) already did not enjoy

immunity under theForeign Sovereign Immunities Act (which question did not need to be answered in the opinion of the judges), he was in any case entitled to immunity on the basis of common law . The Second Circuit did consider that jus cogens in any case no exception to the Foreign Sovereign Immunities Act (FSIA) justifies (lines 9-10 under III).

17 United States Court of Appeals for the Fourth Circuit, November 2, 2012, Bashe Abdi Yousuf, John Doe 1 ea Mohamed Ali Samantar, 699 F.3d 763, docket no. 11-1479.

18 Do 1 tbsp. Already. v. Tukur Yusuf Buratai et al., Civil Action No. 17-1033 (DLF).Confirmed on appeal on another point (US Court of Appeals of the District of Columbia, Nov. 26, 2019, No. 18-7170).

19 Seoul Central District Court January 8, 2021, 2016 Gahap 505092 (Exhibits 76a and 76b [appellant]).

20 Seoul Central District Court April 21, 2021, 2016 Gahap 580239 (Exhibits I-15a and 15b [respondent 1] et al).

21 Court of The Hague 21 March 2012, ECLI:NL:RBSGR:2012:BV9748.

22 Ruling No. 238, the Court has consulted the English translation of this judgment published by the Constitutional Court itself at:

(https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf).

23 Among others, Amsterdam Court of Appeal 20 November 2000, ECLI:NL:GHAMS:2000:AA8395 (Bouterse); Bundesgerichtshof 28 January 2021 (prod. 75 [appellant]); District Court of The Hague 15 December 2017, ECLI:NL:RBDHA:2017:14782 (Alemu), also awarding damages against the convicted person.

24 International Criminal Tribunal for the former Yugoslavia.

25 art. 7 paragraph 1 of the Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction

26 After all, the draft article paragraph reads: 'Immunity rational material from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law (c) war crimes'. See

also C. Ryngaert, NJB 2020, ep 23 p. 1658 par. 5.

27 Third report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur para. 130, UN/GA, A/CN.4/714, see also C. Ryngaert, NJB 2020, ep. 23 p. 1658.

28 ECtHR November 21, 2001, Al-Adsani t. United Kingdom,(no. 35763/97) par. 61.

29 Bundesgerichtshof 28 January 2021 (prod. 75 [appellant]) para. 2 under a).

30 Speech Lord Millet in: Regina v. Bartle and the Commissioner of Police for the Metropolis and others ex parte Pinochet and Regina v. Evans and another and the Commissioner of Police for the Metropolis and others ex parte Pinochet, March 24, 1999, [1999] UKHL 17.

31 High Court of New Zealand of 21 December 2006, Sam Fang et al. v. Zemin Jiang et al., CIV 2004-404-5843, par. 63.

32 Kazemi Estate v. Islamic Republic of Iran, 2014 SCC 62, October 10, 2014, LeBel opinion par. 105.

33 Kazemi Estate v. Islamic Republic of Iran, 2014 SCC 62, October 10, 2014, LeBel opinion par. 103.

34 Exhibit 64 [appellant] .

35 The Fundamental Rights of the Person and the Immunity from Jurisdiction in International Law, Rapporteur Lady Fox, p. 86 para. 32, available on the IDI website (https://www.idiiil.org/app/uploads/2017/06/Lady-Fox.pdf)

36 p. 87 para. 34 of the report.

37 Exhibit 69 [appellant].

38 Report Universal civil jurisdiction with regard to reparation for international crimes, Rapporteur Andreas Buchner, p. 136, 212, 216, 217, 219, 242, 253, (https://www.idi-iil.org/app/uploads/2017/06/01-Bucher-Competence_universel.pdf).

39 ECtHR 14 January 2014, Jones eat UK, nrs. 34356/06 and 40528/06, par. 199, see also ECtHR 12 October 2021, JC eat Belgium (no. 11625/17) par. 71.

40 Bundesgerichtshof 28 January 2021 (prod. 75 [appellant]).