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Uitspraak

judgment

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THE HAGUE DISTRICT COURT

Commerce Team

Judgment of 29 January 2020

in the case C/09/554385 / HA ZA 18/647 of

[claimant] , of [residence] ,
claimant in the principal action,
defendant in the procedural issue,
litigator: mr. L. Zegveld,
acting lawyers: mr. L. Zegveld and mr. L-M Komp,

versus

1 [defendant I] , of [country] ,

2. **[defendant II] ,** of [country] ,

defendants in the principal action,

claimants in the procedural issue,

litigator: mr. C.G. van der Plas,

acting lawyers: mr. C.G. van der Plas and mr. Th. O.M. Dieben.

Parties are referred to as ' [claimant] ', ' [defendant I] ' and ' [defendant II] '.

1 The proceedings

1.1. The course of the proceedings is evidenced by the following:

- the summons of 14 March 2018, with Exhibits 1 - 25;
- the statement of claim in the procedural issue of 31 October 2018, with Exhibits 1 - 6;
- the statement of defence in the procedural issue of 6 March 2019, with Exhibits 26 - 44;
- the motion filed by [defendant I] and [defendant II] during the oral arguments containing Exhibits 7, 8, 9 and 10;
- exhibits 45 (the personal statement made by [claimant] during the court hearing), 45a – 45e (the photos shown of [claimant] 's relatives) and 46a and 46b (the photos shown at the court hearing of [claimant] 's ID cards) submitted to the court by [claimant] in a letter dated 18 September 2019 pursuant to an agreement made at the oral arguments.

1.2. Parties pleaded their cases during the oral arguments of the procedural issue on 17 September 2019. The written summaries of the arguments form part of the procedural documents.

1.3. Finally, a date was scheduled for delivering the judgment in the procedural issue.

2 The dispute in the principal action

2.1. [claimant] requests in a provisionally enforceable judgment:

1. a declaratory decision that [defendant I] and [defendant II] acted unlawfully towards [claimant] and that they are jointly and severally liable to him for the damage he incurred and will incur as a result;

2. determination of the damages to be paid to [claimant] by [defendant I] and [defendant II] at € 536,603, plus interest;

3. holding [defendant I] and [defendant II] jointly and severally liable to pay the costs in these proceedings.

2.2. [claimant] is from the Palestinian territories (the Gaza Strip). He holds [defendant I] and [defendant II] – who at the time had supreme command of the Israeli army and the Israeli air force as Chief of General Staff and Air Force Chief – liable and liable for compensation for the consequences of an air strike on 20 July 2014 (hereinafter: 'the air strike') in the context of the

Israeli military operation in the Gaza Strip, Operation Protective Edge (OPE). The air strike destroyed the residence of his relatives living there and killed six relatives of [claimant] . [claimant] holds [defendant I] and [defendant II] responsible for both the air strike and the policy – as alleged by [claimant] – of the Israeli armed forces to target civil residences during OPE. According to [claimant] the involvement of [defendant I] and [defendant II] in the air strike can be qualified as an international crime, namely a violation of international humanitarian law. [claimant] holds [defendant I] and [defendant II] individually liable for this in these proceedings.

2.3. [claimant] bases the jurisdiction of the Dutch court in this case on Section 9, preamble, and under b and c Rv.[1] He argues that it is impossible for him or at least that it cannot be required of him to institute proceedings in Israel. [claimant] argues that Israeli law, as applied by the Israeli courts, raises all sorts of legal and practical obstacles to Palestians from the Gaza Strip. [claimant] believes that the principal action is sufficiently closely connected to Dutch jurisdiction since he holds Dutch nationality and lives in the Netherlands with his wife and children.

3 The dispute in the procedural issue

3.1. [defendant I] and [defendant II] request – summarized and in essence – in a provisionally enforceable judgment that the court declares that [claimant] has no cause of action or that the court declares that it lacks jurisdiction to take cognizance of the claims brought by [claimant] in the principal action, ordering [claimant] to pay the costs of the proceedings.

3.2. [defendant I] and [defendant II] allege that as former foreign office holders they have official immunity from jurisdiction, as the air strike was carried out in the performance of the public function of the State of Israel and their involvement fully took place in the performance of their duties, in their official capacity for the State of Israel. With a Diplomatic Memo dated 18 October 2018 to the Dutch Ministry of Foreign Affairs produced by [defendant I] and [defendant II] , the State of Israel explicitly asserted official immunity from jurisdiction for [defendant I] and [defendant II] . According to the State of Israel, these proceedings against [defendant I] and [defendant II] are nothing more than an attempt to circumvent the immunity of the State of Israel.

3.3. [defendant I] and [defendant II] also allege that [claimant] paints an inaccurate picture of the law and its application in Israel. In their view, there are sufficient options for [claimant] to litigate the claims in the principal action in Israel. [defendant I] and [defendant II] are of the opinion that the principal action is in no way connected to the Netherlands, considering that all specific features lead to Israel and Gaza.

3.4. [claimant] has put up a defence in the procedural issue. He asserts that he does not invoke liability or secondary liability of the State of Israel in the principal action, but rather the individual responsibility of former office holders for international crimes, as internationally accepted in criminal-law and civil-law proceedings.

4 The assessment

4.1. In this procedural issue two subjects are raised: immunity from jurisdiction and the jurisdiction of this court. The assessment of these two separate subjects leads to the decision whether or not this court has jurisdiction to take cognizance of the claims in the principal action. [defendant I] and [defendant II] , who have only appeared in court to contest the competence of the Dutch court, emphasize that they present their legal argument with sympathy and respect for the suffering of

[claimant] ensuing from the loss of his relatives. However, [defendant I] and [defendant II] believe that the debate on their liability and liability for compensation in connection with the air strike can and should not be conducted before a Dutch court.

4.2. Customary international law does not prescribe how the national legal order should apply immunity from jurisdiction. If no convention rule applies, the national laws of the court before which the case is brought determines the manner in which immunity from jurisdiction is applied. This means that Dutch law determines how this should take place.[2]

4.3. There is no convention or regulation that regulates jurisdiction in this case. Therefore, the jurisdiction of the Dutch court must be assessed based on Part 1 Chapter 1 1 Rv.[3] Section 1 Rv determines – insofar as relevant here:

"*notwithstanding Section 13a of the General Provisions (Kingdom Legislation) Act the jurisdiction of the Dutch court is governed by the following provisions*."

Section 13a of the Wet AB[4] determines that the jurisdiction of the court is limited by "*exceptions recognized in international law*." One of these exceptions is the immunity from jurisdiction, which is recognized in customary international law and elsewhere.[5]

4.4. From this it follows that under Section 1 Rv in conjunction with Section 13a Wet AB the jurisdiction of the Dutch court is only governed by Part 1 Chapter 1 Rv, if it is not limited by an exception recognized in international law within the meaning of Section 13a Wet AB. First and foremost, the court will have to assess whether or not in these proceedings [defendant I] and [defendant II] enjoy functional immunity from jurisdiction. If this is the case, the court must declare itself incompetent. If this is not the case, the court must assess whether or not the Ditch court has jurisdiction in this case pursuant to Section 9, preamble, and under b and c Rv, contained in Part 1 Chapter 1 Rv.

4.5. The court will first assess whether or not [defendant I] and [defendant II] enjoy functional immunity from jurisdiction in these proceedings. In the absence of a relevant convention rule regulating functional immunity for incumbent or former officer holders which is binding on the Netherlands, the court must assess whether or not [defendant I] and [defendant II] enjoy immunity from jurisdiction in these proceedings under customary international law. To answer this question, the court assumes the following facts as having been established:

- i) [claimant] is from the Palestinian territories (the Gaza Strip). He has not lived there since 2005. He has Dutch nationality and lives in the Netherlands with his wife and their children.
- ii) On 20 July 2014 the residence of relatives of [claimant] in the Gaza Strip was bombed in the context of the Israeli military operation OPE. Six of [claimant] 's relatives were killed in this air strike, which also destroyed the residence of his relatives.
- iii) At the time of the air strike [defendant I] was Chief of General Staff of the Israeli Defense Forces (IDF). [defendant II] was Air Force Chief, commander of the Israeli air force, one of the three branches of the IDF.
- iv) [defendant I] and [defendant II] were involved in the air strike in the performance of their duties of their position.
- v) The State of Israel has confirmed this in a Diplomatic Memo of 18 October 2018 to the Dutch Ministry of Foreign Affairs (hereinafter: the Diplomatic Memo):

"*It is the State of Israel's position that actions undertaken by Mr. [defendant I] en Mr. [defendant II] during these hostilities were performed exclusively in their official capacity as General Chief of Staff and Israeli Air Force Commander respectively and in accordance with their autohority under Israeli law.*"

(vi) The State of Israel asserted the functional immunity from jurisdiction of [defendant I] and [defendant II] in the Diplomatic Memo:

"*The State of Israel unequivocally asserts the immunity of Mr. [defendant I] and Mr. [defendant II] with regards to these official acts.*"

Functional immunity from jurisdiction

4.6. Functional immunity from jurisdiction is derived from State immunity, one of the fundamental principles of customary international law:

"*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.*"[6]

4.7. State immunity ensues from the customary international-law principle of equality of states (*par in parem non habet imperium*, equals have no sovereignty over each other). This means that a State cannot be subjected against its will to the jurisdiction of a foreign State. Under customary international law, States may assert State immunity, thereby imposing on other States the corresponding obligation to respect and effectuate that right.[7] In other words, a State may only be summoned before the court of a foreign State after consenting to this.

4.8. State immunity only applies to acts carried out in the exercise of state authority (*acta iure imperii*), not to the acts of a State in interactions with private individuals on an equal basis (*acta iure gestiones*), such as regular commercial transactions. The nature of the act determines to which category it belongs.[8] By their very nature, military operations carried out by a national army of a State are viewed as *acte iure imperii:*[9]

"the core area of State sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security."[10]

This applies to both military operations in a State's territory and in occupied territories.

4.9. States can only function through acts of individuals. Under customary international law, incumbent and former office holders enjoy immunity from jurisdiction, derived from State immunity. Only States, not the incumbent or former office holders personally, can relinquish this derivative immunity, which insofar as relevant has the following forms: personal immunity (*ratione personae*) and functional immunity from jurisdiction (*ratione materiae*).

4.10. Heads of state, government leaders and foreign ministers enjoy personal immunity from jurisdiction during their term of office. This form of immunity is linked to the position and has an absolute nature; it also extends to private conduct.[11]Heads of state, government leaders and foreign ministers only enjoy functional immunity after their term of office.

4.11. Functional immunity from jurisdiction is linked to the acts carried out by an office holder in the performance of their duty. It applies to acts carried out in the exercise of state authority (*acta iure imperii*),[12] in the performance of which office holders can be considered as instruments of the sovereign State. Former office holders can assert this form of immunity, linked to this type of act, also after their term of office. Functional immunity from jurisdiction prevents a situation in which State immunity can be circumvented by holding government officials responsible.

4.12. State immunity and personal immunity from jurisdiction are customary international-law rules of a procedural nature, which are separate from and of a different nature than the substantive rules with which the violation of the norm underlying the claim must be assessed:

"*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*."[13]

In light of the aforementioned nature, contents and rationale of functional immunity of jurisdiction, this also applies to this form of immunity.

4.13. Both the ICJ and the ECHR[14] have investigated if customary international law has a special rule or exception for State immunity in civil proceedings with claims based on international crimes. In 2012 the ICJ concluded as follows in the *Jurisdictional Immunities* case:

"*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 law of armed conflict.*"[15]

The ECHR arrived at the same conclusion in the cases of *Al Adsani*,[16]*Kalogeropoulou*[17] and *Jones.*[18] In the *Al Adsani* case the ECHR considered as follows:

"*Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a state no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged*."[19]

The rulings in the *Kalogeropoulou* and *Jones* cases contain considerations along the same lines.

4.14. The *Jones* case*,* in which the ECHR investigated customary international law as it applied in 2006, also revolved around functional immunity from jurisdiction.[20] The ECHR ruled as follows regarding this subject:

"*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. This pragmatic understanding is reflected by the definition of 'State' in the 2004 UN Convention (…), which provides that the term includes representatives of the State acting in that capacity. The ILC Special Rapporteur, in his second report, said that it was "fairly widely recognised" that immunity of State officials was "the norm", and that the absence of immunity in a particular case would depend on establishing the existence either of a special rule or of practice and opinio juris indicating that exceptions to the general rule had emerged (…).*"[21]

The ECHR concluded:

"*(…) 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, as Lord Bingham put it in the 2006 House of Lords judgement, to the effect that the State's right to immunity may not be circumvented by suing its servants or agents instead.*"[22]

4.15. The ECHR has expressly left the option of developments in customary international law open, both as regards State immunity and functional immunity from jurisdiction, as is evident from this consideration:

"*However the State practice is in a state of flux, with evidence of both the grant and the refusal of immunity rationae 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 developements can be expected*."[23]

4.16. Like [defendant I] and [defendant II] , [claimant] concurs with the substance and rationale of functional immunity from jurisdiction, as provided above. The parties have rightly taken the standpoint that [defendant I] and [defendant II] would enjoy functional immunity from jurisdiction in these proceedings according to the state of customary international law as established in the *Jones* case. The heart of the dispute lies in the question whether or not this has changed under *currently* applicable customary international law.

4.17. [defendant I] and [defendant II] assert to the best of their knowledge that since the *Jones* case no national or international court has rejected functional immunity from jurisdiction for foreign office holders in civil proceedings with claims based on international crimes, in cases in which the State in question has explicitly asserted this immunity and has confirmed that the act in question was approved by it. Referring to several examples,[24] [defendant I] and [defendant II] allege that – on the contrary – functional immunity from jurisdiction was always accepted in such civil proceedings.

[defendant I] and [defendant II] assert that they enjoy functional immunity from jurisdiction under currently applicable customary international law, even if the claims in the principal action concerned international crimes.

4.18. [claimant] responds that he does not invoke secondary liability of the State of Israel in the principal action, but rather the individual responsibility – internationally accepted in criminal-law and civil-law proceedings according to [claimant] – of [defendant I] and [defendant II] for the international crimes as alleged by [claimant] in the principal action.

4.19. The court will now assess whether or not [defendant I] and [defendant II] can be held individually liable in these proceedings in the manner proposed by [claimant] . It is not in dispute in these proceedings that [defendant I] and [defendant II] enjoy functional immunity from jurisdiction if the argument of [claimant] fails.

4.20. Below, the court will *assume for the sake of argument* that the conduct of [defendant I] and [defendant II] – as alleged by [claimant] – can be qualified as 'international crimes', on which the claims in the principal action are based. [defendant I] and [defendant II] have contested vigorously and expressly reject this qualification. This assumption of the court does not mean that it holds [claimant] 's assertions to be correct. The accuracy of this starting point assumed for the sake of argument is only relevant if the conclusion is that [defendant I] and [defendant II] cannot enjoy functional immunity if they have committed international crimes, and should only be assessed in that situation.

4.21. The court would like to note that 'international crime' is not a well-defined concept with a generally accepted content. This type of crime comprises genocide, serious human rights violations, and violations of international humanitarian law – on which [claimant] has based his claims in the principal action.[25] In a scenario such as this one, in which the court only starts from an assumption, the exact content of this concept and the precise qualification of the violation of the norm, which [claimant] has in mind in the principal action, can remain undiscussed.

Individual responsibility

4.22. Individual responsibility, which [claimant] invokes, is described by the ILC as follows:[26]

"*individual responsibility" has acquired an accepted meaning in the light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity*."[27]

In international courts, individual responsibility applies to defendants prosecuted before these courts for international crimes. This legal concept was developed after World War II in the statutes and jurisprudence of ad hoc tribunals prosecuting persons accused of international crimes, such as the Nuremberg Tribunal, the ICTY[28] and the ICTR,[29] and the ICC.[30] Individual responsibility goes hand in hand with a limitation of personal and function immunity from jurisdiction:

"*Beginning with the Nuremberg Charter, the norm of immunity was revised in favour of jurisdiction of international courts to try Heads of State and other senior public officials, for violation of international criminal law*."[31]

Individual responsibility can therefore be seen as an exception to or special rule of personal and functional immunity from jurisdiction in international courts.[32]

4.23. The source of law of individual responsibility and the associated limitation of immunity from jurisdiction for incumbent and former office holders is the statute or founding treaty in the ad hoc tribunals, sometimes in conjunction with a binding resolution of the UN Security Council. In the case of the ICC, individual responsibility is laid down in Article 25 of the Rome Statute.[33] The limitation of immunity from jurisdiction due to individual responsibility is laid down in Article 27 of the same statute. Article 27 of the Rome Statute must be explained as a waiver of immunity of the States Parties to the Rome Statute: the party acceding to the Rome Statute agrees that the ICC

can exercise jurisdiction over its officials.[34] In addition, the ICC has established that there is no rule of customary international law that accepts personal immunity before international courts such as the ICC:

"*In sum, the Appeals Chamber finds that there was no rule of customary international law that would have given Mr Al-Bashir immunity from arrest and surrender by Jordan on the basis of the request for arrest and surrender issued by the Court.*"[35]

4.24. Individual responsibility must be distinguished from and exists alongside the attribution of conduct to States. This starting point is laid down in Article 58 *Articles on State Responsibility* (ASR) van de ILC[36] as cited by [claimant] :

"*These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State*.".

This also follows from the mirror-image Article 24 para. 4 of the Rome Statute:

"*No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law*."

[claimant] correctly asserts that in the case of individual responsibility of a incumbent or former office holder prosecuted before an international court, there is dual attribution or parallel responsibility, both of/to the State and of/to the incumbent or former office holder suspected of an international crime.

4.25. If individual responsibility and dual attribution is a rule of customary international law – which is a question that arises, but can remain undiscussed – this rule would only apply to the prosecution of incumbent or former office holders before *international courts*. *National courts* take a fundamentally different position than international courts. National courts are organs of sovereign States which when prosecuting subjects of foreign states function in the horizontal relationship between States, with the applicable customary international-law principle of equality of States. State immunity and the derivative personal and functional immunity from jurisdiction therefore are the starting points for national courts. By contrast, international courts do not function in the horizontal relationship between States. So, the principle of equality of States and the ensuing immunity from jurisdiction for current and former office holders therefore does not apply to international courts. This is expressed in the considerations of the SCSL[37] regarding personal immunity from jurisdiction, namely that it:

"*derives from the equality of sovereign States and therefore has no relevance to international criminal tribunals which are not organs of a State but derive their mandate from the international community*"[38]

This entails that:

"*the sovereign equality of States does not prevent a Head of State from being prosecuted before an international criminal tribunal or court*".[39]

4.26. The ICC *Appeals Chamber* also highlights "*the different character of international courts when compared with domestic jurisdictions"*:

"*While the latter* [national courts, added by the district court] *are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States, the former, when adjudicating international crimes, do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole. Accordingly, the principle of par in parem non habet imperium, which is based on the sovereign equality of States, finds no application in relation to an international court such as the International Criminal Court*."[40]

4.27. This is explained in more detail in the *Concurring opinion* to the Al-Bashir ruling:

"*(…) judges in national courts exercise jurisdiction in the national forum, in their capacity as delegates for purposes of exercise of sovereign authority within the national forum. In contrast, judges of international courts operate on an entirely different footing of delegated jurisdiction. They are not delegates of any national sovereign forbidden to exercise jurisdiction over his or her sovereign equals.*

They exercise jurisdiction on behalf of the international community, such as represented by the aggregation of States who have authorised those international judges to exercise the jurisdiction in question. Thus, when the ICC 'exercises jurisdiction' (…) it does so on behalf of the international community represented in the membership of the Rome Statute."[41]

4.28. The individual responsibility as it applies in international courts must be distinguished from and exists alongside the personal immunity from jurisdiction as it applies in national courts:

"*(…) these rationales that explained the rule of foreign immunity at the horizontal level are not compromised by proceedings before an international court – certainly not the ICC. In other words, the rationale of perfect equality between States and their absolute independence from each other remains undisturbed, if a State is subjected to the jurisdiction of an international court.*"[42]

4.29. An incumbent or former office holder accused of international crimes may have individual responsibility before an international court, while he would enjoy personal immunity from jurisdiction in criminal proceedings before a national court of a foreign State. The ICJ also follows this reasoning on personal immunity from jurisdiction in the *Arrest Warrant* case:

"*It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal*

jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions."[43]

4.30. An office holder is not exempt from all criminal responsibility:

"*The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they 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*."[44]

4.31. An office holder also does not necessarily go unpunished – insofar as relevant:

"*Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.*

First, such persons enjoy no criminal immunity under international law in their own countries and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

(…)

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."[45]

4.32. [claimant] wrongly disregards this fundamental distinction between international and national courts and the attendant consequences for the applicability of functional immunity from jurisdiction. The consequence of this fundamental distinction is also that individual responsibility does not apply unreservedly in national courts or can be applied one-to-one by the national courts. [claimant] cannot derive different arguments from the passages from the judgements of the Nuremberg Tribunal and the ICTY to which he makes reference. The court explains this as follows.

4.33. The Nuremberg Tribunal made the remark "*they have done together what one of them might have done singly*"[46], cited by [claimant] , when discussing the drafting of the Charter of the Nuremberg Tribunal and the establishment of said tribunal. It would go too far to assume based on that

remark that responsibility also applies in national courts or can or should be extended to also cover national courts. This is all the more applicable since the Charter and the judgements of the Nuremberg Tribunal in 1945-1946 became the starting points for the development of the legal concept of international responsibility. This legal concept and the relation to immunity from jurisdiction in criminal proceedings before national courts in foreign States was developed and detailed further in the subsequent decades. As has been stated above, it was accepted that individual responsibility before international courts must be distinguished from and exists alongside the immunity from jurisdiction taken as the starting point by the national courts.

4.34. The consideration in the *Blaškić* case, as cited by [claimant] , the ICTY mentions the immunity from jurisdiction in national and international courts in the same breath:

"*The general rule under discussion is well established in international law and is based on the sovereign equality of States (par in parem non habet imperium). The few exceptions relate to one particular consequence of the rule. These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.*"[47]

However, in subsequent judgements[48], the ICTY did limit its opinion on the limitation of immunity from jurisdiction in case of suspicion of international crimes to international courts. The ICTY made no (more) statements on functional immunity from jurisdiction in national courts and has left the option of immunity in national courts open. For instance, in the *Krstić* case, the ICTY considered as follows:

"*It may be the case (it is unnecessary to decide here) that, between States, such a functional immunity exists against prosecution for those acts, but it would be incorrect to suggest that such an immunity exists in international criminal courts.*"[49]

The Special Rapporteur of the ILC notes the following on the jurisprudence of the ICTY:

"*It is worth noting, however, that in those cases the Tribunal seems to limit the exception to the exercise of its jurisdiction, without extending it to cases brought before domestic courts*."[50]

4.35. In short, individual responsibility and dual attribution only apply to international courts, which take a fundamentally different position than national courts. Unlike international courts, national courts function in the horizontal relationship between States when prosecuting subjects of foreign States, to which the customary international-law principle of equality of States applies. Unlike for international courts, functional immunity from jurisdiction is the starting point for national courts. The individual responsibility with dual attribution in criminal proceedings before national courts, as advocated by [claimant] , constitutes an acceptance of a limitation of functional immunity from jurisdiction in case of suspicion of international crimes, as recognized in customary international law, and which are prosecuted before national courts. Considering the fundamental nature of State immunity and the rationale of the derivative functional immunity from jurisdiction, this limitation can only be accepted if this is (also) a rule of customary international law. The court will now consider this.

Limitation of functional immunity from jurisdiction in criminal proceedings before national courts as a rule of customary international law?

4.36. In order to assume that a rule of customary international law exists, two equal and constitutive conditions, both to be proven separately, must be met: (firstly) a general State practice (*usus*) and (secondly) the acceptance of it as law (*opinio iuris sive necessitatis,* in short: *opinio iuris*).[51]

4.37. The required State practice (*usus*) can take many forms and may comprise acts of all State organs. It is required that the State practice be extensive and virtually uniform,[52] in the sense that States act in a similar fashion in similar circumstances.[53] No special relevance is attached to the period of the established State practice. In addition, the required juridical view (*opinio iuris*) may be derived from a wide variety of sources. The recommendation of the ILC about the identification of

customary international law[54] may be helpful as a guideline for the manner in which the existence and substance of customary international law is determined. How customary international law is is decisive (*lex lata*) and not how it should develop (*lex ferenda*). Just like for the ICJ, the following applies to the court in determining the existence and substance of customary international law:

"*It is clear that the Court cannot legislate, (…) it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.*"[55]

4.38. There is no disagreement on personal immunity from jurisdiction before national courts; the discussion focuses on functional immunity from jurisdiction:

"*(…) it should be emphasised that delegations welcomed the conclusion that limitations to immunity only apply to immunity ratione materiae and that immunity ratione remains fully applicable*."[56]

The question if functional immunity from jurisdiction must be limited when prosecuting international crimes before national courts has been a source of debate and a deep difference of opinion for decades:

"*The issue of limitations and exceptions to immunity is undoubtetly the most controversial and politically sensitive aspect of this topic. It is therefore not surprizing that the discussion both in the International Law Commission and in the Sixth Comittee of the General Assembly was very heated and reflected the differences between members of the Commission and between States on this question.*"[57]

4.39. [claimant] cites literature in which this limitation of immunity from jurisdiction is argued and endorsed. Also, in the *Resolution on the Immunity from Jurisdiction of the State and of Persons who Act on Behalf of the State* [58] as cited by [claimant] , the IDI[59] rejects in a general sense the functional immunity from jurisdiction for incumbent and former office holders. The majority of the members of the ILC, which has had the subject of "*Immunity of State officials from foreign criminal jurisdiction*" on its agenda since 2007, supported the limitation of functional immunity from jurisdiction in prosecuting international crimes by national courts when adopting Article 7 paragraph 1 of the *Draft Articles on Immunity of State officials from foreign criminal jurisdiction* (hereinafter: DAISFJ).

4.40. Article 7 paragraph 1 DAISFJ reads as follows:

Immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

- a) *crime of genocide;*
- b) *crimes against humanity;*
- c) *war crimes;*
- d) *crime of apartheid;*
- e) *torture;*
- f) *enforced disappearance.*

4.41. A profound difference of opinion on Article 7 paragraph 1 DAISFJ existed in the ILC. Contary to convention, no consensus was reached on the draft article. Instead, a vote was held. The Special Rapporteur did not observe a relevant State practice, but concluded that there is a trend, which was reason for the backers to endorse Article 7 paragraph 1 DAISFJ:

"*(…) there has been a discernible trend towards limiting the applicability of immunity from jurisdiction ratione materiae in respect of certain types of behaviour that constitute crimes under international law. This trend is reflected in judicial decisions taken by national courts which, even though they do not all follow the same line of reasoning, have not recognized immunity from jurisdiction ratione materiae in relation to certain international crimes. In rare cases, this trend has also been reflected in the adoption of national legislation that provides for exceptions to immunity ratione materiae in relation to the commission of international crimes. This trend has also been highlighted in the literature, and has been reflected to some extent in proceedings before international tribunals.*"[60]

4.42. The 'no' voters contest the existence of a trend and are of the opinion 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. Second, those members of the Commission also stressed the difference between procedural immunity from foreign jurisdiction, on the one hand, and substantive criminal responsibility, on the other, and maintained that the recognition of exceptions to immunity was neither required nor necessarily appropriate for achieving the required balance. Rather, in the view of those members, impunity can be avoided in situations where a State official is prosecuted in his or her own State; is prosecuted in an international court; or is prosecuted in a foreign court after waiver of the immunity. Asserting exceptions to immunity that States have not accepted by treaty or through their widespread practice risks creating severe tensions, if not outright conflict, among States whenever one State exercises criminal jurisdiction over the officials of another based solely on an allegation that a heinous crime has been committed.*"[61]

4.43. A trend is not a general State practice. Since there is no general State practice nor an *opinio iuris,* Article 7 paragraph 1 DAISFJ does not codify a rule of customary international law. This also follows from the remark of the Special Rapporteur that:

"*the draft articles, similar to other projects of the Commission, contained elements of both codification and progressive development and that they should be assessed in that light.*"[62]

Incidentally, there is also no ground to assume that under customary international law functional immunity from jurisdiction is limited when prosecuting international crimes before national courts.

Dutch opinion

4.44. [claimant] cannot derive a different argument from the opinion of the Dutch government as cited by him nor from the Dutch criminal law practice as alleged by him.

4.45. In 2016 the Dutch government informed the ILC as follows:

"*The Netherlands further considers that functional immunity does not extend to the commission of international crimes committed by those concerned in their official capacity. See for example the decision of the Court of Appeals of Amsterdam of 20 November 2000, paragraph 4.2 (…).*"[63]

This is not so much an exception to immunity but rather a confirmation that functional immunity only applies to acts performed in the course of a person's official (governmental) function and that the commission of international comes, by definition, cannot be an official function."

In 2017 the Dutch government repeated:

"*It is the position of the Kingdom of the Netherlands that international crimes fall inherently outside the scope of acts in official capacity and therefore should not be susceptible to the plea of immunity.*"[64]

In 2019 the Dutch government made it known that:

"*The Netherlands recognizes that immunity ratione materiae is not absolute, and that exceptions exist to immunity ratione materiae. This would be the case with the commission of international crimes.*"[65]

4.46. [claimant] also refers to criminal cases against a former Afghan general[66] and a former member of the then military regime in Ethiopia[67] as well as the ruling of Amsterdam Court of Appeal in the Bouterse case,[68] in which is considered (under 4.2):

"*Committing very serious criminal offences such as those in this case cannot after all be classed as one of the offical duties of a Head of State.*"

4.47. [defendant I] and [defendant II] correctly note that the cassation in the interest of the law against the ruling of Amsterdam Court of Appeal led to the quashing of this ruling.[69] And in the ruling in the case against the former Afghan general it was only ruled that he did not enjoy personal immunity from jurisdiction.[70] Finally, the question is whether from the judgement, as last of the three cited by [claimant] – against a former member of the then military regime in Ethiopia –

which was delivered in a defended action and states nothing about immunity, it can be derived that functional immunity from jurisdiction was not accepted in that case. Under Dutch law, the rule of immunity from jurisdiction is not a public policy rule, because immunity can be waived, while it must be possible to apply public policy rules irrespective of the attitude of the foreign State or the international organization.[71] Only in proceedings in default of appearance is there an obligation to assess immunity from jurisdiction on its own initiative. In defended actions, this must be invoked.[72]

4.48. The court will not delve deeper into the opinion of the Dutch court and the discussion on the Dutch criminal law practice as alleged by [claimant] , as these do not reflect the current status of customary international law. As has been stated above, a limitation to functional immunity from jurisdiction is not accepted under customary international law in the prosecution of international crimes by national courts. The court must apply customary international law and is not bound by the opinion of the Dutch government.

Extend rules in criminal actions to civil proceedings?

4.49. [claimant] 's argument regarding the convergence of criminal law and civil law does not help him. The court does not rule out per se that developments in customary international law as regards immunity from jurisdiction in criminal cases before national courts may be relevant to and may influence customary international law in this respect in civil proceedings before national courts. That is also the approach of the ECHR, which refers to developments in criminal law in its expectation regarding developments in functional immunity from jurisdiction in civil proceedings with claims based on international crimes expressed in the *Jones* case.[73] Reversely the Special Rapporteur notes that:

"*(…) although at first glance there seems to be a clear distinction between exercising criminal and civil jurisdiction over officials of a foreign State, they do have enough features in common for consideration of the topic to take into account existing practice in relation to immunity of State officials and of the State itself from foreign civil jurisdiction.*"[74]

4.50. However, due to the differences between both jurisdictions the question is whether developments in and/or rules of customary international law in relation to functional immunity from jurisdiction in criminal proceedings before national courts can be extended one-to-one to or can be applied analogously in civil proceedings before national courts in foreign States. This also applies when taking into account that many national jurisdictions and also the ICC offer the option for victims to submit a claim for damages in a criminal action (*action civile*). These civil claims are of an accessory nature with respect to the criminal action in the context of which they can be submitted and are only eligible for award in case of a criminal conviction.

4.51. The court will also leave this subject undiscussed. In the absence of a sufficiently detailed rule of customary international law in the prosecution of international crimes before national courts, there can be no one-to-one extension or analogous application.

Use of margin of appreciation?

4.52. Under Article 6 ECHR, which will be discussed below, States have a margin of appreciation in setting limits to access to a court. Here [claimant] identifies an option for the court to disregard functional immunity from jurisdiction. According to [claimant] , the Dutch court previously made use of this option in a case in 2012 in which it awarded claims – based on international crimes – against 12 members of the former Libyan regime in default of appearance.[75]

4.53. The court does not follow this final conclusion of [claimant] . In the case to which he refers, the Minister of Justice had only given notice, pursuant to Section 3a, subsection 2 Gdw[76], to Colonel Gadhafi, the then Head of State of Libya, who enjoyed personal immunity. The question is whether from that it can be derived that the Minister of Justice accepted that the other 12 defendants did not enjoy functional immunity from jurisdiction. The subsequent judgement, which was passed in default, which states nothing about immunity from jurisdiction, dates from a period in which Dutch

courts had jurisdiction in default proceedings but were not obligated to assess immunity from jurisdiction on their own motion. Not mentioning functional immunity from jurisdiction can therefore also mean that no assessment regarding this had taken place.

4.54. It is more important to state that the option as alleged by [claimant] does not exist. As has been established above, in these proceedings [defendant I] and [defendant II] enjoy functional immunity from jurisdiction pursuant to customary international law. In these proceedings an exception arises, as recognized in customary international law, which limits the jurisdiction of the Dutch court pursuant to Section 13a Wet AB. Section 13a Wet AB does not prescribe that such an exception *may* limit the jurisdiction and incidentally also does not provide the scope for assuming jurisdiction in case of functional immunity from jurisdiction as recognized in customary international law. This provision entails a mandatory limitation of jurisdiction of the Dutch court, which the court must apply. Therefore this court must apply this customary international-law limitation to its jurisdiction with respect to [defendant I] and [defendant II] .

4.55. This has decided the fate of [claimant] 's argument. The conclusion is that the customary international-law rule of functional immunity from jurisdiction for [defendant I] and [defendant II] applies in full in these proceedings.

Article 6 ECHR

4.56. Finally, the court will check the outcome against Article 6 ECHR, whose right to a fair trial assumes a right to access to a court. However, the right to access to a court as enshrined in Article 6 ECHR is not absolute, [77] but is susceptible to limitation by States which may exercise a '*margin of appreciation*'. Limitations to the right to access to a court are allowed under Article 6 ECHR, provided that they (i) serve a legitimate purpose and ii) are proportionate in relation to the legitimate purpose.

4.57. State immunity has a legitimate purpose:

"*to promote comity and good relations between States through the respect of another State's sovereignty*"[78]

This legitimate purpose also extends to the derivative functional immunity from jurisdiction:

"*(…) 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.*"[79]

4.58. The following applies to the proportionality of the limitation ensuing from rules of customary international law:

"*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. The Court will therefore examine whether there was a general rule under public international law requiring the domestic courts to uphold Saudi Arabia's claim of State immunity in respect of the State officials; and, if so, whether there is evidence of any special rule or exception concerning cases of alleged torture.*"[80]

The only assessment a court must carry out in examining the proportionality requirement is whether or not the functional immunity from jurisdiction for [defendant I] and [defendant II] is in agreement with customary international law. The court has established previously that this is the case. The proportionality requirement has therefore been met.

4.59. Unlike with immunity from jurisdiction of international organizations, the availability of an alternative forum does not play a role in assessing State immunity and UN immunity. This also

applies to functional immunity from jurisdiction as a derivative of State immunity. The dispute in relation to this can therefore remain undiscussed.

4.60. [claimant] also makes reference to the superfluous reasoning of the ECHR in the *Naït-Liman* case:

"*Nonetheless, given the dynamic nature of this area, the Court does not rule out the possibility of developments in the future. Accordingly, and although it concludes that there has been no violation of Article 6 § 1 in the present case, the Court invites the States Parties to the Convention to take account in their legal orders of any developments facilitating effective implementation of the right to compensation for acts of torture, while assessing carefully any claim of this nature so as to identify, where appropriate, the elements which would oblige their courts to assume jurisdiction to examine it.*"[81]

From this [claimant] cannot derive an argument to assess – in the context of an examination against Article 6 ECHR – the availability of an alternative legal procedure in Israel, which he contests, considering the fact that the *Naït-Liman* case did not concern immunity from jurisdiction but the question whether or not the lack of a forum necessitatis provision was contrary to Article 6 ECHR.

Conclusion

4.61. The conclusion is that the court must declare itself incompetent, because [defendant I] and [defendant II] enjoy functional immunity from jurisdiction. The court is unable to assess the other matters in dispute.

Costs of the proceedings

4.62. As the party found against, [claimant] is ordered to pay the costs of the proceedings.

On the part of [defendant I] and [defendant II] estimated up to this judgment at € 7,763 (namely € 1,565 in court fees and € 6,198 in lawyer's fees (2 items at € 3,099, according to rate VIII)), plus statutory interest claimed by [defendant I] and [defendant II] . There is no ground for an order to pay the subsequent costs, since the cost award also constitutes an entitlement to enforcement for these subsequent costs. The court will estimate the subsequent costs in accordance with the applicable court-approved scale of costs.

5 The decision

The court

5.1. declares itself incompetent to take cognizance of the claims in the principal action;

5.2. orders [claimant] to pay the costs of the proceedings, on the part of [defendant I] and [defendant II] estimated up to this judgment at € 7,763 in court fees incurred so far and € 157 in subsequent costs, plus € 82 in case of service, the amount of

€ 7,763 as well as the subsequent costs plus statutory interest from the fifteenth day after the date of this judgment, if [claimant] has not paid these costs before that date, until the date on which payment is made in full;

5.3. declares the cost order under 5.2 provisionally enforceable.

This judgment was passed by mr. L. Alwin, mr. B. Meijer and mr. J.S. Honée and pronounced in open

court on 29 January 2020.

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[1] Code of Civil Procedure.

[2] Cf. Supreme Court 1 December 2017, ECLI:NL:HR:2017:3054, paragraph 3.6.2.

[3] This follows from Section 1 Rv.

[4] General Provisions (Kingdom Legislation) Act.

[5] Cf. Explanatory Memorandum to the Amendment of the Judiciary (Organization) Act, the Judiciary (Territorial Division) Act, the Code of Civil Procedure and several other acts, following a modernization evaluation of the judiciary organization and in connection with the regulations for the right of complaint regarding conduct of judicial officers (Modernization of the Judicial Structure (Evaluation) Act), Parliamentary Papers II 2008-2009, 30 201, no. 3, p. 39.

[6] See International Court of Justice (ICJ) 3 February 2012, ICJ Rep. 2012 (*Jurisdictional Immunities of the State* (Germany v Italy; Greece Intervening), hereinafter: *Jurisdictional Immunities,* para. 57.

[7] See *Jurisdictional Immunities*, para. 57, para. 56-57.

[8] Cf. Supreme Court 22 December 1989, ECLI:NL:HR:1989:AD0998, NJ 1991, 70.

[9] Cf. *Jurisdictional Immunities*, para. 77.

[10] ECHR 21 November 2001, no. 31253/96, (McElhinney v. Ireland), para. 38.

[11] Also referred to as 'full' immunity, cf. ICJ 14 February 2002, ICJ Rep 2002, *Case concerning the arrest warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium), hereinafter: *Arrest Warrant.*

[12] Cf. Article 2 paragraph 1 under b of the United Nations Convention on Jurisdictional Immunities of States and their Property, in which it is stated that for the application of this convention 'State' is also taken to mean "representatives of the State acting in that capacity".

[13] *Jurisdictional Immunities,* para. 93.

[14] European Court of Human Rights.

[15] *Jurisdictional Immunities,* para. 91.

[16] ECHR 21 November 2001, 35763/97 (*Al Adsani*/United Kingdom), hereinafter: *Al Adsani*.

[17] ECHR 12 December 2002, 59021/00 (*Kalogeropoulou*/Greece and Germany), hereinafter: *Kalogeropoulou*

[18] ECHR 14 January 2014, 34356/06 en 40528/06 (*Jones*/United Kingdom), hereinafter: *Jones*.

[19] *Al Adsani,* para. 61.

[20] *Jones*, para. 196.

[21] *Jones*, para. 202.

[22] *Jones*, para. 213.

[23] *Jones,* para. 213.

[24] Supreme Court of Canada, *Kazemi estate v. Islamic Republic of Iran*, 2014, SCC 62 [2014] 3 S.C.R. 176, 10 October 2014 : a civil action against, among others, the Iranian Chief Public Prosecutor and the deputy chief of intelligence for torture and the death of the Canadian journalist in an Iranian prison. United States District Court for the District of Columbia, *Doe 1 et al v. Buratai*, No. 17-cv-1033 (DLF), 19 July 2018: a civil action against several Nigerian police and army officers in connection with the death of participants in a protest march. United States Court of Appeals for the 9th Circuit, *Doğan v. Barak*, No. 16-56704, 2 August 2019: a civil action against former defence minister of Israel Ehud Barak in connection with the boarding of a ship of the IDF, in the course of which the son of claimant died.

[25] Cf. the summaries of the opinions on this subject in the fifth report of the Special Rapporteur of the ILC (Fifth report on immunity of state officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, 68th session ILC 2 May – 10 June and 4 July 12 August 2016, (hereinafter: Fifth Report) p. 11 and 17.

[26] International Law Commission.

[27] Commentary to Article 58 of the *Articles on State Responsibility* (ASR) of the ILC

[28] International Criminal Tribunal for the former Yugoslavia.

[29] International Criminal Tribunal for Rwanda.

[30] International Criminal Court. For an explanation of this development, see Chapter 3 of the Fifth Report of the Special Rapporteur.

[31] ICC Case *William Samoei Ruto and Joshua Arap Sang*, case ICC-01/09-01/11-777, Trial Chamber V (A), decision on Mr. Ruto's request for excusal from continuous presence at trial, of 18 June 2013, para. 67.

[32] Cf. Kreß, Claus and Prost, Kimberly, in Triffterer, Otto, (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, 2008) p. 1608.

[33] Rome Statute of the International Criminal Court of 17 July 1998, Treaty Series 2000, 120

[34] Cf. Schabas, William A. *The International Criminal Court A Commentary on the Rome Statute* (2nd edn, 2016), p. 450, Kreß and Prost in Otto Triffterer, 2008, p. 1607.

[35] ICC Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397-Corr of 6 May 2019, para. 117.

[36] International Law Commission.

[37] Special Court for Sierra Leone.

[38] Taylor, case SCSL 2003-01-1, Appeals Chamber decision on immunity from jurisdiction, of 31 May 2004 (hereinafter: *Taylor*), para. 51.

[39] *Taylor*, para. 52.

[40] Al-Bashir, para. 115.

[41] ICC-02/05-01/09-397-Anx1-Corr, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa (hereinafter: *Concurring opinion*), para. 53.

[42] *Concurring opinion*, para. 435.

[43] *Arrest Warrant*, para. 59.

[44] *Arrest Warrant*, para. 60.

[45] *Arrest Warrant*, para. 61.

[46] IMT 1 October 1946 (*Nuremberg Judgement*), p. 52.

[47] ICTY 29 October 1997, IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial (Prosecutor v. Blaškić), para. 41.

[48] Cf. *Radovan Karadzic, Ratko Mladic and Mico Stanisic*, case IT-95-5-D, formal request for deferral of jurisdiction addressed to the Republic of Bosnia and Herzegovina, judgment of the Trial Chamber, 16 May 1995, Judicial Reports 1994-1995, para. 24; *Slobodan Milosevic*, case IT-02-54-T, preliminary exceptions, decision of the Trial Chamber of 8 November 2001, para. 31. *Anto Furundzija*, case IT-95-17/1-T, judgment of Trial Chamber II, 10 December 1998, ibid., 1998, para. 140. *Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, cases IT-96-23-T and IT-96-23/I-T, judgment of Trial Chamber 1, 22 February 2001, para. 494.

[49] Prosecutor v. Krstić, case IT-98-33, ICTY A. Ch., 1 July 2003, para 26.

[50] Fifth Report, para. 99, in which the Special Rapporteur makes reference to judgements of the ICTY referred to in footnote 48.

[51] Cf. Article 38 paragraph 1 ICJ Statute (Statute of the International Court of Justice, San Francisco, 26 June 1945, *Treaty Series* 1979, no. 36, English and French text in *Treaty Series* 1971, no. 55), which references ` *international custom, as evidence of a general practice accepted as law;'.*

[52] Cf. *North Continental Shelf,* para. 74

[53] Cf. ICJ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), ICJ Reports, 1986, para. 186: *"the conduct of states should, in general, be consistent with such rules."*

[54] Advisory Report No. 29 on Identification of customary international law of November 2017.

[55] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, I.C.J. Reports 1996, para. 18.

[56] *Sixth report on immunity of State officials from foreign criminal jurisdiction,* by Concepción Escobar Hernández, Special Rapporteur, 70th Session ILC (2018), UN Doc. A/CN.4/722, p. 5

[57] *Sixth report on immunity of State officials from foreign criminal jurisdiction,* by Concepción Escobar Hernández, Special Rapporteur, 70th Session ILC (2018), UN Doc. A/CN.4/722, p. 5

[58] Naples 2009.

[59] Institut de droit international.

[60] Report of the International Law Commission, Sixty-ninth session (1 May-2 June and 3 July-4 August 2017), para. 141, pag.178-180.

[61] Report of the International Law Commission, Sixty-ninth session (1 May-2 June and 3 July-4 August 2017, para. 141, p. 182.

[62] Report of the International Law Commission, Sixty-ninth session (1 May-2 June and 3 July-4 August 2017), para. 134, p. 174.

[63] ECLI:NL:GHAMS:2000:AA8395

[64] Statement by Dr. René Lefeber (Legal Adviser of Foreign Affairs, Kingdom of The Netherlands) United Nations General Assembly 72nd Session, Sixth Committee Agenda item 82 Report of the International Law Commission.

[65] Comments and observations by the Kingdom of the Netherlands, 13 February 2019.

[66] The Hague Court of Appeal, 29 January 2007, ECLI:NL:GHSGR:2007:AZ7147 and Supreme Court 8 July 2008, ECLI:NL:HR:2008:BC7418.

[67] The Hague District Court, 15 December 2017, ECLI:NL:RBDHA:2017:14782.

[68] Amsterdam Court of Appeal, 20 November 2000, ECLI:NL:GHAMS:2000:AA8395.

[69] Supreme Court 18 September 2001, ECLI:NL:HR:2001:AB1471 (December Murders Suriname).

[70] Supreme Court 8 July 2008, ECLI:NL:HR:2008:BC7418, para. 7.2.

[71] Cf. Supreme Court 25 November 1994, ECLI:NL:HR:1994:ZC1554, NJ 1995, 650.

[72] Cf. Supreme Court 17 May 2019, ECLI:NL:HR:2019:732.

[73] *Jones*, para. 213.

[74] Preliminary report on immunity of State officials from foreign jurisdiction, by Roman Anatolevich Kolodkin, Special Rapporteur ILC, UN Doc A/CN.4/601, p. 172, para. 55.

[75] The Hague District Court, 21 March 2012, ECLI:NL:RBSGR:2012:BV9748.

[76] Bailiffs Act.

[77] Cf. ECHR 21 February 1975, NJ 1975, 462, Golder versus the United Kingdom.

[78] *Al Adsani*, para. 54.

[79] *Jones*, para. 200.

[80] *Jones*, para. 201.

[81] ECHR 15 March 2018, 51357/07, *Naït Liman v. Switzerland*, para. 220.