Court of Appeal The Hague

Case number: 200.278.760/01

Roll date: September 23, 2021

PLEADING NOTE

about

Mr Ismail Ziada

living in The Hague

Appellant (claimant at first instance)

lawyers: mrs. L. Zegveld and LM. Komp

in return for:

1. Mr. Benjamin Gantz

2. Mr Amir Eshel

Both living in Israel

Respondents (defendant in first instance)

lawyers: mrs. CG van der Plas and Th.OM Dieben

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1 The starting point is jurisdiction; immunity is the exception

1. Max 12,350 w [now 12,500]

2. The jurisdiction of the Dutch court in this case arises from Article 9 DCCP. This concerns a Dutch national who has no access to the

judge has. That is the premise in this case.

3. Article 13a of the General Provisions Act provides that the jurisdiction of the court is limited by the exceptions recognized in international law.

4. Your Court must therefore determine whether international law recognizes such an exception to your jurisdiction beyond doubt. I say without a doubt: because if there is such a doubt, you must assume jurisdiction. At least then we come to the question of whether your jurisdiction can be based on art 9 Rv.

5. If you did not assume jurisdiction in case of doubt about the existence of "an exception recognized in international law", you would unjustly limit your powers and thus also your duty to administer justice. Ziada is completely dependent on you to protect its rights. There is no other judge he can turn to. The Netherlands has expressly provided for access to justice in these situations. So you cannot put your authority aside lightly.

6. The starting point is therefore not as assumed by the other party: immunity unless. The starting point is: jurisdiction unless. That unless it must arise clearly from international law.

7. Rosalyn Higgins, former president of the International Court of Justice also points out that the premise is jurisdiction and that immunity is the exception:

> ***"It is very easy to elevate sovereign immunity into a superior principle of international law and to lose sight of the essential reality that it is an exception to the normal doctrine of jurisdiction."***

8. The exception to your jurisdiction must be recognized in international law. That means there must be a written or unwritten rule of international law clearly stating this. The parties agree that there is no written rule that limits the jurisdiction of the Dutch court.

9. There is also no unwritten rule. This applies in any case to the exercise of criminal jurisdiction over individuals who have committed international crimes, but it also applies to civil jurisdiction.

10. With regard to criminal law, I will not discuss today all developments in case law and state practice in which functional immunity in criminal matters has been discussed. This has been done extensively in all the documents in this case.

11. Sufficient is that there is such a lot of practice and ***opinion juris*** is, in which criminal law jurisdiction over international crimes has been assumed, that there can be no exception to jurisdiction in international law. Pointing out all this practice should suffice in this case.

12. Practice and ***opinion juris*** assuming jurisdiction over international crimes began in Nuremberg, then continued in Pinochet, then the international tribunals, and was recently upheld by the Bundesgerichtshof (BGH) in Germany. With all this practice you cannot say that there is a customary law rule that can override the main rule of jurisdiction of the Dutch criminal court. This does not alter the fact that there is also practice in which a different point of view is taken. The point is that the multiplicity of different practices makes it impossible to distil from it a customary rule under which you can limit your jurisdiction.

13. This practice is about criminal jurisdiction. Unwritten international law also has insufficient customary law practice that allows the courts to exercise civil jurisdiction ***forbids***. The Jones case provides insufficient basis for this. There are also fundamental arguments for treating civil jurisdiction no differently from criminal jurisdiction.

14. In addition, the circumstances of this case are exceptionally serious. Ziada has no other legal remedy than with you. Israel maintains an apartheid regime against Palestinians and has excluded Gazans from the right as 'enemy subjects' coming from 'enemy territory'. Proportionality requires that Article 6 ECHR takes precedence over immunity here. That does not apply in all cases. Granting Ziada access to a Dutch court does not mean that immunity should not be granted in all cases in which compensation is claimed. But the court erred in not taking into account the absence of any alternative.

15. I first discuss how customary law is formed partly on the basis of the

expert opinion by Professor John Dugard (filed by deed for the purpose of this hearing). Then I will discuss the practice in which no criminal immunity has been assumed. This practice stands in the way of adopting a customary rule against jurisdiction over international crimes. Then I discuss the lack of a customary rule with regard to civil jurisdiction. Finally, I will discuss Article 6 ECHR and the special circumstances of Ziada's case.

16. But first I will say something briefly about the different forms of immunities.

2 State vs. Functional Immunity

17. There are different types of immunity in international law: state immunity, personal immunity and functional immunity. The court has not sufficiently distinguished these forms of immunity.

18. If we have to judge whether international law has rules that justify an exception to your jurisdiction, we must look at the correct rules of international law. This case concerns jurisdiction over government officials for international crimes.

19. This is not a case against the State of Israel. Nor is it a case against Israel's head of state or government or foreign minister.

20. State immunity serves to protect public actions of governments from jurisdiction of other countries.

21. The problem with the court's verdict is that it sees functional immunity as an extension of state immunity and bases this on the International Court's ruling in the ***Jurisdictional Immunity's Case***. However, this case concerns state immunity, namely the immunity of Germany and thus not the immunity of any person who represented Germany. By taking that ruling as a basis, the court undermines its verdict.

22. Incidentally, state immunity has also been put into perspective in recent decades. State acts in a private context, usually commercial acts, are not

more protected by immunity. So even state immunity is not set in stone. I'll come back to this in a moment.

23. It is certainly true that military action is state action par excellence. But it was also precisely in this area of military operations that the need was established to distinguish unlawful from lawful military action and to link individual liability to unlawful actions by individual soldiers. The court's suggestion that military action in its entirety is absorbed by the immunity associated with public state action is therefore incorrect and rather worrying.

24. This case therefore does not concern 'ordinary' damage resulting from a war. It is about excesses, the systematic bombing of civilian homes. The systematic killing of Gazans, collectively labeling Gazans as enemies. These are serious violations of the law of war, grave breaches and international law attaches individual criminal liability to the soldiers who commit these violations.

25. Their actions therefore do not resolve into state actions under international law. War crimes do not fall under the right of states to wage war and are not a logical consequence of it.

26. This in no way detracts from the fact that states cannot act other than through their officials. But a case against a state, which has indeed acted through its officials, and which can claim state immunity, is quite different from the case against individual officials charged with international crimes committed as individuals. Those are simply not the same things. States cannot commit war crimes. Individuals do.

27. The Bundesgerichtshof, the highest German court, considered:

> “However, in the present case, the subject of the proceedings and the reference point for possible immunity is not the act of a foreign state not involved in the judicial proceedings in general, but the individual criminal responsibility of a natural person for war crimes, which he allegedly committed. to have

> as an authority figure of a foreign state who is not very highly placed within the state organization. A functional immunity to be considered in such a case should be distinguished from other immunities, in particular the personal (ratione personae).”

28. That is precisely why the articles on state liability explicitly state that individual liability is not affected by these articles. Both forms of liability are independent of each other. For that reason, the immunity of one does not mean the immunity of the other.

29. For exactly the same reason, the statutes of international tribunals expressly distinguish between state immunity and liability of individual officials. They thus reflect the development in the field of international criminal law since the late 1990s.

30. State immunity is therefore not an umbrella term that includes personal and functional immunity. If the state is on trial, officials or nationals are not on trial. Cases involving personal and functional immunity are cases against state officials and not the state itself. In those cases, state immunity as such is not under discussion.

3 Development of customary international law

31. As I said, state immunity has evolved in recent decades in the sense that it cannot be invoked any longer for commercial acts of the state.

32. mr. APMJ Vonken writes in Asser

> “The immunity from jurisdiction of foreign states today no longer has an absolute character, in the sense that previously a state could not be sued at all before a foreign state; only the capacity of the defendant mattered. This absolute immunity has today been reduced to a relative immunity. This relative nature of jurisdiction is expressed in the first place in the fact that the mere status of the state as a defendant is no longer decisive, but

> the subject matter of the proceedings plays a crucial role. A state is not entitled to invoke immunity when a state has entered into legal relations with private individuals on an equal footing; in other words: as soon as a state participates in legal transactions as a legal subject under private law (the so-called acta iure gestionis). The State, on the other hand, can only invoke its immunity if the proceedings concern typical government acts, in other words: acts performed by the State in the exercise of its government function (the so-called acta iure imperii).

33. Professor Dugard also emphasizes this development in international law, pointing out that international law is not static.

34. That practice, in which states can no longer invoke immunity as subjects under private law, was initiated by one national court to protect its own nationals and economic interests. Other judges followed. This practice is now part of common law. That's how things go. One begins, a national court, others follow.

35. In his ***dissenting opinion*** in the ***Jurisdictional Immunities*** case of the International Court of Justice, Judge Yusuf wrote:

> 'As Lord Denning commented with respect to the exception of acta jure gestionis: "Whenever a change is made, someone some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood." (Quoted in Brohmer, State Immunity and the Violation of Human Rights, 1997, p. 20, note 85.)'.

36. The way in which the court established customary law is therefore incorrect.

37. The other party will say: this was a ***dissenting opinion***, but I would point out that Judge Yusuf was president of the International Court of Justice from February 6, 2018 – February 8, 2021.

38. The International Law Commission (ILC) stated in its Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, Article 7(1) (2017) that there is no functional immunity from war crimes.

39. The ILC gave two main reasons for adopting this article: (i) a trend showing the lack of functional immunity from international crimes and (ii) the fact that one of the main goals of the international community is prevention of impunity and ensuring accountability and individual criminal liability. Article 7 DAISFJ was adopted with an overwhelming majority of 21 votes in favour, including the Netherlands itself. [Pm MvA wp r nr 51-e charlotte].

40. The court makes short shrift of this in a few sentences by ruling:

> “A trend is not a general state practice. Now that a general state practice is lacking and neither is there any ***opinion juris***, Article 7(1) DAISFJ does not codify a rule of customary international law.”

41. This is far too simplistic, as Professor Cedric Ryngaert also says in his article in the NJB. The court apparently wanted to see consensus. Developments in international criminal law, including an increasingly limited role for immunities, do not require as large a basis in state practice as the court would like. It is also interesting, for example, that the international criminal tribunals have also adopted a lot of customary law since their existence. With the demands set by the court, they could never have accepted this development of international criminal law. A trend within customary law can therefore indeed be sufficient for the adoption of an -amended- rule.

42. There is still more to criticize about the court's method of establishing customary law. A tunnel vision aimed at state practice without giving sufficient weight to the views of governments is incorrect. It is significant in this regard that the court states: 'The court must apply customary international law and is not bound by the view of the Dutch government.' However, as the Advisory Committee on Issues of International Law (CAVV) has established, the views of governments are of crucial importance for determining state practice. The CAVV says about this:

> "The most reliable source for establishing customary international law is the views of governments as they become known over time."

43. The German court says about the importance of the ILC work as a benchmark for establishing customary law:

> “Furthermore, the work of the United Nations International Law Commission may indicate the existence of a legal belief”

44. What the German Court of Appeal also finds is that Germany's position in the ILC does matter. The German court examined the German position in the ILC further and concluded that the criticism focused on the list of crimes for which immunity would not apply, and not on the principle of punishing international crimes. [pm NL Charlotte]

45. Dugard is also extremely critical of the court's handling of the ILC's findings:

> This assessment [of the District Court, lawyer] fails to take account of several facts. First, that the International Law Commission, whose 34 members include politicians, the present or past law advisers of governments, private legal practitioners and academics drawn from a carefully balanced spread of States representing the principal legal systems of the world and different regions, is ideally qualified to pronounce on customary international law as understood by governments of all regions of the world. Second, that the Commission's decision contained in Article 7 was not a hastily conceived judgment but the result of a decade's debate on immunities. In the first intervention in this debate in 2008, the doyen of the Commission, Professor Alain Pellet, set the tone for the Commission's consideration of this subject when he described the judgment in the ***Judgment Warrant case*** as “disastrous” and provided evidence of a willingness on the part of the Court “to interfere in the process of elaboration of the law, by supplementing it, shifting its direction or, less felicitously, seeking to prevent or curb current trends.” Subsequent debate was characterized by vigorous exchanges of this kind between proponents and opponents about the limits of immunity in the case of prosecution for international crimes. Third, that the distinction between codification and progressive development in the work of the Commission is generally unclear as there is normally an element of progressive development in the codification of customary

international law. Fourth, that the decision was reached by a substantial majority, 21 to 8. Voting in Commission is rare but is resorted to on controversial issues that challenge the Commission, such as the question of immunity for international crimes. In these circumstances, the District Court of the Hague should have considered the ILC's Article 7 more carefully and seriously as it confirms the present state of both ***usus*** and ***opinion juris*** on the subject of immunities. [underlines added] [pm charlotte: summarize points 1, 2 and 3 in 1 or 2 sentences per point in NLs]

46. I conclude that the manner in which the court has established customary law is incorrect. As a result, the court misunderstood developments in this law with regard to immunities for international crimes.

4 Delimitation of functional immunity: not for international crimes

47. Back to article 1 Rv and article 13 AB. Your jurisdiction is limited by a exception in international law. There is no such exception. Admittedly, there is indeed a practice of assuming that immunity limits the jurisdiction of the national court. But there is also practice that points to the contrary. A lot of practice even. I walk through that practice in seven-mile boots.

4.1 Nuremberg, Pinochet, and other international and national case law

48. We have already discussed the Nuremberg trials in the first instance. Individual liability for international crimes was already recognized at that time. Article 6 of the Charter of the International Military Court stipulated that persons who committed the violations were individually liable. Article 7 of the Charter stated that immunity cannot be invoked for serious violations of international legal norms. Article 7 of the Nuremberg Charter has been regarded as customary international law in subsequent international jurisprudence.

49. In the ***goering*** In the case, the Tribunal ruled that immunity protects state officials “under certain circumstances” but that it cannot be applied to “acts” that have been designated criminal under international law. It follows that immunity is only for limited categories of acts on the side

is pushed. It also follows from this that the act is central to the assessment thereof.

50. Moreover, the Nuremberg Tribunal never suggested that the nature of the tribunal was relevant in assessing immunity. For the Nuremberg tribunal, the nature of the act was decisive in not assuming immunity. The Nuremberg Tribunal aligned national and international courts. By establishing the tribunal, states did together what one state could have done alone, according to the Nuremberg Tribunal.

51. The ILC, no national court, nor international court ever suggested after Nuremberg that the national or international character of the court was a determining factor in whether or not to adopt immunity. The International Criminal Tribunal for the former Yugoslavia has ***Blaskićc*** This case said exactly the opposite, namely that in respect of international crimes immunity cannot be invoked before either national or international courts. The International Criminal Tribunal for the former Yugoslavia states that this rule has existed at least since the Second World War."***if not before***". At the time of or before World War II, there were no international tribunals, so the Tribunal has wished to rule on individual criminal liability regardless of the jurisdiction in which the prosecution takes place.

52. The highest German court also finds that the practice of international tribunals is relevant for determining a customary law rule that officials of other countries can be prosecuted.

53. The judgment of the District Court of The Hague in which it erects a wall between international and national courts cannot therefore be upheld.

54. The Nuremberg line was later applied in the Pinochet case (1998-99). That is an important matter because it is a matter before a national court. This case did not receive any attention at first instance.

55. In the Pinochet case, the question had to be answered, whether torture at all ***an official act*** of a head of state. The Lords of Appeal ruled by a three to two majority that:

> "International law now recognizes that some crimes are without the protection of the former head of state immunity, so that immunity is equally limited as part of domestic law?".
>
> "It hardly needs saying that torture of its own subjects, or of aliens, would not be regarded by international law as a function of a head of State".
>
> "The contrary conclusion would make a mockery of international law".

56. The Pinochet case was reassessed when one of the judges was found to have links to Amnesty International. In Pinochet 3, the vote against immunity was 6 to 1. The provisions of the Anti-Torture Treaty, which introduced global universal jurisdiction, were incompatible with immunity, the judges ruled. For Lord Saville it was impossible:

> "to see how this immunity can exist consistently with the terms of that convention (convention against torture)."

57. According to Lord Millett:

> "no rational system of criminal justice can allow an immunity which is coextensive with the offence."

58. In Pinochet No. 3, Lord Philips said:

> "no established rule of international law requires State immunity ***rational material*** to be accorded in respect of prosecution for an international crime. International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I don't believe that State immunity***rational material*** can coexist with them."

59. This case thus identified a development in international law, namely international crimes, which was not related to immunity.

60. It is also important how much the act was central in the Pinochet case in assessing whether Pinochet was entitled to immunity. Even the***descent*** Lords made no attempt to circumvent the nature of the conduct in the discussion.

61. The point that Lord Millet also made in this case is that although there are more

international tribunals, adjudication before national courts would remain the norm. At the time of the Pinochet case, the ICTY, ICTR and ICC already existed. But these tribunals were only able to prosecute a limited number of crimes from their jurisdiction, aimed at a specific country, or because of limited capacity. This makes the jurisdictional provisions of international treaties an illusion, the Lords ruled.

62. It is indeed totally unrealistic that international crimes can only be tried by international tribunals. The Statute of the International Criminal Court also emphasizes the importance of national adjudication. The preamble states that prosecution of international crimes must be ensured 'by taking measures at the national level', which also strongly implies that senior officials should not be given immunity. The preamble further states:

> 'that it is the duty of every Stare to exercise its criminal jurisdiction over those responsible for international crimes.'

63. The International Criminal Court therefore also indicates the importance of national adjudication, from which a fundamental distinction between national and international courts cannot be deduced.

64. The ILC has codified the principle of individual liability for international crimes as applied by many international and national courts. This work has received much support as well as criticism. It is for this reason that Cedric Ryngaert has argued that states are neither obliged to grant functional immunity for international crimes nor are obliged to refuse functional immunity.

65. The German Court of Appeal follows the same approach as Ryngaert and rules:

> dd) The recent work of the United Nations International Law Commission on criminal immunity has not yet been completed (...) In any event, no international law rule can be deduced from this that also grants functional immunity in the event of war crimes. This therefore does not alter the general rule of customary international law, which is proven by uniform practice and conviction, that in any case criminal prosecution of

foreign lower-ranking officials for war crimes or certain other crimes, the community of nations as a whole, is admissible by national courts. (underline added)

66. The German Court of Justice has carried out an extensive investigation into the practice of assess whether a customary rule can be adopted and concludes:

> "b) There is a general state practice in the sense that in the situation described, criminal prosecution by a national court is possible. State organs and courts have often criminally prosecuted and convicted foreign officials for war crimes, genocide or crimes against humanity."

> As these decisions rejecting immunity are numerous and of vital importance, it is ultimately irrelevant that proving a practice which confers immunity and therefore usually does not lead to legal proceedings may possibly be more difficult than finding judgments who state that there are no obstacles to prosecution and lead to a conviction. For the rest, even in a practice based on immunity, it should be taken into account that in individual cases judicial decisions are made that confirm immunity because there is no heed or doubts about the application. However, no such statements are known. On the contrary, national jurisdiction is even usually taken for granted."

4.2 Cases before the International Court of Justice

67. Has this all now been undermined in the cases of the International Court of Justice? No, as the German Court of Justice also considers, the International Court of Justice has ***Jurisdictional Immunities*** case between Germany and Italy only excited about ***state immunity*** in compensation proceedings. In that case, it "strongly underlined not to comment on whether and, if so, to what extent, immunity should be respected in criminal proceedings

against an authority figure".

68. In the ***Judgment Warrant*** case it was also a completely different case in a different context. In that case, it was determined that Belgium had violated international law because it had issued an arrest warrant against the Congolese Minister of Foreign Affairs. While the International Court of Justice could find no practice to base this rule on, it stated that the function of a foreign minister was to travel and interact with foreign governments, so that rule had to be adopted.

69. This case therefore concerned personal immunity. It was the incumbent foreign minister. It therefore concerned 'full immunity', in which no distinction is made between actions in 'official capacity' and actions in 'private capacity'. But that's not what this case is about. This case concerns military personnel and functional immunity.

70. In his opinion, Dugard points to other facts and circumstances that make that case quite different from this one. It went in***Judgment Warrant*** case is not about the question of the jurisdiction of the Belgian court over the Congolese Minister of Foreign Affairs. It concerned the validity of an international arrest warrant issued by a Belgian judge. The case therefore concerned interstate cooperation and emphatically not the question of whether immunity could be raised against the jurisdiction of a Belgian court.

71. The ***opinion juris*** the basis for the immunity in the Arrest Warrant case was therefore the unimpeded travel to speak with foreign governments. That view does not exist with regard to international crimes committed by other state officials. It would be not only legally wrong to assume it, but also morally wrong. When that mutual interest of unimpeded action disappears, the rationale behind immunity disappears.

72. The German court also underlines precisely this point when it says about the Arrest Warrant case:

> "It is recognized that certain high-ranking officials, such as heads of state, government or foreign ministers, enjoy immunity from criminal jurisdiction of

other states (see, for example, ICJ, judgment of 14 February 2002 - 837 - Congo v. Belgium - ICJ Reports 2002, 3 marginal number 51 (...) In the first instance, however, it concerns the so-called personal immunity (immunity ratione personae) (...) which - irrespective of the other conditions and their scope - in principle does not extend to lower levels of authority Even if aspects of functional immunity (immunity ratione materiae) are involved, constellations relating to heads of state, government leaders or foreign ministers may (...) no relevant conclusions are drawn about the functional immunity of a military personnel to be examined here."

73. So we have to realize again and again that immunity is the exception and not the rule of jurisdiction. That is precisely why it is of great importance to determine exactly where and to whom immunity is granted. Immunity is not ***catch all*** concept under which every state act can be placed.

4.3 Dutch practice

74. I turn to the consequences of the decision of the District Court of The Hague in this case for Dutch criminal practice. The consequences are significant and not positive.

75. There is an increasing call from the Public Prosecution Service for more investigations into war criminals. In a letter from Minister Blok, also on behalf of 16 other European countries, he drew attention to the crimes committed by the Assad regime in Syria. He wrote:

> "It is everyone's responsibility to fight impunity and demand accountability for the crimes committed in Syria, regardless of who the perpetrator is.
>
> Prosecutions have already been initiated in several of our countries and final sentences have been handed down against perpetrators. As early as 2016, courts in Sweden started prosecuting serious crimes committed in Syria. Last month, a court in

Germany's Koblenz handed down a historic first sentence against a former member of Syrian intelligence for complicity in crimes against humanity. Legal proceedings are also pending in France and a complaint was recently lodged in Paris over chemical attacks by the Syrian regime against its own people."

76. In 2017, the Public Prosecution Service had to dismiss the criminal case against an alleged Afghan war criminal because there was too little evidence. In the explanation to that decision, the Public Prosecution Service wrote:

"Undesirable impunity

Afghanistan has now been at war for more than 40 years. Because perpetrators of war crimes cannot remain impunity, this conflict continues to attract the attention of the Dutch Public Prosecution Service. International war crimes must not go unpunished. And the Netherlands should not be a safe haven for war criminals. That is why the Public Prosecution Service is committed to combating impunity. Moreover, the fight against it is important for the Afghan community in Afghanistan and beyond. Impunity contributes to the continuation of conflicts and this is undesirable. That is why TIM is doing everything it can to track down and prosecute war criminals, although that sometimes takes years."

77. On July 16 of this year, the court in The Hague convicted a Syrian. He had fled, stayed here with asylum and was recognized. The man was sentenced by the court in The Hague to 20 years in prison for his involvement in the 2012 execution of a captured Syrian army soldier, a war crime. The man was the commander of a small battle group in the town of Mohassan in Syria. In the sentencing, the court also considered that the suspect when carrying out the execution ***has had a leadership role***. Immunity was not discussed at all. I refer to the German judgment, where it was also established that national jurisdiction is generally regarded as given, without discussing immunity.

78. A case is currently pending against the former Afghan commander of

a prison in Afghanistan.

79. There are more cases and more will come. Unless your Court hands all these defendants the defense of immunity from jurisdiction of the Dutch court for international crimes, as the court did. The negative consequences of this can hardly be foreseen. I don't think the court has realized that.

80. I have discussed the Dutch practice in detail in the statement of appeal and previous documents. I only repeat what your Court ruled in the Bouterse case:

> After all, committing very serious criminal offenses such as the one at issue here cannot be counted among the official duties of a head of state."

81. Incidentally, what was the judgment of your Court then based to a large extent on the expert judgment of Professor Dugard. He was then heard extensively in person on the matter by your Court.

82. In its decision, the German Court of Appeal also refers to Dutch case law that considers criminal prosecution admissible, including the judgment of the Court of Appeal in the Bouterse case and the judgment of the Supreme Court in the case against the Afghan general.

83. I add the Ami Ayalon case. Reference was also made to this in the first instance, but without addition of the documents showing that he did not claim immunity. Now we have. At the time of the declaration in 2008, Ayalon was a minister in the Israeli cabinet. Exhibit 78 contains Correspondence from the National Public Prosecutor's Office dated 17 June 2008 containing the advice of the Board of Procurators General that Ami Ayalon does not have immunity ex. art. 8 Sr and art. 16 WIM enjoy. Incidentally, the report concerned torture committed in 1999-2000 by Shin Bet, the Israeli security service, of which Ayalon was head from 1996 to 2000.

84. Dutch practice is based on Article 16 of the International Crimes Act, the explanatory memorandum thereto. Also important is the advice of the Advisory Committee on International Law Issues from 2011 that focuses on further detailing the scope of state immunities and the reactions (twice) of

the government on this.

85. It follows from these rules and sources that personal immunities are expressly limited to categories: a. heads of state; b. government leaders; c. foreign ministers; d. foreign officials on official missions in the Netherlands. Not anymore. It is established that the respondents do not belong to one of these categories.

86. I also point to the multitude of international law sources that oblige states, including the Netherlands, to end impunity. These obligations, which have increased enormously in nature and scope, increasingly require a very limited interpretation and scope of immunities.

87. The court paid no attention to these obligations, let alone the spectacular developments of international criminal law. That is remarkable. The (customary and treaty) obligation to prosecute international crimes and the (customary) scope of immunity are, of course, communicating vessels. Developments within one undeniably have consequences for the other.

88. The CAVV clearly states in its advice that the approach should be chosen in which functional immunity fails because it concerns international crimes and this is independent of any parallel liability of the state:

> While in classical international law acts of officials in the performance of their duties could only be imputed to the state, the development of international crimes within international law means that the person who commits the crime can also be held responsible for them. '

89. CAVV acknowledges that this approach has not yet been fully crystallized in customary law, but according to the Commission this is not necessary because a. international law is developing so strongly in this respect, b. In this way, the Netherlands can make a useful contribution to the formation of customary law and c., perhaps most importantly, a different, more reserved, vision (as applied by the court) would result in impunity in violation of international law obligations. In short, this is the golden mean, which suits the great interest

of the prevention of impunity for international crimes.

90. Finally, I would point out that for the formation of customary law, not only judicial statements matter. All state practice is relevant, including the position of the Netherlands in the ILC. The German court has said about this;

> "In order to determine state practice, one can start from the behavior of the state organs that are responsible for international trade under international or national law, usually the government or the head of state."

4.4 Ziada case: war crimes

91. At this point I will briefly discuss the case of Ismail Ziada.

92. What is striking in the judgment of the court is that it pays no attention at all to the acts under discussion here, namely: the knowingly bombing civilian targets. Those are war crimes. Functional immunity applies to the act, so the nature of the act cannot by definition be disregarded. From the Nuremberg cases, but also from the Pinochet case, it becomes clear how important the nature of the act is. The highest German court also ruled that "the charges may be material".

93. That this case indeed concerns war crimes can be assumed on the basis of recent decisions of the International Criminal Court. On February 5, 2021, the Pre-Trial Chamber of the International Criminal Court ruled that it has jurisdiction over the Palestinian territories, including Gaza. On March 3, 2021, the prosecutor announced it was opening an investigation into the bombings committed by Israel in Operation ***Protective Edge*** in July/August 2014. That is the period in which the Ziada family's house was bombed. The ICC Prosecutor previously indicated that there is a reasonable basis to believe that members of the Israeli Defense Forces (IDF) committed war crimes in the context of the 2014 hostilities in Gaza.

94. Universal jurisdiction with regard to war crimes is also undisputed. From the Treaties of

Geneva also shows that states in ***grave breaches*** of these conventions have the obligation to prosecute (or extradite) suspects, office holder or not, and that the courts of states other than the country of origin of the suspect also have jurisdiction to do so. Israel has been party to these treaties since 1951.

95. Universal jurisdiction for war crimes has also been adopted in the Dutch International Crimes Act.

96. In the Pinochet case, Lord Slynn of Hadley said that immunity could be limited if an international treaty clearly gave jurisdiction to states to prosecute the crime and that the treaty explicitly or implicitly excludes immunity and that this treaty is part of domestic law .

97. In those treaties and national rules that give universal jurisdiction over the crimes, therefore, the demarcation of your jurisdiction lies. Those are clear and applicable rules that limit immunity. This is not about jettisoning immunity in its entirety, but only for certain acts within the limits of international and national law. To assume functional immunity would be contrary to the letter and spirit of these Geneva treaties, according to the CAVV.

4.5 Defendants' Positions and Claims for Immunity by Israel.

98. Then to the positions that the defendants held at the time of the bombing of the parental home of Ismail Ziada. Gantz and Eshel were both military commanders in the IDF (Israeli Defense Forces) and are directly responsible for the 2014 policy of bombing civilian homes.

99. This case therefore concerns two senior military personnel. The ruling of the German court refers to a 'subordinate' Afghan soldier. Defendants will argue that that case is different for that reason. That is incorrect.

100. There are three categories of immunity under international law: state immunity, personal immunity and functional immunity. State immunity applies only to the state. Personal immunity only covers heads of state,

heads of government and ministers of foreign affairs. The reason is that they should be able to travel freely. Functional immunity concerns the other category of civil servants of a state. It makes no distinction between higher and lower positions. If functional immunity cannot be assumed for international crimes, in this case war crimes, then this applies to all other officials of a state.

101. Distinguishing between senior and low-ranking military personnel for adjudication under universal (criminal or civil) jurisdiction is not only incorrect from the point of view of the doctrine of immunity, it is also incorrect from the point of view of the rules of war law. War crimes are committed at all levels: by the soldiers who drop the bombs and by commanders who give their orders. Stronger lower military personnel almost always act on assignment. It would be serious if the low-level soldiers were dealt with and the military commanders were kept out of harm's way. It would also thwart the system of war law in which ***command responsibility*** occupies an important place. There is therefore no ground in international law to exempt commanders from the exception to functional immunity.

102. It is therefore irrelevant that the German judgment concerns an Afghan soldier of a lower rank. In addition, if you read the ruling carefully, in that case the position of the Afghan soldier is indeed referred to as a "lower authority figure" (he was a first lieutenant of the Afghan army), but in support of his judgment the German court then only analyzes case law in which it was about higher authorities.

103. For example, the German court refers to “leaders of the Nazi regime”. In Nuremberg (and for that matter also Tokyo) the higher placed were also tried. So high commanders.

104. The German court refers to Eichmann. Eichman also had a high position. During WWII he was a lieutenant colonel in the SS ('SS-Obersturmbahnführer').

105. The German court refers to a judgment of the Swiss court concerning a former defense minister.

106. It is apparent from this and other case-law cited that the German Court of Appeal

lower authorities refers to anyone other than the head of state, head of government and minister of foreign affairs.

107. This is all the more apparent when the German court speaks on page 20 of “certain high-ranking officials, such as heads of state, government leaders or foreign ministers”. With regard to them, the German court considers that it is "recognized" that they enjoy "immunity from jurisdiction in criminal matters in other states". High are therefore heads of state, government leaders or ministers of foreign affairs. The rest is low.

108. A different conclusion cannot be drawn from this judgment and, moreover, it is also untenable under international law. After all, international law only recognizes three forms of immunity: from the state, from the troika and other authorities, that is, lower. As an aside, I would like to point out that Pinochet, Bouterse and the Afghan general (the latter was convicted in the Netherlands) all held high positions.

109. The fact that Israel has explicitly invoked immunity in this case is irrelevant. It cannot be inferred from this that this case differs from other cases in which immunity has been implicitly or explicitly rejected. Judges and the Public Prosecution Service are very aware of the immunity rule. Judges must examine their jurisdiction ex officio, they are rules of public order. They then do it implicitly or explicitly.

110. The highest German court also examined its jurisdiction ex officio in the case against the Afghan suspect. The suspect himself did not invoke immunity. Afghanistan did not do that either, which is not surprising. Even then, the country could barely keep itself afloat. The same was true for Libya when the civil case El Hajouj was filed in the court of The Hague. In that case, too, the court officially examined possible immunity. I will come back to this matter later.

111. It is only Israel that, of course, is on top of things when its soldiers are charged elsewhere. That is his right, but it cannot be concluded from this that immunity played no role in all those other cases. Implicitly, it has been assessed and rejected. The German court has seen that well. Incidentally, it has already been agreed by the Netherlands with regard to an Israeli minister

judged, and rejected, Ayalon.

4.6 Interim conclusion

112. Back to the main question: is there a clear rule in international law requiring your Court to limit your jurisdiction?

113. It should be clear from the case law and other practice that I have outlined that such a rule does not exist, at least with regard to criminal jurisdiction over foreign officials for international crimes. There is practice that assumes immunity, but there is just as much, if not more, practice that recognizes jurisdiction in international crimes without question.

114. The German court concluded after an extensive investigation of international and national case law:

> "Since it is established, for the reasons set forth above, that there is no procedural impediment in the form of functional immunity based on customary international law in the circumstances, (...)

> "Against this general background, isolated voices in the international law literature, which consider functional immunity also to be present in the case of the national prosecution of war crimes, are therefore not sufficient to justify doubts leading to reference to the Bundesverfassungericht.

5 No immunity under civil law

115. I go to civil jurisdiction over international crimes. Here too, a customary law rule must be established that limits your jurisdiction. Only with a clear rule, which there is no doubt, can you limit your jurisdiction. As I said. the existence of an obvious limitation of your jurisdiction is necessary now that if jurisdiction is not assumed, the litigant in this case is denied all access to the law.

116. There is also no rule in civil law prescribing immunity from jurisdiction. There is little practice. The Jones case does not provide sufficient basis for adopting such a rule because that case concerned a violation of Article 6 ECHR. In addition, it is clear from that case that the circumstances of the case are decisive. Finally, our national law must also lead to the conclusion that assuming immunity for international crimes is not justified in civil proceedings either. The connection between criminal and civil proceedings, the fact that immunity is a general doctrine that transcends proceedings, and the centrality of the act in immunity, should lead to two opposite conclusions being drawn in criminal and civil proceedings.

117. I discuss these last points. Then I briefly discuss the Jones case.
I then address the question of proportionality in this specific case, namely the consequence of immunity on access to justice for Ismail Ziada.

5.1 Consistency of jurisdiction in civil and criminal law in Dutch law

118. The court has not ruled out that developments in customary international law with regard to immunity from jurisdiction in criminal matters before national courts may be of interest and influence on customary international law with regard to this point in civil proceedings before national courts.

119. This is understandable since the reason for the failure to grant immunity by the court lies in the nature of the suspected acts, namely international crimes.

120. The court has recognized that this is also the approach of the European Court of Human Rights. In the Jones case, the European Court also cites developments in criminal law to substantiate expectations about developments in functional immunity in civil proceedings.

11. The court also points to the ILC, which recognizes that no relevant distinction can be made between criminal and civil jurisdiction. Given the similarities between the two jurisdictions, the ILC itself cites civil cases in

evidence of the lack of immunity in criminal matters.

121. Dugard points out that, in the context of the draft final draft of the "UN Convention on the Immunity of Jurisdiction of States and Their Property" (2004), the ILC addresses the issue of immunity from civil claims relating to international crimes , rated. The ILC pointed to the House of Lords ruling in the Pinochet case, as it supported the view that government officials cannot invoke immunity for torture committed on their own territory, in both civil and criminal cases.

> * "The International Law Commission considered the subject of immunity from civil claims arising out of international crimes in 1999 when it reviewed the final draft of the articles which became the Convention on Jurisdictional Immunities for States and their Property of 2004. Although this matter was not included in the draft articles, the Commission took the view that it was a subject that should be drawn to the attention of the Sixth Committee of the General Assembly (the Assembly's Legal Committee). A Working Group of the Commission briefly examined recent developments in this field, particularly the decision of the House of Lords in the ***pinochet case,*** which it found had "generated support for the view that State officials should not be entitled to plead immunity for acts of torture for acts committed in their own territories in both civil and criminal actions." According to the Commission, this was a development "which should not be ignored."

12. The Dutch Advisory Committee on International Law Issues (CAVV) has determined in its 'Advice on the immunity of foreign office holders' (2011) to the Minister:

> "Termination of full criminal immunity (such as on cessation of office) means termination of full civil immunity."

13. In national law, the distinction between civil and criminal law is blurred by the possibility that the Netherlands (and many other legal systems) offer victims to participate in criminal proceedings and to bring an action for damages ('action civile'). This almost automatically means that when the Dutch ***punishment*** court has jurisdiction, it may also rule on

a possible civil claim for damages arising from the criminal act.

14. Michael Wood has argued that in criminal proceedings the national prosecution authorities of the forum state consider the possible consequences of prosecution for international relations between States. Prosecuting authorities could terminate proceedings for that reason, while a civil party to the proceedings is not concerned with the consequences of its actions on international relations between States and may even intend to disrupt these relations.

15. This statement is not based on the belief that government officials, whether they are prosecutors or advisers to the Ministry of Foreign Affairs, are likely to behave in a fair and rational manner that promotes the interests of the entire international community, but rather on the belief that their decision will advance the political interests of the government they serve. This is clearly not a valid reason to allow criminal charges or deny civil actions. In fact, there is a need for civil action in the situation where national authorities fail to exercise universal criminal law jurisdiction for political reasons. Civil actions in such situations ensure accountability and do not prevent impunity.

16. There is thus no fundamental reason not to assume immunity in criminal cases, but in civil cases. The unity that every legal system should strive for compels the same rules to apply to both areas if there are no convincing arguments for a different arrangement. Private law is regarded as the 'common law' to which public law derogates. Private law serves as a safety net. Unity must be achieved across jurisdictions by striving for the most identical application of principles.

17. Immunity is a general doctrine derived from international law. International law does not justify the distinction between criminal and civil law. In any case, this is not apparent from the Jones case.

5.2 Case Jones provides no legal basis for exception to civil jurisdiction

122. In Jones, the European Court ruled that it was sufficiently satisfied that the granting of immunity by the United Kingdom in ***this particular case*** adequately reflected the state of public international law, but at the same time indicated that developments in this area should be monitored.

123. Moreover, it is very important that the European Court did not rule that the immunity of Saudi state officials under common law precludes proceedings. It merely ruled that the United Kingdom had not infringed Article 6 by applying its own legislation in this area.

124. Jones very clearly leaves the decision of whether or not to grant immunity to European states. Thus, immunity is not an insurmountable obstacle. Functional immunity of state officials is not absolute. That there is development in this area is clear and also emphasizes Dugard. There is undoubtedly a practice of giving more weight to the seriousness of the crimes at the expense of immunity.

125. The German Court of Appeal has also dealt with the Jones case. He notes that there is a distinction between criminal and civil jurisdiction. But what the German judge ***not*** does is exclude civil jurisdiction in such matters. He first establishes that it is in the ***Al Adsanic*** case (the predecessor to Jones) involved state immunity. In addition, referring to Jones, the judge points out that the case: [pm charlotte check citation]

> "should be considered further in the light of current developments in international law (ECtHR, judgment of 14 January 2014 - 34356/06 ea - Jones ea/United Kingdom - ECtHR 2014-1, 1, paragraph 215; see Kloth on this , AVR 52 [2014], 256, 278)."

126. The German Court of Appeal therefore also emphasizes the ECtHR's consideration that further developments must be considered and does not close the door.

127. The development of the law is apparent from a recent case handed down by the Korean court. In this civil case dated January 8, 2021, the Seoul court ruled

Central District Court that Japan has no immunity from civil jurisdiction. The plaintiffs in this case were among the so-called "comfort women" who were used as sex slaves by Japanese soldiers during the Japanese occupation of Korea (during World War II). The court ruled that these were crimes against humanity. The Seoul Central District Court subsequently ruled that the constitutional right of access to justice is essential and that in this case this right should not be limited by rules of state immunity. In addition, the claimants' claim was sufficiently connected to Korea (the claimants were Korean citizens and the crimes took place in Korea).

128. The case is currently only available in Korean. According to the scientists involved, a Google Translate provides a good translation. We can provide that or an official translation of the case to your Court if you wish.

129. The Korean judge followed the ruling of the Italian Constitutional Court of October 22, 2014. [pm charlotte check is this correct?]

130. In the United States, the Torture Victim Protection Act (TVPA) provides a civil remedy to enforce international criminal law. The TVPA is a US law that provides for the possibility of bringing civil claims against persons who are guilty of or complicit in torture

and/or extrajudicial executions. Under this law, foreign claimants can bring claims against foreign defendants for acts that took place outside the United States. Claims can only be brought against persons who have acted under the actual or apparent authority of a foreign state [OR] Liability is based on the conduct of a foreign official that occurred in an official capacity.

131. Finally, I return to the case of El Hajouj against Libyan state officials. The documents have been submitted as**production 79 AD**. The summons against Ghadaffi could not be served, the Ministry of Security and Justice ruled. On March 28, 2011, the bailiff received a notice ex. art. 3a, paragraph 2 of the Bailiffs Act of the Minister of Security and Justice, stating that the summons, insofar as it related to Colonel Gaddafi, was contrary to the international law obligations of the Dutch State and implementation

of which, in so far as pertaining to Colonel Gaddafi, had to be refused.

132. The case against the other 12 Libyan officials was allowed to proceed. The District Court of The Hague then again asked the question of immunity with regard to these 12 Libyan officials. By the way, you were part of this court. On December 14, 2011, the court delivered an oral ruling requesting the plaintiff to comment on the immunity of the remaining twelve state officials. The court then dismissed immunity and allowed the claim.

133. Dugard writes that the law has not crystallized on this point. He is not quoting the very best, James Crawford, in this regard. Crawford writes:

> "But the authorities are divided. The US courts have endorsed a cogens gravy exception in civil proceedings against former officials, the Italian courts are disregarding the holding of the International Court in Jurisdictional Immunities of the State, and the ILC has voted to exempt certain international crimes from the jurisdictional immunity of state officials before national courts. For the time being at least, consensus on these issues is not in sight.

134. Judge Yusuf of the International Court of Justice wrote in his dissenting opinion in Jurisdictional Immunities ***of the State***, which was a civil case:

> "State immunity is, as a matter of fact, as full of holes as Swiss cheese. Thus to the extent that customary norms of international law are to be found in the practice and opinio juris of States, such practice clearly attests to the fact that the scope and extent of State immunity, particularly in the area of the violation of human rights and humanitarian law, which is currently characterized by conflicting decisions of national courts in its interpretation and application, remains an uncertain and unsettled area of international custom, whose contours are ill-defined.

135. The following also applies with regard to civil jurisdiction: there is practice against and there is practice for it. So it's up to you to judge this. There is no rule that prohibits you from exercising jurisdiction.

136. There are also fundamental arguments for having jurisdiction over international crimes also in civil cases. That is not only that a distinction between criminal and civil law would be artificial. But also that otherwise Ziada has no access to the courts. The special circumstances of this case must weigh heavily. I'll get to that now.

5.3 Access to justice

137. Immunity assumes the exclusive jurisdiction of the country invoking the immunity. Israel in this case. The fact is, however, that Israel does not offer that jurisdiction over residents of Gaza.

138. At first instance, we paid extensive attention to the relationship between immunity and the total lack of access to justice in this case. By Conclusion of Reply in the incident, and by plea.

139. The court has considered in this regard that the only test of proportionality it must apply is whether functional immunity is in accordance with customary international law. This is incorrect.

140. In a recent decision of 2016, the European Court stated that immunities as such are not a violation of Article 6 ECHR. However, the Court then also considers:

> 'It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on categories of persons [...].'

141. The Court then concludes that:

> 'in cases where the application of the principle of State immunity from jurisdiction restricts the exercise of the right of access to a court, the Court must ascertain whether the circumstances of the case justify such

restriction.'

142. It thus follows that it is not lawful for a State to place civil claims outside the jurisdiction of its courts on the basis of immunity without review of access to justice. It must therefore be considered whether the circumstances of the case justify such a restriction.

143. In this case, therefore, the court could not suffice with the consideration that functional immunity is in accordance with customary international law and that the proportionality requirement is therefore met,

144. This consideration of the European Court is mentioned in several ECHR cases, and is also included in the ECHR Guide to Article 6 (civil limb):

> para. 123: 'In cases where the application of the principle of State immunity from jurisdiction restricts the exercise of the right of access to a court, it must be ascertained whether the circumstances of the case justify such restriction. The restriction must pursue a legitimate aim and be proportionate to that aim (Sabeh El Leil v. France [GC], §§ 51-54; Cudak v. Lithuania [GC], § 59). [...] As to whether the measure taken is proportionate, it may in some cases impair the very essence of the individual's right of access to a court (Cudak v. Lithuania [GC], § 74; Sabeh El Leil v. France [GC], § 49; Naku v. Lithuania and Sweden, § 95) [...].'

145. The Guide to Art. 6 then determines:

> Para. 128: Limits to immunity: it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons (McElhinney v. Ireland [GC], §§ 23 -26; Sabeh El Leil v. France [GC], § 50).

146. The same consideration is in Jones.

147. Here we come to the crux. People from Gaza are completely deprived of

any access to justice. Israel has ruled out liability to Palestinians from the Gaza Strip with the introduction of the concept of 'enemy subject' and 'enemy territory'. Under Section 5B of Israel's Civil Wrongs (Liability of the State) Law, liability on any ground is excluded for a claim brought by a Palestinian from the Gaza Strip. This article states that any liability of Israel is excluded towards citizens and residents of a State that Israel regards as 'enemy territory' and therefore as 'enemy'. The Gaza Strip has been classified by Israel as an 'enemy territory'. The discriminatory nature of this provision is evident, as it specifically excludes liability towards a particular population group, namely Palestinians from the Gaza Strip,

148. Moreover, under Israeli law, state liability for damage caused by a combat act, a so-called 'act of war', is excluded. Now that the unlawful bombing of Ziada's family and residence was a combat act, liability for the damage as Ziada suffered is excluded.

149. With these facts completely blocking any access to justice for harm caused by Israel in Gaza, I will not discuss the many other obstacles that exist alongside Palestinians that block effective access to justice in Israel. For further substantiation of the foregoing, Ziada refers the Court to chapters 3-6 of the statement of defense in the jurisdictional dispute in the first instance.

150. For the hearing in first instance, our expert on this subject (no access for Palestinians to Israeli courts) had come from Israel to The Hague. He has handled numerous cases for Palestinians from Gaza. He has stopped because the door is legally and factually closed. The court had no questions for him. The disenfranchisement of Palestinians did not matter. The case could be dismissed on immunity.

151. In consideration 4.59 the court rules:

> 'Unlike the immunity from jurisdiction of international organizations, the availability of an alternative forum plays no role in the assessment of state immunity and the immunity of the UN. That also applies to from

> state immunity derived functional immunity from jurisdiction. The dispute about this can therefore remain undisclosed.'

152. This is incorrect. The availability of an alternative forum does indeed play a role in assessing state immunity. The granting of immunity must be proportional. Whether or not an alternative forum is available is important in this regard. In the absence of an alternative forum (as is the case with Ziada), granting immunity will be rather disproportionate. This has been decided in many ECtHR cases. It is not apparent from those judgments that the issue of access to justice is only an issue for international organisations.

153. This case is unique in the sense that there is really no other access to justice than the Dutch court. Ziada is completely dependent on you to protect its rights. There is no other judge he can turn to. The Netherlands has expressly provided for access to justice in these situations. So you cannot put your authority aside lightly.

154. Article 9 DCCP implements Article 6 of the ECHR. The Guide to article 6 shows that the ***appropriateness of granting immunity*** depends on the circumstances of the case.

155. Article 6 ECHR does not apply to Israel, but does apply to the Netherlands. Ziada has Dutch nationality and has the only escape from this collective exclusion of Palestinians from access to justice, the Dutch court. It is therefore only logical that you comply with the Dutch obligations under Article 6 ECHR in order to nullify the injustice of the Palestinians in Gaza. For that reason, in my view, you cannot avoid looking into access to justice for Ziada. Article 6 EVRM obliges you to do so. The Guide to article 6 shows that there is an irrefutable connection.

156. In addition to Article 6 ECHR, there are other documents that underline the importance of restoration of rights. On December 16, 2005, the UN General Assembly adopted the principles recognizing the right to redress for victims of serious violations of the laws of war and human rights. Article 11 of these principles states:

> 11. Remedies for gross violations of international human rights law and

serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

(a) Equal and effective access to justice;

(b) Adequate, effective and prompt repair for harm suffered;

(c) Access to relevant information concerning violations and repair mechanisms.

157. Article 12 provides:

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law.

158. Judge Yusuf gives in his ***dissenting opinion*** at the ***Jurisdictional Immunities*** It is important to note that these principles reflect the development of international law, in which the individual has taken on a more important position. A development in which it is not only states that dominate this area of law. He argues that the right to a legal remedy is now part of customary international law. Dugard also states this in his expert opinion.

159. The Institute of International Law has adopted two resolutions confirming that immunity cannot be invoked to protect individuals who have committed serious violations of international humanitarian law from claims for redress. The Institute, with some 150 members coming from all corners of the world and elected by their peers, has been recognized for many years as an authoritative authority on the development of international law.

160. The Institute concluded in 2009 in Article II(2) of its Naples resolution on the immunity from jurisdiction of the state and persons acting on behalf of the state in cases of international crimes that “Immunities should not constitute an obstacle to the appropriate repair to which victims of
[international] crimes…are entitled.”

161. In 2015, the Institute stated in its Tallinn Resolution on Universal Civil

jurisdiction with respect to reparation for international crimes:

> "Victims of international crimes have a right to appropriate and effective repair from persons liable for the injury; they have a right to an effective access to justice to claim repair."
>
> "The immunity of States should not deprive victims of their right to Reparation."

162. The practice of access to justice is therefore by no means varied. There is both practice as a firm ***opinion juris*** that violation of rights should lead to access to justice.

6 Conclusion

163. Back to the main question again: is there a clear rule in international law that obliges your Court to limit your jurisdiction? You may only limit your jurisdiction if there is a clear rule. Failing that, the main rule applies, namely that the litigant has a right of access to a court.

164. No rule can be distilled from the case law and other practice that I have outlined that prohibits you from assuming jurisdiction in punitive or civil cases involving international crimes.

165. In his opinion, Dugard refers to the judgments of Lord Denning MR, who was one of the most important British judges of the last century. In the case Trendtex Trading Corporation v Central Bank of Nigeria [the Court, pm Charlotte which court] abandoned the absolute approach to immunity from commercial transactions and took a more limited approach to immunity. Lord Denning points out that "the notion of consensus" with a rule like state immunity is "a fiction".

> "The nations are not in the least agreed upon the doctrine of sovereign immunity. The courts of every country differ in their application of it." "There is no consensus whatever."

166. This does not mean, according to Lord Denning, that there is no rule. It just means we disagree on what the rule is. Every country limits for itself

the concept of immunity. Each country accepts its own exceptions. When determining the standard, countries should be guided by the jurisprudence and practice of other countries. But the most important thing is that in setting the standard they are guided by justice, by 'justice' and not by setting a standard that is contrary to justice.

167. Lord Denning went on to say that there may have been a vacuum in international law because countries have started to deviate from the main rule and that no new rule has been created to fill that gap, a rule with which all countries agree. But it would be deeply unsatisfactory, he says, if the UK subsequently didn't lift a finger to help fill that gap with a standard that is just:

> "It is part of Mr Bingham's case that a vacuum may have been created in the law of nations by the dissent of many from the old rule, but that the vacuum has not been filled by any agreed new rule. Even if the law of nations does not abhor a vacuum, it is entirely unsatisfactory that the courts of this country should not lift a finger to help fill it by a new rule which is 'consonant with justice.' In my judgment the new rule is consonant with justice."

168. At the very least, there is doubt about the existence of "an exception recognized in international law". That doubt gives you room to assume jurisdiction. In fact, that doubt obliges you to assume jurisdiction. If you did not do this, you would unjustly limit your powers and thus also your duty to administer justice.

169. This means that we come to the question of whether your jurisdiction can be based on art 9 DCCP.

170. Finally, what Israel is doing in Gaza defies the international legal system. It makes a farce of that system. You may think, it costs us nothing to grant immunity. This is far from our bed. It's just about Ziada. Well the house of the mother of a Dutch national with residents is bombed, but it is only this one case that is now before us.

171. But it does cost us something. It costs us a legal system with values. Because

sacrifice, we ultimately pay the price ourselves. International law has indeed set limits on such actions, and Dutch national law has also set limits on this. By systematically failing to maintain these boundaries, we undermine the system.

172. All this does not mean that every time an individual claims compensation for human rights violations, immunity should be set aside. What matters is that this case involves international crimes that even the International Criminal Court is now investigating and that there are***An*** form of redress. Israel, Gaza and Ziada are an extreme case. Israel continues to commit international crimes and has systematically excluded Gazans from its justice system. Ziada has Dutch nationality.

173. We recognize that it is important not to assume unlimited jurisdiction and you will not do so if you do assume jurisdiction in this matter. Art 9 RV requires a relationship with the Netherlands. That relationship is there, that is up to a separate debate that is not up for discussion today. It is important to note that, if you assume jurisdiction, the Netherlands will not be involved in all bombings and other crimes committed by Israel. The Netherlands has its own interest here because Ziada is Dutch, has lived here for a long time and has 3 children in the Netherlands. That is the connection with the Netherlands. By limiting your authority to just such cases, you are not assuming an unreasonably large authority. A power that is included in Dutch law with good reason.

174. The promise of immunity to another country, to Israel, is not without limits. Immunity consists in mutual interest and in the exchange of services necessary for a good relationship. That is why the Arrest Warrant case concerned the freedom of travel for Ministers of Foreign Affairs. Foreign lawsuits would thwart that action. But protecting military personnel from trial for war crimes does not serve such a (political) purpose.

175. In that sense, Israel itself has also contributed to the problem now at hand in this case. And we can say: knowingly contributed. With great arrogance, Israel occupies territory that is not its own, which it occupies. With great arrogance towards the international community. the international community,

through the UN, the International Court of Justice, the International Criminal Court, numerous states have repeatedly strongly condemned Israel's behavior. Israel is doing everything it can to stay out of any judicial judgment while simultaneously ignoring international law. Now in this case they are confronted with international law and Dutch law, both of which give you authority to act. I urge you to uphold the law and apply it so as to preserve its value.