**Draft of 1 September 2021**

**In the matter of *Ziada v. Gantz and Eshel***

**Second Additional Opinion by Sir Michael Wood, KCMG**

**XX September 2021**

## I. Introduction

1. I give this Second Additional Opinion in my personal capacity, having been asked whether there are any recent developments that may have altered the views expressed in my previous Opinions dated 15 August 2019 and 16 December 2020. In addition, I have been shown a copy of an Opinion by Professor John Dugard SC dated 25 August 2021. This Opinion needs to be read together with those Opinions, the contents of which are hereby confirmed in their entirety.

2. My credentials, which have been detailed in those previous Opinions, remain unchanged.[1]

3. This Second Additional Opinion indicates that there have been no developments that change customary international law, which continues to recognize the immunity of State officials from foreign civil jurisdiction in respect of official acts carried out during their time in office (**II**). The Opinion then briefly describes two judicial decisions concerning immunity from foreign *criminal* proceedings, from France and Germany, that were issued in January 2021, as well as two judgments of the Seoul Central District Court given in January and April 2021, all after my last Opinion (**III**). It also provides an update on the work of the International Law Commission on the topic 'Immunity of State officials from foreign criminal jurisdiction' at its 2021 session, which has just concluded (**IV**). Finally, it addresses briefly the section of Professor Dugard's Opinion entitled 'The Course Open to the Court' (**V**). The present opinion does not address other aspects of that Opinion; it will, however, be clear from my opinions in this case that I do not agree with much

[1] Opinion by Sir Michael Wood, KCMG (15 August 2019) (hereinafter: 'First Opinion'), paras. 3-4; Additional Opinion by Sir Michael Wood, KCMG (16 December 2020) (hereinafter: 'Additional Opinion'), para. 2.

that is said therein, not least since it is based on unsubstantiated generalizations and assertions, and relies heavily on what is at most 'soft law'.

## II. Customary international law continues to recognize the immunity *ratione materiae* of State officials from foreign civil jurisdiction

4. I am not aware of any developments that may have altered the international law on immunity *ratione materiae* of State officials from the civil jurisdiction of foreign courts. My opinion remains, therefore, that customary international law continues to confer on State officials immunity *ratione materiae* from the civil jurisdiction of foreign courts, including where allegations are made of a breach of *jus cogens*.

5. Some developments may be pointed to with regard to immunity from foreign *criminal* jurisdiction, which is not at issue in the present case.[2] In any event, as described below, nothing has occurred to suggest any change in the established rules of customary international law concerning the immunity of State officials from foreign criminal jurisdiction either.

## III. Four recent judicial decisions concerning immunity in criminal or civil proceedings

6. I am aware of two national court decisions rendered since my earlier Opinions were given, by the French and German courts, concerning immunity in *criminal* proceedings, not in civil proceedings. The German decision is mentioned by Professor Dugard, but he does not address the decision of the French *Cour de cassation*, which upheld the immunity of the foreign government officials in question. These two decisions do not lead me to change my conclusions in any way. I nevertheless mention them briefly, in case they are raised by the parties to the present proceedings.

[2] On the fundamental distinction between civil and criminal proceedings, see First Opinion, at paras. 30(b) and 54; and Additional Opinion, at para. 26.

7. On 13 January 2021, the **French *Cour de cassation*** issued a decision in which it held that the Paris Court of Appeal was right to uphold, under customary international law, the immunity *ratione materiae* of senior officials of the United States of America who were accused, *inter alia*, of acts of torture and arbitrary detention.[3]

8. The case concerned allegations by two French nationals who were arrested in connection with operations launched by the United States against the Taliban regime and the Al Qaida network, and then detained at the American military base at Guantanamo Bay. In appealing to the *Cour de cassation*, they argued, *inter alia*, that the lower court had erred in holding that the acts attributed to the American officials constituted sovereign acts; that the prohibition of torture, as a peremptory norm of international law (*jus cogens*), ought to take precedence over the rules on immunity; and that giving effect to the rule on immunity *ratione materiae* violates their rights under European Convention on Human Rights, including with respect to a fair and public hearing.

9. In rejecting the appeal in its entirety, the *Cour de cassation* agreed that even if the American officials concerned were likely to have taken part (as perpetrators or accomplices) in the events that were alleged to have occurred, as former State officials they were entitled to immunity *ratione materiae* from the jurisdiction of the French courts. Those acts, the Court agreed, "by their nature or purpose, fall within the exercise of the sovereignty of the State concerned".[4] The Court's further observations are worth quoting:

> "25. International custom prevents the agents of a State, in the absence of contrary international provisions binding on the parties concerned, from being subject to prosecution, for acts falling within this category, before the criminal courts of a foreign state.
>
> 26. It is for the international community to determine the possible limits of this principle, when it may be confronted with other values recognized by this community, and in particular that of the prohibition of torture.

[3] Cour de cassation, criminelle, Chambre criminelle, 13 janvier 2021, Appeal no. 20-80.511, CR00042, available at https://www.legifrance.gouv.fr/juri/id/JURITEXT000043045836.
[4] *Id*, at para. 19 (my translation).

27. In the [present] state of international law, the crimes denounced, whatever their gravity, do not fall within the exceptions to the principle of immunity from jurisdiction."[5]

10. In a decision of 28 January 2021, the **German Federal Court of Justice** (*Bundesgerichtshof*) decided that customary international law did not entitle *low-ranking* State officials to immunity *ratione materiae* from prosecution in foreign courts for war crimes.[6] It does not appear that either the State of the official (Afghanistan) or the accused himself (a low-ranking former Afghan soldier) sought to claim immunity. No explanation is given for making a distinction between low-ranking officials and others. The German court did not refer the matter to the Federal Constitutional Court, which under the Basic Law is the final arbiter as to the existence and applicability of general rules of international law.

11. The German court misstated the customary international law on the immunity of State officials from foreign criminal jurisdiction, and in doing so committed numerous errors. Among other things, it seems to have relied on the law and practice of international criminal tribunals,[7] which are governed by their own distinct legal rules,[8] and on cases where the question of immunity was not even considered;[9] it also expressly disregarded the need to look at State practice recognizing immunity.[10] Nor did the Court adequately address the fact that many States recently commenting on the issue of immunity (in discussing the International Law Commission's work on the topic) did not consider that there is an exception to immunity *ratione materiae* where war crimes are alleged:[11] indeed, it failed to recognize that where States are so profoundly divided on a matter, no

[5] *Id*, at paras. 25-27 (my translation). The original reads:

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

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

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

[6] Urteil 3 StR 564/19 vom 28 Januar 2021, available at http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&client=12&pos=0&anz=1&Blank=1.pdf&nr=116372.

[7] *Id*, at paras. 20aa, 24aa, 25bb, 61.

[8] See also my First Opinion, at paras. 30(c) and 52; Additional Opinion, at paras. 22-23.

[9] *Supra* note 6, at paras. 28(2), 30(4), 34(8).

[10] *Id*, at para. 19.

[11] *Id*, at para. 37.

*opinio juris* may be said to exist.[12] In any event, as already noted, the judgment concerned criminal, not civil, proceedings, and makes a clear distinction between the two.[13] In fact, it mentions expressly that the International Court of Justice and the European Court of Human Rights had ruled that there is no exception to immunity *ratione materiae* in civil cases.[14]

12. Two contrasting judgments of the **Seoul Central District Court** deal with *civil* proceedings against Japan. Again, Professor Dugard mentions the earlier decision which declined to uphold immunity, but does not mention the later decision which upheld immunity.

13. The Seoul Central District Court issued on 8 January 2021 a decision allowing Korean citizens to sue Japan for damages suffered by them (or their deceased family relatives) when they were sexually enslaved as 'comfort women' during the Japanese colonial rule of the Korean peninsula.[15] The Court considered 'trends' in international practice, but seems to have reached its conclusion mainly on the basis that any immunity that might exist under customary international law was, in the particular circumstances of the case, inapplicable given the provisions of the Korean Constitution guaranteeing access to the courts.[16]

14. A differently composed Seoul Central District Court reached a very different conclusion on immunity in a judgment issued less than four months later, on 21 April 2021.[17] In this judgment, which was given in full awareness of the earlier decision, similar claims of other 'comfort women' were dismissed on the ground that Japan was entitled under customary international law to sovereign immunity

[12] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 254, para. 67.
[13] *Supra* note 6, at paras. 39, 41bb-44.
[14] *Id*, at paras. 42-43.
[15] An English translation of this judgment has been put online by the 'Korean Council for Justice and Remembrance for the Issues of Military Sexual Slavery by Japan': available at < https://womenandwar.net/kr/wp-content/uploads/2021/02/ENG-2016_Ga_Hap_505092_23Feb2021.pdf>.
[16] The Court's approach is similar to the Italian Constitutional Court's *Sentenza* 238/2014 of 22 October 2014, which created a highly regrettable chasm between international and domestic law (and serious international friction) in holding that although Germany was entitled to immunity from suit under customary international law, the right of access to court under the Italian Constitution prevailed.
[17] The judgment (in Korean) is available at <https://womenandwar.net/kr/wp-content/uploads/2021/04/2016%EA%B0%80%ED%95%A9580239_%ED%8C%90%EA%B2%B0%EB%AC%B8.pdf>; see, in particular, Part III thereof.

from foreign civil jurisdiction in respect of its sovereign acts. The Court found, on the basis of an extensive survey of State practice and decisions of international courts, that there was no general practice among States that could indicate that there are exceptions in customary international law to such immunity, including in cases where the commission of international crimes in breach of *jus cogens* is alleged. Notably, the Court concluded that even if domestic courts could "create" exceptions to immunity, policy decisions of this sort were for the executive and legislative branches, whereas the main role of the judiciary was to settle disputes, not to create uncertainty. The Court further emphasized that respecting international law and promoting pacific international relations were values no less important than the protection of private interests.

## IV. The current state of the work of the International Law Commission on the topic 'Immunity of State officials from foreign criminal jurisdiction'

15. Work on the topic 'Immunity of State officials from foreign criminal jurisdiction' continued at the Commission's seventy-second session (26 April-4 June and 5 July-6 August 2021), during which a debate was held on the Special Rapporteur's eighth report and six draft articles that deal with procedural matters were provisionally adopted.[18] The Commission did not return to draft article 7, but the plenary debates made it clear that it remains the subject of deep controversy. A number of members suggested in the course of the latest session that "the Commission would need to overcome the divergent views of its members on draft article 7 before completing its first reading on the topic."[19] The Special Rapporteur herself recognized that the topic was "highly sensitive politically and presented major legal challenges".[20]

[18] See UN doc. A/76/10: *Report of the International Law Commission on the work of its seventy-second session, 26 April-4 June and 5 July-6 August 2021*, Chapter VI; an advance unofficial version of the Report is available at <https://legal.un.org/ilc/reports/2021/english/a_76_10_advance.pdf>. For my earlier description of the Commission's work, in particular the provisional adoption in 2017—exceptionally by vote—of draft article 7, see First Opinion, at paras. 55-56; Additional Opinion, at paras. 30-40.

[19] *Report of the International Law Commission on the work of its seventy-second session, supra* note 18, at p. 114, para. 81.

[20] UN doc. A/CN.4/SR.3527: Provisional summary record of the Commission's 3527th meeting (21 May 2021), p. 3 (also referring to "issues that inevitably arose as part of any process involving the progressive development and codification of international law").

16. The Commission now aims to conclude the first reading at the Commission's next session, to be held between April and August 2022. If a first reading is achieved in 2022, the second and final reading could take place in 2024. There are, however, many uncertainties, as much remains to be done before a first reading can be completed. It is unclear whether this tentative timetable will be maintained.

17. In the plenary debate, the Special Rapporteur and members of the Commission also made it clear that the Commission's recommendation to States on the eventual form of the draft articles remained an open question, to be decided in connection with the second reading.[21] This relates in particular to whether the draft articles should form the basis for the negotiation by States of a convention that would be subject to ratification.

18. In short, work on the topic 'Immunity of State officials from foreign criminal jurisdiction' is far from completed; draft article 7 remains a pending and highly contentious matter both within the Commission and among States, and its fate is unclear.[22]

## V. Professor Dugard's thesis

19. In the concluding section of his Opinion, entitled 'The Course Open to the Court', Professor Dugard asserts that "[t]here is no clear rule of customary international law on the question of the immunity of State officials for international crimes in civil proceedings before national courts". Professor Dugard then asserts that "the doctrine of absolute immunity … is now in the process of being weakened further in the interests of human rights and humanitarian law." No authority is cited for these propositions other than one dissenting opinion. There is, in fact, ample State practice and evidence of *opinio juris* to support immunity in the circumstances of the present case.

[21] *Report of the International Law Commission on the work of its seventy-second session*, *supra* note 18, at pp. 112-113, para. 75; p. 116, para. 90; p. 119, para. 102; and p. 120, para. 110.

[22] At footnote 31 of his Opinion, Professor Dugard points out that I "dissented to the adoption of Article 7". He goes on to make the unfounded assertion that this "colours [my] account of the work of the ILC." What my vote against draft article 7 does show is that the opinions I have given to this court are entirely consistent with the position that I took, also in a personal capacity, in the ILC, as to the content of customary international law. No doubt Professor Dugard would say the same about his own participation in the ILC debates and in other UN work.

20. Professor Dugard goes on to argue that the court is free to reach a decision based on policy considerations rather than the law ("[i]n making a decision in the present case, a court should be guided by the normative weight that the international community as a whole attaches to human rights and humanitarian law").

21. In doing so Professor Dugard seeks to call into questions Lord Hoffmann's view that 'it is not for a national court to 'develop' international law by unilaterally adopting a version of that law',[23] and does so by taking out of context two passages said to be from Lord Denning in the English Court of Appeal's *Trendtex* case (1977). The second quote (at para 47) was in fact by another judge – Lord Justice Stephenson – who actually declined to apply restrictive immunity in the case. Far from adopting 'a unilateral version of the law', the majority (including Lord Denning) found that the restrictive doctrine was part of customary international law on the basis of abundant practice and evidence of *opinio juris.* As the UK Supreme Court has recently pointed out, the *Trendtex* (and an earlier decision) "marked the adoption by the common law of the restrictive doctrine of sovereign immunity already accepted by the United States and much of Europe."[24]

22. Professor Dugard's thesis is reminiscent of the legal 'grey area' notion already raised by the Appellant in this appeal. At paragraph 41 of my Additional Opinion of 16 December 2020 I pointed out that the acceptance of that notion "would distort basic notions of international law and would risk driving a couch and horses through the law of international immunities." The same may be said of Professor Dugard's thesis.

## VI. Conclusion

23. In light of the above, my conclusions remain as stated in the Opinions of 15 August 2019 and 16 December 2020.[25]

[23] [Mention that these words were endorsed in other UK judgments?]
[24] Lord Sumption in Benkharbouche,
[25] First Opinion, at para. 65; Additional Opinion, at para. 47.

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