Van der FELTZ
lawyers

Van der Feltz advocaten N.V.
Javastraat 22, 2585 AN The Hague PO Box 85615, 2508 CH The Hague
T: +31 (0)70 31 31 050
E: info@feltz.nl
W: www.feltz.nl

Supreme Court of the Netherlands
Attn: President of the Civil Chamber
Korte Voorhout 8
2511 EK THE HAGUE

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| Date: | 7 April 2023 | | |
| Your ref: | 22/00753 | T: | +31 70 31 31 076 |
| Our ref: | 20227573/SvP | M: | +31 6 15 26 46 07 |
| From: | R.T. Wiegerink, lawyer at the Supreme Court | E: | wiegerink@feltz.nl |

Subject: Ziada v Gantz; Eshel (cassation)

Esteemed members of the Court,

The P-G's opinion in the above case gives the plaintiff in cassation **("Ziada")** cause to make the following observations.

*Seriousness of the facts*

1. It should be noted at the outset that the trigger for the present proceedings is very sad. However, the opinion pays only cursory attention to that trigger and also in a relatively abstract manner. There is mention in paragraphs 1.1 and 2.1 of *"the bombing"* and *"a bombing"* in which six of Ziada's relatives were killed on 20 July 2014. These words only euphemistically express the consequences for Ziada of this utterly useless and unconscionable operation and, moreover, these aspects do not play any role further in the Opinion, so that it is not clear to what extent the Advocate-General who drafted the Opinion **("the A-G")** involved them in answering the question of whether the Court was right to uphold Gantz et al's reliance on functional immunity. The assessment of sub-section 2.2 (at paras 3.38-3.41) shows that, unfortunately, the A-G merely concurred with the seriousness of the facts assumed by the Court of Appeal.

2. A press release from the UN Human Rights Committee reveals that in the months of July and August 2014, more than 6,000 airstrikes were carried out by Israel, 1,462 Palestinian civilians were killed and at least 142 families lost three or more family members.[1] The



[1] https://www.ohchr.org/en/Dress-releases/2015/06/un-gaza-inquirv-finds-credible-allegations-war-crimes-committed-2014-both?LangID=E&NewsID=16119.

bombing in which Ziada's family's house was destroyed was unfortunately among them.

3. In stark contrast to the limited attention paid in the opinion to the factual background of the case is the passage in the conclusion (in section 2.5) on the State of Israel's invocation of immunity. The relevance of that appeal escapes Ziada and he is of the opinion that, in any case, your Court should not be guided by this view of the State of Israel, also because that State is not a party to the present proceedings.

*Formation of customary international law*

4. In the opinion, the A-G takes the view (at para 3.27) that the Court of Appeal did not misconstrue the manner in which customary international law is formed. According to the A-G, the Court of Appeal was right to consider that it would *"use the relevant sources to survey state practice and opinio juris with the do! to ascertain the current state of customary international law".* On that basis, according to the A-G, the Court would have rightly concluded that *"there is a clear rule of customary international law".* In addition, according to the A-G, the Court did not disregard its own role in the formation of customary international law. To this end, the A-G considered that *"A rule of customary international law is binding on all States and their organs unless the State has persistently objected to it during the consolidation of the custom."*

5. Ziada questions the A-G's views expressed above on how customary international law arises for several reasons. Like the Court of Appeal, the A-G misses the point that legal development, state practice and new customary law cannot come about by always following the same line. Illustrative in this regard is the commentary on the German Ahmad Zaheer case[2], which, although criminal, involved a similar set of facts. The author, R. Sinha, considers it regrettable that the Federal Supreme Court in that case did not seize its opportunity to rule on state immunity in civil liability cases.[3] He argues:

> *"One would have wished the Court to address the conspicuous disparity between the denial of functional immunity in criminal war crimes trials and the granting of State immunity in civil liability cases against the State concerning the very same war crimes. It is regrettable that the Court did not seize the opportunity to substantiate its findings by taking a firm stand on the significance of international criminal law. Showcasing Germany's commitment to the fight against impunity, it could have emphasised that international criminal law would amount to a "mockery" if officials responsible for crimes punishable under international law could hide behind their State's sovereign immunity, "particularly since these heinous crimes shock the conscience of mankind, violate some of the most*

[2] Bundesgerichtshof (BGH), Jan 28, 2021, 3 StR 564/19, ECLI:DE:BGH:2021:280121U3STR564.19.0.
[3] https://qpil.iura.uni-bonn.de/2021/07/federal-court-of-iustice-reiects-functional-immunitv-of-low-ranking-foreign-state-officials-in-the-case-of-war-crimes/.

*fundamental rules of international law and threaten international peace and security."*

6. It was a crucial opportunity for the German court to show that the impunity of "state officials" was being countered and thus send a clear signal to the world that this was being stopped. This is no different in the present case.

7. The A-G essentially employs circular reasoning by arguing (in para 3.27) that the Court did not disregard the manner in which customary international law arises because it looked at the current state of the law. After all, if the formation of customary law is always looked at that way, there could never be any legal development in that area.

8. Moreover, this approach is simply too short-sighted. Indeed, there is no question of "the *state of* customary international law", but rather a grey area yet to be defined.[4] The ECtHR therefore held in *Al-Adsanien* the subsequent *Jones case* that there has been a development in immunity law and explicitly leaves open the development of customary law on state immunity for international crimes. Ziada points out that Riccardo Pisillo Mazzeschi[5] highlights the importance of national courts increasingly reviewing their position on functional immunity in the future in relation to impunity for international crimes, access to justice and greater compensation for victims.[6]

9. Moreover, there are different ways of looking at functional immunity in civil jurisdiction.[7] On the one hand, the classical view insists on immunity, but on the other hand, a theory has emerged that opposes it and tries to separate from it to arrive at. The reason there is not yet a unified view on which view to follow is precisely a lack of consistent states' practice. It is therefore important that your Council contribute to unifying state practice on functional immunity in civil jurisdiction.

10. All in all, it would be more than a missed opportunity if the reasoning of the Court and the A-G were to be accepted by your Council.

*Violation of Article 6 ECHR*

11. In the opinion, the A-G mentions (in para 3.73) that there is no impermissible restriction on the guaranteed right of access to justice from Article 6 ECHR and, as far as he is concerned, no separate balancing of interests needs to take place here either. In doing so, the A-G misses the point that the right of access to justice must be effective. As the claimant argues,

[4] Grounds of appeal, paras 22-29.
[5] Professor of International Law, University of Siena, Italy; https://www2.ohchr.org/enq1ish/bodies/hrc/docs/membersCVs/MR.RiccardoPissilloMazzeschiEnglish.Ddf
[6] R. Pisillo Mazzeschi," The functional immunity of state officials from foreign jurisdiction: A critique of the tradition theories", *QIL17 (2015) 3-31,* p. 31.
[7] R. Pisillo Mazzeschi, 'The functional immunity of state officials from foreign jurisdiction: A critique of the tradition theories', *QIL* 17 *(2015)3-31,* pp. 21-24.

no trial, let alone fair trial, awaits him in Israel. Only when reasonable and alternative remedies are available to a litigant can it be assumed that granting immunity does not affect his right of access to justice.[8] So the question is whether it is a reasonable alternative for Ziada to turn to the legal system of the State of Israel. The same state that claims to be responsible for the military operation in which plaintiffs' relatives were killed.[9]

*Parallels between civil and criminal law*

12. Where the A-G assumes (in paragraph 3.58) that the Court of Appeal was allowed to disregard the judgment of the District Court of The Hague of 15 December 2017 brought forward in sub-section 3.2 because it was a criminal judgment, the Advocate General misses the point that despite the fact that it was a criminal judgment, this judgment is indeed relevant. The A-G also misses the point in that regard when discussing subsection 3.7 (in para 3.77). The A-G - in short - endorses Justice LeBel's view that a relevant difference between criminal and civil proceedings is that in criminal proceedings 'vexatious charges' could be filtered out.

13. However, there is a risk, also argued by Ziada in the proceedings before the court, that the public prosecutor decides not to prosecute for political reasons, whereas in civil proceedings (where via the rules of the duty to propose and burden of proof 'vexatious claims' may very well be filtered out) to ensure accountability and avoid impunity.[10]

*Final sum*

14. Ziada, precisely because of the very poignant seriousness of the facts, presumptive or otherwise, urgently appeals to your Court to take the lead and contribute to the legal development of customary international law by not accepting reliance on functional immunity in this case.

So much for this response.

Thank you in advance for the attention given to this letter.

With most esteem, R.T. Wiegerink

[8] Grounds of appeal, para 189; see also: ECHR 18 February 1999, no 26083/94, *Waite & Kennedy v Germany.* In *Waite Kennedy,* the ECtHR ruled on granting immunity to international organisations.
[9] See further pleading of the Court of Appeal, p. 26.
[10] Court pleading, pp. 20-21.