ZIADA v Netherlands
Submitted to the European Court of Human Rights [i]

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I. INTRODUCTION

This is an exceptional access to justice case, involving the rights of a Dutch Palestinian citizen whose family was killed in the context of the systematic unlawful attacks on civilians in Gaza in 2014. His civil case, against the former officials directly responsible for those unlawful killings, was dismissed

by the Dutch courts on the basis that immunities under customary international law precluded consideration of his claim. The Dutch courts took an excessively broad approach to immunities - failing to distinguish *state* immunity from the *functional* immunity relevant to individual responsibility of former officials, failing to take into account the nature of the war crimes at issue in the case, and refusing to have any regard for the facts and circumstances of the case, including the lack of any alternative system of justice before which the claim could be brought and the denial of justice that would result from applying immunities in this particular case.

The blanket application of immunities to former officials in respect of their individual responsibility for war crimes is at odds with developing international standards and fails to meet the tests for permissible restrictions on 'access to justice,' in violation of article 6 of the European Convention on Human Rights (ECHR), with unjust and discriminatory effects, in violation of Article 14 in conjunction with Article 6.

II. STATEMENT OF FACTS

1. The Applicant, Ismail Ziada, born on 7 March 1975, is a Dutch national and Palestinian, who has been lawfully resident in the Netherlands since 2005. Six of his close family members – his mother, brothers, sisters in law and nephew, ranging from 70 to 12 years old[1] – were killed when their family home in Gaza was targeted and destroyed.

Underlying Facts: Targeting of the Applicant's Family and War Crimes in Gaza (2014)

2. The applicant's family home was located in the Al-Bureij refugee camp. The Applicant's mother, Muftia Mohamed Ziada, fled from her Palestinian village to the Gaza Strip in 1948. Her ten sons, including the Applicant, eventually built a house for their mother where the extended family lived. The Applicant grew up in Gaza but travelled abroad to study, married a Dutch national and settled in the Netherlands. For four years prior to the bombing, he was unable to see his family as the Israeli authorities refused him permission to travel into the Gaza Strip and his family members were not granted permission to leave.
3. Six members of the family were killed and the family home destroyed when it was targeted and attacked by an IDF airstrike on 20 July 2014.[2] The killing of the Applicants family took place in the context of an intense military campaign 'Operation Protective Edge (OPE)' (OPE) carried out by the Israeli Defence Forces between 7 July 2014 and 26 August 2015, which involved violations

1. [1] The six members of the Ziada family died in the attack were: a. Muftia Mohamed Ziada, 70, the Applicant's mother; b. Jamil Shaban Ziada, 53, the Applicant's brother; c. Bayan Ziada, 39, the wife of Jamil Shaban Ziada; d. Yousef Shaban Ziada, 43, the Applicant's brother; e. Omar Shaban Ziada, 32, the Applicant's brother; and f. Shaban Jamil Ziada, 12, the son of Jamil Shaban Ziada. The family was pulled from the rubble and taken to al Aqsa hospital but were declared dead upon arrival. The Applicant learned of the attack through local news and social media. He could not attend the funeral as he was again denied a permit.

[2] Military Advocate General, Decisions of the IDF Military Advocate General regarding Exceptional Incidents that Allegedly Occurred During Operation 'Protective Edge', Update No. 5, 24 August 2016.

of IHL and war crimes.[3] OPE was an intense and brutal military campaign. Within days of its launch, the UN General Assembly *"Condemn[ed] in the strongest terms […] the latest Israeli military assault on the occupied Gaza Strip, by air, land and sea, which has involved disproportionate and indiscriminate attacks, including aerial bombardment of civilian areas, the targeting of civilians and civilian properties in collective punishment contrary to international law, and other actions, including the targeting of medical and humanitarian personnel, that may amount to international crimes…"*[4]

4. The UN established an independent commission of inquiry (UNCOI) to investigate all violations of international humanitarian law (IHL) and international human rights law in the Occupied Palestinian Territories in the context of OPE.[5] The report describes what was then 'unprecedented' devastation and attacks on civilians and civilian infrastructure and found strong indications of war crimes (para 40): 6,000 air strikes over a 51-day period led to an estimated 2,251 Palestinian deaths, destruction of 18,000 housing units, much of the electricity network, water and sanitation infrastructure, medical facilities and left approx. 500,000 (28% of the population) internally displaced.[6] The COI specifically criticised the role of senior military officials who set policy, planned and carried out attacks, and the refusal to review that policy throughout the campaign.[7] It condemned serious violations of international humanitarian law and international human rights law in some cases amount to war crimes '*strong indications' that these attacks could be disproportionate, and therefore amount to a war crime"*[8].
5. Multiple NGOs, including Israeli and international organisations such as Amnesty International,[9] B'Tselem[10], Breaking the Silence[11] and others[12], have detailed evidence of widespread violations and war crimes orchestrated by senior military officials during this campaign.

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[3] The war crimes carried out during OPE, including through the planning of attacks directed at and causing disproportionate impact on civilians and civilian objects, in violation of the applicable principles of distinction and proportionality and prohibition on targeting, indiscriminate attacks against civilian and military objectives, and disproportionate civilian losses.

[4] UNGA, Ensuring Respect for international law in the Occupied Palestinian Territory, including East Jerusalem, A/HRC/RES/S-21/1, 23 July 2014. http://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session21/Pages/21stSpecialSession.aspx, seen on 11 December 2017, p. 2-3.

[5] UNGA, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/52, 24 June 2015.

[6] *Ibid*, paras 20-23.

[7] Ibid, paras 77-78.

[8] *Ibid*, para 40; 74.

[9] Amnesty International, Families Under the Rubble: Israeli Attacks on Inhabited Homes, 2014, available at https://www.amnesty.org/en/documents/MDE15/032/2014/en/ , seen on 13 December 2017, p. 42.

[10] B'Tselem, Black Flag: The Legal and Moral Implications of the Policy of Attacking Residential Buildings in the Gaza Strip, Summer 2014, 2015, available at http://www.btselem.org/publications/summaries/201501_black_flag, seen on 13 December 2017, p. 58.

[11] Breaking the Silence, This is How We Fought in Gaza: Soldiers' Testimonies and Photographs from Operation "Protective Edge", 2014, available at http://www.breakingthesilence.org.il/pdf/ProtectiveEdge.pdf, seen on 13 December 2017, p. 16-22. Emphasis added by attorneys.

[12] *See* Al-Haq, Divide an Conquer - A Legal Analysis of Israel's 2014 offensive against the Gaza Strip, 2015, available at https://www.alhaq.org/advocacy/6559.html, seen on 17 December 2023, p. 27-81; International Federation for Human Rights (FIDH), Trapped and Punished: The Gaza Civilian Population under Operation Protective Edge, 2015, available at https://www.fidh.org/IMG/pdf/report_gaza_fidh_march_2015.pdf, seen on 17 December 2017, p. 14-69; Defence for Children International – Palestine (DCIP), Operation Protective Edge: A war waged on Gaza's children, 2015, available at https://www.dci-palestine.org/operation_protective_edge_a_war_waged_on_gaza_s_children, p. 15 – 97.

6. The writ of summons submitted to the Dutch courts locates the facts concerning the attack, and the military operation, in its historical military and social context. OPE followed multiple prior military operations between 2005 and 2014, which were also found by international authorities, such as the UN enquiry led by Richard Goldstone and the Human Rights Council, among others,[13] to involve serious violations of international humanitarian law (IHL), in the way that attacks were designed, planned and implemented. It also indicates the broader context of extreme violations facing the Ziada family and other Gazans, who were 'trapped' in the most densely populated area on earth, subjected to a blockade described by the Secretary-General as *'a continuing collective penalty against the population in Gaza'*[14]and facing an intensifying humanitarian crisis by 2014.

Impunity and Lack of Available Remedies in Israel/Palestine

7. The UN commission of inquiry into OPE raised its concerns *'that impunity prevails across the board for violations'* in the aftermath of the campaign and noted *'Israel must break with its recent lamentable track record in holding wrongdoers accountable, not only as a means to secure justice for victims but also to ensure the necessary guarantees for non-repetition'*[15].
8. 7 years later, there has been no meaningful investigation and there is no available remedy in Israeli or Palestinian courts. A cursory Fact-Finding Assessments Mechanism (FFA), ordered by the Military Advocate General (MAG)[16], led to dismissive findings that the attack was justified as counter-terrorism.
9. Civil remedies are entirely unavailable to the applicant, or other Palestinians, in respect of violations in Gaza. As noted by the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, *''compensation claims in the vast majority of cases from Gaza fail owing to physical, financial, legal, and procedural barriers. Those include exceptions written into Israeli law, including the 2014 declaration of Gaza as 'enemy territory', that have made Israeli authorities effectively immune to civil liability for their actions in Gaza.''*[17] In addition, statutory exceptions renders claims for compensation for acts of war this case inadmissible,[18] while other legal and practical barriers would make it effectively impossible to file a claim in any event.[19]

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[13] Eg Goldstone Enquiry

[14] (A/HRC/28/45, para. 70),

[15] UNGA, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/52, 24 June 2015, para 76

[16] The MAG is responsible for conducting criminal investigations into the acts of the IDF, supported by the findings of the FFA. The deficiencies in the MAG report are reflected in the UNCOI report: *'the MAG updates rather make brief references to military necessity, military targets, warnings provided, fulfilment of the requirement of the principle of proportionality or the targeting process, and so on, without supplying an adequate level of detail to support the reasoning without justifying actions that resulted in civilian harm'.*

[17] UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories: Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, A/71/364, 30 August 2016, par. 57

[18] For an overview of the various amendments that the Knesset adopted in this scope and the parliamentary discussions in this regard, see the Norwegian Refugee Council, Legal Opinion regarding the Implementation and Constitutionality of Amendment 8 of the Civil Tort Law (State Liability) in the context of Damages Claims of the Gaza Strip Residents, in Resource Guide: Israel's Policies towards the Gaza Strip Post 2005, prepared for the Amsterdam Roundtable, October 2014, p. 65-95.

[19] UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 647-649; UNGA, Report of the Special Committee to

10. In any event, Israel's Civil Wrongs (Liability of the State) Law appears to rule out the Applicant's claim as arising from conduct of IDF forces in wartime, under Article 5. Furthermore, the claim is time-barred as a claim arising 'in the region' more than three years ago, under Article 5(A)83); and liability is precluded (i) on the basis of the Applicant's status as a Gazan (subject of an 'enemy territory')[20] under Article 5(b); (ii) on the basis that the impugned actions took place in a 'zone of conflict' under Article 5(c); and (iii) by the absence of a prior criminal conviction of the Defendants for the impugned conduct under Annex 2.
11. The Writ of Summons also note that the Applicant is precluded from filing a civil claim in the Palestinian Territories where jurisdiction of the Palestinian courts over the State of Israel and its bodies has been excluded by virtue of an agreement between Israel and Palestine[21] and would only be possible by voluntary agreement by the Defendants.[22] The systemic discrimination and inability for Palestinians to access justice in Israel has been documented by numerous international bodies and NGOs.[23] The situation is summarised by the UN Secretary General of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of Palestinian People and Other Arabs of Occupied Palestinian Territories who concluded in 2016 that *'The Committee is [...] of the opinion that information received casts doubt on the ability of the domestic accountability mechanisms in Israel to bring any measure of justice to the victims of human rights and humanitarian law violations'.* [24]
12. There remains a persistent failure to address and redress those recurring egregious war crimes and violations of jus cogens norms. As is now well known, further violations of IHL, involving war

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Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories: Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, A/69/347, 25 August 2014, par. 65; Evidentiary impediments include that medical expert reports can only serve as evidence if these have been prepared by an Israeli doctor – see UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories: Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, A/69/347, 25 August 2014, par. 67.

[20] In 2014, Israel developed a new legal position, declaring Gaza an 'enemy territory' and by implication its residents 'enemy subjects'. The Torts Order (Liability of the State) (Declaration of Enemy Territory - Gaza Strip) 2014, available on: https://hamoked.org/files/2015/1159681_eng.pdf .

[21] Article III (2) and (3) of Annex IV – Protocol Concerning Legal Affairs of the 1995 Israeli-Palestinian Interim Agreement, available on the Israeli government's website https://www.gov.il/en/Departments/General/the-israeli-palestinian-interim-agreement-annex-iv)

[22] M. Karayanni, The Extraterritorial Application of Access to Justice Rights: On the Availability of Israeli Courts to Palestinian Plaintiffs, in H. Watt and D. Fernandéz Arroyo (eds.), Private International Law and Global Governance, Oxford University Press, 2014, p. 216.

[23] UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories: Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, A/69/347, 25 August 2014, par. 69; UNGA, Report of the UN High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1: Addendum – Implementation of the recommendations contained in the reports of the independent commission of inquiry on the 2014 Gaza conflict and the United Nations Fact- Finding Mission on the Gaza Conflict, A/HRC/31/40/Add.1, 7 March 2016, par. 39; UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories: Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, A/71/364, 30 August 2016, par. 41; Amnesty International, Families Under the Rubble: Israeli Attacks on Inhabited Homes, 2014, p. 41; Norwegian refugee Council, Resource Guide: Israel's Policies towards the Gaza Strip Post 2005, prepared for the Amsterdam Roundtable, October 2014, p. 96.

[24] UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of Occupied Palestinian Territories: Note by the Secretary General, A/71/352, 23 August 2016, par. 64.

crimes carrying individual responsibility, have arisen since, including in the context of Operation 'Iron Swords' which by the time of filing this application has led to approximately 19,400 deaths.[25]

13. In these circumstances, the case brought to Dutch courts was the only available mechanism for the Applicant to secure recognition and redress for the unlawful killing of his family in this context of systematic violations of human rights and IHL. The effect of refusing the Applicant's claim in domestic courts was to leave him without recourse to justice in respect of war crimes allegedly committed by the Defendants.

Dutch Law and Legal Process

14. The Applicant brought a civil case in Dutch courts against the former officials directly responsible for those unlawful killings: Lieutenant General Benjamin Gantz, the Chief of General Staff of the Israeli army from February 2011 to February 2015, and Major General Amir Eshel, the Air Force Chief for the Israel Defence Forces from 2012 to August 2017. It was not in dispute in the Dutch proceedings that the Defendants Benjamin Gantz and Amir Eshel had been military commanders with instrumental roles in the design and implementation of the attacks,[26] and that by the time the case was filed "they no longer h[e]ld these positions".[27]
15. The claim was dismissed by the Dutch courts on the basis that, under customary international law, immunities precluded their consideration of his claim. The courts took an excessively broad approach to immunities - failing to distinguish state immunity from the functional immunity of former officials, to take into account the nature of the crimes at issue in the case, or to have any regard to the circumstances of the case, the lack of alternative fora for redress and the denial of justice that resulted from applying immunities.
16. According to Dutch law, the Dutch court had jurisdiction over this case by virtue of Article 9 (b) and (c) of the Dutch Code of Civil Procedure (DCCP) which provides that the Dutch Courts have jurisdiction when a court decision outside of The Netherlands seems impossible, or when there is sufficient link to the Dutch jurisdiction and it cannot acceptably be asked of the Plaintiff to submit their case to the judgement of another state. Although the court never considered jurisdiction, as dismissed on immunities grounds set out below, this issue was not the subject of the impugned decisions. It was also not in dispute that alleged violations of IHL have direct applicability as torts in Dutch law.
17. This case is not a universal jurisdiction claim.[28] It is about the denial of access to justice in Dutch courts of a Dutch citizen in circumstances where his claim was provided for in law, but was dismissed due to the court's approach to immunity addressed below.
18. Dutch law does not specifically deal with immunity. It provides for exceptions to its jurisdiction in Article 13(a) of the Act on General Provisions of the Kingdom Legislation (Wet Algemene Bepalingen, or AB in short),, which recognizes "exceptions [to jurisdiction] recognised in international law."
19. As set out below, the courts found that immunity fell within the exception to the exercise of jurisdiction - based exclusively on the existence of an established rule under customary

[25] Writ of Summons submitted to Dutch courts, annexed.
[26] Supreme Court 2.1. under (iii)
[27] Supreme Court 2.1. under (iii)
[28] It does not assert the obligation of Dutch courts to hear such claims; see Nait Liman REF

international law. Unlike other immunity cases in other states (cited by the Courts in support of their findings), there is no foreign immunities law in the Netherlands and the Dutch state had not (and still has not) ratified the United Nations Convention on Jurisdictional Immunities of States and Their Property. According to law, the Courts could only reject the case if it could be established that there was, as an exception to jurisdiction, an immunity arising in this case - in other words if there was an immunity from civil suit of former state officials for war crimes established in customary law.

Proceedings before the District Court of The Hague

20. On 14 March 2018, a writ of summons was filed by the Applicant in the District Court of The Hague against two former officials in the Israel Defence Force for the unlawful bombing of the applicant's family home on 20 July 2014 and the killing of his six family members.
21. On 29 January 2020, the District Court of The Hague declared itself incompetent to consider the Applicants claim on grounds that the Defendants enjoy functional immunity from jurisdiction under customary international law. However, the District Court did not examine in detail whether functional immunity is in fact established in customary international law (and could therefore constitute an exception to jurisdiction under Dutch law). The Court assumed that *'state immunity and the derivative personal and functional immunity from jurisdiction are [] the starting points for national courts' (emphasis added).*[29] Citing the *Jones* case it defined the dispute as whether custom has evolved to carve out an *exception* to that immunity.*[30]*
22. It rejected the plaintiff' argument that there was no such immunity, inter alia, where the case concerned international crimes as war crimes, crimes against humanity and genocide. Citing Jones case at this Court, it found that there is no customary international law rule making an 'exception' to functional immunity from jurisdiction in relation to either the prosecution of international crimes by national courts, or in civil claims.*[31]*
23. The District Court took a very broad approach to the legitimate aim pursued by immunities under article 6 ECHR, referring to *'comity and good relations between States through the respect of another State's sovereignty'*. Regards proportionality, the Court simply says, *'the only assessment a Court must carry out in examining the proportionality requirement is whether or not the functional immunity from jurisdiction for [defendant I] and [defendant II] is in agreement with customary international law'.* Although it did not demonstrate that this has been established, it found immunity applied, irrespective of the nature of the crimes. The availability of alternative forum was considered not to play a role and could in the eyes of the Court *'remain undiscussed'.*

Court of Appeal of The Hague

24. On 23 April 2020, the Applicant appealed. On 18 October 2020, Israel invoked jurisdictional immunity of the Defendants via a diplomatic note to the Dutch Ministry of foreign affairs. On 7 December 2021, the Court of Appeal upheld the ruling of the District Court of The Hague.
25. Like the District Court, the Court of Appeal placed emphasis on the ICJ case of *Jurisdictional Immunities* as the starting point, and then stated that the immunity of officials of the State for acts

[29] 4.6
[30] 4.15
[31] 4.51 - 55 The District Court *'does not rule out'* the influence of developments in the criminal sphere in the civil sphere, however it found immunity applicable in either sphere, and '*there can be no one-to-one extension or analogous application'*

they have performed in the performance of their duties is *'not in itself controversial as a rule of customary international law'*[32]. It found functional immunity is '*derivative of the immunity of the state itself*'[33] and the rationale is the same for both. [34]

26. The Court recognised that Israel was not impleaded, may not be required to indemnify the Defendants, and that a judgment may not be enforced against Israel, but dismissed these as *'irrelevant.'*[35] It reasoned there may be consequences for Israel which may *'feel compelled'* to assist the Defendants *'that too would be contrary to the principle that the state enjoys immunity from jurisdiction'*. The court did not engage in consideration of any other interests, beyond those of the state.[36] The Court of Appeal refers selectively to international and national jurisprudence.[37] The position of the Dutch government concerning the work of the ILC and Dutch practice concerning the prosecution of international war crimes in the Netherlands was dismissed as relating only to criminal law (discussed in below).
27. The Court states that whether there is an alternative remedy '*does not play a role.*'
28. The Court concludes that there is *'no question of a 'grey area' ...'* in relation to its finding *'that customary international law, as it presently stands, means that in civil proceedings against a government official, no exception to functional immunity should be made, on the basis of the seriousness of the facts on which the claim is based'*

Supreme Court of The Netherlands

29. The Applicant appealed the findings of the Court of Appeal to the Supreme Court of the Netherlands.[38] On 25 August 2023, the Supreme Court upheld the findings of the Court of Appeal. The decision is short, totalling 4 pages.
30. The Court found that when considering whether customary international law contains a rule that officials can rely on immunity from jurisdiction in a foreign civil case for actions they have performed in the exercise of their public functions, the starting point is that the state enjoys immunity from jurisdiction and that such immunity extends to its officials. No authority is provided to support this conflagration of state and individual immunity as a starting point, from which the Court enquires into whether an 'exception' has been established.
31. Following the reasoning of the District Court and the Court of Appeal, the Court finds there is no exception to the principle of state immunity on the basis of the nature or seriousness of the conduct accused of that state. It is *'not important'* whether the acts concern war crimes. The Court relies on *Jurisdictional Immunities* and jurisprudence from the ECtHR to support its position.

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[32] 3.6
[33] 3.6
[34] The Court reasons, *'it is therefore not obvious that a difference should be made between immunity from jurisdiction of the State of Israel on one hand and [respondent 1] et al. on the other'.*
[35] 3.7
[36] The Court found functional immunity did not constitute an impermissible restriction on Article 6 ECHR rights, and finds that *'no additional weighing of interests need take place'.*
[37] Decisions which had rejected immunities in civil cases in South Korea, the Netherlands and Italy were distinguished from the case at hand: for South Korea because the jurisprudence was not consistent; for the Netherlands because immunity was not part of the Court's reasoning (*Houjouj* case below); and for Italy because the principle of immunity was in violation of the Italian constitution. The Court relies favourably on other decisions, in the UK, New Zealand, Canada and the United States as indicative of customary law, despite the fact that in those jurisdictions the decision to apply immunity was based on statute, not custom.
[38] 3.1

32. The examination by the Court of Article 6 is limited to the following: *'the EctHR has ruled that (functional) immunity from jurisdiction does not constitute a limitation of article 6 ECHR but that restriction is not a violation. According to the ECtHR, it is not important in this context whether the litigant has an alternative forum available.'* The Court does not consider the nature of the violations, alternative remedies, or the status of the Defendants. The Court also finds that *'there are no indications that a general state practice and corresponding legal opinion has developed that meant that CIL now has a different rule or accepts an exception to the aforementioned rule that is relevant to this case',* referring only to an extremely small number of cases. The appeal was dismissed accordingly.
33. The Dutch procedure therefore upheld the claim of 'functional immunity' and dismissed the civil claim, irrespective of the nature of the wrongs, and without considering facts or circumstances such as the impact on access to justice or human rights of its decision. It will be argued below that the Court approach, reasoning and conclusions were manifestly unreasonable in light of the current state of evolving international law, and that its decision represent a flagrant violation of the applicants right to access to justice under article 6.

III. ADMISSIBILITY AND PRIORITY STATUS

34. The Applicant is clearly a victim under the ECHR and has suffered 'significant disadvantage'. He has been denied access to a court under Article 6. He has thereby been denied his one opportunity to achieve redress for the unlawful killings of his family and destruction of his family home in violation of humanitarian law.
35. Domestic remedies have been fully exhausted. The Applicant sought civil remedies and appealed to Supreme Court which rejected the claim on 25 August 2023.
36. This application is submitted within the relevant time limits; four months from the final decision of the Dutch Supreme Court which expires on 25 December 2023.
37. Although this case has dealt with immunities case in the past, there can be no question that this case raises issues that have been 'settled .. in abundant' caselaw, which might render the case manifestly unfounded. There a relatively small number of cases dealing with immunities where deference has been shown to national courts determinations, but, as will be fully argued at Section III below, this case is different in nature from those cases in decisive respects. Moreover, the court has recognised the law is in 'flux' and must be kept under close review. This application will show how the law has evolved in recent developments and practice.
38. The case raises issues of profound concern and broad relevance across the Convention space; it should be prioritised by the Court in accordance with its prioritisation policy.

IV. LEGAL ARGUMENT - ARTICLE 6

IV.1 Legal Argument - ARTICLE 6

39. Article 6 guarantees the right to 'access to a court.' A violation of article 6 arises, in all the circumstances of this case, from the immunity granted to the defendants by the Dutch courts, with

the effect of dismissing the claim as a preliminary matter, precluding access to any judicial determination of the applicant's claim.

A. Nature of Article 6 Rights and Restrictions and Principles of Interpretation

40. Article 6 is not absolute. However, any restriction on access to justice must meet strict criteria; it must be i) governed by clear law; ii) pursue a legitimate aim; iii) be proportionate to that aim and iv) not impair the essence of the right. As set out below, none of these criteria is met in the present case.
41. It is well recognised that this Court is not a court 'of fourth instance,' it does not *'deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention*,'[39] and does not "*substitute its own assessment for that of the national courts unless their findings were arbitrary or manifestly unreasonable*."[40] For the reasons set out below (section XX), it is submitted that the Dutch courts approach to customary law in this particular case *is* manifestly unreasonable in light of developments in law and practice, and is a violation of Article 6.
42. The applicant's key contention is that, under article 6, restrictions on access to justice must be justified by the state, according to the criteria specified above, and were not. The structure and logic of article 6 is that the starting point is access to justice, and any restrictions on it – which cannot impair the essence of the right - must be justified. This applies in immunities cases, where the Court has noted that *"where the application of the principle of State immunity from jurisdiction restricts the exercise of the right of access to a court, the Court is accordingly required to ascertain whether the circumstances of the case justified the restriction*".[41]
43. The Dutch courts' took immunities as a 'starting point,' to be lifted only where applicants prove the existence of a customary 'exception.'[42] Assuming as a premise that justice is blocked, with the onus on the applicants to prove an exception, turns article 6 on its head. As former ICJ judge Dame Roslyn Higgins' cautioned in relation to immunities over 40 years ago:

> *"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…It is sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to a basic rule of immunity. An exception to the normal rules of jurisdiction should only be granted when international law requires – that is to say, when it is consonant with justice and with equitable protection of the parties. It is not to be granted "as of right." [43]*

44. Inherent in the Article 6 proportionality requirement is a careful, holistic weighing up of the totality of the circumstances of the case. As explored more fully below, key factors and distinctions

[39] Markovic and Others v. Italy [GC], 2006, para 107.
[40] J.C. and Others v Belgium [GC], 11625/17, 12 October 2021, para 69.
[41] In Jones §187 (see *Al-Adsani*, §§ 47-48; *Cudak*, §§ 58-59; and *Sabeh El Leil*, §§ 50-51,
[42] See eg. Supreme Court para 3.23 finding the appellant's 'assertion that jurisdiction is the starting point and that [respondent 1] et al. must prove the exception to this (immunity), need not need be discussed,' and various references to 'starting point' being immunity.
[43] R. Higgins, Certain Unresolved Aspects of the Law of State Immunity, 29 Neth. Int'l L. Rev 265 – 276 (1982) at 271.

essential to ascertaining whether a restriction is proportionate in the particular case**,** overlooked by the domestic courts and addressed further below, include the following:

a. the nature and the purpose of the particular immunity in question applicable to the particular defendants as former officials; (in this case, the only immunity in question is 'functional' immunity of former officials, and *not* state immunity or the personal immunities attaching to a limited number of State officials, including sitting Heads of State, Heads of Government and Ministers for Foreign Affairs);[44]
b. the egregious nature of the wrongs alleged (in this case systematic violations of IHL amounting to war crimes and violations of jus cogens norms);
c. the consequences of dismissing the case without any consideration of its merits (including in this case the complete inability to pursue justice for Palestinian victims and the broader human rights, humanitarian and rule of law implications).

45. It is well established that while there is some margin of appreciation for domestic courts, whose role it is to interpret and apply national law, it is this Court's responsibility to exercise **oversight** of permissible restrictions and whether they are compatible with the Convention.[45]
46. In exercising its oversight the Court will apply established principles of interpretation developed across its case law. These require a holistic, purposive, contextual and fact-specific assessment:[46]
    a. A holistic view entails interpreting the Convention – so far as possible harmoniously - in light of other norms of international law, including evolving norms on immunities, or co-applicability of human rights and IHL in armed conflict.[47] Evolving standards on co-applicability make clear that ECHR rights are never simply displaced, and any restrictions must always be no more than strictly required by clear and specific conflicting norms of international law.[48]
    b. The Court has also frequently reiterated the need to interpret the ECHR to give effect to the Convention's special nature and purpose as a human rights treaty,[49] and to ensure that the rights guaranteed therein are "not rights that are theoretical and illusory but rights that are practical and effective".[50]
    c. It has likewise underscored the importance of a contextual and fact-specific interpretation, frequently emphasising that the interpretation and development of the law will be influenced by all of the facts and circumstances of the case.[51] In the context of immunities

[44] ICJ, 14 February 2020, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), para 55.
[45] Fogarty v UK, 'Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court.' also *Waite and Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999-I, § 59).
[46] *Fedotova and Others v. Russia* (Applications nos. 40792/10, 30538/14 and 43439/14), Grand Chamber judgement of 17 January 2023, paras.166-170; *Naït-Liman v. Switzerland* (Application no. 51357/07), Grand Chamber judgement of 15 March 2018, para. 220.
[47] *Georgia v. Russia (II)* (Application no. 38263/08), Grand Chamber judgement (Merits) of 21 January 2021, para. 93.
[48] Hassan v UK; *Al-Dulimi and Montana Management Inc. v. Switzerland* (Application no. 5809/08), Grand Chamber judgement of 21 June 2016, para. 149.
[49] Fogarty v UK, para 35.
[50] *Ibid*, para 127.
[51] *Georgia v. Russia* (II) [2021] para. 82, and *Al-Skeini and Others v. United Kingdom* [2011] para. 132 – scope of application of the convention will develop based on 'exceptional circumstances… [which]… must be determined with reference to the particular facts.' *See also Fedotova and Others v. Russia* (Applications nos. 40792/10, 30538/14 and 43439/14), Grand Chamber judgement of 17 January 2023, paras.166-170; *Naït-Liman v. Switzerland* (Application no. 51357/07), Grand Chamber judgement of 15 March 2018, para. 175, 187, 220.

it has noted that *"the Court is [] required to ascertain whether the circumstances of the case justified the restriction".*[52]

d. Finally, the Court's evolutive or 'living instrument' approach, essential to ensuring the continued relevance of the ECHR as law and society develops, is key given evolving international standards on individual responsibility and on immunities. As noted below, the Court has specifically underscored the need to stay attentive to developments in the immunities field, noting over a decade ago that the law was 'in a state of flux' (see below xx).[53]

47. The application of Article 6 in this case must be consistent with these principles. Permissible restrictions on access to justice require careful co-application of norms, in the context and in light of all the facts and circumstances, in a way that enables the Convention to be given meaningful effect. Dismissing access to justice, without regard to the nature of the case, the purpose and rationale behind restrictions, and its implications, and without any effort to minimise those restrictions, flies in the face of article 6 and established principles of interpretation of this court.

Previous Case law, the Distinct Nature of this Claim and Legal Evolution

48. The Court's previous case law has at times taken an extremely broad and deferential approach[54] (while finding violations in a others).[55] It is no secret that the Court's approach in the small number of cases concerning serious violations of human rights or international crimes, notably *Al Adsani v UK, Jones v UK and JC v Belgium,* has been highly controversial, as reflected in the volume and content of dissenting judgements.[56] The jurisprudence has also been subject to strident and voluminous external criticism, for reasons of law, principle, and human rights implications in practice.[57]

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[52] Jones, para 187.

[53] Jones para 213; see further below

[54] Fogarty v. the United Kingdom [GC], no. 37112/97, 21 November 2001; McElhinney [GC], no. 31253/96, 21 November 2001; Al-Adsani v the United Kingdom [GC], 3576/97, 21 November 2001; Kalogeropoulou and others v. Greece and Germany, no.59021/00, 12 December 2002; Jones and Others v. the United Kingdom, 34356/06 and 40528/06, 14 January 2014; J.C. and Others v Belgium [GC], 11625/17, 12 October 2021; Association des familles des victims du JOOLA v. France, 211119/19, 24 February 2022.

[55] Cudak v. Lithuania [GC], 15869/02, 23 March 2010; Sabeh El Leil v. France [GC], 34869/05, 29 June 2011; Wallishauser v Austria, no. 156/04, 17 July 2012; Oleynikov v Russia, no. 36703/04; Naku v Lithuania and Sweden, no. 26126/07, 8 November 2016; Ndayegamiye-Mpporamazina v. Sweden, no. 16874/12, 5 February 2019; Nuraj v Albania, no. 35703/17, 10 October 2023.

[56] See Joint Dissenting Opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić and Dissenting Opinion of Judge Loucaides, both in Al-Adsani; Dissenting Opinion of Judge Kalaydjieva in Jones; Dissenting Opinion of Judge Pavli in J.C and Others v. Belgium.

[57] See among others A. Orakhelashvili, Jurisdictional Immunity of States and General International Law – Explaining the Jus Gestionis v. Jus Imperii Divide, 26 May 2019; C. Ryngaert, Jones v United Kingdom: The European Court of Human Rights Restricts Individual Accountability for Torture, Utrecht Journal of International and European Law, Volume 30, Issue 79, 2014. 47-50; P. Webb, Jones v UK: The re-integration of State and official immunity?, EJIL:Talk!, 14 January 2014; W.S. Dodge, Is Torture an 'Official Act'? Reflections on Jones v United Kingdom, Opinio Juris, 15 January 2014; L. McGregor, Jones v UK: A Disappointing End, EJIL:Talk!, 16 January 2014; T. Schilling 'The Case-Law of the European Court of Human Rights on the Immunity of States' in: A. Peters et al. (eds.) Immunities in the Age of Global Constitutionalism (Brill, 2014), p. 267, at 277; P. Webb 'A Moving Target. The Approach of the Strasbourg Court to Immunity' in: A. van Aaken/I. Motoc (eds.), The European Convention on Human Rights and General International Law (Oxford University Press, 2018), p. 253. P.D. Mora, "Case Note: Jones v. the United Kingdom: Article 6(1) ECHR and the Immunities of States and Their Officials for Acts of Torture," Cambridge Journal of International and Comparative Law

49. This case requires the Court to consider whether there has been a violation of access to justice in the particular, exceptional, circumstances of this case, not to revisit its jurisprudence as a whole to date. Nonetheless this case does provide an opportunity to clarify aspects of the Court's jurisprudence, to adopt a human rights perspective, consistently with other sources, in finding that absolute or blanket immunities cannot protect former officials responsible for war crimes and preclude access to justice for their victims.
50. The applicant submits that finding a violation of article 6 in the particular circumstances of this case is, in any event, consistent with prior case law of this Court, given the distinct facts and circumstances of this case and as the law has evolved in significant respects.

The Unique Circumstances of this case

51. This case is exceptional. No other case has concerned the assertion of a customary international law based immunity in relation to the commission of systematic war crimes. No case has concerned a court applying solely customary international law (as opposed to statute) as a purported legal basis to deny access to justice and afford absolute functional immunity to former officials. This case is unusual in concerning exclusively civil claims against former officials, whereas other cases have concerned legal action against states, or states together with officials, where the focus on state immunity was less obviously misplaced. This case is also distinguished as it concerns Palestinians with no available system of justice in their home states before which to bring claims, whereby granting functional immunity precludes any access to justice for war crimes. The relevance of each of these to the Article 6 is argued under each of the elements of the Article 6 test in the following section below.

Evolving Practice

52. The *Jones* majority recognised explicitly in 2014 that the law on immunity was 'in flux', and took pains not to lock the Court, or member states, into a restrictive approach.[58] Although deferential to the UK's application of immunity in that case and finding no violation, it recognised evidence of both the grant and refusal of immunity *ratione materiae,* signalling that *'international opinion on the question was beginning to evolve*.'[59] The Court therefore considered that *"in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States.*"[60]
53. It is now almost a decade since the *Jones* case, thirteen years since the cut-off for that courts consideration of comparative standards and practice. A plethora of developments in law and practice have unfolded since then, influencing how article 6 must be interpreted and applied in this case. While specific developments relevant to this case will be discussed under each of the article 6 criteria below, it is worthy of note that evolution can be seen on various dimensions, inter alia:

3, no. 2 (2014): 608-615; C. Overman, "Jones and Others v UK: Immunity or Impunity?" Oxford Human Rights Hub, 19 January 2014.

[58] Jones, para 213 and 215.

[59] Ibid, para 213, noting also '*emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign state officials.'*

[60] Ibid, para 215.

a. *developments affirming individual responsibility for war crimes under international law*, and the importance of the inextricably intertwined rights and obligations in respect of reparation and accountability.[61]
b. *developments in relation to the nature and scope of immunities*.

54. There have been transformations across the various distinct forms of immunities – state, diplomatic, organisational and functional – in recent years, undermining the possibility of a simplistic absolute approach to immunities in general. Through myriad developments in international conventions, national law, national and international judicial practice, the scope of immunities has been clarified and exceptions carved out. Over time exclusions have included, inter alia, commercial and employment contexts. Terrorism exceptions have also appeared in legislation.[62] The area of greatest development, the most restrictive approach, and primary relevance to this case, relate to restriction of functional immunities (*rationae materiae*) based on the international nature of the wrongs and individual responsibility of the perpetrator.
55. While particular aspects of shifting standards on functional immunities are discussed below, these shifts are reflected in, inter alia:
- the 2022 Report of the International Law Commission, seventy-third session, which includes draft articles and commentary on immunity of state officials from foreign criminal jurisdiction ('2022 ILC Report'), which notes (i) a "*discernible trend" towards limiting the applicability of immunity from jurisdiction ratione materiae in respect of certain international crimes* and (ii) the *necessity to* recognise the unity and systemic nature of the international legal order and to *prevent immunity from becoming a procedural mechanism to block the implementation of international law norms regarding accountability and individual responsibility*.[63] The ILC affirms this trend towards exceptions to immunity ratione materiae as reflected inter alia in legislation, practice and literature.[64]
- national level developments, particularly judicial, reveals a steady restriction of immunities *rationae materiae*. This is reflected in the voluminous national cases – mostly criminal but also civil - cited by the ILC in its 2022 report,[65] and in a broader body of cases across continents (highlighted at paragraphs 42-51 below).

[61] The right to a remedy, and to reparation for war crimes, is a basic principle of international law: eg ICRC Study on Customary IHL, Rule 150 and 151; Draft Articles on State Responsibility, Article 31; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; UN General Assembly, Res. 51/108 calling for Article 75(6) of the Statute of the International Criminal Court; UN Secretary-General, Report on the causes of conflict and the promotion of durable peace and sustainable development in Africa § 258, noting UN Secretary-Generals recommendation that "in order to make warring parties more accountable for their actions … international legal machinery be developed to facilitate efforts to find, attach and seize the assets of transgressing parties and their leaders." The Geneva Conventions note States cannot absolve themselves or one another of liability incurred in respect of grave breaches.'

[62] Section 1605A of chapter 28 of the United States Code; Section 6.1 of the State Immunity Act in Canada. Both countries have designated certain States as supporters of terrorism. In Canada, section 4.1 of the Justice for Victims of Terrorism Act provides victims with access to justice, recently used by victims of the downing of a Ukrainian airline by Iran *(*Superior Court of Justice of Ontario, Zarei v.Iran CV-20-635078, 20 May 2021). Dutch courts relied on developments from US and Canada but failed to recognise restrictions developing in domestic legislation.

[63] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 7, pp. 232-234, paras. 9 and 10.

[64] Ibid, footnotes 1013 and 104.

[65] See footnote 1012 of the ILC, 2022, Report of the International Law Commission Seventy-third session, UN Doc A/77/10, Chapter VI, which sets out the following national cases in support of a trend: Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), House of Lords, United Kingdom, 24 March 1999; Pinochet,

- In the Netherlands itself, the view that functional immunities are or should be limited has been avowed by key state actors. The government has expressed its opposition to broad functional immunities.[66] Parliamentary exchanges in 2023 regarding potential ratification of the State Immunity Convention underscore the lack of clarity as to state immunity in Dutch law, while indicating concern to avoid immunity in respect of aggression or human rights violations,[67] resulting in advice from the Government's independent Expert Advisory Committee on Public International law (*De Commissie van advies inzake volkenrechtelijke vraagstukken* (CAVV)). The CAVV has issued a report in 2023 on immunities, stating explicitly that customary international law on functional civil immunities has '*not crystallised*.' [68] The report also notes the distinct nature of state and functional immunities and the limiting the scope of the latter.[69]

56. The evolution heralded by the Court has continued. It cannot reasonably be asserted in 2023 that there is a clear rule of customary law, still less one beyond all doubt with no 'grey area,' that protects former officials from individual responsibility, civil or criminal, for war crimes.

B. Failure to meet Criteria for Permissible Restrictions on Access to Justice

57. This case represents an impermissible restriction on access to justice under Article 6 on account of the failure to satisfy any of the criteria for permissible restrictions set out below. These distinguish this case from other cases previously before the court. In this case the restriction was not provided for in clear domestic (or international) law, and the purported immunity in this case did not pursue a legitimate aim. The courts failed to engage in an adequate proportionality analysis, taking into account and weighing up relevant factors. The net effect was to dismiss the case without due consideration, amounting to an impairment of the essence of the right. This section deals with these issues in turn then summarises why the approach adopted by the Dutch courts (manifestly) has no reasonable justification in Dutch law or in the contemporary international legal framework to which Dutch law refers.

i) Provided for by law

Belgium, Court of First Instance of Brussels, 6 November 1998, p. 349; Hussein, Germany, Higher Regional Court of Cologne, Judgment of 16 May 2000, 2 Zs 1330/99, para. 11; Bouterse, Netherlands, Amsterdam Court of Appeal, 20 November 2000, Sharon and Yaron, Belgium, Court of Appeal of Brussels, 26 June 2002, p. 123 (see also H.S.A., et al. v. S.A., et al,; H. v. Public Prosecutor, Netherlands, Supreme Court, Judgment of 8 July 2008, ILDC 1071 (NL 2008), para. 7.2; Lozano v. Italy, Italy, Court of Cassation, 24 July 2008, para. 6; A. c. Ministère public de la Confédération, Federal Criminal Court (Switzerland), 25 July 2012; FF v. Director of Public Prosecutions, High Court of Justice, Queen's Bench Division, Divisional Court, 7 October 2014; Ferrini v. Federal Republic of Germany, Italy, Court of Cassation, Judgment of 11 March 2004, International Law Reports, vol. 128, p. 658, at p. 674); Jones v. Saudi Arabia, 14 June 2006; Special Prosecutor v. Hailemariam, Federal High Court, Judgment of 9 October 1995, ILDC 555 (ET 1995); Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie, France, Court of Cassation, Judgments of 6 October 1983, 26 January 1984 and 20 December 1985, International Law Reports, vol. 78, p. 125; Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie, Rhone Court of Assizes, Judgment of 4 July 1987, ibid., p. 148; and Court of Cassation, Judgment of 3 June 1988, ibid., vol. 100, p. 330; German Federal Court of Justice on 28 January 2021 (case No. 3 StR 564/19).

[66] ILC, Immunity of State officials from foreign criminal jurisdiction, Comments by governments, 67th Session (2015), Information submitted by the Netherlands, p. 2.

[67] 2023 (June) 2e Kamer response to the proposal to ratify the UN Treaty on State Immunity.

[68] Dutch Advisory Committee on Public International Law (CAVV), Draft articles of the International Law Commission on immunity of State officials from foreign criminal jurisdiction (Advisory report No. 43), 28 June 2023, page 7.

[69] Ibid, page 10.

58. While it is for states to decide how they regulate access to and the administration of justice, they must do so in accordance with Convention principles and the principle of legality. It is a general principle that restrictions on human rights should be provided for in law, which is sufficiently clear and foreseeable to meet the quality of law requirements.[70]
59. There is no legislation in the Netherlands that specifically enshrines immunities in Dutch law. In this respect the present cases differs from other domestic processes - including those of Canada and the United States, given most emphasis by the Dutch courts in their assessment of 'customary international law' - where the immunities applied had been enshrined in domestic statutes. The fact that there was and is no act of parliament was precisely due to controversies as to the proper scope of immunities in general.
60. The legal basis for the grant of immunity relied upon by Dutch courts was Article 13 of the General Provision Dutch law, which provides that jurisdiction is subject to '*exceptions recognised in international law*.' There is no dispute that there is no relevant international treaty basis, so in order to be conceivably provided for in Dutch law it must be established that immunities in this case were 'recognised' in customary international law. However, the Dutch courts failed to carefully ascertain whether there is functional immunity in the circumstances of this particular war crimes case. It took immunity as a 'starting point' – by controversially equating state and functional immunity – and then found there was no established 'exception' to immunity for civil suits against former officials. It is therefore submitted that the courts failed to establish that customary law – based on consistent state practice and opinio juris – provided, in sufficiently clear terms, for the immunity on which they restricted access to justice. As set out further below (at Section C), the courts conclusion that it was 'beyond reasonable doubt' and without any 'grey area'[71] that functional immunity applied and precluded them from considering any of the facts of the case, and that the commission of war crimes by former officials or facts of this case were irrelevant, is manifestly unreasonable today.
61. The fact that the Courts approach to blanket immunity was not a foreseeable interpretation and application of existing law in this case is borne out by the sources above, indicating developments in the law, and also by prior Dutch practice. In many criminal cases and in the *El-Hojouj* civil case, no such immunity was granted; in *El-Hojouj* the applicant's claim against then *current* Libyan state officials for torture and inhumane treatment the court did not consider it necessary to consider immunities at all.[72]
62. There was an insufficiently clear and foreseeable legal basis in national law, and by reference customary international law, to grant functional immunities from civil suit for former officials responsible for war crimes in this case.

ii) Legitimate aim

[70] The principle of legality, and rule of law, are underlying convention principles - Baka v. Hungary (Application no.20261/12) Grand Chamber judgement of 23 June 2016, para.117 – as well as explicitly reflected elsewhere in the ECHR.
[71] Ziada, Supreme Court; referring to Court of Appeal, para 2.2.
[72] El-Hojouj v. Libyan Officials, The Hague District Court, 21 March 2012, ECLI:NL:RBSGR:2012:BV9748; the court proceeded without even explicitly addressing immunities, noting that it would have been unacceptable to ask of El-Hojouj to start procedure before Libyan courts. An award in absentia of 1 million euros was granted. The SCrt dismissed this in Ziada speculating – counsel contested – that immunities simply may not have been considered by the Court as it was not a compulsory part of the review process at that time.

63. Restrictions on access to justice must pursue a legitimate aim.[73] The value protected by the law on *state* immunities, and *personal* immunities attaching to a limited number of State officials, including sitting Heads of State, Heads of Government and Ministers for Foreign Affairs, include comity and good relations between states, enabling states to operate without political interference by foreign courts and its high level officials to discharge stately functions on the international stage.[74] However, even in respect of these more firmly established immunities (state and rationae *personae* as opposed to *materiae*), it is increasingly questioned whether immunity in respect of states engagement in international crimes and serious violations of international law pursues a legitimate aim in light of conflicting international values and norms.[75]
64. What is relevant here, however, is functional immunities. The rationale for such immunities, like the immunities themselves is more limited (and controversial) than for state or personal immunities. As immunity attaches to the *conduct*, not persons, profound doubts have been expressed over decades as to whether granting immunity in perpetuity for former officials for the commission of international crimes can possibly pursue a legitimate aim.[76]
65. The courts made broad references to the aims of state immunity concerning comity and relations between states, but did not seek to establish whether granting functional immunity in this particular case pursued legitimate goals or aims in accordance with article 6. This case is not a case against the state of Israel and does not concern state immunity. It has no conceivable impact on the ability of Israel to conduct legitimate internal or foreign relations. The Dutch courts recognised that Israel was not impleaded, and that it may not need to engage in proceedings, directly or indirectly pay any award or that any judgment could be enforced against it, yet suggested somewhat vaguely that 'negative consequences' for Israel would nonetheless continue as the state may be 'judged' indirectly and may feel obliged to support former officials.[77]
66. The aim of functional immunities is not to protect those responsible for war crimes. It is not to enable individuals - or even the state - to avoid paying reparations to victims. On the contrary, countervailing human rights values at stake in the case, reflected across international law, governing the rights of the victims, reparation and accountability for jus cogens violations, suggest the need to consider a 'legitimate' aim pursued by immunities carefully.
67. Domestic courts must, at a minimum, assess whether the functional immunities pursued in this case, and that protected individuals for war crimes committed while in office, pursued a legitimate aim. There was however no such meaningful assessment in this case. The Dutch courts' failure to

[73] E.g. Cudak v. Lithuania [GC], no. 15869/02, 23 March 2010, para. 59; Sabeh El Leil, supra note 7, paras 51-54.
[74] Fogarty para 34, Al-Adsani, para. 54; Jones, para 118See *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* [2002] ICJ Rep 3, Joint Separate Opinion of Judge Higgins, Kookimans, and Buergenthal at para 75 'immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system'. On foreign ministers, Arrest Warrant Judgment at para 53 notes 'under customary international law, the immunities accorded to Ministers of Foreign Affairs are not granted for their personal benefit, but for the effective performance of their functions on behalf of their respective States'.
[75] International Commission of Jurists International Law and the Fight Against Impunity - A Practitioners Guide ICJ 2015, pp.14-42, 271.; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 19; see also section on ('National Practice')
[76] See e.g. ILC Report, C Hernandez, para 49 on the rationale for limiting functional immunities, infra. Academic commentary on rationale is abundant but includes e.g. Kress C. In Kai Ambros (ed.) Rome Statute of the International Criminal Court: Article-by-Article Commentary (4th ed Beck 2021), pg.2606.
[77] Court of Appeal judgement, para 3.7 second and last paragraph.

consider the aims pursued and their legitimacy, instead assuming that functional immunities applied and were justified, violates the 'legitimate aim' criteria under article 6.

iii) Proportionality

68. The article 6 proportionality test is at the heart of this case. At its essence it requires a 'fair balance' be struck between the legitimate aims of the state and restrictions on rights, or as the Court has noted between the 'individual rights and public interests'.[78] It is well accepted that the more substantial the interference with the right, the greater the justification required.[79] The need for courts in immunity cases to "*ascertain whether the circumstances of the case justify such restrictions"* has been noted.[80]
69. This court has emphasised the necessity for courts to engage in the proportionality test already at the domestic level. In relation to other types of immunity, the Court has recognised that this includes careful consideration of **evolving customary law** and provision of 'adequate and sufficient' reasons by domestic courts, if - as in this case – it purports to provide the basis for restrictions on access to justice:

> *"If national courts simply uphold immunity, without any analysis of the legal nature (commercial or not) of the underlying transactions, or the applicable principles of customary international law, they violate the applicant's right of access to court even in cases where State immunity does in fact apply."*[81]

70. On this basis, Judge Loucaides dissenting in *Al-Adsani* noted that:

> *"**Any form of blanket immunity, whether based on international law or national law, which is applied by a court in order to block completely the judicial determination of a civil right without balancing the competing interests, namely those connected with the particular immunity and those relating to the nature of the specific claim which is the subject matter of the relevant proceedings, is a disproportionate limitation on Article 6 § 1** of the Convention and for that reason it amounts to a violation of that Article. The courts should be in a position to weigh the competing interests in favour of upholding an immunity or allowing a judicial determination of a civil right, after looking into the subject matter of the proceedings. It is true that in the present case the absurd and unjust results of applying a blanket immunity without regard to any considerations connected with the specific proceedings are more evident because the immunity prevented accountability for a grave violation of an international peremptory norm, namely the prohibition of torture. However, this does not mean that the relevant immunities can only be found to be incompatible with Article 6 § 1 in a case like the present one. In my opinion, they are incompatible with Article 6 § 1 in all those cases where their*

[78] E.g. Van Mechelen and Others v. the Netherlands, Nos. 21363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997, paras. 59–65.
[79] Kart v Turkey, 8917/04, 3 December 2009, para 83, 'the broader the immunity the more compelling must be its justification.'
[80] Prince Hans-Adam II of Liechtenstein v. Germany [GC], no. 42527/98,12 July 2001, para. 74, in Jörg Polakiewicz, States' obligations under public international law in relation to the immunity of State officials – the European Court of Human Rights' perspective Bucharest, 21 September 2022 (herEafter Polawkiewicz)
[81] Polawkiewicz, citing *Oleynikov v Russia* . no. 36703/04, Judgment of 14 March 2013, paras. 71-73; see also *Sabeh El Leil v. France* where the court emphasized the importance of giving "relevant and sufficient reasons" for dismissing a claim on the basis of State immunity, para. 67 and the dissenting opinion of Judge Pavli in JC and Others v Belgium at para. 19 "domestic courts have an obligation to adequately set out the factual and legal reasons for their decisions".

application is automatic without a balancing of the competing interests as explained above" [emphasis added].[82]

71. This reasoning must hold weight, 22 years on, and in relation not to grant of state immunity (as in *Al-Adsani*) but immunity ratione materiae.
72. It follows that proportionality requires an assessment of multiple factors: on the one hand, whether there are norms and legitimate aims that justify interference with the right; and on the other, the extent of the interference and whether it is proportionate. This necessarily entails considering the impact on the individual victim's human rights including access to justice. The Dutch courts simply did not provide this proportionality analysis.
73. The legal analysis inherent in the proportionality requirement includes careful reflection on the law governing the particular nature of immunities in this case, the wrongs alleged, and the impact of the restrictions imposed through grant of immunity. It entails taking into account developments, national and international (across types of immunities but in particular in relation to functional immunities at issue in this case), that reject the application of blanket immunities in a case of this nature. Considered in turn below, the nature of immunities, the nature of crimes or violations alleged, the nature of the officials and the availability (or lack of) alternative remedies are all, at a minimum, factors that should be taken into account in the Article 6 analysis. Several factors were not balanced and weighed up by the Dutch courts, but others were flatly rejected as irrelevant.

A. Key Factors in an article 6 proportionality analysis disregarded by Dutch courts

1. Nature of Immunity (Functional, not State or Personal) of the Former Officials

74. The case before Dutch courts concerned the individual responsibility of former military commanders. The distinction between individual and state responsibility is reflected in international law and practice, including for example the ILC Articles on state responsibility.[83] It is uncontroversial that this case does *not* concern state immunity. The former officials in question are *not* part of the triad protected by personal immunities. The fact that the case may or may not have negative effects for the state – which may and should ensue from allegations of serious criminality - is not the criteria.
75. This case can only conceivably concern the application of immunities rationae materiae (or functional immunities). In assessing functional immunities, where there have been most developments, exceptions, and questioning of their appropriate scope of application, careful scrutiny of whether there is a customary rule establishing immunity becomes particularly essential. As noted above, the courts' starting point of assuming immunity applies unless the counter could be proved does not meet this requirement.
76. Crucial distinctions between *state immunity* and the *immunity of individuals*, and between '*personal' immunity of high ranking officials* and *'functional' immunity* have been overlooked by

[82] Dissenting opinion of Judge Loucaides in Al-Adsani.

[83] Article 58 ILC Articles notes "[t]hese articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State." The Commentary explains: "Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them." Also see Special Rapporteur Escobar Hernández, Preliminary report on the immunity of State officials from foreign criminal jurisdiction, *UN Doc. A/CN.4/654*, 31 May 2012, para. 49, where former the ILC Special Rapporteur stressed immunities of state officials 'must be distinguished from the immunity of the State'.

the courts. The courts placed undue emphasis on cases that concerned state immunities, especially the ICJ *Jurisdictional Immunities* – which explicitly leaves the law on the immunity of state officials in respect of the commission of the same acts to develop independently.[84] The principles governing state immunity, treated in some cases as a procedural bar to cases in foreign courts,[85] cannot be automatically extended to official immunities as the Dutch courts suggested. This applies despite criticism that this Court may not have been as clear on the distinction as it should have been in the past - as noted by a dissenting judge in the *Jones* case, that judgement may in effect have '*extend[ed] State immunity to named officials without proper distinction or justification*.'[86]

77. Developments in the past decade clarify the need to consider state and functional immunity separately, as they are distinct in nature, rationale and content. These developments were recognised very recently in both the 2022 ILC Report and in the CAVV report of the Dutch advisory council on international law. The 2023 CAVV report underscores that functional immunity of State officials should not be treated as an integral part of the State immunity rule, but as a separate rule of international law.[87] The decisive shift towards rejecting application of *rationae materie* in cases of individual responsibility for serious crimes (below) reflects recognition of this distinction.
78. Given the distinction between state and functional immunity, the intervention of a foreign state in domestic courts cannot and should not be determinative of whether 'serious international crimes' are regarded as official acts subject to functional immunity. As several ICJ judges noted, this "*is underscored by the increasing realization that State- related motives are not the proper test for determining what constitutes public state acts*."[88] Individuals cannot be immunised from individual responsibility for serious crimes at the behest of their state; this runs counter to developing standards on individual responsibility in international law.[89]
79. Likewise, it is clear that immunity ratione materiae is distinct from personal immunities ratione personae. As such, the Dutch courts' reliance on the status and **rank of the respondents** is of no legal relevance. While status would have been relevant to determining whether the defendants form part of the 'triad' which the ICJ suggested may be entitled to personal immunities in the *Arrest Warrant* case, there is no suggestion military commanders are covered by such immunity. Explicit reliance on the defendants 'rank' to justify – and to distinguish – the court's grant of immunity from cases where such immunity was rejected, is unsupported in law and anomalous. There is no principled justification for suggesting victims should be less able to pursue reparation from higher

[84] ICJ, Jurisdictional Immunities of the State, Germany v Italy, Judgment, 3 February 2012, para 65: "The Court considers that it is not called upon in the present proceedings to resolve the question whether there is in customary international law a "tort exception" to State immunity applicable to acta jure imperii in general. The issue before the Court is confined to acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict."
[85] Al-Adsani, para 48.
[86] Dissenting opinion of Judge Kalaydjiva in Jones.
[87] Advisory Committee on Public International Law, Advisory report on the draft articles of the International Law Commission on immunity of State officials from foreign criminal jurisdiction, Advisory Report no. 43, 28 June 2023, page. 10: "application of the State immunity rule (instead of the independent rule of functional immunity) in situations in which an official of a foreign State is held responsible in a personal capacity for acts that are also attributable to the State, but where the State itself is not involved in the legal proceedings (either directly or indirectly), and its responsibility does not need to be established either, is not evident and not in accordance with international law."
[88] Joint opinion Higgins, Kooijmans and Buergenthal in the Arrest Warrant case of 11 April 2000 (Democratic Republic of the Congo v. Belgium) [2002] ICJ Rep 63, para 85.
[89] See para 35.

ranking rather than lower ranking officials. Moreover, despite the curious emphasis on rank, the Dutch Courts did not consider the fact that the defendants were *former* officials. It would be anomalous, and out of step with evolving developments, if former *officials* enjoy immunity ratione materiae for serious crimes, as an extension of the state immunity, while it is increasingly recognised – as established in the *Pinochet* case 25 years ago - that even former heads of state are not.[90]

80. *Functional immunity* by definition attaches to the nature of the conduct. Yet – as discussed below – there was no meaningful engagement with the growing questions as to whether international crimes, and violations of jus cogens, can and do constitute acts protected as functions of the state.[91] The Dutch courts' conflagration of state and functional immunity, of the interests of states and the rationale for functional immunity in the present case led to a grant of immunity that was not well-founded in customary law.

2. Nature of Violations –War Crimes, Violations of Jus Cogens

81. A key consideration in the proportionality analysis is the particularly egregious **nature of the wrongs** in question. Unusually among immunity cases, this case concerns access to justice in relation to the commission of alleged war crimes.
82. The war crime of attacking civilians is one of the oldest and mostly firmly established prohibitions – and crimes – under international law, carrying both state and individual responsibility.[92] The nature and importance of **individual responsibility** for war crimes – including criminal accountability and reparations – is well established in international law.
83. Evolving international law and comparative practice suggests that, in respect of the commission of war crimes (or other crimes under international law such as crimes against humanity or genocide), functional immunity does not apply.[93] It is recognised that many of these developments arose in the criminal sphere, but they have either been applied explicitly, or extend as matter of principle given their rationale, also to civil claims.[94]

Developments affirming the non-applicability of Functional Immunity to War Crimes

ILC, CAVV and other leading expert reports

[90] Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), House of Lords, United Kingdom, 24 March 1999

[91] E.g. Ibid, which asserted that torture could not constitute an act of state and that immunity is not superior to the protection of *jus cogens; Bouterse,* Amsterdam Court of Appeal, 20 November 2000, ECLI:NL:GHAMS:2000:AA8395, para 4.2, which held that grave international crimes cannot be considered as the official tasks of a Head of State; and United States, Court of Appeals, Yousuf and others v. Samantar , 2 November 2012, 699 F3d 763 (4th Cir. 2012).

[92] International Committee of the Red Cross, Customary International Humanitarian Law, 2005, Rule 150 and Rule 151.

[93] One source among others, see the ILC fifth report which considered jus cogens, the fight against impunity, the right to reparation, the obligation to prosecute crimes under international law and concluded that 'the arguments that have been analysed above make it clear that there are sufficient grounds in contemporary international law to conclude that the commission of international crimes may constitute a limitation or exception to the immunity of State officials from foreign criminal jurisdiction.' ILC, 14 June 2016, Fifth report on the immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, UN Doc A/CN.4/701, para. 217.

[94] Alexander Orkhelashvili, Jurisdictional Immunity of States and General International Law – Explaining the Jus Gestionis v. Jus Imperii Divide (2019), p.106.

84. Of particular note is Article 7(c) of the Draft Articles in the 2022 ILC Report which makes clear immunity rationae materiae shall not apply to the commission of 'war crimes' and other crimes under international law.[95] The ILC is an authoritative source on the development of the law, as reflected in this Court's jurisprudence including in the *Jones* case.[96]
85. While the function of the 2022 ILC Report was to consider criminal law, the underlying rationale and principles of the ILC report are applicable to pursuit of justice more broadly (see also from paragraph 55 on the distinction in the criminal and civil contexts). This is clear from the rationale for functional immunities not applying to war crimes set out in the report, which highlights the broader relevance to victims and the international community beyond solely criminal accountability:
    - *'First, these are crimes about which the international community has expressed particular concern, resulting in the adoption of treaties that are at the heart of international criminal law, international human rights law and international humanitarian law, and the international courts have emphasized not only the gravity of these crimes, but also the fact that their prohibition is customary in nature and that committing them may constitute a violation of peremptory norms of general international law (jus cogens).*
    - *Second, these crimes arise, directly or indirectly, in the judicial practice of States in relation to cases in which the issue of immunity ratione materiae has been raised.*
    - *Lastly, it should be noted that these three crimes are included in article 5 of the Rome Statute, where they are described as 'the most serious crimes of concern to the international community as a whole.'*[97]
86. The 2022 ILC Report references criminal and civil cases in support. The report is not isolated, but the culmination of a slow, cautious and painstaking process over a prolonged period of time.
87. This report is supported by other statements and findings of international bodies. These include resolution of Institute of International Law on the immunity from jurisdiction of the State and State officials in cases concerning international crimes found, over a decade earlier, that in respect of individual officials "*No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.*"[98] Notably, the resolution explicitly covers the exercise of 'criminal, civil and administrative jurisdiction of national courts.'[99]
88. Another significant source is the Dutch CAVV 'advisory' committee which opined that, while the decisions are for the courts in particular cases:

    '*the functional immunity that [former officials] concerned enjoy after they have left office will probably not constitute an obstacle to the exercise of jurisdiction by a Dutch court, if a reasonable suspicion exists that they <u>have committed international crimes</u>.'*[100]

[95] See draft Article 7(c) 'war crimes' (and of potential relevance 7(b) 'crimes against humanity' of the Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 7, p. 230 (ILC report).
[96] E.g. Jones, para 213.
[97] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 7, p. 238, para. 20.
[98] Article III of the resolution, entitled "Immunity of persons who act on behalf of a State", cited in Jones, para 103-5.
[99] Ibid.
[100] Supra, footnote 15, page 17.

National practice

89. National trends judicial practice, also point to the restriction of functional immunities to international crimes. While national cases are invariably uneven and influenced by myriad factors, including national laws and contexts, there are significant recent developments towards repudiation of functional immunities in respect of individual responsibility for war crimes, reflecting established international concern to ensure reparation and accountability for serious violations of international human rights and humanitarian law in armed conflict. Some examples are very recent, and therefore arose since ECrtHR immunities cases. They contribute to the 'decisive trend' to which the ILC referred of challenging absolute immunities in case of serious crimes.
90. Well-known examples of national jurisdictions excluding international crimes from the scope of functional immunity of senior officials include long established decisions such as the *Eichmann* or *Pinochet No. 3* cases. It is reflected in many recent cases, including *Nezzar*[101] in Swiss courts, *Lozano* Case in Italian courts, [102] the most recent example of the *Guatemalan general cases* in Belgian courts[103], and cases in German and indeed Dutch courts, which deserve particular emphasis.
91. The German examples excluding international crimes from the scope of functional immunities deserve note for their relevance to the present case. In a 2021 German Federal Court of Justice (BGH) judgment 2021,[104] an officer of the Afghan National Army was found guilty of, inter alia, war crimes. The Court held that according to general rules of international law, prosecution was not excluded by functional immunity, pointing to general state practice and corresponding opinio juris, relying notably (i) a number of domestic decisions; (ii) statements by the German Federal President and Federal Foreign Minister, as well as (iii) an 'overwhelming majority of academic literature' that denies functional immunity for crimes under international law. The judgement notes:

    'It is stated at the outset that, given the sovereign equality of the States, in principle, a State is not subject to the jurisdiction of any foreign State, at least in relation to sovereign acts (acta iure imperii) […]. However, the sovereign acts of a foreign State that is not party to the court proceedings are not the subject of the proceedings or the reference point for any immunity here, but rather the individual criminal responsibility of a natural person for war crimes that they are supposed to have committed as a not particularly high-ranking official of a foreign State in the State organisation thereof. Any functional immunity to be considered in such a case is to distinguished from other immunities, in particular personal immunities (ratione personae). The same applies to the exclusion of liability under civil law'.[105] [emphasis added]
92. The Dutch Court dismissed the relevance of this German case despite its apparent relevance, on the basis that in the Ziada case the officials were 'high ranking'. As noted above, this arbitrary

[101] Federal Criminal Court of Switzerland, 25 July 2012, A. v. Ministère Public de la Confédération, Case No.BB.2011.140. The Swiss Federal Criminal Court denied immunity ratione materiae for the former Algerian Minister of Defence Khaled Nezzar, for war crimes allegedly committed during the Algerian Civil War.
[102] Lozano (Mario Luiz) v. Italy, Supreme Court of Italy, 24 July 2008, Case No. 31171/2008, noting the emerging trend that crimes under international law are not protected by immunity, but the crimes did not constitute crimes against humanity or war crimes so immunity was applied.
[103] Assize Court, Leuven, 14 December 2023, unpublished.
[104] Bundesgerichtshof (German Federal Court of Justice), Judgment, No. *3 StR 564/19*, 28 January 2021.
[105] Ibid, para 17.

distinction not justified in law (personal immunities apply to a particular triad while in office, and functional immunities focus on conduct not status or rank) or in principle (there is no rationale basis for protecting higher versus lower-level officials).

93. Relying on this BGH decision, on 24 February 2021, the Koblenz Higher Regional Court sentenced a Syrian intelligence office Eyad A. for torture and serious deprivation of liberty, holding 'the Defendant cannot rely on his immunity as a functionary (in the widest sense of the word) of another state'.[106] On 13 January 2022, the same Court sentenced Anwar R, a senior Syrian government official for crimes against humanity[107]. Whilst this decision is not public, it reinforces that functional immunity cannot be invoked by senior state officials before foreign courts, when acts performed in official capacity constitute international crimes.
94. Dutch practice follows suit. Since the Dutch Court of Appeal judgment and prior to the Dutch Supreme Court judgment in this present case, on 14 April 2022, The Hague District Court sentenced an Afghan detention officer to twelve years imprisonment for war crimes, finding him guilty of serious violations of international humanitarian law.[108] Indeed Dutch courts have a history of not applying immunity and convicting senior officials in criminal cases, including in *Bouterse*[109] and the 2008 case of *H./OM*[110]. The perpetrator in the latter case was a high-level Afghan state official, former Head of the Afghan military security and former Deputy Minister of Afghan national security. On 15 December 2017, the Dutch Courts also sentenced a former member and permanent representative of the military regime in Ethiopia to life imprisonment for grave violations of war crimes, torture and killing.[111] While immunities were not explicitly raised, the Prosecutor presumably considered whether immunities applied prior to bringing the case to court, consistent with the Dutch government's stated policy.[112]
95. Several other judicial decisions have also questioned the applicability of immunities to grave violations of human rights or humanitarian law, or war crimes, even in relation to *state* immunity (and since the broad 2012 *Jurisdictional Immunities)*. These include:
    a. The 2014 decision no.238 of the Italian Constitutional Court,[113] ruling that Italian Courts could not deny jurisdiction to civil claims based on sovereign acts constituting war crimes and crimes against humanity (considered of '*limited'* by Dutch courts as *'based …mainly on Italian constitutional law'*[114], though the Court did assess as significance Canadian and US decisions arising out of domestic statute).
    b. South Korean judgments of January and April 2021 were also considered of limited authority by the Dutch Court of Appeal due to conflicting decisions on exceptions to immunity.

[106] Oberlandesgericht Koblenz (Koblenz Higher Regional Court), Judgment, No. *1 StE 3/21*, 24 February 2021, pg. 179.
[107] Oberlandesgericht Koblenz (Koblenz Higher Regional Court), Judgment, No. *1 StE 9/19*, 13 January 2022
[108] *Afghan detention officer/OM*, The Hague District Court, 14 April 2022, ECLI:NL:RBDHA:2022:4976 (English Version), para. 28.
[109] Bouterse, Amsterdam Court of Appeal, 20 November 2000, ECL:NL:GHAMS:2000:AA83895.
[110] *H./OM*, Court of Appeal The Hague, 29 January 2007, ECLI:NL:GHSGR:2007:AZ7143; *H./OM*, Supreme Court of the Netherlands, 8 July 2008, ECLI:NL:HR:2008:BC7418.
[111] *Eshetu A./OM*, The Hague District Court, 15 December 2017, ECLI:NL:RBDHA:2017:14782.
[112] See ILC's Special Rapporteur's Sixth report on immunity of State officials from foreign criminal jurisdiction, Special Rapporteur Concepción Escobar Hernández, *A/CN.4/722*, 12 June 201, pg. 36, footnote 193: 'The possibility that the prosecutor may determine immunity seems to have led the Netherlands to assert in its written comments that "there is little relevant practice" [relating to the invocation of immunity], since the Public Prosecutor would usually first assess whether any immunities will apply before bringing criminal charges."
[113] Italian Constitutional Court, Sentenza no. 238/2014.
[114] Ziada, Court of Appeal, para 315.

However, in a recent development, on 23 November 2023, the Seoul Appellate Court overturned the lower court's decision which had dismissed the case on grounds that South Korea has no jurisdiction over the case due to sovereign immunity, ordering Japan to pay 200 million won.[115] Japan has not appealed. The Appellate Court has said in a statement *'it is reasonable to consider that there is a common international law which does not recognise state immunity for an illegal act… regardless of whether the act was a sovereign act'.*[116]

c. A 2021 Brazilian Supreme Court judgment ruled that immunity from jurisdiction ceases when human rights violations are concerned, finding that *'there is no immunity for grave violations of human rights and of international humanitarian law, for war crimes and crimes against humanity.'*[117]

d. Finally, multiple cases have been decided by the Ukrainian courts, and many others are pending. Several judgments of the Supreme court of Ukraine dismissed immunity on not applicable for various grounds, including the nature of the violations at stake.[118]

96. Developments in related areas include recognised limits on 'acts of state' in the *Belhaj and another v Straw* case in the UK, holding that English Courts should take jurisdiction over serious international wrongs such as 'fundamental human rights' and 'jus cogens'.[119] Also in the UK, while concerning diplomatic immunities, the case of *Benkharbouche* held certain provisions of the State Immunity Act were not justified by any rule of customary international law and incompatible with Article 6 ECHR and Article 47 of the Charter. Examining the practice of thirteen other states, the Court considered that *'this [was] hardly a sufficient basis on which to identify a widespread, representative and consistent practice of states, let alone to establish that such a practice is accepted on the footing that is an international obligation'*[120]. This is particularly pertinent in relation to the Dutch Courts assessment of customary international law, where state practice on the application of functional immunities in civil claims is scant.

97. The broader picture of growing limitations on state immunities and divergence of views as to what constitutes 'official acts' is also evident in the Court of Justice of the European Union's decision of 30 November 2021 that *'fraud …corruption or money laundering fall necessarily outside the bounds of the duties of an official or other servant of the European Union …' as commercial.*[121]

98. As the ILC noted, literature and academic commentary has likewise observed these global trends and developments. As one recent study notes: *"It is generally accepted that State officials (including heads of State) may not claim immunity ratione materiae for committing international crimes, given these can never legitimately considered to be official acts of a State.*[122] It light of recent developments it was also noted in 2022 that we see '*growing support in recent national case-law for an exception with respect to civil claims involving serious violations of international*

[115] Seoul High Court, judgement of 23 November 2023 in the Case 2021NA2017165.
[116] Reuters, South Korea court orders Japan to compensate 'comfort women', reverses earlier ruling, 23 November 2023.
[117] Supremo Tribunal Federal (Brazil), Extraordinary Appeal with Interlocutory Appeal 954.858, 23 August 2021, para 179.
[118] E.g. The Supreme Court of Ukraine Judgement no.308/9708/19 of 14 April 2022; no.428/11673/19, 18 May 2022; no.760/17232/20-ts, 18 May 2022; no. 490/9551/19, 8 June 2022; no. 311/498/20, 22 June 2022.
[119] United Kingdom Supreme Court, Belhaj and another v. Straw, UKSC 3, 17 January 2017.
[120] Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs, UKSC 62, 18 October 2017, para 66.
[121] The Court of Justice of the European Union C-3/20 LR Ģenerālprokuratūra, Grand Chamber judgement of 30 November 2021, para. 67.
[122] Dr. M. Chadwich, The Re-Awakening of Universal Jursidction: French-issued Arrest Warrant for Syrian President, Nottingham Law School, 8 December 2023.

law within the forum State's territory, in particular where no alternative judicial remedies exist for victims.'[123]

ECHR decisions and reactions

99. As above, it is recognised that in several cases the ECtHR has found that the nature of wrongs – even jus cogens norms - was not enough, in itself, to preclude the application of immunities. These decisions have been the subject of acute internal and external criticism on this particular issue, as already noted. This reflected in strong dissents in key judgements, including the *Al-Adsani* judgement and in *Jones.*[124].

100. Moreover, and in any event, as noted from the outset, those cases differed from the present one in the nature of the war crimes at issue, and as the vast majority of those arose before the plethora of developments, set out above, rejecting the application of functional immunities to war crimes and other crimes under international law.

101. To dismiss the nature of crimes as irrelevant and unimportant, as the Dutch courts have done, flies in the face of now well-established international norms governing reparation and accountability, and growing recognition that immunities cannot protect former officials accused of crimes of the gravity at issue in this case.

Non-applicability of functional immunities in criminal and civil cases.

102. Finally, in light of confusion surrounding this matter in Dutch courts, it should be noted that the developments above reflect shifting approaches to subject matter immunity - *rationae materiae* – in respect of *individual responsibility* - apply in principle whether to criminal or civil.

103. It is recognised that many developments have focused on or occurred in the field of criminal field, where practice has been prolific in recent years. However, human rights norms underpinning criminal accountability and reparation are the same. This is made clear in the UN Basic Principles on Reparation which recalls that criminal accountability is one form of reparation, intersecting with others, across human rights jurisprudence of this and other courts on positive obligations.[125] This is reiterated most recently in the Ljubljana-The Hague Convention on criminal cooperation for international crimes which notes the overlapping aims of *'fighting impunity',* and *'recognizing the rights of victims […] provide access to justice and adequate redress, including through reparative justice where appropriate."*[126] It would be illogical and antithetical to principles of human rights or international criminal law to elevate the significance of individual criminal accountability for war crimes, while diminishing the parallel rights of victims to reparation, as may be implied in suggesting immunities cannot apply to criminal but still apply to civil action.

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[123] Polakiewicz, page 5.

[124] Dissenting Opinion of Judge Kalaydjieva, 'I not only share the doubts of some of the numerous dissenting judges in the case of Al-Adsani[], but also find it difficult to accept that this Court had no difficulties in waiving the automatic application of State immunity and finding violations of the right of access to a court concerning disputes over employment …but not concerning redress for torture – as in the present case'.

[125] United Nations, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/60/509/Add.1), 16 December 2005.

[126] Preamble to The Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes, 28 May 2023.

104. Second, there is no justification for the distinction from an immunities perspective either. Criminal responsibility of former officials involves no less interference in state affairs or affects relations between states no less than a civil process; indeed one could argue the opposite. Yet – as Courts have noted- this has not affected the development of international criminal law as the conduct in question is not and should not be protected by immunities under international law.

105. Third, the national developments highlighted above include civil as well as criminal cases. Moreover the jurisprudence in criminal context at times reflects explicitly that the same principles apply to civil action, even if criminal cases for serious crimes and violations have been more prolific in recent years.

106. Fourth, that the distinctions between criminal and civil spheres are not clear has long been accepted by experts too. This is again seen in ILC and CAVV reports, which are limited to consider criminal sphere, but both reject the notion that civil immunities are entirely distinct, and certainly that they were clearly established in customary law as the Dutch courts suggested. The ILC explicitly note the connections between the two stating in a 2013 report, emphasising that immunity from civil jurisdiction should not be 'ignored':

> *'These two types of jurisdiction and criminal jurisdiction have in common the fact that immunity from any of them can be invoked; moreover, in practical terms, there are obviously links between the three forms of jurisdiction. For now, suffice it to note that criminal and administrative penalties are clearly related, as seen in national and international jurisprudence, and, from a broader perspective, that civil compensation suits may be an indirect remedy for serious violations of the law, including criminal offences. Lastly, rulings on immunity in the context of civil jurisdiction, in particular, are common and may be applicable, mutatis mutandi, to immunity invoked in the context of criminal jurisdiction.* [127]

107. The CAVV 2023 report notes that the exclusion of civil immunities is not because the law establishes clear immunities there and not in the criminal sphere:

> *'[while the CAVV] does appreciate the reasons for the ILC's decision to limit the draft articles to immunity from criminal jurisdiction … This is <u>not</u> because the law on immunity of State officials from foreign civil and administrative jurisdiction has already fully crystallised, but precisely because that is not the case…"* [128]

108. While this Court has taken a restrictive view in some civil cases in the past, concern has long been voiced in compelling terms. As the dissenting opinion of J. Kalaydjieva stated in Jones,

> '*I find it difficult to accept that general differences between criminal and civil law justify a distinction in the application of immunity in the two contexts' … I also find it "not easy to see why civil proceedings against an alleged torturer could be said to involve a greater interference in the internal affairs of a foreign State than criminal proceedings against the same person" and also "incongruous that if an alleged torturer was within the jurisdiction of the forum State, he would be prosecuted pursuant to Article 5 § 2 of the Convention against Torture … and no immunity could be claimed, but the victim of the alleged torture would be unable to pursue any civil claim".*

109. This reasoning is evident also in the dissent (on state immunity) issue in *Al-Adsani v UK*, where the minority in a court divided 9:8 described the distinction made by the majority between criminal

[127] ILC, 4 April 2013, Second report on the immunity of State from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, UN Doc A/CN.4/661
[128] CAVV, page 7.

and civil proceedings with respect to jus cogens as *'defective'* and *'not consonant with the very essence of the operation of the jus cogens rules'*.[129]

110. Moreover the majority in Jones, while finding no violation in the context of that civil case, noted some uncertainty as to the distinction and highlighted the need for review:

> *'It is clear that in light of the possibility for victims in some States to lodge a civil claim for damages in the context of criminal proceedings, any difference in the approach to immunity ratione materiae between civil and criminal cases will have an impact on the degree to which civil compensation is available in the different States. However, while this is a matter which no doubt requires some further reflection in the context of judicial decisions on immunity or activities of international law bodies, it is not in itself sufficient reason for this Court to find that the grant of immunity in the present case did not reflect generally recognised rules of public international law.*[130]

111. Finally, in practice criminal and civil are often intertwined in domestic systems, as increasingly before international fora.[131] In many systems victims bring criminal and civil action together; in some systems, civil damages follow criminal suits. The limited rationale provided by the Dutch Court of Appeal for a different approach – that 'screening mechanisms" exist in criminal law – does not necessarily hold true and is, in any event, an insufficient basis for a court to deny access to justice and to reach a determination on admissibility and merits of serious claims such as the one at hand.

3. Impact of Immunities - on victims' rights, access to alternative remedies and rule of law

112. As noted above, proportionality requires balancing the legitimate aim pursued by the state (if any) against the extent of the restriction of the individuals rights. The principle that any restriction on rights under the Convention should be minimised, necessarily requires consideration of the extent of the human rights impact of the restrictions in question – in this case the grant of immunity.

113. The Dutch courts flatly refused to take into account a key factor to be evaluated in the proportionality scheme, before restrictions on access to justice can be justified, namely the complete denial of access to justice that would result from the grant of functional immunity.

114. The fact that the victims are Palestinian victims of war crimes in Gaza, who will be left with no alternative route to justice, is fundamental to the proportionality analysis, and cannot be dismissed as 'not important'.[132] Multiple authoritative sources make clear Palestinians have no access to a court of law to make claims in relation to alleged war crimes in Israeli or Palestinian courts.[133] This includes a statement made by the UN Secretary General of the Special Committee

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[129] Dissenting opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Baretto and Vajic in Al-Adsani v UK.
[130] Jones, para 212.
[131] E.g. ICC Statute, Article 75.
[132] Dutch judgements, para 2.5 of the Supreme Court judgment, referring to para 2.5 of the Court of Appeal judgment. The District Court also states that the issue can remain 'undiscussed' at para 4.59.
[133] UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories: Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, A/69/347, 25 August 2014, par. 69; UNGA, Report of the UN High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1: Addendum – Implementation of the recommendations contained in the reports of the independent commission of inquiry

to Investigate Israeli Practices Affecting the Human Rights of Palestinian People and Other Arabs of Occupied Palestinian Territories who concluded in 2016 that *'The Committee is [...] of the opinion that information received casts doubt on the ability of the domestic accountability mechanisms in Israel to bring any measure of justice to the victims of human rights and humanitarian law violations'.* [134]

115. The statement of facts also highlights the complete impunity that has surrounded such crimes, and the cyclical repetition of violations that has characterised successive military campaigns in the Gaza strip. The realities surrounding the lack of access to justice of the victims, and the unique nature of the complete impossibility of bringing a claim where the crimes arose, must at a minimum be taken into account in the proportionality assessment.

116. The relevance of the lack of alternative access to justice as a factor in the proportionality analysis is borne out by the Court's jurisprudence.[135] Considering whether there *are* reasonable 'alternative means to protect the right' and alternative forms of redress has been described as "a regular feature of the Court's case-law."[136] Indeed, in several of the Court's cases relating to alleged article 6 violations, the availability of alternatives remedies is addressed in the court's analysis even if only in *obiter.*[137] The Court paid close regard to the issue in its admissibility decision concerning the *Association des familles des victimes du JOOLA*, where the applicant association and the other civil parties had not found themselves in a situation where there was no remedy at all; the Court noted that victims had not been deprived of all access to justice since they had been able to seek compensation under the scheme for indemnifying the victims of crime. *"*[138]

117. In *Waite and Kennedy* and *Beer and Regan*, concerning the immunity of international organisations, the Court balanced the denial of access to court resulting from the grant of jurisdictional immunity against the availability of "reasonable alternative means" to protect rights.[139] Most recently, in *J.C. and Others v. Belgium* (applicant seeking compensation for Holy See's failures in respect of sexual abuse in the Catholic Church), the Court noted that the existence of an alternative means of redress was desirable and that in this particular case, the applicants "had not been left without remedies".[140] While the Court stated that the outcome of the case, and the permissibility of state immunity in that case, did not *depend* on the availability of alternative remedies, it is noteworthy that the Court nonetheless proceeded to engage in an assessment of

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on the 2014 Gaza conflict and the United Nations Fact- Finding Mission on the Gaza Conflict, A/HRC/31/40/Add.1, 7 March 2016, par. 39; UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories: Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, A/71/364, 30 August 2016, par. 41; Amnesty International, Families Under the Rubble: Israeli Attacks on Inhabited Homes, 2014, p. 41; Norwegian refugee Council, Resource Guide: Israel's Policies towards the Gaza Strip Post 2005, prepared for the Amsterdam Roundtable, October 2014, p. 96.

[134] UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of Occupied Palestinian Territories: Note by the Secretary General, A/71/352, 23 August 2016, par. 64.

[135] Cudak v. Lithuania, para 55.

[136] Polowski, supra, page 6.

[137] McElhinney, paras 39 and 40, Cudak paras. 55 and 58; JC v Belgium, para 71, Ndayegamiye-Mporamazina v. Switzerland, para 64.

[138] Association des familles des victims du JOOLA v. France, para 32.

[139] Waite and Kennedy v. Germany [GC], 26083/94, 18 February 1999, para 68; Beer and Regan v. Germany, 28934/95, 18 February 1999; para 58.

[140] JC v Belgium, para. 71,

alternative remedies available to the applicant. The same approach was applied in *Ndayegamiye-Mporamazina v Switzerland*[141].

118. Examples of domestic courts assessing the availability of alternative remedies in the context of state immunity, include *AA v Germany* where emphasis was placed on the fact that *'the applicants [had] available to them reasonable alternative means to protect effectively their rights'*.[142] Similarly, the Court in *Natoniewski v Germany* concluded on proportionality depended on the availability of these alternative remedies, finding that "*it cannot be said that State immunity imposes a disproportionate restriction on the right of access to court, when the applicants have available to them reasonable alternative means to protect effectively their rights."*[143]

119. Examples from Dutch national practice suggest that in other contexts, alternative remedies has been a significant consideration. In *El-Hojouj v. Libyan Officials* (2012), while not focused on immunities (which the Court did not even address), the Hague District Court judgement did note that '*it is unacceptable to require the claimant to submit this case to the judgment of a court in Libya*.' It is recognised that jurisdiction under Dutch law can itself be based on the notion of 'forum necessitatis,' which reflects the importance of avoiding gaps in justice, and the need to consider that there are situations where it would be unfair or impossible to expect victims to seek justice elsewhere.

120. In the Dutch Supreme Court judgement of 2021 (concerning immunities of international organisations), the Court considered that 'it is particularly important whether the litigant has reasonable alternative means to effectively protect the rights granted to him by the ECHR'.[144]

121. Other examples from within the convention space include several Ukrainian Supreme Court decisions in 2022, that took into account a variety of relevant factors, including the lack of alternative remedies in the courts of the state of perpetrators nationality, to find immunity did not apply to Russia and war crimes in Ukraine. The Ukrainian court emphasised that victims of war crimes in Ukraine could not reasonably be expected to have any prospect of justice in the Russian courts for the protection of their rights, and that there were no alternative mechanisms or international agreements that provided for compensation.[145]

122. This approach is consistent with international human rights standards and the interests of the international community in preventing 'justice gaps' and the "gaps of protection" to which the Court often alludes in its reasoning. This is reflected in high level declarations at UN and regional level on the need to "*ensure accountability, serve justice [and] provide remedies to victims"* of serious violations, and to *"commit to ensuring that impunity is not tolerated for genocide, war crimes and crimes against humanity or for violations of international humanitarian law and gross violations of human rights law, and that perpetrators of any crimes [are brought] to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in*

[141] Ndayegamiye-Mporamazina v. Switzerland, para 64.
[142] Slovenia, Constitutional Court, A.A. against Supreme Court Order No. ii Ips 55/98, 8 March 2001, para 18. The Court found the conflict between victims right to access to justice and application of rule of state immunity did not materialise in circumstances.
[143] Poland Supreme Court, Natoniewski v. Federal Republic of Germany, Case NO IV CSK 465/09), 29 October 2010, cited at para 146 of Jones.
[144] Netherlands Public Prosecutor's Office at the Supreme Court, ECLI: NL:PHR:2021:304, 26 March 2021, Para 2.32.
[145] Supra note 65.

accordance with international law".[146] It is reflected in the development of the 'no safe haven' principle within the evolving field of universal jurisdiction,[147] and as noted, the *forum necessitis* basis for jurisdiction in, among others, Dutch law.

123. It is essential for this Court, and national courts applying the ECHR, to consider the impact of decisions on access to justice and human rights more broadly. A failure to do so, as explicit in the Dutch courts dismissive approach, is one element leading towards the conclusion that the courts did not engage in the balanced proportionality assessment required under article 6.

vi) The restriction must not impair the essence of the right

124. The Court's third potential criterion for finding a breach of Article 6 ECHR relates to "*the very essence of the right"*". Even a restriction that pursues a legitimate aim and is proportionate, if it impairs the essence of access to justice, could render the grant of immunities illegitimate. [148] In this respect it has been noted in relation to immunities that "it is correct that Article 6 may be subject to inherent limitations, but these limitations should not affect the core of the right." [149] The Al-Adsani court cautioned that "*It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired."* In *Cudak,* the Court stated that it *"must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired*.[150]

125. There can be little doubt that the essence of the right has been impaired in this case, where his civil claim was dismissed case without due consideration of evolving nuanced rules of international law, and in a manner that was dismissive of the nature of the crimes and the lack of any prospect of justice elsewhere. This Court has an important role in fulfilling its protective mandate, to ensure that the essence of article 6 is not impaired, and that its jurisprudence does not hamper progress in relation to access to justice.[151]

Dutch courts – manifestly unreasonable findings regarding custom and article 6

126. The applicant submit that, in light of the foregoing, the Dutch court's approach to this case was manifestly unreasonable, and violated his access to justice under article 6.

127. Dutch law require that a restriction on access to is '*established'* in customary law or reflecting 'generally recognises rules' of PIL.[152] However, immunity was presumed, as the 'starting point' by the Dutch courts, not carefully justified as an exception to jurisdiction through establishing customary norms – state practice and opinion juris – in support of functional immunity for war

[146] Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, General Assembly resolution 67/1 of 24 September 2012, para. 22.
[147] See e.g. M. Langer, Universal Jurisdiction Is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jursidiction', 13 Journal of International Criminal Justice, 2015.
[148] *Ashingdane v the United Kingdom*, no. 8225/78, judgment of 28 May 1985, para 57.
[149] See also the Dissenting opinion of Judge Loucaides in the case of *McElhinney v Ireland*:
[150] Cudak v. Lithuania, para 55.
[151] Naït-Liman v. Switzerland (Application no. 51357/07), [GC], 15 March 2018, para. 220.; Fedotova and Others v. Russia (Applications nos. 40792/10, 30538/14 and 43439/14), [GC], 17 January 2023, para. 167, 168.
[152] Eg Al Adsani, para 56.

crimes. Immunity was taken as absolute on the erroneous basis that it is derivative from and commensurate with state immunity. The onus was on the applicant to establish an exception to an assumed rule.

128. This Court has been clear in cases concerning State immunity, that a violation of Article 6 § 1 arises where *"the grant of immunity was not proportionate as it was either not compatible with the customary international law rule or was ordered without proper consideration by the domestic courts of the rule in question (*§192). Courts approach fundamentally flawed and denied access to justice under article 6.

129. It is at this time, and in light of all developments, implausible to consider functional immunity as applicable to all former officials for all acts irrespective of circumstances. A substantial body of international and national comparative practice makes clear at an absolute minimum there is no 'crystallised' rule of absolute immunity of former officials from civil action under CIL. Undoubtedly there are areas of evolution and practice is never uniform. However, as broadly recognised, a decisive trend indicates that war crimes cannot be covered by functional immunity. Myriad exceptions across the field of immunities in general, and ever wider practice of seeing immunities as not applicable to individual responsibility for serious crimes in particular, make this clear, but many of them overlooked or arbitrarily dismissed by the Dutch courts.

130. The Courts review of practice – even to ascertain that there was no exception to its starting point - was selective and lacked legal basis and reasoning. The anomaly of dismissing the German case as the present officials were higher in rank without basis has been noted, as was its rejection of previous practice in *El-Hojouj* case in Dutch courts. The Courts heavy reliance on US, Canadian or UK cases which, unlike in the Netherlands were based on statutes, contrast with its dismissive approach the Italian as it was based mainly on Italian constitutional law. Its disengagement from developments in criminal law on grounds that are unclear and circular, provides further evidence of the Dutch courts failure: *'the question whether developments in or rules of customary international law relating to functional immunity from jurisdiction before national courts in criminal law can be applied by analogy in civil proceedings […]can be left open because there exists is no sufficiently crystalized rule of customary international law applicable to the situation of the adjudication of international crimes before national courts.'* [emphasis added][153]

131. The Dutch courts position on immunities in general – including failure to distinguish state and functional, to consider criminal and civil developments, cannot be reconciled with article 6. Foregoing developments and standards leave no doubt as to the implausibility of the Courts assertion that a norm of CIL had crystallised and provided the basis for blanket immunity. As the Court has noted, *'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 on categories of persons'.*[154]

132. While the Court will be reluctant to review details of domestic judgements and errors of fact or law, that is not what is at issue in this case. It is the Dutch legal system's failure to provide a reasoned legal basis for the grant of the particular immunity in question, and the suspension of

[153] Ziada, Court of Appeal judgment, para 2.7(f).
[154] Fayad v UK, para 65; Cordova v Italy, para 58.

article 6 rights. It is its failure to even consider the egregious crimes to which the immunity applies, dismissed as 'irrelevant', and the indifference to the complete lack of alternative remedies and resulting denial of justice, dismissed as 'unimportant,' both out of step with the standards highlighted above. The refusal to take into account the totality of relevant factors and reach an assessment of proportionality was, in all of the facts of this exceptional case, reveals a clear violation of article 6.

LEGAL ARGUMENT - ARTICLE 14 DISCRIMINATION

1. Article 14 prohibits indirect discrimination in respect of the protection of convention rights, including access to justice under article 6.[155] In this case a violation of article 14, in conjunction with article 6, arises from the courts' application of blanket immunity without regard to the totality of the circumstances, including the disproportionate impact on the applicant as a Palestinian victim.
2. It is well established that a violation of Article 14 does not require discriminatory intent. It suffices that the state's conduct has a disproportionate impact on particular grounds, including grounds of "*nationality …. or other status*". In this case the violations have a disproportionate impact on the applicant as a Palestinian, and a victim of Israeli war crimes in Gaza, in respect of which it is clear that there is no justice system – in Israel or Palestine – before which to pursue claims domestically.
3. The statement of facts makes clear there is no alternative forum before which the applicant could bring his claim. This is not because the courts of territorial wrongs or nationality are inefficient or inadequate, or as the Dutch courts suggested because there will not be a 'fair trial' in those courts, as arises not infrequently in some other article 6 cases. It is because of the unique situation of Palestinians who are in the extreme, almost unprecedented, situation of having no justice system at all before which to assert their rights. They are therefore entirely precluded from pursuing remedies in courts where the war crimes arose, as is amply recognised in reports cited previously.
4. It is relevant to note as background to the article 14 claim that this lack of access to justice of Palestinians, in particular Gazans, within the Israeli justice system, has itself been recognised as discriminatory in authoritative international reports[156] Indeed, the extent of this is reflected in findings that the system amounts to **apartheid**.[157] Pursuing justice by Palestinians abroad has also

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[155] In *Moldovan and Others v. Romania* (no. 2) (2005), the Court accepted access to justice discrimination in the past, where "ethnicity appeared to have been decisive for the length and the result of the domestic proceedings … and their blank refusal to award non-pecuniary damages." It found a violation of Article 14 in conjunction with Article 6.

[156] B'Tselem, The Occupation's Fig Leaf, , Israel's Military Law Enforcement System as a Whitewash Mechanism (May 2016), available https://www.btselem.org/publications/summaries/201605_occupations_fig_leaf; Expert Legal Opinion on the Legal status and the practice of Israeli courts with respect to civil claims brought by Palestinian claimants (25 February 2019), available at https://assets-global.website-files.com/5eefcd5d2a1f37244289ffb6/62d5661cae8e4bc32d68b861_2019%20Legal%20Expert%20Opinion%20Abu%20Hussein.pdf; Al Mezan, Barriers in Access to Justice (20 November 2020), available at https://reliefweb.int/report/occupied-palestinian-territory/barriers-access-justice-2-al-nabaheen-legal-fact-sheet; Adalah, Obstacles for Palestinians in Seeking Civil Remedies for Damages before Israeli Courts (May 2013), available at https://www.adalah.org/uploads/oldfiles/Public/files/English/Publications/Articles/2013/Obstacles-Palestinians-Court-Fatmeh-ElAjou-05-13.pdf.

[157] Amnesty International, Israel's apartheid against Palestinians: Cruel system of domination and crime against humanity (1 February 2022), available at ; A Threshold Crossed https://www.amnesty.org/en/documents/mde15/5141/2022/en/; Human Rights Watch, A Threshold Crossed Israeli Authorities and the Crimes of Apartheid and Persecution (27 April 2021), available at https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution.

been stymied, influenced by interventions by the Israeli state – as in this case through diplomatic note – in an effort to influence the course of the justice processes.[158]

5. Palestinians are effectively stateless persons when it comes to the pursuit of justice and the disproportionate impact on their rights should at least have been taken into account by the Dutch courts. The Courts' blanket approach to the grant of foreign state officials immunity in this case, in particular dismissing as 'not important' whether the victim has an alternative remedy, has had a disproportionate negative impact on him as a Palestinian left with no recourse to justice.
6. It is recalled finally that the grant of immunity in this case appears out of step with the Dutch approach – including judicial approaches – to immunities in relation to defendants from other states and contexts.[159] To the applicant's knowledge this is in fact the only case where individual responsibility has been blocked by this broad reaching, and manifestly unreasonable, approach to functional immunities irrespective of the egregious nature of the crimes in question or the implications for justice.
7. The Applicant alleges that the denial of just in his case, with discriminatory effect, is a violation of Article 14 in conjunction with Article 6.

VI. JUST SATISFACTION

The Applicant seeks a judgment recognising the violation of his rights, just satisfaction, compensation for legal fees, and repayment of costs awarded against him in domestic proceedings.

[i] Submitted on behalf of Ismail Ziada by Helen Duffy Human Rights *in* Practice (HRiP) and Dutch co-counsel Wout Albers on 22 December 2023. The brief was supported by Lottie Hume (HRiP), European Legal Support Centre and Nuhanovic Foundation. This brief was adjusted for submission via the ECHR application form and annexes as per the Court's rules of procedure.

[158] See, for example, the *Kilani* case in Germany of 2021, https://www.ecchr.eu/en/press-release/statement-german-federal-prosecutors-decision-not-to-open-investigations-kilani-case/; the case of *Doron Almog* in the United Kingdom in 2005, https://www.theguardian.com/uk/2005/sep/12/israelandthepalestinians.warcrimes and https://www.aljazeera.com/news/2005/9/20/uk-court-respite-for-israeli-general; again in the UK in 2009 with the case of Tzipi Livni, https://www.theguardian.com/world/2009/dec/16/tzipi-livni-israel-arrest-warrant; finally, in Spain with the case of *Ben-Eliezer et al*, which has been seen as a crucial step in the path of limiting Spanish law on universal jurisdiction in 2009, https://www.reuters.com/article/uk-spain-israel-warcrimes-sb-idUKTRE50S5U420090129/ and https://www.haaretz.com/2009-05-04/ty-article/israel-urges-spain-to-halt-cynical-gaza-war-crimes-probe/0000017f-e870-dc91-a17f-fcfd1cf00000.

[159] In particular, in the case of *El-Hojouj v. Libyan Officials* of 2012, Dutch (civil) courts lifted immunity for 12 Libyan officials accused of torture and inhumane treatment, stating that it was 'unacceptable to require the claimant to submit this case to the judgment of a court in Libya.' *El-Hojouj v. Libyan Officials*, The Hague District Court, 21 March 2012, ECLI:NL:RBSGR:2012:BV9748; also in the case of *H./OM*, the Dutch Supreme Court upheld the conviction of a former Afghan state official for the international crime of torture by the Appeal Court and preserved the defendant's sentence of twelve years to prison. The Supreme Court stated in paragraph 7.2 of the judgement that "neither his then capacity of director of the State Security Service of Afghanistan nor that of deputy minister of State Security grants the accused immunity from jurisdiction as referred to above under 6.6. [statutory recognition of immunity from jurisdiction derived from international law.]", *H./OM*, Court of Appeal The Hague, 29 January 2007, ECLI:NL:GHSGR:2007:AZ7143; H./OM, Supreme Court of the Netherlands, 8 July 2008, ECLI:NL:HR:2008:BC7418.