JUDGMENT BY DUTCH APPEALS COURT REGARDING FUNCTIONAL IMMUNITY IN CIVIL CASES

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By: Dr Joseph Rikhof

On December 7, 2021, a Dutch appeals court upheld (see here) the decision of a lower court of January 29, 2020 (see here) that foreign officials have immunity in civil cases in Dutch law. The original decision had been criticized for conflating the notions of immunity in criminal and civil cases. (see here)

Before discussing the merits of this case, it is useful to recall the principles of immunity of officials in international criminal law. As set out earlier in this Journal (see here), the main principles are as follows. There are two types of immunity held by individuals under customary international law: (a) personal immunity and (b) functional immunity. Both serve as procedural bars to jurisdiction rather than defences.

Personal immunity (or immunity *ratione personae*) attaches to a select number of high offices: specifically, heads of state, heads of government, and ministers for foreign affairs. Personal immunity is absolute, meaning it covers all acts undertaken in an official or private capacity committed while in office; this includes the alleged commission of international crimes. Personal immunity's protection ceases once an individual leaves office. Personal immunity will apply to an incumbent head of state or other high officials unless one of the following conditions is met:

(i) the State represented by the head of state or other high officials waives the individual's personal immunity;

(ii) personal immunity is ousted by a competing rule of conventional international law; or

(iii) personal immunity is ousted by a competing rule of customary international law.

Functional immunity (or immunity *ratione materiae*), by contrast, attaches to a limited class of acts: namely, those performed in an official capacity of behalf of the State. However, it is now widely accepted that functional immunity is not available for international crimes, including crimes against humanity, genocide and war crimes. (for more details, see here at pages 644-653). This denial of functional immunity is accepted at both the international level (see here at pages 654-677, here and here) as well as the national level (see here at pages 677-695). At the national level, there were momentous decisions earlier in 2021 in France (see here with a commentary here) and Germany (see here with commentaries here and here) with the French court accepting functional immunity for state officials (likely because the crimes in question involved torture and arbitrary detention) and the German court denying it for war crimes and other international crimes based on principles of customary international law while leaving the issue regarding the transnational crime of torture undecided.

The acceptance of functional immunity in civil cases is much less accepted as becomes clear in the reasoning of the Dutch appeal court.

Background of the Dutch case

The original judgment pertained to a civil complaint initiated against the supreme commanders of the Israeli army and the Israeli air force by a relative of a number of Palestinians killed by an Israeli airstrike in 2014. According to the claimant, the airstrike amounted to an international crime.

The judge at first instance was of the view that the actions of the Isaeli military commanders amounted to crimes under international law but that this finding had no relevance on the outcome of the lawsuit as there was no rule in customary international law which allows for functional immunity to be

disregarded by national courts in civil cases even if such international crimes had been committed. (see appeal decision, here at paragraphs 2.1-2.7)

The appeal decision

Main principles

The starting point of the decision of the Court of Appeal is the decision of the International Court of Justice (ICJ) in the *Jurisdictional Immunities of the State* case of February 3, 2012 (see here for an overview of the case and here for the judgment). The Court of Appeal quotes the following paragraphs containing the conclusion of the ICJ in its paragraph 3.3, which states:

“83 (…) the Court must nevertheless inquire whether customary international law has developed to the point where a state is not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict. Apart from the decisions of the Italian courts which are the subject of the present proceedings, there is almost no State practice which might be considered to support the proposition that a State is deprived of its entitlement to immunity in such a case.

84. In addition, there is a substantial body of State practice from other countries which demonstrates that customary international law does not treat a State’s entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated.

91. The court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.

93. This argument therefore depends upon the existence of a conflict between a rule, or rules, of jus cogens, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of jus cogens, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.”

The Court of Appeal recognized that the ICJ case pertained to actions of a state and not to its state functionaries but was of the view that the ICJ reasoning should also apply to state functionaries

because the functional immunity of such persons is derivative from the immunity of the state. It relies for this proposition on the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (see here), which states in article 2.1(b)(iv) that “State” means also “representatives of the State acting in that capacity”. While this treaty is silent on ex-representatives, the Court of Appeal was of the view that such functionaries would also be covered by the treaty according to customary international law (paragraphs 3.4-3-6).

According to the Court of Appeal, the rationale for functional immunity for (former) state officials is the same as for state immunity and since there is no exception for the latter it would be difficult to understand why there would be an exception for the former. If there would be an exception for state officials, the state would be implicated because it would have to pay damages to the victims, which would not possible under state immunity. The Court of Appeal refers to the judgments of the Supreme Court of Canada in the Kazemi case (see here) in support for this proposition with the following quotation (paragraph 3.7):

“[89] The appellants argue that a civil suit against the two individual respondents - even if it were successful - would not necessarily lead to an award of damages against the state, and therefore Iran would not necessarily suffer any financial loss. In their view, the proceedings against Mr. Mortazavi and Mr. Bakhshi would have the effect of jeopardizing only the personal patrimony of those two individuals (…).

[90] Even if the appellants were correct in their contention, a matter of which I am not convinced, their argument is premised on a misunderstanding of the purposes of state immunity. Avoiding both the enforcement of an award of damages against a state and the state’s indemnification of its agents are but two of the many purposes served by state immunity. In practice, suing a government official in his or her personal capacity for acts done while in government has many of the same effects as suing the state, effects that the SIA seeks to avoid. Allowing civil claims against individual public officials would in effect require our courts to scrutinize other states’ decision making as carried out by their public officials. The foreign state would suffer very similar reputational consequences (…).”

Precedents for this position

The Court of Appeal then goes on to indicate that international and national jurisprudence is in agreement that there is generally no exception for immunity of (former) state officials for the commission of war crimes or crimes against humanity and refers in paragraph 3.8 to the decision of the European Court of Human Rights (ECtHR) in the Jones case (see here), which had said:

“213. Having regard to the foregoing, while there is in the Court’s view some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials, the bulk of the authority is (…) to the effect that the State’s right to immunity may not be circumvented by suing its servants or agents instead. (…)”

The Dutch appeals court also points out in the same paragraph that this was still the position of the ECtHR in October 2021 in a situation where victims of abuse by the Catholic church had sued the Vatican (see here for the judgment of the ECtHR).

The Court of Appeal then refers to jurisprudence of the House of Lords in the UK (see here) and the highest courts in New Zealand (see here) and Canada (see here) while pointing out that while the Canadian judgment was based on the *State Immunity Act*, it can still be used as an indication of customary international law. (paragraph 3.9). Jurisprudence in the United States points to the same direction (paragraphs 3.10-3.11) while decisions in South Korea, the Netherlands and Italy, which appears to provide for an exemption to this type of immunity in situations of international crimes were distinguished, namely for South Korea because the jurisprudence was not consistent (paragraphs 3.12 and 3,14), for the Netherlands because immunity was not part of that court's reasoning (paragraph 3.13) and for Italy because the jurisprudence did not address the question of immunity in the context of customary international law but only decided that the principle of immunity was in violation of the Italian constitution and, according to Dutch appeals court, as such had a limited precedential effect on this issue. (paragraph 3.15)

Difference between civil and criminal law

The Court of Appeal also addressed the fact that immunity is much more restricted in criminal law than in civil law. While it acknowledged that from a systematic point of view it is not very satisfactory to have different principles regarding a legal issue in different areas of law, the fact remained (paragraph 3.17) that for a determination of customary international law the element of practice is primarily established by judicial precedent. It finds support for that approach in a statement by the ILC (International Law Commission) Special Rapporteur for the topic of *ius cogens* (see here), which says in paragraph 130 of its report:

"Second, and more importantly, as agreed at the commencement of the consideration of the topic, what should guide the Commission should be State practice and not theoretical considerations. It is particularly important to observe, in this regard, that some cases upholding immunity in civil matters have noted that different rules may apply to criminal matters. To the extent that State practice, in the form of national court cases, supports the distinction, the Commission should follow that practice." (paragraph 3.17)

The Court of Appeal also again relies on international and national jurisprudence to make this point by relying in paragraphs 3.18-3.19 on the caselaw of the ICJ (see here, paragraph 91), the ECtHR (see here, paragraph 61), the German Federal Court of Justice (see here, paragraph 17(a)), the House of Lords of the UK (see here), namely the speeches by Lords Millet and Randerson) and the Supreme Court of Canada, where this quotation from the Kazemi case (see here, paragraph 103) is used to illustrate the point:

“While an exception to immunity for jus cogens violations exists in the criminal context, no such exception has developed in the civil context. My colleague Justice Abella as well as Breyer J. of the United States Supreme Court take issue with this distinction, essentially arguing that the existence of universal criminal jurisdiction contemplates the existence of universal civil jurisdiction as well (…). In my view, principled grounds justify the distinction between the exception to immunity in the civil versus the criminal context. These include the “long pedigree” of exceptions to immunity in criminal proceedings, and the “screening mechanisms” that are available to governments in criminal suits as compared to civil suits (…).”

An important reason to justify this difference according to the Court of Appeal is the fact that in criminal cases, the government has an obligation to prosecute a case if there is sufficient evidence while this is not the case in civil law. (paragraph 3.20)

Sources cited by the appellant to argue that there have been developments which equate the principles of immunity in civil and criminal law, namely the *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State* by the Institut de Droit International (IDI) (see here, article III) and the *Resolution on the Universal Civil Jurisdiction with regard to Reparation for International Crimes* (see by the same organization here, article 5) were dismissed because the accompanying reports to these resolutions made it clear that both were aspirational rather than statements of existing law. (paragraphs 3.21.2 and 3.21.3)

Final observation by the court

In the last paragraph of the judgment the Court of Appeal says that it is not blind to the suffering of the victims or the developments in the area of functional immunity in criminal law, including making an exemption for a lower place functionary as was done in the German case earlier in 2021. (see here) However, according to the Court of Appeal it was not possible to extend these developments to civil law, at least not in the case at hand where the persons claiming immunity are very highly placed military personnel, which carried out the official policy of Israel, which would mean that a judgment about their actions would by implication also be a judgment about the state of Israel. (paragraph 3.24)

Conclusion

While serious inroads are being made regarding the reach of exceptions to functional immunity, especially at the international level, at the national level there are still gaps. In the latter situation, there is a spectrum in the state of the law ranging from some national courts having exceptions to this type of immunity in criminal law for the international crimes of war crimes and crimes against humanity in criminal cases while other courts have expressed doubts about this proposition for transnational crimes, such as torture. On the other hand, there is relatively clear rejection of any exception in civil cases. However, even in the civil law area there appears some interest in considering exceptions as can be seen from examples given by the Dutch Court of Appeal with respect to developments in South Korea and Italy and which can also be seen in the final paragraph of judgment of the Court of Appeal,

which seems to signal a possible different outcome if the officials in question had not been so closely aligned with official government policy.

Another development, which seems to go in the same direction is the fact that countries like the United States and Canada have passed legislation, which specifically sets out exceptions to state immunity if a state has supported terrorism; in the United States, this can be seen in section 1605A of chapter 28 of the *United States Code* (see here) while in Canada, the same was done in section 6.1 of the *State Immunity Act* (see here). Both countries have designated certain countries as supporters of terrorism. In Canada Iran and Syria has been listed as such (see here) while it also gives victims of terrorism supported by such country a cause of action in a Canadian court by virtue of section 4.1 of the J*ustice for Victims of Terrorism Act* (see here), which was most recently successfully used by victims of the downing of an Ukrainian airliner by Iranian armed forced just over two years ago (see for the liability decision here while for the damages decision see here).

Clearly with all these recent developments, the last word on the issue of immunity in international law has not been written yet.

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About the author

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