Functional immunity of foreign State officials in respect of international crimes before the Hague District Court: A regressive interpretation of progressive international law

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On 29 January 2020, the District Court of The Hague rendered a possibly momentous judgment that may reverse an international trend to deny functional immunity to State officials in respect of allegations of international crimes. The reader may be aware that the International Law Commission (ILC) has acknowledged this trend in Article 7 of its Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction ("ILC Draft Articles on Immunity 2017"). The Dutch judgment, if upheld on appeal, may now usher in a return to the traditional position that State officials, just like the State itself, enjoy functional immunity in respect of all official acts, regardless of the nature of these acts. The judgment is all the more surprising as the Dutch Government itself has been a vocal supporter of an exception to functional immunity when it comes to international crimes. Incisively, the District Court held in this respect that it 'must apply customary international law and is not bound by the opinion of the Dutch government'.

The Hague District Court's 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. He was of the view that his claim was sufficiently closely connected to the Netherlands since he holds Dutch nationality and resides in the Netherlands, and thus that jurisdiction could be established on the basis of 'forum of necessity'. Under Dutch law, this principle confers jurisdiction on Dutch courts in cases that have a sufficiently strong nexus with the Netherlands, and regarding which it is unacceptable to require that the claimant submit the claim to a foreign court (Article 9(c) Dutch Code of Civil Procedure). However, eventually, the Court did not (have to) address the jurisdictional issue, as it disposed of the case on immunity grounds. It held that the commanders enjoyed functional immunity from jurisdiction as they conducted military operations in an official capacity. The Court held that there was no customary norm which abrogated this immunity in respect of allegations that an international crime has been committed.

It is recalled that functional immunity of foreign state officials is governed by customary international law. Recently, the ILC has attempted to codify (and to progressively develop) relevant rules in the ILC Draft Articles on Immunity 2017. In Article 7 of the ILC Draft Articles on Immunity 2017, a majority of ILC members agreed on the following limitation of functional immunity (immunity *ratione materiae*) in respect of international crimes: 'Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) crime of

genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; (f) enforced disappearance.' However, Article 7 was particularly controversial: critics stated that the ILC took its wishes for reality, as the rule was not backed up by sufficient State practice.

This lack of consensus at the ILC has now come back to haunt its codification effort. While the ILC justified codifying the immunity exception in Article 7 *because* there was a discernable trend, the Hague District Court interpreted the *trend* to deny functional immunity as *lex ferenda* rather than *lex lata*. This shows that the ILC's mission to progressively develop international law may well backfire: does progressive development not *reinforce* rather than upend the *status quo*? As debates in legal practice will naturally tend to coalesce around the ILC's work, the ILC's explicit statement that a rule amounts (only) to progressive development of the law, may precisely be a red alert for more conservative-minded judges.

From a positivist perspective, it may be understandable that the Court was not willing to equate a *trend* in State practice with a *general* State practice, as required for the existence of a norm of customary international law. However, on closer inspection, there was in fact no need for the Court to engage at such length with the work of the ILC, and to inquire whether a customary exception had crystallized in respect of international crimes. After all, the ILC's work is limited to functional immunity of State officials in *criminal proceedings*, whereas the case before the Hague District Court was a *civil* one. Instead of ruling that functional immunity does, *as a general matter,* not apply to international crimes, the District Court may have wanted to limit the scope of its ruling to *civil matters only*. It could have done so by just relying on the judgment of the European Court of Human Rights (ECtHR) in *Jones v United Kingdom* (2014), in which the ECtHR decided that functional immunity of foreign State officials applied to *civil claims* based on allegations of torture, while stopping short of ruling that such immunity also extended to criminal proceedings. In fact, in *Jones*, the ECtHR admitted that different rules may apply to criminal as opposed to civil proceedings. As such, it distinguished the *Pinochet* decision of the UK House of Lords from *Jones*: in criminal proceedings, functional immunity may be abrogated on the grounds that the UN Torture Convention obliges States Parties to exercise jurisdiction.

One may take issue with the distinction made by the ECtHR (see here for my critique of *Jones*), but it is undeniable that, for purposes of upholding or rejecting immunity, it laid down an important distinction between civil and criminal proceedings. Why the District Court collapses this distinction is not fully explained. In a sibylline manner, the Court states that '[i]n the absence of a sufficiently detailed rule of customary international law in the prosecution of international crimes before national courts, there can be no one-to-one extension or analogous application [from criminal to civil proceedings]'. What the Court may have meant is that the international law of immunities does not make a distinction between criminal and civil proceedings, and that functional immunity applies across the board, regardless of the domestic characterization of particular legal

proceedings. The upshot is that, at least in the Hague District Court's view, State official (functional) immunity from jurisdiction extends to all international crimes, whether the claims are based on criminal or tort law.

The consequences of this decision, if followed on appeal and by courts in other jurisdictions, are far from negligible: upholding State official immunity in respect of international crimes renders (quasi-)universal jurisdiction largely ineffective. Very often *State officials* are prosecuted or sued under the universality principle (or the principle of forum of necessity in civil cases), whereas, per the District Court's judgment, these officials would simply enjoy immunity on the grounds that international crimes are official acts. The District Court gave a small foretaste of what may be about to come, where it refused to 'delve deeper … in the discussion on the Dutch criminal law [cases brought under the universality principle] as alleged by [claimant], as these do not reflect the current status of customary international law'. In other words, even if, in the past, immunity may have been rejected in those cases (perhaps validly), under *current international law*, such immunity has to be respected. From an accountability perspective, this evolution is clearly undesirable, as it opens up a glaring impunity gap. It is hoped that, if an appeal is filed, an appeals court at least limits the scope of immunity to civil matters. Alternatively, the Dutch Government, which, as mentioned, is a staunch supporter of an exception for international crimes, may want to step in and amend the law along the lines of Article 7 ILC Draft Articles on Immunity 2017. Ultimately, for a State to reject foreign State official immunity regarding international crimes need not violate international law. Rather, such a State moves in a grey area not fully governed by international law that allows them to reject immunity on the grounds that such furthers anti-impunity norms which are an integral part of the international legal order.