New Developments in State Practice on Immunity of State Officials for International Crimes

On January 28, 2021, Germany’s Federal Court of Justice (Bundesgerichtshof) (BGH) issued a landmark judgment.¹ The case, brought under Germany’s code of crimes under international law (Völkerstrafgesetzbuch), is an important indicator of state practice regarding the customary international law on immunity of foreign state officials prosecuted for committing core international crimes. The issue has become a source of contention before the U.N. International Law Commission (ILC) as part of its program of work on “Immunity of State officials from foreign criminal jurisdiction.”² The judgment of the BGH thus has implications not only for the ILC’s work, but for other pending cases against former officials accused of international crimes.³

The case involved an Afghan army officer accused of coercing, mistreating, and desecrating captured Taliban fighters. After he was convicted by a Higher Regional Court in Munich, the case was appealed to the BGH, which devoted a wide-ranging and thoughtful opinion to the issue of the accused’s immunity ex officio. Despite agreeing that individuals may sometimes have functional immunity deriving from state immunity (immunity ratione materiae as opposed to personal immunity, or immunity ratione personae), the court nonetheless found that no such immunity existed for individuals accused of war crimes.⁴

In arriving at its decision, the BGH relied upon the proceedings at Nuremberg and particularly Article 7 of the International Military Tribunal’s Statute, providing that “the official position of defendants, whether as Heads of State or Responsible officials in Government Departments, shall not be considered as freeing them from
responsibility. . . .”\(^5\) Article 7 was later codified by the ILC as Nuremberg Principle III, excluding immunity for international crimes based upon an individual’s official position.\(^6\) The court also surveyed German caselaw, the [1962] *Eichmann* decision of Israel’s Supreme Court,\(^7\) a series of national court decisions from Belgium, France, Italy, the Netherlands, South Africa, and Switzerland concerning immunity for international crimes,\(^8\) the jurisprudence of international criminal courts and tribunals,\(^9\) and the writings of scholars.\(^10\)

The BGH also canvassed the ILC’s ongoing work, noting that a controversy had emerged during the proposal and adoption of the Commission’s draft Article 7 providing for an exception to the immunity from prosecution for international crimes. Article 7 states that “immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply” to a series of international crimes: genocide, crimes against humanity, war crimes, the crime of apartheid, torture, and enforced disappearance.\(^11\) Several members of the Commission had objected to this proviso in a recorded vote in 2017 (a highly unusual occurrence at the ILC where consensus is generally the rule), arguing, *inter alia*, that it was not supported by state practice.\(^12\) In its own important contribution to state practice, however, the BGH noted that the ILC’s work is not yet complete and that the dissenting views to draft article 7 appear contrary to the state of customary international law, as reflected in most of the scholarly literature on the subject.\(^13\) Thus, the BGH found that immunity did not prevent Germany’s prosecution of the accused and amended the charges to include a guilty verdict that included the war crime of torture.

The BGH judgment is relatively narrow. It explicitly addresses only the question of immunity for war crimes, although it relies upon cases involving other international crimes including genocide and crimes against humanity. The accused Afghan army officer was also relatively low-ranking, leaving open the question of whether higher-ranking officials might have more protection. Notably, the German Federal Prosecutor’s submission to the BGH, which forms another highly instructive piece of German state practice, was much broader than the BGH: it asserted that functional immunity is inapplicable in foreign and international criminal proceedings for any crime under customary international law, irrespective of the state official’s rank.\(^14\) The BGH did not disagree with this broader legal view but, for reasons of judicial economy, preferred a narrower formulation of its *ratio decidendi*.

Existing precedent, including the Nuremberg judgment, *Eichmann*, and a host of other decisions including proceedings against former Rwandan officials in France\(^15\) and prosecutions of former Syrian regime officials in Germany,\(^16\) makes the BGH’s recent judgment unsurprising, if nonetheless significant. Recent reiterations of absolute
immunity by foreign state officials in court filings, by some scholars, and now before the
ILC have generated reexamination of what was previously considered a core principle of
international criminal law. It may therefore be useful to examine other national cases to
determine whether they align with the BGH’s recent decision, particularly given the
increasing number of cases now being brought against former officials suspected of
international crimes in several European states.

A recent compilation of such cases includes a significant number of ongoing proceedings
against foreign state officials in Argentina, Austria, Belgium, Canada, Finland, France,
Ghana, Hungary, Italy, Lithuania, Senegal, Spain, Sweden, Switzerland, the
Netherlands, the United Kingdom, and the United States. In a recent, related case
against Yankuba Touray, a senior member of former President Yahya Jammeh’s regime,
Gambia’s Supreme Court found that customary international law and the African (Banjul)
Charter on Human and Peoples Rights required it to “interpret and apply Gambian law in
a manner that does not undermine th[e] legitimate expectation [amongst Gambians].” In
the court’s view, this excluded the possibility of immunity for serious human rights
violations, even when the immunity had constitutional status. Along with other European
countries, Germany itself has many cases pending against high-ranking former Syrian
government officials charged with crimes committed during the Syrian Civil War.
Assuming the proper conditions are present for the exercise of prescriptive and personal
jurisdiction in these cases, they represent an important global effort to provide some
measure of accountability for atrocities committed in the course of Syria’s ongoing conflict.

The BGH recognized the current controversy about the status of Nuremberg Principle III
and its operation before national courts but found that it remained a rule of customary
international law and that state practice had not supplanted it with a new rule of customary
international law providing for immunities. This question has also arisen before
international courts and tribunals faced with heads of state asserting immunity before
them. Although the ILC has raised but not yet expressly addressed immunities before
international courts and tribunals in its current program of work, the question of immunity
ratione personae arose at the International Criminal Court (ICC) in the Al Bashir case
when Sudan’s former President repeatedly asserted his immunity before the Court. In
2019, the ICC Appeals Chamber rejected these claims, finding implicitly that the
protests of some states against the rule depriving heads of state of personal immunity in
international criminal proceedings had not yet modified the rule.

The BGH’s decision further resonates with the precedent set in 1998 when British Law
Lords decided that former Chilean President Augusto Pinochet could be extradited to
Spain to stand trial on charges of torture. Pinochet was narrowly decided, and the Law
Lords split on the basis for their decision. Moreover, the subsequent pushback on universal jurisdiction in the wake of *Pinochet* restricted the ability of national jurisdictions to continue to pursue similar cases. Yet the fundamental point that the *Pinochet* case made—that it is “absurd . . . to allow an immunity that [is] virtually coextensive with the offense”—most certainly informed the recent judgment of the BGH.

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1 BGH, Jan. 28, 2021, 3 StR 564/19 [*BGH Immunity Decision*].
4 *BGH Immunity Decision*, supra note 1, ¶ 17.
5 Agreement for the prosecution and punishment of the major war criminals of the European Axis (Aug. 8, 1945), art. 7.
8 *BGH Immunity Decision*, supra note 1, ¶¶ 27-33.
9 Id. ¶¶ 24-26.
10 Id. ¶¶ 35-39.
13 *BGH Immunity Decision*, supra note 1, ¶ 38.
14 Functional immunity of foreign state officials before national courts, a legal opinion by Germany’s federal public prosecutor general, ___ J. INT’L CRIM. JUSTICE ___ (forthcoming, 2021).


26 Eighth report on immunity of State officials, supra note 11, proposing a Draft Article 18 providing that the ILC’s rules on immunities of State officials are “without prejudice to the rules governing the functioning of international criminal tribunals.”

27 Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, Case No. ICC-02/05-01/09 OA2 (May 6, 2019).


29 Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, Case No. ICC-02/05-01/09 OA2 (May 6, 2019).


27 R v. Bow Street Magistrates’ Court ex parte Pinochet (No. 3) [2000] AC 147.
28 Kaleck, supra note 18.