

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 France¹⁵ 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.¹⁷ 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,¹⁸ Ghana, Hungary, Italy, Lithuania, Senegal, Spain, Sweden, Switzerland, the Netherlands,¹⁹ the United Kingdom, and the United States.²⁰ 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.²¹ Along with other European countries,²² Germany itself has many cases pending against high-ranking former Syrian government officials charged with crimes committed during the Syrian Civil War.²³ 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,²⁴ 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,²⁵ 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.²⁶

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.²⁷ *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.²⁸ Yet the fundamental point that the *Pinochet* case made—that it is “absurd . . . to allow an immunity that [is] virtually coextensive with the offense”²⁹—most certainly informed the recent judgment of the BGH.

About the Author: Leila Nadya Sadat, James Carr Professor of International Criminal Law, Washington University Law School; Senior Research Scholar, Yale Law School. Special Advisor on Crimes Against Humanity to the International Criminal Court Prosecutor. This essay is based upon an unofficial translation of the German decision at issue, prepared by the author.

¹ BGH, Jan. 28, 2021, 3 StR 564/19 [*BGH Immunity Decision*].

² *Report of the International Law Commission to the General Assembly*, 72 U.N. GAOR Supp. No. 10, U.N. Doc. A/72/10 (2017).

³ Claus Kress, *German Court Major Judgment on Foreign Officials' Lack of Immunity in War Crimes Trials*, JUSTSECURITY (Feb. 1, 2021), <https://www.justsecurity.org/74457/german-court-major-judgment-on-foreign-officials-lack-of-immunity-in-war-crimes-trials/>.

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.

⁶ U.N. Int'l L. Comm'n, *Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* (1950), https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf.

⁷ CrimA 40/61 Eichmann v. Attorney General, 16 PD 2033 (1962).

⁸ *BGH Immunity Decision*, *supra* note 1, ¶¶ 27-33.

⁹ *Id.* ¶¶ 24-26.

¹⁰ *Id.* ¶¶ 35-39.

¹¹ U.N. Int'l L. Comm'n, *Eighth report on immunity of State officials from foreign criminal jurisdiction*, by Concepcion Escobar Hernandez, Special Rapporteur (Feb. 28, 2020), U.N. Doc. A/CN.4/739, <https://undocs.org/pdf?symbol=en/A/CN.4/739>.

¹² Report of the International Law Commission: 69th session (1 May – 2 June and 3 July – 4 August 2017), ¶ 74, <https://legal.un.org/ilc/reports/2017/english/chp7.pdf>. Sean D. Murphy, *Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?* 112 A.J. INT'L. L. 4,8 (2018).

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).

¹⁵ Cour d'Assises de Paris (July 7, 2016), 14/0044, <https://www.legal-tools.org/doc/b74c0f/> (France); Tito Barahira, Trial International (July 14, 2020), <https://trialinternational.org/latest-post/tito-barahira/>; Octavien Ngenzi, Trial International (July 14, 2020), <https://trialinternational.org/latest-post/octavien-ngenzi/>.

¹⁶ OLG (Feb. 24, 2021), Az. 1 StE 3/21. See also Frank Jordans, *Conviction in landmark case over Syrian government torture*, AP (Feb. 24, 2021), <https://apnews.com/article/state-courts-bashar-assad-crime-germany-courts-b7bd09dd16168fff3980d5e4850aa8fd>.

¹⁷ See, e.g., Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L. L. 815 (2010).

¹⁸ Although a recent judgment rejected the possibility of pursuing former President George W. Bush, other high-ranking members of his government, and the camp commander at Guantánamo Bay in a case alleging torture of detainees, on the grounds that the suspects were immune under international law, Cour de Cassation, Chambre Criminelle, Case No. A 20-80.511 F-P+B+I, Judgment of January 13, 2021, prosecutions of former Nazis, Bosnians, and Rwandans have moved forward. See also Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, 30 MICH. J. INT'L. L. 927, 936-38 (2009); Leila Nadya Sadat, *Transjudicial Dialogue and the Rwandan Genocide: Aspects of Antagonism and Complementarity*, 22 LEIDEN J. INT'L. L. 543 (2009).

¹⁹ Like France, Dutch practice is not uniform. See Cedric Ryngaert, *Functional immunity of foreign State officials in respect of international crimes before the Hague District Court: A regressive interpretation of progressive international law*, EJILTALK! (Mar. 2, 2020), <https://www.ejiltalk.org/functional-immunity-of-foreign-state-officials-in-respect-of-international-crimes-before-the-hague-district-court-a-regressive-interpretation-of-progressive-international-law/>. The case referenced by Professor Ryngaert is currently on appeal.

²⁰ Trial International, annual review 2021, https://trialinternational.org/wp-content/uploads/2021/04/TRIAL_International_UJAR-2021.pdf.

²¹ State v. Yankuba Touray, Supreme Court of the Gambia, Case No. SC. CR/001/2020 (Mar. 19, 2021), https://www.hrw.org/sites/default/files/media_2021/03/YANKUBA%20TOURAY%20JUDGMENT.pdf.

²² See, e.g., Lena Bjurström, *Sweden on the Frontline with Syria Cases*, JusticeInfo.net (Feb. 11, 2020), <https://www.justiceinfo.net/en/73587-sweden-frontline-syria-cases.html>; *Syria - Joint op-ed by Jean-Yves Le Drian and 17 of his European counterparts on the fight against impunity for crimes committed in Syria*, Ministère de l'Europe et des Affaires étrangères (Mar. 31, 2021), <https://www.diplomatie.gouv.fr/en/country-files/syria/news/article/syria-joint-op-ed-by-jean-yves-le-drian-and-17-of-his-european-counterparts-on>. Reem Salahi, *The road to justice for Syria goes through Europe*, MEI@75 (July 14, 2020), <https://www.mei.edu/publications/road-justice-syria-goes-through-europe>.

²³ See, e.g., Ben Hubbard, *German Court Convicts Former Syrian Official of Crimes Against Humanity*, NY TIMES (Feb. 24, 2021), <https://www.nytimes.com/2021/02/24/world/middleeast/germany-court-syria-war-crimes.html?action=click&module=RelatedLinks&pgtype=Article>.

²⁴ *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."

²⁵ 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).

²⁶ *Id.* ¶¶ 53-54; Leila Nadya Sadat, *Heads of State and Other Government Officials Before the International Criminal Court: The Uneasy Revolution Continues*, in THE ELGAR COMPANION TO THE INTERNATIONAL CRIMINAL COURT (MARGARET DEGUZMAN & VALERIE OOSTERVELD, eds., 2021); Leila Nadya Sadat, *Why the ICC's Judgment in the al-Bashir Case Wasn't So Surprising* (July 12, 2019), <https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/>; Claus Kress, *Article 98: Cooperation with respect to waiver of immunity and consent to surrender*, in ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT ARTICLE-BY-ARTICLE COMMENTARY (Kai Ambos, ed., 4th ed. 2021). *But see* Dov Jacobs, *You have just entered Narnia: ICC Appeals Chamber adopts the worst possible solution on immunities in the Bashir case*, SPREADING THE JAM (May 6, 2019), <https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/>

²⁷ R v. Bow Street Magistrates' Court *ex parte* Pinochet (No. 3) [2000] AC 147.

²⁸ Kaleck, *supra* note 18.

²⁹ Joanne Foakes, *Immunity for International Crimes?* Chatham House Briefing Paper (Nov. 2011), p. 10, https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111_foakes.pdf.