insights

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The Immunity of International Judges in Their Home Countries: Final Accord in the Case of Judge Akay v. Türkiye

Introduction

International judges' independence has never been more critical, with sanctions by the United States and criminal proceedings in Russia targeting International Criminal Court (ICC) judges.[1] The European Court of Human Rights' (ECtHR or Court) judgment of April 23, 2024, in the case of Akay v. Türkiye,[2] confirming the immunity of international Judge Akay against national prosecution is, therefore, of significance and should not be overlooked.

This *Insight* will review and analyze the findings of the ECtHR regarding the personal immunity of international judges, whose purpose is to preserve their independence and protect the integrity of international legal proceedings. It will also juxtapose Judge Akay's immunity with the immunity granted to other international judges against criminal proceedings and discuss their applicability in the judges' home state.

Background

In September 2016, while working on a case for the UN International Residual Mechanism for Criminal Tribunals (IRMCT), Judge Akay was arrested in Türkiye, his state of nationality, on allegations implicating him in the failed coup d'état of that year. Despite statements from the UN Office of Legal Affairs (OLA) and from the IRMCT's President

asserting Judge Akay's immunity, Turkish authorities proceeded with his detention and, later, trial.

In December 2016, Judge Akay lodged an application with the ECtHR alleging, *inter alia*, that, considering his immunity as a UN judge, his arrest and pre-trial detention in Türkiye were not "in accordance with a procedure prescribed by law" as required by Article 5(1) of the European Convention on Human Rights.[3]

The main dispute was not about Akay's functional immunity, but his personal one. Personal immunity is attached to the official *position* and lasts only as long as the person is fulfilling the official role (or until the immunity is waived by the entity on behalf of which the person acts – in Akay's case, the UN). In contrast, functional immunity is attached to the official *acts*, attributed to the entity rather than to the agent, and is not temporally limited. It was not in dispute that Akay had functional immunity and that the alleged criminal acts were unrelated to his judicial function. Therefore, the core issue of the case was whether he enjoyed *personal* immunity from criminal proceedings during the pendency of his work as a judge at the IRMCT and, if so, whether such immunity was applicable in his *own* State of nationality.

Of note, the issue under discussion was purely legal, independent of the evidence, or lack thereof, in support of Akay's detention and conviction. The evidence professed by Türkiye was discussed in-depth in another ECtHR judgement.[4]

The ECtHR's General Findings on Immunity of International Judges

With this background in mind, in its recent Judgment the Court made several interesting legal findings regarding immunities.

First, it clarified that the principle of judicial independence at the domestic level applied to international judges and courts as well, since it was required for the proper administration of justice.[5] This is a sensible starting point, even considering that the notion of "international judge" is more amorphic than implied and lacks a general legal definition. The administration of justice, whether national, international or hybrid, would be dangerously impaired if the triers of law or fact were not independent and impartial; shielded from any foreign intervention in their decision making. However, in the case at

hand, the arrest of Akay was clearly unrelated to his work as a judge at the IRMCT; Türkiye was not suspected of attempting to influence the IRMCT's work. In this regard, Akay's position was no different from the 160 senior Turkish judges who were also detained in relation to the failed coup d'état.[6] Certainly, by arresting him, Akay could no longer discharge his duties, which hampered the work of the IRMCT; but it was not his judicial independence that was targeted.

The ECtHR also held that the issue of immunity should have been addressed by domestic courts swiftly and thoroughly, rather than after eight months of detention, as in the case of Akay.[7] Indeed, such a delay in the assessment of immunity frustrated its *raison d'étre* – to protect the inviolability of the person. This was also supported by the International Court of Justice's (ICJ) 1999 advisory opinion that it was a "generally recognized principle of procedural law" that questions of immunity were preliminary issues to be expeditiously decided *in limine litis*.[8]

Personal Immunity of International Judges in the State of Nationality

The Court then found that Akay enjoyed personal immunity. It noted that the UN General Convention on Immunities[9] applied to IRMCT judges (as stipulated in its Art. 29(1));[10] and that the language of Section 19 of the UN General Convention on Immunities, which conferred immunity to certain senior UN officials, was identical to the language in the IRMCT Statute (Art. 29(2)) – both referring to immunity that was granted to "diplomatic envoys". It concluded that "based on the ordinary meaning of the very wording of the relevant instruments, read in context, [Akay] appears to have enjoyed full diplomatic immunity."[11] In this regard the Court, without saying so expressly, seemed to follow the customary law codified in the Vienna Convention on the Law of Treaties[12] regarding the interpretation of treaties, assessing the "ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" and "any agreement related to the treaty."[13] However, the next question that the Court had to grapple with was whether equating the immunity of international judges to that of a "diplomatic envoy" meant that they also had personal immunity in their home country?

The Vienna Convention on Diplomatic Relations (VCDR)[14] and the practice of states is crystal clear that diplomatic envoys, a subcategory of heads of mission, enjoy personal

immunity in the "receiving State." However, it also states that the immunity is *not* applicable in the agent's state of nationality, even when present there in official capacity.[15]

Following this logic, Türkiye argued that Akay, a Turkish national, did not have immunity in its territory and that finding otherwise would mean that UN judges could commit numerous crimes without risk of arrest or being brought to justice in their own state of nationality, unless permission was received from the UN – a view which was, according to Türkiye, untenable. In contrast, Akay explained that Türkiye's interpretation would mean that IRMCT judges would only have personal immunity in the Netherlands, even though they generally discharged their judicial duties in their home states.

The Court concluded that being accorded the same immunities as a "diplomatic envoy" did not mean that you were one:

> the Court emphasises that while the provisions of the [VCDR] are certainly relevant in assessing the scope of the immunity accorded to the applicant, not least because it is part of customary international law on the issue of privileges and immunities, it is not wholly transposable to the situation of the applicant, who benefited from such privileges and immunities in his capacity as a judge of the [IRCMT], the ultimate aim being to protect the independence of the judges, and hence of the tribunal, *vis-à-vis* any State.[16]

The Personal Immunity Granted to Judges in other International Courts

The Court's general statement that the ultimate aim of immunity granted to international judges, as in the case of Judge Akay, is to protect their independence and that of the tribunal "*vis-à-vis* any State," including the state of nationality, will be reviewed in light of the immunity granted to judges in other international judicial institutions.

First, in the case of the ICJ, judges are granted diplomatic immunity "when engaged on the business of the Court".[17] This is an odd phrase that seems to confine, at least temporally if not also geographically, the personal immunity of ICJ judges.[18] Interestingly, this formulation is reproduced in Article 29(2) of the IRMCT Statute. But, the agreement reached in 1946 with the Dutch authorities – the ICJ's host state – discriminates between foreign judges and Dutch ones; the latter only enjoy functional immunity in the

Netherlands.[19] It is also not obvious that the foreign judges have personal immunity in their home countries,[20] especially considering the Court's main residence is in The Hague (so they do not need to "engage in the business of the Court" outside The Netherlands).[21]

The status at the International Tribunal for the Law of the Sea (ITLOS) is similar. ITLOS judges do not have any personal immunity in their country of nationality or permanent residence unless "engaged on the business of the Tribunal" – a function they fulfil habitually in Germany, the host state.[22] ITLOS' headquarters' agreement with Germany provides judges with the same immunity that the host country provides to the heads of diplomatic missions,[23] except for judges who are German or have permanent residency in Germany.[24]

In the case of the ICC, both its statute and its agreement on the privileges and immunities stipulate that judges enjoy the same immunities as are accorded to heads of diplomatic missions "when engaged on or with respect to the business of the Court."[25] The agreement elaborates that judges will be accorded diplomatic immunities "for the purpose of holding himself or herself at the disposal of the Court" when he or she "resides in any state party *other* than that of which he or she is a national or permanent resident".[26] When in the territory of nationality or permanent residency, the personal inviolability applies "to the extent necessary for the independent performance of his or her functions."[27] A similar arrangement with the Dutch authorities exists regarding the Dutch ICC judges.[28] The formulation "to the extent necessary" resembles the immunity granted in the UN Charter to its own officials,[29] which has been interpreted as requiring home countries "to exercise self-restraint whenever judicial action against UN officials would impede the exercise of the UN functions."[30]

Based on this limited review, it would be difficult to conclude that states grant full diplomatic immunity to their own citizens or permanent residents who were elected to serve as judges in international institutions. It is clear that the drafters of the different legal texts differentiated between the immunity granted to judges in their home states and in the host state. Considering that the host state is normally also a signatory of the general agreement regarding the institution's immunity, it is debatable whether the general agreement requires states to provide their international judges with immunity that the host state does not provide to its own judges. In any case, the inviolability of judges in their

home states would at least depend on whether they are expected to discharge their duties there. This does not support the broad statement that international judges' personal immunity applies in its full form "*vis-à-vis* any State", as implied by the ECtHR. The legal reality is more nuanced.

Final remarks

First, as to the fear that granting an international judge personal immunity in the state of nationality would be tantamount to bestowing *carte blanche* to commit crimes, it is important to recall that the immunity can be waived by the institution who is the beneficiary of the immunity. This was recently the case of Lydia Mugambe, also a judge of IRMCT (at the time of her arrest), who was detained, prosecuted and convicted of modern slavery in the UK.[31]

In addition, according to the ICJ 1999 advisory opinion, national courts could "set aside for the most compelling reasons" a "presumption" of immunity for a UN agent when informed by the UN Secretary General.[32] The severity of allegations against Akay, combined with Türkiye's precarious national security at the time, could have reached the "most compelling reasons" threshold. However, the ECtHR elegantly circumvented this issue by finding that the *failure to assess* the immunity could not be regarded as strictly required by the exigencies of the attempted coup d'état.[33] It left open the possibility that participation in a coup d'état or in acts of terrorism could, in theory, justify setting aside a UN official's immunity, even when asserted by the organization, as long as this matter was considered at the outset.

Second, while immunity is a shield against attempts to influence a judge, some courts have a sword to dissuade unwanted interference with their judicial work. In the case of the ICC, Article 70 of its statute criminalizes any attempt to illegally influence the Court's officials in the discharge of their duties.

Third, every institution has its unique legal personality, mandate and legal idiosyncrasies. Contrary to the ECtHR, ICJ, and ITLOS, at the IRMCT judges are expected to work from their home country in order to reduce costs, unless their presence in the courtroom is

required. In other words, despite the linguistic similarity between the different legal texts, the IRMCT Statute should be read in its own legal environment.

Finally, what does the ECtHR decision mean for international judges' personal immunity? The Judgment strengthens the argument that the immunity of an international judge (or any UN senior official for that matter) whose immunity is equated to that of a senior diplomat applies also in the state of nationality or of permanent residency. However, the comparative legal texts reviewed above add a functionality caveat: personal immunity in one's state of nationality or residency applies to the extent necessary for the discharge of the judicial functions. In that sense, the case of Akay – who was required to work from his home country – is rather unique, and it would be difficult to extrapolate any general principle of law with regard to all "international" judges' immunity, whose scope is still dependent on the specific legal texts and the extent to which states are willing to grant their own nationals a diplomatic status.

About the Author: Ady Niv is a lawyer at the international criminal tribunals and courts. He previously worked at the Chambers of the International Residual Mechanism for Criminal Tribunals. The views expressed herein are those of the author alone and do not necessarily reflect the views of any International Tribunal or Court in general.

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[1] Press Release, International Criminal Court, The International Criminal Court deplores new sanctions from the US administration against ICC Officials (June 5, 2025), https://www.icc-cpi.int/news/international-criminal-court-deplores-new-sanctions-us-administration-against-icc-officials; The Presidency of the Assembly of States Parties reiterates its unwavering support for the International Criminal Court, its elected officials, and its personnel (Aug. 1, 2023), https://www.icc-cpi.int/news/presidency-assembly-states-parties-reiterates-its-unwavering-support-international-criminal.

[2] Aydin Sefa Akay v. Türkiye, Judgment, App. No. 59/17 (Apr. 23, 2024), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-233214%22]} [hereinafter Judgment].

[3] *See also* Ady Niv, *The Immunity of Judge Akay in Turkey: A Test Case of International Judges' Immunity and Independence*, 22 ASIL INSIGHTS14 (Oct. 5, 2018), https://www.asil.org/insights/volume/22/issue/14/immunity-judge-akay-turkey-test-case-international-judges-immunity-and.

[4] Judgment, ¶¶ 41, 49, 52, 72. *See also* Yüksel Yalçınkaya v. Türkiye, App. No. 15669/20 (Sept. 26, 2023), ¶¶ 259-272.

[5] Judgment ¶ 113.

[6] Alparslan Altan v. Türkiye, App. No. 12778/17 (Apr. 16, 2019), ¶ 14.
[7] Judgment, ¶ 116.
[8] Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights. Advisory Opinion, 1999 I.C.J. Rep. 62, ¶ 63 (Apr. 29), [hereinafter Advisory Opinion], http://www.icj-cij.org/docket/files/100/7619.pdf. *See also* U.N. Doc. A/CN.4/646, ¶¶ 11-12, https://legal.un.org/ilc/documentation/english/a_cn4_646.pdf.
[9] Convention on the Privileges and Immunities of the United Nations, Dec. 14, 1946, 1 U.N.T.S. 15.
[10] S.C. Res. 1966 (Dec. 22, 2010), https://www.irmct.org/sites/default/files/documents/101222_sc_res1966_statute_en.pdf.
[11] Judgment, ¶¶ 120-121.
[12] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].
[13] *Id.* arts. 31(1), 31(2)(a).
[14] Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95, arts. 14, 31(1).
[15] *Id.*, arts. 31(4), 38(1).
[16] Judgment, ¶ 125 (emphasis added).
[17] Statute of the International Court of Justice, 33 U.N.T.S. 993 [hereinafter ICJ Statute], art. 19.
[18] *See* David Anderson & Samuel Wordsworth, Article 19, *in The Statute of the International Court of Justice A commentary* (3rd ed., Andreas Zimmermann (ed.) et al., 465-474 (hereinafter Article 19 Commentary), at 471.
[19] *See* General Principle II, in the Annex to the Letter from the President of the International Court of Justice to the Minister for Foreign Affairs of The Netherlands, 26 June 1946; Letter from the Minister for Foreign Affairs of The Netherlands to the President of the International Court of Justice, 26 June 1946.
[20] Article 19 Commentary, at 473.
[21] *See* ICJ Statute, art. 22 (in theory the ICJ can seat "elsewhere whenever the Court considers it desirable".)
[22] Statute of the International Tribunal for the Law of the Sea, Dec. 10, 1982 , 1833 UNTS 561, art. 10; Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea, May 23, 1997, 2167 U.N.T.S 271, arts. 13(1), 13(3), 18.
[23] Agreement between the International Tribunal for the Law of the Sea and the Federal Republic of Germany Regarding the Headquarters of the Tribunal, Dec. 14, 2004, 2464 U.N.T.S. 147, art. 18(1)(a).
[24] ITLOS German judges have functional immunity and certain exemption from social security provisions and taxation. *See id.*, art. 23.
[25] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, art. 48(2); Agreement on the Privileges and Immunities of the International Criminal Court, Sep. 9, 2002, 2271 U.N.T.S. 3 (ICC-ASP/I/3), art. 15(1).
[26] *Id.* art. 15(3) (emphasis added).
[27] *Id.* art. 23(a)(i).
[28] *See*, Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, 1 March 2008, arts. 17(1)(a), 17(1)(b), 17(2), 17(7)(a).
[29] *See* United Nations Charter, 1 U.N.T.S. XVI (Oct. 24, 1945), art. 105(2)

[30] Andreas R Ziegler, 'Article 105', *in The Charter of the United Nations: A Commentary, Volume II*, (3rd ed., Bruno Simma et al. (eds), 2012), 2158-2178 (hereinafter UN Charter Commentary), at 2171.
[31] IRMCT Press Release, Statement of the Mechanism following resignation of Judge Lydia Mugambe, https://www.irmct.org/en/news/statement-mechanism-following-resignation-judge-lydia-mugambe.
[32] Advisory Opinion, ¶ 61. While the Advisory Opinion dealt with a question related to functional immunity, the statement is broad enough to include personal immunity as well.
[33] Judgment, ¶ 130.