(State) Immunity for Palestine?

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On December 11, 2023, the Berlin Public Prosecutor's Office decided to discontinue investigations against Mahmoud Abbas, the President of the Palestinian National Authority. The declared reason for doing so lies in his immunity pursuant to Section 20 para. 1 of the German Courts Constitution Act (GVG). The decision is instructive with regard to Germany's understanding of sovereign immunity and Palestine's role in international relations.

The background to the case at hand

In a joint conference with Olaf Scholz in August 2022, – and thus long before the start of the current conflict – Abbas had compared Israel's conduct in Palestinian villages to the Holocaust. In the aftermath, two criminal charges were filed against Abbas, based on Section 130 para. 3 of the German Criminal Code (StGB). The Public Prosecutor's Office considered the criteria of Section 130 StGB fulfilled (approving, denying or trivializing an act committed under the rule of National Socialism). Yet, both the Public Prosecutor and the Foreign Office (whose report the former relied upon) held that Abbas enjoys immunity. For this reason, all charges against him were dropped.

The relevance of Section 20 para. 1 GVG

Section 20 para. 1 GVG reads: „German jurisdiction also shall not apply to representatives of other *states* […] who are staying in the territory of application of this Act at the official invitation of the Federal Republic of Germany" (emphasis added). It is crucial to note that this provision is not directly applicable, given that Palestine's statehood is disputed. At this point, however, the Public Prosecutor's Office resorts to an analogy. Under German law, the two preconditions for such an analogy are the existence of an unintended regulatory gap and a situation of comparable interests. Insofar, the Prosecutor argues that the purpose of Section 20 para. 1 GVG is to keep contacts between subjects of international law at the highest level of government free from problems arising from criminal prosecution. In the Prosecutor's opinion, this is a situation not directly regulated by law but comparable to those explicitly regulated.

The stance of German Courts on the statehood of Palestine

After Palestine's admission to the UN as an observer state, the ICC was instrumental in fostering the recognition of Palestine's statehood: In 2015, Palestine was recognized as a state party to the Rome Statute – despite the fact that only states

may accede to it (Article 125 para. 3 of the Statute). To this day, Germany has not recognized the statehood of Palestine. Likewise, German courts, especially the administrative courts, have so far strictly rejected the statehood of Palestine.

An alleged breakaway decision was rendered on January 19, 2021: In a family law case, a divorce decree from Palestine was recognized as a „state of origin decision." However, in a private international law context, „state of origin" is to be understood in a functional sense, meaning that only the actual exercise of jurisdiction matters, not the recognition of a state under international law. As *Talmon* describes, the reason lies in the differences between public and private international law: „[Nationality in private international law] is based *not* on State sovereignty but on the exercise of jurisdiction; that is, the capacity to make and enforce the law. It does not govern the relations between States, but the legal relations between private individuals" (emphasis added). Hence, the German legal system apparently makes a clear distinction between the exercise of jurisdiction in a broader, functional sense and state sovereignty *stricto sensu*.

Thus, for better or worse – the German courts stick to their position: Palestine is not a state.

Back to the basics: Unintended regulatory gap and comparable interests?

The decision of the Public Prosecutor's Office is, in principle, in line with the courts' position. As Palestine lacks statehood and Sections 18 and 19 GVG are not applicable, the only feasible option to close the investigations against Abbas was an analogous application of Section 20 GVG. However, it is questionable whether the two requirements for an analogy to exist are met: The existence of (1) an *unintended regulatory gap* and (2) a situation of *comparable interests*.

(1) The origin of Section 20 GVG lies in its current paragraph two, which explicitly grants immunity according to the general regulations and agreements under International Law. Today's first paragraph was explicitly introduced into the GVG in 1984 to grant immunity to Erich Honnecker, the head of state of the German Democratic Republic (GDR). This move was necessary since the Federal Republic of Germany did not recognize the GDR as a „foreign" state at that time, wherefore Section 20 GVG – in its original version – was inapplicable to Honnecker, at least in the opinion of some commentators.[1)] The new paragraph 1 of Section 20 GVG was thus intended to ensure that Honnecker nevertheless enjoyed immunity as a representative of the GDR. The wording was hence changed from „head of state" to „representatives of other states." For this reason, Section 20 para. 1 GVG is regularly referred to as „lex Honnecker."

While, in terms of legal history, this is more of an individual case law approach, the requirement of the „state" has not been abandoned. For example, it would have been conceivable to grant immunity to international representatives in general to whom an official invitation had been issued. Against this backdrop, it is not a foregone

conclusion that there is an *unintended regulatory gap*. Still, one may argue that the Federal Republic did not foresee the future implications of this provision, given that the debate on statehood and subjectivity under international law was not as advanced as it is today.

(2) However, even if one holds that a regulatory gap exists, it is highly questionable whether „*comparable interests*“ exist. A situation of “comparable interests” is assumed to exist whenever the situation not expressly regulated by law is one to which the legal principle in question (also) applies (in principle) due to its similarities.[2)] The statement of the Public Prosecutor’s Office that the immunity regime established by Section 20 GVG serves to „keep contacts between subjects of international law […] free from the problems arising from criminal prosecution,“ reads as if Section 20 GVG is a mechanism to facilitate peaceful international relations. As becomes clear in Section 20 para. 2, the immunity provision of the GVG establishes, first of all, a link with the public international law on immunity. It should thus be asked: Does the opinion of the Public Prosecuter coincide with the prevailing understanding of sovereign immunity in international law?

State immunity is probably one of the most incontrovertible pillars of international law, which has also been confirmed by the ICJ. The doctrine goes back to the maxim „*par in parem non habet imperium*„, i.e. no state may exalt its authority over another. According to the prevailing opinion in public international law, immunity arises from the equality, independence, and dignity of states within the international community.[3)] This principle is also reflected in Article 2 para. 1 of the UN Charter (sovereign equality of states). The sovereign immunity, in turn, is expressed in different forms. Importantly, the head of state derives his/her immunity directly from the state itself. He/she is the personification of the state, and hence, his/her official acts are to be considered the acts of the state. This very conception is the source of immunity *ratione materiae* and *ratione personae*. In contrast to private international law, which builds on the exercise of functional jurisdiction, public international law derives immunity directly from the existence of the state – and, in the same vein, state sovereignty – itself. In addition to protecting and upholding the sovereign equality of states, immunity – though at times a controversialtopic – serves to protect the dignity of the head of state. Crucially, it is once again the dignity of the sovereign state that is likewise protected, albeit in a mediated form.[4)] There are no indications in public international law that immunity is generally meant to facilitate the smooth running of international relations.

To resume: Public international law clearly distinguishes between states and non-states in terms of immunity. Hence, the two cases are hardly „comparable.“ Granting immunity irrespective of the existence of a state is not required under international law. Therefore, arguing that an analogy to Section 20 para. 1 GVG is necessary given the commitment of the Basic Law to international law would also not be conclusive. In this respect, it would be necessary to further elaborate on whether and to what extent an „excessive implementation“ of the immunity rules, as carried out by the Public Prosecutor’s Office, is to be deemed acceptable under public international law.

Conclusion

From a formal perspective, the Public Prosecutor follows the previous line of jurisprudence that Palestine is not a state under international law. At the same time, the decision to discontinue investigations against Mahmoud Abbas shows the constraints of public international law (on immunities) in the context of complex political realities. Even though Palestine has not officially been granted statehood, the Public Prosecutor's Office understands the Palestinian territories as a „subject of international law." Yet, what kind of subject and what follows from this is unclear. The status of Palestine remains highly disputed, both politically and legally. However, simply holding that „Palestine is not a state" won't do anymore. Against this backdrop, the decision made by the Public Prosecutor's Office raises crucial questions: How much "state" do we legally attribute to a "quasi-state"? And doesn't this merely conceal the inconsistencies in dealing with Palestine? After all, both the Foreign Office and the Public Prosecutor thought it wrong not to grant state-like immunity to the head of the Palestinian Autonomous Territory.

References

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