For an Effective International Criminal Court

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Without Fear or Favour

Germany played an essential role during the negotiations that led to the adoption of the Rome Statute of the International Criminal Court (ICC) and is widely regarded as one of the most ardent supporters of the Court and the idea of a global system of international criminal justice. Not least for that reason, on 4 December 2000 Germany's Federal Parliament, the *Bundestag*, voted unanimously in favour of Germany's ratification of the Rome Statute. Two years later, the *Bundestag*, again, unanimously, adopted the German Code of Crimes

against International Law and the Act on Cooperation with the International Criminal Court. Most recently, in early June 2024, the *Bundestag* adopted amendments to the Code of Crimes against International Law and accompanying legislation (for a first analysis see here and here), which, inter alia, explicitly excludes functional immunity for crimes under international law, in line with the case law of the Federal Court of Justice.

These developments indicate Germany's strong commitment to the effective enforcement of international criminal law based on the fundamental principle of equality before the law. With its ratification of the Rome Statute, Germany is also legally bound under international law to cooperate with the ICC and to execute any arrest warrants issued by the Court, regardless of the identity of the suspect in question.

This firm commitment to the global international justice system also reflects Germany's special historic responsibility as well as the general receptiveness of the German constitution for international law. However, since the Prosecutor of the ICC applied for arrest warrants not only for three Hamas leaders, but also for Israel's Prime Minister Netanyahu and Defence Minister Gallant, Germany's obligation to cooperate with the Court has been called into question in public political debate and, sporadically, in academia. The two main arguments put forward are that the ICC lacks jurisdiction over the Situation of Palestine and that the immunities of the Israeli officials concerned must be respected. None of these arguments reflects the current state of international law.

In 2021, a Pre-Trial Chamber of the ICC found that the Court may exercise its jurisdiction over international crimes committed on the territory of Palestine and by its nationals. This decision was not based on Palestine's (disputed) statehood under general international law, but on the interpretation of the term 'State Party' in the Rome Statute and the fact that Palestine had ratified the Statute in 2015. Even if that interpretation was not considered to be convincing – a position taken, for example, by the German Federal Government – it is binding on States Parties to the Statute – including Germany. According to Article 119 of the Rome Statute, it is for the Court to determine its jurisdiction and to decide with binding force on the obligations of the States Parties to cooperate with the ICC which result from such determination. It must be recalled that with the exception of Australia and Canada all States Parties to the Rome Statute, including Germany, have accepted Palestine's accession to the Statute without reservation, knowing full well that only States can accede to the Statute. The State Parties have also supported Palestine's active participation in the work of the Assembly of States Parties – including its election to the Bureau of the Assembly and the payment of membership dues. Thus, there can be no question that Palestine is a State Party within the meaning of the Rome Statute. This suggests that the ICC may exercise its jurisdiction under Article 12 of the Rome Statute over all international crimes committed on the territory of Palestine (West Bank, Gaza and East Jerusalem) or by its nationals.

It must therefore be accepted that the Court has jurisdiction over any crimes committed on the territory of Palestine until the ICC decides otherwise. Against the background of the increasing number of recognitions of the State of Palestine by now more than 140 States, as well as the recent expansion of Palestine's rights in the United Nations and the general finding by the UN General Assembly that Palestine meets the requirements for membership in the United Nations, a change in the ICC's jurisprudence on this issue seems unlikely. It is also only on the basis of this interpretation of Article 12 of the Statute – by virtue of the principle of active personality – that the Court has jurisdiction over crimes under international law committed on Israeli territory by Palestinian members of Hamas.

The case against Omar Al-Bashir, who was wanted by the ICC for war crimes, crimes against humanity and genocide, serves as a valuable precedent with regard to the question of whether Prime Minister Netanyahu enjoys immunity. In its unanimous decision of 6 May 2019, the Appeals Chamber of the ICC concluded that Jordan – like Germany a State Party to the Rome Statute – had violated its obligation to cooperate with the Court by failing to arrest the then-serving President of Sudan when he visited Jordan to attend the Arab League summit. In its reasoning, the Appeals Chamber held that personal immunity had never been recognised in international law as a bar to jurisdiction of an international criminal court. Consequently, it was irrelevant whether the accused's State of nationality was bound by the Rome Statute or not. Just like Israel, Sudan was not a State Party to the Rome Statue; moreover, like Israel, the United States and the Russian Federation, it had made its intention clear not to become a party to the Rome Statute, thus legitimately dispensing with the duty of loyalty that arose from the prior signing of the Statute. Having found that there was no personal immunity before international criminal courts, the fact that the Security Council had referred the Sudan situation to the ICC and obliged Sudan to cooperate with the Court, was not decisive for the decision.

The jurisprudence of the ICC is in line with the finding of the International Court of Justice (ICJ) in the Arrest Warrant Case of 2002. The ICJ determined that personal immunity of high-ranking government officials does not constitute an obstacle under international law to criminal prosecution by 'certain international criminal courts' and, in particular, by the ICC. Similarly, the International Military Tribunal at Nuremberg had already held in its judgment of 1 October 1946 that he 'who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.' The subsequent practice of international criminal tribunals has followed this direction. International criminal courts have repeatedly exercised jurisdiction over current or former heads of States or government, whether it was the International Criminal Tribunal for the former Yugoslavia in the case of Slobodan Milošević, the Special Tribunal for Sierra Leone in the case of Charles Taylor, the Kosovo Tribunal in the case of Hashim Thaçi or the ICC in the cases against Omar Al-Bashir and, more recently, Vladimir Putin. In light of this development, the non-recognition of personal immunity, which is expressly laid down in Article 27 of the Rome Statute, has now become customary

international law. This means that, in the German legal system, the rule that there is no personal immunity before international criminal tribunals prevails over ordinary (federal) law by virtue of Article 25 of the German Constitution. In addition, Section 21 of the German Courts Constitution Act, which is directly applicable in the present context, presents an excellent example of the receptiveness of the German legal order for international law. This provision provides that immunities 'shall not stand in the way of execution of a request for transfer of a person in custody and for mutual judicial assistance communicated by an international criminal court established by a legal instrument that is binding on the Federal Republic of Germany.' When requested to surrender a person to the ICC, Germany is thus required to attach decisive importance to any determination made by the Court with regard to the question of immunity.

Due to the exclusion of immunity before international criminal courts such as the ICC, a State Party that executes an ICC arrest warrant against a foreign head of State does not act in contravention of its obligations under customary international law immunity rules, because these rules are not applicable to the ICC and, consequently, also do not benefit affected third States (whether they are States Parties to the Rome Statute or not, like Russia and Israel). This was another point expressly recognized by the ICC Appeals Chamber in its Al-Bashir decision in the context of the application of Article 98(1) of the Rome Statute. In the event of an arrest warrant being issued, customary international law would therefore not prevent Germany from surrendering Prime Minister Netanyahu to The Hague in accordance with Section 2(1) of the Act on Cooperation with the International Criminal Court. This is why, in principle, all (public) ICC arrest warrants, including those against nationals of non-States Parties to the Rome Statute, are transmitted to all 124 States Parties accompanied by the request to execute them. It is exactly for that reason that President Putin did not attend the BRICS summit in August 2023 in South Africa, which, like Germany, is a party to the Rome Statute – he would have run the risk of being arrested there. In proceedings before the Pretoria High Court to determine the obligation to issue a domestic arrest warrant, the South African Government declared that it had already forwarded the ICC's request for an arrest warrant for Putin to the South African Attorney General for national implementation.

Germany, like any other State Party to the Rome Statute, would thus be obliged under international law, and would be capable under German law, to arrest any person against whom the ICC has issued an arrest warrant, be it President Putin or, in future, perhaps one of the Hamas leaders, Defence Minister Gallant or Prime Minister Netanyahu. The opposing view not only misrepresents the current state of international law, but it also contradicts the Nuremberg legacy, which must be upheld particularly by Germany. Moreover, this view disregards the public statement by the German Federal Minister of Justice that President Putin would be arrested in Germany and surrendered to the ICC. If the same were not to apply in the case of an arrest warrant for an Israeli Prime Minister, Germany would be exposed to the accusation of applying double standards and acting *à la tête du client*, depending on how close its relationship was to the home State of the person wanted.

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