An Unfortunate Trend of Vagueness

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The German Government is planning to change the procedural and substantive legal framework on international criminal law in Germany, with an expert hearing having taken place on 31 January 2024 before the German Parliament's (Deutscher Bundestag) Legal Affairs Committee. One aspect appears to have been totally neglected by the current draft proposal: the issue of functional immunity from foreign criminal jurisdiction in case of core crime charges.

Elsewhere, *Kai Ambos* has argued for the introduction of a new section to the German Code of Crimes Against International Law (Völkerstrafgesetzbuch – VStGB) stipulating that "[f]*unctional immunity (immunity ratione materiae) does not apply to the crimes contained in this law" (emphasis added).* I do concur with *Ambos*, not only for substantial reasons (which I cannot elaborate on in detail, but cf. here, pp. 1276-1277 and here). In this post, I highlight an ambiguity regarding the personal scope of functional immunity arising from German case law which the German Government and Parliament should try to clarify within the current reform proposal. This is particularly important given that the ambiguity appears to have travelled to other jurisdictions as illustrated by the case of *Ziada v. Netherlands.* Taken together, this trend risks undermining recent efforts by the International Law Commission (ILC) on the matter.

The International and German Side of the Coin

International law provides for two categories of immunity in the context of domestic criminal prosecutions. As a rule, functional immunity *ratione materiae* applies to all official acts of a foreign state (irrespective of the foreign agent's rank) and is temporally unlimited. The issue at stake is whether this rule may be suspended in case of core crimes charges against individual state officials and to which crimes such exception applies. Immunity *ratione personae*, on the other hand, is personally and temporally limited (to the highest state representatives and only during their term of office). Moreover, the prevailing view does reject any exception to this rule based on international criminal law.

In its Draft Article 7 on immunity of State officials from foreign criminal jurisdiction, the ILC suggests that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of (certain) international core crimes such as genocide, crimes against humanity or war crimes. Notably, the exception suspends immunity irrespective of the official's rank, status, or position.

Yet, a widely reported judgment of the German Federal Court of Justice (Bundesgerichtshof, BGH) issued in 2021 risks introducing a troubling ambiguity into the Draft Article's underlying customary rule that appears to reduce its unlimited personal scope. The Court stated that – notwithstanding the general "existence of a

functional immunity of foreign State officials of whatever rank for official acts" (para. 23) – there was a "general rule of customary international law […] that, *at least*, the prosecution of foreign low-ranking State officials for war crimes or certain other offences affecting the international community as a whole is permissible by national courts" (para. 35; translations by *Nosakhare/Owino/Kreß*, ILR 200 (2022), 366 unless otherwise provided; emphasis added). The Court – addressing the individual criminal responsibility of a former officer in the Afghan National Army for war crimes – emphasized the defendant's low-ranking and subordinate function at several other occasions within its judgment (paras. 13, 16, 39), without clearly defining what "low-ranking" meant and why this criterion was relevant in the context of functional immunity (for a critical view, cf. here, pp. 1276-1277 and here).

In particular, the Court stated that "[t]he fact that immunity was recognized for persons acting on behalf of the State in other contexts does not affect the functional immunity of lower-ranking officials, which is relevant to the decision here. The immunity of certain high-ranking State representatives that may be recognized in criminal proceedings for war crimes does not preclude or affect the charges brought against the accused in these proceedings, and neither does any immunity in civil proceedings" (para. 39). The Court continued by highlighting that it was "recognized that certain holders of high-ranking State offices, such as heads of State, heads of government or foreign ministers, enjoy immunity from the criminal jurisdiction of other States", but emphasized that this was a matter of immunity *ratione personae*, i.e. a different legal category. Even if such cases also involved aspects of functional immunity *ratione materiae*, constellations concerning heads of State, heads of government or foreign ministers did not allow to draw "any decisive conclusions […] regarding the functional immunity of a military service member that is to be examined here" (para. 40).

A Binary Understanding of Functional Immunity(?)

The reasoning suggests that the Court follows a binary understanding of high-ranking officials (heads of State, heads of government or foreign ministers) and low-ranking officials (the rest). Another passage appears to support such a reading, stating that "under customary international law, no general functional immunity *ratione materiae* of subordinate officials of foreign States, *in particular soldiers* [emphasis added], precludes national criminal prosecution for war crimes" (para. 16). A chief of staff or other high-ranking officers are soldiers as well. The Court does not qualify the notion of "soldier". It remains unclear, however, why the Court feels obliged to limit its findings to low-ranking officials in the context of "functional immunity" at all. Introducing such a distinction outside the context of immunity *ratione personae* appears artificial, to say the least. It also threatens to undermine or contradict the ILC's view reflected in Draft Article 7 which does not provide for such differentiation.

Unfortunately, the German Government appears to have embraced the Court's ambiguous stance. In its comments on the ILC-Draft in November 2023, the German Government contended that Draft Article 7 was "a norm of customary international law 'in status [sic!] nascendi'" and that Germany discerned "a trend towards the

acceptance of exceptions from immunity *ratione materiae* when it comes to the most serious crimes under international law" (para. 7). Yet, it also drew the attention of the ILC to the BGH decision, repeating its finding that "according to customary international law, criminal prosecution by a domestic court for certain war crimes was not barred by immunity *ratione materiae*, if 'the acts were committed abroad by a foreign State official of subordinate rank in the exercise of his sovereign functions against non-domestic persons'" (para. 8). The Government added that the judgment addressed the issue only vis-à-vis certain war crimes but had been interpreted "as providing a basis also for German courts to deem immunity *ratione materiae* inapplicable in cases involving other crimes under customary international law" (para. 8).

Unlike suggested by *Ambos*, the Government's last statement appears to primarily deal with the exception's *substantive* scope, i.e. the applicability of the immunity rule vis-à-vis core crimes other than war crimes (such as genocide, crimes against humanity etc.). However, the explicit reiteration of the BGH ruling in the statement, its silence on the caveat in the judgment as to low-ranking officials, and its cautious remarks on the nature of the immunity rule, indeed send an ambiguous signal, particularly vis-à-vis the exception's *personal* scope.

Ambos rightly points out that a legal clarification by the German Government and Parliament reaffirming the binding nature as well as the unlimited (personal) scope of the legal rule codified in Draft Article 7 would be politically desirable. In fact, such a statement – or even a new legal provision – is legally warranted as recent developments in another European country illustrate.

The Dutch Side of the Coin

The equivocal signals sent by German judges and government officials – rightfully criticized by *Ambos* – are aggravated by developments in the Netherlands. In particular, the German Court's differentiation between low-ranking and other state officials invited Dutch judges to distinguish a case before them and affirm the functional immunity of high-ranking military commanders.

On 7 December 2021, The Hague Court of Appeals – dealing with a civil liability claim against senior military officers of the Israeli Defense Forces (IDF) for actions conducted during Operation Protective Edge in 2014 – confirmed the lower court judgment and dismissed the claim on the appeals stage. In doing so, the Court of Appeals relied on considerations of functional immunity. The fact that the case apparently involved former Israeli Minister of Defense and current Minister in the Israeli war cabinet, Benny Gantz, adds additional political controversy to this issue, but shall be set aside here. Suffice to say that the case involved alleged war crimes attributed to Gantz in his capacity as then-IDF Chief of Staff (cf. here, para. 14).

What is interesting from an international legal perspective is, that the Court of Appeals' decision expressly relied on the German judgment in support of its findings on functional immunity. It noted that it was not "blind to developments in criminal law with regard to the immunity from functional jurisdiction, as is apparent from the

judgment of the BGH of 28 January 2021 on the immunity of a low-ranking soldier in the army of a foreign State. In so far as there might already be some justification for extending this development to civil law, as things currently stand, this is in any case not applicable to a case such as the present one, which concerns very high-ranking military personnel who were carrying out official policy of the State of Israel, such that a judgment on their conduct would necessarily also amount to a judgment upon the conduct of the State of Israel" (para. 3.24, translation by an NGO involved in the proceedings). The Court of Appeals, thus, appears to perpetuate the artificial distinction between low-ranking and high-ranking officials in the context of functional immunity (first step). At the same time, it classified senior military officers as high-ranking officials, thus, calling into question the binary classification discussed above and adding another level of complexity (second step).

On 25 August 2023, the Supreme Court of the Netherlands upheld the decision (no official translation available), supported by only brief reasoning (cf. also here, paras. 29-33) which did not discuss German case law.

In December 2023, the plaintiff, Mr. *Ziada*, filed a complaint with the European Court of Human Rights (ECtHR) contending that his right to a fair trial under Art. 6 of the European Convention on Human Rights (ECHR) had been violated by the Dutch courts wrongfully assuming a case of functional immunity (cf. *inter alia* para. 36). The complaint contends that the Courts, in particular The Hague Court of Appeals, erred when relying "on the status and rank of the respondents" in the context of immunity *ratione materiae* (paras. 79, 92). It also touches upon the German BGH's decision (paras. 91-93) while omitting the decision's more equivocal passages.

Preliminary Observations

These developments underscore the need for a clear statement by the German Government and Parliament on the binding nature as well as the unlimited (personal) scope of the legal rule codified in Draft Article 7. A clarifying statutory regulation as suggested by *Ambos* would surely be an adequate remedy. Moreover, the phenomenon illustrates the significance of judicial dialogue on issues of international (criminal) law, a dialogue presumably becoming increasingly relevant in the not-so-distant future due to the increasing volume of universal jurisdiction cases in Europe (for a critical note in this regard, cf. here, pp. 375-377). Lastly, the phenomenon unfortunately suggests that the hesitant (and unconvincing) findings by the German judiciary provided (at least some) support for a Dutch decision further calling into question Draft Article 7.

The Dutch case is of particularly delicate nature given the persons involved, its merits and the current developments in the Middle East. I do not take any stance on these issues, particularly the conduct in question. It remains to be seen how the ECtHR will handle this complaint. Hopefully, the Court – being aware of its decision's wider ramifications on the law of immunity – will be able to consider the case appropriately despite its politically sensitive background.