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INTRODUCTORY NOTE TO JUDGMENT ON FOREIGN SOLDIERS' IMMUNITY FOR WAR CRIMES COMMITTED ABROAD (BGH)

BY TOM SYRING*

[January 28, 2021]

Introduction

On January 28, 2021, the German Federal Court of Justice, or Bundesgerichtshof (BGH), Germany's highest court of ordinary jurisdiction, delivered its judgment in Case 3 StR 564/19[1] pertaining to questions of universal jurisdiction over international crimes and the extent to which foreign soldiers would be barred from prosecution in Germany based on claims of (functional) immunity for war crimes committed abroad. The decision strikes at the heart of a debate where such exceptions to immunity (*ratione materiae*) are yet to be uniformly agreed upon at an international level; it also comes on the verge of a number of related judgments that are pending both in German and other European courts.[2] In the present case,[3] the BGH held that according to the general rules of international law, criminal prosecution in Germany for war crimes committed abroad would not be precluded based on the notion of functional immunity, "when the acts have been committed by a foreign, lower-ranking defendant in the exercise of foreign sovereign activity."[4] Neither the BGH nor Germany's supreme guardian of the "Basic Law," the Federal Constitutional Court, or Bundesverfassungsgericht (BVerfG), has previously pronounced itself on questions of functional immunity in criminal proceedings.

Background to the Case

The case concerned an Afghan army officer accused of coercion, mistreatment of captured Taliban fighters, and desecration of the dead body of a Taliban commander in Afghanistan in 2013 and 2014. The specific acts committed individually or in collaboration with other army personnel included hitting a prisoner's head during interrogations against the wall, pulling his hair, beating him on the head with a folded water hose, and threatening to connect him to electric cables in order to extract information from him. In a separate incidence, at the accused's behest, the corpse of a Taliban commander was hung on a protective wall with a noose around his neck, with the intention being to "present the dead person like a trophy and degrade him in his honor beyond his death."[5]

For his involvement in these acts, the accused (Ahmad Zaheer D)—at the time of trial an asylum seeker in Germany (rejected at first instance), having deserted the army and fled to Europe—was given a suspended sentence of two years' imprisonment by the Munich Higher Regional Court, or Oberlandesgericht München (OLG München).[6] At sentencing, the OLG considered *inter alia* the accused's admission of guilt (the accused had deliberately provided information regarding the criminal conduct in his asylum interview), his cooperation with the police authorities, his young age (he was 21 at the time of the commission of the crimes), and his integration prospects as mitigating circumstances.[7] The question of immunity from prosecution was never raised before the OLG.

The Federal Court of Justice's Judgment

Upon appeal, the BGH sided with the Public Prosecutor General in characterizing the maltreatment of the prisoners not only as "dangerous bodily harm"[8] and "coercion"[9] (as the OLG had done), but as qualifying as a war crime of torture according to § 8(1) no. 3, VStGB, and remanded the Higher Regional Court's decision, asking a differently constituted chamber of that Court to sentence the Afghan officer accordingly. The BGH reasoned that while torture pointed to the causing of "*substantial* physical or mental harm or suffering,"[10] the significance of that harm depended on an overall view of all relevant circumstances of the case. In the present case, screams were being heard from the interrogation room, and the prisoners were handcuffed, blindfolded, and beaten. In such a synopsis of relevant factors it was "of particular importance that the situation had already been filled with aggressiveness, before the accused joined in."[11] Considering these circumstances, it was not necessary for the criteria of significance of the harm to be reached that visible, bloody injuries or damage to the bones occurred or lasting psychological harm ensued,

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though the absence of these factors "point[s] to exceeding the minimum level of significance to only a minor degree."[12]

The BGH otherwise shared the OLG's assessment of the desecration of the dead body as a war crime, underlining that the protection offered by § 8(1) no. 9, VStGB[13] against being treated "in a gravely humiliating or degrading manner" would also extend to a dead person.[14]

Serious as the crimes under scrutiny here are, the case against the former Afghan officer hardly represents the most egregious example of crimes against international law. In fact, there have been several more serious cases before German courts in the past, including against Onesphore Rwabukombe, where the Higher Regional Court in Frankfurt convicted the former Rwandan mayor on genocide charges. Initially, the BGH had also remanded that case, though primarily to request a more severe punishment.[15] Therefore, the present case is not mainly important because of the atrocities committed; rather, its significance is due to the fact that the BGH here chose to consider the question of (functional) immunity, thereby reportedly taking both the defense and the prosecution by surprise.[16]

Indeed, as the BGH also acknowledged, (even) "the Federal Constitutional Court has yet to decide on the question of such immunity."[17] That statement of fact is quite significant, as Article 100(2) of the German Constitution/Basic Law, or Grundgesetz (GG) clearly requires that "[i]f, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law . . . the court shall obtain a decision from the Federal Constitutional Court." Here, the BGH simply declared that a "decision of the Federal Constitutional Court according to Article 100(2) GG is not necessary"[18] as, "despite a few dissenting views in international law jurisprudence, no doubts in need of clarification by the Federal Constitutional Court exist concerning the decisive question of whether domestic criminal prosecution of the accused is precluded based on functional immunity."[19]

In support of its view that acts amounting to crimes against international law committed abroad by foreigners exercising foreign sovereign activity could be prosecuted domestically, the BGH first pointed to cases before international tribunals from Nuremberg on, before discussing at length (largely European) national court decisions where immunity from prosecution had been at issue, the work of the International Law Commission (ILC), and eventually (international) jurisprudence.

In sum, the BGH held that while a comparison of the various cases and opinions, and in particular the statements within the International Law Commission, "on the surface, might indicate that a majority of the states having expressed themselves on the subject take functional immunity even regarding war crimes for granted, a closer look reveals that this is not generally the case."[20] As a case in point, the Court cited Germany's official position presented at the UN General Assembly's Sixth Committee meeting in October 2017, where Germany had indicated that while it "continued to be a staunch supporter of endeavours to bring perpetrators of international crimes to justice, and it appreciated the Commission's ongoing efforts in that regard,"[21] it would not support draft Article 7 on exemptions to immunity in its current form, based on methodological concerns, including a critique of the—inconclusive—list of international crimes to which draft Article 7 would apply.

On the basis of these statements, the Court found no support for the view that a majority of states, at the present time, were critical of a general assumption of the existence of a general rule of international law to the effect that exemptions to functional immunity for international crimes existed. Rather, and interestingly, in a disputable twist of argument (from the point of view of legal theory), the Court reasoned—*argumentum e contrario*—that, "[i]n the face of such reservations [as the one presented by Germany], it could *not* be concluded from the rejection of the draft that from Germany's point of view *none* of the rules included in the draft article would reflect existing customary international law."[22] International cases where immunity had been assumed were dismissed by the Court as incommensurable, referring either to "immunity of certain *high-ranking* government officials"[23] as primarily *ratione personae* which "generally would not apply to lower-ranking government officials"[24] or, "[e]ven where aspects of immunity *ratione materiae* are concerned," as "not allow[ing] decisive conclusions to be drawn regarding the functional immunity of a member of the military, which is at issue here."[25]

Based on such reasoning, the BGH declared examples of potentially existing immunities for international crimes as in any event distinguishable from the present case constellation, found no doubts regarding exemptions to functional

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immunity, and hence justified abstaining from referring that question to the Federal Constitutional Court as otherwise required according to Article 100(2) of the Basic Law.

Comments and Conclusion

While the Court's reasoning and concomitant decision not to refer the question of functional immunity to the Federal Constitutional Court may be contestable from the vantage point of legal theory, it is all the more understandable from a practical perspective: a referral would likely have taken several years and put on hold—if not jeopardized altogether—several current and future cases. Thus, in any event from a legal policy perspective, this is an important judgment, potentially having a major impact on pending and ongoing cases, both in Germany and abroad.[26]

Perhaps key among them is the trial of Hamid Nouri for grave war crimes and murder committed in Iran in connection with the mass execution of members of the People's Mojahedin Organization of Iran (PMOI) and other political prisoners in 1988, which is currently before the Stockholm District Court. According to the indictment, at the relevant time when the accused held the position of assistant to the deputy prosecutor at the Gohardasht prison, he "is suspected of participating, together with other perpetrators, in these mass executions and, as such, intentionally taking the lives of a large number of prisoners, who sympathised with the Mujahedin."[27] If found guilty, this trial would strike at the heart of the Islamic Republic, as Iran's newly elected president, Ebrahim Raisi, "who was judiciary chief before he won June's elections, is also alleged by rights groups to have been a member of an 'execution committee' involved in the [same] mass killing of political prisoners in 1988 when he was a state prosecutor."[28]

Judged by its outcome, the present decision is a crucial step towards fighting impunity of perpetrators of atrocities. However, from a legal theory perspective and with a view to a solid and unified foundation for exemptions to functional immunity for international crimes, it would be desirable that not only the Federal Constitutional Court, but also other (foreign) courts and states (including at the ILC) would soon follow suit.

ENDNOTES

1 Bundesgerichtshof [BHG], Jan. 28, 2021, 3 StR 654/19, ECLI:DE:BGH:2021:280121U3STR564.19.0, https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=8c98a8601d12df344bddda113-b06a7b3&nr=116372&pos=0&anz=2(only in German) [hereinafter Judgment].

2 Relevant, related cases are currently ongoing—for example, in Sweden before the Stockholm District Court, Case no. B 15255-19 (prosecution of an Iranian citizen for grave war crimes and murder committed in Iran in connection with the mass execution of members of the PMOI (People's Mojahedin Organization of Iran) and other political prisoners in 1988). The trial started on August 10, 2021 and is expected to continue until April 2022, see the media release by the Swedish Prosecution Authority, https://www.aklagare.se/en/media/press-releases/2021/july/prosecution-for-war-crimes-in-iran; and in Germany before the Higher Regional Court in Koblenz (Oberlandesgericht Koblenz – OLG Koblenz), Case no. 1 StE 9/19 (prosecution of the head of a Syrian intelligence unit for crimes against humanity committed in Syria). The trial, which is a sequel to the already decided case against the lower-ranking officer of the same unit who has already been convicted before the same court to four-and-a-half years in prison for crimes against humanity related to his role of aiding and abetting torture (Case no. 1 StE 3/21, Feb. 24, 2021), see the OLG's case summary (in German), https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/urteil-gegen-einen-mutmasslichen-mitarbeiter-des-syrischen-geheimdienstes-wegen-beihilfe-zu-einem-ver), started on April 23, 2020 and is expected to last at least until December 2021. See the OLG's media release (in German), https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/weitere-verhandlung-stermine-staatsschutzverfahren-gegen-einen-mutmasslichen-mitarbeiter-des-syrisch. Prosecutorial efforts in other cases may soon follow suit, including in Germany, France, and Sweden, where investigations into the Syrian government's alleged chemical weapons attacks on townships surrounding Damascus have opened. *See Eight Years After Chemical Weapons Attacks at Ghouta, Investigations Have Been Opened in Three European Countries*, Open Society Justice Initiative (Aug. 21, 2021), https://www.justiceinitiative.org/newsroom/eight-years-after-chemical-weapons-attacks-at-ghouta-investigations-have-been-opened-in-three-european-countries.

3 As this case has only been published in German, all translations are by the author. As to the Constitution/the German Basic Law (Grundgesetz – GG), Courts Constitution Act (Gerichtsverfassungsgesetz – GVG), German Code of Crimes against International Law (Völkerstrafgesetzbuch – VStGB) and other relevant legislative texts, recourse has been taken to the translations provided by the German Federal Ministry of Justice and Consumer Protection, https://www.gesetze-im-internet.de/Teilliste_translations.html.

4 Judgment, *supra* note 1, Guiding Principles.

5 *Id.* ¶ 9.

6 Case 8 St 5/19 OLG München (July 26, 2019) (in German only), https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2019-N-52732?hl=true.

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7 *Id*. ¶¶ 149–153.

8 Cf. § 224(1) no. 4, Penal Code (Strafgesetzbuch – StGB).

9 Cf. § 240, Penal Code.

10 Cf. § 8(1), no. 3, VStGB. Emphasis added.

11 Judgment, *supra* note 1, ¶ 75.

12 *Id*. ¶ 77.

13 Cf. § 8(1), VStGB: "Whoever in connection with an international armed conflict or with an armed conflict not of an international character . . . 9. treats a person who is to be protected under international humanitarian law in a gravely humiliating or degrading manner shall be punished . . . in the cases referred to under number 9, with imprisonment for not less than one year."

14 Judgment, *supra* note 1, ¶ 91.

15 Case 4-3 StE 4/10 – 4-1/15 (OLG Frankfurt) [ECLI:DE:OLGHE:2015:1229.4.3STE4.10.4.1.15.0A] (Dec. 29, 2015), https://www.legal-tools.org/doc/bd14c5/pdf (in German only). *See also, e.g.*, *German court hands down life sentence in Rwandan genocide case* (DW, Dec. 29, 2015), https://www.dw.com/en/german-court-hands-down-life-sentence-in-rwandan-genocide-case/a-18949176.

16 *See, for example,* Markus Sehl, *Völkerstrafrecht am Ende?*, LEGAL TRIBUNE ONLINE (Jan. 27, 2021), https://www.lto.de/recht/hintergruende/h/bgh-8st519-voelkerstrafrecht-kriegsverbrechen-bverfg-vorlage-voelkerrecht-gg-folter-afghanistan-grundsatzentscheidung-immunitaet.

17 Judgment, *supra* note 1, ¶ 45.

18 *Id*. ¶ 50.

19 *Id*. ¶ 56.

20 *Id*. ¶ 37.

21 General Assembly, Official Records, U.N. Doc. A/C.6/72/SR.24, ¶ 86, https://undocs.org/en/A/C.6/72/SR.24.

22 Judgment, *supra* note 1, ¶ 37. Emphasis added.

23 *Id.* ¶ 40. Emphasis added.

24 Judgment, *supra* note 1, ¶¶ 39-40.

25 *Id*. ¶ 39.

26 *Cf.* also the cases listed *supra*, note 2.

27 *See* Press Release, Swedish Prosecution Authority (July 27, 2021), https://www.aklagare.se/en/media/press-releases/2021/july/prosecution-for-war-crimes-in-iran.

28 *See* Henry Foy and Andrew England, *Swedish trial of alleged Iranian executioner risks straining nuclear talks*, FINANCIAL TIMES (Aug. 10, 2021), https://www.ft.com/content/ab516e2c-87e6-46ab-a3ea-ee6ea1849712.

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JUDGMENT ON FOREIGN SOLDIERS' IMMUNITY FOR WAR CRIMES COMMITTED ABROAD (BGH)*

[January 28, 2021]

Article 25, Basic Law (*Grundgesetz – GG*); § 20(2), Courts Constitution Act (*Gerichtsverfassungsgesetz – GVG*); § 8(1) nos. 3 and 9, Code of Crimes against International Law (*Völkerstrafgesetzbuch – VStGB*)

1. According to the general rules of international law, criminal prosecution for the war crimes of torture and of treating a person in a gravely humiliating or degrading manner and for thus concomitantly committed general penal offenses such as dangerous bodily harm and coercion, by a domestic court is not precluded based on the procedural impediment of functional immunity, when the acts have been committed by a foreign, lower-ranking defendant in the exercise of foreign sovereign activity against non-domestic persons.

2. Concerning the preconditions of the war crime of torture.

. . .

Based on the court hearings of 9 July and 26 November 2020, the third Criminal Senate of the Federal Court of Justice [. . .] has decided:

1. Based on the Public Prosecutor General's appeal, the Munich Higher Regional Court's judgment of 26 July 2019 will be

   a) changed as to the conviction, in that the accused is guilty of the war crime (against persons) of torture in concurrence of offenses with dangerous bodily harm, coercion and attempted coercion, as well as the war crime (against persons) of treating a person in a gravely humiliating or degrading manner;

   b) set aside as far as the decision regarding the single sentence in case II. B. 1 of the judgment and the overall sentence is concerned; the respective factual findings however will be upheld.

   In the course of the annulment, the case will be remanded for retrial to another Senate of the Higher Regional Court, also regarding the costs of the Public Prosecutor General's remedy.

2. The Public Prosecutor General's further request for revision and the accused's appeal will be dismissed.

3. The accused has to bear the costs of his remedy.

Ipso jure

Reasons:

1. The Higher Regional Court has sentenced the accused to two years' imprisonment for three counts of dangerous bodily harm, one of which in concurrence of offenses with coercion and two of which in concurrence of offenses with attempted coercion, as well as one count of a war crime against persons. The enforcement of the sentence has been suspended. The accused as well as the Public Prosecutor General have appealed the judgment based on factual claims. The Public Prosecutor General's remedy, aiming at convicting the accused also for the war crime of torture and setting aside the terms of punishment, has been partially successful as evident from the operative part of the judgment. Apart from that, the Public Prosecutor General's remedy as well as the accused's appeal are unfounded.

. . .

*The full text of the judgment is available only in German at the website of the BGH (visited October 5, 2021), https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=8c98a8601d12df344bddda113b06a7b3&nr=116372&pos=0&anz=2. The excerpts that are published here were translated by the author of the Introductory Note.

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37. Although this, on the surface, might indicate that a majority of the states having expressed themselves on the subject take functional immunity even regarding war crimes for granted, a closer look reveals that this is not generally the case. Germany's official opinion expressed in the Sixth Committee of the General Assembly in October 2017 represents a case in point. To be sure, there the fifth report of the second Special Rapporteur is being criticized for grave methodological flaws. However, the German representative also pointed out that the principle of individual responsibility for international crimes embodies a major achievement and Germany would be a staunch supporter of endeavors to bring perpetrators of international crimes to justice (see General Assembly, Official Records, UN Doc. A/C.6/72/SR.24, 13). The then ensuing partial criticism was directed against the provided list of particular crimes, for which no immunity was assumed. While the crime of aggression mentioned in the Rome Statute was not listed, the crime of apartheid was included. In the face of such reservations, it could not be concluded from the rejection of the draft that from Germany's point of view none of the rules included in the draft article would reflect existing customary international law. This is particularly true since the statement presented already last year endorsed exceptions to immunity in clearly defined cases (cf. General Assembly, Official Records, UN Doc. A/C.6/71/SR.29, 4). Such a view is also supported by the subsequent statements by the Federal President (cf. Speech on the Occasion of the 75th Anniversary of the Beginning of the Nuremberg Trials on 20 November 2020) as well as the Minister of Foreign Affairs (cf. BT-PIPr. 19/185 S. 23289). These statements evidently do not assume national criminal prosecution for war crimes would be precluded based on functional immunity.

38. ee) An overwhelming majority of the academic literature rejects functional immunity for international crimes, at least as far as lower-ranking government officials are concerned – although at times based on diverging justifications and differentiations [. . .]. Concerns against that point of view are not based on a general conviction of a majority of states or corresponding practice.

39. The fact that an immunity of persons acting on behalf of the state has been assumed in other contexts, does not concern the decisive question of functional immunity of lower-ranking government officials which is at issue here. Neither immunity of certain high-ranking government officials in criminal trials for war crimes, if applicable, nor immunity in civil proceedings are of relevance to the charges against the accused.

40. It has been acknowledged that certain incumbents of high-ranking government offices, such as Heads of State, Heads of Government or Minsters of Foreign Affairs enjoy immunity from other states' criminal jurisdiction (cf. e.g. ICJ, Judgment of 14 February 2002 – 837 – Democratic Republic of the Congo v. Belgium – I.C.J. Reports 2002, 3, para. 51) [. . .]. However, this concerns foremost so-called personal immunity, which – irrespective of other requirements and the scope – generally would not apply to lower-ranking government officials. Even where aspects of immunity *ratione materiae* are concerned, constellations involving Heads of State, Heads of Government or Ministers of Foreign Affairs would not allow decisive conclusions to be drawn regarding the functional immunity of a member of the military, which is at issue here.

. . .

45. cc) Also in other respects, the Federal Constitutional Court has yet to decide on the question of such immunity.

. . .

50. A decision of the Federal Constitutional Court according to Article 100(2) GG is not necessary, since no doubts exist as to the decisive question of whether a rule of international law that is to be considered an integral part of federal law directly creating rights and duties for the individual, would preclude domestic criminal prosecution of the accused as a former government official of another state for acts committed in his country of origin in the exercise of foreign sovereign activity, when the relevant acts represent war crimes.

51. 1. According to Article 100(2) GG, the court shall obtain a decision from the Federal Constitutional Court, if in the course of litigation doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25 GG).

. . .

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55. The existence of such doubts is to be assumed, when there are no pertinent judgments by the highest [German] courts to the relevant questions available and the judicature of international courts has not taken a position in a decisive way [. . .].

56. Judged by that measure, despite a few dissenting views in international law jurisprudence, no doubts in need of clarification by the Federal Constitutional Court exist concerning the decisive question of whether domestic criminal prosecution of the accused is precluded based on functional immunity.

. . .

64. 1. Contrary to the opinion of the Higher Regional Court, the treatment of the prisoners is to be regarded as torture according to § 8(1) no. 3, VStGB, and consequently also as a war crime according to international law. The question, denied by the previous instance, whether the treatment was significant within the meaning of that legal norm, concerns a point of law which the Senate may decide on the basis of the correct material findings. Based on the facts of the case and following an overall view, the physical or mental harm or suffering inflicted on the three prisoners reaches the level of significance required by the war crime of cruel or inhuman treatment of a person who is to be protected according to § 8(1) no. 3, VStGB.

. . .

72. bb) An assessment of the level of significance needs to take all relevant circumstances into account.

73. As the physical or mental harm or suffering represents the point of departure for the assessment of significance, the actually caused physical and mental consequences need to be examined. Furthermore, the type of treatment and its context, length, as well as the condition of the victims may have to be considered [. . .].

74. b) In line with these criteria, the maltreatments are to be regarded as significant according to the facts of the case.

75. In the context of on overall view of all relevant circumstances, it is of particular importance that the situation had already been filled with aggressiveness, before the accused joined in: Cries were heard coming from the interrogation room; the deputy commander was hitting the prisoners with a water hose. The fact that the prisoners were sitting on the floor, handcuffed and blindfolded, rendered them on the whole particularly vulnerable and sensitive to physical and mental assaults, irrespective of whether that sitting position was in line with local custom or whether the handcuffing and blindfolding mainly represented a measure of self-protection on the part of the interrogators.

. . .

77. Considering the overall picture, it is not contrary to a finding of significance that no bloody injuries, damage to the bones or other visible injuries occurred, no cries of pain were uttered, no lasting psychological harm was incurred, and the occurrence in the presence of the accused, who spontaneously joined in, did last no longer than five minutes. However, these aspects point to exceeding the minimum level of significance to only a minor degree.

. . .

91. I. A war crime (against persons) – recognized in customary international law – of treating a person in a gravely humiliating or degrading manner according to § 8 (1) no. 9, VStGB, may also be committed against a deceased person [. . .].

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