

Functional Immunity Before the Federal Court of Justice

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I. Introduction

On 28 January 2021 the German Federal Court of Justice (FCJ) passed a widely discussed sentence against a former Afghan Soldier.¹ The discussion did not revolve around his crimes, but around the Court's statements on the functional immunity of foreign State officials from national criminal jurisdiction.² In this context, two aspects seem to be of greater importance for the German practice with regard to international law.

First, after analysing the current State practice and *opinio iuris*, the Court concluded that under customary international law, foreign State officials in a subordinate position do not enjoy functional immunity in national criminal proceedings for war crimes.³ Since the implementation of the German Code of Crimes Against International Law (CCAAIL)⁴ in 2002, this was the first time a German court

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¹ Federal Court of Justice (*Bundesgerichtshof*) (FCJ), 3 StR 564/19 of 28 January 2021.

² Claus Krefß, *On Functional Immunity of Foreign Officials and Crimes under International Law: The Jan. 28, 2021 Judgement of Germany's Federal Court of Justice*, 31 March 2021, available at <https://www.justsecurity.org/75596/on-functional-immunity-of-foreign-officials-and-crimes-under-international-law/>; Lorenz Rubner, *Viel Lärm um nichts: Die funktionelle Immunität von Kriegsverbrechen*, 9 February 2021, available at <https://voelkerrechtsblog.org/de/viel-laerm-um-nichts/>; Marten Breuer, *Pinochet reloaded: Zur Entscheidung des BGH über die Immunität eines staatlichen Hohensträgers bei Kriegsverbrechen*, 12 February 2021, available at <https://verfassungsblog.de/pinochet-reloaded/>; Henning Büttner and Felix Telschow, *Same Same But Different? Keine Immunität für Kriegsverbrecher:innen vor dem BGH: Völkerrechtliche Tagesthemen: Spotlight (Folge 15)*, 9 June 2021, available at <https://voelkerrechtsblog.org/same-same-but-different-keine-immunitat-fur-kriegsverbreche-rinnen-vor-dem-bgh/>.

³ FCJ, *supra* note 1, at paras. 11, 13, 23, 35.

⁴ Code of Crimes Against International Law (*Völkerstrafgesetzbuch*) (CCAAIL), 26 June 2002, *Bundesgesetzblatt* (BGBl.) I, 2254, as amended on 22 December 2016, BGBl. I, at 3150.