

## POST-MORTEM PROTECTION OF HUMAN DIGNITY: GERMAN SUPREME COURT OF JUSTICE CASE LAW ON VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW / Manfred Dauster

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**Abstract:** *After a long development, Rome Statute represents a codification of customary international humanitarian law. Despite of her own national history with respect to war crimes, Germany finally promotes prosecution of offences against crimes as set forth by the Rome Statute through national authorities based upon the German Criminal Code of Crimes against International Law which mirrors the Rome Statute. Desecration of dead adversaries has become outraging practice in armed conflicts of international and non-international character. The German Federal Supreme Court of Justice in its case law has stated the criminal illegality of such wrong-doing by not only referring to the Rome Statute, but either implementing international case law when it comes to desecration of corpses according to Section 8 paragraph 1 No 9 of the German Criminal Code of Crimes against International Law.*

**Key words:** *Post-Mortem Protection; Human Dignity; International Criminal Law; Rome Statute; German Criminal Code of Crimes; International Humanitarian Law*

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### 1. INTRODUCTORY REMARKS

#### 1.1 A Short Look back into History

Since the Federal Republic of Germany came into existence in 1949, German courts were challenged to adjudicate war crimes as a legacy of the former Third Reich. Working off this legacy has not come to an end yet. A 93 years old German citizen Bruno D. is currently sitting in the docks of the Hamburg regional court<sup>1</sup> (Landgericht Hamburg), where he faces trial as of the part he played in the Stutthof concentration camp<sup>2</sup> during war times as a member of SS (= Schutzstaffel).

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<sup>1</sup> Case no 617 Ks 10/19 jug. The trial is being scheduled until May 2020. The defendant was juvenile at the time when he allegedly committed the crime. Therefore, the trial is not public as foreseen by Section 48 paragraph 1 of the German Law on Juvenile Courts (latest promulgation of December 11<sup>th</sup>, 1974 [BGBl. 1974 I p. 3427]).

<sup>2</sup> Situated in the vicinity of Gdańsk (Poland).

Resuming all those years of searching the truth in the Nazi history of Germany, the NS trials before German courts have unfortunately not been a full success, e. g. the perversion of the German criminal judiciary into a key tool of the NS terror regime remains a dark whole. None of the judges or of the prosecutors in prominent NS judicial or prosecutorial positions have been ever held responsible or have faced trial (Müller, 2014). History of German NS prosecution and adjudication is a different and very complex story which has filled entire libraries.<sup>3</sup> Even the worst NS law academic Carl Schmitt who famously evolved constitutional law under the Führer's will only lose his position as professor (see Mehring, 2009, p. 304). Many of his or his NS colleagues' disciples went on in the Federal Republic of Germany as law professors in prominent positions at universities (Mehring, 2009, p. 504). With view on the NS history of the personnel of the Federal Ministry of Justice ([nowadays] and Consumer Protection) see work of Görtemaker & Safferling (2016), with respect to the personnel of the Federal Foreign Office see work of Conze, Frei, Hayes, Zimmermann (2010); regarding the personnel of the High Court of Appeal at Munich see Ludyga (2012). Ludyga unfortunately did not go into the post-NS-time of the High Court of Appeal.

In the frames of this paper, there is not enough place or space to elaborate on that issue in detail. However, summarizing the post-war history of Germany it may be said that unlike other countries having been part of the atrocities, which happened under the rule of Nazis and allied fascist partners, Germany has held herself responsible for that legacy.

However, the rewards for having worked off the really sinister side of the 20th century's history have to go to others. The Nazis and their allies committed their atrocities under the watchful eyes of global observers, especially the Allies. Even they had put their heads in the sand for a (too) long period of time when it came to save endangered life of Jewish people from extinction (e.g., Bajohr & Pohl, 2006).<sup>4</sup>

When the Quadripartite Agreement of August 8th, 1945, was set up to regulate German affairs under the Allies' responsibility "for Germany as a whole"<sup>5</sup>, the Allies also established the London Statute, which set up the Nuremberg Military Tribunal (Berber, 1969, pp. 252–261; Satzger, 2018, § 11 recital 5). The London Statute and the Nuremberg Court applying the principles of the Statute to "major figures of the NS-Regime", nowadays known as the "Nuremberg Principles".<sup>6</sup> They may be regarded as the corner

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<sup>3</sup> See footnote 1 (see also Maas, 2017).

<sup>4</sup> Regarding the Roman-Catholic Church see Goldhagen (2002).

<sup>5</sup> Erklärung in Anbetracht der Niederlage Deutschlands und der Übernahme der obersten Regierungsgewalt hinsichtlich Deutschlands durch die Regierungen des Vereinigten Königreichs, der Vereinigten Staaten von Amerika und der Union der Sozialistischen Sowjet-Republiken und durch die Provisorische Regierung der Französischen Republik vom 5. Juni 1945 (Dahm, Delbrück, & Wolfrum, 1989, p. 14).

<sup>6</sup> A Nuremberg Principles Academy has been established on November 22<sup>nd</sup>, 2004 in the city of Nuremberg (see International Nuremberg Principles Academy, 2014). The purpose of the foundation according to Section 2 of the Statute is (1) "to promote scholarship and research, and furthermore to promote education. In particular, it will endeavour to implement what are known as the "Nuremberg Principles," and to promote international criminal law and support the struggle against impunity for the most serious crimes that are of concern to the international community as a whole. (2) To achieve this goal, the Foundation is to promote the legitimacy, acceptance and legality of international criminal law. It will achieve this goal in particular through educational programmes, through research, and will support the implementation through scholarly consultation. It is intended in particular to become an international forum for practitioners and theoreticians in international criminal law, as well as for diplomats, multipliers, and civil society, on current questions of international criminal law. The purpose of the Foundation is to be achieved in particular by the following measures: - Specially tailored programmes of training, consultation and advanced education for groups of professionals working in international criminal law;

stones and the genesis of modern international criminal law. However, the Nuremberg trial and its prosecution were seen controversial (Werle, 2018, Einl. VStGB rec. 8).

Less prominent NS perpetrators were dealt by Military Courts in the four occupied zones of Germany (see Werle, 2018, Einl. VStGB recital 10) or by German courts with authorization of the Allies only.<sup>7</sup>

Nuremberg Principles as customary rules of law did not play major role in national court proceedings of other countries as well, except in Israel (Eichmann trial), France (Barbie trial) and Canada (Finta trial) (Werle, 2018, Einl. VStGB recital 11 footnote 32). It is to be noted that German courts in trying NS-crimes related cases never applied the „Nuremberg Principles“ in their domestic arena and referred to common crime regulations as set up by the German Criminal Code of 15 May 1871.<sup>8</sup> In this context, it may be worth discussing whether the principle of “nulla poena sine lege”<sup>9</sup> really hindered German authorities to apply “Nuremberg Principles” retroactively when German courts adjudicated NS atrocities (Ambos, 2018, §1 recitals 11-12; Satzger, 2018, pp. 205–208; 267–268; Werle, 2018, Einl. VStGB recital 21).

Due to biological developments, this kind of discussion is not anymore of practical or forensic relevance. Possible perpetrators of Nazi crimes living unidentified in Germany have aged up and it is quite improbable that new indictments might reach the courts. We are experiencing the beginning of legal history. It is noteworthy again that other post-conflict countries were faced exactly to the same legal problem of “nulla poena sine lege” but reached a differing solution in a different constitutional background. Criminal Code of Bosnia and Herzegovina, which turned the Rome Statute regulations on international crime into national Bosnian law in 2003, applied those rules although respective crimes against international humanitarian law had been committed during the wars in Yugoslavia from 1991 until 1995 and prior to the entry into force of the BiH CC.<sup>10</sup> For view of the activities of the War Crime Chamber of the (State) Court of Bosnia and Herzegovina see Ivanisevic (2008); Kreso, Kreho, Vukoje, & Jukić (2015); Dauster (2019, p. 76).

At the beginning of the 50ties of the 20th century, the Allies slowly withdrew and permitted Germany to prosecute war criminals by her own national authorities. While Germany attempted to comply with her post-Nazi duties, on the international level, various contributors tried to reach consensus on codifying crimes against International

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- Conducting conferences and symposia in the area of international criminal law and related fields;

- Promoting and conducting research work in international criminal law and related fields;

- Projects for education in human rights;

- Organizing discussion forums on current issues in international criminal law.

(3) The measures listed in subsection 2 above may be carried out in alternation or cumulatively. If the financial situation so requires, the Foundation may limit itself to a single measure. (4) The Foundation may pursue its purposes both in Germany and in other countries. In so doing, it is to collaborate with other institutions with a similar focus.”

The foundation is a non-profit civil organization under German Civil Law, founded by the Federal Republic of Germany, the Free State of Bavaria and the City of Nuremberg.

<sup>7</sup> E. g. Bayerisches Gesetz Nr. 22 zur Ahndung nationalsozialistischer Straftaten of May 31<sup>st</sup>, 1946 (BGBl. Teil III no 450-2c), Hessisches Gesetz zur Ahndung nationalsozialistischer Straften of May 29<sup>th</sup>, 1946 (BGBl. Teil III no 450-2h); Bremisches Gesetz zur Ahndung nationalsozialistischer Straften of May 27<sup>th</sup>, 1946 (BGBl. Teil III no 450-2e) and Württemberg-Badisches Gesetz zur Ahndung nationalsozialistischer Straftaten of May 31<sup>st</sup>, 1946 (BGBl. Teil III no 450l).

<sup>8</sup> RGBl. p. 127, in the version, which had been effective on the day of unconditional surrender on 8 May 1945.

<sup>9</sup> Section 1 CC; Article 103 paragraph 3 BL; BVerfGE 71, 115; 73, 235; see also Fischer (2019, Einl. recital 20), Hecker (2019, § 1 recital 9), von Heintschel-Heinegg (von Heintschel-Heinegg, 2015, § 1 recital 11)].

<sup>10</sup> The problems related are complex; see ECHR case no 2312/08 and 34179/08 Maktouf and Damjanovic vs. Bosnia and Herzegovina Judgement of July 18<sup>th</sup>, 2013 with concurring opinions.

Humanitarian Law (hereinafter "IHL"), but those attempts all failed to become effective (Werle, 2018, Einl. VStGB recital 11)<sup>11</sup> until the days when Europe and the rest of our world faced new international crimes in dimensions that everybody of us thought of having had become part of humanity's dark history.

### *1.2 Moving forward to International Criminal Law*

In 1991 in the decline of communist regimes all over Europe, The Federal Socialist Republic of Yugoslavia (hereinafter "FSRY") began to dismantle. The process began in Slovenia - briefly followed by Croatia. Both countries sought independence from Yugoslavia and declared their independent sovereignty in June 1991. The independence process resulted in wars<sup>12</sup> which affected almost all former Yugoslavia. The conflict reached the boiling point in Bosnia and Herzegovina.<sup>13</sup> Strange enough and as a sinister remainder: Ordinary citizens of this world were sitting in their parlours and could watch on TV for the first time the war crimes committed "live": e. g. snipers shot civilians to death in besieged Sarajevo or women and children were segregated from men in Srebrenica before the men in July 1995 became victims of the first European genocide since 1945.<sup>14</sup> At the time, Cold War had already become history and this new era impacted the voting situation in Security Council of United Nations. The permanent members of the council used their veto more wisely as it was the case prior to the collapse of the iron curtain. Faced to brutal killings and to other serious crimes having been committed in the conflict zones of FSRY, UN Security Council established the International Tribunal for the Former Yugoslavia (hereinafter "ICTY") and provided the new international judicial institution for material criminal law, which formed the basis to prosecution and adjudication of war crimes "having been committed between 1 January

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<sup>11</sup> When interested parties vainly discussed codifications of "rules in war", atrocities globally kept on happening. Prior to and in the war of independence of East Pakistan, today Bangladesh, unbelievable cruelties were committed in 1971 when Pakistan's militaries oppressed the Awami-League movement for Bangladesh's independence, and those crimes remained unatoned. Some years later, Red Khmer in Cambodia assumed power. Between 1975 and 1979, when Vietnam militarily intervened and put an end to the regime, the Red Khmer mass-murdered up to 2.2 million Cambodians in the attempt to turn back Cambodia into a purely agricultural society. These are only few examples of violations of Humanitarian International Law, which happened under the watchful eyes of International Community. International Community, however, was not able to terminate the cruelties and to set up a system of prosecution. It was the "Cold War", which split the International Community into two parts, which both were busy defending "their interests". Nowadays, same phenomena can be observed when mass-violations of human rights are happening without any response or intervention of the "big" global players or the International Community as a whole, despite of the UN's engagement for the Rule of Law in post-conflict and fragile States (see Marshall, 2014). With respect to the history see also Ambos (2018a, § 6 recitals 3-20).

<sup>12</sup> Slovenia could reach cease of fire after a 10-day-armed conflict. Croatia was at war between 1991 and 1995 (Calic, 2016, pp. 565-605; Hösch, 2002, pp. 266-297).

<sup>13</sup> By referendum of February 29<sup>th</sup>/March 1<sup>st</sup>, 1992, the majority of voters voted for independence of BiH. On March 2<sup>nd</sup>, 1992 BiH declared her independence and seceded from Yugoslavia. As the Serbian part of the population did not agree on the newly established State of Republic of Bosnia and Herzegovina, armed conflicts broke out. The BiH-war ended on December 14<sup>th</sup>, 1995, when the so-called Dayton Peace Accord was signed in Paris.

<sup>14</sup> ICJ Judgement of February 26<sup>th</sup>, 2007 (BiH vs. Serbia and Montenegro) I.C.J. Reports 2007, 43 (no 179) also clarifying that genocide is not a crime which only individuals can commit. It is rather an offence which a State, under public international law, can commit. This comment was exactly the point of view that the Nuremberg Military Tribunal presented in its verdict (Fink, 2015; Werle, 2018, Einl. VStGB recital 7). See also BGHSt 46, pp. 292.

1991 and a date to be determined by the Security Council after restoration of Peace".<sup>15</sup> The establishment of such an international judicial body as a sub-agency of the Security Council was unheard and unprecedented.<sup>16</sup> After ICTY having been established, the Rwanda Civil War drew the world's attention to Africa, especially when genocide on Tutsi, Twa and moderate Hutu people was committed between April 7<sup>th</sup>, 1994 and December 31<sup>st</sup>, 1994. As a consequence, UN Security Council installed the "International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the territory of neighbouring States, between 1<sup>st</sup> January, 1994 and 31<sup>st</sup> December, 1994", briefly the International Tribunal for Rwanda in Arusha<sup>17</sup> (hereinafter "ICTR"). Those two steps of UNO focused on Yugoslavia and Rwanda represent generally the turning points in a decades-long struggle on codifying crimes against "Rules in War" (Werle, 2018, Einl. VStGB recital 13). That turn finally resulted in the Rome-Statute<sup>18</sup> of July 17<sup>th</sup>, 1998, which upon entering into force, established the International Criminal Court (hereinafter "ICC") at The Hague/Netherlands (Geiß & Bulinckx, 2006). It should be noted that the ICC, unlike ICTY and ICTR, is not an UN body but an independent new international organization with its own legal identity<sup>19</sup> and with criminal jurisdiction subsidiary vis-à-vis national war crime prosecution which precedes.<sup>20</sup>

Germany supported and favoured the efforts towards IHL codifications and towards a permanent international war crime court very much; and, besides Japan, she is still contributing most to the court's budget.<sup>21</sup> So, Germany became one of the founding and signatory States when the Rome Conference enacted the Statute, which entered into force on 1<sup>st</sup> July 2002. It is necessary to briefly comment on interrelations between the public international and national laws. In the international and national legal theory, there is a long-lasting discussion going on related to such correlation between the public international law and the national law of the land (Berber, 1975, § 10 with the comment that the discussion on correlation is not having any practical effect; Geiger, 2018, § 7; Sauer, 2018, § 6; Schorkopf, 2017, § 1 B; Seidl-Hohenveldern, 1987, pp. 132–142; Stern, 1977, pp. 353–354; Verdross & Simma, 1984, §§ 71-74). With view on Germany, Article 59 paragraph 2 sentence 1 of the German Constitution, the Basic Law of May 23<sup>rd</sup>, 1949 (hereinafter "BL"), follows dualistic views and requires for international treaties and other international arrangements affecting the matters of internal German legislation to be

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<sup>15</sup> Resolution No 827 of May 25<sup>th</sup>, 1993. ICTY terminated its functions on December 31<sup>st</sup>, 2017. For the time after closure of ICTY as well as ICTR Security Council installed, by Resolution 1966 an "International Residual Mechanism" supporting both courts in resolving outstanding legal and other case related questions (Ambos, 2018a, § 6 recital 21; Satzger, 2018, p. 228).

<sup>16</sup> In particular, the right wing publicists and politicians in Serbia and later in Croatia also debated the courageous step of UN Security Council very controversially. The tribunal was criticized as a manifest of the "winners' justice", which was mainly directed against the Serb people. Later, when the ICTY's "completion strategy" was implemented by installing the War Crime Chamber at the Court of BiH, same arguments were used in order to discredit the national jurisdiction of BiH over war crimes. During the existence of ICTY, the tribunal was criticized because of the robust approaches which the Prosecutor, a body of the Tribunal, undertook in order to press countries, in particular Serbia, to extradite prominent figures like Slobodan Milošević, Ratko Mladić and Radovan Karadžić. Other voices finally raised the issue of the court's efficiency and long-lasting trials together with the costs incurred due to the court's activities.

<sup>17</sup> Resolution no 995 of November 8<sup>th</sup>, 1994; (see also Williamson, 2006).

<sup>18</sup> UN Treaties Series vol. 2187 no 38544.

<sup>19</sup> Article 2 of the Statute (Ambos, 2018a, § 6 recital 25).

<sup>20</sup> Article 1 phrase 1; Article 4 paragraph 1 of the Statute.

<sup>21</sup> About 12 % out of about 145 Million Euros in 2018; (see also Ambos, 2018a, § 6 recital 30).

transformed into national law by (a consenting) Act of parliament. By Act of Parliament of December 4<sup>th</sup>, 2000, Germany incorporated the Rome Statute into its national law.<sup>22</sup>

With regards to the ICC's substance criminal jurisdiction on genocide, crimes against humanity, war crimes and the crime of aggression<sup>23</sup> pursuant to Article 5 of the Statute and in view of subsidiarity of such international jurisdiction, Germany was called upon to enact adequate national legislation in order to preserve her preceding national jurisdiction on serious crimes as set up by the Statute. By Federal Act of 26 June 2002<sup>24</sup>, Germany enacted "*Völkerstrafgesetzbuch*" (= Code of Crimes against International Law [hereinafter "CCIL"]), which is complementary to the German Criminal Code of 15 May 1871<sup>25</sup> (hereinafter "CC"). CCIL now represents the basis for German authorities to prosecute crimes from the Rome Statute, nationally. So far, Germany reclaims universal jurisdiction.<sup>26</sup>

### 1.3 Competent German Authorities for CCIL Crimes' Prosecution and Adjudication

Few words on the authorities of Germany taking care of war crime prosecution seem to be adequate: Germany has concentrated war crime prosecution on the Federal level. The Federal Prosecutor General and his office are challenged to conduct war crime investigations<sup>27</sup> and prosecution<sup>28</sup>, while adjudication of such crimes is enshrined in the jurisdiction of High Courts of Appeal on the States' level, according to Section 120 of the Courts Constitution Act (hereinafter "CCA")<sup>29</sup> as first instance trial courts. Appeals against those High Courts' decisions (verdicts and other procedural decisions) are allowed and to be decided by the Federal Supreme Court of Justice<sup>30</sup> (hereinafter "FSCoJ") in

<sup>22</sup> BGBl. 2000 II p. 1393. See Ambos (2018a, § 6 recitals 22 – 33).

<sup>23</sup> Amendment to the Statute of December 15<sup>th</sup>, 2017.

<sup>24</sup> BGBl. 2002 I p. 2254 amended by Act of December 22<sup>nd</sup>, 2016 (BGBl. 2016 II p. 3150).

<sup>25</sup> Promulgated last version of 13 November, 1998 (BGBl. 1998 I p. 3322) with the last amendment by Article 2 of the Federal Act of 19 June 2019 (BGBl. 2019 I p. 844). CC remains applicable besides CCIL to which CC is supplementary. A criminal act committed e. g. in armed conflicts may represent a war crime according to CCIL and simultaneously murder according to CC. – Other countries applied a different methodology. Bosnia and Herzegovina e. g. that was mostly affected by war crimes committed during the Yugoslavian wars (the armed conflict was terminated by Dayton Peace Accord of 14 December, 1995). When the country had to prepare for replacing the ICTY in its so-called "completion strategy", Bosnia and Herzegovina enacted a new Criminal Code in 2003 (BiH Official Gazette no 3/03 [with recent amendments Official Gazette no 40/15]) and incorporated the Rome Statute material crimes in that new code. Parallel to this code, Bosnia and Herzegovina gave jurisdiction over war crime prosecution to the Court of Bosnia and Herzegovina (Dauster, 2006). A War Crime Chamber was established within the court and became effective in March 2005.

<sup>26</sup> Section 1 CCIL – regardless by whom and where such crimes were committed. With respect to the four major aims of CCIL see Werle (2018, Einl. VStGB recital 34). With regards to the universality of German jurisdiction see Ambos (2018b, § 1 VStGB recitals 1).

<sup>27</sup> In view of the Police, Germany has concentrated investigations within the Federal Bureau of Investigation by Section 4 paragraph 1 no 4 of the Act on the Federal Bureau of Investigation etc. of 1 June 2017 (BGBl. 2017 I p. 1354; BGBl. 2019 I p. 400). The Federal Bureau of Investigation itself concentrated this challenge within a Central Office on Combating War Crimes.

<sup>28</sup> Section 142a paragraph 1 sentence 1 of the Courts Constitution Act in the version published on 9 May 1975 (BGBl. 1975 I p. 1077 – last amended by Article 10 paragraph 6 of the Act of 30 October 2017 [BGBl. 2017 I p. 3618]).

<sup>29</sup> See footnote 18 (Dauster, 2017).

<sup>30</sup> FSCoJ is Germany's highest court in civil and criminal matters. Besides the FSCoJ, the German Constitution of 23 May 1949 established four more Supreme Courts, for Tax and Customs Matters (Bundesfinanzhof in München), for Administrative Matters (Bundesverwaltungsgericht in Leipzig), for Labor Matters (Bundesarbeitsgericht in Erfurt) and for Social Welfare Matters (Bundessozialgericht in Kassel). A Federal Supreme Court above all those highest federal courts was never established, although it was originally foreseen by the constitution.

Karlsruhe.<sup>31</sup> The review of verdicts by FSCoJ is not organized as a full appeal trial with new evidence.<sup>32</sup> The review is limited to issues of law. FSCoJ examines whether the first instance trial court has correctly applied procedural rules of the Criminal Procedure Code (hereinafter “CPC”) when establishing the facts of the case, and whether the first instance court has correctly applied the invoked provisions of the Criminal Code to the facts of the case.<sup>33</sup>

## 2. CASE LAW

Case law of FSCoJ generally is setting up guidelines, which the Federal Prosecutor General and the High Courts of Appeal ought to take into account when they prosecute and adjudicate CCIL crimes. This presentation is limited to two guide-line-decisions of FSCoJ on post-mortem protection of human dignity of persons under the protection of international humanitarian law. Respective case law demonstrates FSCoJ’s methodology in the theatre of interrelations between national and international “Rules in War”. Each case in discussion will start with the established facts before the presentation turns into legal qualifications as set up by FSCoJ.

### 2.1. Case no 3 StR 57/17

In 2013, the accused departed to Syria in order to join the “armed jihad” there. In Idlib province in the Northwest of Syria he then joined a group of fighters, one out of so many, which were characterized by extremist Islamic ideology and which aimed to replace the ruling Assad-regime by an Islamic theocracy under the rule of Sharia. In April 2014, the group around the accused attacked a Regime checkpoint in the vicinity of the city of Binish and captured and subsequently killed two Regime soldiers. During or after the killing, the soldiers were beheaded and their heads were put on metal bars, which were arrayed in front of a school building in Binish. The accused then posed between the bars together with one of his co-fighters and was photographed. He then published those photos showing the gruesome scenery on the Internet.

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<sup>31</sup> One of the FSCoJ’s senates is seated in Leipzig. This second seat of FSCoJ in Leipzig may be explained by the historical background of the German court system, as FSCoJ is considered a successor of the former Reichsgericht, which the Courts Constitution Act of 27 January 1877 (RGBl. 1878 p. 41; the law entered into force on 1<sup>st</sup> January 1879) had established as Germany’s Supreme Court on civil and criminal matters with its seat in Leipzig. When the German Reich collapsed and the unconditional surrender was signed on 8 May 1945, the Reichsgericht ceased its operation and was formally dissolved by Article 1 paragraph 2 of Law No 2 of the Military Government for Germany (Official Gazette No 3 [1945] p. 4). Germany’s division during the Cold War hindered the Reichsgericht’s re-establishment. The second seat of FSCoJ is a historical reminder of the former Reichsgericht. The Reichsgericht’s Palace of Justice now houses the Federal Supreme Administrative Court and can be visited as a tourist sight.

<sup>32</sup> Section 333 of the German Criminal Procedure Code (in the version published on 7 April 1987 [BGBl. 1987 I p. 1074; 1319] – as most recently amended by Article 3 of the Act of 23 April 2014 [BGBl. 2014 I p. 410]).

<sup>33</sup> FSCoJ also controls pretrial custody in cases as referred to by Section 120 of the Courts Constitution Act be it upon appeal, be it *ex officio*, if custody is lasting longer than 6 months prior to the trial’s commencement. It also has jurisdiction on appeals against decisions of the investigative judge of FSCoJ and of the trial court preceding the verdict.

## 2.2. Case no StB 27/16<sup>34</sup>

The accused was member of a terror group, which was active in the armed conflict in Syria. When they were around Aleppo, the accused and other members of the group found the corpse of a fallen Regime-soldier. The group then decided to humiliate the body of the fallen soldier. One non-identified group member cut off nose and ears of the corpse whilst the accused filmed the scene and made comments like “you shall burn in hell”. Then the accused urged another group member to shoot his Kalashnikov in the head of the fallen soldier what he then did. The bullet made the skull burst. The accused filmed the open skull with the brain calling the fallen soldier “Kuffar” (= non-believer).

## 2.3. Case law in Details

In addition to membership in a foreign terrorist organization according to Sections 129a, 129b of the CC, FSCoJ also applied Section 8 paragraph 1 No 9 of the CCIL in both cases.

By verdict of July 27<sup>th</sup>, 2017<sup>35</sup> when considering the appeal, FSCoJ elaborated on the history or on the genesis of the German CCIL. The verdict takes the argument that the goal of the German Parliament, when adopting CCIL, was to enable Germany to prosecute all crimes under the jurisdiction of the International Criminal Court pursuant to the rules as set forth by the Rome Statute by her own national authorities (legal idea of subsidiary jurisdiction of international institutions). Guided by Rome Statute, CCIL transformed the consolidated international customary law into the German national law, because the German lawmaker was of the opinion that such customary law simply was enshrined in the Rome Statute.<sup>36</sup> FSCoJ accepts such view as legally valid. However, the FSCoJ’s point of view on Germany’s interrelation to the Rome Statute and to the International Criminal Court has an impact on the interpretation methodology of CCIL: Germany reclaims prosecution priority on crimes against international law as a national prerogative. Up to now, it is not very clear how such prerogative priority will affect the daily forensic practice. It will not make international jurisdiction carried out by ICC obsolete, but will limit its jurisdiction with special view on Germany. This again is completely in line with Article 1 of the Rome Statute, which sets forth ICC’s subsidiary jurisdiction.<sup>37</sup> Not surprisingly, such views on the national jurisdiction on crimes against international criminal law covered by CCIL have increased the number of CCIL-cases.<sup>38</sup> The increasing number of CCIL-cases, which steam from all conflict areas but in particular from Afghanistan, Syria and from the Horn of Africa, represent a national endeavour for German authorities to build up cases properly, especially with regards to collecting solid and admissible

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<sup>34</sup> In this case, FSCoJ decided upon procedural appeal the legality of an arrest warrant. The proceeding is different from reviewing a verdict upon verdict appeal. Such appeals lead to a “summary proceeding” before a three-judge-bench without oral hearing. Although the legality of the warrant/custody is being reviewed, the major focus of FSCoJ refers to the principle of speedy proceeding before the trial court in accordance with Article 6 paragraph 1 ECHR. When it came to the legality of custody, FSCoJ referred to the principles that the court had already developed to Section 8 paragraph 9 CCIL and upheld them.

<sup>35</sup> BGHSt 62 pp. 272.

<sup>36</sup> BGHSt 62 p. 272/ 277; (see also Henckaerts, 2005; Werle, 2018, Einl. VStGB recitals 35 in particular recital 41).

<sup>37</sup> See additionally Article 17 paragraph 1 item a and b of the Rome Statute.

<sup>38</sup> Specification given by the Federal Government in Deutscher Bundestag Drucksache 19/12354 (submitted by letter of the Federal Ministry of Justice and for Consumer Protection of August 9<sup>th</sup>, 2019).



evidence from the conflict zones. Although this is a different matter – difficult, complex<sup>39</sup> and not matching our present subject, such procedural problems shall not be kept outside our observations or remain unspoken.

In view of the guilty verdict of the High Court in case number 3 StR 57/17 FSCoJ confirmed the verdict's legal qualification according to Section 8 paragraph 1 No 9 CCIL. In the context of an armed conflict of non-international character, the accused was lawfully found guilty of having gravely humiliated or degraded persons protected under international humanitarian law.<sup>40</sup> FSCoJ qualifies the events in Idlib province of Syria as an armed conflict of non-international character, as various groups used armed force against the Syrian regime and its representatives and against each other. By contrast, an international armed conflict, so FSCoJ, is characterized by use of armed force between states. However, the events in Idlib in 2014 were carried out and organized by well-organized hierarchical (para-) military groups and the conflict they had been involved in was timely lengthy and of a certain intensity.<sup>41</sup> FSCoJ accepts the High Court's findings with regards to an armed conflict of non-international character.<sup>42</sup>

FSCoJ went on in its verdict examination and found that the two soldiers concerned, the victims, were to be considered as persons protected under international humanitarian law. So far, the court refers to Section 8 paragraph 6 no 2 CCIL and qualifies the two captured soldiers as being "hors de combat". In their captivity, they are defenceless and in the hands of the adversary party (which is the organization that the accused was a member).<sup>43</sup>

Despite of being dead at the time of humiliation and degradation those soldiers "hors de combat" remained "persons to be protected under international humanitarian law". According to FSCoJ, such qualifications finds its justification in the principle of post-mortem dignity of human beings and the fact that human dignity does not cease by death.<sup>44</sup> FSCoJ explicitly disagrees with some academic voices, who are of the opinion that desecration of corpses does not fall under Section 8 paragraph 1 no 9 CCIL because when the German lawmaker adopted CCIL, he only aimed to incorporate consolidated customary international law. However, so those academics, neither the wording of the Geneva Conventions nor international law practice had produced any post-mortem protection of human beings. Moreover, such post-mortem protection would contravene Article 103 paragraph 2 of the German Constitution, i.e. the prohibition of analogy in criminal matters. FSCoJ clearly rejects those arguments by referring to the Rome Statute's genesis when the creators of the Statute explicitly elaborated on desecration of

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<sup>39</sup> On the one hand, evidence collected under obscure circumstances in conflict zones by foreign militaries, foreign intelligence authorities, by participants in the armed conflict themselves, by non-governmental organizations being active in the combat areas with differing goals and standards or simply by private persons is only one (major) example and causes various legal problems at trial. Those legal problems, e. g. result in issues on proper procedural regime to be applied to evidence gathered in conflict zones, in particular when the national Criminal Procedure Code does not cover that topic. On the other hand, the German constitution, as well as Article 6 paragraph 1 of the European Convention on Human Rights, demand guarantees for potential defendants with regards to a minimum standard of human rights in a criminal proceeding.

<sup>40</sup> BGHSt 62, p. 272/274.

<sup>41</sup> BGHSt 62, p. 272/274 and 275, (see also Ambos, 2018b, Vor § 8 VStGB recitals 21 – 36).

<sup>42</sup> BGHSt 62, p. 272/275: FSCoJ makes it clear that developments, which occurred after 2014 and which internationalized the conflict in Idlib, had not any impact on the given legal qualification for the time of commitment of crime in 2014.

<sup>43</sup> BGHSt 62, p. 272/276; (see also Ambos, 2018b, Vor § 8 VStGB in particular recital 38 and § 8 VStGB recitals 221 – 229).

<sup>44</sup> BGHSt 62, p. 272/276.

corpses as element of international crime.<sup>45</sup> Additionally, FSCoJ quotes the Rulebook of the International Committee of the Red Cross (hereinafter “ICRC”), which collects international customary rules of warfare and respective State practice. No 113 of ICRC-Rulebook clearly states, according to FSCoJ, that conflicting parties are obligated to prevent dead soldiers from being looted and humiliated.<sup>46</sup> FSCoJ also finds its view confirmed by case law of international courts, e. g. for the Former Yugoslavia and for Rwanda, which also accepted post-mortem protection of persons.<sup>47</sup> Finally, FSCoJ cannot see any contravention to Article 103 paragraph 2 of the German Constitution. Section 8 paragraph 1 no 9 CCIL refers to “persons” and “persons” are an equivalent to “human beings”. Thus, the element of “human beings” covers living and dead men in the same way.<sup>48</sup>

This case law of FSCoJ including dead human beings under the protection of Section 8 paragraph 1 no 9 CCIL is not only lawful, but represents the German contribution to domestication of bewildering and disgusting excesses, which happen on the battle grounds all over the globe when adversarial corpses have become, and are still becoming, objects of the winners’ perversions. Desecrated corpses are abused for propaganda on social media and on channels-, which those perverted winners manage. By displaying those corpses, winners show their insane superiority over the adversaries even after they had passed away. Civilized societies may no longer tolerate any form of perverted excesses as desecration of dead bodies. Human beings keep their dignity after death and take their dignity into their graves.<sup>49</sup> If civilized nations tolerate desecration of dead bodies, the warfare returns to practices which we thought had long gone. At the end of this avenue, the international humanitarian law will be at risk.

Punishing desecrators of persons under protection of international humanitarian law might become a sentencing problem. Section 8 paragraph 1 No 9 CCIL requires a minimum penalty of imprisonment for not less than one year.<sup>50</sup> When we consider those desecrations, which have become public on the Internet and elsewhere, the minimum penalty of not less than one year appears to be adequate and proportional. This is also the view of FSCoJ. The court explicitly states that the lawmaker did not disrespect the constitutional principle of proportionality and that within the range of possible penalties trial courts might find the justified penalty.<sup>51</sup>

Desecration in the case was focused on the heads of the killed soldiers. FSCoJ ruled that in terms of guilt, according to Section 8 paragraph 1 No 9 CCIL, it does not matter whether the criminal act was related to the entire body or to the parts thereof.

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<sup>45</sup> BGHSt 62, p. 272/277 – 278.

<sup>46</sup> BGHSt 62, p. 272/279.

<sup>47</sup> BGHSt 62, p. 272/280.

<sup>48</sup> BGHSt 62, p. 272/280; (see also Geiß & Zimmermann, 2018, § 8 VStGB recital 204). For view of the national criminal law see Section § 168 paragraph 1 CC. This section protects firstly piety of mourning relatives but also post-mortem dignity of the deceased person (Fischer, 2019, § 168 recit. 2) and public peace (order), (Schönke & Schröder, 2019, Vor §§ 166 ff. recital 2; von Heintschel-Heinegg, 2015, § 168 recital 1).

<sup>49</sup> *Sedes materiae* of this view is Article 1 paragraph 1 of Basic Law of 23rd May 1949 (BVerfGE 30, p. 173/194) and since then consolidated jurisprudence of the Federal Constitutional Court; BGH NJW 2009, p. 751; (Herdegen, 2009, Art. 1 Abs. 1 in particular recital 57-58; Sprau, 2020, § 823 Rn. 89; Stern, 1988, pp. 1050–1053, 2006, pp. 50–51); with view on Article 100 of the Bavarian Constitution of December 2<sup>nd</sup>, 1946 see Pestalozza (2003, recital 11).

<sup>50</sup> Up to 15 years according to Section 38 paragraph 2 of the German CC, the maximum penalty unless the law foresees lifelong imprisonment.

<sup>51</sup> BGHSt 62, p. 272/281.

Nevertheless, the court highlights the importance of the human head as the most important identification feature of men and underlined its bond to human dignity.<sup>52</sup>

FSCoJ also ruled that taking photos of chopped off heads put on bars represents an illegal “treatment” of the protected person.<sup>53</sup> The common and natural understanding of this legal term does not require any physical impact on the corpse concerned. “Treatment” does only mean that someone is handling someone or something. It can happen without any physical effect on the victim. The legal understanding of the said term follows the natural meaning, according to FSCoJ. The court lawfully points to the argument that “treatment” can be realized by omission of a legally demanded action. Moreover, the court in its argumentation refers to examples from the national Criminal Code, where no physical impact is a legal prerequisite. The court then finds its interpretation confirmed by case law of international courts, in particular for the Former Yugoslavia and Rwanda. This international case law accepted “degrading treatment” when persons under international protection were forced to do humiliating things.<sup>54</sup> “Treatment” under Section 8 paragraph 1 no 9 CCIL only needs to be focused to victim in a specific way.

Finally, FSCoJ decided that the crime element of a “grave” humiliation or degradation” was lawfully established by the verdict under revision. In view of the minimum penalty of not less than one year, FSCoJ recalls the lawmaker’s intention to criminalize only the more severe actions of desecrators, but not all forms of disrespect or of insult vis-à-vis dead adversaries. In this context, FSCoJ invokes the constitutional principle of proportionality<sup>55</sup> and demands restrictive interpretation of Section 8 paragraph 1 No 9 CCIL. In justifying its request for restrictive interpretation, the court once more returns to the CCIL’s genesis in the Rome Statute’s Article 8 paragraph 2 lit. (xxi) and lit. c (ii), which guided the German lawmaker’s orientation. With respect to Article 8 Rome Statute, the court invokes the English crime element of “outrage”, which the court conceives as the severest form of desecration, which cannot be well understood without taking the cultural background of the victim into consideration. Explicitly, the court states that the crime element of “outrage” is only realized, if the desecration provokes “horror” and “disgust”. The German court so far found once more confirmation of its views in the international criminal case law of the ICTR.<sup>56</sup> Simple insults and vituperations do not match the crime element. Showing off with chopped off heads is lawfully regarded as expression of inadequate superiority above the dead soldiers whose heads had been displayed in public like trophies. This represents a “grave humiliation”. Taking photos of the heads chopped off together with the accused himself demonstrates not only inadequate superiority, but equally inhuman mercilessness.<sup>57</sup>

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<sup>52</sup> BGHSt 62, p. 272/282: The ruling does not discuss the question how only “minor parts” of the body might be seen in the light of Section 8 paragraph 1 No 9 CCIL. If the focus of the Section is human dignity any differentiation between “minor” or “major” body parts is not legally possible. Beforehand such a differentiation would be unethical.

<sup>53</sup> BGHSt 62, p. 272/282 – 284.

<sup>54</sup> E. g. prisoners of war were forced to dance nakedly on tables or were forced to urinate in their own clothes.

<sup>55</sup> BGHSt 62, 272/284 and 285.

<sup>56</sup> Bagasora case – verdict of 18 December 2008 ICTR-98-41 no 2219 and no 2222 and of 14 December 2011 ICTR 98-41 no 729.

<sup>57</sup> By the verdict, FSCoJ spoke in general terms about the trial’s court obligation to pay attention to the cultural background of the culture of the *locus criminis* when assessing the desecration. In the very case, neither FSCoJ nor the trial court entered into that matter. It is the question what that element of “culture of the *locus criminis*” is to be understood. Is it necessary to establish facts about that culture by the trial verdict?

### 3. CLOSING REMARKS

Since 2002 the German CCIL represents the corner stone of Germany's endeavour in prosecuting crimes against international humanitarian law. By enacting CCIL, Germany has given her national authorities priority in this arena, and the increasing number of cases, which are based on CCIL is already giving evidence for the importance of that challenge. Those cases are legally difficult and indeed complex in their own rights, as far as establishing facts and collecting supporting evidence are concerned. Nevertheless, German authorities shoulder the challenge. The German FSCoJ revising the verdicts of 1<sup>st</sup> instance trial courts is on a good way to guide lining the case law e. g. on post-mortem protection of human dignity of persons under protection of international humanitarian law. However, more case law covering different topics is to come: illegal expropriation of civilian belongings and estates in crisis areas, plundering and extorting civilian population in combat regions, enslaving members of ethnic or religious minorities, mass deportations from parts of the population in terms of cleansing entire regions in crisis countries are some more examples that German authorities will have to tackle on their way of strengthening the international humanitarian law in the future.

In implementing the will of the German Parliament to prioritize national prosecution on international criminal matters, the German FSCoJ does not compete with the international criminal institutions. Competition is not the point and, moreover, is not within the range of FSCoJ's jurisdiction as such competition would have a more political character. Bearing the genesis of the German CCIL in mind, the FSCoJ's approach in interpreting CCIL rules is also focused on making the best use of the international case law for the sake of quality in the national case law. This perspective beyond the national plate of daily verdict reviews might surprise judicial authorities of such countries, which have a different legal or cultural environment in terms of using international instruments within their internal, national case work. Hence, Germany's does use international case law as a source of law. However, this should not be an exclusive one-way-street. International judicial institutions should also take notice of the German FSCoJ case law on international criminal matters so that a process of reciprocal fertilization might start.

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Apparently, it is not mandatory, as FSCoJ in the very case did not find a legal default in the trial court's verdict, or the disrespect to such culture was self-evident, as beheading corpses contravenes Islamic burial rites. There is a bit of darkness in the FSCoJ's verdict.

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