

GERMANY'S ATTITUDE VIS-À-VIS INTERNATIONAL CRIME AND ITS PROSECUTION BY DOMESTIC COURTS /

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Abstract: *International and national immunities prevent prosecution. They must therefore be observed ex officio. In the case of a subordinate Afghan military officer and his acts relevant under international criminal law, the highest German criminal court, by ruling of 28 January 2021, found that customary international law does not contain such immunities, if the accused officer committed Rome Statute offences abroad against non-German victims. The finding reinforces the principle of global jurisdiction according to the Rome Statute. The court defined the legal war crimes element of torture. Torture does not necessarily require the use of physical force; injuries suffered are therefore an indicator. The concept of torture is also satisfied if an atmosphere of violence is created that may influence the victim's right to self-determination in the intention of the torturer. An additional crime element consisted in the violation of post-mortem dignity of human beings, which demands respectful treatment of dead opponents. A public display of dead adversaries for the purpose of propaganda runs counter this.*

Key words: *No immunity from prosecution based on customary international law for crimes under the Rome Statute; Psychological mistreatment in interrogations and dishonouring of dead adversaries constitute war crimes; Rome Statute; ICC; International Criminal Law*

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1. INTRODUCTION

Through its judgment of 28 January 2021 (file no. 3 STR 564/19),¹ the Federal Supreme Court of Justice (Bundesgerichtshof, hereinafter: **BGH**) has once again positioned itself in international criminal law and, in doing so, also underlined Germany's position in the prosecution of international crimes as reflected in international law in particular by the Rome Statute of 17 July 1998² and by the German International Criminal

¹ The judgment has not yet been translated into English. Its German version can easily be accessed on the website of the Federal Supreme Court of Justice by entering the file number or the date of the decision. It can also be found in some legal periodicals, cf. NJW (Neue Juristische Wochenschrift) 2021 vol. 18, p. 1326 et seq.; JZ (Juristen Zeitung) 2021 vol. 14, p. 724 et seq. See also comments to the judgment by Kreß (2021a, p. 1335, 2021b, pp. 257–261), by Werle (2021, pp. 732–736), by Breuer (2021), or by Ambos (2021, p. 557).

² BGBl. (= Federal Law Gazette) 2000 II, p. 1394 – last amended by Resolution/RC Res. 5 and 6 of the Signatory States Conference of 10/11 June 2010 (BGBl. 2013 II, p. 134).

Code (Völkerstrafgesetzbuch, hereinafter **VStGB**³) transposing the Rome Statute into German national criminal law.⁴ The judgment of the 3rd Criminal Senate of the BGH⁵ provides a further German contribution to the development of international criminal law, the significance of which cannot be gauged at present. Under the current developments in the Russian aggression against Ukraine and the resulting national and international prosecutions, the ruling of the highest German court, in particular, on conceivable immunities of participants in the war seems like a signpost at least for a German position. Other countries may be interested in the judgment of 28 January 2021 for the reasons mentioned (Ambos, 2021, p. 557). The purpose of this article is to provide this information. The legal views given by the court may be discussed. However, such a discussion would require a separate contribution, which would then also have to deal more closely with the customary international law foundations consulted by the court.

At the same time, the BGH's ruling of 28 January 2021 makes it clear that Germany will not tolerate violations of international humanitarian law as set up by the Rome Statute.⁶ For all those who violate the Rome Statute, Germany has never been a "safe haven" of impunity. The judgment of 28 January 2021 contains nothing less than Germany's self-commitment that this will remain so in the future.⁷

2. THE FACTS OF THE CASE AS DETERMINED BY THE MUNICH HIGH REGIONAL COURT⁸

After taking evidence, the High Regional Court of Munich (Oberlandesgericht, hereinafter: **OLG**) had established the following facts. Since no procedural objections (Verfahrensrügen according to § 344(2) of the German Criminal Procedure Code [Strafprozessordnung,⁹ hereinafter: **StPO**]) had been raised against this, these facts were legally binding for the BGH. The BGH based its own judgement on the established facts, as follows:

1. The accused has served as a first lieutenant in the Afghan army at one of its bases. He noticed in late 2013 / early 2014 that three prisoners, whose hands were tied and whose eyes were blindfolded with scarves, were brought to the barracks. Near the barracks, insurgents had fired on a group of soldiers the day before. The accused heard

³ Statute of 26 June 2002 (BGBl. 2002 I, p. 2254), last amended by article 1 of the Act of 22 December 2016 (BGBl. 2016 I, p. 3150).

⁴ As for the history of the VStGB and the Rome Statute see *inter alios* Werle (2018, margin notes 4 et seq.).

⁵ Crimes under the VStGB are matters of federal jurisdiction and not subject to the general jurisdiction of the Länder (Article 96(5) of the German Constitution, the GG of 23 May 1949 = Grundgesetz [Basic Law], hereinafter: **GG**). Pursuant to § 120(1) no. 8 of the Courts Constitution Act (Gerichtsverfassungsgesetz, hereinafter: **GVG**) in the version promulgated on 9 May 1975 (BGBl. 1975 I, p. 1077) - last amended by article 4 of the Act to Improve the Fight against Money Laundering of 9 March 2021 [BGBl. 2021 I, p. 327]), the Federal Government has transferred this federal jurisdiction in the first instance to the Higher Regional Courts of the Länder at the seat of the respective Land government. Within the BGH, appellate jurisdiction for these state protection offences is concentrated with the 3rd Criminal Senate.

⁶ According to Article 59(2) of the GG, the VStGB has transformed the Rome Statute and the crimes described in it into national German law, so that the German courts apply the provisions of the Rome Statute only indirectly.

⁷ In a broader context and with comments on a recent decision of the German Constitutional Court (Bundesverfassungsgericht, hereinafter **BVerfG**) of 18 August 2020 (file no.: 1 BvR 1918/20) (in NJW [Neue Juristische Wochenschrift] 2020 vol. 43, p. 3166) see Bock and Wagner (2020, p. 3146 et seq.).

⁸ OLG München, verdict of 26 July 2019, file no.: 8 St 5/19 (not published).

⁹ Code of Criminal Procedure as published on 7 April 1987 (BGBl. 1987 I, p. 1074, 1319), as last amended by Article 3 of the Act of 11 July 2019 (BGBl. 2019 I, p. 1066).

shouting from the deputy commander's office, where the prisoners had been taken, and went there. As he entered, the deputy commander struck the prisoners who - still tied and blindfolded - were sitting on the floor in the typical manner of the country, with an inch-thick piece of a water hose. At his request, the accused took notes of the following interrogation, which was filmed by another soldier. The aim was to obtain information about a Taliban leader and weapons caches. During the interrogation, the accused and the deputy commander worked together on the basis of a joint decision to use threats and mild to moderate force to obtain statements from the detainees.

The accomplice threatened the first prisoner that he would "tear him apart". The accused told him in Dari that he would "connect him to electricity", which the accomplice translated to the Pashto-speaking prisoners. The accused pulled the hair of the prisoner who was leaning against the wall of the room and hit his head four times in quick succession against the wall. The other officer hit him twice on the head from above with the loose ends of a water hose folded in the middle.

The accused then pulled the second prisoner's hair for about thirty seconds and demanded that he confess. When another soldier in the room declared that he had arrested the prisoner in the house from which the rockets had been fired, the prisoner sobbed. The accused gave him a light blow to the face with the flat of his hand and ordered him to stop crying.

The deputy commander then hit the third prisoner twice with the back of his hand, pulled him to the ground by his shoulders and hit him on the head with his fist from above. After the attacked detainee had answered a question and stood up again, he was finally hit with the flat of the hand. In contrast to the other two prisoners, he then gave information about the whereabouts of the Taliban and weapons.

When a security officer came to collect the prisoners, the interrogation ended, which had lasted more than four minutes. Overall, the beatings were carried out with light to medium intensity and were likely to cause mild to moderate pain. The abuse with the water hose caused at most, reddening of the skin on the top of the head and slight pain. No external injuries or psychological sequelae were observed.

2. In the first quarter of 2014, the accused found the corpse of a wanted, high-ranking Taliban commander after a firefight. He was ordered by his superior to take the body to a butcher and ordered the body to be taken away in a military vehicle. In the process, the body was placed on the rear of the Humvee vehicle with the arms and legs dangling down. The subsequent drive was filmed with the consent of accused. Before driving off, a policeman punched the deceased three times. The accused made a waving gesture with the dead man's arm. During the drive, the policeman and a soldier sitting on the roof of the vehicle hit the corpse several times with an assault rifle. During a brief stop, the accused held a meat hook to the body.

Finally, the accused drove the corpse to a protective three-meter-high wall and pulled a rope noose around her neck, by which the corpse was pulled up at his behest and with his support. The corpse was pulled up and fastened to a metal grating. Then the accused explained in a filmed speech that they had taken the body "like that of a donkey and hanged it here"; if they caught people like that attacking their people again, they would kill them. While hanging on the rampart, he and those under his command were to present the killed man like a trophy and to degrade his honour beyond death, as well as to promote his own professional advancement by falsely claiming that he had killed the Taliban leader himself.

3. At the time of the offences, since 2001 there had been a "war in Afghanistan in the form of non-international conflict" between the Afghan government forces supported by international troops on the one hand and the Taliban and other non-state armed groups on the other.

On 26 July 2019, the OLG of Munich sentenced the accused to a total term of imprisonment of two years for three counts of dangerous bodily harm, one count of which was combined with coercion and two additional counts were combined with attempted coercion, as well as for a war crime against persons. The execution of the verdict was suspended for probation. There was no conviction for the crime of torture under § 8(1) no. 3 of the VStGB. The accused appealed the verdict, in particular, insofar as he was convicted of war crime against persons under § 8(1) no. 9 of the VStGB. The Federal Prosecutor General (Generalbundesanwalt, hereinafter **GBA**) appealed the verdict on the legal point that the accused was not convicted of torture under § 8(1) no. 3 of the VStGB. The appeal of the accused was rejected as ill-founded, the GBA's appeal was accepted as well-founded.

2.1 *The Issue of (Functional) Immunity*

The BGH places at the core of its decision the question of whether the accused's conviction for war crimes is precluded by the obstacle to conviction of immunity, which may be located in customary international law.

It should be noted that in the proceedings before the OLG, neither the OLG by itself nor any of the parties to the proceedings had raised this legal question now being considered by the BGH. Therefore, in the judgment of the 8th Criminal Senate of the OLG of 26 July 2019, there is not a single word on the problem of possible immunity of the accused according to international law. According to German legal understanding, immunities, especially under international law, if they exist, are to be examined and observed at any stage of the proceeding *ex officio* by the criminal courts, including the BGH.¹⁰ Without any of the appellants having raised the issue, the BGH posed the decisive question of whether a (functional) immunity based on international law prevented the prosecution of the accused Afghan military officer by German criminal courts for his conduct in Afghanistan, and responded negatively to this question.¹¹

Immunity from prosecution would be such a procedural impediment if it existed, irrespective of whether this results from § 20(2) of the Courts Constitution Act¹² (= Gerichtsverfassungsgesetz; hereinafter **GVG**¹³) or directly from article 25 of the German

¹⁰ Margin note 12 of the judgment.

¹¹ Margin note 13 of the judgment.

¹² Courts Constitution Act in the revised version published on 9 May 1975 (Federal Law Gazette I p. 1077), as last amended by Article 2 of the Act of 10 July 2020 (Federal Law Gazette I p. 1648).

¹³ The wording of § 20 of the GVG is: (1) German jurisdiction also shall not apply to representatives of other states and persons accompanying them who are staying on the territory of application of this Act at the official invitation of the Federal Republic of Germany. (2) Moreover, German jurisdiction also shall not apply to persons other than those designated in subsection (1) and in §§ 18 and 19 insofar as they are exempt there pursuant to the general rules of international law or on the basis of international agreements or other legislation.

Constitution,¹⁴ the Basic Law¹⁵ (Grundgesetz; hereinafter: **GG**). The BGH then examines whether the general rules of international law contain a legal principle that precludes acts committed by a foreign subordinate official in the exercise of its official performance abroad to the detriment of non-domestic persons from being prosecuted by German courts. Such examination follows the line of Article 38(1)(b) of the Statute of the International Court of Justice,¹⁶ which refers to state practice as the determining factor of international legal conviction of the existence of a customary rule of international law.¹⁷ In order to determine the relevance of such state practice, the conduct of state bodies responsible for international legal relations under international or national law, regularly the government or the head of state may have to be taken into account. However, a relevant state practice may also result from acts of other state bodies, such as those of the legislature or the courts, insofar as their performance is directly relevant under international law. According to the case law of the Federal Constitutional Court (Bundesverfassungsgericht = hereinafter: **BVerfG**), judicial decisions, as well as doctrines of international law, are only to be used as support arguments in the clarification of customary international law.¹⁸ However, in determining state practice, account must be taken of recent legal developments at the international level, which are characterised by progressive differentiation and an increase in the number of recognised subjects of international law. For this reason, the actions of international organisations and, above all, international courts deserve special attention.¹⁹

The methodology outlined by the BGH also corresponds to that which the International Court of Justice is used to when applying Art. 38 of the ICJ Statute.²⁰

The BGH then states for the so-called *acta iure imperii* that, in view of the sovereign equality of states, a state is in principle not subject to any foreign state jurisdiction.²¹ With regard to functional immunity for natural persons, the BGH notes that this could arise as an outflow of this state immunity, because a state can regularly only act through natural persons. However, the subject of the proceedings and the point of reference for any immunity here was not the sovereign action of a foreign state not involved in the court proceedings in general, but the individual responsibility of a natural person for war crimes that he or she was alleged to have committed as an official of a foreign state that was not particularly prominent in the state organisation. A functional

¹⁴ The wording of article 25 of the GG is: The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.

¹⁵ Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 29 September 2020 (Federal Law Gazette I p. 2048).

¹⁶ As promulgated on 26 June 1945 – in force in Germany since Germany's accession to the United Nations on 18 September 1973 (BGBl. 1973 II, p. 430).

¹⁷ Margin note 14 of the judgment with further references.

¹⁸ BVerfG, Decision of 5 November 2003 – 2 BvR 1506/02, BVerfGE (Official Case Law Collection of the BVerfG) vol. 109, p. 38, 54 with further references.

¹⁹ BVerfG, *ibid.*, footnote 17.

²⁰ Margin note 15 of the judgment with further references.

²¹ For the various types of immunities under international law, see Doehring (2004, margin note 656 et seq.), Satzger (2018, par. 13 margin notes 45 and 46), Werle (2007, margin notes 604 et seq.). The content, scope and limits of immunities under international law are in a state of flux and are the subject of heated debate, cf. Ziegler and Wehrenberg (2013a, p. 5 et seq.), Bothe (1971, pp. 246–270), Häußler (1999, pp. 96–105), Schad (2013), Dörr (2003, pp. 201–219), Karl (2003), Novak and Reinisch (2013, pp. 492–507), Spitzer (2008, pp. 871–873), Würkert (2015, pp. 90–120), Kreicker (2007), Senn (2010), Höfelmeier (2018), and Baldegger (2015). More importantly see decision of the International Court of Justice, Germany vs. Italy, decision of 3 February 2012, ClJ Recueil 2012, p. 99/122 et seq., in particular pp. 134–135.

immunity to be considered in such a case must be distinguished from other immunities, in particular the personal immunity (*ratione personae* as for example of diplomats pursuant to Article 29 of the Vienna Convention on Diplomatic Relations of 18 April 1961,²² of consular personnel pursuant to Article 41 of the Vienna Convention on Consular Relations of 24 April 1963²³ or – pursuant to customary international law the head of state²⁴ or of [certain] members of foreign governments²⁵).²⁶

2.2 On the General Principles of International Law in Matters of Immunity

In its judgment of 28 January 2021, the BGH states that according to the general rules of international law, the criminal prosecution of war crimes of torture and seriously degrading and humiliating treatment of persons, as well as criminal offences of German general criminal law such as dangerous bodily harm and coercion, is not excluded by domestic courts because such acts were committed by a foreign, subordinate official in the exercise of its official functions abroad to the detriment of non-domestic persons.²⁷ The court bases this finding - methodically unobjectionable - on a thorough examination of the relevant international state practice.²⁸ The BGH carries out this investigation in awareness of the significance of such a finding, since corresponding findings could have effects on the obligation of all states.²⁹ Against the backdrop of the latest developments in international criminal law, the BGH attributes increasing importance to international court practice in relation to other interstate practice and no longer assigns such judicial sources of knowledge only auxiliary knowledge value as in earlier times.³⁰ However, this does not imply a statement on the value of judicial sources of knowledge in national legal systems. They are noteworthy, but not primarily decisive. The BGH recognises the problem of other immunities based on international law (disputed State immunity³¹), which it, however, expressly does not want to touch on its decision discussed here. Its statement on the lack of functional immunity under general international law is not intended to say anything about the fundamental problem of state immunity, according to which, in principle, no state has to answer before the courts of other states for acts of sovereignty (*acta iuris imperii*) it has performed.³² The BGH emphasises that the appeal proceedings before it do not concern these other conceivable forms of immunity under

²² In force since 24 April 1964 (cf. for Germany see BGBl. 1965 II, p. 147); see also Doebling (2004, margin notes 674 et seq.).

²³ In force since 19 March 1967 (cf. for Germany see BGBl. 1971 II, p. 1285); see also Doebling (2004, margin note 682).

²⁴ See Doebling (2004, margin notes 671 et seq.), Tangemann (2002), Riznik (2016), and Zehnder (2002).

²⁵ See Doebling (2004, margin note 673).

²⁶ Margin note 17 of the judgment with further references.

²⁷ Margin note 13 of the judgment with further references. See also Doebling (2004, margin notes 685 et seq. in particular for internationally active personnel (judges and other functionaries)).

²⁸ Margin notes 14 et seq. of the judgment with further references.

²⁹ Margin note 14 of the judgment with further references.

³⁰ Margin note 15 of the judgment with further references.

³¹ See Doebling (2004, margin note 682 et seq.), Berber (1975, p. 220 et seq., p. 274 et seq.).

³² As a classical example, see *Germany v. Italy (intervener on the side of Italy: Greece)* International Court of Justice "Immunités Juridictionnelles de l'État" – Arrêt du 3 Février 2012, Recueil 2012, p. 99, in particular p. 122 et seq. and pp. 134–145; see also Kreicker (2012, pp. 107–123), as well as BVerfGE 16, p. 27 et seq., p. 141 et seq.; decision of 17 March 2014 (file no.: 2 BvR 736/13); Schorkopf (2017, p. 416 et seq.), Geiger (2018, p. 300 et seq.).

international law, such as immunity *ratio personae*,^{33,34} but only the individual responsibility of a natural person for war crimes which he or she is alleged to have committed as an official of a foreign state who is not particularly prominent in the state organisation.³⁵

The state practice referred to by the BGH in this respect proves that such foreign officials have often been prosecuted in the past.³⁶ The highest German criminal court correctly states that against this background, the few exceptional decisions have not had a decisive influence on the state practice that it describes as predominant.³⁷ Thus, the court refers to the sentencing of those responsible for the National Socialist system of injustice not only by international (military) courts, for example in Nuremberg, but also by courts of other states.³⁸ The BGH does not get bogged down in details.³⁹ The historian may find this regrettable, for example because the defence of Adolf Eichmann⁴⁰ before the district court in Jerusalem and the defence of Klaus Barbie⁴¹ before the jury court in

³³ In the process of coming to terms with GDR (German Democratic Republic) injustice, in particular for the killing of refugees at inner-German border due to the shoot-to-kill order, there were convictions for former highest officials of the GDR by courts of the reunified Germany. In the context of the constitution complaint lodged against the convictions, the Federal Constitutional Court ruled on 24 October 1996 that the convicted persons could no longer invoke immunity *ratio personae* recognised by Article 25 of the Basic Law. This immunity had ceased to exist with the state of the GDR through the accession of its Länder to the Basic Law (BVerfGE 95, p. 96 et seq.; see also Berber (1975, p. 274 et seq.), Ambos (2018, § 7 margin notes 101–109), Willnow (1997, p. 221 et seq.)). Further see Kreicker (2015, pp. 298–305).

³⁴ See examples collected from the BVerfG's case law by Aust (2021, margin notes 67–70). From a completely different perspective, the problem considered if immunities under international law conflict with guarantees provided for by the European Convention on Human Rights and Basic Freedoms see Brohmer (2002, pp. 85–94), Herdegen (2016, margin notes 52 et seq.).

³⁵ Margin note 17 of the judgment with further references. Further Schorkopf (2017, p. 460 et seq.).

³⁶ Margin notes 19 et seq. of the judgment with further references.

³⁷ Margin note 19 with further references.

³⁸ Margin note 20 with further references.

³⁹ One of these details of Germany's Nazi past, now that the immediate perpetrators have almost all died, is how to deal with the looted art organised by the Nazis throughout Europe and with reparations to the victims (cf. Rapp, 2021, p. 752 et seq.).

⁴⁰ Adolf Eichmann escaped Allied military jurisdiction after the end of the war and emigrated to Argentina in 1948 via the so-called rat line where he lived for the next years in modest circumstances but in close contact with the Argentinian-German ex-Nazi milieu under the name of "Ricardo Klement" until he was located there by a Nazi persecute. The latter informed the then Attorney General of the State of Hesse, Fritz Bauer (cf. Dittmann, 2015, p. 136 et seq.; Steinke, 2013; Wojak, 2009, 2011), who had earned the reputation in the young Federal Republic of Germany for vigorously prosecuting Nazi crimes. Fritz Bauer had had his experiences with the then German establishment and harboured a well-founded distrust that the federal government of the Federal Republic of Germany would take the necessary measures. Instead, he passed on his information to Israel – behaviour that at the time bordered on treason. The rest is history (see Weinke, 2018). The literature on the Eichmann trial, which ended with the only death sentence ever pronounced and carried out in Israel, is almost impossible to survey, so that only examples can be given: Arendt (2006), Cohen (1963), Hausner (1967), Lipstadt (1967), or Yablonka (2004).

⁴¹ The trial of Klaus Barbie, alias Klaus Altmann, who was given the attribute of the "Butcher of Lyon" and who the court in Lyon sentenced to life imprisonment for crimes against humanity after his expulsion from Bolivia on 4 July 1987 and who died of cancer in French penal custody on 25 September 1991, is remarkable not only because his defence used the criminal proceeding as a platform to question French wartime history under the Vichy regime and thus reopened wounds in French national memory. In addition, the defence confronted the French public with its own crimes committed in Indochina and Algeria (Binder, 1989, pp. 1321–1383; Delage, 2011, pp. 330–332; Hammerschmidt, 2017). However, what is remarkable is the life story of Klaus Barbie and his "impressive" career, which he made as a "dictator's aid" in South America after the Second World War and which cannot be understood if one ignores his closeness to the German (post-war) secret service (Bundesnachrichtendienst [BND]) and the American CIA (cf. Bower, 1984; Hammerschmidt, 2014; Schröm and Röpke, 2002). Nothing proves the post-war connections better and with more factual substance

Lyon (*la cour d'assise du Rhône*) implied that the Israeli and French courts were not allowed to convict them because they were only subordinate subordinates of the Nazi regime.⁴² Whether they wanted to invoke functional immunity with this defence was a historical aspect that was of no further relevance to the BGH and, moreover, had not been considered relevant by either the Israeli or the French court. The BGH's view of the lack of functional immunity under general international law is also confirmed by the case law of the International Criminal Tribunal for the Former Yugoslavia (hereinafter: **ICTY**) and the International Criminal Tribunal for Rwanda (hereinafter: **ICTR**).⁴³

In addition to (national and international) case law, the BGH sees its legal opinion confirmed by a (growing) international legal opinion on the absence of functional immunity.⁴⁴ In this context, the court discusses the Statute of the International Military Tribunal in Nuremberg of 8 August 1945 as the beginning of international criminal law at the end of the Second World War⁴⁵ and, building on this, the activities of the International Tribunals for the former Yugoslavia and for Rwanda. In the case law of national courts, such as the Hoge Rad of the Netherlands,⁴⁶ the Belgian Cour de Cassation⁴⁷ and other

than the report by the **US Department of Justice – Criminal Division**, "Klaus Barbie and the United States Government. A Report to the Attorney General of the United States, August 1983".

⁴² Margin note 27. The view on Klaus Barbie would remain incomplete if references were not made to Beate Klarsfeld and her husband Serge Klarsfeld, who both dedicated their lives to the prosecution of fugitive Nazi criminals and who succeeded in locating Klaus Barbie in Bolivia (Klarsfeld and Klarsfeld, 2015). Beate Klarsfeld became almost a celebrity in Germany when she publicly slapped the then Federal Chancellor Kurt Georg Kiesinger at the CDU party conference in Berlin on 7 November 1968 because of his Nazi past. She was later sentenced to one year's imprisonment for bodily harm by the (Berlin-) Tiergarten District Court (Amtsgericht Berlin-Tiergarten) as a result. On appeal filed by Beate Klarsfeld, the Berlin Regional Court (Landgericht Berlin) later reduced the prison sentence to four months, the execution of which was suspended for probation.

⁴³ Margin note 21 with further references. For the legacy of the Sierra Leone Court see Meisenberg (2013, p. 164 et seq.).

⁴⁴ Margin note 23 with further references.

⁴⁵ The BGH does not recall earlier attempts to bring war criminals to trial. The Versailles Peace Treaty of 28 June 1919 (cf. Kolb, 2005; Leonhard, 2019; MacMillan, 2015), through its Article 231, imposed sole responsibility for the First World War on the German Empire (and its allies), in that the provision stipulated: "The Allied and Associated Governments declare, and Germany acknowledges, that Germany and her Allies are responsible as authors for all loss and damage suffered by the Allied and Associated Governments and their nationals as a result of the war forced upon them by the aggression of Germany and her Allies." (so-called War Guilt Article). The current view on War Guilt of historians has become more differentiated (see Clark, 2012; Leonhard, 2018). Against the background of the question of war guilt, it was only logical to also bring the former German head of state, Kaiser Wilhelm II, before a special tribunal of international judges (Article 227 of the Peace Treaty) for "the most serious violation of international morality and the sanctity of treaties" (Schabas, 2018). After his departure from German headquarters in Belgium, the then abdicated Kaiser has sought and found refuge in the Netherlands. The Dutch Government refused to extradite the former emperor to the Entente powers (see Ziegler and Wehrenberg, 2013b, pp. 1–2, 2013a, pp. 1111–1124). Wilhelm II died at the age of 82 on 4 June 1941 in Doorn in the Netherlands. In particular because of German atrocities after the invasion and occupation of neutral Belgium (the massacre of Dinant and the destruction of the university town of Louvain being only the most salient examples), other major German war criminals were also to stand trial before Allied tribunals under Articles 228 and 229 of the Peace Treaty. Despite the clear provisions of the treaty, the German Government stubbornly resisted any extradition request until 1920, when concessions were made elsewhere and the British Government relented, allowing the German authorities to take over the prosecution of war crimes. The criminal trials conducted before the Reichsgericht in Leipzig (the then Supreme Court of Germany) went down in history of international criminal law as the "Leipzig Trials". They lasted from 1921 to 1927 and are certainly not a glorious chapter in the history of German justice, because only in the fewest cases were there guilty verdicts, and then most extremely lenient sentences (Hankel, 2003, 2017; Kaul, 1966, pp. 19–32; Lafleur, 2011, p. 25 et seq.; Müller, 2001, pp. 202–222, 2006, pp. 249–264).

⁴⁶ Margin note 28 of the judgment with further references.

⁴⁷ Margin note 29 of the judgment with further references.

national courts,⁴⁸ the highest German criminal court also sees its view confirmed. According to the BGH, this has not changed by the preliminary work of the International Law Commission of the United Nations on state immunity, insofar as dissenting voices were raised there, but ultimately did not prevail. In this context, the BGH cites the then Special Rapporteur of the UN Commission on International Law, the Russian law professor Roman Kolodkin, for dissenting legal opinions,⁴⁹ whose opinion did not find acceptance in the Commission.⁵⁰ Insofar as the BGH consults (German and foreign) international law doctrine, it does not come to any other conclusion.⁵¹ Finally, the court again takes up an aspect already mentioned at the beginning of its decision.⁵² The Court's view, which is based on individual responsibility, does not affect other immunities based on international law (State immunity, immunity from civil liability) and the discussion held in this regard.⁵³ Ultimately, the BGH also sees itself in line with the case law of German courts.⁵⁴

2.3 *The Question of Torture*

According to German law, torture⁵⁵ as a war crime results from § 8(1) no. 3 VStGB. The provision contains a summary of various criminal law aspects found in individual provisions of the Rome Statute (Ambos, 2018, § 10 margin notes 116 et seq.; Satzger, 2018, § 14 margin. no. 46) and other international law instruments (Geiß and Zimmermann, 2018, § 8, margin note 135). Whoever, in connection with an international or non-international conflict, cruelly or inhumanely treats a person to be protected under international humanitarian law by inflicting substantial physical or mental harm⁵⁶ or suffering on him or her, in particular by torturing or mutilating him or her, is punishable under § 8(1) no. 3 of the VStGB by imprisonment of not less than three years. Although the Higher Regional Court that ruled in the first instance assumed that the treatment of the prisoners by the accused, among others, constituted dangerous bodily harm (within the meaning of § 224 of the Criminal Code⁵⁷ [Strafgesetzbuch, hereinafter **StGB**]), it denied that the ill-treatment was significant within the meaning of § 8(1) no. 3 of the VStGB and did not convict the accused of the war crime of torture in this respect. According to the BGH, materiality was a question of law that it could decide as a court of appeal, because the GBA had challenged the first-instance verdict with his appeal filed to the disadvantage of the defendant, in view of the failure to convict him pursuant to § 8(1) no. 3 of the VStGB. In contrast to the Higher Regional Court, the BGH attributed materiality

⁴⁸ Margin notes 30 – 33 of the judgment with further references.

⁴⁹ Margin note 36 of the judgment with further references.

⁵⁰ Margin note 37 of the judgment with further references.

⁵¹ Margin note 38 of the judgment with further references.

⁵² Margin note 24 of the judgment with further references.

⁵³ Margin notes 39 and 40; margin notes 41 – 43 – all with further references. See also Weigend (2018, § 2 margin note 28 with further references).

⁵⁴ Margin notes 44 – 48 with further references.

⁵⁵ The literature on torture is almost impossible to oversee, for historical considerations in Germany, e. g. as one of the first opponents to torture Praetorius (1613); further see Baldauf (2004), Schmoeckel (2000), Rother (2010). The current discussion has focused on the location of the prohibition of torture in terms of the history of ideas and constitutional law (see Hong, 2006, pp. 24–35), the consequences of its violation (Beestermöller and Brunkhorst, 2006; Beutler, 2006; de Aragão, 2007; Möhlenbeck, 2008) or whether there are exceptions to the prohibition (Breuer, 2006, pp. 11–23; Frankenberg, 2006, pp. 55–68; Greve, 2014, pp. 236–246; Günther, 2006, pp. 101–108; Maier, 2016; Steiger, 2013; Thimm, 2005, p. 1 et seq.).

⁵⁶ As another example for Nazi-cruelties see Griesecke (2007, pp. 269–274).

⁵⁷ Criminal Code in the version promulgated on 13 November 1998 (BGBl. 1998 I, p. 3322), as last amended by Article 1 of the Act of 12 August 2021 (BGBl. 2021 I, p. 3544).

to the ill-treatment inflicted on the prisoners; it constituted torture within the meaning of § 8(1) no. 3 of the VStGB.⁵⁸ All circumstances of the individual case had to be taken into account in order to assess the severity, but the context of the acts also influenced this assessment (Geiß and Zimmermann, 2018, § 8 margin note 138). The criterion of materiality only served to exclude minor cases from the scope of application.⁵⁹ Therefore, only constellations of cases are covered in which the impairment of the victim exceeds the level of a simple bodily injury (according to § 223 of the StGB), whereby, with regard to psychological torture, a physical impairment of the victim is not mandatory.⁶⁰ Based on the correct finding that the VStGB (as incidentally, the Rome Statute) places different requirements on the success of an act that constitutes an offence,⁶¹ a narrower interpretation of § 8(1) no. 3 VStGB is appropriate in view of the history of the law and the differences to general offences under national law,⁶² which only covers the "infliction of serious physical or mental harm". In doing so and in line with the case law of the European Court of Human Rights (Sinner, 2015, margin notes 5 et seq.), the BGH does not lose sight of the fact that the law in § 8(5) VStGB also has in mind the cases on the borderline between seriousness and insignificance of the abuse and allows for a milder punishment of less serious cases, so that a graduated sanctioning is possible and thus the principle of guilt is preserved (Geiß and Zimmermann, 2018, § 8 margin note 264 with further references). Since the point of reference for the seriousness is the physical and mental suffering caused, the physical and mental effects actually caused are to be considered in a special way. In addition, the type of treatment and its context, the duration and the condition of the victim could be of importance.⁶³ Applying these principles to the facts established by the OLG in a manner that was binding to the BGH, the BGH used for its assessment the interrogation situation that was characterised by particular aggressiveness, which the defendant found when he entered and of which he then willingly became a part.⁶⁴ Part of the (intimidating) mistreatment of the prisoners with a water hose were also threats, such as "tearing a prisoner apart" or "connecting him to the electricity".⁶⁵ According to the overall picture of the mistreatment situation, the BGH is certain that it was serious.⁶⁶ The fact that no bleeding, bony or otherwise visible injuries were found on the victims did not change this. This also applies to the fact that the OLG that ruled at the first instance could not establish any psychological consequential damage.⁶⁷ In this context, the BGH also clarified the question of the legal relationship between torture according to § 8(1) no. 3 of the VStGB and the degrading and humiliating treatment of persons according to § 8(1) no. 9 of the VStGB. The court considers torture under § 8(1) no. 3 of the VStGB to be the more specific offence,⁶⁸ which supersedes a further conceivable criminal liability § 8(1) no. 9 of the VStGB (Geiß and Zimmermann, 2018, § 8 margin note 136). The court considers the fact that torture was carried out on

⁵⁸ Margin note 64 of the judgment with further references.

⁵⁹ With view on the legal situation under Article 3 of the European Convention on Human Rights and Basic Freedoms see Sinner (2015, margin notes 5 et seq. with references to the case law of the European Court of Human Rights).

⁶⁰ Margin note 66 of the judgment with further references.

⁶¹ Margin notes 69 and 70 of the judgment with further references.

⁶² Margin note 71 of the judgment with further references.

⁶³ Margin note 73 of the judgment with further references.

⁶⁴ Margin note 75 of the judgment; see also Geiß and Zimmermann (2018, § 8 margin notes 138, 140).

⁶⁵ Margin note 76 of the judgment with further references.

⁶⁶ Margin note 77 of the judgment with further references.

⁶⁷ Margin note 77 of the judgment with further references.

⁶⁸ Margin note 79 of the judgment with further references.

three prisoners at the same time as a single event and thus as legally only one offence.⁶⁹ With regard to the general offences of dangerous bodily harm, coercion and attempted coercion, which were also realised according to the established facts, the BGH considers the offences to be legally a single offence only according to § 52 of the StGB. Torture under § 8(1) no. 3 of the VStGB does not constitute a special provision in relation to general offences, nor does torture consume these offences necessarily,⁷⁰ because the unlawful content of the offences realised differ from each other and not every torture must also be accompanied by coercion.⁷¹

In this respect, the BGH amended the first-instance verdict and pronounced the accused guilty of torture on the appeal of the GBA. In order to determine the sentence to be imposed for the offence of torture, the 3rd Criminal Senate of the BGH referred the case back to another Criminal Senate of the OLG in Munich.⁷²

2.4 The Treatment of the Dead Taliban Leader

The accused had challenged his more extensive conviction for the crime of humiliating or degrading treatment of a person under § 8(1) no. 9 of the VStGB (desecration of a dead enemy) with his appeal. The BGH dismissed the defendant's appeal as ill-founded.

The BGH had already had the opportunity to judge on the post-mortem protection of human dignity of members of opposing armed forces in the past.⁷³ The post-mortem protection of human dignity prohibits any degrading or ridiculing way of treating the corpse.⁷⁴ The court adhered to this case law and applied in the present proceeding.⁷⁵ The public display of the slain Taliban leader and the disrespectful treatment of his corpse that preceded it fulfills the elements of the offence under § 8(1) no. 9 of the VStGB.

3. CONCLUSIONS

The judgement of the BGH of 28 January 2021 is a landmark decision that should attract attention beyond the borders of the Federal Republic of Germany and have a lasting impact on the discussion under international law on immunities from prosecution for war crimes or other crimes under the Rome Statute. Germany has played a prominent role in the prosecution of crimes under the Rome Statute for quite some time (Ambos, 2021, p. 557). This is evidenced, for example, by the prosecution of former members of the security apparatus in Syria under the rule of Bashar al-Assad before the OLG Koblenz.⁷⁶ The highest German criminal court has unequivocally rejected the functional immunity of subordinate sovereigns of foreign states for crimes committed abroad under the Rome Statute, thus making it clear at the same time that such perpetrators cannot regard Germany as a safe, i.e. impunity-free, haven. This may trigger expectations among

⁶⁹ Margin note 80 of the judgment with further references.

⁷⁰ Margin note 83 of the judgment with further references.

⁷¹ Margin note 83 of the judgment with further references.

⁷² § 354(2) and (3) StPO; agreeing Ambos (2021, pp. 557, 558).

⁷³ BGH, NJW 2016, p. 3604; see Dauster (2020, pp. 9–32), Rabe Smolensky (2009, p. 763 et seq.), Schwarzenberg (2009, pp. 303–311); Wallau, Roth, di Fabio and Kindhäuser (2010, p. 259 et seq.), Geiß and Zimmermann (2018, § 8 margin note 234).

⁷⁴ BayVGh (Bayerischer Verwaltungsgerichtshof), NJW 2003, p. 1620.

⁷⁵ Margin note 91 of the judgment with further references; also see Geiß and Zimmermann (2018, § 8 margin note 234).

⁷⁶ File no.: 1 StE 9/19 – On to the case related press and media issues see BVerfG, Decision of 18 August 2020 (file no.: 1 BvR 1918/20) with comments on the case.

the victims of such crimes, which the German prosecution authorities cannot always meet. The procurement of necessary evidence has been in the past, is in the present and will remain in future a decisive momentum. Cautious restraint can be inferred from the BGH's decision. With regard to immunities relevant under criminal law and based on international law, the court only expressed its opinion for the case constellation of subordinate officials of foreign states. The case to be decided gave no reason to go further. However, one would be doing the BGH an injustice if one were to misinterpret the court's caution to mean that German prosecuting authorities were "only after the small ones", while the "big ones" were "let go".

In interpreting the offence of torture under § 8(1) no. 3 of the VStGB, the court exercises caution in a similar manner. The BGH has limited itself to giving direction. Those who had hoped for more, however, overlook the fact that this restraint by Germany's highest criminal court at the same time creates flexibility in the application of the provision. Special circumstances of an individual case can be better taken into account. Whether this entails the danger that the case law will get lost in individual cases is not apparent at present. The extent to which the court allows the contextual circumstances it cites to influence the quality of torture will have to be clarified by the court's future case law. In any case, the view expressed by the court in this judgement is in line with the tendencies at the international level to curb torture. As far as post-mortem protection of human dignity under § 8(1) no. 9 of the VStGB is concerned, the BGH can now rely on its own consolidated case law. The ghouls made public on social media by the perpetrators are more than just an annoyance, but proof of how far morals have been depraved.

4. APPENDIX: AN EXCURSION INTO GERMAN CONSTITUTIONAL PROCEDURE LAW

If it is doubtful in a legal dispute whether such a rule of international law is part of federal law and whether it produces legal effects for the individual inhabitant of the federal territory, the BVerfG must decide whether and to what extent general international law contains legal principles that produce legal effects for German courts (Article 100(2) of the GG). However, in the present specific proceedings, the BGH did not obtain the decision of the BVerfG pursuant to § 13 no. 12 of the Act on the Federal Constitutional Court (Gesetz über das Bundesverfassungsgericht, hereinafter: **BVerfGG**⁷⁷) in conjunction with § 84 of BVerfGG, but decided on the matter itself, also insofar as general public international law was concerned.

The procedure for determining legal principles under international law pursuant to Article 100(2) of the GG (Vitzhum and Proelß, 2019, margin notes 155–161) is, in turn, based on the concrete review of norms pursuant to Article 100(1) of the GG. This provision stipulates that a court which considers a law, the validity of which is at stake in the decision, to be unconstitutional must stay the proceedings pending before it and, if it concerns the violation of the constitution of a Land, obtain the decision of the court of the Land competent for constitutional disputes, and if it concerns the violation of the GG, obtain the decision of the BVerfG (*konkrete Normenkontrolle*).⁷⁸ This also applies if it is a question of the violation of the GG by Land law or the compatibility of a Land law with

⁷⁷ In the version published on 11 August 1993 (BGBl. 1993 I, p. 1473) - last amended by Art. 4 of the Act on the Implementation of Directive (EU) 2016/680 in Criminal Proceedings and on the Adaptation of Data Protection Provisions of the Regulation (EU) 2016/679 of 20.11.2019 (BGBl. 2019 I, p. 1724).

⁷⁸ With view on the constitutional history see Dederer (2016, margin notes 1-4).

another federal law. The comprehensive monopoly of review and judgement of the BVerfG established in this way - a special feature of German constitutional law - can be explained historically. The constitution of the Weimar Republic of 11 August 1919,⁷⁹ which preceded the GG, did not know of a concrete review of norms by the State Court (*Staatsgerichtshof*⁸⁰) of the German Reich. The consequence of this was that every German court could disregard a statute in a legal dispute pending before it if it considered that statute to be unconstitutional.⁸¹ The danger of legal fragmentation is obvious in such a legal situation. The BVerfG's monopoly on decision-making counteracts this danger and thus guarantees legal certainty and legal clarity nationwide. Since Article 25 of the GG attaches greater importance to the general rules of international law after the experiences with the Nazi state under the rule of law and in contrast to the Weimar Reichsverfassung,⁸² it makes sense to extend the decision-making monopoly of the BVerfG in domestic norm checks to the question of the existence and content of legal principles of general international law⁸³ (*norm verification*⁸⁴). The gain for legal certainty and legal clarity is obvious.⁸⁵ In the present criminal proceedings, the BGH had come to the conclusion, which it then also set out, that there is no sentence of general international law within the meaning of Article 25 of the GG that precludes the criminal prosecution of acts of a foreign subordinate official in the exercise of its official activity abroad to the detriment of non-domestic persons. Indeed, a referral to the BVerfG is only admissible but also required if the referring court can present its doubts as to the existence or the content of such a sentence of general international law (Meyer, 2021, margin note 109).

The BGH did not misjudge its obligation to refer the matter to the BVerfG under Article 100(2) of the GG, but was of the opinion that it was not obliged to refer the question of international law to the Federal Constitutional Court.⁸⁶ It is true that the term "legal dispute" used in Article 100(2) of the GG also covers criminal proceedings and is not limited to adversarial proceedings. Otherwise, the guarantee function intended by Article

⁷⁹ RGBl. (Reichsgesetzblatt, Official Gazette of the German Reich) 1919, p. 1383.

⁸⁰ See Schmitt (1996, pp. 48–70); Carl Schmitt can be counted among the Nazi crown jurists, whose legal genius during the period of German fascism made him one of the most controversial jurist personalities, to whom access is still difficult up to today (cf. Mehring, 2021, p. 745 et seq., 2009; Thoma, 1922, p. 267 et seq.; Wehler, 1979; Schiedermaier, 2020, pp. 715–732; Wittreck, 2004, pp. 415–470; Stolleis, 2003, pp. 266–280; Hoogers and Karapetian, 2018, pp. 257–287; Dreier, 2019, pp. 333–335).

⁸¹ Thus the Reichsgericht, the highest court of the German Reich, in a judgment of 4 November 1925, literally stated: "Since the Reich Constitution itself contains no provision according to which the decision on the constitutionality of Reich laws would be withdrawn from the courts and transferred to a specific other body, the right and duty of the judge to review the constitutionality of Reich laws must be recognised." See further Anschütz (1933, par. 4 – 6 with references to judgements of other German courts), Hornauer (2010), Maurer (1963, p. 683 et seq.), Hartmann (2006/2007, pp. 154–173), Kanoth (2003, p. 705 et seq.).

⁸² Anschütz (1933, par. 4-7) referring to the academic whether the binding effect of such rules requires the consent of the competent State bodies of the Reich to such rules. The guarantee of Article 84 of the Constitution of the Free State of Bavaria of 8 December 1946, which is identical in wording to Article 4 of the Weimar Reichsverfassung has become largely obsolete as a result of Article 25 of the Basic Law see Wolf (2017, margin notes 3-6 with further references), Schweiger (2008, margin note 3); further BVerwG (Bundesverwaltungsgericht = Federal Supreme Administrative Court), judgment of 5 April 2016 (file no.: 1 C 3.15), margin notes 30 et seq.; or Dahm, Delbrück, and Wolfrum (1989, p. 117 et seq.).

⁸³ BVerfGE 75, 1 (11); see also Meyer (2021, margin note 107), and Wenig (1971, pp. 42–45 concerning the proceeding, which a submitting court must observe legally).

⁸⁴ See Aust (2021, margin note 62), Dederer (2016, margin notes 281 et seq.), Geck (1976, p. 142), Geiger (2018, p. 154 et seq.), Schmidt-Bleibtreu (1992, margin note 1).

⁸⁵ BVerfGE 23, 288 (317); see also Aust (2021, margin note 62), Meyer (2021, margin notes 33–37 with further references).

⁸⁶ Margin notes 50 et seq. of the judgment.

100(2) of the GG would be called into question.⁸⁷ It was not decisive for the question referred to whether the content of general international law in question created rights and obligations for the inhabitants of the federal territory.⁸⁸ The fact that a court confronted with the legal question had no doubts of its own as to the existence of the legal rule in question is equally irrelevant if the court encounters such doubts from other state bodies. In such case, it is solely up to the BVerfG to dispel doubts expressed by other constitutional bodies or international or foreign courts or recognised voices of international law doctrine.⁸⁹ Such doubts are to be assumed if no uniform legal opinion has been formed on a rule of general international law, be it national or international.^{90, 91} Isolated voices to the contrary were to be disregarded in this context.⁹² The 3rd Senate of the BGH then explains why it has no doubt that general international law does not contain a rule preventing the criminal prosecution of subordinate foreign officials if he has committed war crimes against non-domestic individuals in the exercise of his official function abroad. The BGH's interpretation of law deviates even less from national and international opinions on the non-existing functional immunity of such officials under general international law.⁹³ The arguments of the BGH should not to suspend the criminal law review proceedings in such a legal situation that the court had established, and not submit the legal question to the BVerfG for *norm verification*, are convincing. If the legal situation is clear, there is no reason to refer (abstract or theoretical) questions to the highest German court, the BVerfG.⁹⁴

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⁸⁷ Margin note 52 of the judgment.

⁸⁸ Margin note 53 of the judgment.

⁸⁹ Margin note 54 of the judgment; see also Dederer (2016, margin notes 305 et seq.).

⁹⁰ Margin note 55 of the judgment; see also Meyer (2021, margin notes 110 et seq.).

⁹¹ Since such a procedural obstacle does not exist under customary international law, the discussion as to whether the ratification of the UN Convention of 10 December 1984 (BGBl. 1990 II, p. 247 et seq. – with view on Afghanistan's ratification see BGBl. 1993 II, p. 715) included any immunities could be disregarded. Moreover, the discussion was not uniform anyway (margin note 60 of the judgment).

⁹² Margin note 59 of the judgment.

⁹³ Margin note 57 of the judgment.

⁹⁴ The parties to the appeal proceedings saw this in the same way. Therefore, they did not challenge the decision of the BGH before the BVerfG. Pursuant to Article 93(1) no. 4a of the GG, § 13 no. 8a of the BVerfGG, the accused was entitled to lodge a constitutional complaint with the BVerfG against the BGH's judgment of 28 January 2021 (§ 90.1 of the BVerfGG), which should have been lodged within one month of service of the judgment or its pronouncement (§ 93(1) of the BVerfGG). In order to do so, he would have had to claim that by not submitting the case to the BVerfG pursuant to Article 100(2) of the GG, the BGH had deprived him of the "statutory judge" (Art. 101(1) sentence 2 of the GG, see BVerfGE 64, p. 1 et seq.; Aust (2021, margin note 63), Meyer (2021, margin note 8), Feldmüller (1999, p. 204 et seq.)). If the requirements of Art. 100(2) of the GG are met and the court seized is obliged to make the referral, the judges of the BVerfG become "statutory judges" within the meaning of Article 101(1) sentence 2 of the GG, who must decide on the question of referral (Geiger, 2018, p. 155). Although a defendant cannot force the referral to the BVerfG, the constitutional complaint offers him or her a subsequent opportunity for correction. There is a high probability that the BVerfG, if it deals with the "statutory judge", will incidentally also comment on the question of international law raised. However, the accused in the proceeding concerned did not move his subject up to the BVerfG.

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