State immunity — Functional immunity — Foreign State officials — Immunity from foreign criminal jurisdiction — Whether functional immunity applying to subordinate State officials — Customary international law

International criminal law — War crimes — Torture — Humiliating and degrading treatment — Gravity threshold — Universal jurisdiction — Afghanistan — Taliban — Afghan military

Jurisdiction — Universal jurisdiction — War crimes — Functional immunity — Foreign State officials — Immunity from foreign criminal jurisdiction — Whether functional immunity applying to subordinate State officials for war crimes committed abroad — Whether precluding criminal prosecution by domestic court

Relationship of international law and municipal law — General rules of international law — State immunity — War crimes committed by foreign State subordinate official in exercise of official functions to detriment of foreign national — Functional immunity — Whether precluding criminal prosecution by domestic court

War and armed conflict — Non-international armed conflict — Afghan military in conflict with non-State armed groups, including Taliban — Law of armed conflict — The law of Germany

Functional Immunity of Foreign State Officials and Crimes under International Law Case

(Case No 3 StR 564/19)

Federal Republic of Germany, Federal Court of Justice (BGH).[1]
28 *January* 2021

(Schäfer, Wimmer, Paul, Berg and Anstötz, *Judges*)

Summary:[2] *The facts*:—On 26 July 2019, the accused appellant, a former officer in the Afghan National Army, was found guilty by the Munich Higher

[1] The third Section for Criminal Law (*Strafsenat*).
[2] Prepared by Ms W-M Nosakhare, Ms J. Asin Owino and Professor C. Kreß.

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Regional Court[3] of offences committed during 2013-14 in the course of a non-international armed conflict in Afghanistan. That conflict, which was between Afghan Government forces supported by international troops on the one hand, and the Taliban and other non-State armed groups on the other, had been ongoing since the end of 2001. The accused was sentenced to a total of two years' imprisonment for three counts of dangerous bodily harm, one count of which was combined with the crime of coercion, two counts of attempted coercion, and for a war crime against persons of degrading and humiliating treatment. The judgment of the Higher Regional Court suspended the execution of the sentence, against which the accused appealed on points of law. The Federal Prosecutor General lodged an appeal seeking a conviction for the war crime of torture and the reversal of the entire sentence.

Held:—The appeal of the Federal Prosecutor General and the appeal of the accused were dismissed.

(1) Under the general rules of international law, the procedural obstacle of functional immunity did not preclude criminal prosecution by a domestic court for war crimes of torture and seriously degrading or humiliating treatment committed by a foreign State subordinate official in the exercise of his or her official functions abroad to the detriment of a foreign national (paras. 19-35).

(2) The appeal of the Federal Prosecutor General was successful, in that the guilty verdict was to be modified. In other respects it was unfounded, as was the appeal of the accused (para. 62).

(3) The accused appellant met the requirements for the war crime of torture (paras. 63-4).

(4) The judgment of the Munich Higher Regional Court was amended.

(a) The guilty verdict was modified to the extent that the accused was found guilty of war crimes of torture in combination with dangerous bodily harm, coercion and attempted coercion, as well as the war crimes of outrages upon personal dignity by degrading or humiliating treatment (paras. 81-5).

(b) The individual sentences in case II.B.1 of the grounds for judgment (*Urteilsgründe*) and the overall sentence were annulled. The respective findings were upheld, as they were not affected by the errors of law (para. 86).

To the extent of the annulment, the matter was remanded back to another criminal division of the Higher Regional Court for a new hearing and decision.

The text of the relevant part of the judgment of the Court commences on the following page.[4]

[3] Case No 3 StE 1/19-6 8 St 5/19.
[4] The text in square brackets has been inserted by the translators.

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A.

[The following is a summary of the statement of facts made by the Higher Regional Court (paragraphs 3-10 of the judgment).]

3. I. The accused was enlisted as a senior lieutenant in the Afghan army on one of its bases. In late 2013/early 2014, Taliban insurgents fired on a group of soldiers near the base. The next day, the accused noticed that three insurgents were captured and brought to the barracks with hands tied and eyes blindfolded with scarves. When the accused heard shouting in the deputy commander's office where the detainees had been led, he went there. When he entered, the deputy commander struck the detainees, who were still shackled and blindfolded (sitting on the floor in a manner conforming with custom in Afghanistan), with a piece of a water hose about a metre long and an inch thick. At the request of the deputy commander, the accused recorded the subsequent interrogation in writing, and another soldier filmed it. The purpose of the interrogation was to obtain information about a Taliban leader and weapons caches. The accused and the deputy commander cooperated during the interrogation based on a joint decision to use threats and mild to moderate force to elicit statements from the detainees.

4. The co-perpetrator threatened the first prisoner saying that he would "tear him apart", after which the accused stated to the first detainee in Dari that he would "connect him to electricity", which the deputy commander translated to the Pashto-speaking detainee. The accused then pulled the hair of the detainee leaning against the wall of the room and hit his head against the wooden wall four times in quick succession. The deputy commander then hit him twice on the head from above with the loose ends of the water hose folded in the middle.

5. The accused then pulled the second detainee's hair for about 30 seconds and demanded that he confess. When a different soldier in the room declared he had arrested the detainee in the house from which the rockets in the insurgent attack had been fired, the detainee started crying. The accused gave the second detainee a light blow to the face with the palm of his hand and told him to stop crying.

6. The deputy commander then hit the third detainee twice with the back of his hand against the area of his forehead, pulled him to the ground by the shoulder, and hit him on the head with his fist from above. After the detainee answered a question and straightened up again, he was hit in the face with the palm of his hand. Due to the abuse, and unlike the other two detainees, he gave information about the whereabouts of the Taliban and weapons.

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7. The interrogation, which had lasted for four minutes, ended when a security officer arrived to pick up the detainees. Overall, the beatings were delivered with mild to moderate intensity and occasioned mild to moderate pain. At most, the abuse with the water hose produced redness of the skin on the top of the head and mild pain. There were no more external injuries or psychological consequences.

8. II. At a point in the first quarter of 2014, the accused found the corpse of a wanted, high-ranking Taliban commander after a shootout. He was ordered by his superior to take the body away to a butcher in a military vehicle.

9. In the process, the corpse was placed on the rear of a Humvee-type vehicle in such a way that the arms and legs dangled downward. Before the drive commenced, a police officer punched the corpse three times and made waving gestures with one of the corpse's arms. The subsequent drive to the butcher was filmed with the knowledge of the accused. During the drive, the policeman and a soldier sitting on the vehicle's roof struck the corpse several times with an assault rifle. During a brief stop, the accused attached the corpse to a meat hook. He then had the corpse driven to a three-metre-high protection wall and pulled a noose of rope around the neck of the corpse, by which it was pulled up and attached to a metal grate at his behest and with his support. Then, in a filmed speech, he declared that they had taken the body "like that of a donkey and hanged it"; if they caught such people (referring to the Taliban) attacking their people again, they would kill them. In hanging him on the protective wall, he and those under his command aimed to present the corpse as a trophy and to desecrate the body, as well as to promote his professional career by falsely claiming that he had killed the Taliban leader himself.

10. III. At the time of the commission of these crimes, there was a war in the form of a non-international armed 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, which had been ongoing since the end of 2001.

B.

[The Federal Court considered the applicability of functional immunity, which would constitute an obstacle to its jurisdiction, from paragraph 11 of the judgment as hereunder.]

11. A decision on the merits of the case is not precluded by the procedural obstacle of functional immunity, which must be examined

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ex officio. According to customary international law, former military officials like the accused are not exempt from German criminal jurisdiction concerning war crimes (II.). Since there are no serious doubts in this respect, the Senate can rule on this without first obtaining a decision from the Federal Constitutional Court (III.) Consequently, there is no need to clarify whether functional immunity would be excluded on other grounds (IV.) In all other respects, too, German criminal jurisdiction is established (V.).

12. I. The Senate must decide on the existence of any immunity, although it has not been invoked in the present proceedings. German jurisdiction is a general procedural requirement; its existence and its limits are to be examined and taken into account *ex officio* as questions of law at any time during the proceedings (see BVerfG, Decision of 13 December 1977—2 BvM 1/76, BVerfGE 46, 342, 359; BGH, Judgments of 3 March 2016—4 StR 496/15, StV 2017, 103 marginal No 20; of 19 December 2017—XI ZR 796/16, BGHZ 217, 153 marginal No 15). In so far as immunity under customary international law exists, such immunity is generally relevant, irrespective of whether this follows from § 20 para. 2 of the Courts Constitution Act (*Gerichtsverfassungsgesetz*, *GVG*) (see Kissel/Mayer, *GVG*, 10th ed., § 20, marginal No 2 et seq.; MüKoZPO/Zimmermann, 5th ed., § 20 *GVG* marginal No 9 f.) or directly from Article 25 of the Basic Law (*Grundgesetz*, *GG*) (cf. on § 20 *GVG* old version BGH, judgment of 26 September 1978—VI ZR 267/76, NJW 1979, 1101; see also Note Verbale of the Permanent Mission of the Federal Republic of Germany to the United Nations of 6 April 2017, 190/2017).

13. II. According to the general rules of international law, criminal prosecution by a domestic court for war crimes of torture and seriously degrading or humiliating treatment, as well as for general criminal offences, committed by the same conduct, such as dangerous bodily harm and coercion, is not precluded because the acts were committed by a foreign subordinate State official in the exercise of his/her official function abroad to the detriment of foreign nationals.

[The Court next defined the meaning of a general rule of customary international law and the means for its determination, requiring the established practice of numerous, but not all, States and the conviction of an obligation under international law.]

14. 1. A general rule of customary international law within the meaning of Article 38 para. 1 lit. (b) of the Statute of the International Court of Justice (ICJ Statute) is a rule that is supported by an established practice of numerous, but not necessarily all, States ("consuetudo" or "usus") under the conviction of an obligation under

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international law (*opinio iuris sive necessitatis*) (BVerfG, Decision of 3 July 2019—2 BvR 824/15 et al., NJW 2019, 2761 marginal No 32; cf. also ICJ, Judgment of 3 February 2012—1031—*Germany* v. *Italy* —*ICJ Reports 2012*, 99 marginal No 55).[5] Because of the fundamental obligation of all States expressed therein, there is a high threshold placed on their determination (BVerfG, Decision of 3 July 2019—2 BvR 824/15 et al., loc. cit., para. 31 mwN).

15. In order to determine State practice, the conduct of the State organs responsible, under international or national law, for the conduct of international legal relations, which are ordinarily the government or the head of State, may have to be relied upon. However, State practice may also result from the acts of other State organs, such as those of the legislature or the courts, in so far as their conduct is of direct international legal relevance (BVerfG, Decision of 5 November 2003—2 BvR 1506/03, BVerfGE 109, 38, 54 mwN). While it is true that, according to the case law of the Federal Constitutional Court, judicial decisions and teachings of international law are to be used only as subsidiary means for the clarification of customary international law, account must be taken of recent legal developments at the international level, characterized by progressive differentiation and an increase in the number of recognized subjects of international law. For this reason, the actions of organs of international organizations and, above all, international courts deserve special attention (BVerfG, Decision of 5 November 2003—2 BvR 1506/03, loc. cit.). In addition, the decisions of national courts may be taken into account in particular where, as in the area of the immunity of foreign States from jurisdiction, domestic law allows national courts to apply international law directly (see BVerfG, Decision of 13 December 1977—2 BvM 1/76, BVerfGE 46, 342, 367 f.). Furthermore, the *travaux* of the United Nations International Law Commission can be an indication of the existence of an *opinio iuris* legal conviction (cf. BVerfG, Decisions of 8 May 2007—2 BvM 1/03, BVerfGE 118, 124, 136 f.; of 6 December 2006—2 BvM 9/03, BVerfGE 117, 141, 161).

16. 2. On the basis of the standards set out above, under customary international law, no general functional immunity *ratione materiae* of subordinate officials of foreign States, in particular soldiers, precludes national criminal prosecution for war crimes.

[Consequently, the Court affirmed the sovereign immunity of States under paragraph 17 of the judgment reproduced below, which

[5] *Germany* v. *Italy*, 168 ILR 1.

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it then specifically delimited from the scope of the functional immunity of a foreign State official in criminal proceedings.]

17. a) It is well established as a starting point that, given the sovereign equality of States, a State is in principle not subject to any foreign State jurisdiction, at least concerning sovereign acts (*acta iure imperii*) (cf. BVerfG, Decisions of 27 October 2020—2 BvR 558/19, juris para. 18 ff; of 6 May 2020—2 BvR 331/18, NJW 2020, 3647 para. 18 ff; ICJ, Judgment of 3 February 2012—1031—*Germany* v. *Italy—ICJ Reports 2012*, 99 paras. 53 ff; BGH, Judgment of 19 December 2017—XI ZR 796/16, BGHZ 217, 153 paras. 16 ff; Steinberger, State Immunity in EPIL vol. 4, 615, 619; Isensee/Kirchhof/F. Becker, *Handbuch des Staatsrechts*, 3rd ed. Sec. 230, marginal No 81). This may result in functional immunity for natural persons as an emanation of State immunity since a State can regularly act only through such persons (see ECtHR, Judgment of 14 January 2014—34356/06 et al.—*Jones and Others* v. *United Kingdom*—ECHR 2014-I, 1 para. 202 et seq.;[6] BGH, Judgment of 26 September 1978—VI ZR 267/76, NJW 1979, 1101; ICTY, Judgment of 29 October 1997—IT-95-14-AR 108—*Blaskić*—para. 41; Kissel/Mayer, *GVG*, 10th ed., Sec. 20, marginal No 3). However, the subject of these proceedings and the point of reference for immunity, in this case, is not the sovereign act of a foreign State, not involved in the legal proceedings, in general, but the individual criminal responsibility of a natural person for war crimes that he is alleged to have committed as a foreign State agent who is himself not particularly prominent in the State organization. A functional immunity to be considered in such a case must be distinguished from other immunities, in particular personal immunity (*ratione personae*). The same applies to the exclusion of civil liability.

[The Court found, in paragraph 18, general State practice permitting the criminal prosecution of foreign State officials who hold subordinate positions in foreign criminal proceedings for war crimes as below:]

18. b) There is general State practice to the effect that criminal prosecution by a national court is possible in the constellation described. State organs and courts have often prosecuted and sentenced foreign State officials for war crimes, genocide or crimes against humanity. Since the decisions rejecting immunity are numerous and of considerable importance, the difficulty of finding proof of practice of

[6] *Jones and Others* v. *United Kingdom*, 168 ILR 364.

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immunity that precludes court proceedings as against the available evidence that negates the operation of immunity as an obstacle to prosecution leading to conviction is inconsequential.

19. Even in the event of a practice that recognizes immunity, it could be expected that, due to instances of non-compliance with such practice or doubts about its pertinence, court rulings would be issued in individual cases confirming immunity. Such decisions, however, are not evident. To the contrary, domestic jurisdiction has regularly been deemed to apply.

[The Court extensively scrutinized the relevant proceedings of national and international judicial bodies to ascertain evidence of a legal conviction that denies the inapplicability of functional immunity to State officials who hold subordinate positions when they are prosecuted in foreign criminal proceedings for war crimes in paragraphs 20-34 of the judgment below.]

20. aa) For example, numerous responsible persons of the National Socialist regime were convicted not only by the International Military Tribunal in Nuremberg but also by criminal courts of other States (see, for example, UNWCC, *Law Reports of Trials of War Criminals*, vol. VII, 1 et seq., 23 ff; vol. XIII, 70 ff; vol. XIV, 23 ff; *Bulletin Criminel Cour de Cassation Chambre criminelle* No. 239 [1983]; CanLII 129 (SCC), [1994] 1 SCR 701).

21. bb) The same applies to the punishment of crimes in the former Yugoslavia. For example, in Germany—among other States—a member of the Serbian armed forces and the head of a local police station were convicted of aiding and abetting genocide as well as other offences (see BGH, Decision of 21 February 2001—3 StR 244/00, NJW 2001, 2732; BayObLG, judgments of 23 May 1997—3 St 20/96, NJW 1998, 392; of 15 December 1999—6 St 1/99). Furthermore, the conviction of a Rwandan mayor for genocide was likewise found not to be precluded by his former position (see BGH, judgment of 21 May 2015—3 StR 575/14, JZ 2016, 103; Frankfurt Higher Regional Court, judgment of 29 December 2015—4—3 StE 4/10—4—1/15, juris).

22. cc) In addition, there are other proceedings before national courts for criminal offences in which the accused were State officials during the period of the offence (see in particular the decisions listed below under c) cc)). For example, in recent years, several former members of the Iraqi army have been convicted of war crimes by European courts (see Barthe, *Journal of International Criminal Justice* 16 [2018], 663, 665 et seq. for individual examples).

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23. c) In addition to the unanimous State practice, there is a general conviction that under international law—assuming the existence of a functional immunity of foreign State officials of whatever rank for official acts—the prosecution of lower-ranking State officials for war crimes or certain other offences affecting the international community as a whole by national courts is permissible (cf. generally on the recourse to the individual by international criminal law BVerfG, Decision of 18 November 2020—2 BvR 477/17, JZ 2021, 142 para. 18).

24. aa) Article 7 of the Statute of the International Military Tribunal of 8 August 1945, which is counted among the "Nuremberg Principles", expressly provided that the official position of an accused, whether as head of a State or as a responsible official in a government department, was not to be considered a ground for exclusion from punishment or a ground for mitigation of punishment. It is thus apparent that this provision presupposed jurisdiction over such persons concerning the crimes within the court's jurisdiction—crimes against peace, war crimes, crimes against humanity (Article 6 of the Statute). Although the court was established exclusively to try and punish the principal war criminals of the European Axis (Article 1 of the Statute; on the special situation of Germany under constitutional law after the war BVerfG, Judgment of 29 July 1952—2 BvE 3/51, BVerfGE 1, 351, 367; Decision of 21 October 1987—2 BvR 373/83, BVerfGE 77, 137, 154; see also Art. 107 UN Charter), the principles recognized by the Statute had already been reaffirmed in 1946 by the General Assembly of the United Nations (UN Doc. A/RES/95[I]) and were subsequently increasingly used as general principles (cf. on the irrelevance of the State function in war crimes also US Department of the Army, Field Manual FM 27-10, The Law of Land Warfare of 18 July 1956, No 510). For example, they were taken into account in drafting the Rome Statute of the International Criminal Court (see BT-Drucks. 14/2682 pp. 100, 101; Kirsch, Wash. U. Global Stud. Law Review 6 [2007], 501; on the starting point for the development of an international criminal justice system for crimes against humanity also BVerfG, judgment of 28 July 2005—2 BvR 2236/04, BVerfGE 113, 273, 297).

25. bb) The International Criminal Tribunal for the former Yugoslavia (see UN Doc. S/RES/827 [1993]; BVerfG, Decision of 12 December 2000—2 BvR 1290/99, NJW 2001, 1848, 1853) assumed that those responsible for the commission of war crimes, crimes against humanity or genocide could not invoke immunity from national or international jurisdiction even if they had committed the crimes in the exercise of their State function (ICTY, Judgment of 29 October

1997—IT-95-14-AR 108—*Blaskić*—para. 41; see also ICTY, Judgment of 10 December 1998—IT-95-17/1-T—*Furundžija*—para. 140). Although, in contrast, the International Criminal Court, in connection with questions of immunity, has distinguished international courts acting in the interest of the international community as a whole from national jurisdiction exercised in the interest of an individual State (subsequently, Special Court for Sierra Leone, Decision of 31 May 2004—SCSL-2003-01-I—*Taylor*—para. 51), it did not express a view on whether functional immunity existed for war crimes before national courts (see ICC, Judgment of 6 May 2019—ICC-02/05-01/09 OA2—*Al-Bashir*—para. 113; on this, see, for example, Chaitidou, ZIS 2019, 567, 574 et seq.; see also, generally, Report of the United Nations Secretary-General of 3 May 1993, UN Doc. S/25704 para. 55).

26. cc) National courts have, in many cases, not seen any obstacle to ruling on war crimes, crimes against humanity or genocide.

27. (1) The Supreme Court of Israel has assumed, with detailed justification and with reference to the "Nuremberg Principles", that the "act of State doctrine" does not preclude criminal liability for violations of international law, in particular for international crimes such as crimes against humanity (Supreme Court, Judgment of 29 May 1962—*Eichmann*—36 ILR (1968), 277, 308 ff.).[7] Even if the Supreme Court did not explicitly discuss the immunity of foreign State officials in this context (cf. on the act of State doctrine BVerfG, Decision of 24 October 1996—2 BvR 1851/94 and others, BVerfGE 95, 96, 129 mwN), it is clear from its decision and its reasoning that, as a result, acting as a State official does not prevent criminal proceedings before a foreign domestic court.

28. (2) The Dutch High Council did not address the issue of immunity in a case concerning prosecution for torture (Hoge Raad, judgment of 18 September 2001—749/01 CW 2323, *Netherlands Yearbook of International Law* 32 [2001], 282 et seq.), after a lower court had rejected immunity on the grounds that the commission of such grave crimes could not be considered part of official State duties (Amsterdam Court of Justice, judgment of 20 November 2000—R 97/163/12 Sv et al., *Netherlands Yearbook of International Law* 32 [2001], 266 ff.; in general, Zegveld, *Netherlands Yearbook of International Law* 32 [2001], 98, 113 ff.). In a later case, the court denied the immunity of a convicted person for acts committed in an official State function in Afghanistan under Dutch law (Hoge Raad,

[7] *Attorney-General of the Government of Israel* v. *Adolf Eichmann*, 36 ILR 5.

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judgment of 8 July 2008—07/10063, *International Law in Domestic Courts* 1071 [NL 2008]).

29. (3) The Belgian Court of Cassation has not granted immunity to a military officer in criminal proceedings for serious violations of international humanitarian law, unlike a head of State or government (Cour de cassation de Belgium, Decision of 12 February 2003—P.02.1139.F, *Journal Tribunaux* 2003, 243, 246 et seq. [*International Legal Materials* 42 (2003), 596]; see Rau, HuV-I 2003, 92; d'Argent, *Journal Tribunaux* 2003, 247, 250 ff.).

30. (4) In a case involving, among other things, allegations of genocide and torture against former foreign State officials, the Spanish Constitutional Court did not address the problem of immunity but rather the question of national jurisdiction, and—in contrast to the contested decision—accepted this at least in part in that concrete case (Tribunal Constitutional, Judgment of 26 September 2005—237/2005, *Boletin Oficial del Estado* 2005 No 258—17753—45 [*International Law in Domestic Courts* 137 (ES 2005)]; on the previous decision of the Tribunal Supremo, see Benavides, *International Legal Materials* 42 (2003), 683, 684 f.).

31. (5) In criminal proceedings concerning the killing and injury of Italian citizens by a US soldier in Baghdad, the Italian Court of Cassation concluded that State immunity does not apply to crimes under international law (Suprema Corte di Cassazione, Decision of 24 July 2008—Case No 10171/2008, *International Law in Domestic Courts* 1085 [IT 2008]; see Tondini/Bertolin, *Quaderni Constituzionali* [2008], p. 89; July 2008—31171/2008, *International Law in Domestic Courts* 1085 [IT 2008]; cf. Tondini/Bertolin, *Quaderni Constituzionali* 28 [2008], 897).[8]

32. (6) After detailed considerations, the Swiss Federal Supreme Court has—in a case concerning a former Minister of Defence—come to the conclusion that no unanimous clear answer can be given to the question of whether the immunity *ratione materiae* applies to all acts committed in an official capacity and whether the alleged serious violations of humanitarian law must be taken into account. However, in such constellations, it is not possible, according to the Court, to invoke functional immunity (Federal Supreme Court, Decision of 25 July 2012—BB.2011.140, *Arrêts du Tribunal Pénal Fédéral Suisse* 2012, 97, 113 f.).

33. (7) The French Court of Cassation has repeatedly accepted the basis that, in principle, immunity exists for acts of State officials in the

[8] *Public Prosecutor and Another* v. *Lozano*, 168 ILR 485.

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exercise of governmental, not private-sector, authority. However, exceptions to this may exist in accordance with the rules of peremptory international law (Cour de cassation, decision of 16 October 2018—16-84.436, *Bulletin des arrêts de la chambre criminelle* 2018, 560, 563; see also Cour de cassation, decisions of 19 March 2013—12-81.676, *Bulletin des arrêts de la chambre criminelle* 2013, 124; of 23 November 2004—04-84.265, *Bulletin criminel* 2004, 1096; of 13 March 2001—00-87.215, *Bulletin criminel* 2001, 218).

34. (8) In an earlier decision, this Court itself initially left open the question of whether the principle of State immunity, with the same legal force as in civil procedural law, "has significance for criminal prosecution and protects foreign State organs beyond the circle of persons enjoying personal immunity (heads of State, diplomats)" (BGH, judgment of 30 July 1993—3 StR 347/92, BGHSt 39, 260, 263; cf. also Decision of 29 May 1991—StB 11/91, NJW 1991, 2498, 2499). However, on several subsequent occasions, it has seen no reason to address this question expressly and has left the prosecution of former foreign State officials by German courts for offences under the German Code of Crimes against International Law (*Völkerstrafgesetzbuch*, *VStGB*) or previously under the former § 220a of the German Criminal Code (*Strafgesetzbuch*, *StGB*), undisturbed (see Federal Court of Justice, Judgment of 21 May 2015—3 StR 575/14, JZ 2016, 103 [genocide with the participation of a Rwandan mayor]; Decisions of 21 February 2001—3 StR 244/00, NJW 2001, 2732 [Aiding and abetting genocide by the head of a local police station in Bosnia–Herzegovina]; of 6 June 2019—StB 14/19, BGHSt 64, 89; of 5 September 2019—AK 47/19, juris marginal No 7 et seq.; of 9 October 2019—AK 54/19, juris [Torture by Intelligence Service officers in Syria]; of 16 May 2019—AK 23/19, juris [in this case]).

[The Court's survey of the jurisprudence conducted in the preceding paragraphs led it to affirm a rule of customary international law in paragraph 35 below which states that: Notwithstanding the debates before the International Law Commission on the question of limitation or exceptions to immunity as considered in paras. 35-8 of the judgment, these do not impair its findings on the permissibility of the prosecution of foreign low-ranking State officials for war crimes or other offences affecting the international community as a whole.]

35. dd) The more recent *travaux* of the United Nations International Law Commission on criminal immunity have not yet been completed (on the significance of the International Law Commission, BVerfG, Decision of 6 December 2006—2 BvM 9/03, BVerfGE 117, 141, 161; see also ICJ, Judgment of 3 February

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2012—1031—*Germany* v. *Italy*—*ICJ Reports 2012*, 99 para. 56).[9] At present, it is at least not possible to derive from them a rule of international law granting functional immunity also in the case of war crimes. The *travaux* in question, therefore, do not change the general rule of customary international law, as evidenced by uniform practice and legal conviction, that, at least, the prosecution of foreign low-ranking State officials for war crimes or certain other offences affecting the international community as a whole is permissible by national courts.

36. In July 2007, the International Law Commission included the issue of immunity of State officials from foreign criminal jurisdiction in its work programme (see *Yearbook of the International Law Commission* 2007, Volume II Part 2, para. 376; also Memorandum of the Secretariat of the General Assembly of 31 March 2008, UN Doc. A/CN.4/596) and subsequently dealt with it regularly, as did the Sixth Committee of the United Nations General Assembly. The Special Rapporteur, who was initially appointed for this purpose, expressed the opinion that the reasons given for exceptions to immunity were not convincing and that there was no uniform State practice in this regard (see, for example, Kolodkin, Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/631, 425). In contrast, the Special Rapporteur of the International Law Commission, who was subsequently entrusted with the task, has, after examining legal practice, recognized a clear development towards seeing the commission of international crimes as the limit for recognizing immunity of State officials (Escobar Hernández, Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/701, 73 f.), and considered the possibility that this is a rule of customary international law (loc. cit. p. 78). In its subsequent report, however, she stated that the question of limitations or exceptions to immunity was the most controversial and politically sensitive issue (Escobar Hernández, Sixth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/722, 5; cf. critically, for example, Nolte, A/CN.4/SR.3365, 3 ff.). She summarized the opinions of State representatives expressed in this regard in the Sixth Committee of the General Assembly to the effect that, in the opinion of two States, international crimes could never be regarded as the exercise of State sovereign power, one State accepted a limitation of immunity as an already existing customary international law, ten States saw a development in this direction. In comparison, eleven States

[9] *Germany* v. *Italy*, 168 ILR 1.

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denied the existence of corresponding customary international law, and eight others—including Germany—did not even affirm a tendency in this direction (UN Doc. A/CN.4/722, 6 f.; for further developments, see the two subsequent reports UN Doc. A/CN.4/729, 4 f., 7; A/CN.4/739; summarizing Kittichaisaree, *The Obligation to Extradite or Prosecute*, 2018, 254 ff; Ascensio/Bonafe, RGDIP 122 [2018], 821 ff; see also Ambos/Kreß, *Rome Statute of the International Criminal Court*, 4th ed., Art. 98 para. 65 ff).

37. Although this might *prima facie* suggest that the majority of the States expressing an opinion consider functional immunity to exist even in the case of war crimes, on closer examination, this is not generally the case. By way of example, the view officially expressed by Germany in the Sixth Committee of the General Assembly in October 2017 is to be singled out. Therein, the fifth Report of the second Special Rapporteur was indeed criticized for considerable methodological errors. However, Germany's representative also pointed out that the principle of individual responsibility for international crimes is a significant achievement and that Germany reliably supports efforts to bring perpetrators of international crimes to justice (see General Assembly, Official Records, UN Doc. A/C.6/72/SR.24, 13). The criticism then expressed in detail is directed, for example, against the list of certain crimes provided for in the draft, for which there is no immunity; while the crime of aggression mentioned in the Rome Statute is not listed, the crime of apartheid is included. Given these kinds of reservations, it cannot be concluded from the rejection of the draft that, from Germany's point of view, none of the provisions contained in it is recognized under customary international law, especially since the statement made by Germany the year before had affirmed the existence of exceptions to immunity in clearly defined cases (see General Assembly, Official Records, UN Doc. A/C.6/71/SR.29, 4). Subsequent statements by Germany's Federal President (cf. speech on the 75th anniversary of the start of the Nuremberg Trials on 20 November 2020) and Germany's Foreign Minister as part of the Federal Government (see BT-PlPr. 19/185 p. 23289) also speak in favour of such an understanding. It is apparent that they do not assume that a national prosecution for war crimes is precluded by functional immunity.

38. ee) The vast majority of academic literature rejects functional immunities in the case of crimes under international law, at least concerning subordinate State officials—albeit on partly different grounds and with nuances (see, for example, MüKoStGB/Ambos, 4th ed., Vor § 3 Rn. 135 et seq., marginal No 811; Ambos/Kreß, *Rome*

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Statute of the International Criminal Court, 4th ed., Art. 98 marginal No 31; Triffterer/Ambos/Burchard, *Rome Statute of the International Criminal Court*, 3rd ed., Art. 27 marginal No 16; Folz/Soppe, NStZ 1996, 576, 578 f.; Talmon in Paulus et al., International, National and Private Law: Hybridisation of Legal Systems? *Immunity*, 2014, 313, 324 et seq.; Tomuschat in Paulus et al., International, National and Private Law: Hybridization of Legal Orders? *Immunity*, 2014, 405; Mettraux/Dugard/du Plessis, *International Criminal Law Review* 18 [2018], 577, 593 et seq.; Cassese et al., *Cassese's International Criminal Law*, 3rd ed., 240 et seq.; Pedretti, *Immunity of Heads of State and State Officials for International Crimes*, 2013, 190, 307 et seq.; decidedly Kreicker, *Völkerrechtliche Exemtionen*, 2007, 219; ders., JR 2015, 298 et seq.; ambivalent in the case of "normal State organs" Dörr, AVR 41 [2003], 201, 218 et seq.). The concerns expressed in contrast (see, for example, Fox/Webb, *The Law of State Immunity*, 3rd rev. ed., 570 et seq.; van der Wilt in Ruys/Angelet/Ferro, *The Cambridge Handbook of Immunities and International Law*, 2019, 595, 605; Wuerth, AJIL 106 [2012], 731; Huang, *Chinese Journal of International Law* 2014, 1; Murphy, *American Journal of International Law Unbound* 112 [2018], 4; cf. also van Alebeek in Ruys/Angelet/Ferro, *The Cambridge Handbook of Immunities and International Law*, 2019, 496, 517 f.; d'Argent/Lesaffre, *The Cambridge Handbook of Immunities and International Law*, 2019, 614) do not rely on a shared belief of a majority of States or a practice to that effect.

[The Court examined cases in which foreign State officials were granted immunity and distinguished these cases from the question of functional immunity of subordinate foreign State officials in paras. 39-49.]

39. d) The fact that immunity was recognized for persons acting on behalf of the State in other contexts does not affect the functional immunity of lower-ranking officials, which is relevant to the decision here. The immunity of certain high-ranking State representatives that may be recognized in criminal proceedings for war crimes does not preclude or affect the charges brought against the accused in these proceedings, and neither does any immunity in civil proceedings.

40. aa) It is recognized that certain holders of high-ranking State offices, such as heads of State, heads of government or foreign ministers, enjoy immunity from the criminal jurisdiction of other States (see, for example, ICJ, Judgment of 14 February 2002—837—*Congo* v. *Belgium—ICJ Reports 2002*, 3 para. 51 [see also EuGRZ 2003, 563]; Federal Court of Justice, Decision of 14 December 1984—2 ARs 252/84, BGHSt 33, 97, 98). However, this is, first of all, a matter

of personal immunity (see BGH, judgment of 30 July 1993—3 StR 347/92, BGHSt 39, 260, 263), which—irrespective of the other requirements and its scope—does not extend to lower-ranking State officials as a matter of principle. Even if aspects of immunity *ratione materiae* are at issue, constellations involving heads of State, heads of government or foreign ministers (see, for example, Supreme Court of Appeal [South Africa], Judgment of 15 March 2016—867/15, para. 84; Order of the Attorney General of 24 June 2005—3 ARP 654/03-2) do not allow any decisive conclusions to be drawn regarding the functional immunity of a military service member that is to be examined here.

41. bb) The same applies to decisions on immunity in civil proceedings.

42. For example, in so far as the European Court of Human Rights has accepted the granting of immunity *ratione materiae* for State officials in civil proceedings in which there were unsuccessful claims for damages on allegations of torture, it has on the one hand expressly considered that it is not a matter of criminal responsibility for torture but of State immunity in civil proceedings for damages (ECHR, Judgment of 21 November 2001—35763/97—*Al-Adsani* v. *United Kingdom*—ECHR 2001-XI, 79, para. 61 [EuGRZ 2002, 403]).[10] On the other hand, it has indicated that the matter must be kept under further observation in light of current developments in international law (ECtHR, Judgment of 14 January 2014—34356/06 and others—*Jones and Others* v. *United Kingdom*—ECHR 2014-I, 1 para. 215; see Kloth, AVR 52 [2014], 256, 278).[11]

43. The International Court of Justice has also strongly emphasized in connection with State immunity in proceedings for damages that it would not decide on the question of whether, and if so, to what extent, immunity is to be observed in criminal proceedings against a State official (ICJ, Judgment of 3 February 2012—1031—*Germany* v. *Italy*, *ICJ Reports 2012*, 99 para. 91).[12] Its fundamental considerations that neither the accusation of serious violations of international humanitarian law and the law of armed conflict nor the violation of peremptory norms of international law (*ius cogens*) lead to the loss of immunity are therefore not without further application to criminal proceedings.

44. Decisions of the Federal Constitutional Court (see, for example, BVerfG, Decisions of 6 May 2020—2 BvR 331/18, NJW 2020, 3647 marginal No 14 et seq.; of 17 March 2014—2 BvR 736/13,

[10] *Al-Adsani* v. *United Kingdom*, 123 ILR 24.
[11] *Jones and Others* v. *United Kingdom*, 168 ILR 364.
[12] *Germany* v. *Italy*, 168 ILR 1.

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NJW 2014, 1723 marginal No 20 mwN; of 6 December 2006—2 BvM 9/03, BVerfGE 117, 141; of 15 February 2006—2 BvR 1476/03, BVerfGK 7, 303, 307) and the Federal Court of Justice (cf. BGH, judgments of 26 June 2003—III ZR 245/98, BGHZ 155, 279, 283; of 19 December 2017—XI ZR 796/16, BGHZ 217, 153 marginal No 15 et seq. mwN) on immunity in civil proceedings also contain no comments on the scope of functional immunity in criminal proceedings.

45. cc) In other respects, the Federal Constitutional Court has not yet decided on such immunity, either.

46. In so far as it has stated that "exceptions to immunity for cases of war crimes, crimes under international law and violations of *ius cogens* under international law are being discussed", it has not dealt with this further, since the particular decision was not concerned with the immunity of State organs *per se* "flowing from State immunity, in particular of State officials", but with the diplomatic immunity to be distinguished from it (cf. BVerfG, Decision of 10 June 1997—2 BvR 1516/96, BVerfGE 96, 68, 84 f.). It further stated that State immunity only applies if the State is a party to the judicial proceedings; a judicial decision on official acts of other States in the context of preliminary questions is, so it was held, not prohibited under international law (BVerfG loc. cit. p. 90). As far as diplomats are concerned, the Court held that no reliance can be placed on the general immunity of State organs in addition to the right of diplomatic immunity (BVerfG loc. cit. p. 91).

47. Furthermore, the Federal Constitutional Court assumed that the immunity of State officials is not generally unbounded, but that rather the specific charges may be relevant in determining its scope. There is, for example, no general rule of international law according to which spies who are prosecuted by the State affected by the spying can invoke the principles of State immunity (BVerfG, Decision of 15 May 1995—2 BvL 19/91 et al., BVerfGE 92, 277, 321).

48. (3) There is no need to set out to what extent functional immunity would prevent prosecution solely for general criminal offences, as the Higher Regional Court assumed for the mistreatment of detainees. The acts with which the accused is charged relate to war crimes according to § 8 *StGB*, and corresponding crimes recognized under customary international law have been committed (see in detail C. I. 1 and D. I below).

49. Since the procedural obstacle of immunity does not exist, the relevant facts must be examined comprehensively from a legal point of view (cf. on the verdict of guilty for general crimes committed in combination, Federal Court of Justice, Decision of 21 February 2001—3 StR

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244/00, NJW 2001, 2732). This also follows from the fact that general national criminal offences extend to war crimes so that these can therefore be penalized as ordinary crimes (see BT-Drucks. 14/8524 S. 12; on the Convention against Torture BT-Drucks. 11/5459 p. 24 f).

50. III. A decision by the Federal Constitutional Court pursuant to Article 100 para. 2 *GG* is not necessary. There is no doubt within the meaning of that provision as to the pertinent question whether, based on a rule of international law forming part of federal law and directly giving rise to rights and obligations for the individual, domestic criminal prosecution of the accused, as a former State official of another State for official acts committed in his home State, is excluded if these acts are war crimes.

51. (1) Pursuant to that provision, the decision of the Federal Constitutional Court shall be obtained if, in the course of litigation, it is doubtful whether a rule of international law is part of federal law and whether it directly gives rise to rights and obligations for the individual (Article 25 *GG*).

52. a) The term "litigation" within the provision's meaning is to be interpreted broadly and includes any judicial proceedings. Its guarantee function in favour of the general rules of international law would not be satisfied if the term "litigation" were narrowly defined; for example, if it were limited to adversarial proceedings (BVerfG, Decision of 31 March 1987—2 BvM 2/86, BVerfGE 75, 1, 11).

53. b) Referrals are admissible even if the content of the rule of international law is not capable of directly creating rights and obligations for the individual but if the rule is addressed only to States or their organs as addressees of the law (BVerfG, Decisions of 13 December 1977—2 BvM 1/76, BVerfGE 46, 342, 362 f.; of 12 April 1983—2 BvR 678/81 and others, BVerfGE 64, 1, 14 mwN).

54. c) According to the jurisprudence of the Federal Constitutional Court, a submission pursuant to Article 100 para. 2 *GG* is required if, in examining the question of whether and to what extent a general rule of international law applies, the court itself encounters evidence of serious doubts, even if the court itself does not entertain any doubts. It is only the Federal Constitutional Court itself and not the referring court that has the power to clarify existing doubts. Serious doubts as to the existence or scope of a general rule of international law exist if the court deviates from the opinion of a constitutional body or from the decisions of high German, foreign or international courts or from the teachings of renowned authors of international law scholarship (BVerfG, Decision of 12 October 2011—2 BvR 2984/09, BVerfGK 19, 122 marginal No 128).

55. Such doubts must also be assumed to exist if there is no relevant case law of the highest courts on the questions submitted and the case law of international courts does not decisively comment on them (see BVerfG, Decision of 8 May 2007—2 BvM 1/03, BVerfGE 118, 124, 133; see also BVerfG, Decision of 12 April 1983—2 BvR 678/81 et al., BVerfGE 64, 1, 14 ff.). Furthermore, and beyond the wording of the provision, questions are admissible which do not relate to the existence but only to the scope of a rule of international law; the importance which Article 25 *GG* attaches to the general rules of international law requires a uniform jurisdiction also on their scope. This means that the proceedings under Article 100 para. 2 *GG* can also serve to interpret and concretize general rules of international law with their characteristically thin normative density (BVerfG, Decision of 30 January 2008—2 BvR 793/07, BVerfGK 13, 246, 250 mwN).

56. (2) On this basis, notwithstanding individual dissenting opinions expressed in international legal scholarship, there are no doubts to be clarified by the Federal Constitutional Court with regard to the relevant question of whether functional immunity precludes the national prosecution of the accused.

57. The Court's decision does not deviate from the opinion of a constitutional organ or the decision of high German, foreign or international courts but is in line with such. As already explained in detail, the instances mentioned above have in no case assumed that criminal proceedings against military personnel or other subordinate State officials for war crimes by a national court are excluded under customary international law. On the contrary, in the constellations in which a corresponding problem existed, the possibility of criminal prosecution was considered to be given.

58. In addition, the Federal Constitutional Court recently dealt with a comparable case in connection with criminal proceedings against alleged former officers of the Syrian General Intelligence Service for crimes under the *VStGB* in the Syrian conflict. The core of those proceedings does not concern the legal issue relevant here but rather an application for a temporary injunction to enable journalists to follow the proceedings in Arabic. However, the Federal Constitutional Court cited, as one reason for the great public attention, in that case, the circumstance that the Federal Republic is claiming jurisdiction for itself, which would not exist under general principles, but which is due to the specific character of the criminal acts in question, which affect the international community as a whole; it did not mention the problem of immunity (see BVerfG, Decision of 18 August 2020—1 BvR 1918/20, NJW 2020, 3166, marginal No 11).

59. Against this overall background, isolated voices in international legal scholarship who consider functional immunity to exist in the case of national criminal prosecution of war crimes are therefore not sufficient to justify doubts leading to submission to the Federal Constitutional Court (see also BVerfG, Decision of 6 May 2020—2 BvR 331/18, NJW 2020, 3647 marginal No 30 on the irrelevance of voices in the case law of other States and the literature).

60. IV. Due to the reasons above based on which there cannot be any doubts under the given circumstances on the absence of the procedural obstacle of functional immunity under customary international law, it can be left open whether ratification of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 ("Convention against Torture"; cf. BGBl. II 1990, 247 et seq.; for Afghanistan BGBl. II 1993 pp. 715, 717) includes a waiver of any immunities (cf. on this—with inconsistent reasoning—House of Lords, judgment of 24 March 1999—*R* v. *Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*—All England Law Reports 1999, 97 et seq., 148 et seq., 168 et seq., 179;[13] Kittichaisaree, *The Obligation to Extradite or Prosecute*, 2018, 247; Akan-de/Shah, EJIL 21 [2011], 815, 841 et seq.; critically Talmon in Paulus et al., International, National and Private Law: Hybridization of Legal Orders? *Immunity*, 2014, 313, 331 f.; see also Wuerth, AJIL 106 [2012], 731; ambivalently, the British statement in the Sixth Committee of the General Assembly, UN Doc. A/C.6/66/SR.28, 4).

61. V. In other respects, German criminal jurisdiction is also established. As the Higher Regional Court correctly explained in more detail, this already applies according to § 7 para. 2 No 2 *StGB*. Consequently, there is no need to explain that, in addition, the principle of universal jurisdiction laid down in § 1, Sentence 1 *VStGB* applies, which leans on § 5 of the Rome Statute of the International Criminal Court, which also applies to Afghanistan as a State party to that treaty (cf. BT-Drucks. 14/8524 p. 14; BGBl. II 2003 p. 422), and from which additional competence for further offences may follow (see BGH, judgment of 30 April 1999—3 StR 215/98, BGHSt 45, 64, 69 f.; Decision of 6 June 2019—StB 14/19, BGHSt 64, 89 marginal No 71).

[13] *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)*, 119 ILR 135.

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C.

62. In response to the appeal of the Federal Prosecutor General, the guilty verdict is to be modified. This results in the revocation of the affected individual sentences and the overall sentence. The determination of the remaining individual sentence, on the other hand, is free of legal error.

63. I. Concerning the mistreatment of the three prisoners, the guilty verdict contains errors of law in favour of the accused. In connection with the interrogation of the prisoners, the accused committed the war crime of torture in combination with dangerous bodily harm, coercion and attempted coercion.

64. (1) Contrary to the opinion of the Higher Regional Court, the treatment of the detainees is to be considered torture within the meaning of § 8 para. 1 No 3 *VStGB*, and thus at the same time, a war crime according to international law. With regard to the question as to whether the treatment is substantial within the meaning of the provision in § 8 para. 1 No 3 *VStGB*, which the lower court answered negatively, this is a question of law which the Senate can decide based on the findings made without an error of law. According to the factual basis, the physical or mental damage or suffering inflicted on the three prisoners, on a broad perspective, meets the required gravity threshold which the war crime of cruel or inhumane treatment of a person to be protected pursuant to § 8 para. 1 No 3 *VStGB* requires.

65. a) The notion of "substantiality" requires a sufficiently large measure of impairment to be inflicted by the impugned act and does not serve solely to exclude minor cases from the scope of application (see BGH, Decisions of 5 September 2019—AK 47/19, juris, marginal No 38; of 6 June 2019—StB 14/19, NJW 2019, 2627, marginal No 63). The gravity is to be assessed taking into account all circumstances of the case, in particular the nature of the act as well as its context (see BGH, Decisions of 25 September 2018—StB 40/18, juris marginal No 22; of 17 November 2016—AK 54/16, juris marginal No 27).

66. aa) In order to specify the gravity requirement, both the legal context and the purpose connected therewith must be taken into account. Accordingly, the extent of the impairment inflicted must clearly exceed that of a bodily harm (see BGH, Decisions of 25 September 2018—StB 40/18, juris para. 22; of 17 November 2016—AK 54/16, juris para. 27), although, given the possibility of purely psychological torture, the infliction of a physical impairment is not mandatory.

67. (1) The *VStGB* imposes different requirements on the extent of physical and psychological damage in different elements of the offence.

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Whereas, for example, § 7, para. 1 No 5 *VStGB*, § 8 para. 1 No 3 *VStGB*, which are at issue here, require substantial physical or mental harm or suffering, § 7 para. 1 No 8 *VStGB*, on the other hand, requires severe physical or mental harm, in particular of the kind described in § 226 *StGB*. This difference in terminology indicates that the requirements for substantiality are not as high as for the level of severity compared with § 226 *StGB*.

68. (2) Nevertheless, the term torture used in the provisions and its underlying rationale indicate a significant severity.

69. The elements of the crime of torture under § 7 para. 1 No 5 *VStGB*, § 8 para. 1 No 3 *VStGB* are based on Article 7 para. 1 letter (f), Article 8 para. 2 letter (a) No ii, letter (b) No x, letter (c) No i and letter (e) No xi of the Rome Statute of the International Criminal Court (ICC Statute) (see BT-Drucks. 14/8524 pp. 12 f., 21, 26). According to the statutory definition in Article 7 para. 2 letter (e) ICC Statute, torture within the meaning of Article 7 para. 1 of the ICC Statute means the "intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused" (see also Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., Rn. 1052 f.; Triffterer/Ambos/Hall/Stahn, *Rome Statute of the International Criminal Court*, 3rd ed., Art. 7 marginal No 132; Triffterer/Ambos/Dörmann, ibid., Art. 8 marginal No 87 ff; MüKoStGB/Geiß/Zimmermann, 3rd ed., § 8 *VStGB* marginal No 138; on § 1 para. 1 sentence 1 Convention against Torture Nowak/Birk/Monina/Zach, *The United Nations Convention Against Torture and its Optional Protocol*, 2nd ed., Art. 1 para. 81 et seq.; on Art. 3 para. 1 No 1 letter (a) III Geneva Convention ICRC/Cameron and others, *Third Geneva Convention*, 2020, Art. 3 para. 662 et seq.). Because, according to the explanatory memorandum to the draft law, the term torture in § 8 para. 1 No 3 *VStGB* is to be understood in the same way as in § 7 para. 1 No 5 *VStGB* (BT-Drucks. 14/8524 p. 26), which implements Article 7 para. 1 letter (f) ICC Statute, substantial harm is comparable to great physical or mental pain. In this context, the explanatory memorandum to the *VStGB* refers to the "infliction of serious physical or mental harm" (BT-Drucks. 14/8524 loc. cit.).

70. (3) According to the legislature's intention, the crimes defined in the *VStGB* are subject to universal jurisdiction according to § 1, Sentence 1 *VStGB*. The reason for this is that such crimes are directed "against the vital interests of the international community", have a transnational character, and—according to the preamble to the ICC Statute—concern "the most serious crimes affecting the international community as a whole" (see BT-Drucks. 14/8524 p. 14). This

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emphasizes the special significance of the crimes in question, not least in comparison with acts governed by law enacted by nation-States. At the same time, it gives reason to aim at an interpretation in line with an existing international understanding of the law.

71. (4) Finally, the seriousness of the accusation and the serious penalty threat, especially in comparison to the bodily harm offences under § 223 et seq. *StGB* and the crime of extortion of testimony under § 343 *StGB*, tends to suggest that a restrictive interpretation is not far-fetched (see also BGH, judgment of 27 July 2017—3 StR 57/17, BGHSt 62, 272 marginal No 48). At the same time, however, it must be taken into account that § 8 para. 5 *VStGB* mitigates the sentence in less severe cases of § 8 para. 1 No 3 *VStGB*. Therefore, there is room for graduated decisions on the legal consequences, especially in cases in which the gravity threshold is only slightly passed. Moreover, the offence under international criminal law is also characterized by the requirement of a connection with an international or non-international armed conflict.

72. bb) The relevant circumstances are to be included in the examination of the gravity requirement.

73. Since the point of reference for gravity is the physical or psychological damage or suffering, particular attention must be paid to the physical and psychological effects actually caused. In addition, the nature of the impugned treatment and its context, its duration and the condition of the victim may be taken into account (cf. MüKoStGB/Geiß/Zimmermann, 3rd ed., § 8 *VStGB* marginal No 140; see also on Art. 3 ECHR—ECtHR, Judgment of 1 June 2010—22978/05—*Gäfgen* v. *Germany*—EuGRZ 2010, 417 marginal Nos 88, 101; on torture under international humanitarian law ICTY, Judgment of 3 April 2007—IT-99-36-A—*Brđanin*—marginal No 251).

74. b) According to the criteria described above, the abuse is to be considered grave within the meaning of the statute.

75. In the overall context, it is of particular importance that the situation was already characterized by aggressiveness when the accused entered: screams came from the interrogation room, the deputy commander hit the detainees with a water hose. The fact that the detainees were sitting on the floor, tied up and blindfolded, rendered them particularly vulnerable and sensitive to physical and mental attacks, regardless of whether the sitting position is customary in Afghanistan and the shackling and blindfolding of the prisoners were primarily measures to secure the interrogators' safety.

76. In this position, they were not only physically abused by several persons and with the use of a water hose, but they were also threatened

with considerable consequences, such as the threats directed to one prisoner to be "torn apart" and another to be "connected to electricity". The effect of this physical and psychological treatment on the interrogated detainees can be seen in the fact that one of them began to cry. Another finally made the requested statements after he had been struck twice on the forehead with the back of a hand, then while he was on the floor on the shoulder and, lying there, twice struck on the head with a fist (cf. on forced statements as an expression of considerable fear, anguish and mental suffering—concerning Article 3 ECHR—ECtHR, judgment of 1 June 2010—22978/05—*Gäfgen* v. *Germany*—EuGRZ 2010, 417 paras. 89, 103).

77. Because of this overall picture, the fact that no bleeding, bony or visible injuries occurred, no sounds of pain were uttered, no lasting psychological consequential damage resulted, and the event did not last longer than five minutes in the presence of the accused who spontaneously joined in, does not negate the gravity. However, these aspects speak for the fact that the necessary level of gravity is exceeded only to a small extent.

78. c) The accused's intent must only relate to the factual circumstances sustaining the assessment of the damage or suffering being grave, not to that assessment itself (cf. correspondingly to § 184c *StGB* aF BGH, judgments of 24 September 1980—3 StR 255/80, BGHSt 29, 336, 338; of 10 May 1995—3 StR 150/95, BGHR *StGB* § 178 para. 1 sexuelle Handlung 8; Fischer, *StGB*, 68th ed., § 184h marginal No 10; similarly, also for the assessment according to § 224 para. 1 No 5 *StGB* BGH, judgments of 23 June 1964—5 StR 182/64, BGHSt 19, 352, 353; of 4 November 1988—1 StR 262/88, BGHSt 36, 1, 15; of 26 March 2015—4 StR 442/14, NStZ-RR 2015, 172, 173). Such intent was established in the contested judgment.

79. d) A war crime of degrading or humiliating treatment (Article 8, para. 1, No 9 *VStGB*) committed by the same act steps behind the more specific war crime of torture (see ICTY Judgments of 16 November 1998—IT-96-21-T—*Mucić*—marginal No 442; of 3 March 2000—*Blaskić*—IT-95-14-T—marginal No 154 f.; Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., marginal No 1275).

80. The torture of the three detainees constitutes a single war crime. Admittedly, the general rules on *concursus delictorum* for offences against decidedly personal legal interests apply to the relationship, from the perspective of *concursus delictorum*, of several war crimes against persons; for the association with an armed conflict does not allow combining the several individual acts into one combined offence in the legal sense (BGH, Decision of 20 February 2019—AK

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4/19, BGHR *VStGB* § 8 para. 1 Konkurrenzen 1 Rn. 25 mwN). However, under the concrete circumstances, the mistreatment of one detainee also had a psychological effect on the other two detainees sitting next to him, so that there is a partial identity of the relevant conduct so that there is only one single offence (generally see, for example, BGH, Decision of 4 April 2019—AK 12/19, juris, marginal No 60, etc.).

81. 2. The accused is also guilty as a co-perpetrator of causing dangerous bodily harm (§ 224 para. 1 No 4 *StGB*), of coercion of a prisoner to make certain statements (§ 240 para. 1 *StGB*), as well as of attempted coercion of the other two prisoners (§ 240 paras. 1 and 3, § 22, 23 *StGB*).

82. These offences and the war crime of torture form one act. If a perpetrator, through his conduct, commits both an element of the general criminal law and an element of the *VStGB*, the general rules on *concursus delictorum* apply (BT-Drucks. 14/8524 S. 13; cf. also BGH, Decision of 17 June 2010—AK 3/10, BGHSt 55, 157 marginal No 50). If the same act violates several laws, it must, in principle, be assumed that the act is a single act. In this way, the guilty verdict fulfils its expressive function by expressly naming all the violated statutory crimes. The exception to this principle is the case where one offence supersedes another. This is the case if the conduct constitutes several criminal offences, but the application of one of those offences is sufficient to express the wrongfulness of the act so that the other offences are superseded (in this regard, see BGH, Decision of 29 April 2020—3 StR 532/19, NStZ-RR 2020, 243 mwN).

83. The war crime of torture is neither a more specific offence than bodily harm and (attempted) coercion that has all the characteristics of these other criminal provisions, nor does it consume the elements of these offences, since they do not fall within the standard picture of the typical accompanying offence and possess an independent character of wrongfulness that goes beyond that of the primary offence (cf. on the general prerequisites BGH, Decision of 11 June 2020—5 StR 157/20, NJW 2020, 2347 marginal No 19 et seq. mwN). This is because the war crime of cruel or inhumane treatment by torture does not require dangerous bodily harm or (attempted) coercion or is regularly accompanied by these. Thus, causing mental suffering is sufficient. Even if torture requires an additional purpose (compare the corresponding "elements of the crime" according to Art. 9 ICTY Statute to Art. 8 para. 2 letter (a) (ii) para. 1 ICTY Statute; see also Art. 1 para. 1 of the Convention against Torture), this need not consist of coercion to do, acquiesce to or refrain from an act within

the meaning of § 240 para. 1 *StGB*, but may, for example, consist of punishment or humiliation.

84. The offences committed to the detriment of the various detainees under the *StGB* form one act in this case by virtue of the overarching more serious war crime of torture, the underlying conduct of which is partially congruent with that of each of the offences under the *StGB*. With a view to ensuring the clarity and comprehensibility of the conviction, it is not necessary to make it explicit in the actual decision that, in this case, the components forming the unity of the act are of the same kind (see BGH, Decision of 31 May 2016—3 StR 54/16, NStZ-RR 2016, 274, 275).

85. II. The individual penalty concerning the treatment of the corpse remains undisturbed. In all other respects, the sentence must be reversed.

86. 1. The change in the guilty verdict leads to the revocation of the individual sentences affected by it in case II.B.1. This entails the revocation of the total term of imprisonment and eliminates the basis for the decision on the suspended sentence. In that latter respect, there is thus no need for further elaboration.

87. The underlying findings of fact remain in place since they are not affected by errors of law (§ 353 para. 2 of the German Code of Criminal Procedure (*StPO*)) and are supported by the assessment of the evidence. This also applies to the statements of the Higher Regional Court on the water hose used (generally see on the dangerous tool according to § 224 Paragraph 1 No 2 *StGB* BT-Drucks. 13/9064 p. 9; BGH, Decision of 22 March 2017—3 StR 475/16, juris marginal No 17 mwN; furthermore BGH, judgment of 13 January 2006—2 StR 463/05, juris marginal No 7, 19; Decision of 25 November 1986—4 StR 605/86, StV 1988, 62 f. with critical comment Rolinski; cf. also BGH, judgment of 6 June 1952—1 StR 708/51, BGHSt 3, 105, 109). It heard a forensic physician as an expert on the consequences of the injury that appeared possible and sufficiently explained the conclusions drawn from this. In this context, the additional considerations of the trial court that an injury to the eyes was not to be expected even if the blows had gone wrong due to the cloth tied around the head, cannot be overturned under the procedural standard governing these proceedings.

88. 2. Concerning the remaining individual sentence of one year and four months in case II.B.2, the context of the reasons given for the sentence sufficiently shows that the Higher Regional Court indeed weighed up the listed aspects (in contrast, see BGH, Decision of

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1 March 2011—3 StR 28/11, NStZ-RR 2011, 284 et seq. on a particular individual case).

89. In so far as the Federal Prosecutor General complains that the Higher Regional Court did not take certain circumstances into account as aggravating factors, this, as with the other complaints, is essentially a matter of divergent assessments compared to those that the trial court made without an error of law.

D.

90. The judgment review based on the appeal of the accused has not produced any legal error to his disadvantage. The appeal of the Federal Prosecutor General also does not result in such an error (§ 301 *StPO*). In this respect, only the following is to be stated:

91. I. A war crime against persons—recognized under customary international law—by means of treatment that is seriously degrading or humiliating according to § 8 para. 1 No 9 *VStGB* may also be committed against a deceased person (cf. in detail BGH, judgment of 27 July 2017—3 StR 57/17, BGHSt 62, 272 marginal No 16 et seq.; approving Werle/Epik, JZ 2018, 261, 262; rejecting Ambos, NJW 2017, 3672; critically also Bock/Bülte, HRRS 2018, 100). This is not altered by the fact that the Fifty-Ninth Act to Amend the Criminal Code of 9 October 2020 (BGBl. I p. 2075), § 201a para. 1 No 3 *StGB* (new version) now expressly regulates image recordings of deceased persons, and the explanatory memorandum of the draft bill assumed that deceased persons did not belong to the protected group of persons under § 201a *StGB* under previously applicable law (see BT-Drucks. 19/17795 p. 1, 9). The relevant provisions are situated in a different factual context and are based on a separate legislative development (cf. on § 201a *StGB*, for example, LK/Valerius, *StGB*, 12th ed., § 201a marginal No 10 et seq.; on § 8 *VStGB* BGH, judgment of 27 July 2017—3 StR 57/17 loc. cit. marginal No 19 et seq.).

92. On the whole, the treatment of the person killed was also grave within the meaning of § 8 para. 1 No 9 *VStGB* (see on the standards, BGH, judgment of 27 July 2017—3 StR 57/17, BGHSt 62, 272 marginal No 48 ff.).

93. II. Since the year 1992 was mentioned both in the caption and in the findings, as well as in the further context of the judgment, it is an obvious drafting error that the year of birth of the defendant is stated at one point as "1995" in the context of the evaluation of evidence and

that he would therefore still have been a minor at the time of the respective acts.

[Report: Unofficial English translation prepared by Whitney-Martina Nosakhare, Jerusha Asin Owino and Professor Claus Kreß (German original)]

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