Court:	**Federal Court of Justice, 3rd Criminal Division**
Decision date:	**28.01.2021**
Having legal force:	**yes**
File reference:	**3 StR 564/19**
ECLI:	**ECLI:DE:BGH:2021:280121U3STR564.19.0**
Document type:	**Judgment**
Source:	juris
Statutory provisions:	**Art. 25 of the German Basic Law (GG), Art. 20(2) of the German Judicature Act (GVG), Art. 8(1)(3) of the International Criminal Code, Art. 8(1)(9) of**
Suggested citation:	**Federal Court of Justice, judgment of 28 January 2021 – 3 StR 564/19 – juris**

Headnote

1. In accordance with the general rules of international law, punishment under criminal law for the war crimes of torture and gravely humiliating or degrading treatment and for general criminal offences committed at the same time, such as grievous bodily harm and coercion, through a domestic court is not to be ruled out owing to the procedural impediment of functional immunity if the acts have been carried out by a foreign lower-ranking official in the performance of their sovereign activities abroad to the detriment of non-domestic persons.

2. The preconditions for the war crime of torture.

Sources

NSW Basic Law, Art. 25 (internal to the Federal Court of Justice)
NSW German Judicature Act, Art. 20 (internal to the Federal Court of Justice)
NSW International Criminal Code, Art. 8 (internal to the Federal Court of Justice)

Proceedings

Previous decision of the Higher Regional Court of Munich, 26 July 2019, 3 StE 1/19

Order

1. On appeal by the Federal Public Prosecutor, the judgment of the Higher Regional Court of Munich of 26 July 2019

   a) has its guilty verdict amended in that the party accused is guilty of war crimes against individuals through torture in concomitance with grievous bodily harm, with coercion and with attempted coercion and of war crimes against individuals through humiliating or degrading treatment;

   b) has its dictum regarding the individual penalties in case II.B.1 of the reasons for the judgment and regarding the overall penalty annulled; but the respectively associated findings are upheld.

To the extent of the annulment, the matter is remitted to another Criminal Division of the Higher Regional Court for further proceedings and a decision, including regarding the costs of the Federal Public Prosecutor's remedy.

2. Any further appeal by the Federal Public Prosecutor and any appeal by the defendant is rejected.

3. The defendant shall bear the costs of the remedy.

The court rules as follows

Reasons

1 The Higher Regional Court found the defendant guilty of grievous bodily harm in three cases, in one case in concomitance with coercion and in two cases in concomitance with attempted coercion, and of war crimes against individuals, resulting in an overall prison sentence of 2 years. The sentence was suspended. The defendant and, at the expense thereof, the Federal Public Prosecutor are appealing against the judgment through their appeals each based on substantive contentions. As can be seen from the operative part of the judgment, the Federal Public Prosecutor's appeal is partially successful in seeking to have the defendant also found guilty of the war crime of torture and to have the dictum of the penalty annulled in its entirety. For the remainder, like the defendant's appeal, it is unfounded.

A.

2 The Higher Regional Court essentially reached the following findings and assessments:

3 I. As a lieutenant in the Afghan army, the defendant was operating at one of its support bases. At the end of 2013 / beginning of 2014, he noticed three prisoners being brought to the barracks blindfolded and with their hands chained. The previous day, a group of soldiers had been fired at by insurgents nearby. The defendant heard cries from the Deputy Commander's office into which the prisoners had been led and made his way over to it. As he entered, the Deputy Commander was hitting the prisoners who, as was typical in that country, were sitting on the floor (still chained and blindfolded), with an approximately metre-long, inch-thick piece of hose. At the latter's request, the defendant made notes on the following interrogation filmed by another soldier. Its aim was to find out information about a Taliban leader and Taliban arms caches. The defendant and the Deputy Commander worked together during the questioning and made the joint decision to get the prisoners to talk by issuing threats and using mild to moderate force.

4 The accomplice threatened to 'rip' the first prisoner 'to pieces'. The defendant told the prisoner in Dari that he would 'connect' him 'to the electricity supply', which the accomplice translated for the Pashto-speaking prisoners. The defendant pulled the hair of the prisoner who was leaning against the wall of the room and hit his head against the wooden wall four times in quick succession. The other Officer hit him on the head twice from above using the loose ends of a hose folded in half.

5 The defendant then pulled the second prisoner's hair for around 30 seconds and demanded that he confess. When another soldier who was in the room explained that he had captured the prisoner at a house from which the missiles had been fired, the prisoner sobbed. The defendant gave him a light slap in the face and told him to stop crying.

6 The Deputy Commander then hit the third prisoner twice on the forehead with the back of his hand, dragged him to the floor by the shoulder and punched him in the head from above. After the prisoner had answered a question and stood back up, he was finally slapped in the face. Unlike the other two prisoners, because of the mistreatment, he then provided details of the whereabouts of the Taliban and the weapons.

7 The more than 4-minute questioning came to an end when a security officer came in and collected the prisoners. Overall, the hitting was carried out with mild to moderate force and was capable of causing mild to moderate pain. The mistreatment with the hose was at least capable of causing erythema on the top of the head and mild pain. No external injuries or consequential psychological effects could be identified.

8 II. In the first quarter of 2014, after a gun battle, the defendant discovered the dead body of a wanted high-ranking Taliban commander. By order of his superior, he was supposed to take the body to a butcher's and ordered the body to be taken away in a military vehicle. The body was laid on the back of the Humvee-type vehicle so that his arms and legs dangled down. The defendant was aware that the subsequent journey was being filmed. Before the journey began, a policeman punched the dead man three times; the

defendant made a waving gesture with the man's arm. During the journey, the policeman and a soldier who was seated on the roof of the vehicle hit the body numerous times with a assault rifle. During a brief stop, the defendant attached a meat hook to the body.

9 Finally, he had it driven to a protective wall around 3 metres in height and put a loop of rope around its neck by which, at his command and with his help, the body was pulled up and attached to some metal grating. He then declared, in a filmed speech, that they had 'brought [the body] with them and hung it up here as if it were the body of a donkey'; if they ever caught those who had attacked their people, they would kill them. By hanging the body up on the protective wall, he and those under his command were simply presenting the dead man as a trophy and degrading him after his death and, by incorrectly claiming that he had killed the Taliban leader himself, he was simply trying to further his professional career.

10 III. At the time the offences were committed, a war had been waging in Afghanistan 'since the end of 2001 in the form of a non-international armed conflict' between, on the one hand, Afghan government forces supported by international troops and, on the other, the Taliban and other non-government armed groups.

B.

11 The procedural impediment of functional immunity, to be examined ex officio, does not preclude a decision in this matter (see I.). In accordance with customary international law, (former) military officials such as the defendant are not outside German criminal jurisdiction in relation to war crimes (II.). Since there is no serious doubt in this respect, the Division can reach a finding hereon without first obtaining a decision from the Federal Constitutional Court (III.). There is therefore no need to clarify whether functional immunity would be excluded on other grounds (IV.). German criminal jurisdiction is also otherwise applicable (V.).

12 I. The Division has to decide on the existence of any immunity even though it has not been asserted in the present case. German jurisdiction is a general procedural requirement; its existence and the limits on it are to be examined and taken into consideration ex officio as legal questions at every stage of the proceedings (cf. Federal Constitutional Court, decision of 13 December 1977 – 2 BvM 1/76, BVerfGE 46, 342, 359; Federal Court of Justice, judgments of 3 March 2016 – 4 StR 496/15, StV 2017, 103, paragraph 20; and of 19 December 2017 – XI ZR 796/16, BGHZ 217, 153, paragraph 15). Where immunity under customary international law exists, such immunity is generally significant irrespective of whether it is derived from Article 20(2) of the German Judicature Act (cf. Kissel/Mayer, GVG, 10th ed., Article 20(2) et seq.; MüKoZPO/Zimmermann, 5th ed., Article 20 of the German Judicature Act, paragraphs 9 and 10) or directly from Art. 25 of the German Basic Law (cf., regarding Article 20 of the old version of the German Judicature Act, Federal Court of Justice, 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. In accordance with the general rules of international law, the criminal punishment for the war crimes of torture and gravely humiliating or degrading treatment and for general criminal offences committed at the same time, such as grievous bodily harm and coercion, through a domestic court is not to be ruled out because the acts have been carried out by a foreign lower-ranking official in the performance of their sovereign activities abroad to the detriment of non-domestic persons. Specifically:

14 1. A general rule of customary international law within the meaning of Art. 38(1)(b) of the Statute of the ICJ is a rule which is based on established practice in many, but not necessarily all States ('consuetudo' or 'usus') on the assumption that it is an obligation under international law ('opinio iuris sive necessitatis') (Federal Constitutional Court, decision of 3 July 2019 – 2 BvR 824/15 et al., NJW 2019, 2761, paragraph 32, with further references; cf. also ICJ, judgment of 3 February 2012 – 1031 – Germany v. Italy – I.C.J. Reports 2012, 99, paragraph 55). Owing to the fundamental obligation on all States expressed therein, high standards have to be placed on establishing immunity (Federal Constitutional Court, decision of 3 July 2019 – 2 BvR 824/15 et al., loc. cit. paragraph 31, with further references).

15 To determine what is customary in a given State, reference may be made to the behaviour of the organs of state which, pursuant to international or national law, are responsible for legal relations under international law, this usually being the government or the head of state. However, what is customary in a given State may also be determined, where their behaviour is of direct relevance to international law, from

the actions of other organs of state, such as those of the legislature or the courts (Federal Constitutional Court, decision of 5 November 2003 – 2 BvR 1506/03, BVerfGE 109, 38, 54, with further references). In accordance with the case-law of the Federal Constitutional Court, it is also true that judicial decisions, like academic opinions on international law, are only to be referred to as aids in clarifying customary international law. However, when establishing what is customary in a given State, account must be taken of more recent legal developments at an international level characterised by ever greater differentiation and an increase in recognised subjects of international law. As a result, particular attention needs to be paid to the actions of organs of international organisations and especially international courts (Federal Constitutional Court, decision of 5 November 2003 – 2 BvR 1506/03, loc. cit.). In addition, the decisions of national courts should be taken into account, in particular, where, as in the area of the judicial immunity of foreign States, internal law allows the national courts to apply international law directly (cf. Federal Constitutional Court, decision of 13 December 1977 – 2 BvM 1/76, BVerfGE 46, 342, 367 and 368). Furthermore, the work carried out by the United Nations International Law Commission may indicate the existence of a legal conviction (cf. Federal Constitutional Court, decisions of 8 May 2007 – 2 BvM 1/03, BVerfGE 118, 124, 136 and 137; and of 6 December 2006 – 2 BvM 9/03, BVerfGE 117, 141, 161).

16 2. Applying the standards described, in accordance with customary international law, there is no general functional immunity ratione materiae of lower-ranking officials, particularly soldiers, of other States precluding national criminal prosecution for war crimes.

17 a) It is stated at the outset that, given the sovereign equality of the States, in principle, a State is not subject to the jurisdiction of any foreign State, at least in relation to sovereign acts (acta iure imperii) (cf. Federal Constitutional Court, decisions of 27 October 2020 – 2 BvR 558/19, juris, paragraphs 18 and 19; and of 6 May 2020 – 2 BvR 331/18, NJW 2020, 3647 paragraphs 18 et seq.; ICJ, judgment of 3 February 2012 – 1031 – Germany v. Italy – I.C.J. Reports 2012, 99, paragraphs 53 et seq.; Federal Court of Justice, judgment of 19 December 2017 – XI ZR 796/16, BGHZ 217, 153, paragraphs 16 et seq.; Steinberger, *Sovereign immunity in EPIL*, vol. 4, 615, 619; Isensee/Kirchhof/F. Becker, *Handbuch des Staatsrechts*, 3rd ed., Article 230, paragraph 81). The functional immunity of natural persons may also be derived therefrom as a product of sovereign immunity since a State can usually only act through such persons (see ECtHR, judgment of 14 January 2014 – 34356/06 et al. – Jones and Others v. United Kingdom – ECtHR 2014-I, 1 paragraphs 202 et seq.; Federal Court of Justice, judgment of 26 September 1978 – VI ZR 267/76, NJW 1979, 1101; International Criminal Tribunal for the former Yugoslavia, judgment of 29 October 1997 – IT-95-14-AR 108 – Blaskic – paragraph 41; Kissel/Mayer, GVG, 10th ed., Article 20, paragraph 3). However, the sovereign acts of a foreign State that is not party to the court proceedings are not the subject of the proceedings or the reference point for any immunity here, but rather the individual criminal responsibility of a natural person for war crimes that they are supposed to have committed as a not particularly high-ranking official of a foreign State in the State organisation thereof. Any functional immunity to be considered in such a case is to distinguished from other immunities, in particular personal immunities (ratione personae). The same applies to the exclusion of liability under civil law.

18 b) General practice in a given State exists where criminal prosecution is possible through a national court based on the facts of the case outlined. Organs and courts of a State have prosecuted and convicted many foreign officials for war crimes, genocide or crimes against humanity under criminal law.

19 Since these decisions denying immunity are numerous and highly significant, it is therefore of no consequence that, under certain circumstances, proving practice granting immunity and therefore not usually leading to any judicial proceedings may be more difficult than identifying such findings denying any obstacle to criminal prosecution and leading to a conviction. Besides, even in the case of practice where immunity is assumed, it would still have to be anticipated that, in certain cases, there may be court decisions that confirm immunity on account of it not being observed or there being doubts over its application. However, no such statements are apparent. On the contrary, the State has usually been considered to have internal jurisdiction.

20 aa) For example, many of those responsible under the national socialist regime were convicted not only through the International Military Tribunal in Nuremberg, but also through criminal courts in other States (cf., for example, UNWCC, *Law Reports of Trials of War Criminals*, vol. VII, 1 et seq., 23 et seq.; vol. XIII, 70 et seq.; vol. XIV, 23 et seq.; *Bulletin Criminel*, Court of Cassation Criminal Division No. 239 [1983]; CanLII 129 (SCC), [1994] 1 SCR 701).

21 bb) The same applies to punishments for crimes committed in the former Yugoslavia. Hence, for example, in Germany – in addition to other countries – a member of the local Serbian armed forces and the leader of a local police station were convicted of accessory to genocide and further offences (see Federal Court of Justice, decision of 21 February 2001 – 3 StR 244/00, NJW 2001, 2732; Bavarian Supreme Court, judgments of 23 May 1997 – 3 St 20/96, NJW 1998, 392; and of 15 December 1999 – 6 St 1/99). Moreover, the former position of a Rwandan mayor did not prevent him from being convicted of genocide (see Federal Court of Justice, judgment of 21 May 2015 – 3 StR 575/14, JZ 2016, 103; Higher Regional Court of Frankfurt, judgment of 29 December 2015 – 4 – 3 StE 4/10 – 4 – 1/15, juris).

22 cc) By way of addition, further proceedings before national courts dealing with offences in which the defendants were officials when the offences were committed can also be cited (cf., in particular, the decisions just cited under c) cc)). In recent years, for example, a number of former members of the Iraqi army have been found guilty of war crimes by European courts (see, for specific examples, Barthe, *Journal of International Criminal Justice* 16 [2018], 663, 665 et seq.).

23 c) In addition to corresponding unanimous practice among States, it is generally believed that, in accordance with international law – if the functional immunity of foreign officials should be assumed for sovereign activities irrespective of ranking – the criminal prosecution of lower-ranking officials in national courts is allowed for war crimes or certain other offences affecting the global community as a whole (cf., generally, regarding claims being made against the individual through international criminal law, Federal Constitutional Court, decision of 18 November 2020 – 2 BvR 477/17, JZ 2021, 142 paragraph 18).

24 aa) Art. 7 of the Charter of the International Military Tribunal of 8 August 1945 which is one of the 'Nuremberg Principles', expressly stated that the official position of defendants, whether as heads of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment. It therefore obviously required jurisdiction over said persons in relation to crimes falling within the competence of the Tribunal – crimes against peace, war crimes, crimes against humanity (Art. 6 of the Charter). Although the Tribunal was formed exclusively to sentence and punish major war criminals from the European Axis (Art. 1 of the Charter; for the particular constitutional situation in Germany after the war, Federal Constitutional Court, 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 of the UN Charter), the principles recognised by the Charter had already been affirmed in 1946 by the United Nations General Assembly (UN Doc. A/RES/95[I]) and subsequently cited on numerous occasions as general principles (cf., regarding the irrelevance of 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 also considered when drawing up the Rome Statute of the International Criminal Court (see Bundestag document 14/2682, page 100, 101; Kirsch, Wash. U. Global Stud. Law Review 6 [2007], 501; regarding the starting point for the development of international criminal justice for crimes against humanity, also Federal Constitutional Court, 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]; Federal Constitutional Court, decision of 12 December 2000 – 2 BvR 1290/99, NJW 2001, 1848, 1853) found that, for the committing of war crimes, crimes against humanity or genocide, those responsible could not themselves cite immunity from national or international jurisdiction if they had committed crimes in the performance of their state function (International Criminal Tribunal for the former Yugoslavia, judgment of 29 October 1997 – IT-95-14-AR 108 – Blaskic – paragraph 41; cf. also International Criminal Tribunal for the former Yugoslavia, judgment of 10 December 1998 – IT-95-17/1-T – Furundzija – paragraph 140). Although, compared to the latter, the International Criminal Court, in connection with questions of immunity, distinguished between international courts, which acts in the interests of the international community as a whole, and national case-law developed in the interests of an individual State (following this, Special Court for Sierra Leone, decision of 31 May 2004 – SCSL-2003-01-I – Taylor – paragraph 51), it did not say, in relation thereto, whether there was any functional immunity for war crimes before national courts (see International Criminal Court, judgment of 6 May 2019 – ICC-02/05-01/09 OA2 – Al-Bashir – paragraph 113; in relation hereto, for example, Chaitidou, ZIS 2019, 567, 574 et seq.; see, in general, also Report of the Secretary-General of the United Nations of 3 May 1993, UN Doc. S/25704, paragraph 55).

26 cc) National courts have on many occasions seen no obstacle in deciding on war crimes, crimes against humanity or genocide.

27 (1) The Israeli Supreme Court, providing detailed reasons and citing the 'Nuremberg Principles', found that the 'Act of State' doctrine did not prevent criminal responsibility for breaches of international law, in particular in international crimes like crimes against humanity (Supreme Court, judgment of 29 May 1962 – Eichmann – *International Law Reports* 36 [1968], 277, 308 et seq.). Even though the Court, in that context, did not explicitly discuss the immunity of foreign officials (cf., regarding the 'act of state doctrine', Federal Constitutional Court, decision of 24 October 1996 – 2 BvR 1851/94 et al., BVerfGE 95, 96, 129, with further references), it is clear from its decision and the reasons for it that ultimately actions as a official did not prevent criminal proceedings before a foreign national court.

28 (2) The Supreme Court of the Netherlands did not examine the question of immunity in proceedings relating to criminal 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 the earlier court had denied immunity on the grounds that such serious criminal acts could not be regarded as having been committed as part of the person's sovereign responsibilities (Court of Appeal of Amsterdam, judgment of 20 November 2000 – R 97/163/12 Sv et al., *Netherlands Yearbook of International Law* 32 [2001], 266 et seq.; relating hereto as a whole, Zegveld, *Netherlands Yearbook of International Law* 32 [2001], 98, 113 et seq.). In a later case, with respect to the legal position in the Netherlands, it denied the immunity of a convicted person for acts they carried out in their sovereign function in Afghanistan (Hoge Raad, judgment of 8 July 2008 – 07/10063, *International Law in Domestic Courts* 1071 [NL 2008]).

29 (3) The Belgian Court of Cassation, unlike for a head of state or government leader, ultimately granted a member of military personnel no immunity in criminal proceedings for serious breaches of humanitarian international law (Belgium Court of Cassation, decision of 12 February 2003 – P.02.1139.F, *Journal Tribunaux* 2003, 243, 246 and 247 [*International Legal Materials* 42 <2003>, 596]; see, in relation hereto, Rau, HuV-I 2003, 92; d'Argent, *Journal Tribunaux* 2003, 247, 250 et seq.).

30 (4) The Spanish Constitutional Court, in a case relating, amongst other things, to accusations of genocide and torture against former foreign officials, did not look at the issue of immunity, but rather the question of national jurisdiction and – unlike the decision objected to – at least partially accepted these in that specific case (Constitutional Court, judgment of 26 September 2005 – 237/2005, *Boletin Oficial del Estado* 2005, No. 258 – 17753 -, 45 [*International Law in Domestic Courts* 137 <ES 2005>]; regarding the previous decision of the Tribunal Supremo, see Benavides, *International Legal Materials* 42 [2003], 683, 684 and 685).

31 (5) The Italian Court of Cassation, in criminal proceedings relating to the killing and injuring of Italian citizens by a US soldier in Baghdad, ultimately assumed that sovereign immunity did not apply to crimes under international law (Suprema Corte di Cassazione, decision of 24 July 2008 – 31171/2008, *International Law in Domestic Courts* 1085 [IT 2008]; in relation hereto, Tondini/Bertolin, Quademi Constituzionali 28 [2008], 897).

32 (6) The Federal Supreme Court of Switzerland – in proceedings relating to a former Defence Secretary – according to more detailed statements, came to the conclusion that it was impossible to reach an entirely clear answer to the question of whether immunity ratione materiae related to all acts carried out in a person's sovereign function and the serious breaches of humanitarian law had to be taken into consideration here. However, functional immunity could not be cited in such circumstances (Federal Supreme Court, decision of 25 July 2012 – BB.2011.140, *Arrets du Tribunal Pénal Fédéral Suisse* 2012, 97, 113 and 114).

33 (7) The French Court of Cassation has based many judgments on the fact that, in principle, immunity existed for acts by officials in the exercise of state, non-private authority, but exceptions could exist in accordance with the rules of mandatory international law (Court of Cassation, decision of 16 October 2018 – 16-84.436, *Bulletin des arrêts de la chambre criminelle* 2018, 560, 563; see also Court of 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; and of 13 March 2001 – 00-87.215, *Bulletin criminel* 2001, 218).

34 (8) In an earlier decision, the Division itself initially put to one side the question of whether the principle of sovereign immunity, having the same force as in civil procedural law, 'is significant in criminal prosecution and protects the organs of foreign states beyond the group of people enjoying what is referred to as

personal immunity (heads of state, diplomats)' (Federal Court of Justice, 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, it subsequently saw on numerous occasions no reason to address this question expressly and immediately allowed the criminal prosecution of (former) foreign officials through German courts for offences under the International Criminal Code or previously in accordance with Article 220(a) of the old version of the German Criminal Code (StGB) without objection (see Federal Court of Justice, judgment of 21 May 2015 – 3 StR 575/14, JZ 2016, 103 [genocide in which a Rwandan mayor participated]; decisions of 21 February 2001 – 3 StR 244/00, NJW 2001, 2732 [accessory to 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, paragraphs 7 et seq.; of 9 October 2019 – AK 54/19, juris, [torture by members of the intelligence services in Syria]; and of 16 May 2019 – AK 23/19, juris, [in this case]).

35 dd) The recent work of the United Nations International Law Commission on immunity under criminal law has not yet been completed (regarding the significance of the International Law Commission, Federal Constitutional Court, decision of 6 December 2006 – 2 BvM 9/03, BVerfGE 117, 141, 161; see also ICJ, judgment of 3 February 2012 – 1031 – Germany v. Italy – I.C.J. Reports 2012, 99, paragraph 56). These do not currently suggest any rules of international law granting at least functional immunity, including for war crimes. They therefore do not alter the general rule of customary international law evidenced by standard practice and conviction that at least foreign lower-ranking officials could be criminally prosecuted through national courts for war crimes or certain other offences concerning the international community as a whole.

36 In July 2007, the International Law Commission looked into the subject of the immunity of State officials from foreign criminal jurisdiction in its work programme (see Yearbook of the International Law Commission 2007, Volume II, Part 2, paragraph 376; in basic terms also Memorandum of the Secretary of the General Assembly of 31 March 2008, UN Doc. A/CN.4/596) and regularly dealt with it thereafter like the United Nations General Assembly Sixth Committee. The special rapporteur initially appointed for this suggested that the reasons cited for exceptions to immunity were unpersuasive and also lacked any standard practice among different States (see, for example, Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, UN Doc. A/CN.4/631, 425). Conversely, after examining legal practice, the International Law Commission special rapporteur succeeding the latter recognised a clear development in viewing the committing of international crimes as limiting the assumption of the immunity of State officials (Escobar Hernández, *Fifth report on immunity of State officials from foreign criminal jurisdiction*, UN Doc. A/CN.4/701, 73 and 74), and considered viewing this as a rule of customary international law (loc. cit., page 78). In her subsequent report, however, she said that the question of limitations on or exceptions to immunity were the most controversial and politically sensitive aspect (Escobar Hernández, *Sixth report on immunity of State officials from foreign criminal jurisdiction*, UN Doc. A/CN.4/722, 5; cf., critically thereof, for example, Nolte, A/CN.4/SR.3365, 3 et seq.). She summarised the opinions expressed on the matter by the State representatives during the General Assembly Sixth Committee by stating that, in the view of two States, international crimes could never be regarded as the exercising of State jurisdiction, one State assumed a limitation on immunity to be already existing customary international law, ten States saw a development therein, whilst eleven States denied the existence of corresponding customary international law and eight others – including Germany – did not even acknowledge any tendency in that respect (UN Doc. A/CN.4/722, 6 and 7; cf., regarding the further development, the two subsequent reports UN Doc. A/CN.4/729, 4 and 5, 7; A/CN.4/739; by way of summary, Kittichaisaree, *The Obligation to Extradite or Prosecute*, 2018, 254 et seq.; Ascensio/Bonafe, RGDIP 122 [2018], 821 et seq.; see also Ambos/Kreß, *Rome Statute of the International Criminal Court*, 4th ed., Art. 98 paragraphs 65 et seq.).

37 Although this might ostensibly indicate that the majority of States commenting consider functional immunity to exist even for war crimes, on closer examination this is not generally the case. Take for example the view here that Germany officially adopted during the General Assembly Sixth Committee in October 2017. It is true that the fifth report of the second special rapporteur was criticised for containing major methodological errors. However, Germany's representative also pointed out that the principle of individual responsibility for international crimes was a significant achievement and Germany reliably supported efforts to bring those committing international crimes to court (see General Assembly, Official Records, UN Doc. A/C.6/72/SR.24, 13). The criticism then specifically made was aimed, for example, at

the draft list of certain crimes for which there was no immunity; whilst the crimes of aggression mentioned in the Rome Statute were not listed, the crime of apartheid was included. Given such reservations, it is impossible to conclude from any omission from the draft that, from Germany's perspective, none of the rules contained in it were recognised under customary international law, particularly as the opinion already given the previous year affirmed that there were exceptions to immunity in clearly defined cases (cf. General Assembly, Official Records, UN Doc. A/C.6/71/SR.29, 4). Subsequent statements made by the Federal President (cf. Speech on the 75th anniversary of the beginning of the Nuremberg Trials on 20 November 2020) and by the Foreign Secretary as part of Federal Government (see BT-PlPr. 19/185 page 23289) also support such an understanding. The latter evidently do not assume that any functional immunity might stand in the way of national criminal prosecution for war crimes.

38 ee) The overwhelming majority of academic literature denies functional immunity for crimes under international law, at least with respect to lower-ranking officials – albeit with in some cases alternative approaches in terms of reasoning and differentiations – (cf., for example, MüKoStGB/Ambos, 4th ed., before Article 3, paragraphs 135 et seq.; Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., paragraph 811; Ambos/Kreß, *Rome Statute of the International Criminal Court*, 4th ed., Art. 98, paragraph 31; Triffterer/Ambos/Burchard, *Rome Statute of the International Criminal Court*, 3rd ed., Art. 27, paragraph 16; Folz/Soppe, NStZ 1996, 576, 578 and 579; Talmon in Paulus et al., *Internationales, nationales und privates Recht: Hybridisierung der Rechtsordnungen? Immunität*, 2014, 313, 324 et seq.; Tomuschat in Paulus et al., *Internationales, nationales und privates Recht: Hybridisierung der Rechtsordnungen? Immunität*, 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 and 308; in emphatic terms, Kreicker, *Völkerrechtliche Exemtionen*, 2007, 219; same, JR 2015, 298 et seq.; in ambivalent terms in 'normal organs of state' Dörr, AVR 41 [2003], 201, 218 and 219). The concerns expressed in relation thereto (see, for example, Fox/Webb, *The Law of Sovereign immunity*, 3rd revised 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 and 518; d'Argent/Lesaffre, *The Cambridge Handbook of Immunities and International Law*, 2019, 614) are not based on any general conviction of a majority of the States or corresponding practice.

39 d) The fact that, in other contexts, immunity has been assumed for persons acting for the State does not relate to the question of the functional immunity of lower-ranking officials which is relevant to the decision here. Any immunity of specific high-ranking representatives of a State which may possibly exist even in criminal proceedings for war crimes has as little effect on the accusations made against the defendant as any immunity in civil proceedings.

40 aa) It is true that it is accepted that certain holders of high-ranking offices of state like heads of state, government leaders or foreign secretaries enjoy immunity from criminal jurisdiction in other States (cf., for example, ICJ, judgment of 14 February 2002 – 837 – Congo v. Belgium – I.C.J. Reports 2002, 3, paragraph 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 what is referred to as personal immunity (see Federal Court of Justice, judgment of 30 July 1993 – 3 StR 347/92, BGHSt 39, 260, 263) which – irrespective of the other preconditions and their scope – does not in principle extend to lower-ranking State officials. Even though aspects of immunity ratione materiae are also discussed here, circumstances relating to heads of state, government leaders or foreign secretaries (cf., for example, Supreme Court of Appeal [South Africa], judgment of 15 March 2016 – 867/15, paragraph 84; order of the Federal Public Prosecutor of 24 June 2005 – 3 ARP 654/03-2) do not allow any relevant conclusions to be drawn on the functional immunity of a member of the military services to be examined here.

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

42 Where, for example, the European Court of Human Rights assumed, in the context of appeals against the failure of claims for compensation for torture, that immunity was granted ratione materiae for official acts of State officials in civil proceedings examining accusations of torture, it expressly considered, first of all, that it was not about criminal responsibility for torture, but about sovereign immunity in compensation

proceedings under civil law (ECtHR, judgment of 21 November 2001 – 35763/97 – Al-Adsani v. United Kingdom – ECtHR 2001-XI, 79 paragraph 61 [EuGRZ 2002, 403]). Secondly, it pointed out that the matter would have to be looked at further in light of the present developments in international law (ECtHR, judgment of 14 January 2014 – 34356/06 et al. – Jones and Others v. United Kingdom – ECtHR 2014-I, 1 paragraph 215; cf. in relation hereto Kloth, AVR 52 [2014], 256, 278).

43 The International Court likewise stressed that, in relation to the immunity of the State in compensation proceedings, it did not have to reach any decision on the question of whether and, if so, to what extent immunity in criminal proceedings may have to be observed against a State official (ICJ, judgment of 3 February 2012 – 1031 – Germany v. Italy –, I.C.J. Reports 2012, 99, paragraph 91). Its underlying considerations that neither the accusation of serious breaches of humanitarian international law and of the law in armed conflict, nor the breach of mandatory international law (ius cogens) led to the loss of immunity are therefore not immediately applicable to criminal proceedings.

44 Decisions of the Federal Constitutional Court (see, for example, Federal Constitutional Court, decisions of 6 May 2020 – 2 BvR 331/18, NJW 2020, 3647, paragraphs 14 et seq.; of 17 March 2014 – 2 BvR 736/13, NJW 2014, 1723, paragraph 20, with further references; of 6 December 2006 – 2 BvM 9/03, BVerfGE 117, 141; and of 15 February 2006 – 2 BvR 1476/03, BVerfGK 7, 303, 307) and of the Federal Court of Justice (cf., for example, Federal Court of Justice, judgments of 26 June 2003 – III ZR 245/98, BGHZ 155, 279, 283; and of 19 December 2017 – XI ZR 796/16, BGHZ 217, 153, paragraphs 15 et seq., with further references) regarding immunity in civil proceedings likewise make no mention of the extent of functional immunity in criminal proceedings.

45 cc) Nor has the Federal Constitutional Court otherwise yet reached any decision on such immunity.

46 In so far as it has referred generally to the fact that 'exceptions to immunity in cases of war crimes, crimes under international law and breaches of ius cogens under international law [were] discussed', it has not looked any further at it since the decision did not relate to the 'immunity of State organs, in particular of members of the government, flowing' from sovereign immunity, but rather to diplomatic immunity which is to be distinguished therefrom (cf. Federal Constitutional Court, decision of 10 June 1997 – 2 BvR 1516/96, BVerfGE 96, 68, 84 and 85). It has also said that sovereign immunity only applies if the State as such is party to the judicial proceedings; a judicial decision on sovereign acts of other States during preliminary questions was not prohibited under international law (Federal Constitutional Court, loc. cit., page 90). For diplomats, other than the right to diplomatic immunity, recourse could certainly not be made to any general immunity of organs (Federal Constitutional Court, loc. cit., page 91, with further references).

47 Moreover, the Federal Constitutional Court has likewise assumed that the immunity of officials does not generally apply without any limitation, but that, for example, the criminal charge may be relevant. There is hence no general rule of international law in accordance with which spies who are being prosecuted by the State affected by the espionage under criminal law may cite the principles of sovereign immunity (Federal Constitutional Court, decision of 15 May 1995 – 2 BvL 19/91 et al., BVerfGE 92, 277, 321).

48 3. Nothing need be said about the extent to which functional immunity would prevent criminal prosecution solely for general offences, as was assumed, for example, by the Higher Regional Court in respect of the mistreatment of the prisoners. This is because the acts that the defendant is accused of carrying out relate to war crimes pursuant to Article 8 of the International Criminal Code, and there are actually corresponding crimes recognised under customary international law (see specifically in relation hereto under C. I. 1 and D. I below).

49 Since there is therefore no procedural impediment of immunity, the real-life circumstances complained about have to be fully examined from a legal perspective (cf., regarding the conviction for concomitant general criminal offences, Federal Court of Justice, decision of 21 February 2001 – 3 StR 244/00, NJW 2001, 2732). This is also evident from the fact that general national criminal offences include war crimes and these may therefore be criminalised as 'ordinary crimes' (cf., in relation hereto, Bundestag document 14/8524, page 12; regarding the Convention against Torture, Bundestag document 11/5459, pages 24 and 25).

50 III. In accordance with Art. 100(2) of the German Basic Law, no decision by the Federal Constitutional Court is required since there is no doubt within the meaning of this provision regarding the question that is relevant to the decision as to whether, based on a rule of international law applicable as an element of Federal law and directly generating rights and obligations for the individual, national criminal prosecution of the defendant as a former official of another State for sovereign acts carried out in their home State is excluded if these acts are war crimes.

51 1. A decision of the Federal Constitutional Courts has to be obtained in accordance with Art. 100(2) of the German Basic Law if there is any doubt in a legal dispute whether a rule of international law is an element of Federal law and whether it directly generates rights and obligations for the individual (Art. 25 of the German Basic Law).

52 a) The term legal dispute within the meaning of the provision 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 performed if the term 'legal dispute' were interpreted narrowly, for example if it were limited to adversarial proceedings (Federal Constitutional Court, decision of 31 March 1987 – 2 BvM 2/86, BVerfGE 75, 1, 11).

53 b) Submissions are admissible even if the substance of the rule under international law is unable to generate rights and obligations for the individual directly, but instead only applies to States or their organs as the parties at whom the statutory provision is directed (Federal Constitutional Court, decisions of 13 December 1977 – 2 BvM 1/76, BVerfGE 46, 342, 362 and 363; and of 12 April 1983 – 2 BvR 678/81 et al., BVerfGE 64, 1, 14, with further references).

54 c) Pursuant to the case-law of the Federal Constitutional Court, a submission in accordance with Art. 100(2) of the German Basic Law is due simply if the court of decision, in examining the question of whether and in what scope a general rule of international law applies, has serious doubts, and the court might itself also have no doubts. It is not the court of decision, but only the Federal Constitutional Court which has the authority to clarify any existing doubts itself. There are serious doubts over the existence or scope of a general rule of international law if the court departs from the opinion of a constitutional body or from the decisions of high German, foreign or international courts or from the teaching of international law by recognised authors (Federal Constitutional Court, decision of 12 October 2011 – 2 BvR 2984/09, BVerfGK 19, 122, paragraph 128, with further references).

55 Such doubts are also to be assumed if there is no relevant supreme court case-law regarding the questions raised and the judicature of international courts does not provide any decisive opinion thereon (see Federal Constitutional Court, decision of 8 May 2007 – 2 BvM 1/03, BVerfGE 118, 124, 133; cf. also Federal Constitutional Court, decision of 12 April 1983 – 2 BvR 678/81 et al., BVerfGE 64, 1, 14 et seq.). Moreover, beyond the wording, questions are permitted which relate not to the existence, but merely to the scope of a rule under international law; the significance that Art. 25 of the German Basic Law attributes to the general rules of international law also requires consistent case-law regarding their scope. This means that proceedings pursuant to Art. 100(2) of the German Basic Law may also be used to interpret and specify general rules of international law with their usually low degree of regulation (Federal Constitutional Court, decision of 30 January 2008 – 2 BvR 793/07, BVerfGK 13, 246, 250, with further references).

56 2. By this yardstick, notwithstanding differing individual views expressed by some in international law, there are no doubts requiring clarification by the Federal Constitutional Court over the question of relevance to the decision as to whether functional immunity prevents national criminal prosecution of the defendant.

57 In its decision, the Division departs neither from the opinion of a constitutional body, nor from the decision of supreme German, foreign or international courts, instead being consistent with them. As already described in detail, it has never been assumed by the courts mentioned that criminal proceedings against members of the military services or other lower-ranking officials for war crimes through a national court were ruled out pursuant to customary international law. In circumstances where such an issue has arisen, the possibility of criminal prosecution has instead been regarded as existing.

58 In addition, the Federal Constitutional Court was recently looking at a comparable situation relating to criminal proceedings against suspected former members of the Syrian General Intelligence Service for offences under the International Criminal Code during the Syrian conflict. It is true that these proceedings

did not essentially relate to the legal question of relevance here, but rather to a request for the issuing of a provisional order intended to enable journalists to follow the course of the proceedings in Arabic. However, the Federal Constitutional Court still cited as a reason for the considerable public attention the fact that the Federal Republic was claiming jurisdiction that did not exist according to general principles, but was instead due given the particular nature of the criminal offences in question which were of concern to the international community as a whole; it did not mention the issue of immunity (see Federal Constitutional Court, decision of 18 August 2020 – 1 BvR 1918/20, NJW 2020, 3166, paragraph 11).

59 In light of all of the above, a few voices in the literature on international law which also consider functional immunity to exist where war crimes cases are prosecuted in national courts are not enough to substantiate doubts leading to the submission (see, regarding the irrelevance of voices in the case-law of other States and in the literature, also Federal Constitutional Court, decision of 6 May 2020 – 2 BvR 331/18, NJW 2020, 3647, paragraph 30).

60 IV. Because, for the reasons given above, under the given circumstances, there is undoubtedly no procedural impediment of functional immunity based on customary international law, it can remain an open question whether ratification of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 ('Convention against Torture'; see Federal Law Gazette II 1990, 247 et seq.; for Afghanistan, Federal Law Gazette II 1993 pages 715, 717) contains an exception to any immunity (cf. in relation hereto – with differing 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; Kittichaisaree, *The Obligation to Extradite or Prosecute*, 2018, 247; Akande/Shah, EJIL 21 [2011], 815, 841 and 842; critically thereof, Talmon in Paulus et al., *Internationales, nationales und privates Recht: Hybridisierung der Rechtsordnungen? Immunität*, 2014, 313, 331 and 332; see also Wuerth, AJIL 106 [2012], 731; in ambivalent terms, the British opinion during the General Assembly Sixth Committee, UN Doc. A/C.6/66/SR.28, 4).

61 V. Otherwise, German criminal jurisdiction is likewise available. This applies, as rightly described in more detail by the Higher Regional Court, simply pursuant to Article 7(2)(2) of the German Criminal Code. Nothing need therefore be said about the fact that the universal jurisdiction laid down in the first sentence of Article 1 of the International Criminal Code also applies, this being based on Article 5 of the Rome Statute of the International Criminal Court also applicable to Afghanistan (cf. Bundestag document 14/8524, page 14; Federal Law Gazette II 2003 page 422), and annex competence may arise therefrom for further offences (cf. Federal Court of Justice, judgment of 30 April 1999 – 3 StR 215/98, BGHSt 45, 64, 69 and 70; decision of 6 June 2019 – StB 14/19, BGHSt 64, 89 paragraph 71).

C.

62 The guilty verdict should be amended on appeal by the Federal Public Prosecutor. This results in the annulment of the individual penalties relating thereto and of the overall penalty. However, there has been no error in law in the fixing of the remaining individual penalty.

63 I. In relation to the mistreatment of the three prisoners, the guilty verdict contains errors in law in favour of the defendant. The latter was liable for prosecution for the war crime of torture in concomitance with grievous bodily harm, with coercion and with attempted coercion during the interrogation of the prisoners.

64 1. Contrary to the view taken by the Higher Regional Court, the treatment of the prisoners is to be regarded as torture within the meaning of Article 8(1)(3) of the International Criminal Code, and therefore at the same time as a war crime within the meaning of international law. The question answered in the negative by the earlier court as to whether the treatment is relevant within the meaning of the provision is a legal question which can be decided by the Division on the basis of findings free of errors in law. According to the underlying facts, the physical or mental harm or suffering caused to the three prisoners, when viewed as a whole, is ascribed the necessary substantiality that is a precondition of the war crime of cruel or inhuman treatment of a person who is to be protected in accordance with Article 8(1)(3) of the International Criminal Code.

65 a) The term substantiality requires a sufficiently large degree of harm caused by the act and does not

merely serve to eliminate petty offences from the scope of application (cf. in relation hereto, Federal Court of Justice, decisions of 5 September 2019 – AK 47/19, juris, paragraph 38; and of 6 June 2019 – StB 14/19, NJW 2019, 2627, paragraph 63). Substantiality is to be assessed in light of all of the facts of the case, in particular the type of act and its context (see Federal Court of Justice, decisions of 25 September 2018 – StB 40/18, juris, paragraph 22; and of 17 November 2016 – AK 54/16, juris, paragraph 27).

66 aa) Both the systematic regulation structure and the purpose associated with it have to be taken into account when limiting substantiality. Accordingly, the degree of harm must be well above that of simple bodily harm (see Federal Court of Justice, decisions of 25 September 2018 – StB 40/18, juris, paragraph 22; and of 17 November 2016 – AK 54/16, juris, paragraph 27), although, given the possibility of purely psychological torture, physical harm is not absolutely essential.

67 (1) The International Criminal Code places differing requirements on the degree of physical and mental harm in different factual situations. For example, whilst substantial harm or suffering is required under Article 7(1)(5) and Article 8(1)(3) of the International Criminal Code in question here, Article 7(1)(8) of the International Criminal Code, on the other hand, requires severe harm, in particular of the type described in Article 226 of the German Criminal Code. This differentiating terminology indicates that the requirements on substantiality are not as high as in the case of the degree of severity to be compared with Article 226 of the German Criminal Code.

68 (2) The term torture used in the provisions and its underlying understanding here nevertheless suggest significant severity.

69 The offences under Article 7(1)(5) and Article 8(1)(3) of the International Criminal Code are based on Art. 7(1)(f), Art. 8(2)(a)(ii), Art. 8(2)(b)(x), Art. 8(2)(c)(i) and Art. 8(2)(e)(xi) of the Rome Statute of the International Criminal Court (referred to hereinbelow as the International Criminal Court Statute; cf. Bundestag document 14/8524, pages 12 and 13, 21, 26). In accordance with the legal definition given in Art. 7(2)(e) of the International Criminal Court Statute, torture within the meaning of Art. 7(1) of the International Criminal Court 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' (cf. also Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., paragraphs 1052 and 1053; Triffterer/Ambos/Hall/Stahn, *Rome Statute of the International Criminal Code*, 3rd ed., Art. 7, paragraph 132; Triffterer/Ambos/Dörmann, loc. cit, Art. 8, paragraphs 87 et seq.; MüKoStGB/Geiß/Zimmermann, 3rd ed., Article 8 of the International Criminal Code, paragraph 138; regarding the first sentence of Article 1(1) of the Convention against Torture, Nowak/Birk/Monina/Zach, *The United Nations Convention Against Torture and its Optional Protocol*, 2nd ed., Art. 1, paragraphs 81 et seq.; regarding Art. 3(1)(1)(a)(III) of the Geneva Convention, ICRC v. Cameron et al., Third Geneva Convention, 2020, Art. 3, paragraphs 662 et seq.). Because, according to the grounds for the bill, the term torture in Article 8(1)(3) of the International Criminal Code is supposed to be understood as in Article 7(1)(5) of the International Criminal Code – implementing Art. 7(1)(f) of the International Criminal Court Statute – (Bundestag document 14/8524 page 26), substantial harm is accordingly comparable to severe physical or mental pain. The grounds for the law are based in this respect on the 'infliction of severe physical or mental harm' (Bundestag document 14/8524 loc. cit.).

70 (3) It was the legislature's intention that the crimes standardised under the International Criminal Code be subject to universal jurisdiction in accordance with the first sentence of Article 1 of the International Criminal Code. The basis for this is that they are directed 'at the vital interests of the international community', are international in nature and – in accordance with the preamble of the International Criminal Court Statute – relate to the 'most serious crimes of concern to the international community as a whole' (cf. Bundestag document 14/8524, page 14). This stresses the particular significance of criminal offences, particularly also compared to offences regulated nationally. There is at the same time good reason to consider an interpretation in line with an international legal understanding.

71 (4) Finally, given the seriousness of the criminal charge and the wide range of penalties, particularly compared to bodily harm offences pursuant to Articles 223 et seq. of the German Criminal Code and to the extortion of statements pursuant to Article 343 of the German Criminal Code, a rather restrictive interpretation is not out of the question (cf. also Federal Court of Justice, judgment of 27 July 2017 – 3 StR 57/17, BGHSt 62, 272, paragraph 48). Nevertheless, it should at the same time be borne in mind

that Article 8(5) of the International Criminal Code provides for a reduced sentence in less serious cases under Article 8(1)(3) of the International Criminal Code. Accordingly, there is still room for a tiered approach to decisions in terms of their legal consequences, particularly if the threshold of substantiality is only just exceeded. In addition, the offence under international criminal law is also characterised by the fact that it has to be connected to an international or non-international armed conflict.

72 bb) The relevant facts have to be taken into account when examining substantiality.

73 Since the point of reference for substantiality is physical or mental harm or suffering, particular account needs to be taken of the physical and psychological effects actually caused. For example, the type of treatment and its context, its duration and the condition of the victims may also have to be taken into consideration (cf. MüKoStGB/Geiß/Zimmermann, 3rd ed., Article 8 of the International Criminal Code, paragraph 140; see also, regarding Art. 3 ECHR ECtHR, judgment of 1 June 2010 – 22978/05 – Gäffgen v. Germany – EuGRZ 2010, 417 paragraphs 88, 101; regarding torture pursuant to humanitarian international law, International Criminal Tribunal for the former Yugoslavia, judgment of 3 April 2007 – IT-99-36-A – Brdanin – paragraph 251, with further references).

74 b) According to the standards outlined, the mistreatment is to be assessed as substantial within the meaning of the offence.

75 When viewed as a whole, it is of particular significance here that the situation was already marked by the use of aggression when the defendant arrived: Cries were heard from the interrogation room and the Deputy Commander was hitting the prisoners with a hose. The fact that the prisoners were sitting on the floor and were shackled and blindfolded suggested that they were particularly defenceless overall and susceptible to physical or mental attacks irrespective of whether they were sitting in a way that was typical for that country and their shackles and blindfolds were primarily measures used for the interrogators' own safety.

76 In this situation, they were not only physically mistreated by a number of people and through the use of a hose. Instead, they were also threatened with serious consequences, one of the prisoners being threatened with being 'ripped to pieces' and another with being 'connected to the electricity supply'. The effect of this simultaneously physical and psychological treatment on those being interrogated is clear, for example, from the fact that one of them began to sob. Another finally provided the requested information after twice being hit on the forehead with the back of the hand, then being dragged to the floor by the shoulder and punched in the head twice while lying there (cf., regarding forcedly obtained information as an expression of substantial fear, anguish and mental suffering – in relation to Art. 3 ECHR – ECtHR, judgment of 1 June 2010 – 22978/05 – Gäffgen v. Germany – EuGRZ 2010, 417, paragraph 89, 103).

77 In view of the overall picture, substantiality is ultimately not precluded here by the fact that there was no bleeding and that there were no bone injuries or other visible injuries, no cries of pain and no consequential psychological effects and the event lasted no more than 5 minutes in the presence of the defendant who had arrived spontaneously. However, these aspects suggest that the threshold of substantiality was only marginally exceeded.

78 c) The defendant's intent must relate merely to the actual facts on which the assessment of the harm or suffering as being substantial is based, not on this assessment itself (cf. accordingly, with respect to Article 184(c) of the old version of the German Criminal Code, Federal Court of Justice, judgments of 24 September 1980 – 3 StR 255/80, BGHSt 29, 336, 338; and of 10 May 1995 – 3 StR 150/95, Federal Court of Justice case-law, German Criminal Code, Article 178(1), sexual conduct 8; Fischer, *StGB*, 68th ed., Article 184(h), paragraph 10; similarly also regarding assessment pursuant to Article 224(1)(5) of the German Criminal Code, Federal Court of Justice, 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; and of 26 March 2015 – 4 StR 442/14, NStZ-RR 2015, 172, 173). Such intent is to be inferred from the contested judgment.

79 d) Behind the more particular war crime of torture comes a war crime committed through this same act of humiliating or degrading treatment (Article 8(1)(9) of the International Criminal Code) (cf. International Criminal Tribunal for the former Yugoslavia, judgments of 16 November 1998 – IT-96-21-T – Mucic – paragraph 442; and of 3 March 2000 – Blaskic – IT-95-14-T – paragraphs 54 and 55; Werle/Jeßberger,

Völkerstrafrecht, 5th ed., paragraph 1275).

80 The torture of the three prisoners constitutes a single war crime. It is true that, in respect of the relationship between several war crimes against persons in adversarial law, the general rules for offences against personal rights apply; this is because the connection to an armed conflict is unable to link individual acts to a contextual element in a legal sense (Federal Court of Justice, decision of 20 February 2019 – AK 4/19, Federal Court of Justice case-law, International Criminal Code, Article 8(1), competition 1, paragraph 25, with further references). However, according to the specific facts of the case, the mistreatment of one prisoner had at the same time a psychological effect on the other two sitting next to him, so the acts carried out were in some respects identical and merely a single act was therefore being carried out (cf. generally, for example, Federal Court of Justice, decision of 4 April 2019 – AK 12/19, juris, paragraph 60, with further references).

81 2. The defendant was also liable for prosecution as an accessory to grievous bodily harm (Article 240(1)(4) of the German Criminal Code), coercion of one prisoner to provide certain information (Article 240(1) of the German Criminal Code) and attempted coercion of the other two prisoners (Article 240(1) and (3) and Articles 22 and 23 of the German Criminal Code).

82 These breaches of the law are in concomitance with the war crime of torture. If an offender, through their actions, commits both an offence under general criminal law and an offence under the International Criminal Code, then general competition rules apply (Bundestag document 14/8524, page 13; cf. also Federal Court of Justice, decision of 17 June 2010 – AK 3/10, BGHSt 55, 157 paragraph 50). If a number of laws are breached through the same act, in principle, concomitance is to be assumed. In this way, the guilty verdict performs its clarification function by expressly naming all of the criminal standards met. Treated as exceptions to this principle are cases in which there is a unity of laws. This arises if, although behaviour meets a number of criminal provisions, to establish the degree of wrongdoing of the act, the application of one offence alone to which the remaining offences are secondary is sufficient (in relation hereto as a whole, Federal Court of Justice, decision of 29 April 2020 – 3 StR 532/19, NStZ-RR 2020, 243, with further references).

83 Compared to grievous bodily harm and (attempted) coercion, the war crime of torture is neither a more particular offence which has all of the features of these other criminal provisions, nor does it include these offences, since, as a rule, they are not part of the typical concomitant act and have a separate degree of wrongdoing extending beyond the main act (cf., in relation to the general preconditions, Federal Court of Justice, decision of 11 June 2020 – 5 StR 157/20, NJW 2020, 2347, paragraphs 19 et seq., with further references). This is because the war crime of cruel or inhuman treatment through torture is conditional neither upon grievous bodily harm nor (attempted) coercion, nor is the latter usually inherent therein. The causing of mental suffering is therefore enough. Even if torture also requires an additional aim (cf. the corresponding 'Elements of Crimes' in accordance with Art. 9 of the International Criminal Court Statute under Art. 8(2)(a)(ii), variant 1 of the International Criminal Court Statute; see also the first sentence of Art. 1(1) of the Convention against Torture), the latter does not need to lie in coercion in respect of an act, tolerance or forbearance within the meaning of Article 240(1) of the German Criminal Code, but may instead exist, for example, in punishment or degradation.

84 The criminal offences committed against the various prisoners in accordance with the criminal code are encompassed here by the more serious war crime of torture carried out concomitantly in each case. The inclusion of similar concomitance in the order is unnecessary given the clarity and comprehensibility of the guilty verdict (cf. Federal Court of Justice, decision of 31 May 2016 – 3 StR 54/16, NStZ-RR 2016, 274, 275).

85 II. The sentencing in terms of legal consequences applies only in relation to the individual penalty relating to the treatment of the dead body. It should otherwise be annulled.

86 1. The changing of the guilty verdict results in the annulment of the individual penalties relating thereto in case II.B.1. This brings with it the annulment of the overall prison sentence and undermines the basis for the decision on the suspended sentence. Nothing need therefore be said on the matter.

87 The underlying findings may be left as they stand since they are unaffected by errors in law (Article 353(2)

of the Code of Criminal Procedure (StPO)) and are based on the consideration of evidence. The same also applies to the statements made by the Higher Regional Court on the hose used (see generally in relation to the dangerous tool in accordance with Article 224(1)(2) of the German Criminal Code, Bundestag document 13/9064, page 9; Federal Court of Justice, decision of 22 March 2017 – 3 StR 475/16, juris, paragraph 17, with further references; in addition, Federal Court of Justice, judgment of 13 January 2006 – 2 StR 463/05, juris, paragraph 7, 19; decision of 25 November 1986 – 4 StR 605/86, StV 1988, 62 and 63 with critical comments, Rolinski; cf. also Federal Court of Justice, judgment of 6 June 1952 – 1 StR 708/51, BGHSt 3, 105, 109). It heard a forensic pathologist as an expert on the injuries which may possibly arise and adequately described the conclusions drawn therefrom. In this context, the considerations additionally carried out by the trial court that, because of the cloth tied around the head, an injury, for example, to the eyes was not to be expected even if accidentally hit in the wrong place, are still to be added on appeal.

88 2. In respect of the remaining individual penalty in case II.B.2 of 1 year and 4 months, the combination of the reasons for the judgment makes it sufficiently apparent that the Higher Regional Court actually considered the aspects mentioned in detail (cf., by way of comparison, with respect to a special individual case, Federal Court of Justice, decision of 1 March 2011 – 3 StR 28/11, NStZ-RR 2011, 284 and 285).

89 Insofar as the Federal Public Prosecutor objects to the fact that the Higher Regional Court failed to consider certain facts as capable of increasing the penalty, these, like the further objections, are essentially differing assessments compared to those which the trial court that was called upon to make those assessments made free of errors in law.

D.

90 The review of the judgment based on the defendant's justification for an appeal revealed no error in law to the detriment thereof. Nor was any such error revealed by the Federal Public Prosecutor's appeal (Article 301 of the Code of Criminal Procedure). Only the following need be mentioned in this respect:

91 I. A war crime – recognised under customary international law – against persons through gravely humiliating or degrading treatment in accordance with Article 8(1)(9) of the International Criminal Code may also be committed against a deceased person (cf., specifically, Federal Court of Justice, judgment of 27 July 2017 – 3 StR 57/17, BGHSt 62, 272 paragraphs 16 et seq.; in agreement, Werle/Epik, JZ 2018, 261, 262; disagreeing, Ambos, NJW 2017, 3672; critically also Bock/Bülte, HRRS 2018, 100). This does not alter the fact that, owing to the Fifty-Ninth Act Amending the Criminal Code of 9 October 2020 (Federal Law Gazette I, page 2075) Article 201(a)(1)(3) of the new version of the German Criminal Code now expressly regulates the taking of pictures of deceased persons and the grounds for the bill assumed that, pursuant to the previously applicable law, deceased persons did not belong to the group of people protected under Article 201(a) of the German Criminal Code (see Bundestag document 19/17795, pages 1, 9). The statutory provisions each apply to a different factual context and are based on separate legislative developments (cf., with respect to Article 201(a) of the German Criminal Code, for example, LK v. Valerius, StGB, 12th ed., Article 201(a), paragraph 10, with further references; with respect to Article 8 of the International Criminal Code, Federal Court of Justice, judgment of 27 July 2017 – 3 StR 57/17, loc. cit., paragraphs 19 et seq.).

92 The treatment of the deceased was also grave overall within the meaning of Article 8(1)(9) of the International Criminal Code (see, with respect to the standards, Federal Court of Justice, judgment of 27 July 2017 – 3 StR 57/17, BGHSt 62, 272, paragraphs 48 et seq.).

93 II. Given the year 1992 mentioned both in the title and in the findings, and given the further context of the judgment, it is a clear mistake in the wording that, during the consideration of the evidence, the defendant's birth year was at one point given as '1995' and he would therefore still have been an adolescent when the acts were carried out.