

In the Proceedings on The Constitutional Complaint

Of Mr. Jorgic

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Against

- a) the decision of the Bundesgerichtshof (BGH – Federal Court of Justice) of 30 April 1999 – 3 StR 215/98 –,
- b) the decision of the Oberlandesgericht (OLG – Higher Regional Court) Düsseldorf of 26 September 1997 – IV – 26/96 –

On 12 December 2000, the 4th Chamber of the Second Senate of the Federal Constitutional Court, through

Judges President Limbach,
Jentsch
and Di Fabio,

unanimously decided, pursuant to § 93b in conjunction with § 93a of the *Bundesverfassungsgerichtsgesetz* (BVerfGG – Federal Constitutional Court Act) (as promulgated on 11 August 1993 – *Bundesgesetzblatt* (BGBl – Federal Law Gazette) I, p. 1473):

The constitutional complaint is not admitted for decision.

Extract from Grounds:

1

1. The constitutional complaint concerns the interpretation of Article II and VI of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (Genocide Convention) as well as of § 220a of the *Strafgesetzbuch* (StGB – German Criminal Code) in the course of the conviction of a Bosnian Serb by a German court on account of the commission of crimes of genocide in Bosnia-Herzegovina. . . .

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The complainant is a Bosnian Serb. He was arrested during his last entry into Germany, on 16 December 1995. . . . On 26 September 1997, the *Oberlandesgericht* (OLG – Higher Regional Court) Düsseldorf convicted him of eleven counts of genocide pursuant to §§ 220a.1,

Numbers 1 and 3 of the German Criminal Code in conjunction with other crimes arising out of the same or related acts. He was sentenced to life in prison. . . . With its judgment of 30 April 1999, the *Bundesgerichtshof* (Federal Court of Justice) modified the judgment of the Higher Regional Court . . . with respect to the terms of the conviction, such that the complainant was convicted . . . of genocide in conjunction with thirty counts of murder arising out of the same or related acts. . . .

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The constitutional complaint is not admitted for a decision from the Court because the requirements for admission outlined by § 93a.2 of the Federal Constitutional Court Act have not been met in this case. . . .

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2. To the extent that the complainant asserts that the interpretation of the concept *Zerstörungsabsicht* (intent to destroy) found in § 220a of the German Criminal Code constituted a violation of Article 103.2 of the *Grundgesetz* (GG – Basic Law), the complaint is unfounded; the interpretation upon which the decisions of the nonconstitutional courts relied does not constitute a violation of Article 103.2 of the Basic Law, also when considered in conjunction with the *Rechtsstaatsprinzip* (principle of the rule of law). . . .

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The Higher Regional Court and the Federal Court of Justice found that § 220a of the German Criminal Code provides protection for groups. They have concurrently interpreted the concept of the intent to destroy that is contained in § 220a of the German Criminal Code in such a way that the destruction of a group – also a part of a group that is geographically defined – includes the annihilation of a group as a social unit with its special qualities, uniqueness and its feeling of togetherness, not exclusively their physical-biological annihilation. Both courts, therefore, conclude that an actor, as a means of destruction, must above all personally or through others want to employ the actions named in § 220a.1, Numbers 1 to 5 of the German Criminal Code. The following are identified as possible, independent additional means: (1) detention in inhumane conditions; (2) destroying and looting houses or buildings of importance to the group; as well as (3) expulsion of members of the group. It is, in the view of the courts, sufficient if the actor adopts the intent of a central, controlling authority, which is organised in a structured manner; the existence of such authority is assumed in the elements of the crime of genocide outlined by § 220a of the German Criminal Code. The intent element is satisfied even if it extends only to part of the group. The corresponding intent of the central, controlling authority could also arise from its political expressions.

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This interpretation, in the challenged judgments, of the concept of intent in § 220a of the German Criminal Code, complies with the standards of Article 103.2 of the Basic Law.

7

a) The starting point of the challenged judgments, that the elements of the crime of genocide protect a legal interest that lies beyond the individual, namely the social existence of a group,

finds its basis in the wording of the provision that requires that the intent to destroy be directed against the "group as such." The intent to destroy required by § 220a of the German Criminal Code, considering the natural meaning of the words, has a broader meaning than physical-biological annihilation. This conclusion is also supported by the fact that the law, in § 220a.1, Number 3 of the German Criminal Code complements "destruction" with the special attribute "*körperlich*" (bodily), thereby establishing that the criminalised actions must be combined with the physical annihilation of the group. § 220a.1, Number 4, on the other hand, establishes the special case of the biological annihilation of a group without having the effect of a physical annihilation of the presently living members of the group. This means that the wording of the statute does not conclusively establish that the actor must have the intent to physically annihilate at least a substantial number of the members of a group. . . .

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b) It does not overstep the possible meaning of the statute's language if the courts accept that the intent to destroy can focus on a geographically defined group. This interpretation is based on the fact that § 220a of the German Criminal Code penalises the intent to partially as well as completely destroy the group.

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c) The complainant's argument that the challenged judgments equated expulsion with annihilation cannot succeed. Both judgments clearly conclude that systematic expulsions can be a means of carrying out the intent to destroy a group and serves as an indication of this intent, but that expulsions alone do not establish the intent to destroy a group.

10

d) Whether the criminality of an act was statutorily defined before the act was taken is, first and foremost, to be judged on the basis of the criminal law of the Federal Republic of Germany (cf. BVerfGE 92, p. 277 [at p. 324]). Nevertheless, the effects of applying the jurisdiction of the Federal Republic of Germany to facts arising outside of Germany must be tested against the principle of the rule of law (Article 20.3 and Article 28.1.1 of the Basic Law) (cf. BVerfGE 92, p. 277 [at p. 325]). The standards governing public punishment on this basis have their foundation in the principle of proportionality (cf. BVerfGE 92, p. 277 [at p. 323]). The Federal Constitutional Court has held that the procedural guarantees that are provided in criminal proceedings pursuant to Article 103.2 of the Basic Law acquire particular importance in this context (cf. BVerfGE 92, p. 277 [at p. 323]). This corresponds to the fact that German law-making power, when based on international law and relying on facts arising out of a foreign territory for its nexus, is subject to the human rights commitments of international law.

. . . In this respect, Article 15 of the International Covenant on Civil and Political Rights of 19 December 1966 (ICCPR) must especially be observed. The Federal Republic is bound to the terms of Article 15 of the ICCPR in its dealings with matters arising in Bosnia-Herzegovina. Article 15.1.1 of the ICCPR, limits the criminal law competence of the Federal Republic of Germany through international law. Therefore no one may be held guilty of an act or omission which did not constitute a criminal offence pursuant to domestic or international law at the time when it was committed (cf. also Article 22.2.1 of the Rome Statute of the International Criminal Court, Federal Law Gazette II, p. 1393 [at p. 1412]). The norm corresponds, to this degree, to Article 103.2 of the Basic Law. If an individual is subject to

legal duties under domestic or international law, the principle of the rule of law in conjunction with Article 103.2 of the Basic Law requires that the courts, in the interpretation and application of domestic law, like § 220a of the German Criminal Code, which serves as the implementation of international criminal law, observe the prohibition on crafting criminal law by analogy also with respect to the controlling elements of international law. This is especially the case when, as here, the complainant's exposure to criminal sanction is possible directly pursuant to international law. . . . The prevailing opinion proceeds from the assumption that crimes of genocide are sanctionable as crimes directly pursuant to international law (see, International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind, ILC Yearbook 1996, Vol. II(2), Art. 2).

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The possible terms of § 220a are, therefore, to be determined in accordance with the elements of the crime of genocide as they exist in international law, as they are established by Article II of the Genocide Convention, Article 4 of the Statute of the International Criminal Tribunal for the former Yugoslavia, Article 4 of the Statute of the International Criminal Tribunal for Rwanda and Article 6 of the Rome Statute for the International Criminal Court. It is clear that the nonconstitutional courts' interpretation of § 220a of the German Criminal Code lies within the margins of the possible interpretation of the international law elements of the crime of genocide and conforms to the relevant jurisprudence and practice of the United Nations. . . .

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3. The challenged decisions do not violate the constitution by assuming the applicability of German criminal law pursuant to § 6 Number 1 of the German Criminal Code in conjunction with Article VI of the Genocide Convention, to the charged actions of the complainant.

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a) Out of respect for the prohibition on interference with state sovereignty that is anchored in customary and treaty law (Article 2, Number 1 of the UN Charter), the Federal Constitutional Court has required some sensible nexus with Germany when subjecting acts to German law that have occurred in a foreign territory and therefore outside the German territory (cf. BVerfGE 63, p. 343 [at p. 369]; 77, p. 137 [at p. 153]; 92, p. 277 [at pp. 320–321]). What constitutes a sensible nexus is dependent on the particular nature of the subject of regulation. . . . For criminal law, the principle of universal or world jurisdiction constitutes such a sensible nexus, along with the principles of territoriality, protection, active and passive personality, and the principle of the substituting criminal law jurisdiction (cf. BVerfGE 92, p. 277 [at pp. 320–321]; . . .). Universal jurisdiction applies only to specific crimes which are viewed as threats to the legal interests of the international community of states. It is distinguishable from the principle of the substituting criminal law jurisdiction, codified in §7.2 Number 2 of the German Criminal Code, in that it is not dependent on whether the act is punishable in the territory where it occurs or whether or not there is a possibility for extradition. . . .

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b) Whether the Genocide Convention contains such a rule providing for universal jurisdiction must be determined by interpretation of the Convention. Treaties in international law are

generally interpreted in accordance with the ordinary meaning of the terms of the treaty, in light of the treaty's object and purpose, and with consideration given to general international law (cf. BVerfGE 40, p. 141 [at p. 167]; 46, p. 342 [at p. 361]; 96, p. 68 [at p. 87]; Articles 31–32 of the Vienna Convention on the Law of Treaties). The courts' interpretation and application regarding the field of application of the German provisions concerning genocide found in § 6 Number 1 of the German Criminal Code in conjunction with Article VI of the Genocide Convention, are, in any event, neither obviously untenable (cf. BVerfGE 6, p. 45 [at p. 53]) nor arbitrary, in that, pursuant to no conceivable aspect, they can be considered legally justifiable (cf. BVerfGE 3, p. 359 [at p. 364]).

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aa) In the course of interpreting the treaty in accordance with the meaning of its terms, courts have concluded, with no reservations concerning possible constitutional law violations, that Article VI of the Genocide Convention in no case contains a ban on the application of the German criminal jurisdiction. The Convention's explicit treatment of the jurisdictional element is, however, not exhaustive because the active or passive personality principle as the basis for criminal jurisdiction is also not identified. . . . Pursuant to its object and purpose, the courts have interpreted Article I of the Genocide Convention such that the Convention strives for effective criminal prosecution of genocide. Therefore, the absence of a rule concerning universal jurisdiction only means that the states that are parties to the Convention are under no obligation to prosecute, although they have the opportunity to pursue criminal prosecutions on this basis. There is no reservation when, in justifiable cases, priority is given to the systematic-teleological interpretation of international treaties over the interpretation of a treaty in accordance with the meaning of its terms (cf. International Court of Justice, South West Africa Cases, ICJ Reports 1962, p. 319 [at p. 336]). This is especially the case with respect to prosecution of foreign criminal acts on the basis of international treaties, which often do not clearly identify which jurisdictional nexus will be regulated. Genocide is, as the most severe violation of human rights, . . . the classic case for application of universal jurisdiction, the purpose of which is to make possible the most thorough prosecution of crimes perpetrated against the especially important legal interests of the international community of states.

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bb) Furthermore, on the basis of Article 31.3, Letter b of the Vienna Convention on the Law of Treaties, the Federal Court of Justice relied upon the Rome Statute of the International Criminal Court, which has not yet come into force and has not yet been ratified by Germany. The Rome Statute, however, addresses only the jurisdiction of the International Criminal Court. The national courts only come into consideration in so far as the relationship between the national court with presumptive jurisdiction and the International Criminal Court is at issue. With respect to the jurisdiction of the national courts over genocide, the Rome Statute also raises questions because it requires, for the jurisdiction of the International Criminal Court, the ratification of the Statute by the State where the crime occurs or the State of the perpetrator. This contradicts the idea behind universal jurisdiction, which does not require such a nexus. Germany failed, during the negotiations over the Rome Statute, in its attempt to derive the automatic jurisdiction of the International Criminal Court from the national courts' jurisdiction over the relevant crimes, a competence which has universal jurisdiction as its basis. This proposal was founded on the competence of all states, which can transfer to the international court the authority to prosecute to which they are entitled pursuant to universal

jurisdiction. The German proposal was, however, rejected on the basis of the *pacta tertiis* argument (cf. Article 34 of the Vienna Convention on the Law of Treaties) and not because the applicability of universal jurisdiction to the crimes identified in Article 6 *et seq.* of the German Criminal Code should be called into question. . . .

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5. The challenged decisions are also free of constitutional error in so far as they assume, for acts of genocide in Bosnia, a concurrent jurisdiction for the German courts and the Yugoslavian Criminal Tribunal. . . .

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No appeal may be taken against this decision.

Limbach

Jentsch

Di Fabio