FEDERAL COURT OF JUSTICE

ORDER

3 StR 454/22

of

20 March 2024

Reference: yes

BGHSt: yes

Publication: yes

JNEU: no

Section 250 sentence 2 and section 256 (1) no. 1 (a) of the Code of Criminal Procedure (*Strafprozessordnung*, StPO);

Article 25 of the Basic Law (*Grundgesetz*);

Section 20 (2) of the Courts Constitution Act (*Gerichtsverfassungsgesetz*)

1. Reports that have been compiled by United Nations bodies or entities for evidence purposes for official or court proceedings are covered by the scope of section 250 sentence 2 of the Code of Criminal Procedure. Under section 256 (1) no. 1 (a) of the Code of Criminal Procedure, however, they can nonetheless be read out in court and used as evidence in an allowable departure from the principle of immediacy (*Unmittelbarkeitsgrundsatz*).

2. General functional immunity does not extend to crimes against international law, regardless of the rank or status of the perpetrator. This applies to offences for which criminal liability derives directly from general customary international law. Those

offences include crimes against humanity and war crimes as established under customary international criminal law and defined in the provisions of the Rome Statute of the International Criminal Court and, correspondingly, in the German Code of Crimes against International Law (*Völkerstrafgesetzbuch*, VStGB).

Federal Court of Justice, Order of 20 March 2024 - 3 StR 454/22 - Koblenz Higher Regional Court

in the criminal proceedings
against

inter alia for the crime against humanity of killing a person

In accordance with section 349 (2) and (4) and, by way of analogy, section 354 (1) of the Code of Criminal Procedure, the Third Criminal Panel of the Federal Court of Justice, having heard the Appellant and the Federal Public Prosecutor General, ruled unanimously on 20 March 2024 – in respect of 2. on application by the Federal Public Prosecutor General – as follows:

1. On appeal on points of law by the Defendant, the judgment issued by Koblenz Higher Regional Court of 13 January 2022 is amended as follows:

   a) the Defendant is guilty of

      - especially serious sexual coercion instead of especially serious rape and

      - two counts of aiding the sexual abuse of prisoners instead of three counts of sexual abuse of prisoners;

   b) the Defendant's conviction for two counts of sexual coercion is overturned.

2. The remainder of the appeal on points of law is rejected.

3. The Appellant shall bear the costs of the appeal and the necessary costs incurred by private accessory prosecutors A. ,

   K. , M. , F. , Al.

   , Ab. , Mu. ,

   Als. , G. , Ka. , Kan.

   , H. , Ha. , Ham. ,

   B. , Alg. , Ma. ,

   Kh. , A. Hamm. and M. Hamm. in the appellate proceedings on points of law.

Reasons

1 The Higher Regional Court found the Defendant guilty of the crimes against humanity of killing, torture, severe deprivation of liberty, rape and sexual coercion, and that the same acts also constituted: 27 counts of murder under specific aggravating circumstances (*Mord*), 25 counts of dangerous bodily harm, especially serious rape, two counts of sexual coercion, 14

counts of unlawful imprisonment lasting more than one week, two counts of hostage-taking and three counts of sexual abuse of prisoners, and sentenced him to life imprisonment. In his appeal on points of law, the Defendant submitted that the Higher Regional Court had committed errors of both procedural and substantive law. On the point of substantive law appealed, the verdict is amended as set out in the operative provisions; on all other points, the appeal is ill-founded (section 349 (2) of the Code of Criminal Procedure).

I.

2 1. The Higher Regional Court reached the following findings:

3 a) From no later than 29 April 2011 onwards, in response to a central government directive, the Syrian security forces sought to avert a threat to the stability of the government and to prevent its possible overthrow by violently suppressing the protest movement against the regime of President Bashar al-Assad that had emerged during the Arab Spring. Security forces attacked and broke up protests across the country, even using live ammunition against peaceful protesters; fleeing protesters were pursued, arrested, imprisoned and subsequently tortured repeatedly or indeed killed. In some cases, people who were merely suspected of belonging to the opposition or who were wholly unconnected with the protests were taken prisoner and tortured. The objective of this course of action, in which the secret services played a crucial role, was to obtain information about other opposition members and to intimidate the public and thus prevent future protests.

4 b) Brutal methods of torture were used in Branch X of the General Intelligence Directorate and in a prison under its control in the X district of D. Following the outbreak of the conflict, officers conducting interrogations were given ever greater licence. It was thus ultimately possible for them to engage in torture without being specifically ordered to do so but with the tacit approval of their superiors. Torture was from that point onwards used in almost all interrogations in Branch X.

5 The staff of Branch X engaged in the grievous and ruthless mistreatment of prisoners during questioning. The infliction of great pain and suffering by interrogators or by prison officers present at interrogations was, by design, an integral aspect of operations at the Branch. Torture was, at the least, always used whenever a prisoner did not answer or did not give the desired answer to a question from their interrogator. Branch X had rooms in which instruments of torture (such as batons, cables, belts and pliers) were used. The screams of those being tortured could be heard throughout the prison almost 24 hours a day.

6 The overall conditions of detention in the Branch X prison were also inhumane. Prisoners were largely held in multi-occupancy cells, which from April 2011 onwards were so overcrowded that occupants had to take it in turns to sleep on the floor and otherwise had to stand. Other prisoners were held in groups of two or three in small 'single-occupancy' cells. Neither washing facilities nor medical care was available. Prisoners lost weight rapidly and their general health suffered as a result of not getting enough to eat, and of sleep deprivation caused by the aforementioned conditions and by the loud screams of those who were being tortured. Almost every single inmate was taken at least once for questioning during which they were tortured.

7 c) Between 29 April 2011 and 7 September 2012, at least 4000 people, including 20 private accessory prosecutors, were imprisoned for a period of at least several days in the conditions detailed above. At least 27 people, including a seven-year-old child, died as a result of the torture and of the general conditions of detention.

8 Specific – in some cases repeated – instances of ill-treatment of 20 of the private accessory prosecutors and the consequences of that ill-treatment are detailed in the Higher Regional Court judgment. Three of those private accessory prosecutors were victims of sexual abuse, which is relevant for the legal assessment below. During a period of imprisonment lasting approximately two months, private accessory prosecutor F. had a baton forced into his anus by a prison officer. F. required surgery for the injuries he suffered as a result. One prison officer reached up and grabbed private accessory prosecutor Kan.'s breast through her clothing while she was cuffed. During one of numerous interrogations, an officer of Branch X pushed private accessory prosecutor Ha.'s head into his lap and held her face-down against his genitals.

9 d) The Defendant already had the rank of colonel and had taken on the posts of deputy director of Branch X and head of the Interrogations Unit prior to 29 April 2011. He held those posts during the entire period in question. His duties included investigative work and gathering information as efficiently as possible. Between five and ten interrogators and the prison director reported to him. In his position as a military-style superior, the Defendant had comprehensive authority to issue instructions (*Weisungsrecht*) vis-à-vis all individuals in his unit. His area of responsibility thus covered the management of the prison, the treatment of prisoners and the conduct of interrogations. He exercised his powers in practice and visited the prison at regular intervals to monitor compliance with his instructions. He set the objectives of questioning, received interrogation reports and was notified of incidents such as the deaths already mentioned. The torture and ill-treatment of prisoners was a reality; a common practice that the Defendant maintained. Interrogators and prison officers were given

free rein in their choice of methods. The Defendant had a formal right to propose to the director of the branch what was to happen to prisoners (continued imprisonment; release; transfer to other authorities; etc.); however, in most cases, that right of proposal was, in reality, equivalent to actual decision-making powers.

10 The Defendant was aware of and encouraged the use of torture and other forms of violence, including sexual assault, as measures for extorting testimony and as means of intimidation. He accepted the deaths as an inevitable consequence of that ill-treatment, and of the conditions of detention, of which he was also aware. The Defendant identified with the Syrian state and was aware of the concerted action being taken by the security forces against (suspected) opponents of the regime. Not only did he approve of that action, he considered his own role as an integral part of it. The survival of the regime was also important to him for personal reasons, as his status, his income and the social privileges he enjoyed were all dependent upon it. He was familiar with both the decisions of the government and with the overall political situation in Syria. He knew that there was no legal basis either for the imprisonment or for the interrogation methods or conditions of detention, and that these all violated human rights.

11 2. The Higher Regional Court took the position that the Defendant committed all the offences on which it ruled as a co-perpetrator and by the same acts. As regards private accessory prosecutor F., the Higher Regional Court found the Defendant to be criminally liable for offences including especially serious rape (section 177 (1) nos. 1 and 3 and section 177 (2) sentence 2 no. 1 of the version of the Criminal Code (*Strafgesetzbuch*, StGB) in force until 9 November 2016) and sexual abuse of prisoners (section 174a (1) of the Criminal Code); as regards private accessory prosecutors Kan. and Ha., the Higher Regional Court found the Defendant to be criminally liable for sexual coercion (section 177 (1) nos. 1 and 3 of the version of the Criminal Code in force until 9 November 2016) and for sexual abuse of prisoners.

II.

12 The procedural complaints are unsuccessful for the reasons set out in the submission from the Federal Public Prosecutor General. Further explanation is only required regarding the objection, on the grounds of violation of the principle of immediacy, to the use of reports as evidence.

13 1. The complaint is argued on the following basis:

14 a) According to the case for the appeal on points of law, the presiding judge at the State Security Division of the Higher Regional Court ordered that the German translations of three reports by the Independent International Commission of Inquiry on the Syrian Arab Republic dating from 2011, 2013 and 2016, and the 2012 report *Syrien* by the Federal Office for Migration and Refugees (BAMF), be read out in court in the main hearing. The Defendant's counsel then raised an objection to the use of said documents as evidence. Defence counsel submitted that the principle of immediacy required 'direct evidence, in this case above all witness testimony'.

15 b) It is evident from reading the three reports submitted by the Appellant in conjunction with publicly available sources that the United Nations Human Rights Council established the aforementioned Commission of Inquiry in 2011 through Resolution S-17/1. The Human Rights Council tasked the Commission of Inquiry with investigating all alleged human rights violations perpetrated since March 2011 in the Syrian Arab Republic and identifying the perpetrators with a view to ensuring subsequent criminal prosecution. Once the Commission of Inquiry was established, the Human Rights Council appointed its members; whenever members stepped down, the Human Rights Council appointed replacements. Subsequent resolutions have extended the mandate of the Commission of Inquiry and defined that mandate in more detail. As well as numerous briefings, the Commission presents a report on its findings to the Human Rights Council at least once a year at a Human Rights Council session. Findings are based primarily on the evaluation of documents and witness testimony. Pursuant to paragraphs 14 and 15 of Resolution S-17/1, the Human Rights Council publishes the reports and transmits them to the General Assembly of the United Nations.

16 2. The appeal argues that the State Security Division should not have been allowed to take the reports, read out in court, of the Commission of Inquiry as evidence of the human rights violations committed in Syria – which it did, alongside a wide range of other evidence (Higher Regional Court judgment, p. 164). The appeal states that the reports were not verified in the main hearing, and that indeed they could not be verified. The appeal argues that the judgment cannot be upheld because the principle of immediacy was violated.

17 3. There are questions as to the admissibility of the complaint. Merely complaining in the abstract of a violation of the principle of immediacy is not sufficient to meet the requirements governing appeal submissions set out in section 344 (2) sentence 2 of the Code of Criminal Procedure. An appellant must instead demonstrate that, in contravention of section 250 sentence 2 of the Code of Criminal Procedure, a document has been read out *instead* of a person being examined (see KK-StPO/Diemer, 9. Aufl., § 250 para. 19). The

provision does not preclude supplementing witness testimony by reading out a document, particularly where this is done for the purpose of verifying the credibility of witness statements (cf. Federal Court of Justice, Judgment of 14 May 2014 - 2 StR 475/13, NStZ 2014, 607, 608).

18 Therefore, the fact that it is not evident from the appeal what witnesses ought to have been questioned in place of the use of documentary evidence may in itself render the line of argument followed in the complaint insufficiently clear. The appeal suggests that the Appellant considers the reports to have been used in place of testimony from numerous individuals – not specified in the appeal – who had been questioned about human rights violations. However, having the reports read out could at the very most only constitute an inadmissible substitute for in-person testimony from the reports' authors (cf. Federal Court of Justice, Judgment of 4 April 1951 - 1 StR 54/51, Decisions of the Federal Court of Justice in Criminal Matters (*Entscheidungen des Bundesgerichtshofs in Strafsachen,* BGHSt) 1, 94, 95 f.; Order of 4 April 2023 - 3 StR 68/22, Collection of Rulings of the Federal Court of Justice (*BGH-Rechtsprechung*, BGHR) *StPO § 256 Abs. 1 Nr. 5 Urheber 1* paras. 12 ff.; Meyer-Goßner/Schmitt, StPO, 67. Aufl., § 256 para. 5; SSW-StPO/Kudlich/Schuhr, 5. Aufl., § 249 para. 30 with further references).

19 As the Federal Public Prosecutor General correctly submitted, there is no indication that the Appellant is objecting to the use as evidence of the document from the Federal Office for Migration and Refugees.

20 4. The complaint is ill-founded. The reports by the Independent International Commission of Inquiry come within the scope of section 250 sentence 2 of the Code of Criminal Procedure, for they were, as clear from their content, drafted for evidence purposes for official or court proceedings (cf. Federal Court of Justice, Judgment of 18 May 1954 - 5 StR 653/53, BGHSt 6, 141, 142 f.; Judgment of 16 February 1965 - 1 StR 4/65, BGHSt 20, 160, 161; and Order of 25 September 2007 - 1 StR 350/07, NStZ-RR 2008, 48; MüKoStPO/Kreicker, 2. Aufl., § 250 para. 16). However, under section 256 (1) no. 1 (a) of the Code of Criminal Procedure, reading them out in court and thus using them as evidence represented a permissible departure from the principle of immediacy.

21 a) The Commission of Inquiry established by the United Nations Human Rights Council is to be categorised as a public authority within the meaning of section 256 (1) no. 1 (a) of the Code of Criminal Procedure. The term covers agencies of the state or of another public administration entity that are established under public law and are tasked with the performance of public duties, and that exist independently of their senior officials (cf. Federal Constitutional Court, Judgment of 14 July 1959 - 2 BvF 1/58, Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts*, BVerfGE) 10, 20, 48;

Supreme Court of the German Reich, Order of 14 November 1888 - Rep. 1291/88, Decisions of the Supreme Court of the German Reich in Criminal Matters (*Entscheidungen des Reichsgerichts in Strafsachen*, RGSt) 18, 246, 249; Federal Court of Justice, Order of 20 September 1957 - V ZB 19/57, Decisions of the Federal Court of Justice in Civil Matters (*Entscheidungen des Bundesgerichtshofs in Zivilsachen*, BGHZ) 25, 186, 188 f.; Meyer-Goßner/Schmitt, StPO, 67. Aufl., § 256 paras. 11 and 12). Public authorities need not have sovereign powers (see Federal Court of Justice, Order of 20 September 1957 - V ZB 19/57, BGHZ 25, 186, 189) nor must they necessarily be part of the German state (see Federal Court of Justice, Judgment of 9 July 1991 - 1 StR 666/90, NJW 1992, 58, 59).

22 aa) These criteria for categorisation as a public authority – which are to be interpreted broadly – have been met in the case at hand. The Commission of Inquiry is tasked with the performance of public duties. The Commission was established through a resolution of the Human Rights Council, which itself is part of the United Nations: the Human Rights Council is a subsidiary organ established by a resolution of the General Assembly (Resolution 60/251). Entities that are part of the United Nations are to be considered equivalent to national agencies for the purposes of section 256 (1) no. 1 (a) of the Code of Criminal Procedure. As a member of the United Nations and of the Human Rights Council, the Federal Republic of Germany not only assists in the performance of those institutions' duties, it also makes use of those institutions in pursuit of the purposes that are defined in the Charter of the United Nations (Article 1 of the UN Charter) and that were recognised as binding by the Federal Republic of Germany through its adoption of the Basic Treaty (*Grundvertrag*) (cf. Federal Law Gazette (*Bundesgesetzblatt,* BGBl.) 1973 II p. 430; see also Article 24 of the German Basic Law).

23 The United Nations has legal personality and is therefore an entity tasked with certain duties within the meaning of the above definition. In the exercise of those duties, the international organisation has rights and obligations under international law (cf. Epping in Ipsen, *Völkerrecht*, 8. Aufl., § 8 paras. 60 ff.). Under Article 104 of the UN Charter and as a result of ratification of the Convention on the Privileges and Immunities of the United Nations (BGBl. 1980 II p. 941), the United Nations and its bodies have the status of legal subjects under domestic as well as international law.

24 The Commission of Inquiry exists independently of its senior officials. That the Human Rights Council issued the investigative mandate not to specific individuals but rather to the Commission, a permanent institution, is evidenced by the fact that the resolution establishing the Commission preceded the appointment of the Commission's members, and members who departed were replaced.

25 bb) Furthermore, the spirit and purpose of section 256 (1) no. 1 (a) of the Code of Criminal Procedure justify considering United Nations bodies and entities as public authorities according to the same criteria as apply for domestic agencies. The main purpose of section 256 (1) no. 1 (a) of the Code of Criminal Procedure is not to avoid an additional workload being placed on members of public authorities as a result of their being called as witnesses; rather, the provision is rooted in the particular trust that is placed in public institutions because of their impartiality, their public service obligation, and the expertise that they possess as a result of their specialisation in specific areas (see Koblenz Higher Regional Court, Judgment of 24 June 1982 - 1 Ss 267/82, NJW 1984, 2424; MüKoStPO/Krüger, 2. Aufl., § 256 para. 8; but see Seyler, GA 1989, 546, 549). Following this logic, United Nations entities in general provide no less a guarantee of the reliability and accuracy of written information than do the public authorities at German federal or *Land* level, or the public authorities of other states (on this point see Federal Court of Justice, Judgment of 20 October 1959 - 5 StR 365/59, *Recht in Ost und West* 1960, 71; Judgment of 9 July 1991 - 1 StR 666/90, NJW 1992, 58, 59; Order of 5 June 2018 - 4 StR 524/17, juris).

26 b) The reports read out in court are to be considered as issued by the Commission of Inquiry. Reports are deemed to be issued by a public authority where an individual acting for that authority and authorised to disclose information on that authority's behalf provides information on findings that have been obtained in connection with the authority's activity and that are not intended solely for internal use (cf. Federal Court of Justice, Order of 26 February 1988 - 4 StR 51/88, BGHR *StPO § 256 Abs. 1 Behörde 2*; MüKoStPO/Krüger, 2. Aufl., § 256 paras. 12 ff.; Meyer-Goßner/Schmitt, StPO, 67. Aufl., § 256 para. 15). It is clear from Resolution S-17/1 itself that the three reports read out in court, relating to observations covered by the Commission's mandate, were intended for an external audience. The documentation of the investigation findings were specifically intended for publication.

27 aa) The reports were issued by the Commission of Inquiry even if they are not signed by its director or by an individual authorised by him. In the past, the courts have in some cases found that documents were not to be deemed as issued by a public authority where they were not signed by an individual who was to be regarded as authorised to issue statements on that authority's behalf, or where they did not include, beside the signature, the relevant indication that the signatory was acting on behalf of the authority (cf. for example Federal Court of Justice, Order of 20 January 1984 - 3 StR 487/83, NStZ 1984, 231; Judgment of 6 June 1984 - 2 StR 72/84, NStZ 1985, 36; Order of 26 February 1988 - 4 StR 51/88, NStZ 1988, 283). However, the key question is not whether or not a document bears a signature or a shorthand for powers of representation; given that documents are now increasingly sent or published exclusively electronically, such formalities are becoming less

important. The central criterion is, rather, that a statement to be read out in court does actually come from the authority in question and its issue reflected that authority's intention. The signature of a competent representative with the relevant indication of powers of representation can be evidence that this is the case; the absence of such a signature is not, however, proof of the contrary (cf. KK-StPO/Diemer, 9. Aufl., § 256 para. 3; LR/Stuckenberg, StPO, 27. Aufl., § 256 paras. 41 f.; SSW-StPO/Franke, 5. Aufl., § 256 para. 5). Whether or not the issue of the statement to be read out reflected the intention of the authority is, in such a case, to be established by the court in a process not bound by formal procedural restrictions on the taking of evidence (*Freibeweis*) (cf. Meyer-Goßner/Schmitt, StPO, 67. Aufl., § 256 para. 30).

28 bb) There are no doubts as to the authenticity of the reports read out in this case. As evidenced by the session reports for the 19th and 31st sessions of the Human Rights Council in 2012 and 2016, the Chair of the Commission of Inquiry presented the reports to the Human Rights Council. The reports are therefore not merely drafts, nor are they purely personal declarations by individual members of the Commission. The reports are, moreover, publicly available, both in the United Nations information system with their corresponding document number and on the website of the Human Rights Council and the Commission of Inquiry. This, too, makes it clear that the reports constitute binding announcements of the findings of investigations.

29 c) The reports read out in court provided information obtained in the exercise of the Commission of Inquiry's mandate by its members or staff and each report thus contained an official record (*Zeugnis*) within the meaning of section 256 (1) no. 1 of the Code of Criminal Procedure. That term covers information acquired in the exercise of their official duties by, and other official knowledge of, members of public authorities (cf. RG, Judgment of 26 July 1883 - Rep. 1673/83, RGSt 9, 88, 92; KK-StPO/Diemer, 9. Aufl., § 256 para. 2).

30 The scope of the provision is not limited to statements documented in public registers or records (but see SK-StPO/Velten, 5. Aufl., § 256 para. 20). This is clear from the spirit and purpose of the provision and from its place in the overall legal framework. As with the other types of official record (*Zeugnis*) and opinion (*Gutachten*) listed in section 256 (1) of the Code of Criminal Procedure, the overall purpose of allowing an official record from public authorities to be read out in court is to speed up proceedings by making it possible, in the main hearing, to dispense with questioning that is unnecessary because it will not commonly provide any further information (cf. *Bundestag* document, *Bundestagsdrucksache*, BT-Drucks. 15/1508 pp. 13 and 26). It would be contrary to that purpose were the trial court always required to question members of public authorities on observations that had already been officially documented, and this irrespective of any actual need for clarification and

despite the relevant individuals' in a given case being unable to provide any information beyond that which had already been recorded (on surveillance reports cf. Federal Court of Justice, Order of 8 March 2016 - 3 StR 484/15, BGHR *StPO § 256 Abs. 1 Nr. 5 Ermittlungsmaßnahmen 3* paras. 2 f.). Such a narrow interpretation would, moreover, render meaningless the provision in section 256 (1) no. 1 (b) of the Code of Criminal Procedure regarding official records (*Zeugnisse*) provided by sworn experts in relation to their work: it would mean that those experts could not provide any information from public records or registers. Furthermore, interpreting the provision differently for public authorities than for experts – despite the wording indicating that it is to be interpreted consistently – would run counter to the legislative intent. The legislative intent is that, within the scope of section 256 (1) no. 1 of the Code of Criminal Procedure, sworn experts be treated like authorities (see BT-Drucks. 15/1508 p. 26).

III.

31 The judgment largely stands up to the comprehensive substantive review conducted in response to the substantive complaint. However, the findings, which were based on an evaluation of the evidence that was free from legal error, do not support all aspects of the verdict. The verdict is to be amended in light of the provisions of the Criminal Code protecting sexual self-determination; however, this does not affect the sentence.

32 1. The Higher Regional Court correctly took the position that the procedural impediment of immunity of public officials did not apply. The Defendant does not enjoy any functional immunity under customary international law (cf. section 20 (2) of the Courts Constitution Act) that would protect him from criminal prosecution by another state for the actions established. The Defendant was acting as an official of the Syrian state and the actions in question are thus to be categorised as state action by the Syrian regime. Functional immunity, derived from state immunity, can protect individuals carrying out sovereign acts on behalf of a foreign state from prosecution by German courts. However, general functional immunity does not apply in cases of crimes against international law, regardless of the status or rank of the perpetrator (see Federal Court of Justice, Order of 21 February 2024 - AK 4/24, NJW 2024, 1674 para. 53 with further references). This applies to offences for which criminal liability derives directly from general customary international law. Those offences include crimes against humanity – which this case concerns – as established under customary international criminal law and defined in the provisions of the Rome Statute of the International Criminal Court and, correspondingly, in the German Code of Crimes against International Law (cf. Federal Court of Justice, Order of 30 November 2022 - 3 StR 230/22, BGHSt 67, 180 para. 23; on prosecution for criminal offences arising from the same

conduct under the Criminal Code see Federal Court of Justice, Judgment of 28 January 2021 - 3 StR 564/19, BGHSt 65, 286 para. 49); on war crimes see Federal Court of Justice, Judgment of 28 January 2021 (3 StR 564/19, BGHSt 65, 286 para. 13).

33 The Comments and observations on the International Law Commission's draft article 7 on the immunity of state officials, dated November 2023 and submitted by the Permanent Mission of the Federal Republic to the United Nations, do not give any grounds to now call into question the exclusion of crimes against international law from general functional immunity and to seek a decision on this matter from the Federal Constitutional Court (Article 100 (2) of the Basic Law). The Comments and observations present the view that such a limitation of immunity is at most 'customary international law "in statu[...] nasciendi"'; that a trend towards the acceptance of such a limitation can be observed ('Comments and observations by the Federal Republic of Germany on the draft articles on "Immunity of State officials from foreign criminal jurisdiction"', p. 3). The Panel, however, has already demonstrated that it is an established part of customary international law not to exempt foreign officials from the jurisdiction of domestic courts in such cases, and that this approach reflects established state practice (see Federal Court of Justice, Judgment of 28 January 2021 - 3 StR 564/19, BGHSt 65, 286 paras. 13 ff. with further references). Germany's Comments and observations categorised that judgment as 'important German State practice' with a 'significant bearing' (loc. cit.); the vast majority of European and other states have taken a much stronger position in support of the limitation of immunity (cf. Ambos, DRiZ 2024, 30, 33; Kreß, F.A.Z. of 6 November 2023 p. 8; Raube, KriPoZ 2024, 216).

34 To be distinguished from general functional immunity are special functional immunities enjoyed in particular by members of diplomatic missions (see Article 38 (1) and Article 39 (2) sentence 2 of the Vienna Convention on Diplomatic Relations) and of consular posts. Other provisions apply to those exemptions (cf. for example sections 18 and 19 of the Courts Constitution Act). The Federal Court of Justice judgment referred to above did not address potential exceptions to such special functional immunities.

35 2. The Higher Regional Court also correctly took the position that the limitation of prosecution under section 154a (1) sentence 1 no. 1 of the Code of Criminal Procedure, which the Federal Public Prosecutor General had applied when charges were preferred, was invalid under section 395 (5) sentence 2 of the Code of Criminal Procedure insofar as it concerned violations of the law affecting the private accessory prosecutors. This was because the private accessory prosecutors had not agreed to such a limitation of prosecution (cf. Federal Court of Justice, Order of 15 May 1973 - 4 StR 177/73, VRS 45 [1973], 181; Judgment of 12 June 2001 - 1 StR 190/01, juris para. 8). As regards the sexual offences under general criminal law committed against private accessory prosecutors F., Kan. and

Ha., the findings of the Higher Regional Court are, however, to be assessed as follows in deviation from the original verdict; this does not affect the Defendant's criminal liability for the crime against humanity of sexual violence under section 7 (1) no. 6 of the Code of Crimes against International Law (see Federal Court of Justice, Order of 12 October 2022 - AK 32/22, juris paras. 32 and 42; Order of 30 November 2022 - 3 StR 230/22, BGHSt 67, 180 para. 60):

36 a) The offence against private accessory prosecutor F. does not constitute, for the Defendant as co-perpetrator (section 25 (2) of the Criminal Code), an especially serious case of rape under section 177 (2) sentence 2 no. 1 and section 177 (4) no. 1 of the version of the Criminal Code in force until 9 November 2016, which version applies in accordance with section 2 (1) of the Criminal Code, but rather an especially serious case of sexual coercion under section 177 (1) nos. 1 and 3 and section 177 (4) no. 1 of that same version of the Criminal Code.

37 The offence as defined in the earlier version of section 177 (2) sentence 2 no. 1 of the Criminal Code – unlike in the version currently applicable (see Federal Court of Justice, Order of 24 September 2018 - 5 StR 358/18, NStZ 2019, 275 f.) – could only be committed by the individual who themselves carried out the sexual act (cf. Federal Court of Justice, Judgment of 22 April 1999 - 4 StR 3/99, juris para. 5; Order of 21 April 2009 - 4 StR 531/09, NStZ-RR 2009, 278; BeckOK StGB/Ziegler, 61. Ed., § 177 para. 49). As the Defendant was not present when the victim was penetrated with a baton, he cannot be the perpetrator of the crime of rape. However, sexual coercion under the earlier version of section 177 (1) nos. 1 and 3 of the Criminal Code was not an offence that could only be committed in person; the Defendant is therefore, under section 25 (2) of the Criminal Code, to be considered as having committed that offence – under the aggravating circumstances set out in the earlier version of section 177 (4) no. 1 of the Criminal Code.

38 b) The Defendant's criminal liability for the basic offence of sexual coercion under section 177 (1) nos. 1 and 3 of the earlier version of the Criminal Code committed by the Defendant as co-perpetrator through his actions against private accessory prosecutors Kan. and Ha. is superseded by his criminal liability under the Code of Crimes against International Law, for the basic offence does not contain any elements of wrongdoing by the Defendant that are not covered in full by the scope of section 7 (1) no. 6 of the Code of Crimes against International Law (cf. Federal Court of Justice, Order of 30 November 2022 - 3 StR 230/22, BGHSt 67, 180 paras. 56 ff.; MüKoStGB/Werle/Jeßberger, 4. Aufl., § 7 VStGB para. 82).

39 c) In addition, the Defendant's actions against the three private accessory prosecutors named above are to be categorised as three cases, arising from the same conduct, of aiding (section 27 (1) the Criminal Code), rather than perpetrating, the sexual

abuse of prisoners as defined in section 174a (1) of the version of Criminal Code in force until 30 June 2021, which is the applicable version in this case in accordance with section 2 (1) of the Criminal Code. Given this legal assessment, only the two cases committed against private accessory prosecutors F. and Ha. can be prosecuted; prosecution of the case concerning private accessory prosecutor Kan. is statute-barred (section 78 (1) sentence 1 of the Criminal Code).

40 aa) Under the definition of sexual abuse of prisoners in section 174a (1) of the earlier version of the Criminal Code, that offence could also only be committed in person (see MüKoStGB/Renzikowski, 4. Aufl., § 174a para. 33; Schönke/Schröder/Eisele, 30. Aufl., § 174a para. 13). As in section 174 (1) of that version of the Criminal Code, which was structured in the same way, the description of the offence contained no reference to a 'third person' with whom the sexual physical contact could also take place (on the relevant version of section 174 (1) of the Criminal Code, cf. Federal Court of Justice, Judgment of 7 September 1995 - 1 StR 236/95, BGHSt 41, 242, 243 ff.; Order of 18 April 2007 - 2 StR 19/07, NStZ 2007, 699). The definitions of the two offences were not revised until the Act to Combat Sexual Violence against Children (*Gesetz zur Bekämpfung sexualisierter Gewalt gegen Kinder*) (BGBl. 2021 I p. 1810) entered into force on 1 July 2021, which was after the acts in question were committed.

41 The Defendant was not present at the scene in any of the cases in question and did not personally engage in the sexual acts established. The findings in the Higher Regional Court judgment therefore only support a conviction for aiding the offences, which were perpetrated by various officers of Branch X.

42 bb) To the extent that the sexual abuse of prisoners was directed against private accessory prosecutors F. and Ha., prosecution of the Defendant for aiding that offence is not statute-barred. In accordance with section 78b (1) no. 1 of the Criminal Code, the period of limitation does not begin until the victim turns 30 and thus, for private accessory prosecutor F., who was born on 20 September 1984, not until the end of 19 September 2014, and for private accessory prosecutor Ha., who was born on 8 July 1987, not until the end of 7 July 2017 (on the retroactive application of legislative changes extending the stay of limitation, which entered into force on 27 January 2015, to offences that were not yet statute-barred on that date, cf. Federal Court of Justice, Order of 24 June 2004 - 4 StR 165/04, BGHR *StGB § 78b Abs. 1 Ruhen 12*; Order of 8 February 2012 - 1 StR 658/11, juris para. 3; Order of 7 April 2020 - 3 StR 90/20, StV 2021, 295 para. 7; Order of 29 March 2021 - 2 StR 450/19, juris para. 15; LK/Greger/Weingarten, StGB, 13. Aufl., § 78b para. 1a). The applicable five-year limitation period (section 78 (3) no. 4 of the Criminal Code) had thus not yet passed when

limitation was – at the latest – interrupted under section 78c (1) sentence 1 no. 5 of the Criminal Code by the issuance of the warrant of arrest for the Defendant on 7 February 2019.

43 To the extent that the acts were committed against private accessory prosecutor Kan., who was born in 1976, the procedural impediment of limitation does, however, apply. The statute of limitations expired five years after the end of the period of commission, namely on 7 September 2017, with no measures having been undertaken that would have interrupted the period of limitation.

44 d) The verdict is thus to be amended in accordance with section 354 (1) of the Code of Criminal Procedure as set out in the operative provisions. Said amendment is not precluded by section 265 (1) of the Code of Criminal Procedure as the Defendant could not have defended himself more effectively against a charge amended as above than he did against the charges brought.

45 e) Otherwise, for the reasons set out in the submission from the Federal Public Prosecutor General, the verdict does not contain any errors of law that are to the Defendant's disadvantage. The Panel has not undertaken further amendments to the wording of the operative provisions (cf. for example Federal Court of Justice, Order of 30 November 2022 - 3 StR 230/22, BGHSt 67, 180 paras. 60 and 65), given that the wording of the operative provisions is a matter for the discretion of the Higher Regional Court (section 260 (4) sentence 5 of the Code of Criminal Procedure).

46 3. The amendment to the guilty verdict does not affect the sentence, as section 7 (1) no. 1 of the Code of Crimes against International Law and section 211 of the Criminal Code mandate the imposition of a sentence of life imprisonment.

47 4. Given the very limited success of the substantive complaint, it cannot be considered inequitable to order the Defendant to pay the full costs of his appeal (section 473 (4) of the Code of Criminal Procedure).

Prior instance:

Koblenz Higher Regional Court, 13 January 2022 - 1 StE 9/19