

## German High Courts Confront Serbian War Crimes

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[1] In two recent decisions the German federal courts engaged in the interpretation and application of international criminal and humanitarian law, pursuant to the codification of those norms in German criminal law. Both cases involved appeals of convictions secured in lower German courts against Serbs who participated in the atrocities of the Serbian ethnic-cleansing (perpetrated against Bosnian Muslims) in the then newly independent Bosnia-Herzegovina.

[2] The 12 December 2000 decision of the Fourth (three-judge) Chamber of the Second Senate of the *Bundesverfassungsgericht* (BVerfG [Federal Constitutional Court]), and the preceding decision of the *Bundesgerichtshof* (BGH [Federal Court of Justice]) in the same case, dealt primarily with the 1948 Genocide Convention. The BVerfG's Chamber, in a lengthy commentary, refused to admit the applicant's constitutional claims.

[3] The 21 February 2001 decision of the Third Criminal Senate of the *Bundesgerichtshof* (BGH [Federal Court of Justice]) dealt primarily with the 1949 Geneva Convention on the Protection of Victims of International Armed Conflicts. The BGH upheld the lower German courts' conviction of the appellant under that convention.

A. Decision of a Three-Judge Chamber of the *Bundesverfassungsgericht* (BVerfG [Federal Constitutional Court]) (2 BvR 1290/99) – 12 Dec. 2000

[4] The complainant was a Bosnian Serb who had been convicted by the *Oberlandesgericht* Düsseldorf (Higher Regional Court in the city Düsseldorf) of a broad range of crimes including genocide, murder, aggravated assault and aggravated false imprisonment. Finding the accused to be especially guilty, the Düsseldorf Court imposed, among other terms of imprisonment, a life sentence. The crimes occurred in the spring and early summer of 1992, in the course of the Serbian ethnic-cleansing campaign in that portion of the newly independent Bosnia-Herzegovina that Milosevic claimed as part of his "Greater Serbia". The complainant participated in the murder, kidnapping and dislocation of Muslims in the villages Grabska, Mala Bukovica and Svarlije.

[5] The Third Criminal Senate of *Bundesgerichtshof* (BGH [Federal Court of Justice]) upheld (with some alterations) the convictions and sentences in a decision from 30 April 1999. First, the BGH affirmed the jurisdiction of the German courts pursuant to the universal jurisdiction created by § 6(1) of the *Strafgesetzbuch* (StGB [German Federal Criminal Code]) over crimes like genocide, which violate internationally protected rights. Second, the BGH found that crimes like murder and manslaughter, to which universal jurisdiction has not been extended by § 6 StGB, may still qualify for universal jurisdiction if they form part of the complex of actions that constitutes genocide. Third, the BGH consolidated a number of specific acts of which the appellant had been convicted by the trial court under the umbrella of distinct genocide charges, concluding that genocide involves multiple, naturally connected acts or a complex of actions. Finally, the BGH defined the boundaries of such a complex of actions that constitutes a single act of genocide, including geographic and temporal unity.

[6] The Fourth (three-judge) Chamber of the Second Senate of the *Bundesverfassungsgericht* (BVerfG [Federal Constitutional Court]) (President Limbach, Justices Jentsch and Di Fabio) refused to admit the defendant's constitutional complaint for consideration by the full, eight-judge Senate. Acceptance of complaints to the BVerfG filed by individuals claiming a violation of a fundamental right lies in the discretion of one of the three-judge Chambers with "constitutional significance", previous determination of the issue by the Court and the unlikelihood of success being the controlling standards. (Articles 93a, 93b and 93c of the *Bundesverfassungsgerichtsgesetz* [BVerfGG {Federal Constitutional Court Act}]). The complainant asserted the following, primary claims: (1) The German courts lacked jurisdiction over the case, which constituted a violation of Article 101.1 of the Basic Law (banning extraordinary courts – "No one shall be removed from the jurisdiction of his/her lawful judge");(1) and (2) The lower German courts violated Article 103 of the Basic Law (prohibiting *ex post facto* punishment and requiring clarity of criminal statutes) by applying a definition of genocide that had no basis in § 220a StGB, the domestic law criminalizing genocide (as a codification of the 1948 Genocide Convention).(2)

### *Jurisdiction of the German Courts*

[7] Section 6 StGB establishes the jurisdiction of German courts over the crime of genocide, without regard to where in the world the events are alleged to have occurred and without regard to whether the accused or victims are German nationals.(3) German jurisdiction over genocide depends, however, on a rule of international law that extends universal jurisdiction to that crime. It is this foundation that the complainant first challenged, citing Article VI of the 1948 Genocide Convention, which provides for jurisdiction for "a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction." The Chamber found no grounds to admit the complaint on this point, explaining that Article VI of the 1948 Genocide Convention had never

been interpreted to prohibit universal jurisdiction, merely that Article VI does not establish an obligation on the part of states that are parties to the Convention to exercise such jurisdiction. The Chamber concluded that genocide, as a grave violation of human rights, so clearly qualifies for the universal jurisdiction extended to protect and promote human rights that review of the claim was unnecessary. The Chamber found support for this conclusion in the Rome Statute of the International Criminal Court, which relies first on the exercise of jurisdiction by national courts pursuant to universal jurisdiction before allowing the new International Criminal Court to take jurisdiction over a case.

[8] The complainant also argued that, even if it were true that Article VI of the 1948 Genocide Convention establishes universal jurisdiction over genocide, a norm of customary international law now exists that prohibits German courts from exercising jurisdiction pursuant to universal jurisdiction. The complainant found support for such a prohibition in customary international law from the fact that no states had exercised universal jurisdiction over genocide and that the first international application of the 1948 Convention following World War II involved the use of special U.N. (international) tribunals for Yugoslavia and Rwanda in the 1990s. The Chamber dismissed this argument, finding in part that universal jurisdiction over genocide had attained the status of an international *jus cogens* norm, firmly fixing the norm until it is clearly overturned by a new *jus cogens* rule.

[9] Finally, the Chamber concluded that German jurisdiction over the case, pursuant to universal jurisdiction, did not create an impermissible conflict with the jurisdiction of the U.N. Criminal Tribunal for the former Yugoslavia.

#### *Specificity of the German Genocide Statute*

[10] The Chamber also refused to admit the complainant's claim that the German courts' interpretation of the German genocide statute constituted a violation of the constitutional requirement that criminal law be specific and clear. (Article 103.2 of the Basic Law). The Chamber registered its approval of the lower courts' interpretation of § 220a StGB (Germany's genocide statute), concluding that it was foreseeable that the crime: (1) involves the intent to physically/biologically destroy the group; (2) can consist of multiple, individual actions, which can be consolidated to form the basis of a single genocide charge; (3) can involve attacks on a group that is only geographically differentiated (as opposed to racially, ethnically or religiously); and (4) can involve forced displacement. The Chamber found ample support for these interpretations in an array of international law sources, including the 1948 Genocide Convention (Article II), the Statutes of the Yugoslavian and Rwandan Criminal Tribunals (Article IV), the Rome Statute of the International Criminal Court (Article VI) and the declarations of various U.N. organs, including the Security Council and General Assembly. Relying on this body of law, the Chamber was satisfied that the lower German courts' interpretation of the genocide statute easily met the standard of clarity and foreseeability imposed by Article 103 of the Basic Law.

#### B. Decision of the *Bundesgerichtshof* (BGH [Federal Court of Justice]) (3 StR 372/00) – 21 Feb. 2001

[11] The appellant was convicted by the *Oberlandesgericht* Düsseldorf (Higher Regional Court in the city Düsseldorf) of aiding and abetting the perpetration of genocide, as well as general crimes like aiding and abetting assault and false imprisonment. The crimes occurred during the Serbian ethnic-cleansing campaign in the spring and early summer of 1992, and were aimed at the Bosnian Muslims living in that portion of the newly independent Bosnia-Herzegovina that Milosevic claimed as part of his "Greater Serbia". The appellant had been an outspoken Serbian nationalist and at the relevant time was part of an armed and uniformed Serbian force that played a role in ransacking Muslim homes, forcing Muslims into refugee status and imprisoning Muslim men. The specific actions supporting the appellant's conviction included his personal participation in the imprisonment and transportation of Muslims, the mistreatment of five Muslim captives and his participation as a guard at a concentration camp.

[12] The Third Senate of the BGH rejected the appeal, which chiefly challenged the jurisdiction of the German courts over the complex of crimes of which the appellant had been convicted.

#### *Jurisdiction Over Genocide and Aiding Genocide*

[13] The Court reaffirmed German jurisdiction over genocide, including aiding and abetting the perpetration of genocide. (4) The Court found it necessary, in order to exercise German jurisdiction over genocide pursuant to the universal jurisdiction established by § 6(1) StGB, only that the principle perpetrator possessed the requisite intent to destroy all or part of the group and that the appellant need only have been aware of this intent.

#### *Jurisdiction Over Aiding Assault and False Imprisonment*

[14] The Court affirmed German jurisdiction over the charge that the appellant aided and abetted assault and false

imprisonment. The appellant had challenged German jurisdiction on the grounds that these charges should either be subsumed under the genocide charge (for which § 6(1) StGB establishes universal jurisdiction) or dismissed because German law does not establish universal jurisdiction for such general crimes. The Court agreed with the appellant's argument that the crimes of assault and false imprisonment protect individual integrity and interests, not the integrity and interests of a group, with which the genocide provision is concerned. For this reason, the Court agreed with the appellant that § 6(1) does not establish German jurisdiction over these crimes when they occur outside of Germany.

[15] The Court, however, found a basis for German jurisdiction over these general crimes in § 6(9) StGB, which establishes German jurisdiction over "acts which, on the basis of an intergovernmental agreement binding on the Federal Republic of Germany, are to be prosecuted even if they have been committed abroad." The Court upheld the lower court's invocation of the 1949 Geneva Convention on the Protection of Victims of International Armed Conflicts as the source of the § 6(9) jurisdiction in this case. The Court approved of the lower court's reliance upon the 1999 decision of the International Court of Justice in the *Tadić Case*, which resolved (in favor of the application of the 1949 Geneva Convention) the fundamental questions regarding the application of the 1949 Geneva Convention to the circumstances surrounding the Serbian ethnic-cleansing in Bosnia-Herzegovina in the spring of 1992.

[16] First, it was taken as without dispute that both Germany and Bosnia-Herzegovina were parties to the 1949 Geneva Convention at the time of the appellant's acts.(5) Second, the Court was satisfied with the lower court's reliance on the *Tadić* decision for the fulfillment of Articles 2 and 4 of the 1949 Geneva Convention (that the conflict qualified as an international conflict and that the obligation to provide protection to the victims could be attributed to the appellant, who was a co-national of Bosnia and not a representative of a foreign force). Finally, the BGH approved of the lower court's designation of the appellant's acts as "grave breaches" of the 1949 Geneva Convention, justifying universal jurisdiction in the case.(6) The Court especially noted the appellant's infliction of torture on at least five Muslim victims with respect to this point.

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*For more information:*

Decision of the Bundesverfassungsgericht on-line:  
<http://www.bundesverfassungsgericht.de>

Press-release of the Bundesgerichtshof on-line:  
<http://www.uni-karlsruhe.de>

1948 Genocide Convention on-line:  
<http://www.tufts.edu/departments/flectcher>

1949 Geneva Convention on-line:  
<http://www.icrc.org/ihl.nsf>

ICTY *Tadić* Decision on-line:  
<http://www.un.org/icty/tadic/appeal/judgement>

(1) The defendant also complained that the lower German courts failed to refer this question to the Federal Constitutional Court as required by Article 100.2. The Chamber refused to admit this claim, in part because the reference requirement of Article 100.2 is limited to general or customary international law norms and not treaty-based norms like those at issue in this case.

(2) The German genocide provision (§ 220a StGB) is essentially identical to the 1948 Genocide Convention. Still, slight variations advise the comparison of the statutes here:

*Section 220a StGB. Genocide.*

(1) Whoever, with the intention to liquidate, in whole or in part, a national, racial or religious group or a group distinguished by its ethnic characteristics,

1. kills members of the group,
2. causes serious physical or mental injuries to members of the group, especially of the type specified in Section 224,
3. subjects the group to living conditions likely to cause total or partial physical destruction of the group,
4. imposes disciplinary actions designed to prevent childbirth within the group or
5. forcibly transfers children of the group to another group,

will be punished by imprisonment for life.

*The 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Article 2.*

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

(3) § 6 StGB reads: "German criminal law applies further, irrespective of the law of the place of the act, to the following acts committed abroad: (1) Genocide (Section 220a StGB)."

(4) Section 27 StGB outlines the terms of aiding and abetting a crime:

(1) Whoever has intentionally rendered aid to another to his intentionally committed illegal act, will be punished as an aider and abettor.

(2) The punishment of the aider and abettor is determined by the punishment imposed for the act committed by the perpetrator. It is to be mitigated pursuant to Section 49, paragraph 1.

(5) Bosnia likely succeeded to member status as a result of its control over territory once controlled by the Socialist Federal Republic of Yugoslavia, which had been a party to the Convention. In any event, the newly independent Bosnia had signed and ratified the 1949 Geneva Conventions by March 1992.

(6) Article 147 of the 1949 Geneva Convention on the Protection of Civilians in the time of War reads:

Art. 147. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.