ЦЕНТР МЕЖДУНАРОДНЫХ
И СРАВНИТЕЛЬНО-ПРАВОВЫХ ИССЛЕДОВАНИЙ
INTERNATIONAL AND COMPARATIVE
LAW RESEARCH CENTER

ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Осуществление уголовной юрисдикции Германии и международное право

Манфред Даустер

COURSES OF THE SUMMER SCHOOL ON PUBLIC INTERNATIONAL LAW

Exercise of Criminal Jurisdiction by Germany and International Law

Manfred Dauster

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The present publication contains the text of lectures by Manfred Dauster on the topic “Exercise of Criminal Jurisdiction by Germany and International Law”, delivered by him within the frames of the Summer School on Public International Law 2020.

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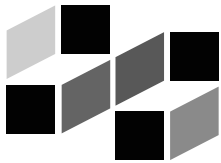

ЦЕНТР МЕЖДУНАРОДНЫХ
И СРАВНИТЕЛЬНО-ПРАВОВЫХ ИССЛЕДОВАНИЙ

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Дорогие друзья!

Центр международных и сравнительно-правовых исследований продолжает публикацию лекций, прочитанных в рамках Летней Школы по международному публичному праву.

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В 2020 году Летняя Школа состоялась в третий раз. В связи с пандемией COVID-19 она прошла в онлайн-формате на отдельно разработанной платформе. Специальные курсы были посвящены теме «Национальная юрисдикция и международное право». Их прочитали Седрик Рейнгарт («Национальная юрисдикция и международное право»), Алина Мирон («Экстерриториальная юрисдикция: концепция и пределы»), Филиппа Вэбб («Иммунитет государства и его должностных лиц от иностранной юрисдикции»), Манфред Даустер («Осуществление уголовной юрисдикции Германии и международное право»), Роман Анатольевич Колодкин («Национальная юрисдикция и Конвенция ООН по морскому праву»). Общий курс международного публичного права прочёл сэр Майкл Вуд.

Центр международных и сравнительно-правовых исследований выражает благодарность членам Консультативного совета Летней Школы: Р. А. Колодкину, С. М. Пунжину, Л. А. Скотникову, Б. Р. Тузмухамедову — и всем, кто внёс вклад в реализацию этой идеи, в том числе АО «Газпромбанк» за финансовую поддержку проекта.

Dear friends,

The International and Comparative Law Research Center continues publication of lectures delivered within the Summer School on Public International Law.

The Summer School is a project of the Center aimed at providing those learning, working, or aspiring to work in the sphere of international law, with an opportunity to obtain advanced knowledge of the subject and encouraging participants to engage in independent research. The Summer School's curriculum is comprised of lectures and seminars of the general and special courses under one umbrella theme delivered by leading international law experts, as well as of independent and collective studying.

In 2020, the Summer School was held for the third time. Due to the COVID-19 pandemic, it was held on a tailor-made online platform. The Special Courses were devoted to the topic "National Jurisdiction and International Law". The courses were delivered by Cedric Ryngaert ("National Jurisdiction and International Law"), Alina Miron ("Extraterritorial Jurisdiction: Concept and Limits"), Philippa Webb ("Immunity of States and their Officials from Foreign Jurisdiction"), Manfred Dauster ("Exercise of Criminal Jurisdiction by Germany and International Law"), and Roman Kolodkin ("National Jurisdiction and UNCLOS"). The General Course on Public International Law was delivered by Sir Michael Wood.

The International and Comparative Law Research Center wishes to express its appreciation to the members of the Advisory Board — Roman Kolodkin, Sergey Punzhin, Leonid Skotnikov, and Bakhtiyar Tuzmukhamedov — as well as others who helped implement the project, including Gazprombank (JSC) for their financial support.

Манфред Даустер

Манфред Даустер был назначен председательствующим судьёй в Верховном суде Баварии (апелляционный отдел по уголовным делам) в 2019 году. До этого он был председательствующим судьёй в Верховном апелляционном суде Мюнхена (апелляционная и первая инстанция по уголовным делам) и судьёй в разных судах Мюнхена. Он также был судьёй в Государственном суде Боснии и Герцеговины (апелляционный отдел по военным преступлениям и организованной преступности) в 2005–2007 гг. и работал в Управлении Верховного представителя в Сараево/Боснии и Герцеговине (борьба с мошенничеством) в 2000–2002 гг. Судья Даустер имеет докторскую степень в области конституционного права. Он является членом Института экономического, международного и европейского уголовного права Саарского университета (Саарбрюккен).

Manfred Dauster

Manfred Dauster was appointed the Presiding Judge at Bavarian Supreme Court (appellate division in criminal matters) in 2019. Before that, he served as the Presiding Judge at High Court of Appeal Munich (appellate and first instance division in criminal matters) and took other positions as a judge at different courts in Munich. He also served as a Judge at the State Court of Bosnia and Herzegovina (appellate division: war and organized crimes) (2005–2007) and worked at the Office of the High Representative in Sarajevo/Bosnia and Herzegovina (Anti-Fraud) (2000–2002). Judge Dauster has PhD in Constitutional Law. He is a Member of the Institute of Economic, International and European Criminal Law at Saarland University (Saarbrücken).

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List of Abbreviations

AHKABl	Amtsblatt der Alliierten Hohen Kommission (Official Gazette of the Allied High Commission)
BayRS	Bayerische Rechtssammlung bereinigter Vorschriften (Official Bavarian Collection of Reviewed Statutes and other [Law] Degrees)
b. c.	before Christ
BGHSt	Amtliche Sammlung der Rechtsprechung des Bundesgerichtshofs in Strafsachen (Official Collection of Jurisprudence of the Federal Supreme Court of Justice on Criminal Matters)
BGBl. I	Bundesgesetzblatt (Federal Official Gazette) Teil I (Gesetze und Rechtsverordnungen) (Part I national Statutes and Law Degrees)
BGBl. II	Bundesgesetzblatt (Federal Official Gazette) Teil II (internationale Verträge) (Part II international treaties)
BGBl. III	Bundesgesetzblatt (Federal Official Gazette) Teil III (Rechtsvorschriften des Bundesrechts, die vor dem Zusammentritt des 1. Bundestags zustande gekommen sind) (Part III Statutes, which were adopted before the First Bundestag convened)
BiH	Bosnia i Herzegovina
BL	Basic Law (Grundgesetz)
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court)
BVerfGE	Amtliche Sammlung der Entscheidungen des Bundesverfassungsgerichts
CC	Criminal Code (Strafgesetzbuch)
CPC	Criminal Procedure Code (Strafprozessordnung)
CCIL	Criminal Code of Crimes against International Law (Völkerstrafgesetzbuch)
DRiZ	Deutsche Richterzeitung

e.g.	exempli gratia (for example)
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
f.	folgende (Seite) (following page)
ff.	folgende (Seiten) (following pages)
Hrsg.	Herausgeber (editor)
hrsg.	herausgegeben (edited)
ICJ	International Court of Justice
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
JR	Juristische Rundschau
lit.	litera
LNTS	League of Nations Treaties Series
NJW	Neue Juristische Wochenschrift
no	number
Nr.	Nummer
p.	page
pp.	pages
RGBl.	Reichsgesetzblatt (Official Gazette of the German Empire)
S.	Seite (page)
UNTS	United Nations Treaties Series
vol.	volume
VerfGE	Amtliche Sammlung der Entscheidungen des Bayerischen Verfassungsgerichtshofs (Official Collection of Jurisprudence oft he Bavarian Constitutional Court)
VStGB	Völkerstrafgesetzbuch (Criminal Code of Crimes against International Law)
WEU	West European Union
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

LECTURE 1:

Interrelations Between International Public Law and National Law. General Thoughts and Theoretical Considerations

Introductory Remarks

Prior to entering into detailed discussions about International Criminal Law in the judicial practice of German courts (and related other German authorities), we should briefly clarify some basic terms of interrelations between national and international law in order to find a common understanding of our broader topic.[1]

What is International Public Law about?

How to describe interrelations between such and national German law?

Answering the first question, we will attempt to define International Public Law. Later, we will see that today's International Criminal Law is a subset of International Public Law and part of a process, which has started but has not terminated yet. Globalization is not only a financial or economic phenomenon. Globalization also takes place in our legal theatre and is making legal things complicate, difficult, and complex. This is very true as soon as we leave our national legal framework,[2] which we are used to. I am so keen to say that never ever before the rule-producing machinery has been so busy internationally, as it is today. We shall be aware of the perspective that this machine will not stop anymore. We are in the middle of a globalization trend.[3]

The Germans call International Public Law "*Völkerrecht*"; the French use a similar language and name International Public Law "*Droit des gens*". We may go on with such examples

but shall then answer the question, whether it is just possible to draw any conclusion from it on the substance of the legal order we are talking about. Certainly not! The criterion "*les gens*" marks a group of people, which is not clearly defined in its composition, and its composition might depend on time and further circumstances. The same is to be said about the German "label" "Völker". For example, the "Bavarians" are certainly a "*Volk*", but are they a legal entity internationally recognized, or are they more an expression of folklore? "*Völkerrecht*" and "*Droit des gens*" as legal criteria go both back to a translation of a language when — long ago — the Romans talked about their legal interactions with foreigners, meaning non-Roman citizens. They called respective rules of their internal legal order "*ius gentium*", and used this term to describe the entirety of such national Roman rules,[4] which we today would call "law on foreigners", "immigration laws" or "laws on trade of foreigners within the Roman Empire".[5] A further breakdown of the history of terminology, which at best allows for indications of the different cultures' historical understanding of international law, does not really lead any further.[6] We may define International Public Law as such: International Public Law is the sum of norms that define the modes of conduct necessary for the orderly coexistence of the peoples of the world, which are not regulated by the domestic law of individual sovereign states.[7]

We may agree on some more facts: International Public Law is not anymore restricted or limited to regulations in only inter-state relations. As the world has dramatically changed, the scope of International Public Law includes interrelations among states, among them and other international legal entities with recognized legal personality and again among themselves and finally not to forget among some entities, which are recognized actors in the international arena by history and tradition, in particular the Holy Seat,[8] the Order of Knights of Malta (Maltese Order)[9] and the International Committee of the Red Cross.[10]

Into Details of Interrelations Between International Public Law and National Laws

Developments in recent decades have gone even further. Traditionally, International Public Law did not address individuals at all. When International Public Law hesitatingly started to deal with Human Rights and their implementation improved on the level of international institutions, individuals came increasingly into focus of international legislation. Do we include International Criminal Law in our considerations, have we to assess individual obligations and duties directly deriving from international sources? Having that in mind, we may say that even individuals have now become part of the scope of International Public Law. International Public Law in sum is the entirety of rules, which direct the legal interrelations primarily and generally among States but also to a certain extent among States and other legal persons admitted to international interrelations and among those legal persons themselves[11] including individuals.

In the context of defining what International Public Law is about, we should also briefly discuss the question of the legal nature of the international legal system. By the way, this discussion is as old as the history of International Public Law. It goes back to the era of the 16th century[12] or even earlier to the end of the 15th century. Few scholars have totally denied the legal character because of the absence of any enforcement authority at the international level.[13] Despite Article 51 of the UN Charter, there is still not any enforcement mechanism at the level of international law. Article 51 of the UN Charter is an exception to this and can partly be explained by the powerlessness of the League of Nations and the subsequent events in the Second World War. Article 51 of the UN Charter authorizes the Security Council to take measures for establishing or re-establishing (global) peace and international security if there is "international unrest" or such "unrest" is imminent. However, such measures of the Council need the member states of the United Nations in terms of enforcing

the Security Council's decisions. Nevertheless, the view on missing (supreme) enforcement authorities at the international level is too short-handed. Such a view focused exclusively on the enforcement mechanism without taking into account anthropological experience. Since humankind has organized itself in social structures and created enforcement mechanisms within the framework of such structures, their respective legal rules have been constantly and repeatedly disregarded. When Cain killed his brother Abel, the act not only constituted a disregard for the divine order, which is why the Lord punished Cain at the foot of the crime.[14] Moreover, the murder story of the two brothers also shows that Cain thereby questioned the earthly legal order at the same time. The existence of enforcement may be significant for the effectiveness of a social structure but in no way is the enforcement matter decisive and indispensable for qualifying such a structure or order as having legal character. Rather is it a matter of fact, as well as of social and political experience made over the centuries, that subjects of International Public Law recognize the legally binding force of International Public Law and do not only consider it as being only a blank expression of trans- or supra-national morality. The states recognize the binding force as a matter of effluent self-interest of all members of the international family in the functionality of international relations, because they simply know that they must interact internationally for the sake of their own benefit and good. Now, of course, one's own advantage can also be achieved through violence. Permanently applied violence, although, leads nationally and internationally at the end to the harm of all and to chaos. It was precisely this harmfulness that taught even in ancient times the most powerful states to use violence only locally and for a limited period of time and to rely otherwise on rules. Be it the Hittites and the Egyptians with the first inherited peace treaty of 1259 B.C. between Ramses II and Hattusili II, which we know of today,[15] or be it later the Romans, who knew very well when to deploy their legions or to agree on alliances or treaties of friendship even with Barbarians if it was for the sake of their general very Roman best. At the international level, there is

and was not only violence that we should be aware of. As belligerent as the past was, peace times came and lasted longer. *Leviathan* did not run the show.[16] Jurists should not leave the binding nature of International Public Law to philosophers or theologians only. Members of the international community do consent that the idea of justice and international fairness is *sedes materiae* of the binding force of International Public Law, as some scholars say: The more International Public Law promotes justice and fairness among members of the international family, the more International Public Law will have the chance of being respected.[17]

There is another point to be outlined, which makes International Public Law so special but also so different. We should be aware of those particularities, as they help us to understand International Public Law and processes related thereto better: How is International Public Law made, or how does it come into existence? In a different context, when it came to the enforcement of International Public Law, we already got to the point that within the community of internationally acting subjects, a sovereign or a supreme authority is missing. In modern societies, the sovereign is the nation or the people, which along the given constitution of the land adopts new rules by its elected representatives in the parliaments of the countries or through a plebiscite. Governments being responsible to those parliaments are expected to enforce adopted statutes of parliaments. In constitutional law, we describe such processes with the concept of representative democracy. In the international arena, however, we are far from being democratic if we disregard the fact that national governments acting on behalf of their states are (mostly) democratically elected and accountable to their national parliaments. We miss such constructions, hierarchies, and mechanisms at the international level where equal actors meet equal counter-actors. None of them is supreme or even superior to another; as Article 2 of the UN Charter clearly states: "The organization is based upon the principle of the sovereign equality of all its members". Such finding has consequences for the

law-generating process on the international level. In the absence of a superior or supreme authority, all members of the international community equally cooperate in the production of international rules and, at the same time, they subject themselves to the rules, which they have generated. Mechanisms for such law production on the international level are not much formalized.[18] It may start with a common practice among some or all states, which itself might take a certain time in order to be called "common practice". If then those practitioners in the international arena gain conviction of that practice being more than only an accidental exercise, such practices acquire legally binding effects. In such a case, we talk about customary law, which may be in force globally or only regionally among some states — often situated in specific regions of our world. Anyway, this more old-fashioned and traditional way of giving birth to (new) international rules is often taking quite a time. In our modern days, the instruments of law creation are much conferred to treaties, agreements, conventions, and other forms of bilateral and multilateral consensus patterns of equal partners. Whoever takes part in making such contractual rules will be bound by them. Others, who remain outside of such contractual rule production, remain unbounded and free. They are even not expected to pay attention to that law *"inter partes"*.[19] In contrast to the emergence of common state practice and customary law, the making of treaties as the most used and most important instrument of international rules has whereas become formalized by the United Nations Convention on the Law of Treaties of May 23, 1969,[20] which nevertheless should not be regarded as full codification. In the law of treaties, we still must fill gaps by falling back on unwritten rules of International Public Law.

States and other subjects of International Public Law are free to codify customary law into conventions, and such codifications often occur, as the Convention on the Law of Treaties proves. It is an interesting question whether such codifications may terminate the legal effects of underlying customary rules or whether customary

rules despite their codification continue to exist independently from the codex and even may take a different legal path. The next interesting issue in this very context will be the question of what will happen if codified treaty rules of customary law conflict with the uncodified rules and is it then methodologically correct to use principles that we inherited from our legal Roman ancestors (e.g. *lex specialis [posterior] derogat legem generalem [priorem])*.

Parts of the doctrine of international law point out that international law is characterized by predominant political elements and they, therefore, ask whether and to what extent the political side of international law is compatible with or contradictory to the binding character of the international legal order.[21] From my personal point of view, such discussions overrate the context, which International Public Law is being put in. In interactions between states in the international theatre, one only finds politics because this is what international relations are all about. Politics also include economic or financial interests. Political contexts do not inevitably deprive law of its binding effects. Constitutional law rules the life and interactions of the highest state organs, and their interrelations are mostly of political nature. Nobody, as far as I am aware, is of the opinion that constitutional law does not have any binding effects. If such opinions should be seriously held, their representatives deny the legal nature of constitutional law, which only dictators might do — unfortunately successfully. The same is to be applied to the international arena. If one takes a closer look at state activities in the international arena, one will find that the motive of their conduct does not necessarily have a legal background, but states rather search for a better political reputation or standing. It is all about "macro-psychology" on international stages, where actors do not ask the question, what am I allowed but what is my goal and my benefit, when I realize it. As an instrument, trust-building in contact with similarily interested parties is one of the ways to get the ball in the goal. Predictability is another instrument. Precisely due to the lack of "superiors" on the international scenery, a state searching

for a better standing can only be successful if it finds reliable co-players pursuing the same screenplay. Political circumstances influence the emergence and enforcement of International Public Law, demand flexible responses, and often contribute to the "soft" nature of International Public Law rules.[22] However, that is on the one side exactly how our world is being. On the other hand, when at international levels compromises are made, it proves that the compromising parties start from a possibly conflicting but nevertheless binding point and then look for a way out of the dilemma in their cooperative domination over such binding rules, and though they end up in establishing their compromise.

Moreover, there should not be any dispute that International Public Law represents an ethical order. So far, we fall back into the almost eternal discussion about the interrelations between law and morality. International Public Law does not represent a closed normative system. It is rather imperfect, incomplete, and in permanent development due to exactly its imperfectness.[23] This openness and imperfection, International Public Law has rather in common with morality. There may be core tenants of morality, which are unchangeable and form the basis for the categorical imperative in Kant's understanding, such as the requirement not to harm others. As far as International Public Law is concerned, its own incompleteness and lack of perfection demand an underpinning, which international morality is able to provide for. Morality[24] appeals to the inner attitude, while law tends to be based on one's expressed behavior and applies legal consequences to one's conduct. Moral rules, if they are disregarded, are not able to produce such consequences. The disrespecting individual may feel bad, and — in the worst case — experience social disregard by others. The situation is very similar at the international level. Good or well-intended behavior at international levels may make states earn respect and reputation within the international family. Good will, fairness, and trustworthiness are moral values and their implementation in inter-state relations finally enforces the effectiveness of International Public Law.

Let us turn to different forms of manifestation in International Public Law. Later, when we look at the relationship between German national constitutional law, as set forth by the Basic Law of May 23, 1949[25] (hereinafter: BL), and International Public Law, we will see that these forms of manifestations are reflected by some of the constitutional regulations.

As we already briefly discussed at an earlier stage, the first and primary source of law is customary law. In this respect too, International Public Law should not be seen in isolation from national contexts. In our legal history, customary law dominated our national legal systems for centuries, until it was actually late and slowly replaced by written statutes, which were adopted by pre-parliamentarian feudal assemblies or decreed by monarchs. These national processes took some centuries until written statutes (often only codifying the traditional legal customs of the realms) became more important than customary law, which had passed from one generation to the next, often passed through the generations only orally and then increasingly incorporated into judgments of courts and of other princely magistrates.[26] Especially in Germany, romantically inclined legal historians looked back on the long-bearded, free German peasants who sat under the court lime trees of their villages and worked their way through finding the "natural" law of their tribes before the court assembly or their elder men could apply it to the case. This nostalgic view of Germanic legal traditions had little to do with historical reality, even though such situations may well have occurred. This nostalgia can rather be explained by the skeptical rejection of the reception of Roman and canon law, which was mirrored by the early modern codifications, and which those nostalgically transfigured Romantics felt to be in contradiction with the German legal traditions, as they saw them. The national reception processes were accompanied and influenced by ecclesiastical law practices of the Roman Catholic Church, which were much more underpinned by written forms of legal acts than in early monarchial institutions of European countries. Regarding

International Public Law, we recognize comparable routes in history, which have not been terminated, yet, although nowadays, the Canonic Laws do not anymore represent suitable examples.

As to definitions: First, inter-state rules need an observance by a certain number of international participants. Second, those observers shall be convinced that their practice is legally binding. Such definition does not deviate from theories of common law in national systems. At least in Germany, our courts and scholars define German common law exactly in the same way,[27] albeit customary law does not anymore play a relevant part in domestic proceedings in Germany. From the given definition, two indispensable elements:

- practice as an objective criterion and
- conviction as a subjective criterion

are to be concluded and underlie the legal character of such rules.

Some brief questions should be raised in this context: How much time shall pass until we can talk about practices becoming customary? How do international institutions, e.g. the International Court of Justice at The Hague, establish the two criteria?

As we have already learned, International Public Law is produced by the members of the international community, which are addressees of the rules they themselves have created. We may wonder which State organs are relevant and have the competence to participate in such law-producing proceedings. Is it the Head of State, the Government, the Ministry of Foreign Affairs? What kind of part does national jurisprudence play with respect to international law production? If they are relevant, does exclusively the highest level of the judicial hierarchy count? So far, Article 38 paragraph 1 lit. d of the Statute of the International Court of Justice (hereinafter: ICJ Statute) of June 26, 1945[28] does help. The provision refers to national judicial decisions without making any referral to the hierarchical level. In the end, even judgments of inferior

courts might mirror what the attitude of individual countries vis-à-vis state-to-state practices is about. National or even regional or local statutes might have similar impacts on the international level although they remain national rules provided for that co-players in the international arena gain the conviction that such internal rules fit international needs. So far, lawmaking on the national, as well as on the international level, can be regarded as a reciprocal proceeding. It should not be overseen that the same applies to internal governmental or administrative practices, as they might indicate the relevance of such internal matters on the international customary level.

Finally, some comments on the general principles of law recognized by civilized nations (Article 38 paragraph 1 lit. c of the ICJ Statute). Such general principles are hard to define. Scholars of International Public Law do not agree on a common definition. It is a common understanding that we talk about national law principles, often to be found in national private law, as national private or civil law is focused on equal interrelations between two or more partners and shows the same cooperative character as International Public Law does. Those principles often go back to Roman civil law which, by its reception at the turning point from the late Middle Ages to the Renaissance became the model of many national legal systems. Again, the reception was much influenced by ecclesiastical rules of the Roman Catholic Church in Middle, Western, and Southern Europe. The reformation at the beginning of the 16th century did not change that much. If we take national private law principles into consideration, we shall wonder if such singular principles match the character or nature of state-to-state-interrelations. National family or marriage laws are not of such fitting nature. The attribute of "general" refers to the substance of the principle concerned and not to the scope of application of the rule. Article 38 paragraph 1 lit. c of the ICJ Statute also refers to the element of "civilized nations", which describes the scope of application. Equality among all legally recognized members of the international community rather does

not permit any differentiation among those members. However, it is an indisputable matter of fact that some national legal systems are more advanced and developed than others. That goes back to their tradition, their academia, their researchers, publicists, and refined judicial case law. All those elements are modeling the legal landscapes on this globe. For example, France and its legal system are still having an impact on countries in Africa. Vice versa, the Anglo-American legal family consists of more countries than the United Kingdom and the United States. That is the meaning of the legal term of "civilized nations".

What does Article 38 paragraph 1 lit. d of the ICJ Statute mean? National court decisions and academic teachings of publicists are not an independent fourth source of law. From the Statute's point of view, they are rather an auxiliary tool to the International Court of Justice when it comes to identifying and establishing the legal quality and substance of rules and practices, which might be considered being of customary nature or being a general principle according to Article 38 paragraph 1 lit. b and c of the ICJ Statute. As an auxiliary tool, not every court decision might be of relevance under Article 38 paragraph 1 lit. d of the ICJ Statute. One would look at the countries' judicial hierarchy and rather accept a supreme court's decision than a judgment of a lower court. To be more precise: In our times, national constitutional courts determining human rights issues become perfect candidates to be looked at if it comes to International Human Rights disputes. "Teachings of the most highly qualified publicists" are the next tool. Of course, any publicist will feel honored and proud to be quoted by the International Court of Justice as "most highly qualified". Such quotations represent the dubbing knight by the highest judicial institution of the world. However, we shall see that the Statute does not exclusively refer to lawyers or professors of International Public Law. Those "highly qualified publicists" may also be found among other disciplines from political science, anthropology, philosophy, ethics, economy, etc. depending on the nature of the case that the

International Court of Justice is considering. The methodology of identifying those "highly qualified" scholars is a different and probably controversial issue. The sheer number of published theses might be an indicator for the preeminent position of an individual scholar but is not decisive at the end of the day. The echo that an opinion within a discipline concerned provokes certainly represents a strong element of evidence for the reputation of the publicist. Their identification may require a pain-staking selection proceeding and, at the end of the road, appearing arbitrarily. The more often "publicists" are summoned by international judicial institutions to act as experts before them, the stronger is the evidence that they might be considered "highly qualified". So far, there is a bit of transparency but for the rest, their identification remains rather foggy, as such identification is conducted in secret deliberations and "*in camera*". "Competing" colleagues of the most highly qualified publicists may therefore wonder why someone else and not they got the attribute.

Into Details of Interrelations Between International Law and National Law

When we start talking about the interrelations between national law and International Public Law, we shall recall our findings from the previous foregoing discussion. They made us understand that we are having legal communication between both spheres, the international and the national. We also should agree on the interrelations between both as being a process of reciprocal fertilization. We are not in a planet-moon situation where the moon independently circles around the planet. Albeit the law of the land and International Public Law might have a different emergence, both might have their independent courses in their development. Whereas, it is a matter of fact that both law systems often share the same or comparable matters of concern. As it can therefore be turned: International Public Law does exist and does expect to be

respected. The states confronted with the international legal order must make their minds up how to comply with such international expectations.[29] The ban of slavery, the ban of capital punishment or of torture represent subjects of common legal interest. No state in the world nowadays would still raise its voice and propagate the promotion of slavery and justifying such demands because it brings economic advantages to the domestic agriculture or industry.

When it comes to capital punishment, we see a somewhat odd picture. The death penalty is still imposed and executed in too many countries, although most of the states have abolished such gruesome practices. Whereas, even those countries that impose and carry out death penalties have a rather defensive attitude towards it and, whenever critics raise their voices, such countries invoke the principle of non-interference in internal affairs. However, even they would not stand up and propagate the re-introduction of the death penalty where it is abolished, as they know well that the majority of countries would shudder at such bad taste. Protection of private and nowadays of intellectual property, and, more importantly, of foreign investments are addressees of rules in national and international systems. Only the legal intensity of such regulations may differ. We have already referred to legal globalization, which keeps going on. Whenever states fail in national politics — be it in providing their citizens with food and water or preventing them from starvation or be it different natural disasters — national authorities appeal to international levels — often enough combined to requests for establishing new international institutions. International Humanitarian and International Criminal Law further are good examples for phenomena, which were "internationalized" over time but in former times were regarded as exclusively domestic affairs. Whenever armed conflicts break out, the call for "humanitarian intervention"[30] is often the immediate echo in the international arena. Demands for international prosecution — be it by the International Criminal Court or be it by international *ad hoc* tribunals — do not await a long time. Having that in mind

and being aware that on the international level, we do not find any barrier to new international rules, we have to be clear in respect to the significance of the interrelations between national and International Law, which lead us to some interesting aspects:

- Should national courts be allowed to apply international rules in their domestic casework or are they forced into such application?
- What is to be done if in the same matter, international and national rules conflict and produce different results?
- How do international covenants become binding within the legal system of the land?
- Is there a legal consequence if an authority of a country without having international jurisdiction carries out an act of international relevance?
- Do matters exist, which exclusively belong to the "*Domaine Réservée*" of a country?
- What is the legal situation of internal rules, internal acts, or other internal matters if they somehow reach the level of international law or of international institutions?

When it comes to theories of how the interrelations between law of the land and International Public Law shall look like, we basically find two academic schools. One of them represents a **dualistic/pluralistic** view. The opponent school is called **monistic**. Within the two mainstreams, we additionally find sub-theories and "side" schools,[31] which we must not pursue in order not to confuse ourselves more than necessary. Dualism considers law of the land and International Public Law as independent from each other, as according to the older dualistic doctrine, both legal systems regulate different legal matters, which do not have anything in common. If such a view is correct, then the question is to be answered whether

International Public Law is superior and precedes the law of the land. For some monistic disciples, International Public Law is the external department of the internal rules of the countries (supremacy of the law of the land above International Law). Other monistic viewers give International Public Law supremacy or priority above the law of the land. They argue that states' activities legally terminate where International Public Law defines their limits. When we look at the practice of states in their interactions, we finally might find that both theoretical schools do not have much in common with reality and stately practices. Moderate monistic views are favored by the fact that they at least can establish a system, which explains international interrelations between both order systems without any or almost any contradiction. They underpin the supremacy of International Public Law, as international legal practice mirrors such superciliousness. Scholars have spent a lot of effort on those theories but without any weighable practical relevance.[32] We can see that when we look at practices of major countries in the international arena.[33] Today, the dualistic view on International Public Law in its interrelation to national law has become predominant in stately practice and in doctrine. Both systems are principally separated and independent from each other. However, International Public Law may have legally binding effects within national systems if national systems order so.[34]

England and Wales[35] are coming from a customary law background and are still underlining this legal heritage although, in our days, Bills of Parliament dominate daily life in the United Kingdom as it is alike in the rest of Europe. It is noteworthy that English law practitioners including English judges cultivate a very practical approach when it comes to resolving problems in a pending case. Theories are more something for scholars at universities than of practical use in courtrooms. Though, it does not surprise that English and Welsh courts apply international customary law in the way they likewise do it with national customary law.[36] They only abstain from such practice if international rules contravene Acts of

Parliament and preceding judicial rulings. If the English and Welsh courts apply international customary law, they do so as such rules are regarded as being part of the law of the land.

With a view on the law of international treaties: English and Welsh judges only apply domestic law and disrespect international treaties unless the Parliament has expressively adopted such treaties with the necessary royal consent. This brings a particularity with the United Kingdom into play. The country does not possess a written, codified constitution. Making international treaties still belongs to inherited royal prerogatives, which are carried out by the Government. Not every single international agreement needs the Enabling Act of Parliament. The United Kingdom is a partner in much more international agreements than the House of Parliament in Westminster has consented to. Courts may disrespect all those international arrangements of Her Majesty's Government, which have not been passed through parliamentarian proceedings. The consent in Westminster is the enabling instrument turning international arrangements into law of the land. If consent was given, such "international" rules enjoy the same faith as all other national rules. They are not having any superiority or normative priority.

With respect to customary law, the USA follows the UK's path without any particularities.[37] The difference between both countries lays in the law of international treaties. American theory differentiates between "self-executing treaties" and such, which are not self-executing. Self-executing treaties do not need adoption by Congress. Their rules are automatically law of the land and applicable in US courts. Non-self-executing treaties miss any internal legal effect unless Congress adopts them and (often) supplies them with additional executing rules. In contrast to the UK, where due to the absolute sovereignty of the Parliament, Westminster may adopt rules as they please the Parliament, the US constitution reclaims normative supremacy, which even Congress must respect. In case

of conflict between international and constitutional law, rules of treaties become obsolete in the internal arena but stay binding in the international theatre. Another particularity in the US may be seen in Congress's sovereignty to enact bills, which may remove the executing effect of supporting statutes. In this case, the conflict rule of "*lex posterior derogate legem priorem*" removes the internal legal effects but does not touch on the treaty's binding force on the international level.

Before we move to the German perception of interrelations between International Public Law and national law, we will investigate the French practice.[38] Since the Napoleonic codifications at the beginning of the 19th century, France has not anymore a great deal with national customary law. The era of the "Ancien Régime" had gone, when any royal degree had to be registered by the various "Parlements" of the realm before entering into force. The ancient "Parlements" often refused to do so, when they concluded that the royal degree concerned contravened "the customs" of the land. Nowadays, French institutions have a similar attitude vis-à-vis international customary law. Within French courts, customary law does not play a relevant part. Nevertheless, one exception should not go unmentioned when it comes to French criminal prosecution. First of all, however, it should be said that the case I am referring to is an absolute exception in French criminal history at the end of the 20th century. We are going to talk about the criminal proceeding against Klaus Barbie, the so-called slaughterer of Lyon under the German Nazi-occupation of the territory of the Vichy-Regime. He was a ringleader in the Gestapo-Center in Lyon and became famous for his sophistic and brutal torture methods. Moreover, he was (co-) responsible for deportations of Jews to mass distinction camps and for other cruelties in occupied Lyon. He left France in the fall of 1944 and emigrated to Bolivia in 1951. Before Barbie went to Bolivia, he played a condemnable role in the American secret service. After the Federal Republic of Germany was founded in 1949, he also maintained contacts with the newly instituted Federal Intelligence

Service. By the way, many Nazi criminals can be said to have somehow served in Western (and also Eastern) intelligence services, and their services were gladly accepted there. In the case of Barbie, all this had a particularly bad taste, because he was sentenced to death in absentia in France in 1947 and the Americans prevented his extradition to France. In Bolivia, he lived inconspicuously under the name of Klaus Altmann. After the appearance of Ernesto Che Guevara in Bolivia and the strengthening of local partisans there, Barbie's expertise in combatting partisans was in demand again, and he worked for the Bolivian Ministry of Interior at the rank of Lieutenant Colonel ad honorem as trainer and advisor to the security forces of the dictator Hugo Banzer Suarez. Beate and Serge Klarsfeld, a famous Nazi-hunting couple, identified him in 1970. After a change of regime in La Paz in 1983, Barbie alias Altmann was arrested and extradited to France.[39] Barbie was put to trial at the "court d'assise" in Lyon, where on May 11, 1987 the proceeding began. On July 4, 1987, Barbie was found guilty of crimes against humanity and sentenced to lifelong imprisonment. He died in prison on September 25, 1991.

The proceeding against Klaus Barbie before the "court d'assise du Rhône" is noteworthy because the war crimes he committed could not anymore be prosecuted because of the lapse of time. However, France in 1964 incorporated the crime against humanity in its criminal legislation and excluded laps of time for such felony so that the "court d'assise" in Lyon could base the guilty verdict on this provision. As we will later see, crime against humanity is a legacy of the Nuremberg Military Tribunal and became one of the so-called Nuremberg Principles. French judges based their guilty verdict on a crime against humanity, although at the time the crime was committed, such a criminal provision was not in force neither in Germany nor in France. The "court d'assise" when establishing Barbie's guilt disregarded the principle "*nulla poena sine lege (stricta)*". German courts, however, in their endeavor to prosecute Nazi criminals felt to be prevented from applying Nuremberg

Principles and referred so far to that principle as set forth by Section 1 of the German Criminal Code (hereinafter: CC) and by Article 103 paragraph 2 BL. Instead, German courts applied the German CC in the form promulgated at the time when the crime was committed.

As we are going to see a little later, Germany has chosen a midway between these schools of thought and follows a moderate dualistic path.[40] More on that is to follow when we look closer at the current German Constitution.

Perception of International Public Law by the Constitutions of the North-German Federation of 1867, of the German Empire of 1871, and of the Weimar Republic of 1919

In order to understand the current practice of Germany's institution with a view on Public International Law, we should take a closer look into the constitutional history of Germany.

The Constitution of the North-German Federation of 1867

The **Constitution of the North-German Federation of 1867** was the result of the so-called German War of 1866 between the Kingdom of Prussia on the one side and the other German states including the Habsburg Empire of Austria and Hungary on the other side.[41] The essential consequence of Prussia's victory was the ousting of Austria and Hungary from the German scenery. After 1866, Austria-Hungary orientated its foreign policy towards the southeast of Europe and no longer played a significant role within the "smaller" Germany. The political landscape of Germany changed dramatically. The German Confederation of 1815, the association of German states after the defeat of Napoleon, came to its end. In 1866, Prussia annexed some German states, e.g. the Kingdom of Hanover, and forced other states in North Germany into a new Federation

under Prussia's lead. In southern Germany, the Kingdom of Bavaria, the Kingdom of Württemberg and the Grand-Duchies of Hesse-Darmstadt and Baden survived the defeat as independent states but had to agree on military alliances with Prussia (already directed against the French Empire under Napoleon III).[42]

The Constitution of 1867 did not specify the Federation's interrelations to International Public Law. However, there are some connotations, which indicate the Federation's view on the international level. Article 11 paragraph 1 stated the Federal Presidency, the Prussian Crown, had to represent the Federation according to International Public Law, to declare war on behalf of the Federation and to make peace, to enter into (military) alliances and to conclude international treaties with foreign states, to appoint and to receive diplomatic personnel. Article 11 paragraph 1 — in a traditional way — conferred the international representation to the King of Prussia in his capacity as Head of State, as his prerogative and in his capacity as Commander-in-Chief of the armed forces.[43] In making treaties, the Prussian King was internally not the only actor in the arena. As far as international treaties were related to matters of federal legislation,[44] the King needed prior to the conclusion of such a treaty the assent of the Federal Council, an organ of the Federation, in which all the governments of the member states were represented.[45] In order to enter into force, concluded treaties then needed the consent of the Parliament (= Reichstag) by absolute majority therein.[46]

With respect to the law of international treaties, the 1867 constitution is silent as far as the normative hierarchy is concerned. The enabling act of the Reichstag was a parliamentary statute and had the same normative rank as other parliamentary statutes but in rank below the Constitution. In case of legal conflict, general principles had to be applied. Though, it could happen that a later "Reichsgesetz" removed the legal effect of the enabling act — expressively or silently. Then the international treaty lost its legal

effect in the national arena but remained binding the Federation in the international theatre.

The 1867 Constitution totally ignored the existence of international customary law. Consequently, the Constitution did not say anything about, for example, the normative rank of customary law within the German legal order. There are few indications that the North German Federation was not so ignorant. In the context of nationality according to Article 3 of the Constitution, the last sentence simply states: Vis-à-vis foreign countries, all citizens of the Federation may claim protection. This constitutional regulation refers to an institution of international customary law: Diplomatic and Consular Protection of nationals by their home countries against internationally unlawful treatments by third countries.[47] This institute is still part of international customary law up to now and has not been codified despite its major significance. The respective UN Conventions[48] did not touch upon it. By referring to that institute of citizens' protection vis-à-vis foreign countries, the Constitution made clear that it does not only acknowledge the existence of the institute including its customary background but also that the North German Federation promised its citizens to make use of it in favor of the nationals in international fora.

When it comes to North German courts and their use of customary law, the point is that the national legal system in North Germany and in entire Germany was much split. In the Western part of Germany once occupied by France, Napoleonic legislation had been introduced and remained in force even after Napoleon's defeat and after the return of the occupied territories under the German umbrella. Some other territories had modernized their legislation in the 18th century; others did not. Some territories stood frozen in time and kept their feudal law system in place. In order to fill the legal gaps and flaws, courts used customary principles that they inherited from the reception of Roman Law into German Law some centuries ago. As courts did with national customary law, so did

German courts under the Constitution of 1867 with international customary law. The silence of the Constitution did not prevent them from doing so provided for that parliamentary statutes did not regulate the matter otherwise or provided for that jurisprudence did not demand otherwise.

The Constitution of the German Empire of 1871

The failing campaign of Prince Leopold of Hohenzollern, a member of the catholic branch of the royal house of Prussia, for the crown of Spain[49] and the diplomatic consequences hereto in form of troubles between the French Ambassador and the Prussian King Wilhelm culminated into the so-called "Depeche of Ems".[50] This was a telegram that Wilhelm sent to his Prime Minister and later Chancellor Otto von Bismarck[51] after an unpleasant encounter on his holidays in Bad Ems with the French Ambassador. Bismarck altered the telegram text and, with the intentionally sharpened undiplomatic version, it went public.[52] The expected consequence came quickly. France declared war on Prussia, and Prussia (including the North German Federation) activated the alliances that Prussia had concluded with the Southern German States. France was quickly defeated, Emperor Napoleon[53] was captured in Sedan, and Germany was on its way to national unity as the Second German Empire.[54] The **Constitution of April 16, 1871**[55] created a monarchial Federation of 25 kingly and princely States[56] and Free Cities under the hereditary Presidency of the King of Prussia, who accepted the title "German Emperor" (and not Emperor of Germany). The 1871 Constitution was very much a copy of the 1867 Constitution. Though, its Article 11 ruled that the Emperor represented Germany to foreign states, declared war and made peace, concluded alliances and other treaties, appointed the Empire's envoys, and received such from foreign countries.[57] Conclusion of treaties needed the (prior) assent of the Federal Council, the representation of the allied monarchial governments of the German States to the Empire, and

after the conclusion, such treaties needed the enabling approval of the German Parliament, the Reichstag. With a view on the normative hierarchy between national and international law of treaties, the 1871 Constitution kept silent so that the enabling statute had the same normative rank as all other acts of Parliament.[58] In case of conflicts, general principles had to be applied to resolve the conflict.

With respect to international customary law, the 1871 Constitution was as silent as the 1867 Constitution had been. The German Empire upheld its tradition as to be seen from Article 3 of the Constitution, which bestowed to every German[59] a right to claim protection against a foreign state.

The Weimar Constitution of 1919

During the life of the 1871 Constitution, new developments on the level of International Public Law had taken place, which the German "Constituante" in Weimar could not completely ignore.

Already in the timely context of the enactment of the 1871 Constitution, the International Committee of the Red Cross was founded in February 1863 in Switzerland.[60] One of the fathers of the International Committee of the Red Cross, Henri Dunant, was one of the observers of the events in the battle of Solverino in the Austrian-Italian war of 1859. Henri Dunant was shocked at the sanitary and medical situation on the battlefield, which he then impressively described in his book on the battle of Solverino.[61] The book was the outcry for "humanity" in international armed conflicts.[62] Warring parties should be "domesticated" by "international rules in war". Henri Dunant and his supporters went further in their demands for "civilized warfare" when they required international prosecution of those individuals who violated those rules of civilized warfare. We must not elaborate further on that subject. For the moment we may state that in the 1970s, the foundation of modern International Humanitarian Law was laid.[63]

It took about two more decades until the international community took more concrete steps, which indirectly might have influenced the constitution-making process in 1919. At the end of the 19th and in the first decade of the 20th century, a series of international conferences on "rules in war" took place, especially in The Hague, and produced conventions on warfare at land and on the sea. In the first place, on October 18, 1907, the first Hague Land Warfare Convention was concluded, which is still effective today.[64] These instruments introduced some long-expected "rules in war". Germany became the party to all those conventions.

Those developments should be taken into consideration when the era after World War I is looked at. Parallel to the constitution-making process, the new German Republic[65] had to negotiate a peace agreement with the victorious parties of the war.[66] France in particular insisted that Germany's guilt for the outbreak of the First World War and for all violations of the Hague Conventions during the war be enshrined in the peace treaty.[67] Articles 237 to 241 of the Peace Accord of Versailles of June 28, 1919 dealt with such matters.[68] With respect to the former German Emperor, all endeavors of the Entente-Powers failed in the end. When the German defeat was at dawn and in the days of uprising domestic revolutions, Emperor Wilhelm II left the German headquarters in Spa/Belgium and fled to the Netherland where he was granted asylum. The Dutch government refused to extradite the abdicated monarch[69] for his prosecution by the Entente powers. He died on June 4, 1941 in House Doorn in the Netherlands.[70]

The complete defeat of the German Empire at the end of World War I in November 1918 brought Germany into internal turmoils.[71] The monarchs were dethroned, the existing constitutional order collapsed in revolution and counter-revolution. The Constitution **of August 11, 1919**, the so-called "**Weimarer Reichsverfassung**", marked the new beginning of the German Empire under the auspices of democracy. The Constitution's life was a short one and much

over-shadowed by the rules of the Versailles Peace Accord, which dominated almost the entire first decade of the Republic not only internationally but also domestically.[72] The decline of democracy was a creeping process,[73] which was characterized by governments replacing the Parliament's powers with those of the President, who enacted emergency degrees one by one and one after the other before[74] on January 30, 1933 he finally appointed Adolf Hitler Reichskanzler.[75]

It is noteworthy that the "Weimarer Reichsverfassung" never was overridden or suspended. After the Parliament had adopted the so-called "Enabling Act" of March 24, 1933,[76] the legislative power passed from Parliament to the Government, which even was empowered to alter or amend the Constitution.[77] The NS Government could legally ignore the Constitution, and they did so. What it meant in reality, we know from history.[78]

With a view on International Public Law, the "Weimarer Reichsverfassung" by its Article 178 paragraph 2 referred to the Peace Treaty of Versailles of June 28, 1919 and gave this treaty priority to all German law including the Constitution itself.[79] This priority is unique, as for other treaties concluded by Germany with the consent of the Parliament according to Article 45 paragraph 3 of the Constitution such priority was unknown. However, in distinction to the practice, under Article 11 paragraph 3 of the 1871 Constitution, the consent of the Parliament as set forth by Article 45 paragraph 3 of the Constitution was now regarded as a precondition of the international validity of treaties that the German Reich concluded after 1919[80] and allowed the Reichspräsident to ratify the concluded agreement.[81] If a later law was in conflict with a treaty law, such treaty law did not take precedence. The later law removed the domestic effects of the international treaty concerned (*lex posterior derogat legem priorem*). Germany, however, remained internationally bound by the agreement. Beyond that, the Constitution maintained some traditions, which the

Republic inherited from the monarchies. Article 78 paragraph 1 of the Constitution reserved the administration of relations with foreign states to the Reich.[82] The Reichspräsident as Head of the State represented Germany in international relations, concluded alliances and other treaties with foreign powers, appointed German and received foreign envoys.[83] As part of the constitutional heritage, Article 112 paragraph 3 of the Constitution granted all citizens of the Reich a right to protection by the Reich abroad. The constitution-makers were cautious towards the Entente Powers and did not talk about "foreign powers or foreign states" but only about protection outside the German territory. Again, Versailles' shadows hung even over the selection of this wording. More importantly, the Weimar Constitution by its Article 4 acknowledged as the first German constitution the existence of generally recognized rules of the International Public Law as binding rules of the domestic law of the Reich. By stating that, the Constitution incorporated International Public Law as a legal source of German laws into the domestic legal order.[84] However, the Constitution kept silent on the hierarchical relation between the (domestic) law of the Reich and such rules of International Public Law. The novelty of such constitutional rule was that such international rules concerned no longer had to be transformed into German law but created rights and obligations for everyone on German soil.[85] Constitutional law experts of the time agreed that the constitutional element of Article 4 of the Constitution "commonly recognized rules" was to be understood as meaning that it only existed, if Germany had also recognized the rule concerned. If not, the domestic binding effect would not enter into force.[86] Doctrine went a step further and gave such rules according to the principle of "*lex posterior derogat legem priorem*"[87] priority above older laws of the land.

The Constitution did not rule on the matter of Germany's membership in international organizations, among them most importantly the League of Nations,[88] which came into existence in parallel with the peace-making process at Versailles. Although

the then American President Woodrow Wilson can be regarded as one of the fathers of the League of Nations, the USA ultimately failed to ratify the Versailles Treaty, which created the League of Nations. The USA remained outside the League of Nations. Their absence though weakened the new organization from the beginning and the weakness remained until its dissolution on April 18, 1946.[89] Germany as a defeated nation had to apply for membership and did so successfully in 1926[90] but then left the League after Hitler seized power and notified Germany's withdrawal in October 1933. Silence of the Weimar Constitution of international cooperation is an element of Germany's interrelation with International Public Law, which will dramatically change after World War II.

LECTURE 2:

Interrelations Between International Public Law and National Law: Details from the Basic Law

How It Began

We spare out the time of the Nazi Regime when Germany under the flag of the Third Reich got rather famous for breaking rules of International Public Law than for contributing to its development. The crimes committed under that Swastika Flag will take our interest when we will discuss how International Criminal Law came into existence.

May 8, 1945 will mark Germany's history not only as the day of the unconditional surrender of the German Army[91] but also as the day of the country's liberation from the fascists and at the same time, as the first step to democracy and Rule of Law in Germany.[92] However, such a new start had to take place under disastrously bad conditions — legally, economically, and socially. Let me summarize the constitutional history of Germany between May 18, 1945 and May 23, 1949, when the Basic Law entered into force. I apologize for not paying the necessary attention to the East of Germany under the occupation of the Red Army to concentrate on the Western part of Germany and its constitutional development.[93]

Germany's infrastructure, economy, social life, and public institutions were almost destroyed in 1945. The country was occupied by Allied armed forces and finally divided into four occupation zones[94] western to the river line of Neiße and Oder.[95] Chaos was more than imminent[96] and became a frightening reality when after the Potsdam Conference of August 2, 1945, where the ethnic cleansing from German population in Poland, Czechoslovakia, and Hungary (and other countries) and their deportation to Germany

were agreed upon, the deportation of Germans from former German territories became reality.[97]

In Berlin on June 5, 1945, the Allies assumed Supreme Authority with respect to Germany by their Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany, obligated all German authorities to carry out unconditionally the (further) requirements of the Allied Representatives and to comply with all proclamations, orders, ordinances, and instructions additionally issued by them.[98] With regards to Germany as a whole, an Allied Control Council seated in Berlin was installed; in each occupation zone, military governments were instituted.[99] Germany's capital Berlin got a particular status, which was then kept until the reunification of Germany on October 3, 1990.[100]

Along the lines of the Potsdam conclusions, the military governments of the four occupation zones started to rebuild the public infrastructure within their domains commencing with the lowest level of the municipalities,[101] allowing new political parties[102] and implementing their denazification policy including the dissolution of NSDAP and all related Nazi institutions and organizations.[103] Prosecution of (major) war criminals was also concluded in Yalta and Potsdam. It represented a particular chapter in Germany's post-war history and shall be discussed separately in the context of International Criminal Law. The military governments in the four occupation zones "revitalized" former German states like Bavaria[104] or Hamburg or created new states like North-Rhine-Westphalia as the next step.[105] They appointed needed (provisional) governments.[106] The state of Prussia, however, was abolished by Allied Control Council Law No. 46 of February 25, 1947.[107] Those new and revived German states adopted their post-war constitutions in 1946 and 1947, which found the necessary consent of the people by referendums. The Constitution of the Free State of Bavaria, for example, entered into force on December 2, 1946.[108] In those years,

the cornerstone of German Federalism, as we know it today, was laid.[109] After the German states still under the supervision of the military governments had consolidated and inter-zone-cooperation among the Western occupation zones had improved,[110] the German currency, the Reichsmark, turned into a crisis, which was worsened by the flourishing black-market economy that was much in a swing because the economy was still characterized by almost all goods being rationalized. The Western Allies in consultation with the West German governments and other German politicians decided in this situation to abolish the devaluating Reichsmark and to restart the financial sector in their occupation zones by introducing the Deutsche Mark as the new currency.[111] In parallel to this situation, the Americans concluded a Reconstruction Program for Europe's economy (the so-called Marshall Plan), which would lose any effect in Germany if Germany's old and shattered currency was kept valid.[112] Agreements with the Soviet Military Administration were far from being reached. In 1948, in consultation with the governments of the states within the Western occupation zones and Western politicians, the military governments in the West moved towards a currency reform in order to replace the Reichsmark and to shut down the black-market economy and at the same time the rationing of almost all goods in Western Germany. On June 20, 1948, the Deutsche Mark replaced the Reichsmark in the Western zones and was also introduced in the Western sectors of Berlin.[113] June 20, 1948 marked a turning point and laid the foundation for the German "Economic Miracle", which began to flourish at the beginning of the 1950s. However, it also made manifest that Germany was clearly divided into two influence zones — one in the West and one in the East. The "Iron Curtain" went slowly down.[114]

In 1948, the Western military governments and the governments of the Western German states[115] acknowledged that as regards Germany as a whole, agreements with the Soviet Military Administration were far from being reached. The currency reform, Marshall Plan, and deepening Inter-Zone Cooperation, as well as

global developments related to the Cold War and the Iron Curtain, led to the London Six-Powers Conference between the USA, UK, France, Belgium, Netherlands, and Luxemburg from February 23 until March 6, 1948 and from March 20 until June 1, 1948. The Conference concluded the establishment of a new German state to be formed out of the Western military zones.[116] Again, the Final Communiqué underlined that this future state had to be a federal state.[117] After consultations, the Prime Ministers of the West German governments were charged to convene a Parliamentary Assembly,[118] which should draft a West German constitution.

After preparatory works,[119] the governments of Western German States convened the Parliamentary Council,[120] which assembled in Bonn from September 1, 1948 until May 23, 1949. After the Military Governors of the Western Occupation Zone approved the Draft and two-thirds of the state parliaments — except the Parliament of Bavaria disagreed[121] — concluded their consent, the President of the Parliamentary Council Konrad Adenauer, who then in 1949 was elected the first Federal Chancellor and held then the office for 14 years, proclaimed the constitution, the Basic Law of Germany, on May 23, 1949.[122] The Basic Law[123] despite all alterations and amendments[124] is still in force and will represent the basis of our discussion on International Public Law. In contrast to former German constitutions, the Basic Law is not only open to international affairs. It is rather "friendly"[125] to the International Legal Community and their products, as we will later see when we go through the operative part of the Basic Law. In the first place, we will get an overview:

- Article 1 paragraph 2 refers to human rights as the fundament of all human community and of peace and justice in the world,
- Article 9 paragraph 2 forbids any association, of which purpose and activity are directed against ideas of international understanding,

- Article 16a paragraph 1 in the context of asylum and refugees refers to refugee conventions and the European Convention of Human Rights,
- Article 23 deals with matters related to the European Union,
- Article 24 paragraph 1 permits the transfer of sovereignty rights onto supra-national institutions,
- Article 24 paragraph 3 matters with (international) systems of collective security (such of defensive character) and allows the Federal Republic of Germany to agree on limitations of its sovereignty in favor of such institutions,
- Article 25 incorporates rules of international customary law into the German legal system and determines their rank in the normative hierarchy thereto. Article 100 paragraph 2 constitutes the sole jurisdiction of the Federal Constitutional Court on matters related to Article 25,
- Article 26 forbids any war of aggression,[126]
- Article 59 regulates the international representation of Germany through the Federal President and the necessity of parliamentarian consent to international treaties,
- Articles 87a, 87b deal with German armed forces[127] and
- Article 88 reflects the European Central Bank and the transfer of sovereignty rights onto this institution.

Due to time limitations, we will not discuss all those articles in detail. We will be selective and discuss Articles 23, 24, and 88 in the context of the European institutions and briefly with NATO. We spare out Articles 87a, 87b and concentrate on the Preamble and Articles 25 and 59 of the Basic Law.

The Preamble of the Basic Law — Not Only a Manifesto

The "kindness" of the German constitutional order vis-à-vis International Public Law may already be seen in the Preamble[128] of the Basic Law, which contains some important statements of the constitution-makers. Those elements are:

- Responsibility before God and man;
- World Peace;
  - Equal Partnership; and
  - A United Europe.

Finally, the Preamble refers to the German nation's "free self-determination" as the fundament of having exercised the constituent power. All those elements have their own meaning, in particular when read in the context of the following operative articles of the Constitution.[129] The first statement on "Responsibility before God and Man" has a strong reference to Germany's recent history in the first place and contains a promise to the world: The new state of Germany never ever will behave in such an irresponsible manner as the Reich did under Adolf Hitler. History will not repeat! In the context of the promotion of world peace, this means that Germany will abstain from any aggression towards other members of the world community[130] and is sworn in international peacekeeping. "Responsibility before Man" does also contain the clear statement vis-à-vis individuals of mankind that ignorance and violations of human rights will not anymore be on Germany's agenda, as it was before under the Nazi rule. With regards to human rights, such responsibility also expresses a self-limitation of German authorities in exercising their powers. The Preamble instructs them not to exercise the powers conferred on them not at any price, but in accordance with the legally established position of the individual. It is a constitutional avowal against any form of totalitarianism. It is even more than a vow, as the constitutional fathers thereby revealed

that they proceeded from constitutional ethics, of which Germany had not yet heard and experienced through a constitutional charter.[131]

At the same time, again with regards to the international arena, the Preamble demands German authorities to be actively and positively involved in every process, which deals with human rights issues and their improvements. However, whatever the Preamble states, it does not contain any manual. The responsible political authorities of Germany are free in making their decisions on how and when to participate in such human rights issues. Retrospectively with regards to the Third Reich and its atrocities committed, responsibility before man and promotion of world peace also means and demands to confront Germany with the victims and the victims' countries of the Nazi Regime. Already by its Constitution's Preamble, Germany was therefore urged to seek reconciliation in particular with France, Israel, Poland, and the then-USSR, which German authorities tried to do in pain-staking processes, which finally took decades to be completed if ever possible.

Promoting World Peace[132] is regarded as a further constitutional value of essential significance. It does not forbid military defense in accordance with International Public Law[133] or alliances with defensive character[134] but represents rather a full program of demands. Not only the UNO, as the main global peace-keeping organization pursuant to Article 1 of the Charter, is to be supported by German authorities but equally all other organizations, institutions, and individual programs, which pursue maintenance or restoration of global or regional peace shall be supported by German authorities. They are ideally obligated to take part in any form of global or regional prevention of disturbance, which might have an impact on peace. Those really broad goals include Germany's interaction with those institutions that work on International Criminal Justice, although in 1949, such International Criminal Justice systems were not visible, even not imaginable. In this respect, the progressive

development at the international level affected the understanding of the constitution and demanded its extensive interpretation. Constitutional texts are not static matters. International criminal justice will seize our interest later in this summer course, but it should be clear to us that international crimes, which the so-called Rome Statute of July 17, 1998[135] defines, represent a serious threat to global peace, as well as immunity from prosecution of such crimes.

The Preamble thirdly refers to Equal Partnership[136] in a United Europe. This element manifests a further reference to Germany's situation at the time when the Parliamentary Council adopted the Basic Law. As a result of the continuing occupation regime and the lack of full sovereignty of the new Federal Republic of Germany, the country was far from enjoying equality among other states,[137] let alone "partnership" with them. Most of the former, so-called enemy countries of Germany looked at the re-organization of German statehood rather skeptically and with mistrust. The "parents" of the Basic Law were very conscious of Germany's temporary inferiority and challenged the future political authorities to do their very best in terms of changing this "pariah" situation. On May 23, 1949, cooperation within Europe and ideally Europe's unity was a very popular subject not only of discussions among politicians. Preventing Germany from any military aggressivity was seen in this context. However, the discussion on Europe's unity was not focused only on Germany. Outside the reach of the Soviet Regime, people painfully felt the split through Europe by the Iron Curtain and found their security better preserved within and by an organized or unified Europe. Those ideas were not born after World War II; their roots can be traced back to the aftermath of World War I,[138] but those roots got revived at the end of the 1940s and beginning 1950s.[139] Already at the Convent of Herrenchiemsee in 1948, constitutional experts agreed on the need for German authorities to be open to supra-national institutions and proposed the constitutional possibility to transfer parts of German sovereignty to such institutions.[140] The Parliamentary Council adopted their advice by Articles 23 and

24 of the Basic Law, which will seize our interest in the context of the German interrelations with institutions of the European Union. Nevertheless, the significance of the element "Equal Partnership in a Unified Europe" is not already exhausted despite numerous European institutions having been established since then, in particular the European Union. It is indeed a permanent requirement for the German political institutions not to stop their European endeavors[141] and to keep the European project ongoing.

Finally, we must discuss the last reference of the Preamble to International Public Law as far as the "parents" of the Constitution invoke the right to Free Self-Determination.[142] Self-determination is a term of International Public Law, which became meaningful by Woodrow Wilson's 14-points program at the end of World War I[143] when Germany lost its colonies by the Versailles Peace Accord and when the Austrian-Hungarian Empire was split into different independent States, as for example Czechoslovakia and Yugoslavia. However, in the post-World-War-II era, it became even more relevant in the process of decolonization of the former colonial empires, in particular of the United Kingdom and France. As of the meaning, Germany itself was not affected by the decolonization. Its colonies, especially in Africa, had long gone. However, referring to the principle of self-determination as an expression of constituent power, Germany promised to the world a positive perspective on such countries, which were getting independent in the 1950s and 1960s. Whatever Germany claimed for itself, Germany could not deny the right to other countries. Again, the Preamble did not provide for a precise manual for the political organs of the Federal Republic of Germany to act on self-determination agendas on this globe rather than a programmatic point of view of Germany. However, free self-determination had and still has relevant internal connotations. The Parliamentary Council made clear who was the constituent of the Basic Law: It was the German nation composed of the people within the Federal States, as referred to by the Preamble, and nobody else. By making such a statement, the Parliamentary

Council wanted to prevent rumors in particular among right-wing people and organizations saying that the Allied Powers in exercising their occupation authority imposed or dictated the present German constitution. It is noteworthy that such conspiracy theories nowadays represent the line of argumentation of right-wing extremists, who deny the legal existence of the Federal Republic of Germany and minimize the Republic as a construct of Foreign Powers still exercising an influence on the Germans. They belittle the Republic as an illegitimate and illegal corporation established on the basis of private law and disobey the laws of the land, as enacted after 1949. Needless to say that they reclaim the legal continuity of the German Reich in the boundaries of December 31, 1937, which — in their revisionism — they argue never had ceased to exist and to which the Federal Republic of Germany may not be identical.

Article 25 — The Corner Stone in Opening Germany's Legal Order Towards International Law

Article 25 of the Basic Law reads: The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory. Besides Article 59 of the Basic Law, which we will discuss a bit later, Article 25 of the Basic Law is indeed the core norm of the German Constitution in its view on International Public Law.[144] As we have already learned, this Article was preceded by Article 4 of the 1919 Weimar Constitution. In contrast to Article 4 of the 1919 Weimar Constitution and following the initial advice of the Constitutional Convent of Herrenchiemsee[145] and the example of some precedent State Constitutions,[146] Article 25 of the Basic Law goes a step further than previous German constitutions traditionally did.[147] Article 25 represents the constitutional *opening clause*, which enables International Public Law to enter the German legal order automatically[148] and without paying any respect to a German (contractual) consent to such international rules,[149] which

the majority of scholars required under the regime of Article 4 of the 1919 Constitution.[150] Such a clause follows the line of other current constitutional regulations, which we already have briefly touched on, and addresses in the first place the German authorities to set up their activities internally and in interaction with others in the international arena according to such international rules, which Article 25 has in mind.[151] The referral of Article 25 to International Public Law is rather dynamic than static. The actual status of the rule of International Public Law and its current content produces the internal effects, which Article 25 has established.[152] Article 25 understands International Law as the entirety of rules on interrelations between States and other subjects of International Law including international organizations and — with certain limits — individuals. Internal regulations of international organizations might be of such character provided that the ground of their legal validity is to be found in the international community of law.[153] As to the sources of such rules, German scholars refer to Article 38 of the Statute of the International Court of Justice,[154] as we also did in the first lecture. The Law of Treaties is excluded from the scope of application of Article 25 of the Basic Law, as Article 59 of the Basic Law specifically deals with international treaties of Germany.[155] We will discuss Article 59 later within this lecture.

Article 25 gives Rules of International Public Law precedence before domestic laws so that colliding Acts of Parliament, be it the Federal Parliament, be it a State Parliament, and all legal acts below that level (degrees of the governments, municipal regulations, etc.) are set out of force as far as the scope of the content of the rule reaches. The question is about whether Article 25 equalizes Rules of International Public Law even with the law of the Federal Constitution or whether the Basic Law concedes the precedence of such Rules before itself.[156] The jurisprudence of the Federal Constitutional Court on the matter is not very clear and ambivalent and most of the scholars vote for a rank between the Constitution and domestic law inferior to the Constitution. Nevertheless, the

latter opinion from my perspective is the more convincing one, the ranking of International Public Law in the normative hierarchy of Germany does not change the nature of the rule and does not "nationalize" it. Furthermore, independently of how high Article 25 ranks international rules, there is quite a series of questions, which do not find immediate responses.

- What about conclusions of international organizations, which Germany is a member of (decisions of the Security Council of UN, resolutions of the General Assembly of UN, NATO resolutions)? Often the question may be responded to by looking at the respective Charters or Alliance Treaties. The Security Council's decisions are binding, resolutions of the General Assembly are not.

- What about those international Rules colliding with the Law of the European Union and how to resolve such a law conflict by national rules?[157]

We may discuss these normative conflicts, which often represent conflicts of international or regional values, later.

Article 25 brought another novelty to German constitutional law. The Article does not only incorporate rules of International Public Law into the German legal system but also directly creates rights and duties for the inhabitants of the federal territory. This individual component was unseen and unheard in German constitutional history and in constitutional systems of other countries. Which are those rules of International Pubic Law that can produce such individual effects vis-à-vis German authorities? As we have already discussed, most of the rules of International Public Law still deal with interrelations between states, international organizations, and states and international organizations. The nature of such rules does not permit their application to individuals so that every rule with a possible application to individuals must be thoroughly examined whether such individuals can be their

addressees. It is well thinkable that the international Minimum Standard of Human Rights is such a collection of international rules of which individuals might claim their application to them. As far as duties are concerned, it is even more difficult to deduct them from International Public Law and if so possible, such rules immediately conflict with liberties, which the Basic Law has established and which may be only limited or restricted by formal parliamentarian acts or upon such formal parliamentarian acts.[158] Even more sophisticated is the conflict situation between such rules of International Law invoked by an individual but giving less liberty than a national fundamental right.

As "kind" Article 25 of the Basic Law might be, related to its "kindness", many questions have not found satisfying responses yet. In addition to the automatic transformation of International Public Law into national law as set forth by Article 25, the Article also reflects a point of methodology. It represents a rule for interpreting national law in the light of International Public Law. Whenever facts require a view from the perspective of International Public Law, German authorities must do so, and in doing so, they shall choose an interpretation, which assigns the most effect to such international rules.[159] This has an important "side" effect, as the Federal Constitutional Court once ruled.[160] If German authorities are requested to assist a foreign state to implement its decision and this decision contravenes International Public Law, German authorities shall omit any supporting action. Otherwise, German authorities will be at risk to be held co-responsible for respective violations of International Public Law. However, if foreign authorities violate International Public Law and request Germany to assist in the implementation, Article 25 of the Basic Law does not provide for strict automatism. Requested German authorities — in such cases — are requested by Constitution to make use of their political means to influence the requesting foreign state to return to international legality.[161] If this process of influencing the foreign state to return to international justice, German authorities must reject such requests

of assistance and stay away from co-responsibility in the continuing violation of International Public Law.

Article 25 of the Basic Law and its content is to be guaranteed by the German justice system. If by Article 25, individual rights established by International Public Law create direct legal positions, the person concerned is entitled to present such claims to German courts; the nationality of such plaintiff is without any relevance. Such legal protection is an integral part of the justice guarantee of Article 19 paragraph 4 of the Basic Law.[162] If an international court or international arbitration institution finds a violation in a German verdict or judgment, national law must provide for a reopening of the case. This does not only follow from Article 25 but also from the International Public Law principle of restitution.[163] The Federal Constitutional Court of Germany has jurisdiction on individual complaints because of violations of human rights positions as established by the Basic Law.[164] Procedurally, it is not admitted to directly base such a constitutional complaint upon violations of International Public Law. However, such complaints often find their fundament in the violation of International Human Rights, which might correspond to the human rights guarantees of the Basic Law and overlap each other so far. In such a case, the jurisprudence of the Federal Constitutional Court in examining the individual complaint takes the international legal position of the complaining individual into consideration and in doing so applies a stronger, higher control standard.[165]

Finally, in the context of Article 25 of the Basic Law, we must refer to its procedural implementation. As we have already seen, Article 25 of the Basic Law represents a cornerstone in the interrelations between German law and International Public Law, and in its importance, the regulation did not find any preceding example in Germany's constitutional history.[166] In the Weimar Republic and the last German Empire, ordinary courts decided in their case work whether to accept rules of International Public Law

as a binding rule of the internal regulations to be applied. Although such cases were not (and are not) on the courts' daily schedule,[167] differing jurisprudence was at risk and such missing legal unity could imply Germany's responsibility for any disrespect of international rules caused by its various courts.[168] In terms of preventing such international liability of Germany caused by its courts and in terms of paying the necessary respect to the importance of Article 25 of the Basic Law in Germany's international relations, the Constituent decided to create a novelty by Article 100 paragraph 2 of the Basic Law.[169] The Article reads: "If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court". Whenever in a procedure before a German court, rules of International Public Law, which are not related to international treaties, arise and such rules prove to become relevant for the decision making in the case, the court is obligated to suspend its proceeding and to submit the international rule concerned to the Federal Constitutional Court if the court is in doubt of the existence and/or the content of such rule. The Federal Constitutional Court in sole jurisdiction may then decide the legal question in a similar way as it must happen if a German court is in doubt of the constitutionality of a parliamentarian statute (Article 100 paragraph 1 of the Basic Law). Such a monopoly on the highest judicial level preserves the unity of national law with respect to International Public Law and respects the preceding rank of International Public Law within the German legal system. Additionally, Article 100 paragraph 2 of the Basic Law does not only mirror the German respect for the international legal community but equally a uniform application of their rules within the case law of German courts, and by doing so, the Federal Constitutional Court's monopoly guarantees best Germany's preservation from international liability in the international arena. With respect to individual plaintiffs in concrete proceedings before German courts, the monopoly of the Federal Constitutional Court provides for legal

security and, with respect to the parliamentarian lawmaker, the Federal Constitutional Court's jurisdiction according to Article 100 paragraph 2 of the Basic Law upholds the priority of Parliamentarian Statues, if the rule invoked does not exist or does not have the content that is considered by the court, which is dealing with the concrete case.[170] Therefore, it is not necessary for the judge in the concrete case to have doubts. The suspension of the case and the submission to the Federal Constitutional Court must be carried out in any situation when the concrete international legal problem is under discussion among scholars, other authorities, which deal with International Public Law (the Federal President or the Federal Government, which do not have any prerogative in assessing the relevance of the question)[171] or internationally.[172] It is noteworthy that the submission procedure as set forth by Article 100 paragraph 2 of the Basic Law does not comprise interpretation problems, which are related to international treaties that are transformed into national law pursuant to Art. 59 of the Basic Law,[173] unless the judge in the case is of the opinion that such a parliamentarian statute consenting to an international treaty is inconsistent with the constitution. In that case, it might be necessary to suspend the proceeding and submit the question of constitutionality to the Federal Constitutional Court according to the (ordinary) proceeding, as instituted by Article 100 paragraph 1 of the Basic Law.[174] However, if there is a doubt in the case, as concerned by Article 100 paragraph 2 of the Basic Law, and the sitting judge does not suspend his/her proceeding and submit the international problem to the Federal Constitutional Court, such court then disrespects the principle of the *iudex naturalis* or statutory judge and contravenes the guarantee and human right of Article 101 paragraph 1 of the Basic Law.[175]

Article 59 (With Some Remarks Related to Article 32) — A Way to Parliamentarize Foreign Policies

Article 59 of the Basic Law in a classical way regulates the representation of the Federal Republic of Germany in the international arena and determines if international treaties concluded by the Federal Republic of Germany need the consent of the Parliament before entry into force.[176] It reads:

> "(1) The Federal President shall represent the Federation in international law. He shall conclude treaties with foreign states on behalf of the Federation. He shall accredit and receive envoys. (2) Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements, the provisions concerning the federal administration shall apply, *mutatis mutandis*".

Before we later discuss details of Article 59, we shall briefly go on an excursion. As we have already learned from the Preamble: The starting point of German statehood is to be seen in the federal states of Germany (*Länder*). Previous German constitutions underlined this view even with respect to foreign relations of Germany and enshrined into some of federal states' prerogatives underpinning their statehood. With respect to the German Constitution of 1871, we referred to the right of the Kingdom of Bavaria to send diplomatic envoys to foreign powers or to install embassies of such foreign countries within their own Kingdom. This has become part of history.[177] Nevertheless, we must take the principal distribution of powers within the Federal Republic of Germany into account. Article 30 of the Basic Law rules: "Except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the *Länder*".[178] However, what we can take out of Article 30 of the Basic Law is the statement

that the *Länder* are to be the primary source of German statehood and that the Federation in regard to the *Länder* needs competences expressively assigned to it. Regarding the legislation, Article 70 of the Basic Law

> (1) The *Länder* shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation.
>
> (2) The division of authority between the Federation and the *Länder* shall be governed by the provisions of this Basic Law concerning exclusive and concurrent legislative powers.

assigns respective matters exclusively to the Federation or in concurrence with the *Länder* but giving the Federation precedence in exercising the competence to legislate such matters.[179] Regarding international relations of Germany, Article 32[180] paragraph 1 of the Basic Law assigns the authority to the federal constitutional organs of Germany.[181] If the conclusion of an international agreement by federal authorities touches particular interests of a *Land*, this *Land* shall be heard (Article 32 paragraph 2 of the Basic Law). As far as the *Länder* are having legislative power (exclusive [in particular education, cultural and security matters] or concurring), they may conclude treaties with foreign states with the consent of the Federal Government (Article 32 paragraph 3 of the Basic Law). The purpose of Article 32 of the Basic Law is to strengthen the federal principle of the German Constitution on the one hand and on the other guaranteeing that the Federal Republic of Germany in international arenas is speaking with one voice.[182] These two objectives of Article 32 of the Basic Law are fraught with tensions in state practice.[183] These tensions must be balanced.[184] On our excursion, we may stop here because the excursion's purpose was to raise your attention to this German particularity and we may summarize: Under the conditions of Article 32 paragraph 3 of the Basic Law as an expression of "openness in the German statehood",[185] the federal states of Germany are themselves subjects of International Pubic Law and may therefore participate in Germany's international legal

relations. This participation includes the conclusion of treaties with third states.[186]

After this excursion, we return to Article 59 of the Basic Law. Its paragraph 1 regulates the external representation of Germany in a classical way[187] and assigns this authority to the Federal President as Head of State. So far, Article 59 paragraph 1 of the Basic Law correlates with customary International Public Law, which acknowledges the Head of State as the "natural" representative of the State in international interactions.[188] The Head of State does not need evidence for his power of representation.[189] This rather formalistic view of the role of the Head of State in systems, which do not combine the sole external representation of the state by its Head with political powers of the Head of State, as it is the case with the monarchs in most of the European constitutional monarchies, does not any more mirror the reality, although from the wording of Article 59 paragraph 1 of the Basic Law, the President's power in external affairs is extensive and without any exception.[190] The German Federal President factually finds himself in a diffusive position and his involvement in external affairs of Germany's international politics is in a process of decreasing significance.[191] Increasing internationalization and globalization produce too many players on the international scene, who overtake the Heads of State by their multiple uncounted activities. International hectic is losing some of the focus points, and — unfortunately — that hits most of the Heads of State. Eras when Emperor Wilhelm II met his "cousin" Tsar Nicolas II in Zarskoje Selo for making foreign policy have long gone. Although Article 59 paragraph 1 of the Basic Law correlates the position of the Federal President to a traditional view of customary International Public Law, nothing is said on the President's real material power position. International Public Law leaves it to the national constituents to design the parts that their State organs are supposed to play. Let us recall that under the regime of former constitutions, the monarchical Head of State did not only represent the state to the international theatre. The

Head of State simultaneously was the Commander-in-Chief of the armed forces and it was he who forged alliances with other Heads of State, made war and peace. The Federal President according to the Basic Law is out of such kind of business. In peacetime, the Minister of Defence commands the Armed Forces, in the state of defense, it is the Federal Chancellor. Declaring the state of defense is now a matter of the Parliament (Bundestag) in conjunction with the Federal Council (Bundesrat), and the same is to be applied to peacemaking.[192] The transfer of those important authorities from the Head of State, who is not to be held responsible by the Parliament,[193] to the Parliament itself or to State organs, which the Parliament may hold responsible, does have a meaning. The Federal President — except in few emergency situations, which do not matter in this context — is an apolitical figure, who is not involved in or dealing with the daily political routine. Foreign politics matter the Federal Government and the Federal Parliament (including the Federal Council but less).[194] They make the decisions including on treaty-making questions[195] and direct the international orchestra.

Let us direct our attention to Article 59 paragraph 2 of the Basic Law, which regulates treaty-making with the inclusion of the Parliament (first sentence) and making miscellaneous (governmental) agreements (second sentence).

Article 59 paragraph 2 of the Basic Law, unlike preceding German constitutions, reinforces the trend of the Constitution towards stronger participation of the Parliament in both Houses (Bundestag [Lower House] and Bundesrat [Upper House].[196] The Parliament is not anymore only an observer in foreign politics of the Federal Republic of Germany but a co-actor to the Federal Government in making international politics.[197] Adopting treaty laws, the Parliament controls the Government and impounds the parliamentary responsibility of the Government. Moreover, such laws secure the implementation of international treaties within the

national system and determine the normative rank of the treaty in the legal hierarchy of Germany.[198]

As to the legal element of Article 59 paragraph 2 of the Basic Law "treaties that regulate the political relations of the Federation", we are talking about a constitutional novelty, which preceding German constitutions did not establish and which also is not a terminology of customary International Public Law[199] (the second element of Article 59 paragraph 2 of the Basic Law "[treaties, which] relate to subjects of federal legislation", however, represents the classical heritage of German constitutional law since the 1867 Constitution).[200] This new element is given if the Federal Republic of Germany by concluding the treaty concerned aims for changing the power balance within the international arena, e.g. strengthening or enforcing the German position herein.[201, 202]

Final Remarks: What Happened to Diplomatic Protection?

When we went through the 1867, 1871, and 1919 constitutions of Germany, we regarded their respective provisions on the individual legal position of diplomatic protection as evidence that those old constitutions referred to International Customary Public Law and that they did not ignore or deny its existence. Reading the Basic Law, we must state that any regulation on diplomatic protection has vanished from the text of the constitution. A conclusion that this constitutional claim of individuals for diplomatic protection has been abolished would be rushed. Again, we shall return to the special historical situation, in which the Basic Law came into existence. The Occupation Powers in West and East Germany upheld their rights from taking over the supreme authority in Germany in 1945 in reserve. The Federal Republic of Germany in 1949 was almost disabled with respect to Foreign Policy. The High Commissioners of the Western Allied Powers were foreign powers from the perspective of the Basic

Law, with which the newly established Federal Government was to cooperate for its own sake. However, the High Commissioners still had the authority to limit those individual liberties, which the Basic Law just instituted as the progress of humanity, democracy, and as an expression of Rule of Law. Claims to protect individuals against actions of the High Commissioners limiting individual rights would have been understood by the same High Commissioners as a German attempt to judge the legality of their authority. That contravened the Occupation Statute. The interpretation and application of the Occupation Statute were — in the first place — an international matter for the three Western Allies alone. German authorities did not have to talk them into it. To that extent, at least in the early years of the Statute, the credo was: *Roma locuta causa finita*. For the sake of avoiding such a legal clash, the "parents" of the Basic Law wisely decided to spare out any regulation on diplomatic protection from the promulgated text of the Basic Law. However, the Right to Diplomatic Protection kept on existing — so to say unspoken and not written out — between the lines of the written Constitution. It is not only common opinion among scholars but also jurisprudence of the Federal Constitutional Court that the Right to Diplomatic Protection is still part of constitutional law under the regime of the Basic Law. The arguments for its derivation[203] may vary, as well as the Federal Government might have (political) discretion in its implementation, which is not fully judicially controlled. The constitutional continuity of Diplomatic Protection, however, is out of any serious argument.

Conclusions

Germany might be an economic and financial powerhouse within the international concert. However, this international concert perceives Germany often as hesitant and very full of reservations when it comes to muscle plays. Unlike other countries, e.g. the USA, where the President represents the motor in

international politics,[204] in Germany constructed as a Parliamentary Democracy with a very self-confident Parliament and its enormous possibilities to influence the score of the Government how to play in the international orchestra, the Government is not anymore the German solo violinist. The Government is challenged to continuously justify and explain what it is doing in the international theatre. This might explain why our Chancellor behaves, as she behaves. Eras, which were rather characterized by a sort of "hurrah" patriotism and — in this way — militarism, have gone. Having a 20th-century history, as Germans have, not surprisingly, Germany's constitution pays a lot of attention to Public International Law and Germany's correlation thereto. Endorsing this attention, Germany displays a more tranquil part behind the scenes being aware that its constitutional requirements with international correlations are not made for "hurrah"-Rule of Law international activities. The challenge is permanent, and Germany has contributed a lot to new developments in International Public Law, and it will continue. When we come to International Criminal Law, we will experience such rather quiet contributions.

LECTURE 3:

International Public Law and Individual Persons

A Subject in Ignorance

Modern International Public Law came into existence at the turning point between the Middle Ages and Renaissance.[205] As far as sciences on International Public Law are concerned, preconditions of early research into International Public Law were carried out by politicians like Niccolò Macchiavelli (1469–1527) or theoreticians like Jean Bodin (1530–1596). However, modern states, being still under development, were represented by their monarchs as personalization of the power centers. Not for nothing did Macchiavelli's most famous work deal with the power plays of *Il principe* (1513). Jean Bodin's merit was his description of sovereignty in his work in *Les six Livres de la République* (1576),[206] which the French Kings only 100 years later understood in a personalized version as *le roi absolu des lois*. For centuries, individual human beings were not considered in any way in the context of International Public Law[207] — just as the Romans did in saying: *Minima non curat praetor*.[208] Even Immanuel Kant's research in his famous and path-breaking booklet *Zum ewigen Frieden. Ei philosophischer Entwurf* (1796)[209] did not see human beings as holders of rights within International Public Law. This was the legal status of human beings in correlation to International Public Law until the end of the 19th century when due to the atrocities of modern warfare since the Crimea War, the focus slowly changed. Whatever we miss about individual human rights on the international level, we either miss them on the internal level. In Europe of the 16th, 17th, and 18th centuries, absolute monarchs reigned and ruled their realms, and such forms of government were not fit for human rights. Constitutions, as we know them today, did not exist. The American Declaration of Independence marked

the turning point on July 4, 1776. On September 25, 1789, the so-called *Bill of Rights*[210] was proposed and was later integrated into the US Constitution of September 17, 1787 as the First Ten Amendments dealing with citizens' rights. In Europe, in the course of the French Revolution, the French National Assembly proclaimed *La Déclaration des Droits de l'Homme et du Citoyen* on August 26, 1789.[211] Neither the *Bill of Rights* nor *La Déclaration des Droits de l'Homme et du Citoyen* nor those human rights catalogs, which became part of constitutions promulgated across Europe during the period of constitutionalism in the 19th century, had any feasible effect on the legal situation of individuals in International Public Law.

Excursion: Article V Section 30 of the Treaty of Osnabrück of October 24, 1648

However, there might be an exception that is noteworthy and worthwhile to be discussed. October 31, 1517 marks a turning point in Germany's and the world's history. It was the day when Martin Luther submitted his 95 Articles to his Archbishop in Mainz, Electoral Prince and Arch-Chancellor of the Holy Roman Empire, Albrecht of Brandenburg.[212] The subsequent events split Germany and the known Western world and abolished Unity of Christianity, as represented by the Church of Rome, and caused wars in Germany between the Roman Catholic Emperor Charles V and his allies on the one side and the protestant princely league on the other side. Finally, and under political pressure especially with regards to his own succession in the Imperial Dignity, Charles conceded the protestant Lutherans[213] religious liberty by the so-called *Augsburg Reichsabschied* of September 25, 1555.[214] By Section 24 of this Reichs Law, members of the Reich corporations[215] got the authority to impose on people living in their territory the religion that they themselves lived (in 17th century becoming famous as a principle: *Cuius regio eius religio*). For those people disagreeing with their territorial sovereign on the subject of imposed beliefs,

Section 24 of the *Reichsabschied* granted the basic human right to move from their home territory to territories of their choice where they could live according to their beliefs (so-called emigration right[216] or *ius emigrandi*). The *Reichsabschied* additionally and most importantly proclaimed a *permanent Reichs Peace*, which could not be implemented finally in the following decades. In the continuing context of forth-existing internal religious (and political power), struggles and unrest between the catholic and protestant Reich corporations and the catholic Imperial House of Habsburg in 1618 on the occasion of the question of succession to the Bohemian Crown, the Thirty Years War broke out, which decimated the German population by almost half and was marked by atrocities, which the World needed almost 300 years to re-experience.[217] The War was terminated by the Peace Accord of Westphalia, signed in Münster on October 24, 1648, and entered history as the Treaties of Münster and Osnabrück (the second town of treaty negotiations).[218] According to Article V §30 *Instrumenta Pacis Osnabrucense*, the Osnabrück Peace Accord, the Reformists or Calvinists were legally recognized beside the Lutherans as the second Protestant Congregations, the *Augsburg Reichsabschied* of 1555 was reinforced and clarified. The rule *Cuius regio eius religio* was upheld, as well as the Right to Emigration.[219]

The Treaties of Westphalia of 1648 are remarkable not only because they terminated a devasting war but as a matter of fact that the treaty-making powers acted as equal states. As today Article 2 No. 1 of the UN Charter establishes,[220] not only the UNO but also International Public Law is based upon the principle of equality of the (member) states. This move of the Westphalian Treaties is to be memorized forever and also marks a new era in International Public Law science.[221] The Treaties represented an international war-ending instrument and reorganized the center of Europe territorially and politically. The Netherlands left the Empire and became independent subjects of International Public Law. The old Swiss Confederation was freed from the jurisdiction

of the judicial institutions of the Holy Roman Empire and took the first step to its independence. Few of the warring countries, e.g. the Kingdom of Sweden and the Kingdom of France, were compensated by German territories. France acquired "*les trois évechées*" Metz, Toul, and Verdun, which the King of France factually controlled since the middle of the 16th century, and territories in Alsace, which were not fully ceded to the King of France. Sweden also came into possession of German territories in the North of Germany (former archbishopric of Bremen, territories in Mecklenburg and Pomerania), which it held until the Agreements of Vienna after the definite fall of Napoleon. As far as those foreign sovereigns were installed in German territories without a territorial cession, those territories remained German, and their foreign sovereigns became full members of the Reich corporations with the right to be represented in the *collegia* of the *Immerwährender Reichtstag*[222] in Regensburg. As members of the *collegia*, such foreign sovereigns had to keep feudal fidelity vis-à-vis the Holy Roman Emperor — an extremely bizarre situation. The Pope did not sign the Treaties[223] and thus minimized his own significance on the international scene. The image of one Christianity represented spiritually by the Pope and secularly by the Holy Roman Emperor finally became history. The treaties strengthened the constitutional position of the princely territories of Germany, whose sovereigns became almost independent from the Holy Roman Emperor and were even allowed to alliance militarily with foreign sovereign provided for that such alliances are not directed against the interests of the Reich or the Holy Roman Emperor.[224] This constitutional impact on the internal German constitutional situation was dramatic but then lasted for more than 150 years until 1806, when the last Emperor of the Holy Roman Empire Francis II gave way to Napoleon's pressure and put down the Holy Empire's crown. Although the Treaties had this dramatic impact on the constitutional conditions of and within Germany, they remained in their nature instruments of International Public Law.

Such a statement has a meaning for the legal nature of the individual right of emigration.[225] It was settled into an international environment, which must have changed its legal nature. Had it been originally granted by an Act of Parliament (Reichstag) in 1555, the Treaties of Westphalia internationalized the right. It remained the sole example of human rights guarantees by International Public Law for centuries.

However, one must be cautious in being hyper-euphoric and be aware of the historical reality. The doctrine about individual legal positions providing the person concerned for a right to claim,[226] which he was able to submit to independent courts, was not developed in Germany before the middle of the 19th century.[227] Independent courts in our nowadays' understanding did not exist. Such submissions related to *ius emigrandi* to courts if existing were directed against territorial sovereigns,[228] almost all of which enjoyed the so-called Imperial *privilegium de non evocando*. This personal privilege of territorial sovereigns allowed the princes in Germany to hinder their subjects to submit their legal affairs to Imperial courts, in particular to the *Reichskammergericht*. Additionally, we must take into consideration that Article V Section 30 of the Osnabrück Treaty dealt with corporative rights and obligations of the Reich's nobility. *Reichskammergericht* had not any jurisdiction on violations of such corporative rights and obligations.[229] They could only be submitted to the *Reichshofrat*, a semi-judicial institution established within the Imperial Government in Vienna.[230] Who of the possible plaintiffs could afford such a move to an institution far from his home? More importantly, to make use of the right of emigration represented a hardship for those, who liked to adhere to their beliefs. In the times we are talking about, home within a particular territory meant more than real estate or house, which one could easily sell. Societies in the 16th, 17th, and 18th centuries were not open societies. They were moreover designed by strictly divided classes and within such classes, life did not much depend on the individual will but on rules, as set forth by corporative groups,

which defended their (often purely economic) interests against anybody from outside, who petitioned access to the corporation. Such social orders were seen as God-given and not to be changed by people in their time.[231] People were part of a strongly organized social and economic machinery in their home country. Having in mind the social seclusions, where economic life was organized by guilts, it seemed to be almost impossible for religious dissidents to make use of their right of emigration. This social and economic background explains the exodus of English religious dissidents from Great Britain to the colonies in North America in the 17th and 18th centuries because the colonies were differently organized and made a re-integration in the colonial society easier. If there was a social hierarchy in the English colonies, such hierarchy was flexible and permitted new people to find their places therein. Neither God nor birth but economic success assigned the people their places in the society. It also explains the exodus of German peasants to Russia when in the 18th century, the Tsar started to colonize the fertile soil of the steppes in the south of his empire and in return brought farmers from Germany, among other countries, to settle in. Hereby, the imperial Russian government guaranteed the settlers religious freedom, among other things. The new settlements in Russia were also — from the point of view of the settlers — neither prejudiced nor prospectless. Although precise studies are missing, it is obvious that in the end, only a few people were in the position to emigrate from their home territories invoking Article V Section 30 of the Osnabrück Treaty.[232] A closer look at the historical reality demonstrates moreover perversions of Article V Section 30. In particular, the Imperial House of Habsburg in Austria and Bohemia and the Royal House of Wittelsbach in Bavaria were the strongest supporters of the Roman Catholic Church in Germany and promoted the so-called Counter-Reformation in their territories.[233] Article V Section 30 of the Osnabrück Treaty did not stop them in restoring Catholicism in their territories wherever and whenever they felt the opportunity to and they widely expulsed their subjects.[234] In particular, Empress Maria Theresa as Archduchess of Austria was

very effective in cleansing her territories from protestant dissidents in the 18th century.[235]

Anyway, we leave the German constitutional history behind us and find that nowadays it is not anymore much disputed that individual persons are reflected by International Public Law. The extent to which people have become subjects of International Public Law and the nature of the basis for this can be neglected here, as can the question of whether their subject status depends on the enforceability of International Human Rights or is conditioned by them.[236] Such finding depends much on the developments, which took place when International Humanitarian Law came into existence. However, this is only one important aspect, which I feel so significant that we look at it closer.[237] Other things may be put aside.

Miseries in Wars Before 1939

As we have already said, individual human rights were not earnestly considered by International Public Law until the second part of the 19th century, when warfare became a real industry, which caused unbelievable miseries on the battlefields. Human rights were more a subject of discourses among philosophers and anthropologists. One can hold against it and cynically say that war events have never produced amusement parks. This is truly right when we take new results of battlefield archaeology, in particular from England,[238] into our account. Medieval battlegrounds were real slaughter fields, where combatants were hacked into pieces and medical help was only available for those, who could afford to pay the surgeons' bills — for sure, not the common combatants, who were almost simple peasants and farmers following their lords. Rules of chivalry requesting the knights to show mercy to their defeated enemies were nothing else than romantics of minnesingers. The difference between the two eras — the Middle

Ages, for example, and the 19th century, when warfare became industrialized — were on the one hand the mass production of weapons and ammunition, which was unknown in earlier times, because one sword was laboriously smithed by the swordsmiths for days and weeks. In addition to mass-produced weaponry came modern armies, hundreds of thousands of which were also recruited from conscripts. The conscription of entire male sections of the population into the army, incidentally an achievement of the French Revolution and perfected by Napoleon until entire regions were exhausted, promised an almost inexhaustible supply of men. The side effect of this was the depersonalization of entire army bodies; the individual soldier counted only for his ability to function. While in the old days, seasons shaped the conduct of war — in winter the warring peasant spent his time home at his farm and with his family, now in modern days wars become independent from seasons. If the coffers of the warring king got exhausted, wars were over. Modern warfare was in the hands of interested high finance, of which resources of money often seemed inexhaustible. On the other hand, the further distinguishing criterion was public awareness. Contemporary battleground reporting was not known before the 19th century. Whatever was reported in the old days, was written down decades after the events and had often a touch of legends and fairy tales glorifying the winner and not talking about the miseries that the ordinary combatants had gone through. Journalism even on battlegrounds became more common not before the middle of the 19th century when at the same time the means of communication improved and the term of actuality got a modern meaning. In contrast to former times, in the middle of the 19th century, most people could read and write so that newspapers found a different, broader audience. Miseries in the war camps could therefore not been hidden anymore. Additionally, we should not oversee that in former times prior to Napoleon's *levées en masse*, fighting armies counted 10 or 20 thousand men on each side. In the 19th century, however, we are talking about a war industry, which included 100,000 men on each side. The impact on the people at home was

very different when unnumbered family members got killed, missed, or wounded and if they returned, they returned crippled.

The Geneva Convention of August 22, 1864 dealt with the medical personnel in wars, their neutrality, and the Red Cross emblem but did not establish individual rights. The same is to be stated on all international agreements on warfare matters concluded between 1864 and the beginning of World War I, in particular The Hague Convention of July 27, 1899 on Laws and Customs of Land Warfare, concluded at the First Peace Conference at The Hague, and The (Fourth) Hague Convention of October 18, 1907 on Laws and Customs of Land Warfare, concluded at the Second Peace Conference at The Hague.[239] They established international obligations for the contracting States when warring, and those obligations, of course, had a protective impact on individuals and on the civilian population of the warring countries (as e.g. plundering was forbidden, the use of certain weapons and materials was forbidden or at least limited, the situation of war prisoners was regulated, etc.). However, the legal situation remained unchanged with regards to individual claims in case of violation of such rules, as e.g. Article 3 of The Hague 1907 Convention demonstrates. Article 3 says that in case of violation of the Hague Statute(s), the warring violator as a state might be obligated to compensations to the damaged opponent and is also held responsible for all activities of the personnel of their armed forces in violation of the Statutes. Claims of individuals harmed by such violations were not a matter of concern.[240] The 1907 agreements are still in force for the contracting States, though for Germany. As we will see, international society acquainted the conviction that those rules over time have turned into Customary International Law. As such, they influenced the later Nuremberg Principles, which the Nuremberg Military Trial applied on the most prominent German war criminals, and consecutively the modern International Criminal Law. After World War I, under the guidance of the League of Nations or the International Committee of the

Red Cross, improvements to the given conventions were agreed, e.g. the Geneva Protocol on the Prohibition of the Use in War of Asphyxiating , Poisonous or Other Gases , and of Bacteriological Methods of Warfare of June 17, 1925, or the Agreement on the Treatment of Prisoners of War of July 27, 1929. Attempts to improve international instruments for better protection of the civilian population became themselves victims of World War II. The plan of the Swiss Government to convoke a conference in 1940 in order to adopt such improvements did not take place anymore. The appeal of the International Committee of the Red Cross to the warring parties of World War II to implement the draft rules or at least to respect them remained unheard, as we know. For the period before 1945, we may conclude that International Public Law had produced a lot of legal instruments, which we nowadays call Humanitarian Law. Those instruments improved the "laws in war" or moreover to some extend they established such rules for the first time. Those instruments reflected individual positions but only as a side-effect of obligations of States and not as a legal position that an individual concerned was able to pursue nationally or internationally.[241]

It should be added that Germany was not yet prepared[242] to accept internationally guaranteed human rights prior to the end of World War II. We have already discussed the view of the authorities of the Weimar Republic regarding International Public Law and its effects on the internal legal system of Germany, in particular taking into account Article 4 of the 1919 Constitution. International Human Rights were not recognized commonly within the international community and in particular not by Germany. After the November revolutions overthrew the monarchies in November 1918, *Reich* and *Länder* incorporated catalogs of Basic Rights (in German terminology: *Grundrechte*) in the new constitutions. Nevertheless, the dogmatic and jurisprudence of courts did not accept the immediate binding force of such constitutional laws. The particular Basic Rights were more regarded as "programmatic phrases", guidelines or directives for the lawmakers and the other

supreme authorities of *Reich* and *Länder*.[243] Analyzing the case law of German courts of that time, one will hardly find any judgment or verdict, which quoted those Basic Rights. If so, it is a good question, how could a country accept internationally guaranteed human rights as binding internal legal parameters when the national catalogs of Basic Rights were argued in their binding force.

A New Movement After Disasters Between 1939 and 1945

When on September 1, 1939, Germany raided Poland, Adolf Hitler wilfully ignored the Treaty Outlawing War, the so-called Briand-Kellogg Pact, of August 28, 1928, to which Germany was a signatory State[244] and which outlawed any aggression and obligated the member States to peaceful settlements of disputes (Article I and Article II). Needless to say that Hitler also ignored all other limitations of International Public Law regarding warfare. The results are known. With respect to war crimes, there is a closer connotation with International Criminal Law so that we will discuss those matters later.

Not only Germany found itself in a devasting situation in 1945. Moreover, it was the entire Europe that was to restart. Not only politicians but also civil societies were quite clear on their mind that the new start should make a difference to the post-period after World War I. Very early after World War II had been terminated, at least in Western Europe it became obvious that only closer cooperation in Europe could stabilize the continent and that such stabilization included Germany in which shape of Germany so ever. There are two movements, which we should consider — one of them led finally to the European Union and the other one to the Council of Europe. Both of them had a human rights element.[245] The human rights element of the Council of Europe at the beginning was the stronger one. The then European Communities acquired their human rights elements in the process of their developments.

We will not be able to examine the third strand of cooperation, which refers to military cooperation within Europe by the Western European Union and the cooperation across the Atlantic by NATO. Both organizations had and still have an impact on the continent's stability. The Western European Union[246] was finally absorbed by the European Union and does not play anymore a part in the international arena. Although both organizations were indispensable for keeping peace in Europe, in particular in periods of the Cold War, they are missing — in contrast to the Council of Europe and the European Communities/Union — a typical human rights momentum so that they did not much contribute to developments on the side of International Human Rights.

Global Efforts

Internationally, after May 8, 1945, everything started with the adoption of the ***Charter of United Nations*** and its General Declaration of Human Rights on June 26, 1945 and on December 10, 1948.[247] The Charter and the General Declaration influenced the process of constitution making in Germany, as we have already discussed and as we can see from the Preamble and Article 1 of the Basic Law.[248] Both UN documents guided the Parliamentary Council and embossed the will of the "parents" of the German constitution to open the German legal system as much as possible towards the influences of the international community, in particular with regards to future human rights activities,[249] and they did that being very conscious of the fact that at the end of the 1940s, the United Nations had a special, rather reserved view of Germany (see Article 53 of the Charter[250] — so-called "Enemy-States Clause").[251] However, as a guideline, the Declaration is methodologically playing its part as a (supporting) element in the interpretation of specific human rights contexts of the Basic Law by German courts.[252] As such a tool of interpretation, the missing binding force of the Declaration does not represent any impediment for German jurisprudence, as German

courts legally may use any (legal) source of knowledge. The next major step taken by the United Nations in the field of International Human Rights improvement was the International Covenant on Civilian and Political Rights of December 19, 1966,[253] as well as the International Covenant on Economic, Social and Cultural Rights of December 19, 1966.[254] The Federal Republic of Germany became a member State of both Covenants[255] after the two German States acceded the United Nations as Member States on September 18, 1973.[256] Both Covenants became national law by adoption of the German Parliament pursuant to Article 59 paragraph 2 of the Basic Law and — within the German normative hierarchy — they enjoy the rank of federal statutes.[257] As such, they represent a supplement[258] to the national catalog of Basic Rights and though they are used in the jurisprudence of the German courts. As a federal statute, everybody may invoke the rights guaranteed by the Covenants in front of courts, and such practice is not uncommon in German courtrooms. Moreover, in particular, the Covenant on Civilian and Political Rights was an argument in political debates between the two German states in the 1970s and 1980s when the Federal Republic of Germany invoked the missing minimum standards of freedom in the German Democratic Republic.[259] This has meanwhile become history. Nevertheless, both Covenants do still play a major part in discussions of civil societies not only in Germany but internationally. Under the UN responsibility, over time a series of international agreements have been produced that we can only touch but which have a tremendous impact on International Human Rights, as we know them nowadays, and which play an influential part in the national system, in particular in the jurisprudence, be it as criminal justice is concerned, be it in other domains of society:

- the Genocide Convention of December 9, 1948,[260] which the Federal Republic of Germany became a member of on February 22, 1955.[261] We will come back to this Convention later in the context of International Criminal Law,

- Geneva Refugee Convention of July 28, 1951,[262] which entered into force for the Federal Republic of Germany on April 22, 1954,[263]
- International Covenant on the Elimination of Racial Discrimination of March 7, 1966,[264] which Germany became a member of on June 15, 1969,[265]
- Convention on the Elimination of All Forms of Discrimination against Women of December 18, 1979,[266] which entered into force in Germany on August 9, 1985,[267]
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984,[268] in force in Germany on October 31, 1990,[269]
- Convention on the Rights of the Child of November 20, 1989,[270] in force in Germany on April 5, 1992,[271]
- and so on.[272]

The Federal Republic of Germany is part of the reporting system that those Covenants have installed as a tool of implementation and has also enforced the individual complaint system, as established by the Covenants.[273]

Regional Efforts I: the Council of Europe

The Council of Europe was a child of the World War II experiences that European nations went through, as well as a victim of the beginning Cold War and the closing Iron Curtain at the end of the 1940s. On March 17, 1948, France, the United Kingdom, and the Benelux States agreed on founding the Western European Union in terms of improving cooperation on economic, cultural, social, and military matters. The preamble of the agreement underpinned the belief of the founding members

in the basic human rights, human dignity, personal liberty, and other ideals, as set forth by the Charter of the United Nations.[274] Parallel to the foundation of the Western European Union, civil society all over Europe pushed politics to move ahead. Under the roof of the Consulting Assembly of the Council of Europe, which was founded on May 5, 1949[275] and which the Federal Republic of Germany joined as a full member on May 2, 1951,[276] the Minister Committee moved to the European Convention on Human Rights and Basic Freedoms, which the Committee adopted on November 3, 1950 and which was signed by Belgium, Denmark, France, Island, Ireland, Italy, Luxemburg, Germany, Saarland, Greece, the Netherlands, Norway, Turkey, the United Kingdom, and Sweden.[277] After the 10th ratification, the Convention entered into force on September 9, 1953.[278]

The Convention (including the Additional Protocols) is — without any exaggeration — the most important legal instrument across entire Europe and accepted by the people.[279] The Basic Rights of more than 800 million inhabitants of the Member States as set forth by the Convention are implemented by the European Court of Human Rights in Strasbourg in procedures that every complainant may enter provided for that the complainant has exhausted the national legal remedies.[280] At the end of 2019, the Court had about 56,000 pending cases, most of them filed by individuals according to Article 34 of the Convention.[281] Inter-State applications pursuant to Article 33 of the Convention are exceptional but having a greater (political) significance.[282] The implementation of judgments of the Court is a national obligation, as Article 46 paragraph 1 of the Convention is ruling. The Convention does not allow the Court in Strasburg to annul national administrative or court decisions.[283] Article 46 paragraph 1 of the Convention assigns to the Committee of Ministers[284] the authority to survey the implementation of final Court judgments by respective national institutions by a reporting system, which implies political pressure on the negligent or ignoring Member State.

The Convention, which is an international treaty[285] that every State applying for membership to the Council of Europe, shall mandatorily sign, is significant for the Rule of Law and for Democracy in Europe, as it provides for a clearly defined judicial mechanism in enforcing Human Rights across the continent. Europe would have a totally different look without it. Furthermore, the material law of the Convention[286] has become a subject of daily judicial jurisprudence on every thinkable legal subject, e.g. Article 5 and 6 of the Convention represent guidelines in the jurisprudence of criminal courts and impact the practice of pretrial detention. We are lacking time in order to discuss such matters in detail. However, the Convention is becoming relevant even on politically highly sensitive matters, e.g. the protection of our global climate and on what national governments are obligated to do in terms of turning internationally agreed protection goals into concrete steps on the national level. On 20th December, the Hoge Raad, the Supreme Court of the Netherlands, in its "Urgenda" decision in the third and final instance condemned the Dutch government to reduce greenhouse gas emissions in the Netherlands by 25% by the end of 2020 in comparison with the base year 1990. The Hoge Raad thus confirmed corresponding pre-instance decisions from 2015 and 2018.[287] Interestingly, the Hoge Raad invoked Article 2 and 8 of the Convention as the fundament of its judgment and said:[288]

> "The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) requires the states which are parties to the convention to protect the rights and freedoms established in the convention for their inhabitants. Article 2 ECHR protects the right to life, and Article 8 ECHR protects the right to respect for private and family life. According to the case law of the European Court of Human Rights (ECtHR), a contracting state is obliged by these provisions to take suitable measures if a real and immediate risk to people's lives or welfare exists and the state is aware of that risk.

The obligation to take suitable measures also applies when it comes to environmental hazards that threaten large groups or the population as a whole, even if the hazards will only materialize over the long term. While Articles 2 and 8 ECHR are not permitted to result in an impossible or disproportionate burden being imposed on a state, those provisions do oblige the state to take measures that are actually suitable to avert the imminent hazard as much as reasonably possible. Pursuant to Article 13 ECHR, national law must offer an effective legal remedy against a violation or imminent violation of the rights that are safeguarded by the ECHR. This means that the national courts must be able to provide effective legal protection.

The risk of dangerous climate change is global in nature: greenhouse gases are emitted not just from Dutch territory, but around the world. The consequences of those emissions are also experienced around the world.

The Netherlands is a party to the United Nations Framework Convention on Climate Change (UNFCCC). The objective of that convention is to keep the concentration of greenhouse gases in the atmosphere to a level at which a disruption of the climate system through human action can be prevented. The UNFCCC is based on the premise that all member countries must take measures to prevent climate change, in accordance with their specific responsibilities and options.

Each country is thus responsible for its own share. That means that a country cannot escape its own share of the responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope and that a reduction of its own emissions would have very little impact on a global scale. The State is therefore obliged to reduce greenhouse gas emissions from its territory in proportion to its share of the responsibility. This obligation of the State to do “its part” is based on Articles 2 and 8 of ECHR, because

there is a grave risk that dangerous climate change will occur that will endanger the lives and welfare of many people in the Netherlands.

When giving substance to the positive obligations imposed on the State pursuant to Articles 2 and 8 ECHR, one must take into account broadly supported scientific insights and internationally accepted standards. Important in this respect are, among other things, the reports from the IPCC. The IPCC is a scientific body and intergovernmental organization that was set up in the context of the United Nations to handle climatological studies and developments. The IPCC's 2007 report contained a scenario in which the warming of the earth could reasonably be expected to be limited to a maximum of 2 °C. In order to achieve this target, the Annex I countries (these being the developed countries, including the Netherlands) would have to reduce their emissions in 2020 by 25–40%, and in 2050 by 80–95%, compared to 1990.

At the annual climate conferences held in the context of the UNFCCC since 2007, virtually every country has regularly pointed out the necessity of acting in accordance with the scenario of the IPCC and achieving a 25–40% reduction of greenhouse gas emissions in 2020. The scientifically supported necessity of reducing emissions by 30% in 2020 compared to 1990 has been expressed on multiple occasions by and in the EU.

Furthermore, since 2007, a broadly supported insight has arisen that, to be safe, the warming of the earth must remain limited to 1.5 °C, rather than 2 °C. The Paris Agreement of 2015 therefore expressly states that the states must strive to limit warming to 1.5 °C. That will require an even greater emissions reduction than was previously assumed.

> All in all, there is a great degree of consensus on the urgent necessity for the Annex I countries to reduce greenhouse gas emissions by at least 25–40% in 2020. The consensus on this target must be taken into consideration when interpreting and applying Articles 2 and 8 ECHR. The urgent necessity for a reduction of 25–40% in 2020 also applies to the Netherlands on an individual basis".[289]

The decision did not remain undisputed. German courts went a different way exercising "judicial self-restraint", as due to the principle of separation of powers, they were of the opinion that such claims exclusively belong to the "political domain" reserved to governments only. We do not need to go any further into the decision and the related questions of the separation of powers and the relationship of the judiciary to the government in a democracy, but we should take the Dutch decision as an example of how deeply the European Convention on Human Rights has penetrated national jurisprudence.[290]

Regional Efforts II: the European Union[291]

The European Union, as we know and perceive it nowadays,[292] was beyond any dreams and imagination, when everything started with the European Community for Coal and Steal on April 18, 1951 (effective since July 23, 1952).[293] At that time, nobody ever dreamed about the importance of this "creature" in the context of human rights, although with regards to the (individual) activities within "coal and steel" the basis for fundamental rights was laid. The European Community for Coal and Steel cannot be divided from the German-French reconciliation, which in 1951 was at its beginning. The history of the European Union is complex with the ups and downs the Communities experienced on their way towards the Union, and the ups and downs keep on coming. The recent history of the Union in its interrelation with the United Kingdom

and its Brexit in recent years gives evidence for ups and downs — the never-ending story of continental Europe with the British Isles. We still do not know where we will end up with the United Kingdom. Not only the history of the European Union is complex.[294] So is the law of the Treaty on the European Union of February 7, 1992 (so-called Treaty of Maastricht[295] as the Constitutional Treaty of the European Union)[296] and correlated Treaties, which the Union Treaty refers to (Treaty of the Functioning of the European Union of March 25, 1957 [which has been amended and altered by a series of Treaties as e.g. the Treaty of Amsterdam of October 2, 1997, the Treaty of Nizza of February 2, 2001, the Treaty of Lisbon of December 13, 2007, and other European instruments including Additional Protocols, etc.]).[297] The Treaties provide for the *Primary European Law,*[298] which — in Germany — has been transformed into national law according to former Article 24 and nowadays according to Article 23 of the Basic Law, and this Primary Law precedes national law. The Treaties have transferred German sovereignty rights to the institutions of the European Union. The *Primary European Law*[299] by itself is complex and represents the basis for the *Secondary European Law*[300] — the law which is produced by the different European institutions,[301] in the first line by the European Commission, by the European Council of Ministers (not to mix up with European Council [composed of the Heads of State respectively the Heads of Governments]), — both together with the European Parliament[302] — be it by Decisions, by Directives or be it by Recommendations[303] — and — not to oversee — by judgments of the European Court of Justice and the European Court of First Instance,[304] as well as the European Central Bank, of which the significance increases year by year but of which the decision making machinery[305] is completely different from the legal acts that the "political" institutions of the European Union are allowed to use. Whatever the European Central Bank concerns, we cannot discuss it in the given framework of these lectures, although the Bank's activities in recent crisis' years prove its importance, in particular, defending the European currency's stability, the Euro. The

European Central Bank and its fiscal policy have recently become a matter of dispute and disturbance between the entire European Union, in particular the European Court of Justice in Luxemburg and the German Federal Constitutional Court, as by the judgment of May 5, 2020, the German Federal Constitutional Court (files No. 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15 and 2 BvR 1651/15) declared specific fiscal decisions of the European Central Bank in violation with the German constitution.[306] The decision is seen as very controversial and everybody is getting nervous. Some critics see the Occident in decline or see the judgment as a lesser form of declaration of war by the Federal Constitutional Court against the European Court of Justice. After all, on 11 December 2018, the Luxembourg Court of Justice had still seen the decisions of the European Central Bank in line with Union law, which the Federal Constitutional Court could not share. At present, at any rate, the knives are being sharpened linguistically.

Article 288 of the Treaty on the Functioning of the European Union describes the legal acts of the European Union as follows:

> "To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.
>
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.
>
> Recommendations and opinions shall have no binding force."

Those forms may only be exercised if Primary Law grants the Union institutions a (limited) individual authorization to do so.[307] The principle of subsidiarity under Article 5 paragraph 3 of the Treaty on Functioning of the European Union[308] does not prevent the Union from exercising its competences.[309] Subsidiarity is not a political program, but a matter of justice. Its disregard may lead to the annulment of the Union act by the European Court of Justice.[310]

We shall keep those forms of legal activities on our mind, as in the context of Human Rights and Basic Liberties of the Union, the European institutions make use of them (mostly of regulations and of directives) in order to transform the (political) goals and aims of the Union in concrete measures, which might have an immediate effect on the legal position of individuals within the Union. Because of such immediate effects, the legal forms of action, as established by Article 288 of the Treaty on the Functioning of the European Union, also influence individual proceedings, be it before national courts, be it before European Courts. Regulations and decisions are binding on the European as well as on the national level, directives might have the same effects if they are or become self-executing.[311] Nationally, legal actions of the European institutions precede and supersede any national rule,[312] be it a national act of law, be it a governmental ruling, or be it an administrative decision.[313] European acts shall be implemented and applied in the first place by national authorities or — in case of directives — shall be transformed into national executive orders or acts, which then are to be implemented by national authorities even if national law explicitly contravenes Union rules.[314] In such cases of conflict, implementing national authorities must ignore those national regulations. With regards to the legal position of individuals, they may claim the superiority of Union Law within any of their proceedings, which they have with national authorities.[315] Such superiority of Union Law has its consequences for national proceedings beyond this point. The effectiveness of the enforcement of Union Law also includes the granting of interim legal protection, even if this leads to the disregard of a parliamentary law that is contrary to Union Law.[316]

In case of doubt as to the interpretation of Union Law and the resulting conflicts with national law, national judges[317] must seek a ruling from the European Court of Justice under Article 267 of the Treaty on the Functioning of the European Union (Preliminary Ruling Procedure, probably the most important type of procedure before the European Court of Justice).[318] The subject of such a referral is the interpretation of the Treaties and the examination of the validity of secondary Union law,[319] but not the question of the compatibility of national law with Union law[320] or the lawful application of Union Law within a national proceeding.[321] It is for the national courts to answer the latter question on their own responsibility. If German courts fail to make the required submission, this omission has constitutional consequences. Since the European Court of Justice has a monopoly on the interpretation of Union Law[322] and is thus the "statutory judge" according to Article 101 paragraph 1 sentence 2 of the Basic Law[323] within German proceedings, an omitted but necessary submission to the European Court of Justice violates the constitutionally secured right to the "statutory judge". This applies without exception also to the Federal Constitutional Court of Germany.[324] Furthermore, the Law of the European Union provides for an additional control mechanism, which has a significant political impact. We are talking about the Infringement Procedure, which, under Article 258 of the Treaty on the Functioning of the European Union, gives the Commission (and each Member State) the power to bring proceedings against (other) Member States that do not respect Union law.[325] Since the European Court of Justice is prevented from annulling the national act that is contrary to Union law, the Court delivers a judgment establishing the infringement. In order to enforce this judgment, pursuant to Article 260 of the Treaty on the Functioning of the European Union, the Court of Justice has the power to impose periodic penalty payments on the State concerned, which may be severe.[326] Germany, too, has had to experience this on several occasions, for example with the German "Reinheitsgebot" of beer due to the lack of implementation of Union environmental directives.[327]

When it comes to Human Rights and the European Union, we have the Charter of the Fundamental Rights of the European Union in the first place. The Charter has been incorporated into the Primary Law of the Union.[328] Union Law, as well as national enforcement practices based upon Union Law, have therefore to be in harmony with those Fundamental Rights,[329] otherwise, the European Court of Justice might annul the Secondary Law act.[330] The European Union is founded on four pillars, which already characterized the European Communities and historically explain its existence.[331] We are talking about free movement of goods,[332] free movement of persons,[333] free movement of services,[334] and free movement of capital.[335] These fundamental freedoms, which can be broken down further (freedom of movement of Union citizens under Article 21 of the Treaty on the Functioning of the European Union, freedom of establishment for entrepreneurs, and free movement of payments) constitute the economic character of the European Union market.[336] These fundamental liberties look like political programs, and initially they have been. However, over the years with lots of underpinning Secondary Law products and constant jurisprudence of the European Courts, individual legal positions have been founded in many regards. These provisions of secondary Union law give the necessary substance to the above-mentioned fundamental freedoms and provide it with up-to-date references to the right-holders envisaged. I will give you a few examples, which play an enormous role in the daily practice of the national courts and have a direct impact on individual citizens of the Union:

- Council Regulation No. 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,
- Regulation No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) of June 17, 2008,

- Regulation No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II) of July 11, 2007,
- Council Regulation No. 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Antitrust Procedure Regulation),
- Council Regulation No. 139/2004 on the control of concentrations between private companies (Merger Regulation) of January 29, 2009,
- Council Regulation 2015/1589 of July 13, 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (State Aid Procedure Regulation),
- Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States of April 29, 2004,
- Regulation No. 492/2011 of the European Parliament and of the Council on freedom of movement for workers within the Union of April 5, 2011,
- Directive 98/5/EC of February 16, 1998 to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained,
- Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications of September 7, 2005,
- Directive 2016/679 of the European Parliament and of the Council on the protection of individuals with regard to the

processing of personal data and on the free movement of such data and repealing Directive 95/46/EC of April 27, 2016 (basic data protection regulation),

- Regulation 2019/788 of the European Parliament and of the Council of April 17, 2019 on the European Citizens' Initiative,
- etc.

This list is not exhaustive and can be continued. What we learn from the list is already that the European Union covers a wide range of policies, as they are harmonizing the legal orders within the Union,[337] economies including fair competition,[338] social policy,[339] politics on agriculture and fishing,[340] and other matters (traffic,[341] energy,[342] industry,[343] environment,[344] and consumer protection).[345] For lawyers in the Union, of utmost importance is the Directive 98/5/EC of February 16, 1998[346] to facilitate the practice of the profession of lawyers on a permanent basis in a Member State other than that in which the qualification was obtained. It is still not daily routine yet but in criminal proceedings, courts increasingly experience defense counsels defending their clients in a judicial forum they are not used to. Not knowing the legal order of a country but nonetheless defending within this unknown environment is a risky business. At the end of the avenue, the clients of such foreign defense counsels take the decision, who is going to represent them in court.

Regional Efforts III: European Criminal Law — An Independent Category or a Category in Being?

Against the background of the European Union and Council of Europe, we come to European Criminal Law and at once we bow out the idea of having a European Criminal Code and a European Criminal Procedure Code. The paraphrase of Kai Ambos,[347] who speaks of a Europeanized substantive criminal law, comes much

closer to reality. In view of the principle of limited individual empowerment of the Union institutions,[348] which dominates European Union law, and in the absence of explicit authorization in Primary Law, codifications will not take place unless the Member States of the Union conclude an international treaty to this effect or amend the Primary Law accordingly. Now, we are very far from that. The establishment of the European Prosecutor's Office[349] has not changed and will not change that. However, the Union Law may have an impact on national criminal law nevertheless, if we only look at the scope of activities, which the Treaty on the Functioning of the European Union allows.[350] In the context of the Union jurisdiction, we shall not oversee that the exercise of such complex jurisdiction requires funding, and wherever public funds are at hand, crime is not far away. Here then come other Union principles at play, e.g. Article 4 paragraph 3 of the Treaty on the Functioning of the European Union demanding the Member States to be loyal towards the Union.[351] Loyalty towards the Union is two-folded. It requires a supportive attitude of the Member States at the Union level. At the national level, loyalty requires Member States to consider whether certain individual conduct detrimental to the Union should be punishable by the national legislator as ultima ratio. If national rules on tax and customs fraud prove inadequate, these shortcomings may jeopardize the customs union among the Member States, as well as the harmonization of tax law in the Union.[352] Anyway and nevertheless, we cannot beat around the bush and there is no getting away from the fact that there is no written criminal law at the European level, and this opens up problems of application when it comes to long-established principles of criminal prosecution, for example, that punishment can only be imposed if the act was punishable before it was committed and that punishability must be laid down in writing in the law at the time the act is committed.

However, so true the finding is that substance law at the European level is co-existing alongside with national criminal

law and that such substance law will not be well enforced unless such enforcement is supported by national (criminal) law so sobering it is to realize that it is difficult at this stage to speak of a closed or completed system of European criminal law. In order to approximate European criminal law in a substantive sense, its representatives on the side of academics[353] are dependent on drawing on principles of primary law, on principles of interpretation and on individual instruments of secondary law, on putting these sources of knowledge into relation to one another and then drawing conclusions from them that could prove the existence of European criminal law. It cannot be denied that the European Union and the Council of Europe increasingly and frequently have to deal with crime phenomena for topical reasons, such as the events of 11 September 2001 or in the field of corruption, in order to achieve an effective, harmonized fight against such delinquency in all Member States for their own good.[354] Such tendencies may increase the more the European Union finds that the protection of its own interests requires stronger efforts, as it happened by the establishment of the European Prosecutor's Office in Luxemburg.[355] However, for the time being, the finding with regards to European Criminal Law does not move us to hyper-euphoric conditions. Those who advocate European criminal law argue that greater attention should be paid to the interdependencies between Union and national law, to the mutual interpenetration of both legal systems, and to increased sensitivities when it comes to the application of national substantive criminal law, which is still decisive, in national criminal proceedings that could have a European background. No area of substantive criminal law is excluded. The attitudes called for may concern driving without a driving license if the offender, after "losing" his national driving license, "obtains" a new driving license from another Member State; they may have an impact in cases of bribery, for example, if bribery leads to distortion of fair competition; they may have an impact in fraud proceedings, as well as in tax and customs evasion proceedings. It is almost bold to claim that any criminal cross-border behavior within the Union is

susceptible to this view. In summary, however, none of this is a new insight that moves the world, and in the end, all that matters are that loyalty and solidarity[356] are demanded at all levels, even though the perspective may be particularly penal.

On the side of procedural law, it does not look much better. Criminal procedures still matter in national legislation, and such legislation varies from one country to the next. One must not like it, but the Union is composed of Member States, which underwent different legal schools and traditions. The colorful "bouquet" of different procedural systems is the result of that and does make the Union finally so interesting.

What we find at the European level are several European institutions, whose jurisdictions are about facilitating the cooperation between respective national authorities, about collecting necessary information and data and their processing and sharing. In the first place, there is Europol, an international organization seated at The Hague.[357] The next international institution also seated at The Hague is Eurojust,[358] whose scope of jurisdiction is similarly designed as that of Europol but focused on prosecutors and judges and their proceedings. Both institutions may be strengthened in their scope of authority when the European Public Prosecutor's Office will be fully implemented. At present, however, this is still more of a pipe dream. Then we are dealing with the third violinist in concert, the European Anti-Fraud Office (OLAF).[359] OLAF's challenge is to protect the financial interests of the European Union where the Union collects funds (in particular customs fees) and spends money. In contrast to Europol and Eurojust, OLAF is designed as an independent body within the European Union managed by its director-general and within its jurisdiction, OLAF is operative — conducting spot checks, inspections, etc. Furthermore, in case of OLAF successfully establishing facts and evidence for wrong-doing in its scope of jurisdiction, it is able, in contrast to Eurojust and Europol, as a matter of law and without formal support

from national authorities, to conduct its own proceedings within the limits of its powers and, where appropriate, to bring actions against delinquent individuals and companies before the courts, including those of States outside the European Union. Such actions are of civil or administrative nature and their processing depends on the respective national procedure law. If it comes to criminal prosecution, OLAF again depends on the national prosecutor's offices, where OLAF may initiate the prosecution by reporting the crime. However, after that, the procedures go their national ways, in which OLAF can only accompany its own criminal charges. Within the national criminal proceedings, OLAF does not generally enjoy a special position and is treated like any other complainant or reporter of a crime. OLAF as "amicus curiae" in national criminal proceedings is a charming idea, but far from the procedural reality. As far as OLAF is concerned, further developments also depend on how the EU in Luxemburg develops in the future. There may be extensions of competence. However, for the time being, this is still a glimpse into the crystal ball. Finally, we come to the European Public Prosecutor's Office,[360] the newest European institution with penal connotations. The European Public Prosecutor's Office's jurisdiction shall be the defense of the Union's financial interests by investigating alleged wrongdoings. Even against the background of the fact that criminal investigations are generally associated with (deep) interventions in individual legal spheres, they require a tight legal corset that shows the conceivable measures, but also the precisely described limits that they must observe. Since a European investigating judge is not yet envisaged, certain measures, such as a house search or telephone surveillance, can only be ordered by a judge; the European Public Prosecutor's Office will have to turn to the national courts in the future. This can lead to bizarre situations in individual cases. The European Public Prosecutor's Office applies its legal bases, the national judge must take these into account, but he is also obliged to respect his national fundamental rights. He is also bound by the European Convention on Human Rights, which the European Public Prosecutor's Office must consider only

marginally, if at all, because the Union is not a member of the Convention. In this way, it is quite conceivable that the European Court of Human Rights will decide on Secondary Union law in this way, which the European Court of Justice in Luxembourg has so far found unimaginable. There could be a threat of a clash of legal cultures.

The future development of the European Public Prosecutor's Office moreover conceives chances. The financial crimes that the Office is supposed to go after need to be regulated and clearly defined by European Law. This applies no less to the procedural instruments and other procedural guarantees to be used. The development of these rules could put an end to the current state of legal fragmentation, where each of the European authorities dealing with criminal matters has its own rules. This does not exactly promote clarity and predictability. As Helmut Satzger puts it: "The Regulation may therefore become something of a nucleus of supranational procedural law".[361]

When talking about (future) supranational procedural rules[362] at present, we must look at what happens on the side of integration. (More) integration may be the result of (more) harmonization of the different legal concepts of the Member States, as we have already talked about. Furthermore, increasing integration also depends on closer cooperation among the Member States, which the Union feels to be challenged. Harmonization and closer cooperation, of course, have multi-folded facets. One of them is the mutual recognition of judicial decisions (Article 82 paragraph 1 of the Treaty on the Functioning of the European Union), in particular on cross-border criminality as defined by Article 83 of the Treaty on the Function of the European Union. The Union according to Article 82 paragraph 2 of the Treaty on the Function of the European Union may facilitate the rules by directives including minimum standards of harmonization. Every practitioner working on cross-border criminal cases will confirm how cumbersome

different proceedings of formal recognition by different countries will be, how much precious time they consume, and how uncertain any outcome is.[363] Of course, such mutual recognitions must respect the rights of defendants, and that currently is the point, where advocates and human rights representatives are becoming nervous. The question is whether there is any (agreeable) European ordre public standard, which may put limits to the mutual recognition.[364] Thus, the German Federal Constitutional Court by a couple of rulings corrected German authorities applying the Federal Law on the European Arrest Warrant.[365] It was like the trumpets of Jericho for the Federal Republic of Germany when on May 27, 2019 in case No. C-508/18 the European Court of Justice took offense at the fact that European arrest warrants were issued in Germany by public prosecutors. Only independent authorities were allowed to do this, and the German public prosecutors were not. The Court was right.[366] Another example I am free to give you. In a case at the Munich High Court of Appeals as first instance court (file no.: 7 St 1/16), the court used informatic expert evaluations, which the Court of Grande Instance at Paris had already established within its own proceeding and provided the Munich Court with upon a properly channeled international request for legal assistance. As the French expert in establishing his expertise used different informatic methodologies not so known to German defense counsels, those counsels invoked the differing standards of investigation as a violation of the common ordre public. We must not go deeper in details but take with us that the (common) ordre public will be a very complicate even technical issue on the common way of Member States of the European Union on their way to a union-wide harmonized proceeding.[367]

Ne bis in idem is an inherited principle of criminal law in modern states, and thus Article 103 paragraph 3 of the Basic Law rules: No person may be punished for the same act more than once under the general criminal laws. If criminal verdicts are to be recognized reciprocally within the Union, the principle may cause problems for convicted individuals concerned. As the German Federal

Constitutional Court once established,[368] the principle bans any further prosecution of offenders, who have been already punished or finally acquitted, from any repeated prosecution and punishment due to the same act. In former times, states ignored what happened outside their own criminal jurisdiction and people faced the risk to be put on trial twice in different countries. This has changed, as ne bis in idem might be regarded as a common principle of the European Union. Article 54 of the Convention of June 19, 1990 Implementing the Schengen Agreement of June 14, 1985 on the Gradual Abolition of Controls at Common Borders explicitly recognizes ne bis in idem as a principle to beapplied by the Schengen Members.

Double jeopardy does not represent a major problem regarding the guarantees of the Convention on Human Rights. According to Article 4 paragraph 1 of Protocol No. 7 of November 225, 1984 to the Convention, ne bis in idem has become part of the Convention Law, as it entered into force on November 1, 1988. However, Germany, the Netherlands, and the United Kingdom have not ratified the Protocol yet, so there is a major gap. The interesting question will be how the European Court of Human Rights will position itself with respect to the gap. It is inevitable from my perspective that the European Court of Human Rights "stumbles" over the fact that there could be a double standard between the members of the Union respecting ne bis in idem among each other already and Germany, the Netherlands, and the United Kingdom, which are bound by Union Law but not by Protocol No. 7. By all cautiousness, we may wonder whether it would be legitimate and conceivable that the European Court of Human Rights in interpreting Convention Law expands ne bis in idem as a fundamental principle, which is not only based on the Convention but also on the common conviction of the Union and its members. Such a step forward could be audacious, as the Court of Human Rights in its case-law argumentation would recur to Union Law. Indeed, it would represent a major step towards creating European principles in criminal matters. The developments promise to become interesting and exciting.

Within the European Union, we are at the beginning of a process, not at its end.[369] There are changes to come but they are taking time to be regulated, transformed, and implemented within the national legal systems of the Union's members. I am personally scared that it will take too long. There is a topic that concerns me repeatedly and it is related to the position of witnesses, witnesses under threat, vulnerable witnesses, and victim witnesses and their relatives. In terms of clarification, I may give you a recent example. Our court in Munich tried a case with a right-wing, Neo-Nazi terrorist background and the indictment of the Federal Prosecutor General alleged that this group consisted of at least three people and was supported by others sharing the same ideology. The group committed murders on immigrants from Turkey and Greece, as well as on a female Police Officer for almost a decade. During this period, the two male members of the core group, who took their own lives on the day of their planned arrest, obtained the financial means to live, but also to finance further terrorist activities, such as a bomb attack, through bank robberies. Relatives of the shot victims joined the criminal proceeding. When they testified as witnesses, there were highly dramatic scenes in the courtroom, fathers collapsed, mothers suffered crying fits. Recently, the panel concerned delivered the verdict in writing. On more than 3,000 pages, the court established how and why it was able to establish the guilt of the defendants. This verdict will be reviewed by the Federal Supreme Court of Justice when the participants in the review proceeding will have submitted their grounds for their legal remedies. Immediately after the delivery of the grounds in writing, victim families and their representatives raised their voices in order to criticize the verdict as of missing empathy for their situation and the consequences caused to them by the judged criminal acts.[370] This is exactly the point: The European Codes of Criminal Procedure require witnesses to appear and testify in court, unless they have rights to refuse to testify. However, the rules of the procedure take little account of the circumstances in which the witnesses made their perceptions, whether they or their relatives or friends were injured, and the situation in which they

found themselves according to their perceptions, and often enough still at the time of their examination by the court. At the Union level, first steps have been taken in terms of improving the legal situation of in particular victim witnesses.[371] Taking cross border criminality and border crossing criminals in particular terrorists into account, who often enough are part of international networks, it depends on chance whether (victim) witnesses are to testify in France, Belgium, or Germany — sometimes in all countries. They still go to different protection zones, which at best have a small common minimum standard. In very few countries, can they hope for psycho-social support, which they are entitled to in Germany at least.[372] From the perspective of (victim) witnesses, the current situation is unbearable.

LECTURE 4:

International Criminal Law

First Discussions in the 19th Century

In the course of our lectures, we have already raised the point: How much back have we to go into history in order to understand when the first roots of International Criminal Law became visible? For most of the jurists and philosophers of the time prior to World War I, any international liability for criminal offenses was inconceivable. Categories in use in the 19th century and before were of national nature when it came to criminal prosecution and adjudication. Let us take piracy as an example. Piracy in the 18th century (and before) was a plague. In particular, commerce and trade suffered from being looted on the High Sea. However, nobody at the time imagined prosecuting pirates internationally by international criminal courts.[373] When in the context of the First Geneva Convention of 1864, Henri Dunant and his fellows expressed the idea of international prosecution, their voices died away — unheard. It was unbelievably difficult to convince the major European States at the end of the 19th century that warfare was not boundless and had to become domesticated and civilized in order to ameliorate the faith of the weakest in armed conflicts, the civilian population, the wounded soldiers, and the war prisoners. It took the Community of (major) States almost two decades in order to come to conclusions on the international *law in war* at the two Peace Conferences at The Hague before World War I. However, they finally agreed on the limits of warfare.

However, the lesson of the outgoing 19th and the commencing 20th century was: If only the community of States was not able yet to agree on limits to the *right to war*, they finally agreed on *the law*

in war and created hereby the fundament of today's *International Humanitarian Law*. E.g. be it the First Geneva Convention of 1864, be it The Hague Convention on Land Warfare, which we already quoted, and which are still in force, they founded the fundament of International Criminal Law.

Failure to Implement the War Crimes Provisions of the Versailles Peace Accord

In the aftermath of World War I, the rules on warfare acquired actuality in a direction that the Member States of the Peace Conferences at The Hague one and two decades ago did not expect to come. In Part VII "Penalties" of the Versailles Peace Accord of June 28, 1919,[374] it was ruled:

> "ARTICLE 227
>
> The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.
>
> In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed. The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.

ARTICLE 228

The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of its allies. The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

ARTICLE 229

Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power. Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the powers concerned. In every case the accused will be entitled to name his own counsel.

ARTICLE 230

The German Government undertakes to furnish all documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders and the just appreciation of responsibility".[375]

Whatever supreme offenses against international morality and sanctity of treaties according to Article 227 paragraph 1 of the Treaty

meant, it sounds melodramatic and does not have a legal meaning. It is meant as a political statement to the (international as well as the respective national) public[376] and was not well received within Germany[377] in particular because it was linked to allegations of the collective accountability of all Germans for the outbreak of World War I, whereby even ordinary people at the epoque were well aware of the fact that wars of aggression, if Germany had started such one, had not been banned by international law. The political implications become obvious when we consider that Wilhelm II was supposed to become a defendant before a "special tribunal", while other persons accused of violations of laws and customs of war should be brought before military tribunals of the Allies and Associated Powers. Whatever Wilhelm II had done as the Commander-in-Chief of the Imperial Armed Forces or as the Head of State, the Allies and Associated Powers wanted him a "special treatment" before a "special court". Furthermore, not the laws of war were the criterion of the adjudication of the former Emperor by this "special court" but "the highest motives of international policy".[378] Moreover, in general terms, it was, and it is a common understanding and not disputed that prosecution of individuals requires the indispensable criterion of guilt. In 1914 when World War I broke out, International Public Law did not know such individual criteria. This did not change until about 40 years later when the military tribunal in Nuremberg made precisely this individual element of crime the basis of its criminal law findings. In 1914 or at the time of the Treaty of Versailles, the state was responsible for violations of international law, but not guilty.[379] The Government of the Kingdom of the Netherlands, where Wilhelm II found political asylum,[380] accepted the Emperor as a political refugee and did not extradite him to the Allies and Associated Powers so that in reality Article 227 of the Treaty became obsolete. However, the wording of Article 227 of the Treaty makes clear that the Allies and Associated Powers did not precisely know what to charge Wilhelm II with. Did he commit War Crimes, Crimes against Humanity, or what did he do wrong? Terms like *War Crimes* or *Crimes against Humanity* were not common even among jurists.

So far, Article 227 of the Versailles Treaty was not at all a perfect starting point for a later war crime. More precise was Article 228, so far as the provision referred to violations of *laws and customs of war*. However, the question is was it precise enough? As we have already seen, Articles 228 to 230 of the Versailles treaty never acquired international significance. Although the Allies demanded the extradition of about 900 individuals, none out of the German military or civilian leadership was extradited to the Allies and Associated Forces. The internal resistance in Germany was too big.[381] If that had happened, it is fair to say that the Allies would not have been prepared for such military trials. The trials before the German Supreme Court, the Reichsgericht,[382] ended up in a complete failure,[383] and the Allies, although having the authority to enforce Articles 228–230 militarily, abstained and gave up.

After this intermezzo in Leipzig, efforts on the level of the League of Nations, which the USA did not become a member of, or on different international levels were small.[384] The so-called Briand-Kellogg Pact or the Ostracize War Treaty of August 27, 1928[385] may be regarded as the biggest step forward into disparaging international aggression and towards peaceful settlements of international disputes. However, the international community was not able to agree on an absolute ban of wars of aggression, and the consequences were soon shown by Nazi Germany that by its Minister of Propaganda, the famous Joseph Göbbels,[386] proclaimed the "total war" on its enemies[387] on February 18, 1943 in the Berlin Palace of Sports. World War II was at dawn and plunged the World into lawlessness.[388] The 20th century showed its sinister side, unfortunately not only with regards to Nazi Germany but there in the first place.

Nuremberg and So On

The Nazis and their Allies committed their atrocities under the watchful eyes of global observers, especially the Allies. Even they

had put their heads in the sand for a (too) long period of time when it came to saving endangered lives of Jewish people or of other minorities from extinction.[389] When the Quadripartite Agreement of August 8, 1945 was set up to regulate German affairs under the Allies' responsibility "for Germany as a whole",[390] the Allies also agreed on the London Statute, which set up the Nuremberg Military Tribunal.[391] The London Statute and the Nuremberg Court applying the principles of the Statute on "major figures of the NS Regime"[392] — nowadays known as the "Nuremberg Principles".[393] Most academic scholars regard them as the cornerstones and the genesis of modern International Criminal Law.[394]

The results of the Nuremberg Military Trial are known and have become part of human history. The same is to be said on all those additional prosecutions of German (and foreign) war criminals from the time of World War II by allied military courts. When the German authorities finally took over the prosecution of World War II crimes, the national history of working up this dark chapter of our history began and is not terminated yet. National Socialism, although it only lasted 12 years, can be compared to stray cancer that made all sectors of the society sick. This clinical picture may have been predominantly worked out under criminal law as far as mass killings are concerned. Other areas of society are in the process of coming to terms with their Nazi past or are waiting to be dealt with. This can be the public administration in all its references, this can be universities. There are no limits to the imagination in this respect.

At the beginning of the 1950s, the Allies slowly withdrew and permitted Germany to prosecute war criminals by its own national authorities. While Germany attempted to comply with its post-Nazi duties, on the international level, various contributors tried to reach a consensus on codifying crimes against International Humanitarian Law, but those attempts all failed to become effective[395] until the days when Europe and the rest of our world faced new international crimes in dimensions that everybody of

us thought of having had become part of humanity's dark history. Anyway, International Humanitarian Law moved forward, as we have already seen. Internationally, since the United Nations came into existence, its Member States agreed on a series of conventions and resolutions, which we should exemplarily reiterate:[396]

- Convention on the Prevention and Punishment of the Crime of Genocide397 of December 9, 1948, which the Federal Republic of Germany became a member of on February 22, 1955,[398]
- Third Geneva Convention on the Treatment of Prisoners of War of August 12, 1949,[399]
- Geneva Convention on the Protection of Civilians in Time of War of August 12, 1949[400] (including the Additional Protocol to the Geneva Conventions of August 12, 1949 on the Protection of Victims of International Armed Conflicts [Protocol I] of June 8, 1977; Additional Protocol to the Geneva Conventions of August 12, 1949 on the Protection of Victims of Non-International Armed Conflicts [Protocol II] of June 8, 1977, Additional Protocol to the Geneva Conventions of August 12, 1949 on the Adoption of a Supplementary Protection Mark of December 8, 2005 [Protocol III]),
- Geneva Refugee Convention of July 28, 1951,[401] which entered into force for the Federal Republic of Germany on April 22, 1954[402] (including the Protocol of January 31, 1967),[403]
- Convention on the Protection of Cultural Property in the Event of Armed Conflicts (Convention of The Hague) of May 14, 1954[404] (including the First Protocol to the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflicts of May 14, 1954; Second Protocol to the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflicts of March 26, 1999),

- Treaty on the Prohibition of Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water of August 5, 1963,[405]
- Treaty on the Non-Proliferation of Nuclear Weapons of July 1, 1968,[406]
- International Covenant on the Elimination of Racial Discrimination of March 7, 1966,[407] which Germany became a member of on June 15, 1969,[408]
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of April 10, 1972,[409]
- Convention on the Elimination of All Forms of Discrimination against Women of December 18, 1979,[410] which entered into force in Germany on August 9, 1985,[411]
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984,[412] in force in Germany on October 31, 1990,[413]
- Convention on the Rights of the Child of November 20, 1989,[414] in force in Germany on April 5, 1992,
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of January 13, 1993,[415]
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention) of September 18, 1997,[416]
- Liability of States for Acts Contrary to International Law[417] of December 12, 2001,

- Convention on the Rights of Persons with Disabilities of December 13, 2006,[418]

Furthermore, the Council of Europe did not remain inactive and created covenants, which affect the legal situation in Europe, which we may exemplarily quote:

- European Welfare Convention of December 11, 1953,[419]
- European Settlement Convention of December 13, 1955,[420]
- European Convention for the Peaceful Settlement of Disputes of April 27, 1957,[421]
- European Social Charter of October 18, 1961,[422]
- European Agreement on Transfer of Responsibility for Refugees of October 16, 1986,[423]
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of November 26, 1987,[424]
- European Charter on Regional and Minority Languages of November 5, 1992,[425] and
- Framework Convention on the Protection of National Minorities of February 1, 1995.[426]

As regards the international and the regional arena, those international instruments certainly have their own weight and significance in political processes in general. In this respect, they are part of international or regional efforts to improve the lot of persons affected by the Conventions, and to remove this protection from the national context, since only the establishment of protection at the international level gives rise to the expectation that states will not then be able to deal with protection at their own discretion. However, their importance goes beyond this.[427] Whenever International

Criminal Law provisions are applied, these conventions must be used as a basis for interpretation. Whether a child soldier is to be regarded as a slave does not normally follow from the provisions of the Rome Statute, for example. Forced prostitution of members of ethnic minorities in armed conflicts only acquires its complete picture when humanitarian protection provisions are added to the Rome Statute, which are found in other conventions or agreements. The application of International Criminal Law, therefore, requires a permanent synoptic view not only of the criminal provisions themselves but also of the regulations that lie behind these criminal provisions and make them understandable only in the context of the crime situation to be assessed. It is often also the case that certain regulations of International Humanitarian Law can only be understood against a specific historical background. This makes the application of International Criminal Law rather difficult, because a complex methodology is hereby required. Additionally, we may not only focus on international conventions. Such conventions finally are compromises between signatory states. By their very nature, compromises are deliberately incomplete. Both international and national authorities, which deal with International Criminal Law in the first place and thus with humanitarian International Criminal Law in the second place, have no choice but to resort to customary international law[428] to fill the gaps. This is the case, for example, with the protection of victims in civil wars, where there are no conventions. For example, Additional Protocol II[429] to the Geneva Conventions of 12 August 1949 on the protection of victims of non-international armed conflicts is woefully incomplete and its incompleteness is well known.[430] Under the auspices of the International Committee of the Red Cross, a group of renowned researchers compiled a collection of customary rules on international and non-international armed conflicts and supporting documents thereto. This expert report is one of the most important publications in the field of International Humanitarian Law[431] and can be used as a source of customary international law in the international and national prosecution of war crimes. Its forensic importance should not be underestimated.

Another issue related to violations of International Humanitarian Law is about what is to happen to victims of such violations. If such violations are subjects to court proceedings — nationally or internationally — does International Humanitarian Law mandatorily require their participation in such proceedings, what is the aim of such participation, are they protected by law if their life and limbs are under threat by such participation? All these issues are about the protection of victims and witnesses, especially when it comes to criminal proceedings. Is this a human right under International (Criminal or Humanitarian) Law, are there minimum standards for it?[432] These questions are of immense practical and forensic importance and, if victim and witness protection is taken seriously, require a considerable logistical and financial effort in their implementation.[433] Where victims and witnesses are concerned, we are not talking exclusively about their compensation, even though victims of violations of International Humanitarian Law are certainly the most likely to need such compensation. We are talking about injuries, whether physical, psychological or affecting their homeland and their property. Whoever witnessed executions as an uninvolved eyewitness, whoever witnessed (mass) rapes, whoever saw people, especially children, starve or die of thirst, their soul is forever branded. If it is then a matter of coming to terms with this historical event — no matter in what proceedings and before what court — victims, as well as witnesses, must be preserved in their physical and mental health and have the right to have their state of mind, fears and future prospects taken seriously prior to, during, and after the trial. In addition, victims and other eyewitnesses of both terrorist attacks and war crimes, when they seek justice or testify as witnesses in the process of finding justice, must fear of being subjected to persecution from their home countries, their neighbors, and often from their own family members. The ICTY and ICTR have tried to take this into account during their work by setting up appropriate witness protection programs and establishing appropriate facilities and institutions. The situation is similar with the ICC. The protection efforts were not always successful. German

courts also take victim and witness protection into account. Details of international and national witness and victim protection would easily fill another lecture. We must leave it with basic considerations. In my opinion,[434] in the absence of binding international regulations, the protection of witnesses and victims is anchored in the protection of the human dignity of those affected. After all, if institutions expect witnesses to share their knowledge with them, and can even, under certain circumstances, force them to do so, it is an inalienable obligation to draw the necessary conclusions from the protection of the human dignity of those affected and to provide them with the best possible protection. In implementing such protection obligations, international courts are dependent on the support of the members of the international community. However, they too must respect human dignity and are therefore obliged to provide the international courts with the best possible support. Unfortunately, not all members of the international community are aware of this unlimited and unrestricted obligation and though act selectively.

The Federal Republic of Germany is a Member State of all those Conventions, Treaties, and Covenants, which we went through. According to Article 59 paragraph 2 of the Basic Law, the German Parliament adopted them and transformed them into national law with the consequence that consecutively a lot of national Statutes had to be amended in order to comply with Germany's international obligations deriving from the international instruments. Later, we come to the German Criminal Code on International Crimes. It is not premature to say that in applying the provisions of the said Code, German courts are confronted with the same methodological problems.

Moving Forward to International Criminal Law

In 1991 in the decline of communist regimes all over Europe, the Federal Socialist Republic of Yugoslavia (hereinafter: FSRY)

began to dismantle. The process began in Slovenia — briefly followed by Croatia. Both countries sought independence from Yugoslavia and declared their independent sovereignty in June 1991. The independence process resulted in wars,[435] which affected almost all former Yugoslavia. The conflict reached a boiling point in Bosnia and Herzegovina.[436] Strange enough and as a sinister reminder: Ordinary citizens of this world were sitting in their parlors and could watch on TV the first time when war crimes were committed "live", e.g. when snipers shot civilians to death in besieged Sarajevo or women and children were segregated from men in Srebrenica before the men in July 1995 became victims of the first European genocide since 1945.[437] At the time, the Cold War had had already become history and this new era impacted the voting situation in the Security Council of United Nations. The permanent members of the council used their veto more wisely as it was done prior to the collapse of the iron curtain. Faced with brutal killings and other serious crimes committed in the conflict zones of FSRY, the UN Security Council established the International Tribunal for the Former Yugoslavia (hereinafter: ICTY) and provided the new international judicial institution for material criminal law, which formed the base to prosecution and adjudication of war crimes "having been committed between 1 January 1991 and a date to be determined by the Security Council after restoration of Peace".[438] The establishment of such an international judicial body as a sub-organ of the Security Council was unheard and unprecedented.[439] After the ICTY was established, the Rwanda Civil War drew the world's attention to Africa, especially when genocide on Tutsi, Twa, and moderate Hutu people was committed between April 7, 1994 and December 31, 1994. As a consequence, the UN Security Council installed the "International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994", briefly

the International Tribunal for Rwanda in Arusha[440] (hereinafter: ICTR). Those two steps of UNO[441] focused on Yugoslavia and Rwanda represent in general terms the turning point in a decades-long struggle on codifying crimes against "Rules in War".[442] That turn finally resulted in the Rome Statute[443] of July 17, 1998, which after entry into force established the International Criminal Court (hereinafter: ICC) at The Hague/Netherlands.[444] It should be noted that, unlike the ICTY and ICTR, the ICC is not a UN body but an independent new international organization with its own legal identity[445] and with criminal jurisdiction subsidiary vis-à-vis national war crime prosecution, which precedes.[446]

Germany supported and favored the efforts towards International Humanitarian Law codifications and towards a permanent international criminal court very much; and it is still contributing most to the court's budget besides Japan.[447] So, Germany became one of the founding and signatory States when the Rome Conference concluded the Statute, which entered into force on July 1, 2002. With regard to Germany, Article 59 paragraph 2 sentence 1 of the Basic Law of May 23, 1949 by the act of Parliament of December 4, 2000, Germany merged the Rome Statute into national law.[448] As Germany ratified the Rome Statute, the country is legally bound to international legal cooperation with the ICC according to Articles 86–102 of the Statute. Internally, this cooperation follows the path, as set forth by the Federal Act on International Cooperation on Criminal Matters Act of December 23, 1982,[449] as last amended by Article 1 of the Act of July 21, 2012,[450] unless the Statute provides for special arrangements.

Do Not Overburden International Institutions

The ICC is not out of the critical political focus of the international community[451] (proceedings too slow, too expensive, too personal-intensive, etc.), and that will go on. As it once was

with Africa (in particular with Sudan and Kenya), in the future, there will be different topics of concern, which are related to the ICC. However, the attitude of international politics does surprise whenever new crisis situations arise somewhere on this globe. First, political helplessness pops up but then secondly voices call for international criminal interventions. If not the ICC is requested, then new judicial institutions show up on the agendas of demand. The path to the ICC's establishment was rocky and the ICC is under constant "surveillance". However, we must know international courts are not a panacea. When international terrorism was a rising star, it owed its rise to international political failure. Those who supported the Taliban with weapons should not be surprised if these weapons suddenly appeared in the hands of Osama bin Laden: Whoever sows the wind reaps the storm. Even in the medieval Gesta Romanorum, it was aptly stated "Quidquid agis prudenter agas and respice finem!" The fact that then, in the face of growing worldwide terror and paralyzing political agony as a miracle cure, demands for international terror prosecution were raised as a treatment only reinforced the impression that the locomotive had no steam in its boiler. As with many other things, judicial institutions at the international level shall not become a matter of inflation. Moderate and low inflation rates are good for the national economy. If the rates gallop, they cause impoverishment of large parts of the population. Let us give the ICC the chance of probation and all the time it takes the court to do so.

The side effect of this was the depersonalization of entire army bodies; the individual soldier counted only on his ability to function.

LECTURE 5:

International Criminal Law in the National Arena

The Criminal Code of Crimes Against International Law

With regards to the ICC's substance criminal jurisdiction on genocide, crimes against humanity, war crimes, and the crime of aggression[452] pursuant to Article 5 of the Rome Statute and taking into account the subsidiarity or complementarity of such international jurisdiction,[453] Germany was called upon to enact adequate national legislation in order to preserve its preceding national jurisdiction on serious crimes as set up by the Statute.[454] By Federal Act of 26 June 2002,[455] Germany enacted "Völkerstrafgesetzbuch" (= Code of Crimes against International Law [hereinafter: CCIL]), which is complementary to the German Criminal Code of 15 May 1871.[456] CCIL now represents the base for German authorities to prosecute crimes from the Rome Statute, nationally. So far, Germany reclaims universal jurisdiction.[457] Other countries, e.g. Bosnia and Herzegovina, went a different way. They did not create a "special" Criminal Code on International Crimes but incorporated such criminal regulations in their existing criminal codes.[458]

German Authorities in Charge

Few words on the authorities of Germany taking care of war crime prosecution seem to be adequate: Germany has concentrated war crime prosecution on the federal level. The Federal Prosecutor General and his office are challenged to conduct war crime investigations[459] and prosecution.[460] Such a concentration of responsibilities in central authorities, which also have a statutory mandate to maintain the Federal Republic of Germany's external contacts in the police and criminal law fields, makes sense. It is

further underlined by the fact that investigations into current war crimes are investigations abroad and that the evidence required for the conviction of the perpetrators is, of course and predominantly, located in third countries. Unlike e.g. the USA, Germany has not established a Federal Court with first instance jurisdiction on criminal matters. It is moreover a constitutional rule, as well as tradition, that the execution of federal statutes is considered as a matter of administration by the authorities of the federal states and only exceptionally by authorities of the Federation.[461] Against the background that Article 2 paragraph 1 of Protocol No. 7 of 22 November 1984[462] to the Convention for the Protection of Human Rights and Fundamental Freedoms provides for the possibility of appeal against criminal judgments and that the exceptional provision of Article 2 paragraph 2 of the Protocol calls for caution, the federal legislature decided to establish jurisdiction for charges brought by the Federal Prosecutor General at the higher regional courts and to concentrate this jurisdiction at those higher regional courts which are established at the seat of the respective state government.[463] Moreover, the jurisdiction of the Higher Regional Courts according to Section 120 of the Court Constitution Act is not limited to criminal proceedings dealing with violations of International Humanitarian Law. It goes far beyond this and, in these times, focuses on the adjudication of (international and domestic) terrorism. All offenses that are directed against the existence or safety of the Federal Republic of Germany (including its states)[464] and its constitutional basic order are assigned to the higher regional courts,[465] which pass verdicts there through so-called State Protection Senates.[466] These Senates are specialized panels within the court organization of the respective higher regional courts. They exercise the jurisdiction of the Federation, not of the Länder, but nevertheless remain Länder courts. In connection with the criminal prosecution of (foreign) terrorism, it must be emphasized that terrorist offenses, committed particularly in Afghanistan, Iraq, and Syria, also often include violations of International Humanitarian Law. This mixture of terror offenses and violations of International Humanitarian

Law has given rise to the phenomenon of "asymmetric wars" as a new challenge not only under international law but also under national criminal law.[467] For example, Jihad aims at the expulsion of parts of the population (such as the Yezidi in Syria or Iraq) or at their enslavement. Looking backwards, as Jihad presents itself, it also aims at the destruction of the cultural assets of humankind. Indoctrinations are commonplace and part of the Islamists' terrorist program. These, in turn, also include children and young people who are not only indoctrinated religiously but are also trained in the use of weapons in order then to be used as fighters or suicide bombers. Another phenomenon of practical importance should not be hidden. States are responsible to implement International Humanitarian Law. These obligations can be burdensome — also in financial terms. Military operations in crisis areas, be it Afghanistan, Iraq, Libya, or be it Syria, prove, as daily experience shows, to be protracted and generally also personnel intensive. It becomes increasingly difficult to justify such operations politically in the home countries, as the duration of the mission increases. The governments concerned are therefore increasingly inclined to outsource military or security tasks in the areas of operation and to entrust their performance to private companies. If we look closer at them, we must conclude that such companies are war entrepreneurs. The tendency is somewhat backward-looking and seems like the mercenary system of the early modern age, where war entrepreneurs — like the Duke of Friedland, Generalissimos Wallenstein, actually Albrecht Wenzel Eusebius von Waldstein (born on September 24, 1583 in Hermanitz on the Elbe; died [notably murdered by Imperial agents] on February 25, 1634 in Eger/today Czech Republic), who had already become known to us, handled this business as Imperial Commander-in-Chief and did it though to his own advantage during the Thirty Years' War. Identifying who bears (state or individual) responsibility, especially when these war enterprises exceed their orders, is a difficult task not to be underestimated in the problems, which the collection of solid evidence will cause.[468] In this scope of jurisdiction, higher regional courts in Germany ought to comply with the full range of

International Humanitarian Law, which we went through earlier. In a composition of regularly five professional judges (without jury or lay judges), the senates pass their verdicts in the first instance.

Criminal proceedings at the main trial in Germany are not conducted as adversarial or parties' proceedings. The indictment of the prosecutor's office describes the facts of a historical event and alleges the criminal charges thereto. After having confirmed the indictment, German courts take evidence *ex officio*, the prosecutor and defense may motion for taking additional evidence, but Section 244 of the Criminal Procedure Code allows German penal courts to reject such motions under the conditions as set forth. The courts, in particular their presiding judges, direct the main hearings and are not limited to monitoring the regularity of the taking of evidence by the parties. Observers not familiar with this kind of proceeding are often stroke by the predominance of German penal judges in the courtrooms. So it is, when high courts try their cases related to humanitarian law.

Appeals against those high courts' decisions (verdicts and other procedural decisions) are allowed and to be decided by the Federal Supreme Court of Justice in Karlsruhe.[469, 470] Appeals filed against verdicts or decisions of the afore-said senates of the higher regional courts are dealt with by a special senate within the Federal Supreme Court of Justice. When it comes to challenging verdicts, German criminal procedural law does not provide for a full review in the sense that the Federal Supreme Court of Justice, for its part, collects evidence or makes its own determinations as to the guilt of the accused.[471] The review of the verdict is only a limited review, namely whether the higher regional court correctly applied substantive criminal law to a factual situation that it had established in course of its own proceeding. If no specific procedural objections are raised, the Federal Supreme Court of Justice is bound by the facts established by the higher regional court. Procedural objections must be raised in a specified manner; they concern the question of

whether the higher regional court correctly applied the procedural rules of the Code of Criminal Procedure in establishing the facts of the case.[472] The procedural objections submitted must be raised in a specified manner in such a way that the Federal Supreme Court of Justice is enabled to examine whether the alleged violation of procedural law by the higher regional court has taken place. If this is not done, the raised procedural objection is incomplete and thus inadmissible and to be rejected. If the examination upon admissible procedural objections shows that the violation of procedural rules did not take place, the procedural objection is ill-founded and thus to be rejected. If the procedural objections are well-founded, a further step is then taken to examine whether the verdict of the higher regional court is based on the objection that has been established. In other words: whether the founded objection is of relevance. If this is missing, the complaint is again ill-founded. In the case of well-founded procedural objections that show a relevant violation of the procedural law on which the contested verdict is based, the Federal Supreme Court of Justice sets aside the verdict and refers the case back to another criminal senate of the higher regional court for retrial and decision.

Challenges in Proceedings

German High Courts when adjudicating international crimes do not apply any particular or special procedural law but the Criminal Procedure Code, which is in use in ordinary criminal proceedings before all German courts. Whoever is indicted because of crimes, as set forth by the German Criminal Code of Crimes against International Law, will not experience a "special" or "particular" treatment at trial. Insofar, the principle of equality before law (Article 3 paragraph 1 of the Basic Law) is respected.

However, that is what proceedings before the High Courts have in common with the rest of the penal judiciary. The rest is quite

different. As we have already found, violations of Humanitarian Law as set forth by the German Criminal Code of Crimes against International Law are an exact copy of those crimes that the Rome Statute has enshrined. They share the same interpretation problems, which are resolvable, as the former international criminal courts have already produced quite an impressive case law or jurisprudence, which German courts consult or should consult. More importantly, when International Criminal Law slowly came into existence, academic scholars at once took interest in the new discipline in being. In the meantime, the courts dealing with crimes against international law can draw on rich academic literature from the German-speaking world. This has already reached such an extent that it is only manageable with some effort. Added to this are the no less numerous voices, especially from the Anglo-American, Spanish, French, and Italian-speaking areas. The questions of interpretation concerning substantive criminal law that arise in criminal proceedings before the Higher Regional Courts can be resolved. However, knowledge of foreign languages mentioned is sometimes necessary, which cannot be demanded or expected in ordinary criminal proceedings before German courts. In addition, the German Federal Court of Justice is also increasingly producing case law in international criminal law that can guide the higher regional courts. We will come to this Supreme Court jurisprudence in our case studies.

The problems lay in establishing the facts and therefore in the evidentiary proceeding. They are numerous, multi-layered, and often can only be resolved with considerable expenditure of personnel and time. A certain inventiveness often does no harm, as far as the Code of Criminal Procedure allows unorthodox methods. German forensic experience also teaches that the accused violations of international law often enough pair with all conceivable manifestations of international terrorism. This does not make it any easier to present evidence. Having said this, it can already be stated at this point that no one should expect a “short trial” for

crimes against international law. It is not possible to address all the problems of fact and evidence that may arise. However, I would like to present a selection that illustrates the procedural difficulties.

As with international terrorism alike we are talking about offenses committed abroad. The courts do not only have the offender but all information and evidence are coming from beyond the German borders and from countries, which often do not cooperate with Germany or which are factually not in the position to deliver requested legal assistance because they are still at war or in an armed conflict, which hinders their authorities to do the job even if they are willing to do so. Eyewitnesses of the crime concerned are living there but the foreign authorities do not know anything about their whereabouts. If foreign authorities know where they are living, they do not possess passports, the pre-conditions for a visa to be issued. Even if important witnesses living abroad are found and willing to testify, it is a Sisyphean challenge to bring them into the courtroom. They may be victim witnesses, witnesses under threat, etc. The court's care requires that they be given the best possible protection, which often enough begins in their home country and must continue beyond the time after their testimony. This represents a multiple challenge, includes German embassies, domestic immigration offices, social welfare authorities, and finally witness protection services provided for by German Police. Often enough, we are talking about such witnesses, who have a special social background. If they agree to come to Germany, they insist on being accompanied by their families, who then must be cared for as well. Video link interrogations are not a solution. Such hearings take place in an environment that is often dangerous for the witnesses, in which German authorities cannot take protective measures and the foreign authorities requested to provide the necessary assistance cannot or will not offer the necessary protection. Often, foreign authorities also lack the technical equipment that would make such Internet interrogations possible in the first place. In terms of establishing the credibility of such witnesses, only little is known

about the witnesses' backgrounds. In events involving war or other crimes against international law, it is generally difficult to decide exactly who is the perpetrator and who the witness. Witnesses from crisis areas in the Near and Middle East, Afghanistan, or Africa also have a completely different socio-cultural understanding of the role of a witness or the duty of truth incumbent upon them. In countries with a still living tribal culture, it is often the tribal elder who determines what the truth is; witnesses adhere to these guidelines because they must fear ostracism by their tribe. If a crisis area is marked by tribal culture, it is often also the tribes that carry the conflict and have combatant status. Such tribal conflicts then continue in the courtroom, where it is then part of the dispute to harm the opposing tribe through witness statements. In such constellations, the duty of truth is rather secondary.

The second pillar of establishing truth or guilt is documents that are often not produced by German authorities but found in the area of the crime spot or elsewhere in a foreign country. Thus, the reliability of such documents comes into question. German criminal procedural law is characterized by the recognition of the Federal Court of Justice that it is not the task of a trial to reconstruct the investigations of the police and public prosecutor's office. Thus the "chain of evidence", which has a lasting impact on Anglo-American criminal procedure, does not play a dominant role in German criminal courts. However, this does not relieve German criminal courts of the duty to examine whether the introduction of documents — regardless of where they come from — is opposed by prohibitions on the collection of evidence, which are not numerous and usually presuppose the most serious violations of rights on the part of the accused, or by prohibitions on the use of evidence. In case of doubt, these principles can lead to the court having to deal more closely with the origin of the evidence documents.

The background origins of evidence documents are various and vary the assessments to be made on them. Again, we are talking

about crisis regions, where combats forth and back lead to the finding that warring groups gain and lose a territory. Whenever they conquer a region, their members seize documents from the defeated opponent. Warriors are neither educated nor trained in seizing documents in a proper procedural way. In particular in Iraq, when the Islamic State was defeated, non-Iraqi troops took part in cleansing the area from the caliphate. On this occasion, regular soldiers, as well as members of the military intelligence services, laid their hands-on enemy documents, which they got hold of, and took them away. However, neither soldiers nor members of the secret services are trained in seizing or confiscating documents according to the rules of the Code of Criminal Procedure. Furthermore, as chaos provides for opportunities, documents later submitted to courts have been stolen or embezzled in governmental offices or have been unlawfully produced using official papers and seals. With all these variations of origin, only one thing is certain, that the documents will not be handled and submitted to the court by the investigating authorities provided for by law (including foreign law). According to German legal understanding, their dubious origin does not make the documents unusable without further ado. Nevertheless, the court will try to trace their way back to their origin by taking additional evidence — if only in order to rule out that they have not been coerced from their original owner by torture or similar human rights violations. As with witnesses, tracing can be a very rocky, and in any case very time-consuming, road when it comes to the evidential value of documents. The tracing requires witnesses so that we then return to our starting point.

Crisis areas are usually well monitored by (foreign and domestic) secret services (civilian and military units).[473] Next to them, usually, when the fighting dies down and civil emergencies (hunger, epidemics) follow, so-called non-governmental organizations with completely different objectives emerge. Secret services, as well as these organizations, often have valuable information about the situation on the ground, the context, and about involved

and uninvolved persons. In contrast to some other countries, German criminal proceedings have no problems with intelligence information, because it can be assumed that this information was obtained in compliance with the laws of the intelligence services. However, the procurement of information by humanitarian or other organizations working in the field must be looked at more closely. Intelligence agencies, however, classify their information[474] and generally do not disclose the names of their staff; in order to protect their staff, many of the organizations working in the field impose confidentiality obligations by their statutes and swear their staff to this confidentiality. This makes it extremely difficult to obtain evidence from them in public criminal proceedings. It is a very sensitive and delicate issue to convince the secret services to declassify their information. However, such efforts are not futile. If the court offers the secret services an appropriate environment[475] (exclusion of the public, interrogation at a different location by video technology, alienation means to keep the identity secret), sometimes secret service employees are also named as witnesses, although they are usually only granted limited permission to testify on precisely defined subjects. Foreign secret services, on the other hand, keep their distance from German criminal proceedings. The situation is similar to the humanitarian organizations mentioned above. If employees of these organizations testify as witnesses, they often lose their credibility on the ground. This puts humanitarian or other aid activities at risk.

Those are some of the various procedural problems. We might find the time to discuss related issues in more detail while look at the case studies.

Endnotes

1 We have to spare out the Law of supra-national institutions, as e.g. the European Union. Having started on the fundament of the founding treaties (European Community of Coal and Steel of April 18, 1951; European Economic Community of March 25, 1957; European Atomic Energy Community of March 25, 1957), which, by nature, were international treaties, the European Union has turned after fifty years in existence into a phenomenon, which widely differs from other international institutions so that a completely separate contemplation of it will be needed and is mandatory.

2 In the national arena, academics are therefore wondering whether law can still be granted at all in this growing flood of standards and norms (R. Holtschneider, *Normenflut und Rechtsversagen. Wie wirksam sind rechtliche Regelungen?* (Nomos 1991).

3 C. Callies, *Staatsrecht III. Bezüge zum Völker- und Europarecht* (2nd edn, C.H. Beck 2018), 12 ff.

4 K.H. Ziegler, *Völkerrechtsgeschichte* (2nd edn, C.H. Beck 2007) 35 ff.; F. Berber, *Lehrbuch des Völkerrechts, Erster Band: Allgemeines Friedensrecht* (2nd edn, C.H. Beck 1975) 1–9; A. Verdross and B. Simma, *Universelles Völkerrecht. Theorie und Praxis* (3rd edn, Duncker & Humblot 1984) 1 ff.

5 K.H. Ziegler, op. cit., 35–44; A. Verdross and B. Simma, op. cit., 1 ff.; F. Berber, op. cit., 2.

6 F. Berber, op. cit., 3 f.

7 I. Seidl-Hohenveldern, *Völkerrecht* (6th edn, C. Heymann 1987) 1; F. Berber, op. cit., 7 f. and 9; A. Verdross and B. Simma, op. cit., 6; R. Geiger, *Staatsrecht III. Bezüge des Grundgesetzes zum Völker- und Europarecht* (7th edn, C.H. Beck 2018) 4 ff.; F. Schorkopf, *Staatsrecht der internationalen Beziehungen* (C.H. Beck 2017) 4; C. Callies, op. cit., 8.

8 F. Berber, op. cit., 163–165; K. Doehring, *Völkerrecht* (2nd edn, C.F. Müller 2004) 120; A. Verdross and B. Simma, op. cit., 247–249; I. Seidl-Hohenveldern, op. cit., 172 f.

9 F. Berber, op. cit., 167; K. Doehring, op. cit., 120; A. Verdross and B. Simma, op. cit., 252 f.; I. Seidl-Hohenveldern, *Völkerrecht* op. cit., 195; G.B. Hafkemeyer, *Der Rechtsstatus des Souveränen Malteser-Ritter-Ordens als Völkerrechtssubjekt ohne Gebietshoheit* (Dröge 1955).

10 K. Doehring, op. cit., 120; K.H. Ziegler, op. cit., 182 and 186 (referring to Article 7 of the Geneva Convention on the Amelioration of the Condition of the Wounded in Armed Forces of August 22, 1864 [text in W.G. Grewe (ed.), *Fontes Historiae Iuris Gentium, Quellen zur Geschichte des Völkerrechts* (Band III, Teilband 1, De Gruyter 1992) 551 ff.), which established the Red Cross as symbol of neutrality). F. Berber, op. cit., 167–169; A. Verdross and B. Simma, op. cit., 253 f.; I. Seidl-Hohenveldern, op. cit., 194 f.

[11] I. Seidl-Hohenveldern, op. cit., 1; F. Berber, op. cit., 7 f. and 9; A. Verdross and B. Simma, op. cit., 6.

[12] K.H. Ziegler, op. cit., 117 ff.

[13] K. Doehring, op. cit., 10 (no "international legal nihilsm").

[14] Genesis 4.9.

[15] M. Will, "Völkerrecht und nationales Recht" (2015) 11 Juristische Ausbildung 1164.

[16] T.M. Plautus (ca. 254–184 b.c.), *Asinaria*; T. Hobbes, *Elementorum philosophiae sectio tertia de cive* (Parisiis 1642) (in particular, on Hobbes' radical individualistic views in this very context see A. Verdross and B. Simma, op. cit., 14; O. Höffe, *Lexikon der Ethik* (7th edn, C.H. Beck 2008), "Herrschaft", p. 132 — also see W. Hennis and H. Maier, "Der Herrschaftsvertrag", in *Politica — Abhandlungen und Texte zur politischen Wissenschaft* (Luchterhand 1965) 131 f.; D. von der Pfordten, *Rechtsethik* (2nd edn, C.H. Beck 2011), 320, 325. With respect to ethics, moral and politics, K.H. Nusser, "Politische Ethik", in A. Pieper and U. Thurnherr (eds.), *Angewandte Ethik. Eine Einführung* (C.H. Beck 1998) 176 ff.; see also F. Berber, op. cit., 9 ff.; A. Verdross and B. Simma, op. cit., 11; G. Jellinek, *Die rechtliche Natur der Staatsverträge* (A. Hölder 1880) 2 f., 45.

[17] K. Doehring, op. cit., 3 ff., especially 10 f.

[18] Even not through the Vienna Convention on the Law of Treaties of May 23, 1969 (UNTS 1155, p. 331).

[19] On the problem of contracts at the expense of third parties ("*pacta tertiis nec prosunt nec nocent*") see F. Berber, op. cit., 62, 463 f.; K. Doehring, op. cit., 154 f.; A. Verdross and B. Simma, op. cit., 486 f.

[20] UNTS vol. 1155, p. 331. However, the Convention does not reply to all relevant questions within the law of treaties, e.g. it does not rule on the problem of what is to happen with a treaty between two states, which agree to give a certain territory a new status — maybe as an independent entity? May those signatory states expect the international community to respect and recognize the status of such territories? (K. Doehring, op. cit., 154 f.).

[21] For an overview, see F. Berber, op. cit., 2. This is connected with the question of the validity of law, including international law, which over the centuries natural law scholars have sought to answer and thus repeatedly raised the problem of "material justice" (see H. Welzel, *Naturrecht und materiale Gerechtigkeit* (4th edn, Vandenhoeck & Ruprecht 1962), which today we are inclined to answer at the procedural level by asking about the "fairness of the proceedings". However, not everything that has been produced in a fair trial is in the end materially just. Even with fair results, there must be a substantive-legal corrective. However, to define this by general criteria borders on squaring the circle.

[22] One might object to such an approach the existence of the international legal figure of "*ius cogens*" or "mandatory international rules". We may find time and opportunity to discuss that matter in more detail. However, International Public Law does not know a normative hierarchy, and "*ius cogens*" if existing would require such a legal ranking order. See K. Doehring, op. cit., 132; also see the Draft of the International Law Commission on Responsibility of States for Internationally Wrongful Acts of 2001 (the text appears in the annex to General

Assembly resolution 56/83 of December 12, 2001, and was corrected by document A/56/49 [Vol. I/Corr.4]).

23 K. Doehring, op. cit., 8.

24 U. Volkmann, *Rechtsphilosophie* (C.H. Beck 2018) 151–187; R. Zippelius, *Das Wesen des Rechts. Eine Einführung in die Rechtsphilosophie* (3rd edn, C.H. Beck 1973) 32 f.; D. von der Pfordten, op. cit., 63 ff.; F. Berber, op. cit., 31 ff.

25 BGBl 1949, p. 1.

26 The process is still mirrored by the importance and significance of case law in Anglo-American systems that are based upon such legal traditions.

27 BVerfG NJW, 2009, p. 1469, Rn. 62; also C. Grüneberg, "Einleitung vor §1 Rn. 22", in *Palandt, Bürgerliches Gesetzbuch mit Nebengesetzen* (79th edn, C.H. Beck 2020).

28 Article 38 paragraph 1 of the ICJ Statute lists the sources of law, which the Court considers to apply on cases submitted:

a) international conventions, whether general or particular, establishing rules expressively recognized by the contesting states;
b) international custom, as evidence of a general practice accepted by law;
c) the general principles of law recognized by civilized nations;
d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Against the background of increasing activities at the international level and new players appearing there, it is adequate to wonder whether Article 38 paragraph 1 of the ICJ Statute is exhaustive or open to new legal developments already visible, e.g. internal decisions of international organizations with an external signal effect (see F. Schorkopf, op. cit., 6; R. Geiger, op. cit., 8 ff., 81.

29 F. Schorkopf, op. cit., 15; C. Callies, op. cit., 9 ff.; R. Geiger, op. cit., 8 f.

30 K. Doehring, op. cit., 444 ff.; A. Verdross and B. Simma, op. cit., 290 f.

31 See K. Doehring, op. cit., 302 ff.; A. Verdross and B. Simma, op. cit., 53 ff.; F. Berber, op. cit., 94 ff.; F. Schorkopf, op. cit., 17 ff.; C. Callies, op. cit., 93 ff.; H. Sauer, *Staatsrecht III. Auswärtige Gewalt, Bezüge des Grundgesetzes zu Völker- und Europarecht* (5th edn, C.H. Beck 2018) 86 ff.; R. Geiger, op. cit., 14 ff.

32 F. Berber, op. cit., 95; M. Herdegen, "Art. 25 Rn. 5", in T. Maunz, G. Dürig, R. Herzog, R. Scholz, M. Herdegen and H.H. Klein (eds.), *Grundgesetz Kommentar* (C.H. Beck 2016).

33 For Middle and East Europe, see K. Skubiszewski, "Völkerrecht und Landesrecht: Regelungen und Erfahrungen in Mittel- und Osteuropa", in W. Fiedler and G. Ress (eds.), *Verfassungsrecht und Völkerrecht. Gedächtnisschrift für Wilhelm Karl Geck* (Heymann 1989) 777 ff.

34 M. Herdegen, "Art. 25 Rn. 4", op. cit., 2016.

35 Scotland has a quite different legal system, which makes it unique on the British Isles. See F. Berber, op. cit., 96–98.

36 M. Herdegen, "Art. 25 Rn. 23", op. cit., 2016.

37 Ibid., "Art. 25 Rn. 24"; F. Berber, op. cit., 98 f.

38 Ibid., 103 f.

39 The story goes that Federal Chancellor Dr. Helmut Kohl obstructed Barbie's extradition to Germany. Dr. Kohl was afraid that his extradition and consecutive

trial in Germany would re-inflame the debate on war criminals inside Germany, which he thought was to be over.

40 F. Schorkopf, op. cit., 22 ff.; R. Geiger, op. cit., 15.

41 G.A. Craig, *Deutsche Geschichte 1866–1945. Vom Norddeutschen Bund bis zum Ende des Dritten Reiches* (3rd edn, C.H. Beck 1981) 15 ff.; M. Stürmer, *Die Deutschen und ihre Nation, Band 4: Das ruhelose Reich. Deutschland 1866–1928* (Siedler 1981) 143 ff.; G. Mann, *Deutsche Geschichte des 19. und 20. Jahrhunderts* (Fischer 1992) 316 ff.

42 G.A. Craig, op. cit., 22 ff.; A. Kraus, *Geschichte Bayerns. Von den Anfängen bis zur Gegenwart* (3rd edn, C.H. Beck 2004) 518 ff.; 533 ff.

43 Art. 63 paragraph 1.

44 Art. 4 listed the matters of legislation, which were reserved to the federal lawmaker.

45 Prussia had 17 out of 43 votes in the Council. The assent needed a relative majority.

46 Article 11 paragraph 2 of the Constitution in conjunction with Article 28 of the Constitution.

47 ICJ Judgment of February 5, 1970 (Barcelona Traction Case) (ICJ Reports 1970, p. 34 ff.); K. Doehring, op. cit., 383 ff.; A. Verdross and B. Simma, op. cit., 817 f.; W.K. Geck, "Diplomatischer Schutz", in J. Schlochauer et al. (eds.), *Strupps Wörterbuch des Völkerrechts* (2nd edn, vol. 2, de Gruyter 1960) 379 ff.; M. Dauster, "Der Anspruch des Staatsangehörigen auf Schutz gegenüber dem Ausland" (1990) 12 Jura 26 ff.

48 Vienna Convention of April 18, 1961 on Diplomatic Relations (UNTS 500, p. 95); Vienna Convention of April 24, 1963 on Consular Relations (UNTS 596, p. 261).

49 G.A. Craig, op. cit., 31 ff.; M. Stürmer, *Die Deutschen und ihre Nation, Band III: Das ruhelose Reich. Deutschland 1866–1918* (Siedler 1985) 162–165; K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland, Band V: Die geschichtlichen Grundlagen des deutschen Staatsrechts* (C.H. Beck 2000) 319 f.

50 R. Poidevin and J. Bariéty, *Deutschland und Frankreich, Die Geschichte ihrer Beziehungen 1815–1975* (C.H. Beck 1982) 100 ff.

51 For his biography, E. Engelberg, *Bismarck. Urpreußе und Reichsgründer* (Akademie-Verlag 1985) 727 ff.

52 M. Stürmer, op. cit., 1985, 163/165; G.A. Craig, op. cit., 33 f.; K. Stern, op. cit., 2000, 320 f.

53 J. Willms, *Napoleon III., Frankreichs letzter Kaiser* (C.H. Beck 2008) 257 ff.

54 The First German Empire was the Holy Roman Empire of German Nation, which vanished on August 6, 1806 when the last Emperor Francis II put down the Holy Roman Crown (and became Francis I as the first Austrian Emperor) (abdication degree of Francis II of August 6, 1806: H. Rosendorfer, *Deutsche Geschichte. Ein Versuch: Friedrich der Große, Maria Theresia und das Ende des Alten Reiches* (Nymphenburger 2010) 361 and 362; K. Stern, op. cit., 2000, 176 and 178).

55 RGBl. 1871, p. 63.

56 Article 1.

57 Article 4. The German Emperor was the commander-in-chief of the armed forces. In the era of peace, however, the King of Bavaria remained commander-in-chief of the Bavarian Army and was assisted by a Bavarian War Ministry (G.A. Craig, op. cit., 48; K. Stern, op.cit., 2000, 386). Some major Federal States under the 1871

Constitution likewise the Kingdom of Bavaria kept on to send ambassadors to foreign countries and to receive envoys from them. Bavaria had its own embassies to Austria, France, Russia, Italy, Switzerland, and to the Holy Seat, as when concluding the Alliance with the Northern German Federation on November 23, 1870, the Kingdom of Bavaria got those competences of particularities by Articles VII and VIII of the Final Protocol thereto (K. Stern, op.cit., 2000) 384; G. Anschütz, *Die Verfassung des Deutschen Reichs vom 11. August 1919* (Gehlen 1968) Art. 78 Rn. 1; p. Laband, *Das Staatsrecht des Deutschen Reiches, Band III* (5th edn, Mohr 1913) 2 f.).

58 For the Kingdom of Bavaria, M. von Seydel, *Bayerisches Staatsrecht* (2nd edn, Mohr 1913) 629 and 631.

59 The "German" as a legal criterion was introduced for the first time. Nevertheless, it took the Empire almost 40 more years before an Imperial Law on German Nationality was enacted in 1913 (Reichs- und Staatsangehörigkeitsgesetz of July 22, 1913 [RGBl., 1913, p. 583]). Until 1913, the legislation of the different German States regulated citizenship.

60 Geneva Convention on the Red Cross of 1864, in particular on improvements for wounded soldiers in land armies (F. Berber, *Völkerrecht — Dokumentensammlung, Band 2* (C.H. Beck 1967) 1869 ff.; W.G. Grewe (ed.), op. cit., 551 ff.). For the challenge of the International Committee of the Red Cross in developing International Humanitarian Law, see H. Spieker, "Zusammenarbeit des Deutschen Roten Kreuzes mit dem Institut für Friedenssicherungsrecht und Humanitäres Völkerrecht", in H.J. Heintze and K. Ipsen (eds.), *Heutige bewaffnete Konflikte als Herausforderungen an das humanitäre Völkerrecht. 20 Jahre Institut für Friedenssicherungsrecht und Humanitäres Völkerrecht — 60 Jahre Genfer Abkommen*, (Springer 2011) 32 ff.

61 H. Dunant, *Remembrance of Solferino* (Geneva 1862).

62 The sanitary and medical conditions on the battlefields in the Crimea War from 1853 until 1856 had been similarily horrifying but they did not evoke any broader reaction or consequences on the international level although immediate war reporting was possible the first time due to telegraph communication (U. Keller, "Das Bild des Krieges: Der Krimkrieg (1853–1856)", in Leibniz-Institut für Europäische Geschichte, *Europäische Geschichte Online* (Mainz 2013) <http://www.ieg-ego.eu/kelleru-2013-de> accessed 15 August 2021; G. Werth, *Der Krimkrieg. Die Geburtsstunde der Weltmacht Rußland* (Ullstein Verlag 1992)).

63 F. Berber, *Lehrbuch des Völkerrechts, Zweiter Band: Kriegsrecht* (2nd end, C.H. Beck 1969) 72; K.H. Ziegler, op. cit., 186.

64 G.F. von Martens, *Nouveau Recueil Général des Traités, Band 3* (Dieterich 1878) 461.

65 From a Soviet point of view, see J.S. Drabkin, *Die Entstehung der Weimarer Republik* (Pahl-Rugenstein 1983) 303 ff.

66 H. Schulze, *Weimar. Deutschland 1917–1933* (Die Deutschen und ihre Nation) (Severin und Siedler 1982) 189–202; 222–303.

67 C. Clark, *Die Schlafwandler. Wie Europa in den Ersten Weltkrieg zog* (15th edn, Deutsche Verlags-Anstalt 2014) 22 ff.; J. Leonhard, *Die Büchse der Pandora. Geschichte des Ersten Weltkriegs* (C.H. Beck 2018) 29 ff.

68 Other War Crime suspects had to be extradited to the Entente Powers for their prosecution. Against the background that the Versailles Peace Treaty was regarded

as a "dictate" and as expression of the "winners' justice" (K. Stern, op.cit., 2000, 681), the German Government did not comply with those obligations. Instead, the German Government prevented such extraditions by Law of December 18, 1919 (RGBl. I, p. 2125), which established the German Supreme Court's first instance jurisdiction on persons falling under Articles 227 to 231 of the Peace Accord. The Entente Powers finally accepted such manoeuvers (K. Stern, op.cit., 2000, 540). The so-called Leipzig trials were disastrously managed by the Reichsgericht, the German Supreme Court, and resulted in a complete failure (K. Müller, "Oktroyierte Verliererjustiz nach dem Ersten Weltkrieg", in *Archiv des Völkerrechts Band 39* (2001) 202–222; K. Müller, "Die Leipziger Kriegsverbrecherprozesse nach dem Ersten Weltkrieg", in B.R. Kern and A. Schmidt-Recla (eds.), *125 Jahre Reichsgericht* (Duncker & Humblot 2006) 249–264; H. Wiggenhorn, *Verliererjustiz. Die Leipziger Kriegsverbrecherprozesse nach dem Ersten Weltkrieg* (Studien zur Geschichte des Völkerrechts, Band 10) (Nomos 2005). The then Minister of Justice Gustav Radbruch admitted in his autobiography the bad case management. See K. Ambos, *Internationales Strafrecht. Strafanwendungsrecht — Völkerstrafrecht — Europäisches Strafrecht — Rechtshilfe* (5th edn, C.H. Beck 2018), 113 f.; J. Matthäus, "The Lessons of Leipzig", in p. Heberer and J. Matthäus (eds.), *Atrocities at Trial* (University of Nebraska 2008).

69 Abdication Degree of Wilhelm II of November 9, 1918, in B. Pollmann (ed.), *Lesebuch zur Deutschen Geschichte, Band III: Vom Deutschen Reich bis zur Gegenwart* (Chronik Verlag 1984) 110; P. Scheidemann, "Ausrufung der Republik. 9. November 1918", in B. Pollmann (ed.), op. cit., 111/112; with respect to the history of the abdication of Wilhelm II, see L. Machtan, *Prinz Max von Baden. Der letzte Kanzler des Kaisers* (Suhrkamp Verlag 2013) 400 ff., in particular 425 ff.

70 For his biography: J.C.G. Röhl, "Wilhelm II. Deutscher Kaiser 1888–1918", in A. Schindling and W. Ziegler (eds.), *Die Kaiser der Neuzeit 1519–1918. Heiliges Römisches Reich, Österreich, Deutschland* (C.H. Beck 1990) 419 ff.

71 J.S. Drabkin, *Die Novemberrevolution 1918 in Deutschland* (Deutscher Verlag der Wissenschaften 1968). Regarding Bavaria where temporarily a revolutionary system alike the Soviet system was established, see A. Kraus, op. cit., 613 ff.; F. Hartung, *Deutsche Verfassungsgeschichte. Vom 15. Jahrhundert bis zur Gegenwart* (9th edn, Koehler 1969) 311 ff.; A. Gallus, "Eine kontinuitätsgebremste Revolution. Deutschland an der Wegscheide zwischen Monarchie und Demokratie", in T. Biskup, T. Vu Minh and J. Luh (eds.), *Preußendämmerung. Die Abdankung der Hohenzollern und das Ende Preußens* (arthistoricum.net 2019) 23 ff.

72 K. Stern, op.cit., 2000, 681–691.

73 E. Hobsbawm, *Gefährliche Zeiten. Ein Leben im 20. Jahrhundert* (Deutscher Taschenbuch Verlag 2006) 63 ff.; H. Arndt, D. Engelmann, H.J. Friederici, M. Menzel, L. Mosler, H. Niemann and A. Wörner, *Geschichte der deutschen Sozialdemokratie 1917–1945* (Dietz 1982) 316 ff.; A. Kraus, op. cit., 674 ff.; F. Hartung, op. cit., 325–339.

74 K. Stern, op.cit., 2000, 599–606; 633–636; H. Schulze, op. cit., 346–412; K. Buchheim, *Die Weimarer Republik. Das Deutsche Reich ohne Kaiser* (Kösel-Verlag 1970) 7 ff.; S. Haffner, *Von Bismarck zu Hitler* (Kindler 1987) 87 ff.

75 W.L. Shirer, *Aufstieg und Fall des Dritten Reiches* (The Rise and Fall of the Third Reich. A History of Nazi Germany) (Kiepenheuer u. Witsch 1961) 144 ff.;

H.U. Thamer, *Verführung und Gewalt. Deutschland 1933–1945* (Die Deutschen und ihre Nation, Band 5) (Siedler 1986) 231 ff.; H.U. Thamer, *Die NSDAP. Von der Gründung bis zum Ende des Dritten Reiches* (C.H. Beck 2020); K. Stern, op.cit., 2000, 763 ff.; R. Kühnl, *Der deutsche Faschismus in Quellen und Dokumenten* (4th edn, Pahl-Rugenstein 1979) 188 ff.; K.D. Bracher, *Die Auflösung der Weimarer Republik. Eine Studie zum Problem des Machtverfalls in der Demokratie* (Droste 1984) 26 ff.; M. Broszat, "Der Staat Hitlers. Grundlegung und Entwicklung seiner inneren Verfassung", in M. Broszat and H. Hieber (eds.), *dtv-Weltgeschichte des 20. Jahrhunderts in 14 Bände* (2nd edn, Deutscher Taschenbuch Verlag 1971) 13 ff.; I. Kershaw, *Hitler 1936–1945* (Deutsche Verlags Anstalt 2000) 13 ff. (original title: *Hitler. 1936–1945: Nemesis*); P. Austermann, *Der Weimarer Reichstag. Die schleichende Ausschaltung, Entmachtung und Zerstörung eines Parlaments* (Böhlau Köln 2020) (see also J. Bisky, "Das Unterste zuoberst kehren. Wie der Weimarer Reichstag zerstört wurde" *Süddeutsche Zeitung* 143 (24 June 2020) 12).

76 "Act to Remedy the Ills of the People and the Reich" (RGBl. 1933 I, p. 141). K. Stern, op.cit., 2000, 775 ff.

77 The Federal Constitutional Court by BVerfGE 6, 309/331 f. characterized the "Act to Remedy the Ills of the People and the Reich" as a revolutionary step to founding the national-socialist terror regime and qualified the Act as unconstitutional although the Court stated that the Act was not to be measured against the rules of the Weimar Constitution.

78 The period between 1933 and 1945 in Germany is commonly known as the "Third Reich". It is to be noted that the Nazis never called their regime the "Third Reich" but "the Reich" and later after annexations and occupations of foreign territories "Großdeutschland" or "Großdeutsches Reich". — For the history of the "Third Reich" idea, G. Hamza, "Die Idee des 'Dritten Reichs' im deutschen philosophischen und politischen Denken des 20. Jahrhunderts" (2001) 118 Zeitschrift der Savigny-Stiftung (Germanistische Abteilung) 321–336.

79 G. Anschütz, *Die Verfassung des Deutschen Reichs vom 11. August 1919* (Gehlen 1968) Art. 178 Rn. 3; K. Stern, op.cit., 2000, 681.

80 G. Anschütz, op. cit., Art. 45 Rn. 9.

81 Ibid., Art. 45 Rn. 10.

82 Article 78 paragraphs 2 and 3 of the Constitution made some exceptions in favor of the Reichsländer provided for that their legislative jurisdiction or special interests with neighboring States was concerned (G. Anschütz, op. cit., Art. 78 Rn. 3–5). The Reichsländer were constitutionally free to interact with the Holy Seat and to conclude treaties with the Papal Seat (so-called concordats, as Bavaria and Prussia did in 1924 and 1929 (G. Anschütz, op. cit., Art. 78 Rn. 7). — Article 78 definitely terminated the practice of some former Federal States under the 1871 Constitution to send ambassadors to foreign countries and to receive envoys from them. Especially, Bavaria had its own embassies to Austria, France, Russia, Italy, Switzerland, and the Holy Seat, as when concluding the alliance with the Northern German Federation on November 23, 1870, the Kingdom of Bavaria got those competences of particularities by Articles VII and VIII of the Final Protocol thereto (K. Stern, op.cit., 2000, 384; G. Anschütz, op. cit., Art. 78 Rn. 1; P. Laband, *Das Staatsrecht des Deutschen Reiches, Band III* (5th edn, Mohr 1913) 2 f.; M. von Seydel, op. cit., 627–629).

[83] Article 45 paragraph 1. Although being the commander-in-chief of the armed forces (Article 47), declarations of war and peace treaties needed a formal bill of Parliament. International treaties, which affected matters of legislation of the Reich, entered into force if the Reichstag gave its consent (Article 45 paragraph 3).

[84] G. Anschütz, op. cit., Art. 4 Rn. 1 with expressive critics on the wording of Article 4 that he disqualified as "*pater peccavi*".

[85] Ibid., Art. 4 Rn. 2.

[86] Ibid., Art. 4 Rn. 4 with Rn. 5.

[87] Ibid., Art. 4 Rn. 8.

[88] See Article 1 with Article 26 of the Versailles Peace Accord. K.H. Ziegler, op. cit., 201 f.

[89] F. Berber, *Lehrbuch des Völkerrechts, Dritter Band: Streiterledigung, Kriegsverhütung, Integration* (2nd edn, C.H. Beck 1977) 224 ff.

[90] Ibid.; G. Stresemann, "Eintritt des Deutschen Reichs in den Völkerbund", in B. Pollmann (ed.), op. cit., 134 f.

[91] Art. 35 of the 1907 Hague Land Warfare Convention; Text of the Military Capitulation of May 7, 1945 in B. Pollmann (ed.), op. cit., 177 f.; Reichsminister Johann Ludwig Schwerin von Kosigk, Rundfunkansprache nach der Kapitulation am 7. Mai 1945 an das deutsche Volk, in B. Pollmann (ed.), op. cit., 179/180; F. Berber, op. cit., 1969, 82 f.; K. Stern, op.cit., 2000, 916/918.

[92] R. von Weizsäcker, *Vier Zeiten. Erinnerungen* (Siedler 1997) 317 ff.; also see R. von Weizsäcker, *Lernen Sie, miteinander zu leben, nicht gegeneinander. Reden zur Demokratie* (Herder 2020); N. Frey, "Befreiung" *Süddeutsche Zeitung* 95 (24 April 2020) 5.

[93] Regarding the international legal situation of Germany after World War II, see R. Geiger, op. cit., 43–72.

[94] London Protocol of September 12, 1944 between the Governments of the United States of America, the United Kingdom, and the Union of the Soviet Socialist Republics on the Zones of Occupation in Germany and the Administration of "Greater Berlin", in *Background Documents on Germany, 1944–1959, and a Chronology of Political Developments Affecting Berlin, 1945–1956* (Washington, DC, General Printing Office 1959) 1–3. Originally, Germany was divided into three zones, each of them to be administered by one of the winning allies. Later in December 1944, France took part in the division of Germany and got an occupation zone in Germany's South-West (Supplementary Agreement to the Protocol of September 12, 1944 on the Zones of Occupation in Germany and the Administration of "Greater Berlin", concluded in Potsdam on July 25, 1945 (D. Rauschning and H. Krüger, *Die Gesamtverfassung Deutschlands* (Alfred Metzner 1962) 80; K. Stern, op.cit., 2000, 922/923); Communiqué of the Jalta Conference of February 11, 1945, in B. Pollmann (ed.), op. cit., 199/200; J. Becker, "Die deutsche Frage in der internationalen Politik 1941–1949", in J. Becker, T. Stammen and P. Waldmann (eds.), *Vorgeschichte der Bundesrepublik Deutschland. Zwischen Kapitulation und Grundgesetz* (2nd edn, Fink 1987) 9–62; T. Stammen, „Das alliierte Besatzungsregime in Deutschland", in J. Becker, T. Stammen and P. Waldmann (eds.), op. cit., 63–94.

[95] Finally put under Polish and Soviet administration (Poland: Silesia, Pomerania, and the Western part of East Prussia; Soviet Union: Eastern part of East Prussia,

today's Kaliningrad Region (agreed between the USA, UK, and USSR at the so-called Potsdam Conference on August 2, 1945). Documents in D. Rauschning and H. Krüger, op. cit., 95 ff.; B. Pollmann (ed.), "Die Potsdamer Konferenz 2. August 1945", in B. Pollmann (ed.), *Lesebuch zur Deutschen Geschichte, Band III: Vom Deutschen Reich bis zur Gegenwart* (Chronik Verlag 1984) 201–208; K. Stern, op.cit., 2000, 933 ff.

96 The last German Reich Government under "Reichspräsident" *Großadmiral* Karl Dönitz, whom Hitler appointed by a special law, was arrested on May 23, 1945 in Flensburg. The German supreme power ceased to exist (K. Stern, op.cit., 2000, 891.

97 "Orderly Transfer of the German Population", see K. Stern, op.cit., 2000, 939 f.; P. Waldmann, "Die Eingliederung der ostdeutschen Vertriebenen in die westdeutsche Gesellschaft", in J. Becker, T. Stammen and P. Waldmann (eds.), op. cit., 165–197; A. Hillgruber, *Deutsche Geschichte 1945–1986. Die "deutsche Frage" in der Weltpolitik* (6th edn, Kohlhammer 1987) 18 f. Partly, when the Red Army approached the territory of Germany in East Prussia, Silesia, and Pomerania, the first wave of Germans left their homes and reached German territories Western to the Oder and Neiße line in winter 1944/1945 (K. Stern, op.cit., 2000, 994 f.; T. Kielinger, *Winston Churchill. Der späte Held* (5th edn, C.H. Beck 2015) 331 ff.). After the Red Army had invaded and occupied former German territories in Germany's East, a second wave commenced to move West. That concerned the remaining German population in regions now administered by Poland, in Czechoslovakia, Hungary, in the now Baltic States, Rumania, and Yugoslavia, who were violently forced to leave their homes and to go West. In 1945/1946, most of them stranded in the Western occupation zones; some remained in the Soviet occupation zone. More than 10 million people were impacted and arrived in unclear and insecure conditions having lost all their belongings and their properties (K. Stern, op.cit., 2000, 995 f.). With view on their traumata and on the inhuman violence they had experienced, see literature quoted in footnote 256 in K. Stern, op.cit., 2000, 995; H. Schütz, "Die Eingliederung der Vertriebenen in Bayern", in L. Huber (ed.), *Bayern. Deutschland. Europa. Festschrift für Alfons Goppel* (Passavia 1975) 63 ff.; J.K. Hoensch, *Geschichte Böhmens. Von der slavischen Landnahme bis zur Gegenwart* (4th edn, C.H. Beck 2013) 436.

98 Article 13 of the aforesaid Declaration to be found in *Gazette of the Allied Control Council* 1945 supplement No. 1, page 7.

99 Agreement between the Allies on Control Machinery in Germany, London, November 14, 1944. Copyright: the United States of America Department of State. <http://www.cvce.eu/obj/agreement_between_the_allies_on_control_machinery_in_germany_london_14_november_194 4-en-ec18fd66-c681-44ee-baad-97555abffd4f.html> accessed 15 August 2021; France entered the agreement on May 1, 1945 (K. Stern, op.cit., 2000, 923). A similar institution was established for "Greater Berlin", which was called Comendatura and consisted of the four military commanders of the four Berlin sectors. The Allied Control Council had to take its decisions by unanimous votes. Therefore, it became dysfunctional very quickly after its establishment in August 1945. Almost immediately after its establishment, events and developments took place and resulted in the so-called Cold War. Disagreements from the Yalta and Potsdam conferences between the Western Allies on the one hand and the Soviet Union, on the other hand, became manifest

and prevented the Allies from a coherent policy with respect to Germany as a whole (K. Stern, op.cit., 2000, 948). Each of the military governments pursued its own policy in the respective occupation zones and in doing so, they increased the disagreement effects from the Allied Control Council and verse versa. On March 20, 1948, the Soviet Commander-in-Chief Marshall Sokolowskij quitted the Allied Control Council, which then never was convoked again (K. Stern, op.cit., 2000, 950 f.).

[100] Unity Treaty of August 31, 1990 (BGBl. 1990 II, p. 889).

[101] K. Stern, op.cit., 2000, 1021–1026; H. Maier, "Die Entwicklung der kommunalen Politik und Organisation in den drei westlichen Besatzungszonen", in J. Becker, T. Stammen and P. Waldmann (eds.), op. cit., 351–365.

[102] K. Stern, op.cit., 2000, 998–1010; e.g. Basic Program of CSU (Christian Social Union) of October 10, 1945, in pp. 212–215; K. Adenauer, *Erinnerungen 1945–1953* (Fischer Bucherei 1967) 43 ff.; K. Hesse, "Das Grundgesetz in der Entwicklung der Bundesrepublik Deutschland: Aufgabe und Funktion der Verfassung", in E. Benda, W. Maihofer and H.J. Vogel (eds.), *Handbuch des Verfassungsrechts, Studienausgabe* (De Gruyter 1984) 3 ff.; R. Kunz, "Parteien und Parlamentarismusentwicklung in den deutschen Ländern 1945 bis zur Gründung der Bundesrepublik", in J. Becker, T. Stammen and P. Waldmann (eds.), op. cit., 367–389.

[103] K. Stern, op.cit., 2000, 977–984; V. Dotterweich, "Die 'Entnazifizierung'", in J. Becker, T. Stammen and P. Waldmann (eds.), op. cit., 125–163.

[104] A. Kraus, op. cit., 742 f.

[105] F. Hartung, op. cit., 360– 363.

[106] K. Stern, op.cit., 2000, 1026–1033; 1033 ff.; H. Schneider, *Länderparlamentarismus in der Bundesrepublik* (Springer 1979) 11 ff.

[107] E.R. Huber (ed.), *Quellen zum Staatsrecht der Neuzeit. Band 2: Deutsche Verfassungsdokumente der Gegenwart (1919–1951)* (Matthiesen & Co 1951) 648; K. Stern, op.cit., 2000, 947. The preamble of Law No. 46 tells us the Allies' motives for Prussia's abolishment: "The Prussian State which from early days has been a bearer of militarism and reaction in Germany has de facto ceased to exist. Guided by the interests of preservation of peace and security of peoples and with the desire to assure further reconstruction of the political life of Germany on a democratic basis, the Control Council enacts as follows…." (retrieved from <https://en.wikisource.org/w/indes.php?title=Control_Council_Law_No_46_(25_Feburary_1947)_Abolition_of_Prussia&oldid=6808478>). J. Zimmermann, "'Seit jeher Träger des Militarismus und der Reaktion in Deutschland'. Das Bild von Preußen nach dem Zweiten Weltkrieg", in T. Biskup and T. Vu Minh (eds.), op. cit., 107 ff. This view was not commonly shared among scholars and is still debated nowadays (e.g. B. Engelmann, *Preußen. Land der unbegrenzten Möglichkeiten* (Büchergilde Gutenberg 1980); H. Bartel, I. Mittenzwei and W. Schmidt, *Preußen und die deutsche Geschichte*, in p. Bachmann and I. Knoth (eds.), *Preußen — Legende und Wirklichkeit* (Dietz 1985) 309 ff.; H.W. Koch, *Geschichte Preußens* (List 1978) 403 ff.; (former Federal President) R. von Weizsäcker, *Die deutsche Geschichte geht weiter* (Siedler 1983) 261 ff., also (former Federal President) Walter Scheel, Das demokratische Geschichtsbild, in B. Pollmann (ed.), op. cit., 333, in particular 343).

[108] BayRS 100-1-8; H. Nawiasky, K. Schweiger, F. Knöpfle, C. Leussner and E. Gerner, *Die Verfassung des Freistaates Bayern, München (Loseblattsammlung), Die Entwicklung des Verfassungsrechts seit 1946*, Rn. 5 — 98 (C.H. Beck 2008).

[109] W. Hoegner, „Der Kampf Bayerns um den Föderalismus 1945/46“, in L. Huber (ed.), op. cit., 29 ff.; p. Lerche, “Föderalismus in Deutschland”, in L. Huber (ed.), op. cit., 77 ff.

[110] K. Adenauer, op. cit., 102–137.

[111] A. Hillgruber, op. cit., 39.

[112] K. Stern, op.cit., 2000, 1135 ff. As for the French military occupation zone, the 1948 currency reform was not allowed in the State of Saarland and the Deutsche Mark was not introduced therein, where Paris pursued a very special policy. After the French Government rather failed in annexing the region, the other Allies agreed on a special status of the region, which made it almost a French protectorate with internal autonomy (K. Stern, op.cit., 2000, 1030 f.; W. Reinert, *Der Dicke muß weg. Ein Saar-Roman* (Queisser 1980); E. Voltmer and F.J. Röder, *Ein Leben für die Saar* (Queisser 1979) 112/122; R. Brosig, *Die Entstehung und Entwicklung der Verfassung des Saarlandes vom 15. Dezember 1947*, in R. Rixecker and R. Wendt, *Die Verfassung des Saarlandes. Kommentar* (Alma Mater 2009) 18 ff.).

[113] The Soviet Military Administration responded by blocking the Western sectors from any supply from June 1948 until May 4, 1949. The Western Powers kept West Berlin alive by providing the population with air carriers, which even transported coal during the winter of 1948/1948. — In the Soviet zone, another currency reform was carried out with little effect, as the East Mark rapidly lost value vis-à-vis the Deutsche Mark. Additionally, the Soviets began to transform the economy in their military zone into a stately or centrally planed and managed economy a la the Soviet Union (K. Stern, op.cit., 2000, 1166/1169; A. Hillgruber, op. cit., 39).

[114] W. Churchill, *Der Zweite Weltkrieg* (Scherz 1948) 1103: “From Stettin on the Baltic Sea till Trieste on the Adria, an Iron Curtain went down on the continent”. — Speech given to the Westminster College in Fulton/Missouri in March 1946 — full text pp. 1102/1104; T. Kieling, *Winston Churchill. Der späte Held*, op. cit., 343–346.

[115] Except for the Government of Saarland under Prime Minister Johannes Hoffmann, who — supported by the French Government and the French representative in Saarbrücken, Governor Gilbert Granddval — pursued a more Paris-related policy in terms of promoting Saarland’s independence from the rest of Germany and underpinning the customs union between France and Saarland, which has already been established, as well as the “Saarland Franc”, the little brother of the French Franc, was introduced as the official currency of the State (A. Heinen. *Saarjahre, Politik und Wirtschaft im Saarland 1945–1955* (Steiner 1996) 45 ff.).

[116] K. Stern, op.cit., 2000, 1211 ff.; T. Stammen and G. Maier, “Der Prozeß der Verfassungsgebung”, in J. Becker, T. Stammen and P. Waldmann (eds.), op. cit., 391–429.

[117] J.V. Wagner (ed.), *Parlamentarischer Rat, Band 1: 1948–1949* (Boldt 1975) 1 ff.

[118] K. Stern, op.cit., 2000, 1214 ff. reproducing the text of the so-called “Frankfurt Documents”, which were issued to the Prime Ministers of the West German States by the Western Military Governors in order to guide the work of the future “Constituent Assembly”. The Prime Ministers then met for consultations from July 8, 1948 until July 10, 1948. The Prime Ministers of East Germany were not invited

(see H. Ehard, "Die deutsche Ministerpräsidentenkonferenz in München 1947", in L. Huber (ed.), op. cit., 33 ff.; K. Stern, op.cit., 2000, 1142–1144).

[119] The most important draft was the so-called "Draft Constitution of Herrenchiemsee". The Prime Minister of Bavaria Hans Ehard invited constitutional experts from all Western States of Germany (except Saarland) to convene an expert meeting, which was held between August 10 and August 25, 1948 in the Old Palace of Herrenchiemsee, a remote island in Bavaria's biggest lake with a picturesque view of the Bavarian Alps, and became known as the "Constitutional Convent of Herrenchiemsee". The final product of this expert meeting was the "Draft Constitution of Herrenchiemsee" (see Constitutional Committee of the Conference of the Prime Ministers of the Western Occupation Zones, *Report on the Constitutional Convention on Herrenchiemsee from August 10 until August 23, 1948* (Munich 1948); A. Bauer-Kirsch, "Herrenchiemsee. Der Verfassungskonvent von Herrenchiemsee — Wegbereiter des Parlamentarischen Rates" (Dissertation, Rhenish Friedrich Wilhelm University of Bonn 2005), which influenced the following deliberations of the Parliamentary Council and which is still an important tool for understanding and interpreting the current constitution of Germany.

[120] The Council consisted of 65 members proportionally elected by the parliaments of the West German States (+ 5 members of [West] Berlin [due to the special status of Berlin, those Berlin participants were part of the deliberations but not allowed to take part in the voting of the Council]).

[121] D. Blumenwitz, "Bayern und Deutschland", in L. Huber (ed.), op. cit., 41 ff.; A. Kraus, op. cit., 744.

[122] Article 145 paragraph 1 of the Basic Law.

[123] Prior to proclamation and entry into force, the Draft Basic Law was submitted to the parliaments of the German States in the Western Occupation Zone (again, except for the Parliament of Saarland because of the special regime that France had installed in this region of Germany (Saarland returned to the Federal Republic of Germany on January 1, 1957 after the voters of Saarland by a 67.71% majority in a plebiscite of October 23, 1955, rejected the so-called Saar-Accord between Germany and France of October 22, 1954, which foresaw a Saar Government autonomous in domestic affairs but internationally represented by a High Commissioner of the West-European Union. After the failure, France consecutively agreed to let Saarland accede to the Federal Republic of Germany by the French-German Luxemburg-Treaty of October 27, 1956, and the Parliament of Saarland formally applied to the accession on December 14, 1956); K. Stern, op.cit., 2000, 1419 f.). (Article 144 paragraph of the 1 Basic Law, which required the consent of two-thirds of the German States). Between May 18 and May 21, 1949, they voted for their consent with one exception. Although Article 178 of the Bavarian Constitution of 1946 obligated Bavaria to accede to a future German democratic federal state (G.M. Köhler, "Article 178 recitals 2–7", in H. Nawiasky, K. Schweiger and F. Knöpfle (eds.), *Die Verfassung des Freistaates Bayern. Hrsg. von Karl Schweiger und Franz Knöpfle* (C.H. Beck 2000)), the Bavarian Parliament by 101 against 63 votes with 9 refraining votes did not adopt the Basic Law but voted by the majority for the recognition of the Basic Law, as set forth by Article 144 paragraph 1 of the Basic Law. The Bavarian concerns referred to a too strong

centralism of the system, as established by the Basic Law (H.H. Klein, "Art. 144 Rn. 15", in T. Maunz, G. Dürig, R. Herzog, R. Scholz, M. Herdegen and H.H. Klein (eds.), *Grundgesetz Kommentar* (C.H. Beck 2016)). Although the Basic Law never was submitted to a plebiscite, the Germans have accepted this constitution, which established a surprisingly strong and stable democratic system under the Rule of Law, and have confirmed their acceptance by many national polls since then. Unlike the Weimar Constitution of 1919, which was overshadowed by the Versailles Peace Agreement and its severe consequences, instability, internal unrest, and social and political disloyalty, the legitimacy of the 1949 constitution has never been contested as a matter of principle if we leave the right-wing extremists aside). The creation of the new (West) German State was paralleled by the creation of a second German State on the territory of the Soviet Military Administration. On October 7, 1949, the German Democratic Republic was proclaimed, which existed until October 3, 1990, when the States of the German Democratic Republic acceded to the Federal Republic of Germany (M. Dauster, "Der Beitritt der zukünftigen Länder der Deutschen Demokratischen Republik zur Bundesrepublik Deutschland" (1990) BayVBl 455 ff.; Verfassungsgesetz zur Bildung von Ländern in der Deutschen Demokratischen Republik vom 22. Juli 1190 (DDR-GBl, 1990 I, p. 955)) and when then the reunification of Germany was completed.

The Federal Republic of Germany established in 1949, however, was not a fully sovereign State. The sovereignty was limited, as the Occupation Statute of the Western High Commissioners of September 21, 1949 gives evidence for (K. Stern, op.cit., 2000, 1378 ff.; full text reproduced [in German]: K. Stern, op.cit., 2000, 1388/1390; [in English]: American Journal of International Law 43(4) (1949) 172–174). The Allied High Commissioners by this Statute made a series of reservations as far as their prerogatives were concerned including their prerogatives with respect to Germany as a whole. The restrictions concerned in particular the foreign policy including the foreign trade policy, the economy (see the annexed Ruhr Statute), military issues, refugee issues) and represented a heavy burden for the forthcoming new Republic (K. Stern, op.cit., 2000, 1391–1398; K. Adenauer, op. cit., 34 ff.). As the Federal Republic of Germany consolidated, the Cold War progressed, the reconciliation policy of the Federal Government in particular regarding France improved, the restrictions of the Occupation Statutes were mitigated, e.g. Revision of the Occupation Statute of March 6, 1951, including annexed documents (AHKABl 1951, pp. 792–795) (K. Stern, op.cit., 2000, 1400 ff.; K. Adenauer, op. cit., 234 ff.). It took further four years until on May 26, 1952, the Allied Powers agreed with Germany on the so-called Germany Treaty (BGBl. 1954 II, p. 62), which led to the termination of the Occupation Regime of the Allies over the Federal Republic of Germany (but not with respect to Germany as a whole) (see Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany of October 23, 1954 [BGBl. 1955 II, p. 21]) (K. Stern, op.cit., 2000, 1410 ff.; K. Adenauer, op. cit., 234 ff.). The conclusion of the treaty was facilitated and accompanied by a series of events, e.g. the rearmament of the Federal Republic of Germany and its accession to NATO (after the European Defence Community consisting out of France, Germany, Italy, Belgium, the Netherlands, and Luxemburg, which included German armed forces, failed in

the French National Assembly [K. Stern, op.cit., 2000, 1417 f. The text of the agreement is partly reproduced in Europa-Archiv 1952, p. 344 ff.], the co-founder of the European Economic Community, etc.). However, the reserve rights with respect to Germany as a whole ceased to exist, when the Allies agreed on the German reunification in 1990 by the Agreement on the Final Regulation with respect to Germany of September 12, 1990 (BGBl. 1990 II, p. 1317) and finally suspended their rights and responsibilities, which they held since the Second World War had ended, on October 1, 1990 (K. Stern, op.cit., 2000, 1825). After the collapse of the monolithic socialist regime under the SED (Sozialistische Einheitspartei Deutschlands) in November 1989, activists and politicians at the so-called "Central Round Table" in the still existing German Democratic Republic hoped for a new constitution of the re-unified Germany, which they liked to be composed of elements of the Basic Law but equally of elements of the Constitution of the German Democratic Republic that they found valuable and worthwhile to be maintained (K. Stern, op.cit., 2000, 1786 ff.). However, the democratically elected Parliament of the German Democratic Republic refused to seize the matter on April 26, 1990 (K. Stern, op.cit., 2000, 1788), and directed the German Democratic Republic beneath the umbrella of the Basic Law. Anyway, the East German economy was crumbling and the reunification process became a hasty affair without any time for creating a completely new constitutional order. Current Article 146 of the Basic Law is the result of compromising of both Germanies by Article 4 No. 6 of the Unity Treaty of August 31, 1990 (BGBl. 1990 II, p. 889 f.).

Although the name of "Reich" was not revitalized, when the Federal Republic of Germany was founded in 1949, the official State doctrine of the institutions of the Federal Republic of Germany kept on the position that the "German Reich" did not submerge neither by the unconditional surrender on May 8, 1945 nor later. The official (West) German position was that the Federal Republic of Germany re-organized the statehood of Germany, which was temporarily suspended and its supreme authority was timely administered by the Allies, who acted as trustees on behalf of the incapacitated German State (BVerfGE 36, 1 ff.; K. Stern, op.cit., 2000, 1115–1128; J.A. Frowein, "Die Rechtslage Deutschlands und der Status Berlins", in E. Benda, W. Maihofer, and H.J. Vogel (eds.), op. cit., 29 ff.; F. Klein, "Bonner Grundgesetz und Wiedervereinigung Deutschlands", in O. Bachof, M. Drath, O. Gönnenwein and E. Walz (eds.), *Forschungen und Berichte aus dem Öffentlichen Recht, Gedächtnisschrift für Walter Jellinek* (Isar Verlag 1955) 119 ff.; *Verfassungsausschuss der Ministerpräsidenten-Konferenz der westlichen Besatzungszonen, Bericht über den Verfassungskonvent auf Herrenchiemsee vom 10. bis 23. August 1948* (München 1948) 18/20). Identical with the former German Reich, the Federal Republic of Germany reclaimed to have inherited all international legal positions, which the Reich had agreed on by international treaties. Politically, the Federal Republic of Germany felt entitled to the sole representation of Germany on the international scene. For almost two decades, this doctrine of sole representation in the 1960s resulted in international difficulties, whenever third States recognized the German Democratic Republic diplomatically. The Federal Republic of Germany considered such a diplomatic step as an "unfriendly act" (K. Doehring, op. cit., 455 f.) and responded to it by ceasing or at least suspending

the diplomatic relations, which the Federal Republic of Germany maintained to the third country concerned. This so-called "Hallstein Doctrine" slowly got out of use in the late 1960s (see explanations K. Stern, op.cit., 2000, 1448 footnote 869) and was then not anymore applied when Chancellor Willy Brandt (see p. Merseburger, *Willy Brand 1913–1992. Visionär und Realist* (Deutsche Verlags-Anstalt 2013) 430 ff.) assumed office in 1969 and moved to a new policy with the neighboring countries of Germany in the East (in particular Poland [Treaty of Warsaw of December 7, 1970 — BGBl. 1970 II, p. 651], with the USSR [Treaty of Moscow of August 12, 1970 — BGBl. 1970 II, p. 353]) (H. Steinberger, "Völkerrechtliche Aspekte des deutsch-sowjetischen Vertragswerkes vom 12. August 1970" (1971) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 63 ff.)] and by the Treaty with Czechoslovakia of December 11, 1973 [BGBl. 1974 II, p. 1127]) and recognized the German Democratic Republic diplomatically (Agreement between the Federal Republic of Germany and the German Democratic Republic on the Fundament of Their Interrelations of December 21, 1972 [BGBl. 1973 II, p. 421]; with respect to the constitutionality of the agreement BVerfGE 36, 1 ff.; K. Doehring, "Hat die BRD die internationale Kompetenz (Souveränität) zum selbständigen Abschluss von Verträgen mit der DDR", in I. von München and W. Rudolf (eds.), *Völkerrecht und Außenpolitik, Band 9: Staats- und völkerrechtliche Aspekte der Deutschland- und Ostpolitik* (Athenäum 1971) 18 ff.; K. Doehring, "Die Anwendung von Völkerrecht in den Beziehungen zwischen BRD und DDR", ibid., 58 ff.; K. Doehring, "Rechtsbeziehungen zwischen der BRD und der DDR auf der Grundlage der Gleichberechtigung und der Nichtdiskriminierung", ibid., 65 ff.) (K. Stern, op.cit., 2000, 1485 ff.). As a consequence of those treaties, on September 18, 1973, both German States became full members of the United Nations (133rd and 134th members) (K. Doehring, "Gleichzeitige Mitgliedschaft von BRD und DDR in internationalen Organisationen", in I. von München and W. Rudolf (eds.), op. cit., 78 ff.).

124 Between entry into force in 1949 and November 15, 2019, the Basic Law got 64 amendments or alterations.

125 M. Herdegen, "Art. 25 Rn. 6–8", op. cit., 2016; F. Schorkopf, op. cit., 4 f.; ibid., 25 ff. regarding the state practice in Germany; C. Tomuschat, Staatsrechtliche Entscheidung für die internationale Offenheit, in J. Isensee and p. Kirchhof (eds.), *Handbuch des Staatsrechts*, *Band XI* (3rd edn, C.F. Müller 2013) 440 ff.

126 M. Bothe, "Das völkerrechtliche Gewaltverbot und die Eindämmung des Krieges — eine unmögliche Aufgabe?", in H.J. Heintze and K. Ipsen (eds.), op. cit., 87 ff. with criticism of the German attitude in applying Article 26 in the national (criminal) forum (ibid., 95 ff.). Article 26 of the Basic Law is now mirrored by Section 13 of the German Criminal Code on Crimes against International Law.

127 Defending the country and nation is a basic and principal stately duty of all States and their natural right (O. Depenheuer, "Art. 87a Rn. 1–5", in T. Maunz, G. Dürig, R. Herzog, R. Scholz, M. Herdegen and H.H. Klein (eds.), *Grundgesetz Kommentar* (C.H. Beck 2008)) and the mirror of their expectations vis-à-vis their nationals to obey the law and to comply with their legal duties. States not willing or able to produce protection against aggressions from outside may not deserve to be called "States". However, German history proves that armed forces often had been misused in internal troubles. Therefore, the Basic Law made some major

changes in the inherited tradition. The Federal President is not any more the Commander-in-Chief of the armed forces (see the history: V. Epping, "Article 65a Rn. 19–24", in T. Maunz, G. Dürig, R. Herzog, R. Scholz, M. Herdegen and H.H. Klein (eds.), *Grundgesetz Kommentar* (C.H. Beck 2008)). According to Article 65a of the Basic Law, the Minister of Defence is now the civil commander of the German Armed Forces (see V. Epping, "Article 65a Rn. 25–28", op. cit., 2008)), unless the State of Defence is proclaimed according to Article 115a of the Basic Law. In this case, the Federal Chancellor replaces the Minister of Defence as the Commander-in-Chief (Article 115b of the Basic Law). German history saw several Ministers of War or Defence who were militaries. Such military ministers are constitutionally forbidden (Article 66 of the Basic Law in conjunction with Section 5 of the Federal Act on Federal Ministers of July 27, 1971 (BGBl. 1971 I, p. 1166). If a military becomes a member of the Federal Government, Section 25 paragraph 4 of the Federal Act on Militaries of May 30, 2005 (BGBl. 2005 I, p. 1482) in conjunction with Section 18 paragraph 1 of the Federal Act on Federal Ministers forces the military to quit the military service beforehand. In internal troubles, Armed Forces may only be used under the conditions as set forth by Article 87a paragraph 4 in conjunction with Article 91 paragraph 2 of the Basic Law and provided for that the Federal Government in Cabinet concluded such use. In times of peace, the power of command of the Defence Ministers is not without any limits. Before the background of increasing German participation in international military operations, the jurisprudence of the Federal Constitution Court (since AWACS/Adria/Somalia decision of July 12, 1994 [BVerfGE 90, 286 ff. — confirmed by decision of May 7, 2008 in BVerfG, NJW 2008, 2018 ff.; BVerfGE 100, 266 ff. and BVerfGE 104, 151 ff.], criticized by V. Epping, "Article 65a Rn. 32 ff.", op. cit., 2008)) put the decision on such military operations by the Minister of Defence in the context of the parliamentarian system of Germany and required the consent of the Parliament prior to the commencement of participation in such international operations. This interdependence of governmental decision-making and parliamentarian consent on military matters in times of peace is unique but underpins the Parliament's prerogatives as the nation's representation and is good in terms of democracy. Public debates in the Parliament make the decision-making transparent and may prevent the Government from ill-thought-out judgments. In some way, the German Armed Forces have turned into a Parliamentary Army (further C. Callies, "Article 24 paragraph 2, Rn. 79 ff.", in T. Maunz, G. Dürig, R. Herzog, R. Scholz, M. Herdegen and H.H. Klein (eds.), *Grundgesetz Kommentar* (C.H. Beck 2016)).

[128] „Conscious of their responsibility before God and man, inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law. Germans in the Länder of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia have achieved the unity and freedom in Germany in free self-determination. …".

[129] So far, the Preamble is to be characterized at least as an explanatory legal statement (K. Larenz, *Methodenlehre der Rechtswissenschaft. Studienausgabe*

(Springer 1983) 137–139), which is to be applied in constitutional interpretations, as well as in interpretations of "ordinary" legal statements in civil or criminal law (K. Larenz, op. cit., 235–240). — Scholars in Germany's jurisprudence are in agreement that the Preamble of the Basic Law does not only represent an introduction to the (operative part of) Constitution, a political manifesto, or a political program. The Preamble on the one hand represents more and contains constitutional values, which are meaningful (explicitly BVerfGE 5, 85, 127 f.; M. Herdegen, "Präambel, Rn. 12–14", in T. Maunz, G. Dürig, R. Herzog, R. Scholz, M. Herdegen and H.H. Klein (eds.), *Grundgesetz Kommentar* (C.H. Beck 2015). On the other hand, it does no harm to read the Preamble as a political program. The legal binding content of the Preamble can also be concluded from the missing constitutional description of the territory of the Federal Republic of Germany. The Basic Law does not define the German territory. Of course, boundaries are mostly defined by international agreements, e.g. in the case of Germany by the Agreement on the Final Regulation with respect to Germany of September 12, 1990 (BGBl. 1990 II, p. 1317). However, the Preamble enumerates the Federal States, of which the people formed the constituent of the national constitution. Most of those States precede the Federal Republic of Germany in terms of history and have their inherited boundaries. Their territorial size was known when the Basic Law entered into force. The sum of the States' territories makes the German national territory. The meaning of the enumeration goes further. In conjunction with Article 30 and Article 20 paragraph 1 of the Basic Law, the list of States teaches the authorities of the Federal Republic of Germany that first the States precede the Republic, that the States form the Federation, and that all statehood of Germany begins with the States. Consequently, Article 79 paragraph 3 of the Basic Law declares any removal of the Federal System as unconstitutional. See further C. Callies, op. cit., 93 ff.

130 Confirmed by Article 26 paragraph 1 of the Basic Law: "Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be criminalised". The criminalization is now found in Section 13 of the German Code on International Crimes of June 26, 2002 — amended by the Law of December 22, 2016 (BGBl. 2016 I, p. 3150). For the history of Article 26 of the Basic Law see: *Verfassungsausschuss der Ministerpräsidenten-Konferenz der westlichen Besatzungszonen, Bericht über den Verfassungskonvent auf Herrenchiemsee vom 10. bis 23. August 1948* (München 1948) 24; M. Bothe, "Das völkerrechtliche Gewaltverbot und die Eindämmung des Krieges — eine unmögliche Aufgabe?", in H.J. Heintze and K. Ipsen (eds.), op. cit., 87 ff.

131 M. Herdegen, "Präambel, Rn. 29–32; Rn 39–42", op. cit., 2015.

132 In absence of German Military Forces, the 1946 Constitution of Bavaria by Article 99 invoked International Public Law as the guarantor against aggressions from outside Christian Graf von Pestalozza, in K. Schweiger, F. Knöpfle, C. Leusser and E. Gerner (eds.), *Die Verfassung des Freistaates Bayern*. Kommentar, Article 99 Rn. 47–51 but not conceding any legal effect to the regulation and characterizing the content as an appeal to the Allies to defend Bavaria in case of aggression.

133 Article 51 of the Charter of UNO.

134 NATO Treaty of April 4, 1949 (BGBl. 1955 II, p. 630): Article 1 and Article 5.

[135] UNTS vol. 38544 p. 3.
[136] M. Herdegen, "Präambel, Rn. 59–61", op. cit., 2015.
[137] See Article 1, Article 2 of the UN Charter.
[138] E.g. the Pan-European Union, which Richard Nikolaus Coudenhove-Kalergi founded in 1922 and of which the program was a federal Europe based upon Democracy and Christian-Occidental values. The Union had a conservative touch (see R.N. Coudenhove-Kalergi, *Pan-Europa, der Jugend Europas gewidmet* (Pan-Europa Verlag, 1923, reprint Amalthea 1987); O. von Habsburg, *Die Paneuropäische Idee. Eine Vision wird Wirklichkeit* (Amalthea Signum 1999)). Nowadays, the Pan-European Union has been minimized in its importance and has become some sort of conservative political club. Further: M. Schweitzer and W. Hummer, *Europarecht. Das Recht der Europäischen Union — Das Recht der Europäischen Gemeinschaften (EGKS, EG, EAG) — mit Schwerpunkt EG* (5th edn, Luchterhand 1996) 11 f.; B. Beutler, R. Bieber, J. Pipkorn and J. Streil, *Die Europäische Gemeinschaft. Rechtsordnung und Politik* (3rd edn, Nomos Verlagsgesellschaft 1987) 30 f.
[139] Winston Churchill at the University of Zurich/Switzerland on September 19, 1946: "Therefore, I say to you: Let Europe arise", in T. Krieling, *Winston Churchill. Der späte Held,* op. cit., 346 f. Reconciliation and military cooperation between Germany and France represented the background of Churchill's idea of a federalized Europe, which did not include the United Kingdom. The United Kingdom outside this construct and according to Churchill's ideas should act as a "friend and partner" as the USA alike. However, others in Europe did not share Churchill's perspective appeal, e.g. Charles de Gaulle kept his view focused on Germany to be kept down for the sake of France's security (J. Willms, *Der General. Charles de Gaulle und sein Jahrhundert* (C.H. Beck 2019) 285). The first breakthrough — after the Basic Law entered into force — came from Paris, when Robert Schuman presented the so-called Schuman or Monnet Plan (Jean Monnet was Head of the French Planning Office) on May 9, 1950. The plan dealt with resolving the inherited problem of the German and French heavy industry at the Ruhr River and in Lorraine and transferring the national German and French authorities to a new supra-national institution, the then European Community for Coal and Steel (B. Beutler, R. Bieber, J. Pipkorn and J. Streil, op. cit., 30 f.).
[140] *Verfassungsausschuss der Ministerpräsidenten-Konferenz der westlichen Besatzungszonen, Bericht über den Verfassungskonvent auf Herrenchiemsee vom 10. bis 23. August 1948* (München 1948) 23 f.
[141] M. Herdegen, "Präambel, Rn. 69–74", op. cit., 2016.
[142] With a special view of the question in the context of the two German States, K. Doehring, "Das Selbstbestimmungsrecht des deutschen Volkes", in I. von München and W. Rudolf (eds.), op. cit., 85–87.
[143] Fourteen-Points Speech given to the Houses of Congress on January 8, 1918 (K. Schwabe, "Woodrow Wilson 1913–1921. Kreuzzug für die Demokratie", in C. Mauch (ed.), *Die Präsidenten der USA* (6th edn, C.H. Beck 2013) 296, 303 f.).
[144] F. Schorkopf, op. cit., 147.
[145] *Verfassungsausschuss der Ministerpräsidenten-Konferenz der Westlichen Besatzungszonen, Bericht über den Verfassungskonvent auf Herrenchiemsee vom 10. bis 23. August 1948* (München 1948) 23/25; M. Herdegen, "Art. 25 Rn. 16 and 17", op. cit., 2016.

[146] M. Herdegen, "Art. 25 Rn 18", op. cit., 2016; see Article 84 of the 1946 Constitution of Bavaria stating: The internationally recognized principles of International Public Law are integral part of the domestic law (K. Schweiger, "Art. 84 Rn. 3", in H. Nawiasky, K. Schweiger, F. Knöpfle, C. Leusser and E. Gerner (eds.), op. cit., 2008, being of the opinion that Article 25 of the Basic Law made Article 84 of the Bavarian Constitution obsolete [see VerfGHE 8, 74 ff.; 12, 131 ff.; 14, 43 ff.]).
[147] M. Herdegen, "Art. 25 Rn. 14", op. cit., 2016.
[148] M. Herdegen, "Art. 1 Rn. 1", op. cit., 2009.
[149] Ibid., "Art. 1 Rn. 2".
[150] M. Herdegen, "Art. 25 Rn. 15", op. cit., 2016.
[151] Ibid., "Art. 1 Rn. 2".
[152] BVerfGE 18, 441/448; 46, 342/364 ff.; M. Herdegen, "Art. 25 Rn. 28", op. cit., 2016.
[153] M. Herdegen, "Art. 25 Rn. 30", op. cit., 2016.
[154] Ibid., "Art. 25 Rn. 31–42"; F. Schorkopf, op. cit., 150 ff.
[155] M. Herdegen, "Art. 25 Rn. 43", op. cit., 2016. For the discussion whether universal treaties (including the UN Charter and the European Convention on Human Rights) might fall under the prerogative of Article 25, see M. Herdegen, ibid., Rn. 44–46 (2016).
[156] Ibid., "Art. 25 Rn 78–79".
[157] For those complexes, see ibid, "Art. 25 Rn. 80–82".
[158] Ibid., "Art. 25 Rn. 85–94", invoking BVerfGE 95, 96 ff. The case dealt with the criminal prosecution of Border Officers of the Former German Democratic Republic who implemented the order of the Army Command of GDR to prevent citizens of GDR from fleeing from GDR to the Federal Republic of Germany by shooting at them — in many cases with lethal results for the victims. The German Federal Constitutional Court confirmed the guilty verdicts although the principle of forbidden retroactive application of criminal law was at stake with good arguments. The Court saw that principle also established by Article 103 paragraph 2 of the Basic Law having been displaced as elementary Rules of International Law (in particular freedom of movement) required their precedence. Further F. Schorkopf, op. cit., 156 ff.
[159] M. Herdegen, "Art. 25 Rn. 72", op. cit., 2016.
[160] BVerfGE 75, 1/19.
[161] M. Herdegen, "Art. 25 Rn. 74–76", op. cit., 2016.
[162] Ibid., "Art. 25 Rn. 95".
[163] Ibid., "Art. 25 Rn. 96 and Rn. 13"; K. Doehring, op. cit., 838 ff.
[164] Article 93 paragraph 1 No. 4a of the Basic Law in conjunction with Section 90 paragraph 1 of the Law on the Federal Constitutional Court in the form of promulgation of August 11, 1993 (BGBl. 1993 I, p. 1473).
[165] BVerfGE 58, 1/34 f.; 59, 63/89; 112, 1/22; also see M. Herdegen, "Art. 25 Rn. 97", op. cit., 2016; H. Bethge, "§90 Rn. 71", in T. Maunz, B. Schmidt-Bleibtreu, F. Klein, G. Ulsamer, H. Bethge, K. Grasshof, R. Mellinghof and J. Rozek (eds.), *Bundesverfassungsgerichtsgesetz Kommentar* (C.H. Beck 2005).
[166] H.G. Dederer, "Art. 100 Rn. 268", in T. Maunz, G. Dürig, R. Herzog, R. Scholz, M. Herdegen and H.H. Klein (eds.), *Grundgesetz Kommentar* (C.H. Beck 2013).

[167] G. Ulsamer, "§83 Rn. 5", in T. Maunz, B. Schmidt-Bleibtreu, F. Klein, G. Ulsamer, H. Bethge, K. Grasshof, R. Mellinghof and J. Rozek (eds.), *Bundesverfassungsgerichtsgesetz Kommentar* (C.H. Beck 1992).

[168] W.K. Geck, "Das Bundesverfassungsgericht und die allgemeinen Regeln des Völkerrechts", in in C. Starck (ed.). *Bundesverfassungsgericht und Grundgesetz, Festgabe zum 25-jährigen Bestehen des Bundesverfassungsgerichts, Band II* (Mohr 1976)125/145.

[169] M. Herdegen, "Art. 25 Rn. 98", op. cit., 2016; H.G. Dederer, "Art. 100 Rn. 270", op. cit.

[170] H.G. Dederer, "Art. 100 Rn. 272–280", op. cit., 2013; G. Ulsamer, "§83 Rn. 8 and Rn. 11–22", in T. Maunz, B. Schmidt-Bleibtreu, F. Klein, G. Ulsamer, H. Bethge, K. Grasshof, R. Mellinghof and J. Rozek (eds.), *Bundesverfassungsgerichtsgesetz Kommentar* (C.H. Beck 1992).

[171] H.G. Dederer, "Art. 100 Rn. 322", op. cit., 2013.

[172] Ibid., "Art. 100 Rn. 306 and 307"; G. Ulsamer, "§83 Rn. 8 and Rn. 10", op. cit., 1992).

[173] H.G. Dederer, "Art. 100 Rn. 280", op. cit., 2013; G. Ulsamer, "§83 Rn. 5", op. cit.

[174] E. Kaufmann, "Normenkontrollverfahren und völkerrechtliche Verträge", in O. Bachof, M. Drath, O. Gönnenwein and E. Walz (eds.), *Forschungen und Berichte aus dem öffentlichen Recht, Gedächtnisschrift für Walter Jellinek* (Olzog 1955) 445 ff.

[175] H.G. Dederer, "Art. 100 Rn. 283", op. cit., 2013.

[176] F. Schorkopf, op. cit., 171 f.; R. Geiger, op. cit., 123 ff.

[177] In the context of the European Union, we will discuss Articles 23, 24 of the Basic Law. We then will see that the special construction of German federalism enables the *Länder* to establish *"representations"* with the European Union in Brussels.

[178] S. Korioth, "Art. 30 recital 1", in T. Maunz, G. Dürig, R. Herzog, R. Scholz, M. Herdegen and H.H. Klein (eds.), *Grundgesetz Kommentar* (C.H. Beck 2006) commenting that the regulation of Article 30 is almost obsolete as other regulations of the Constitution precisely distribute the powers between the Federation and the *Länder*. Korioth explains the existence by historical reminiscences before the background of the Occupation Regime (ibid., Rn. 4–6).

[179] S. Korioth, "Art. 30 Rn. 20 and 21", op. cit.

[180] Regarding the historical development, see M. Nettesheim, "Art. 32 Rn. 3 and 5", in T. Maunz, G. Dürig, R. Herzog, R. Scholz, M. Herdegen and H.H. Klein (eds.), *Grundgesetz Kommentar* (C.H. Beck 2007).

[181] Ibid., "Art. 32 Rn. 29–59".

[182] Ibid., "Art. 32 Rn"; H. *Sauer,* op. cit., 39 ff.

[183] M. Nettesheim, "Art. 32 Rn. 12–14", op. cit., 2007, with a special view of "internationalization and globalization" in the interrelations of Germany with the outside world.

[184] Among the Federal States, opinions on the practice of Article 32 are split (see M. Nettesheim, "Art. 32 Rn. 61–71", op. cit., 2007), pointing to the compromise found by the Federation and the *Länder* in the Agreement of Lindau of November 14, 1957); ibid., Rn. 72 (2007) reproducing the text of that agreement. Further see C. Callies, op. cit., 86 ff; R. Geiger, op. cit., 110 ff.; F. Schorkopf, op. cit., 251 ff.

[185] M. Nettesheim, "Art. 32 Rn. 97", op. cit., 2007.

[186] Ibid., "Art. 32 Rn. 99–119". Regarding other internationally active entities below the level of *Länder*-statehood, ibid., Rn. 120–123 (2007), in particular with regards

to international activities of municipalities, ibid., Rn. 124–129 (2007); also see M. Dauster, "Kommunale Deutschlandpolitik? Partnerschaften zwischen Städten der Bundesrepublik und kommunalen Gebietskörperschaften der DDR und Polens" (1990) NJW 1084–1090. — Interestingly, International Public Law is not only applied to treaties and other activities of the *Länder* in their interrelations with Third Parties in the international arena. The German federalism is particular and characterized by cooperation among (all or different) German *Länder* or among (all or different) German *Länder* and the Federation. Such cooperation might follow specific rules, as set forth by the Basic Law, but may also be set up by inter-governmental agreements or even by formal treaties (then to be consented by the respective *Länder* parliaments and the Federal Parliament). In absence of specific constitutional rules on such treaties, it may happen that International Public Law is to be consulted when such inter-governmental treaties or agreements are interpreted or otherwise dealt with. — Regarding the Länder activities through their EU representations in Brussels, see F. Schorkopf, op. cit., 271 f.; C. Callies, op. cit., 86 ff.

187 M. Nettesheim, "Art. 59 Rn. 11–13", op. cit., 2009.

188 K. Doehring, op. cit., 214 f.

189 Article 7 No. 2 lit. a of the Vienna Convention on the Law of Treaties of May 23, 1969 (UNTS 1155, p. 331 and BGBl. 1985 II p. 926). The same applies to the Head of Government and the Minister of Foreign Affairs.

190 M. Nettesheim, "Art. 59 Rn. 35–40", op. cit., 2009. Does it mean a representation monopoly in the hands of the President's office? See the discussion ibid., Rn. 41–48.

191 Ibid., "Art. 59 Rn. 22"; C. Callies, op. cit., 64, 67 ff.; R. Geiger, op. cit., 117 ff.; F. Schorkopf, op. cit., 280 ff.; H. Sauer, op. cit., 46 ff.

192 Article 115a reads: (1) Any determination that the federal territory is under attack by armed force or imminently threatened with such an attack (state of defence) shall be made by the Bundestag with the consent of the Bundesrat. Such determination shall be made on application of the Federal Government and shall require a two-thirds majority of the votes cast, which shall include at least a majority of the Members of the Bundestag. (2) If the situation imperatively calls for immediate action and if insurmountable obstacles prevent the timely convening of the Bundestag or the Bundestag cannot muster a quorum, the Joint Committee shall make this determination by a two-thirds majority of the votes cast, which shall include at least a majority of its members. (3) The determination shall be promulgated by the Federal President in the Federal Law Gazette pursuant to Article 82. If this cannot be done in time, promulgation shall be effected in another manner; the determination shall be printed in the Federal Law Gazette as soon as circumstances permit. (4) If the federal territory is under attack by armed force, and if the competent federal authorities are not in a position at once to make the determination provided for in the first sentence of paragraph (1) of this Article, the determination shall be deemed to have been made and promulgated at the time the attack began. The Federal President shall announce that time as soon as circumstances permit. (5) If the determination of a state of defence has been promulgated, and if the federal territory is under attack by armed force, the Federal President, with the consent of the Bundestag, may issue declarations

under international law regarding the existence of the state of defence. Under the conditions specified in paragraph (2) of this Article, the Joint Committee shall act in place of the Bundestag (see H. Sauer, op. cit., 65 ff.; F. Schorkopf, op. cit., 369 ff., 402 ff.; C. Callies, op. cit., 133 ff., 166 ff.).

193 Instead, Basic Law by Article 61 has instituted a particular impeachment procedure before the Federal Constitutional Court for willful violation of the Basic Law or of any federal law. Such an impeachment does not invoke political reasons for the removal by a judgment of the Federal Constitutional Court (R. Herzog, "Art. 61 Rn. 2", in T. Maunz, G. Dürig, R. Herzog, R. Scholz, M. Herdegen and H.H. Klein (eds.), *Grundgesetz Kommentar* (C.H. Beck 2009), and regarding the constitutional history in recitals 3–6). The proceeding before the Federal Constitutional Court (see Roman Herzog, ibid., Rn. 33–65 [2009]) has much in common with an ordinary criminal proceeding and among scholars, the impeachment is not unanimously accepted. Some constitutions of the *Länder* know similar proceedings against members of their governments and in a few *Länder* against members of their parliaments. Neither the impeachment against the Federal President nor the impeachments against members of the State governments ever gained any relevance. They are fossils from the time of constitutionalism in the 19th century when parliaments fought for parliamentarian responsibility of kingly or princely ministers (M. Dauster, "Die Ministeranklage im deutschen Landesverfassungsrecht", in W. Fiedler and G. Ress (eds.), op. cit., 123 ff.).

194 M. Nettesheim, "Art. 59 Rn. 49–55", op. cit., 2009.

195 Ibid., "Art. 59 Rn. 56–83". Scholars disagree whether the Federal President, whose (formal) authority includes the formal ratification of international treaties, may reject their ratification and thereby prevent such treaties to enter into force internationally (see for discussion M. Nettesheim, "Art. 59 Rn. 83", op. cit., 2009; F. Schorkopf, op. cit., 173 ff.).

196 The *Bundesrat* is the constitutional institution composed of representatives of the governments of the *Länder*, not of the *Länder* parliaments (see Article 51 of the Basic Law). The Länder shall participate through the Bundesrat in the legislation and administration of the Federation and in matters concerning the European Union (Article 50 of the Basic Law) (see R. Müller-Terpitz, "Art. 50 Rn. 49", in T. Maunz, G. Dürig, R. Herzog, R. Scholz, M. Herdegen and H.H. Klein (eds.), *Grundgesetz Kommentar* (C.H. Beck 2017). As far as the participation of the *Bundesrat* in the federal legislation is concerned, the form of such participation refers to the regulations of the Basic Law, which concern the process of federal law making according to Articles 70–78 of the Basic Law. Few federal Laws need the explicit consent of the *Bundesrat* before being regarded as adopted, against most of the Draft Laws passed through the *Bundestag,* the *Bundesrat* may vote on objection. However, the *Bundestag* may then override such objections (see for details Articles 77 and 78 of the Basic Law (R. Müller-Terpitz, "Art. 50 Rn. 59 and 60", op. cit., 2017)).

197 BVerfGE 1, 372/394 f.; 90, 286/357; M. Nettesheim, "Art. 59 Rn. 91", op. cit., 2009.

198 M. Nettesheim, "Art. 59 Rn. 93–97", op. cit., 2009.

199 Ibid., "Art. 59 Rn. 103–110".

200 Ibid., "Art. 59 Rn. 98".

[201] BVerfGE 1, 372/381; 90, 286/359; M. Nettesheim, "Art. 59 Rn. 99–102", op. cit., 2009; F. Schorkopf, op. cit., 176 ff.

[202] F. Schorkopf, op. cit., 103 ff as to the enforcement of international treaties.

[203] Is it simply constitutional tradition, is it the position of individuals as legal subjects with human rights, or is it the German citizenship as a reciprocal bound between nationals and State? All arguments have something in common, as well as all commentators agree on a wide political discretion of the Government in terms of the implementation of Diplomatic Protection in concrete cases (see K. Doehring, op. cit., 368 ff.; A. Verdross and B. Simma, op. cit., 878 ff.; W.K. Geck, "Diplomatischer Schutz", op. cit., 379 ff.; M. Dauster, "Der Anspruch des Staatsangehörigen auf Schutz gegenüber dem Ausland" (1990) 12 Jura 26 ff.; C. Callies, op. cit., 27 f.).

[204] As a "monarch" for a limited time (F. Münch, "Die Bundesregierung", in W. Schätzel and H. Wehberg (eds.), *Völkerrecht und Politik*, Band 2 (Metzner 1954) 96 f.

[205] K.H. Ziegler, op. cit., 117 ff.

[206] Ibid., 133

[207] K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland, Band III: Allgemeine Lehren der Grundrechte, 1. Halbband* (C.H. Beck 1988) 51 ff. not only describes the (philosophical) history of human rights ideas but also considers the constitutional history of such rights in different countries, in particular in Germany since the era of Enlightenment (ibid., p. 128 ff).

[208] H. Mosler, "Das Institut de Droit International und die völkerrechtliche Stellung der menschlichen Person", in W. Wengler (ed.), *Justitia et Pace: Festschrift zum hundertjährigen Bestehen des Institut de Droit International* (Duncker & Humblot 1974) 85 ff. regarding the development since the early doctrines of natural law. With respect to the modern developments to regard individuals increasingly as bearers of rights under international law with their own legal personality, see K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland, III. Band, 2. Halbband* (C.H. Beck 1994) 1529 ff.; C. Callies, op. cit., 25 f.

[209] I. Kant, *Schriften zur Anthropologie, Geschichtsphilosophie, Politik und Pädagogik, Werkausgabe Band XI* (Suhrkamp 1977) 191 ff.

[210] See <https://www.archives.gov/founding-docs/bill-of-rights-transcript> accessed 15 August 2021.

[211] The Declaration is still in force according to the Preamble of the (present) Constitution of France of October 4, 1958 — M. Duverger, *Constitutions et Documents Politiques* (Presses universitaires de France 1981) 235; G. Franz, *Staatsverfassungen; eine Sammlung wichtiger Verfassungen der Vergangenheit und Gegenwart in Urtext und Übersetzung* (Oldenburg 1950); M. Duverger, op. cit., 9/10.

[212] F. Jürgensmeier (ed.), *Erzbischof Albrecht von Brandenburg 1490–1545. Ein Kirchen- und Reichsfürst der Frühen Neuzeit* (Knecht 1991); A. Stein, *Kardinal Albrecht* (Projekte-Verlag Cornelius 2013).

[213] The Reformist (Calvin and Zwingli) Branch of the Protestants did not find any recognition.

[214] H.H. Hofmann (ed), *Quellen zum Verfassungsorganismus des Heiligen Römischen Reiches Deutscher Nation 1495–1815* (Wissenschaftliche Buchgesellschaft 1976) 17; A. Buschmann, *Kaiser und Reich. Verfassungsgeschichte des Heiligen*

Römischen Reiches Deutscher Nation von Beginn des 12. Jahrhunderts bis 1806, Teil I: Vom Wormser Konkordat 1122 bis zum Augsburger Reichsabschied 1555 (2nd edn, Nomos 1994) 215–283; H. Schilling, *Aufbruch und Krise. Deutschland 1517–1648* (Das Reich und die Deutschen, Band 4) (Siedler 1988) 240 ff. The ruling Emperor of the time was Charles V, in whose Empire the sun never set. Despite being the mightiest sovereign in Europe, Augsburg in 1555 meant to Charles V a defeat not only in view of his secular power policy but also in view of his religious ambitions. His objective was to restore and guarantee the unity of Christianity under the spiritual guidance of the papacy and under the secular leadership of the Holy Roman Emperor. He felt to have totally failed, when, in conjunction with his succession to the throne, his plan to place his son Philip, who already was crowned King of Spain, on the German imperial throne failed due to the resistance of his brother, Archduke Ferdinand of Austria, who then became Charles V's successor in the Holy Roman Empire, and the German Electoral Princes, Charles V laid down the crown and withdrew to Spain to the monastery of San Jeronimo de Yuste, where he died on 21 September 1558 (A. Kohler, *Karl V. 1500–1558. Eine Biographie* (3rd edn, C.H. Beck 2014) 327 ff.).

215 Reich corporations were named "*collegia*": the first collegium was composed of the Electoral Princes, the second collegium was composed of Princes, Earls, and Imperial Knights, and the third collegium was composed of the Free Imperial Cities.

216 K. Stern, op.cit., 2000, 37.

217 The best examples in German literature but presenting a selection only: H.J.C. von Grimmelshausen, *Der abenteuerliche Simplicissimus Teutsch* (1668), reprint: *Werke in drei Bänden. Band I/1. Halbband* (D. Breuer, ed.) (Deutscher Klassiker Verlag 1989); R. Huch, *Der große Krieg in Deutschland* (Ullstein 1980); F. von Schiller, *Wallenstein — Trilogie: Wallensteins Lager — Die Piccolomini — Wallensteins Tod* (1799); R. Rebitsch, *Wallenstein. Biografie eines Machtmenschen* (Böhlau 2010); G. Mortimer, *Wallenstein. Rätselhaftes Genie des Dreißigjährigen Kriegs* (Primus 2013); C. Pantle, *Der Dreißigjährige Krieg: Als Deutschland in Flammen stand* (Propyläen 2017); P.H. Wilson, *Der Dreißigjährige Krieg. Eine europäische Tragödie* (Theiss 2017); H. Münkler, *Der Dreißigjährige Krieg: Europäische Katastrophe, deutsches Trauma 1618–1648* (Rowohlt 2017); G. Schmidt, *Die Reiter der Apokalypse. Geschichte des Dreißigjährigen Kriegs* (C.H. Beck 2018); G. Mann, *Wallenstein* (Fischer 1973).

218 K. Stern, op.cit., 2000, 43, footnote 130 indicating where the texts are to be found. Further H. Schilling, *Aufbruch und Krise. Deutschland 1517–1648* (Das Reich und die Deutschen, Band 4) (Siedler 1988) 445 ff.; H. Diewald, *Wallenstein* (Ullstein 1987).

219 W. Durner, "Art. 11 Rn. 9", in T. Maunz, G. Dürig, R. Herzog, R. Scholz, M. Herdegen and H.H. Klein (eds.), *Grundgesetz Kommentar* (C.H. Beck 2012).

220 See the reference of K.H. Ziegler, op. cit., 144 f. to Emer de Vattel (1714–1767), who used for the first time the terminology of *société des nations* (Le droit des gens, ou principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains, 1758) (K.H. Ziegler, ibid, p. 160).

221 Ibid., 144 f.

[222] *Immerwährender Reichstag* in Regensburg was the representation of the three collegia of the Reich (electoral princes, princes, dukes, earls, barons and knights and free cities). In contrast to former times, when the Holy Roman Emperor and German King summoned the Reichstag on his discretion, after the Westphalia Accords, the institution turned into a permanent one.

[223] Pope Innocence X protested by Pontifical Breve *Zelo domus Dei* of November 26, 1648 against in particular the religious agreements within the Westphalia Peace Treaties and annulled them (K.H. Ziegler, op. cit., 145), however without any legal effect.

[224] The consolidated and strengthened position of the territorial princes of Germany vis-à-vis the Reich and Emperor changed the *Immerwährender Reichtstag*. Was it the rule in former times prior to 1648 that the Emperor presided the Reichstag *in majestate*, from 1648 onwards he was almost absent, though represented by his *Prinzipalkommissar*, a member of the highest nobility, e.g. of the House of Thurn and Taxis in the 18th century. The individual members of the collegia as well did not participate in the sessions of the *Immerwährender Reichstag*, which then turned into a congress of diplomatic envoys (B. Stollberg-Rilinger, *Des Kaisers alte Kleider. Verfassungsgeschichte und Symbolsprache des Alten Reiches* (2nd edn, C.H. Beck 2013) 310 ff.). It is legitimate to say that those envoys were more seized by protocol questions and their ceremonial ranking than by substance matters. The Reichstag became almost meaningless at the end of the Holy Roman Empire's existence.

[225] Other see the Freedom of Religion as the first individual fundamental right (R. Herzog, *Allgemeine Staatslehre* (Athenäum 1971) 359/360; G. Anschütz, "Die Religionsfreiheit", in G. Anschütz und R. Thoma (eds.), *Handbuch des Deutschen Staatsrechts* (Mohr Siebeck 1998) 675 ff.).

[226] R. Herzog, op. cit., 389 ff.

[227] G. Jellinek, *Allgemeine Staatslehre* (3rd edn, Kiel 1926; Athenäum 1976) 416–427; R. Herzog, op. cit., 358.

[228] F. Berber, op. cit., 390 quoting A.L. von Schlözer, *Allgemeines StatsRecht und StatsVerfassungsLere* (Vandenhoek und Ruprecht 1793). Schlözer praises the Holy Roman Empire of the German Nation as the only country in the world in which one could bring an ordinary lawsuit against one's own sovereign not before his court, but before a "foreign court". What was meant was the Imperial Chamber Court, which private individuals could appeal to for violation of private rights by the sovereign if the sovereign did not enjoy the *Privilegium de non evocandi*. However, at the end of the 18th century, the Holy Roman Empire of the German Nation was more in the state of a confederation of states than in the state of a federal state in the modern sense (also F. Berber, ibid., 390 f.).

[229] K. Stern, op.cit., 2000, 30.

[230] Ibid., 31.

[231] K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland, Band III, 1. Halbband: Allgemeine Lehren der Grundrechte* (C.H. Beck 1988) 103.

[232] W. Durner, "Art. 11 Rn. 10", op. cit. 2012, who correctly points to existing serfdom at the end of the middle ages and beginning modern times as a barrier to the right of emigration, which the territorial sovereigns increasingly tightened by different means.

[233] A. Kraus, op. cit., 221 ff.; K. Pfister, *Kurfürst Maximilian I. von Bayern* (2nd edn, Ehrenwirth 1980) 30 ff.
[234] F. Berber, op. cit., 393.
[235] B. Stollberg-Rilinger, *Maria Theresia. Die Kaiserin in ihrer Zeit* (C.H. Beck 2017) 644 ff; for Bohemia see J.H. Hoensch, op. cit., 259 ff., 291 ff.
[236] See K. Doehring, op. cit., 113.
[237] Ibid., 110 ff. with more aspects.
[238] HistoricEngland, "Battlefields" (*HistoricEngland* 2017) <HistoricEngland.org.uk/listing/> accessed 15 August 2021; A. Curry and G. Foard, "Where Are the Dead of Medieval Battles? A Preliminary Survey" (2016) 11 (2–4) Journal of Conflict Archeology 61 <https://doi.org/10.1080/15740773.2017.1324675> accessed 15 August 2021.
[239] Together with the IVth Covenant, a series of additional agreements on the "laws in war" had been concluded at The Hague (to be found in RGBl. 1910, p. 82 ff.) (F. Schorkopf, op. cit., 399).
[240] Regarding the states' responsibility, see F. Schorkopf, op. cit., 419 ff.
[241] K. Doehring, op. cit., 426.
[242] With regards to the history of Human Rights in Germany, see K. Stern, op.cit., 1988, 100 ff., 108 ff.; G. Anschütz, op. cit., 568 ff.
[243] K. Stern, op.cit., 1988, 120 ff.; G. Anschütz, op. cit., 511 ff.
[244] RGBl. 1929 II, p. 97.
[245] K. Stern, op. cit., 1994, 1612 ff., 1623 ff. reflecting the historical development of interrelations between German Basic Rights and International Human Rights.
[246] F. Berber, op. cit., 1977, 288.
[247] The Universal Declaration knows no implementation mechanism (K. Stern, op.cit., 1994, 1597), which can be explained against the background of its early emergence at the end of the 1940s and the view at that time of the ban on interference in the internal affairs of states. Humanitarian interventions for whatever reasons and for whatever purposes were simply unthinkable at the beginning of the United Nations.
[248] F. Schorkopf, op. cit., 467, 479 f.
[249] Especially, the General Declaration of Human Rights of 1948 in conjunction with Article 1 No. 3 of the UN Charter represents a UN Program in terms of strengthening human rights. However, as the Preamble of the Declaration concedes, the Declaration was not designed to enter into force as a legally binding instrument. Moreover, the General Assembly of the UN (see especially Article 10 of the Charter) does not have the authority of adopting binding international rules (F. Schorkopf, op. cit., 480; K. Stern, op.cit., 1994, 1521 f.) for the endeavors at the beginning of the 1990s to improve the human rights situation globally, e.g. on the establishment of an International Human Rights Court, and the problems which come from differing concepts of the universality of human rights on the one hand and the conflicting interests of developing countries to go their own ways.
[250] F. Berber, op. cit., 1969, 52 ff.
[251] The "enemy-states clause" may have become obsolete (F. Schorkopf, op. cit., 654 footnote 422) but has not been removed from the Charter, yet.
[252] E.g. BVerfGE 141, 220 ff.; BGHSt 41, 241/245 f. (F. Schorkopf, op. cit., 467, 480 f.)

[253] UNTS 999, p. 171 — including the two Facultative Protocols of December 19, 1966 on the jurisdiction of the UN Human Rights Committee for individual complaints and of December 15, 1989 on the Abolishment of Capital Punishment. For both of the Covenants, see K. Stern, op.cit., 1988, 261 ff.
[254] UNTS vol. 993, p. 3.
[255] BGBl. 1973 II, p. 1534; BGBl. 1973 II, p. 1570.
[256] Regarding the difference in significance between both Convenants, see F. Schorkopf, op. cit., 467, 481 f.
[257] Looking at the global ratifications of both covenants, almost two-thirds of the Member States have become members of both Covenants. However, this does not yet permit to qualify the Covenants as general rules of Public International Law. In such a case, the regulations could precede Federal Statutes by a higher rank (Article 25 of the Basic Law).
[258] Cautiousness in the application is advised because the Federal Republic of Germany made some reservations to both of the Covenants (see F. Schorkopf, op. cit., 482).
[259] In particular, after the Final Act of the Helsinki Conference on Security and Cooperation in Europe of August 1, 1975 (see K. Stern, op.cit., 2000, 2019 f.; K. Stern, op.cit., 1988, 265–267).
[260] UNTS vol. 78, p. 277.
[261] BGBl. 1955 II, p. 210.
[262] UNTS vol. 189, p. 150.
[263] BGBl. 1954 II, p. 619.
[264] UNTS vol. 660, p. 195.
[265] BGBl. 1969 II, p. 2211.
[266] UNTS vol. 1249, p. 13.
[267] BGBl 1985 II, p. 1234.
[268] UNTS vol. 1465, p. 85.
[269] BGBl. 1993 II, p. 715.
[270] GAOR, 44th session, Resolution No. 25 of December 12, 1989.
[271] BGBl. 1992 II, p. 990.
[272] F. Schorkopf, op. cit., 482 ff.; C. Callies, op. cit., 45 ff.; K. Stern, op.cit., 1994, 1540 ff.
[273] F. Schorkopf, op. cit., 486; K. Stern, op.cit., 1994, 1603 ff., in particular for the so-called 1503 procedure on the basis of the resolution No. 1503 (XLVIII) of the General Assembly of UN of May 27, 1970.
[274] K. Stern, op.cit., 1988, 268 ff., 272; K. Stern, op.cit., 1994, 1561 f.
[275] UNTS vol. 87, p. 103; vol. 604, p. 296; vol. 777, p. 322; vol. 793, p. 350.
[276] BGBl. 1953 II, p. 558.
[277] Nowadays, more than 40 European States are members of the Convention including the Russian Federation (since May 5, 1998). — For the history, see K. Stern, op. cit., 1988, 273/274; F. Schorkopf, op. cit., 485; K.J. Partsch, Die Entstehung der europäischen Menschenrechtskonvention (1953/1954) 15 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 631 ff.
[278] UNTS vol. 213, p. 221.
[279] Interestingly, the European Court of Human Rights and the Federal Constitutional Court of Germany rather coexist in harmony although their scopes of jurisdiction

overlap (F.C. Mayer, "Einleitung Rn. 71; §34 Rn. 2", in U. Karpenstein and F.C. Mayer (eds.), *Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Kommentar* (2nd edn, C.H. Beck 2015); H. Sauer, *Jurisdiktionskonflikte in Mehrebenensystemen. Die Entwicklung eines Modells zur Lösung von Konflikten zwischen Gerichten unterschiedlicher Ebenen in vernetzten Rechtsordnungen. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (Springer 2008); K. Stern, op.cit., 1994, 1563: "Overall, Europeans living under the legal regime of the ECHR can be said to enjoy a system of European fundamental rights (and other rights) which, although not yet perfect in all respects, goes far beyond what the universal covenant system offers in terms of the guarantees of international human rights. In this sense, a European community of fundamental rights exists as part of that growing European constitutional state with common fundamental values".

[280] Article 35 paragraph 1 of the Convention; K. Stern, op.cit., 1988, 275; P. Schäfer, "§35 Rn. 7 ff", in U. Karpenstein and F.C. Mayer (eds.), op. cit.

[281] P. Schäfer, "§34 Rn. 2", in U. Karpenstein and F.C. Mayer (eds.), op. cit.

[282] F. Schorkopf, op. cit., 492; U. Karpenstein and C. Johann, "§33 Rn. 2", in U. Karpenstein and F.C. Mayer (eds.), op. cit., with examples from the Court's jurisprudence.

[283] K. Doehring, op. cit., 440.

[284] The 11th Additional Protocol of May 11, 1994, which entered into force on November 1, 1998, redesigned the procedure before the Court of Strasburg. The European Commission for Human Rights, to which individual complaints could have been filed only, was abolished. The immediate submission of such complaints to the Court was established and the Committee of Ministers' part was reduced to the surveillance of the implementation of final judgments. The Court became a permanent institution (F. Schorkopf, op. cit., 491; K. Doehring, op. cit., 439).

[285] K. Stern, op.cit., 1988, 277; H. Sauer, op. cit., 105 ff.

[286] Regarding the jurisprudence of the European Court of Human Rights, German courts take the position that they are not strictly bound by individual findings of the European Court of Human Rights but that they have to respect them in particular when the judgment contains general connotations of jurisprudence which go beyond individual cases, e.g. systematic flaws in a national legal system (BVerfGE 74, 358/370; 111, 307/329; M. Herdegen, *Europarecht* (21st edn, C.H. Beck 2019) 48 ff.; F. Schorkopf, op. cit., 208 ff.; H. Sauer, op. cit., 116 ff., 121 ff.). German criminal law has a dualistic structure with regard to the legal consequences of a criminal conviction, namely the punishment according to Sections 38 ff. of the Criminal Code and the mandatory measures of reform and prevention according to Sections 61 ff. of the Criminal Code, which can be imposed instead of or in addition to punishment. In the case of dangerous offenders, this also includes preventive detention (for an unlimited period of time), which had been carried out in correction ordinary facilities of the ordinary prison system. The European Court of Human Rights found that such preventive detention violated Article 5 paragraph 1 and Article 7 paragraph 1 of the Convention (judgment of December 17, 2009 [ECHR NJW 2010, 2495 ff.]). Against this background, the German Federal Constitutional Court by the judgment of May 4, 2011 (BVerfGE 128, 326 ff., in

particular Rn. 86 ff.) then changed its case law and found violations of the Basic Law. However, that was not enough. As a consequence, though, the entire system of preventive detention in Germany was remodeled (T. Fischer, *Strafgesetzbuch* (66th edn, C.H. Beck 2019) §66 Rn. 8).

287 File No. 19/00135; B. Wegener, "Urgenda III: Die Niederlande als Modell richterlichen Klimaschutzes" (*VerfBlog*, 21 December 2019) <https://verfassungsblog.de/urgenda-iii-die-niederlande-als-modell-richterlichen-klimaschutzes/> accessed 19 August 2021, DOI: https://doi.org/10.17176/20191222-053736-0>

288 See <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007> accessed 19 August 2021.

289 See <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007> accessed 19 August 2021.

290 See also T. Kirchner, "Wenn Richter die Welt retten" *Süddeutsche Zeitung* 97 (27 April 2020) 7.

291 For the complex mechanism of transferring sovereignty rights onto supranational institutions according to Article 23 of the Basic Law, see F. Schorkopf, op. cit., 217 ff. — Recently by the Decision of February 13, 2020, the Federal Constitutional Court in case No. 2 BvR 739/17 annulled Article 1 paragraph 1 sentence 1 of the (Federal) (consenting) Act on the Agreement of February 19, 2013 on the Establishment of a Common European Patent Court (ABl. EU Nr. C 175 of June 20, 2013), as the establishment of such court implies an amendment to the German Constitution but was not adopted by the necessary quorum of a two-thirds majority in Parliament, as set forth by Article 79 paragraph 2 of the Basic Law. Further see C. Callies, op. cit., 178 ff., 211 ff.; H. Sauer, op. cit., 179 ff.).

292 K. Stern, op.cit., 1994, 1519 describes the situation as of a European Constitution in being, which embraces human rights and mechanisms of their protection. In a similar vein, Peter Häberle ("Europa in kulturverfassungsrechtlicher Perspektive (1983)", in *Rechtsvergleichung im Kraftfeld des Verfassungsstaates. Methoden und Inhalte, Kleinstaaten und Entwicklungsländer* (Duncker & Humblot 1992) 45 ff., und "Gemeineuropäisches Verfassungsrecht (1991)", in *Rechtsvergleichung im Kraftfeld des Verfassungsstaates. Methoden und Inhalte, Kleinstaaten und Entwicklungsländer* (Duncker & Humblot 1992) 71 ff.) describes the current constitutional situation in Europe, while stressing the importance of fundamental rights.

293 The genesis of this Community for Coal and Steel may not be separated from the experiences, which Europe, in particular France and Germany, had made with the implementation of the Versailles Peace Accord in the 1920s. Was it one goal of the French Government in 1919 to punish Germany economically by the rules of the Peace Accord, the illegal occupation of the Ruhr District in 1923 was a major mistake and a breach of International Public Law. Since 1921, Germany struggled to comply with the reparation demands of the Allies controlling the German financial and economic abilities by the so-called Reparation Conference. When French and Belgian troops occupied the Ruhr District, the German industrial power house, widespread resistance was the echo. The occupation resulted in a French-Belgian dictatorship with summary executions of resistance fighters, with strikes and sabotage. The German Government collapsed and the Great Inflation broke out. The French Government under Prime Minister Raymond Poincaré finally gave in and the reparation plan was consecutively mitigated under the

US leadership (K. Stern, op.cit., 2000, 684–687). Despite all destructions by air bombings of World War II, the Ruhr District remained the Western German center of heavy industry even in the first years after World War II. As international control was not regarded as an optimal option and as France understandingly kept its profound mistrust, a different solution had to be found and was found in this supra-national body, which allowed controls not only of the German heavy industry but equally of the heavy industry of the other signatory States (Belgium, Netherlands, Luxemburg, and Italy) but also closer cooperation with the heavy industry sectors of all of the countries. It shall not be overseen that at the beginning of the 1950s, there was a shortness of coal and steel in all Europe and such closer cooperation was much needed (F. Berber, op. cit., 1977, 294; M. Schweitzer and W. Hummer, op. cit., 13 ff. including the European Community and the European Nuclear Community).

294 S. Magiera, "Die Einheitliche Europäische Akte und die Fortentwicklung der Europäischen Gemeinschaften zur Europäischen Union", in W. Fiedler and G. Ress (eds.), op. cit., 507 ff.; B. Beutler, R. Bieber, J. Pipkorn and J. Streil, op. cit., 550 ff.

295 A. Epiney, R. Mosters and A. Rieder, *Europarecht I. Das institutionelle Recht der Europäischen Union* (4th edn, Stämpfli Verlag 2015) 13 ff.

296 Ibid., 33 ff.

297 See for a short outline of the historical developments since the 1980s K. Stern, op.cit., 2000, 1560 ff.

298 U. Fastenrath and T. Groh, *Europarecht* (4th edn, Richard Boorberg Verlag 2016) 326 ff.; C. Callies, op. cit., 46 ff.; H. Sauer, op. cit., 142 ff.

299 For the sources and the ranking of Union Law, see A. Epiney, R. Mosters and A. Rieder, op. cit., 41 ff.; U. Fastenrath and T. Groh, op. cit., 328 ff.

300 U. Fastenrath and T. Groh, op. cit., 328 ff.; F. Schorkopf, op. cit., 226 ff.

301 See Article 13 of the Treaty on the European Union. The European Council is the political motor of the Union (see Article 15 of the Treaty on the European Union without being a legislator (Article 15 paragraph 1 of the Treaty on the European Union), the Council together with the Parliament is the law-maker of the Union (Article 16 of the Treaty on the European Union), the Commission according to Article 17 surveys the implementation of European law, represents the interests of the Union, has the right to respective initiatives and exercises governmental and administrative functions (A. Epiney, R. Mosters and A. Rieder, op. cit., 46 ff.; M. Schweitzer and W. Hummer, op. cit., 47 ff.; U. Fastenrath and T. Groh, op. cit., 289 ff.).

302 In the past prior to democratic and direct elections to the European Parliament, critics often voiced the deficite in the legislation of the European institutions (e.g. G. Ress, "Über die Notwendigkeit der parlamentarischen Legitimierung der Rechtsetzung der Europäischen Gemeinschaften", in W. Fiedler and G. Ress (eds.), op. cit., 625 ff.).

303 Article 288 of the Treaty on the Functioning of the European Union.

304 Article 19 of the Treaty on the European Union; the judicial sector consists of the European Court of Justice, the European Court (of first instance) and special judicial European bodies (B. Beutler, R. Bieber, J. Pipkorn and J. Streil, op. cit., 137 ff., 213 ff.; M. Schweitzer and W. Hummer, op. cit., 76 ff.).

[305] Articles 282–284 of the Treaty on the Functioning of the European Union.

[306] ECB decisions on the government bond purchase programme incompatible with its powers; Press Release No. 32/2020 of 5 May 2020; Judgment of 5 May 2020; 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15. With today's ruling, the Second Senate has upheld several constitutional complaints against the Public Sector Purchase Programme (PSPP). According to these, the Federal Government and the German Bundestag have infringed the complainants' right under Article 38.1 sentence 1 in conjunction with Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law by failing to take action against the fact that the European Central Bank (ECB), in the decisions adopted for the introduction and implementation of the PSPP, neither examined nor demonstrated that the measures taken in this connection were proportionate. The judgment of the Court of Justice of the European Union (ECJ) of 11 December 2018 does not preclude this, since it is simply no longer comprehensible in terms of monitoring the proportionality of the decisions adopted for the implementation of the PSPP and was therefore also ultra vires. However, the Senate was not able to establish a violation of the ban on monetary budget financing. Current financial aid measures of the European Union or the ECB in connection with the current Corona crisis are not the subject of the decision.
Facts:
The PSPP is part of the Expanded Asset Purchase Programme (EAPP), a Eurosystem framework for the purchase of assets. According to its rationale, the EAPP aims to expand the money supply in order to stimulate consumption and investment and to raise the inflation rate in the euro area to just below 2%. The PSPP was established by the ECB decision of 4 March 2015, which was subsequently amended by five other decisions. The PSPP will be used to purchase government bonds and similar marketable debt instruments issued by the central government of a euro area Member State, "recognized institutions", international organizations, and multilateral development banks established in the euro area, subject to the detailed conditions set out in the ECB Decisions. The PSPP represents by far the largest part of the EAPP. As of 8 November 2019, the Eurosystem had acquired securities with a total value of 2,557,800 million euro under the EAPP, of which 2,088,100 million euro was accounted for by the PSPP.
In their constitutional complaints, the complainants claim that the PSPP violates the prohibition of monetary public financing (Article 123 TFEU) and the principle of limited individual authorization (Article 5(1) TEU in conjunction with Articles 119, 127 et seq. TFEU). By the order of 18 July 2017, the Senate referred several questions to the Court of Justice for a preliminary ruling; these questions concerned in particular the prohibition of monetary budget financing, the ECB's mandate for monetary policy, and possible encroachment on the competence and budgetary sovereignty of the Member States. In its judgment of 11 December 2018, the ECJ ruled that the PSPP did not go beyond the ECB's mandate and did not violate the prohibition of monetary budget financing. Against this background, an oral hearing was held in Karlsruhe on 30/31 July 2019 (see PM No. 43/2019 of 25 June 2019).
I. The Decision of the Governing Council of the European Central Bank of 4 March 2015 (EU) 2015/774 and the subsequent Decisions (EU) 2015/2101, (EU)

2015/2464, (EU) 2016/702 and (EU) 2017/100 are — despite the ruling of the Court of Justice to the contrary — without prejudice to Article 119 and Article 127 et seq. of the Treaty on the European Union. TFEU and Art. 17 et seq. of the ECB Statute as ultra vires measures.

1. According to the consistent case law of the Federal Constitutional Court (see BVerfGE 126, 286 <302 et seq.; 134, 366 <382 et seq. marginals 22 et seq. >; 142, 123 <198 et seq. margin 143 et seq. >; BVerfG, the judgment of the Second Senate of 30 July 2019–2 BvR 1685/14, 2 BvR 2631/14 -, margin 140 et seq.), its duty to pursue substantiated complaints of ultra vires action by the European institutions and bodies is to coordinate with the task entrusted by the Treaties to the Court of Justice of interpreting and applying the Treaties and in doing so to preserve the unity and coherence of Union law (see Article 19.1 of the First Subsection of the First Chamber of the European Union, the second sentence of Article 267 TFEU). If each Member State were to claim the right to decide on the validity of Union acts through its own courts, the primacy of application could be undermined in practice and the uniform application of Union law would be jeopardized. If, on the other hand, the Member States were to waive ultra vires control altogether, the decision on the basis of the Treaties would be left to the Union institutions alone, even if their legal understanding of the matter were to result in a Treaty amendment or an extension of competences. The fact that in the borderline cases of possible transgression of competences on the part of the Union institutions — as is to be expected according to the institutional and procedural precautions of Union law — which are rare, the constitutional and Union law perspectives are not completely harmonized is due to the fact that the Member States of the European Union remain masters of the Treaties even after the entry into force of the Treaty of Lisbon and the threshold to the federal state has not been crossed (see BVerfGE 123, 267 <370 et seq.) The tensions that are in principle unavoidable under this construction must be cooperatively balanced in accordance with the idea of European integration and defused by mutual consideration. This characterizes the cooperation in the European Union, which is an association of states, constitutions, administrations, and jurisdictions (BVerfGE 140, 317 <338 marginal No. 44).

The interpretation and application of Union law, including the determination of the method to be applied in this connection, is primarily the task of the Court of Justice, which, pursuant to Article 19.1 sentence 2 TEU, is responsible for upholding the law in the interpretation and application of the Treaties. The methods developed by the Court of Justice to give concrete legal form to the law are based on the common (constitutional) legal traditions of the Member States (cf. also Article 6(3) TEU, Article 340(2) TFEU), as they have been reflected not least in the case-law of their constitutional and supreme courts and of the European Court of Human Rights. However, the peculiarities of Union law imply not inconsiderable differences in the meaning and weighting of the various means of interpretation. A manifest disregard for the methods of interpretation handed down in the European legal area or for general principles of law common to the legal systems of the Member States is not covered by the mandate of Article 19(1), second sentence, TEU. Against this background, it is not the task of the Federal Constitutional Court to substitute its interpretation for that of the Court

of Justice in the case of questions of interpretation in Union law which, even if dealt with methodologically in the usual legal-scientific discussion framework, can lead to different results (BVerfGE 126, 286 <307>). Rather, it must respect the decision of the Court of Justice even if the latter reaches a view that could be countered with weighty arguments, as long as it can be traced back to recognized methodological principles and does not appear objectively arbitrary.

2. The Court's view that the Governing Council's decision on the PSPP and its amendments still fall within the scope of its powers clearly fails to recognize the importance and scope of the principle of proportionality (Article 5(1), second sentence, and (4) TEU), which must also be observed in the allocation of powers, and is methodologically simply no longer justifiable because the actual impact of the programme on economic policy is completely ignored.

The approach of the Court of Justice to disregard the actual effects in the proportionality test and to dispense with an evaluative overall view fails to meet the requirements for a comprehensible verification of compliance with the monetary policy mandate of the European System of Central Banks (ESCB) and the ECB. In such an approach, the principle of proportionality (Article 5 (1), second sentence, and (4) TEU) cannot fulfill its corrective function of protecting Member State competences, which basically leaves the principle of limited individual authorization (Article 5 (1), first sentence, and (2) TEU) empty-handed. The complete ignoring of all economic policy effects also contradicts the methodical approach of the Court of Justice in almost all other areas of the Union legal order. This does not do justice to the interface function of the principle of conferral and the repercussions that this must have on the methodological control of compliance with it.

3. The Court's interpretation of the principle of proportionality and the provision of the ESCB's mandate based on it, therefore, exceed the mandate given to it in the second sentence of Article 19(1) TEU. The Court's self-limitation of its judicial review as to whether there is a "manifest" error of assessment on the part of the ECB, whether a measure "manifestly" goes beyond what is necessary to achieve the objective or whether its disadvantages are "manifestly" disproportionate to the objectives pursued, does not affect the ECB's competence, which is limited to monetary policy. On the contrary, it allows the ECB self-determined, creeping extensions of its competence or, in any case, declares them to be not or only to a very limited extent subject to judicial review. However, the preservation of the European Union's competence bases is of decisive importance for guaranteeing the democratic principle and the legal constitution of the European Union.

II. As the Senate is thus not bound by the Court's decision, it must assess independently whether the Eurosystem, in taking the decisions establishing and implementing the PSPP, was still acting within the competences granted to it under primary law. This is not the case for lack of sufficient considerations of proportionality.

A programme for the purchase of government bonds such as the PSPP, which has a significant economic policy impact, requires in particular that the monetary policy objective and the economic policy impact are identified, weighed, and balanced against each other. Therefore, the unconditional pursuit of the monetary policy objective of the PSPP to achieve an inflation rate below but close to 2%,

while ignoring the economic policy implications of the programme, appears to disregard the principle of proportionality.

The necessary balancing of the monetary policy objective with the economic policy implications of the means used does not follow from the decisions, which are the subject of this procedure. They therefore infringe the second sentence of Article 5 (1) and (4) TEU and are not covered by the ECB's competence in the field of monetary policy.

The decisions are limited to stating that the inflation target has not been achieved and that less burdensome means are not available. They do not contain a forecast of the economic policy implications of the programme or whether they are proportionate to the desired monetary policy benefits. It is not apparent that the Governing Council of the ECB would have identified and weighed up the consequences invested in and directly related to the PSPP, which the PSPP inevitably causes due to its volume of more than two trillion euros and maturity of now more than three years. The negative effects of the PSPP increase in scope and duration so that the requirements for such a weighing increase with the duration.

The PSPP improves the refinancing conditions of the Member States because they can obtain loans in the capital market at significantly more favorable conditions; it therefore has a significant impact on the fiscal policy framework in the Member States. In particular, it can have the same effect as financial assistance under Art. 12 et seq. of the ESM Treaty. The scope and duration of the PSPP may mean that even effects that comply with primary law become disproportionate. The PSPP also has an impact on the banking sector by transferring large amounts of risky government bonds to the Eurosystem's balance sheets, thereby improving the economic situation of banks and increasing their creditworthiness. The consequences of the PSPP also include economic and social impacts on almost all citizens, who are at least indirectly affected as shareholders, tenants, property owners, savers, and policyholders. Savings, for example, are subject to significant risks of loss. Companies, which are no longer economically viable per se, remain in the market because of the general interest rate level which has also been reduced by PSPP. Finally, as the duration of the programme and the overall volume increase, the Eurosystem is becoming increasingly dependent on the policies of the Member States, as it is increasingly unable to terminate and unwind the PSPP without jeopardizing the stability of the monetary union.

These and other significant economic policy implications should have been weighted by the ECB, related to the projected benefits for the achievement of the monetary policy objective defined by the ECB and weighed up according to proportionality considerations. As far as can be seen, no such balancing has taken place, either at the beginning of the programme or at a later stage. Without documentation that and how this balancing has taken place, legal compliance with the ECB's mandate cannot be effectively controlled by the courts.

III. On the other hand, whether the Federal Government and the Bundestag also violated their responsibility for integration by not insisting on the termination of the PSPP cannot be conclusively assessed, because only after a comprehensibly presented proportionality test by the Governing Council of the ECB, can it be

finally determined whether the PSPP is compatible with Article 127 (1) TFEU in substance.

IV. In so far as the Court's judgment denies an infringement of Article 123(1) TFEU, the handling of the "guarantees" for a purchase programme developed in its judgment in the Gauweiler case meets with considerable objections, since the Court refrains from examining in greater detail the anti-circumvention measures contained in the PSPP and does not deal with contrary indicators. However, the Senate considers itself bound by the opinion of the Court in this respect, since, in view of the real possibility that, in any event, the guarantees recognized by the Court were complied with by the ECB, a manifest breach of Article 123(1) TFEU cannot yet be established.

Admittedly, the Court has largely taken away the effect of individual "guarantees" such as the prohibition of announcement, the lock-up period, the prohibition of holding the bonds in principle until maturity, and the necessity of an exit scenario. However, whether a bond purchase programme such as the PSPP constitutes a manifest circumvention of Art. 123 (1) TFEU is not decided by compliance with a single criterion, but on the basis of an overall assessment. In conclusion, a manifest circumvention of the prohibition of monetary budget financing cannot be established, in particular because

- the volume of purchases is limited in advance,
- the purchases made by the Eurosystem are only disclosed in aggregated form,
- an upper limit of 33% per International Securities Identification Number is observed,
- purchases are carried out in accordance with the national central banks' capital key,
- only bonds issued by entities that have access to the bond market on the basis of a minimum rating are purchased, and
- purchases should be limited or stopped and purchased debt instruments should be put back on the market when continued intervention is no longer necessary to achieve the inflation target.

V. A violation of the constitutional identity of the Basic Law in general and the overall budgetary responsibility of the German Bundestag in particular is not apparent. It is true that a (retroactive) change in the distribution of risk between the ECB and the national central banks in view of the size of the PSPP of more than two trillion euros would affect the limits of the overall budgetary responsibility of the German Bundestag as developed by the Senate and would be incompatible with Article 79 (3) of the Basic Law. However, the PSPP does not provide for such risk sharing — which is already prohibited by primary law — for the government bonds of its Member States purchased by the national central banks.

VI. The Federal Government and the German Bundestag are obliged, by virtue of the responsibility for integration incumbent upon them, to oppose the way in which the PSPP has been handled to date.

1. In the event of obvious and structurally significant transgressions of competences by organs, institutions, and other bodies of the European Union, the constitutional organs are obliged, within the scope of their competences and with the means at their disposal, to actively work towards compliance with the integration programme and the cancellation of measures not covered by the

integration programme, and — as long as the measures continue to be effective — to take suitable precautions to ensure that the domestic effects of the measures remain as limited as possible.
In concrete terms, this means that the Federal Government and the Bundestag are obliged, by virtue of their responsibility for integration, to work towards a proportionality assessment by the ECB. The same applies to the reinvestment phase of the PSPP, which started on 1 January 2019 and will be resumed on 1 November 2019. In this respect, the obligation to monitor the Eurosystem's decisions on government bond purchases under the PSPP and to use the means at their disposal to work towards compliance with the mandate assigned to the ESCB also continues.
3. German constitutional bodies, authorities, and courts may not participate in the creation, implementation, enforcement, or operationalization of ultra vires acts. The Bundesbank is therefore prohibited from participating in the implementation and execution of the decisions which are the subject of this procedure after a transitional period of a maximum of three months necessary for voting in the Eurosystem, unless the Governing Council of the ECB clearly demonstrates in a new decision that the monetary policy objectives pursued with the PSPP are not disproportionate to the associated economic and fiscal policy implications. Under the same condition, the Bundesbank is obliged to ensure a coordinated — also long-term — reduction of the government bond holdings within the framework of the Eurosystem.
See M. Nettesheim, "Das PSPP-Urteil des BVerfG — ein Angriff auf die EU?" (2020) NJW 1631 ff.

307 A. Epiney, R. Mosters and A. Rieder, op. cit., 61 ff.; B. Beutler, R. Bieber, J. Pipkorn and J. Streil, op. cit., 75 ff.; U. Fastenrath and T. Groh, op. cit., 368.

308 U. Fastenrath and T. Groh, op. cit., 52 f.

309 A. Epiney, R. Mosters and A. Rieder, op. cit., 69; M. Herdegen, op. cit., 106 f.

310 A. Epiney, R. Mosters and A. Rieder, ibid.

311 Directives, which by their nature need national transformation and implementation acts, regularly set up precise deadlines, within which the national lawmakers have to become active. Often Member States omit such deadlines. Unless the European Commission or another Member State is of the opinion that such omission represents a violation of the European Treaty Law and submits the matter to the European Court of Justice (see Article 258 and 259 of the Treaty on the Functioning of the European Union) the inactivity might lead to the question, whether such a directive is able to produce legal effects without the necessary transformation act. The European Court of Justice affirmed such self-execution of directives in constant jurisprudence at the latest since EuGH Rs 41/74 (Slg. 1974, p. 1337 ff.; Rs 8/81 (Slg. 1982, p. 53) and based its jurisprudence on the criterion of the *effet utile*. The negligent Member State should not get in the position to determine when a binding directive becomes effective within the national legal system by arbitrarily being inactive (critical K. Doehring, op. cit., 168), and in doing so to put the legal unity of the Union at risk (B. Beutler, R. Bieber, J. Pipkorn and J. Streil, op. cit., 183). The Federal Constitutional Court of Germany accepted this European jurisprudence as conform to the Law of the Treaties (BVerfGE 75,

p. 223 ff.) (M. Schweitzer and W. Hummer, op. cit., 106; U. Fastenrath and T. Groh, op. cit., 336 ff., 369).

312 F. Schorkopf, op. cit., 28 ff.

313 EuGH Rs. C-6/64, p. 1269 ff. and since then constant jurisprudence; M. Herdegen, op. cit., 245.

314 B. Beutler, R. Bieber, J. Pipkorn and J. Streil, op. cit., 79 ff.

315 M. Herdegen, op. cit., 246.

316 Ibid., 249 f.

317 Not only courts of last instance, see EuGH Rs.-C-314/85, Slg. 1987, p. I-4199; A. Epiney, R. Mosters and A. Rieder, op. cit.,173.

318 M. Herdegen, op. cit., 236; A. Epiney, R. Mosters and A. Rieder, op. cit., 171 ff.; B. Beutler, R. Bieber, J. Pipkorn and J. Streil, op. cit., 233 ff.; U. Fastenrath and T. Groh, op. cit., 446 ff.

319 Unless the interpretation is clear — "acte-clair theorie" see EuGH Rs. C-283/281 Slg. 1982, p. I-3415; A. Epiney, R. Mosters and A. Rieder, op. cit., 172; U. Fastenrath and T. Groh, op. cit., 454.

320 M. Herdegen, op. cit., 236 — National Law, which obliges courts to submit questions about the conformity of national law with Union Law to national constitutional courts, may not hinder those courts to (simultaneously) seize the European Court of Justice of the matter (EuGH, Rs. C-188/10 & C-189/10, EU:C2010:363, Rn. 40 ff.; M. Herdegen, ibid.).

321 U. Fastenrath and T. Groh, op. cit., 450.

322 After the accession of the European Union to the European Convention on Human Rights, which is still discussed, the interrelation between the European Court of Justice and the European Court of Human Rights will be an interesting topic (M. Herdegen, op. cit., 52 ff.; B B. Beutler, R. Bieber, J. Pipkorn and J. Streil, op. cit., 183 issue (Opinion 2/13 of the European Court of Justice of December 18, 2014 — EU:2014:2454 — Rn. 178 ff.). However, although not being a signatory member of the Convention and therefore not being a party of a proceeding before the European Court of Human Rights, legal acts of the European Union might become indirectly matter of a proceeding before the European Court of Human Rights provided for that such Union act has been merged into national law and such national law becomes subject of a human rights proceeding before the European Court of Human Rights [ECHR EuZW 1999, p. 308 ff. in case Matthews vs. UK when citizens of Gibraltar were excluded from the election to the European Parliament and the plaintiff challenged the UK laws]). For the interrelations between the European Union and Council of Europe in general, see Council of Europe, Compendium of texts governing the relations between the Council of Europe and the European Union, 4th edition, Strasbourg 2001.

323 BVerfGE 73, 339/366 f.; 75, 223/233 ff.; A. Epiney, R. Mosters and A. Rieder, op. cit., 117 ff.; H. Sauer, op. cit., 174.

324 The interrelations between the German Federal Constitutional Court and the European Court of Justice represent an interesting but also difficult matter. According to the Basic Law, the Federal Constitutional Court is the guardian of the constitution, whose word is the last word in constitutional matters. This also includes the so-called "guarantee of eternity" of Article 79 paragraph 3 of the Basic Law, according to which amendments to the Basic Law which affect

the structure of the Federation into Länder, the fundamental participation of the Länder in legislation or the principles laid down in Articles 1 and 20 are inadmissible. This "guarantee of eternity" also covers the transfer of German sovereign rights to the European Union pursuant to Article 23 paragraph 1 sentence 2 of the Basic Law (Article 23 paragraph 1 sentence 3 of the Basic Law). In addition, the Federal Constitutional Court considers itself to have a particular duty to implement the fundamental rights of the Basic Law. This results in a number of overlaps, including with the jurisdictions of the Federal Constitutional Court and the European Court of Justice, which became even more pronounced after the proclamation of the Charter of Fundamental Rights of the European Union on 7 December 2000 (ABl. 2000 C 364, p. 1 ff.). For the Charter applies not only to Union institutions but also within the Member States when Union law is implemented. The Federal Constitutional Court has taken a position in several decisions (BVerfGE 123, 267 ff.; 126, 286 ff.; 140, 317 ff.; 37, 271 ff.; 73, 339 ff.; 118, 79 ff.) which cannot be deepened here (see M. Herdegen, op. cit., 257 ff.). This also applies to the relationship between the Federal Constitutional Court and the European Court of Justice (M. Herdegen, op. cit., 271 f.; G. Hirsch, "Europäischer Gerichtshof und Bundesverfassungsgericht — Kooperation oder Konfrontation?" (1996) NJW 2457 ff.; K. Lenaerts, "Kooperation und Spannung im Verhältnis von EuGH und nationalen Verfassungsgerichten" (2015) 50(1) Europarecht 3 ff.; B. Beutler, R. Bieber, J. Pipkorn and J. Streil, op. cit., 97 ff., F. Schorkopf, op. cit., 121 ff.

325 A. Epiney, R. Mosters and A. Rieder, op. cit., 156 ff.; B. Beutler, R. Bieber, J. Pipkorn and J. Streil, op. cit., 246 ff.; U. Fastenrath and T. Groh, op. cit., 419 ff.

326 EuGH, Rs. C-387/97, Slg. 2000, I-5047; A. Epiney, R. Mosters and A. Rieder, op. cit., 158; U. Fastenrath and T. Groh, op. cit., 424.

327 M. Herdegen, op. cit., 227. Political consequences could result from infringement proceedings against Poland concerning the "judicial reforms" there (see I. Werner, "Richter unter Kontrolle" *DRiZ* (2019) 202 ff.), where the Commission has the not unfounded suspicion that these reforms distance Poland from the principles of the rule of law and the independence of the judiciary in the Member States, which Article 7 of Treaty on the European Union, as well as Article 67 of the Treaty on the Functioning of the European Union, have on their minds and which characterize judicial cooperation between the Member States pursuant to Articles 81–86 of the Treaty on the Functioning of the European Union (M. Herdegen, op. cit., 384 ff.; A. Epiney, R. Mosters and A. Rieder, op. cit., 37 ff.; 121).

328 A. Epiney, R. Mosters and A. Rieder, op. cit., 100.

329 Ibid., 102 ff.

330 Art. 263 of the Treaty on the Functioning of the European Union.

331 M. Herdegen, op. cit., 303 ff.; U. Fastenrath and T. Groh, op. cit., 121 ff.; K. Stern, op.cit., 1994, 1591 ff.

332 B. Beutler, R. Bieber, J. Pipkorn and J. Streil, op. cit., 273 ff.; M. Herdegen, op. cit., 314 ff.; M. Schweitzer and W. Hummer, op. cit., 353 ff.

333 M. Herdegen, op. cit., 338 ff.; U. Fastenrath and T. Groh, op. cit., 140 ff. and 155 ff.

334 M. Herdegen, op. cit., 357 ff.; M. Schweitzer and W. Hummer, op. cit., 362 ff.; U. Fastenrath and T. Groh, op. cit., 170 ff.

[335] B. Beutler, R. Bieber, J. Pipkorn and J. Streil, op. cit., 301 ff.; M. Herdegen, op. cit., 365 ff.; M. Schweitzer and W. Hummer, op. cit., 369 ff.; U. Fastenrath and T. Groh, op. cit., 183 ff.
[336] M. Herdegen, op. cit., 303 ff.
[337] B. Beutler, R. Bieber, J. Pipkorn and J. Streil, op. cit., 368 ff.
[338] Ibid., 409 ff.; M. Schweitzer and W. Hummer, op. cit., 365 ff.; U. Fastenrath and T. Groh, op. cit., 199 ff.
[339] B. Beutler, R. Bieber, J. Pipkorn and J. Streil, op. cit., 436 ff.; M. Schweitzer and W. Hummer, op. cit., 462 ff.
[340] Ibid., 446 ff.; ibid., 243 ff.
[341] M. Schweitzer and W. Hummer, op. cit., 421 ff.; U. Fastenrath and T. Groh, op. cit., 256; Bayerisches Oberstes Landesgericht, Decision of October 28, 2019 (case No. 202 StRR 1438/19) — driving licenses.
[342] U. Fastenrath and T. Groh, op. cit., 239 ff.
[343] M. Schweitzer and W. Hummer, op. cit., 505 ff.
[344] Ibid., 478 ff.; U. Fastenrath and T. Groh, op. cit., 250 ff.
[345] B. Beutler, R. Bieber, J. Pipkorn and J. Streil, op. cit., 464 ff. M. Schweitzer and W. Hummer, op. cit., 485 ff.;
[346] M. Schweitzer and W. Hummer, op. cit., 365 ff.
[347] K. Ambos, op. cit., 566.
[348] U. Fastenrath and T. Groh, op. cit., 50 f.
[349] Council Regulation (EU) 2017/1939 of 12 October 2017 establishing a European Public Prosecutor's Office in conjunction with Article 84 of the Treaty on the Functioning of the European Union. <http://data.europa.eu/eli/reg/2017/1939/oj> accessed 15 August 2021.
[350] H. Satzger, *International and European Criminal Law* (2nd edn, C.H. Beck 2018) 73; K. Ambos, op. cit., 570 ff., 577 ff.
[351] U. Fastenrath and T. Groh, op. cit., 49.
[352] H. Satzger, op. cit., 77; M. Schweitzer and W. Hummer, op. cit., 434 f.
[353] E.g. H. Satzger, op. cit., 79 ff.
[354] Ibid., 85 with a list of matters, which EU has regulated by Directives, Framework Decisions, and Conventions.
[355] Council Regulation (EU) 2017/1939 of October 12, 2017. The regulation did not adopt any substance criminal law and leaves that to the Member States. The European Public Prosecutor's Office is envisaged as a coordination institution and a centralized authority for collecting relevant data/evidence. Whatever European Public Prosecutors's Office achieves in terms of investigation, all that will be processed by national authorities within the Member States according to their national procedural legislation.
[356] K. Ambos, op. cit., 570 ff., 594 ff.
[357] History of founding: H. Satzger, op. cit., 125; with regards to their scope of authority: ibid., p. 126 ff. — Collecting data, processing and sharing them need regulations with view on data protection, legal remedies and — in case of unlawful processes compensation (see ibid.).
[358] Ibid., 128 ff.
[359] Ibid., 130 ff.
[360] Ibid., 132 ff.; K. Ambos, op. cit., 570 ff., 695 ff.

[361] H. Satzger, op. cit., 133.
[362] K. Ambos, op. cit., 570 ff., 606 ff.
[363] H. Satzger, op. cit., 132 f.
[364] Ibid., 137 f.
[365] BVerfG NJW 2016, 1149 ff. (see hereto H. Satzger, "Grund- und menschenrechtliche Grenzen für die Vollstreckung eines Europäischen Haftbefehls? 'Verfassungsgerichtliche Identitätskontrolle' durch das BVerfG vs. Vollstreckungsaufschub bei 'außergewöhnlichen Umständen' nach dem EuGH" (2016) NStZ 514 ff.; D. Burchardt, "Die Ausübung der Identitätskontrolle durch das Bundesverfassungsgericht — Zugleich Besprechung des Beschlusses 2 BvR 2735/14 des BVerfG vom 15.12.2015 ('Solange III'/'Europäischer Haftbefehl II') (2016) 76 ZaöRV 527 ff.).
[366] Professional associations of prosecutors in Germany immediately took the opportunity in order to urge the politicians to finally reform the prosecutor's offices in Germany into independent bodies and to remove any legal possibility of influence by the executive branch of the government. This demand is old and has remained unheard for decades, and so will it be.
[367] H. Satzger, op. cit., 139 f. and ibid., p. 140 ff. with regards to the necessary acts of implementation of this criminal law policy of the European Union.
[368] BVerfGE 12, 62/66.
[369] H. Satzger, op. cit., 164 ff.; Frank Schorkopf, "Der Wertekonstitutionalismus der Europäischen Union" (2020) Juristen Zeitung 477 ff.
[370] Annette Ramelsberger, "Warum waren wir Ihnen kein Wort wert?" *Süddeutsche Zeitung* 101 (2 May 2020) 7.
[371] H. Satzger, op. cit., 167 f.
[372] Section 406g of the German Criminal Procedure Code.
[373] Piracy, unfortunately, returned as a matter of serious concern at the international level, in particular when we look at the Horn of Africa Region. According to Articles 105, 110 and, 111 of the UN Covenant on the High Sea, states are legally obligated to combat piracy at the High Sea. The international practice at the Horn of Africa nevertheless causes some serious problems if military forces are used (F. Schorkopf, op. cit., 381 f.). The same is to be applied to military forces in combatting international terrorism (ibid., p. 382 f., p. 391 ff.). With regards to German military forces operating outside Germany, the question, in particular, is about human rights of the Basic Law to be applied in such operations.
[374] Although having been a signatory, the US Senate did not ratify the Peace Agreement.
[375] The Peace Accord of St. Germain-en-Laye with Austria of September 10, 1919 provided for similar rules by Articles 173–176 (Australian Treaties Series 1920 No. 3) — except a rule demanding the prosecution of former Austrian Emperor and King of Hungary Charles I (1916–1918). The War Crime Prosecution imposed on the Austrian Government by the St.-Germain Accord had not more than a paper effect and remained without any practical relevance.
[376] H. Satzger, op. cit., 222.
[377] Ibid.
[378] Ibid.

[379] K. Doehring, op. cit., 503; A. Verdross and B. Simma, op. cit., 850. As far as voices are quoted, who discuss "guilt" in connection with State delinquency in International Public Law, those voices do not refer to elements of crime under criminal law (see ibid., p. 850 footnote 15). Rather, they discuss legal categories which belong to the cooperative, i.e. civil law colored fault. Guilt in the sense of criminal law requires a guilty individual. The problem is similar to the one we know from corporate criminal law when it comes to the criminal liability of legal entities under private or public law (see M. Löffelmann, "Der Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden" (2014) JR 185 ff.). This becomes obvious when we look closer at the discussion, where the criterion of "diligence" is introduced, which is a civil law element (ibid., p. 953).

[380] Wilhelm II lived in "House Doorn" in the Netherlands like a Prussian "Grandseigneur" in some sort of idyll (see B. Hasselhorn, "Nach dem Königstod. Zum Umgang Wilhelms II. mit seinem Erbe nach 1918", in T. Biskup, T.V. Minh and J. Luh (eds.), op. cit., 39/40.

[381] H. Satzger, op. cit., 222 and 223. The legal considerations of the German Government that Section 9 of the German Criminal Code forbade extradition of German nationals for a foreign government was not convincing. The Peace Treaty of Versailles superseded any national law of Germany.

[382] RGBl. 1919, p. 2125. However, the respective Law of December 19, 1919 did not define what is to be understood by the criterion of "laws and customs of war". Instead, the law referred to the German Criminal Code, which in 1919 neither defined crimes against the laws and customs of war nor any different international crime. In sum, the German war crime prosecution after World War I was a stillborn child.

[383] H. Satzger, op. cit., 223.

[384] E.g. the Slavery Convention of September 25, 1926 as amended by the Protocol of December 7, 1953 (BGBl. 1972 II p. 1473).

[385] LNTS vol. 94, p. 57. See also Protocol on the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of June 17, 1925 (LNTS vol. 94, p. 65).

[386] For the biography of this psychopathical "petit bourgeois" with his inferiority complexes, see p. Longerich, *Joseph Göbbels, Biographie* (Siedler 2010). The other horrifying lunatic as the Head of the German Police and Chief of the concentration camps was Heinrich Himmler. For his biography, see p. Longerich, *Heinrich Himmler. Biographie* (Siedler 2008); further: M. Uhl, T. Pruschwitz, M. Holler, J.L. Leleu and D. Pohl (eds.), *Die Organisation des Terrors. Der Dienstkalender Heinrich Himmlers 1943–1945* (Piper Verlag 2020); also see R. Walther, "Terminsache Massenmord" *Süddeutsche Zeitung* 81 (6 April 2020) 13.

[387] I. Kant, *Schriften zur Anthropologie, Geschichtsphilosophie, Politik und Pädagogik, Schrift zum ewigen Frieden, 1795, Werkausgabe Band XI* (Suhrkamp 1977) 191/200: "Woraus denn folgt: dass ein Ausrottungskrieg, wo die Vertilgung beider Teile zugleich, und mit dieser auch alles Rechts treffen kann, den ewigen Frieden nur auf der großen Kirchhofe der Menschengattung stattfinden lassen würde. Ein solcher Krieg also, mithin auch der Gebrauch der Mittel, die dahin führen, muss schlechterdings unerlaubt sein".

[388] With regards to the perversion of the German Justice System, see C.L. Fountaine, "Complicity in the Perversion of Justice: The Role of Lawyers in Eroding the Rule of Law in the Third Reich" (2020) 10 St. Mary's Journal on Legal Malpractice and Ethics 198 ff.

[389] E.g. F. Bajohr and D. Pohl, *Der Holocaust als offenes Geheimnis. Die Deutschen, die NS-Führung und die Alliierten* (C.H. Beck 2006); regarding the Roman Catholic Church, see D.J. Goldhagen, *Die katholische Kirche und der Holocaust. Eine Untersuchung über Schuld und Sühne* (Siedler 2002).

[390] Erklärung in Anbetracht der Niederlage Deutschlands und der Übernahme der obersten Regierungsgewalt hinsichtlich Deutschlands durch die Regierungen des Vereinigten Königreichs, der Vereinigten Staaten von Amerika und der Union der Sozialistischen Sowjet-Republiken und durch die Provisorische Regierung der Französischen Republik vom 5. Juni 1945 (G. Dahm, J. Delbrück and R. Wolfrum, *Völkerrecht, Band I/Halbband 1* (2nd edn, De Gruyter 1989) 14).

[391] F. Berber, op. cit., 1969, 252–261; H. Satzger, op. cit., 223; K. Doehring, op. cit., 510 ff.

[392] Less prominent NS perpetrators were dealt by Allied Military Courts in the four occupied zones of Germany (see G. Werle, "Einleitung VStGB Rn. 10", in C. Safferling (ed.), *Münchener Kommentar zum Strafgesetzbuch, Band 8 Nebenstrafrecht III* (3 edn, C.H. Beck 2018),) or by German courts with authorization of the Allies only (e.g. Bayerisches Gesetz Nr. 22 zur Ahndung nationalsozialistischer Straftaten of May 31, 1946 (BGBl. Teil III No. 450-2c), Hessisches Gesetz zur Ahndung nationalsozialistischer Straftaten of May 29, 1946 (BGBl. Teil III No. 450-2h); Bremisches Gesetz zur Ahndung nationalsozialistischer Straften of May 27, 1946 (BGBl. Teil III No. 450-2e) and Württemberg-Badisches Gesetz zur Ahndung nationalsozialistischer Straftaten of May 31, 1946 (BGBl. Teil III No. 450l) (Nuremberg Principles as customary rules of law did not play a major role in national court proceedings of other countries as well, except in Israel [Eichmann trial], France [Barbie trial] and Canada [Finta trial] [G. Werle, "Einleitung VStGB Rn. 11 footnote 32", op. cit.)]). It is to be noted that German courts in trying NS crimes related cases never applied the "Nuremberg Principles" in their domestic arena and referred to common crime regulations set up by the German Criminal Code of 15 May 15, 1871 (RGBl. p. 127) in the version, which had been effective on the day of unconditional surrender on May 8th, 1945. In this context, it may be worthwhile to discuss whether the principle of "nulla poena sine lege" (Section 1 Criminal Code; Article 103 paragraph 3 BL [BVerfGE 71, 115; 73, 235]; T. Fischer, *Strafgesetzbuch* (66th edn, C.H. Beck 2019), Einleitung Rn. 20; B. Hecker, A. Schönke and H. Schröder, *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2019), §1 Rn. 9; B. von Heintschel-Heinegg, "§1 Rn. 11", in B. von Heintschel-Heinegg (ed.), *Strafgesetzbuch Kommentar* (2nd edn, C.H. Beck 2015)) really hindered German authorities to apply "Nuremberg Principles" retroactively when German courts adjudicated NS atrocities (H. Satzger, op. cit., 267 and 268 with reference to Article 7 paragraph 1 ECHR (H. Satzger, ibid., pp. 205–208); G. Werle, "Einleitung VStGB, Rn. 21", op. cit.; K. Ambos, op. cit., 5 f.). Due to the progression of time since the end of World War II, this kind of discussion is not anymore of practical or forensic relevance. Possible perpetrators of Nazi crimes living unidentified in Germany have aged up and it is quite improbable that new indictments

might reach the courts. We are experiencing the beginning of legal history. It is noteworthy again that other post-conflict countries were faced exactly to the same legal problem of "nulla poena sine lege" but reached a differing solution in a different constitutional background. The Criminal Code of Bosnia and Herzegovina, which turned the Rome Statute regulations on international crimes into national Bosnian law in 2003, applied those rules although respective crimes against International Humanitarian Law had been committed during the wars in Yugoslavia from 1991 until 1995 and prior to the entry into force of the BiH Criminal Code (the problems related are complex, see ECHR case No. 2312/08 and 34179/08 Maktouf and Damjanovic vs. Bosnia and Herzegovina Judgment of July 18, 2013 with concurring opinions). Regarding the activities of the War Crime Chamber of the (State) Court of Bosnia and Herzegovina see B. Ivanisevic, *The War Crime Chamber in Bosnia and Herzegovina: From Hybride to Domestic Court* (International Center for Transitional Justice 2008); M. Kreso (ed.), *10th Anniversary of Section I for War Crimes at the Court of Bosnia and Herzegovina* (Court of Bosnia and Herzegovina 2015); M. Dauster, "From Nuremberg to The Hague and beyond: International Law in Courts: Court of Bosnia and Herzegovina as an example" (2019) 2 Bratislava Law Review 76 ff.

393 The Nuremberg Principles Academy was established on November 22, 2004 in the city of Nuremberg (see the Statute of the International Nuremberg Principles Academy Foundation <https://www.nurembergacademy.org/fileadmin/media/pdf/statute/Nuremberg_Academy_Statute_2018.pdf> accessed 15 August 2021). The purpose of the foundation, according to Section 2 of the Statute, is (1) "to promote scholarship and research, and furthermore to promote education. In particular, it will endeavor to implement what are known as the 'Nuremberg Principles,' and to promote International Criminal Law and support the struggle against impunity for the most serious crimes that are of concern to the international community as a whole. (2) To achieve this goal, the Foundation is to promote the legitimacy, acceptance and legality of International Criminal Law. It will achieve this goal in particular through educational programs, through research, and will support the implementation through scholarly consultation. It is intended in particular to become an international forum for practitioners and theoreticians in International Criminal Law, as well as for diplomats, multipliers, and civil society, on current questions of International Criminal Law. The purpose of the Foundation is to be achieved in particular with the following measures: — Specially tailored programs of training, consultation and advanced education for groups of professionals working in International Criminal Law; — Conducting conferences and symposia in the area of International Criminal Law and related fields; — Promoting and conducting research work in International Criminal Law and related fields; — Projects for education in human rights; — Organizing discussion forums on current issues in International Criminal Law. (3) The measures listed in subsection 2 above may be carried out in alternation or cumulatively. If the financial situation so requires, the Foundation may limit itself to a single measure. (4) The Foundation may pursue its purposes both in Germany and in other countries. In so doing, it is to collaborate with other institutions with a similar focus". The foundation is a non-profit civil organization under German

Civil Law, founded by the Federal Republic of Germany, the Free State of Bavaria, and the City of Nuremberg.

394 However, the Nuremberg trial and its prosecution were seen controversial (G. Werle, "Einleitung VStGB, Rn. 8", op. cit.)).

395 Ibid., "Einleitung VStGB, Rn. 11". — When interested parties vainly discussed codifications of "rules in war", atrocities globally kept on happening. We may start with Nigeria at the end of the 1960s. Since the independence of Nigeria from Great Britain in 1960, some peoples of Nigeria have been struggling for supremacy in the state. Especially the Christian Igbo, living in the Biafra province, felt disadvantaged compared to the Muslim Hausa and Fulani of the North. The conflict was exacerbated by the discovery of oil near the Igbo settlement area in the Niger Delta, which soon became an important economic pillar of Nigeria. On January 15, 1966, Igbo officers led by Major Chukwuma Kaduna Nzeogwu coughed to seize power. In the process, Nigerian Prime Minister Abubakar Tafawa Balewa was killed. From the Igbo officers, General Johnson Aguiyi-Ironsi took over the state power. Parts of the population of Nigeria feared to be oppressed by the Igbos in the future. In July 1966, a counter-coup restored the hegemony of the North. After the coup on January 15 and the counter-coup, a pogrom to the Igbo took place, in which several tens of thousands of Igbo died. In the course of the conflicts between the province of Biafra, which was striving for independence, and Nigeria, the Nigerian troops were more successful, but were never able to occupy Biafra completely. A blockade of the province and finally the outbreak of a famine catastrophe there, which claimed several hundred thousand victims, especially children, ended the war in 1970 (L. Heerten, "A wie Auschwitz, B wie Biafra. Der Bürgerkrieg in Nigeria (1967–1970) und die Universalisierung des Holocaust" (2011) 8 Zeithistorische Forschungen/Studies in Contemporary History 394–413). Prior to and in the war of independence of East Pakistan, today Bangladesh, unbelievable cruelties were committed in 1971 when Pakistan's militaries oppressed the Awami-League-Movement for Bangladesh's independence, and those crimes remained unatoned. Some years later, Red Khmer in Cambodia assumed power. Between 1975 and 1979, when Vietnam militarily intervened and put an end to the regime, the Red Khmer mass-murdered up to 2.2 million Cambodians in the attempt to turn back Cambodia into a purely agricultural society. These are only a few examples of violations of International Humanitarian Law, which happened under the watchful eyes of the International Community. The International Community, however, was not able to terminate the cruelties and to set up a system of prosecution. It was the "Cold War" that split the International Community into two parts, both busy with defending "their interests". Nowadays, the same phenomenon can be observed when mass violations of human rights happen without any response or intervention of the "big" global players or the International Community as a whole, despite the UN's engagement for the Rule of Law in post-conflict and fragile States (see D. Marshall, "Reboot Required: The United Nations' Engagement in Rule of Law Reforms in Post-conflict and Fragile States", in D. Marshall (ed.), *The International Rule of Law Movement. A Crisis of Legitimacy and the Way Forward* (Harvard Law School 2014) 85–134). With respect to the history, see also K. Ambos, op. cit., 114 ff.

[396] S. Miyazaki, "Aspects of International Humanitarian Law as World Law", in W. Fiedler and G. Ress (eds.), op. cit., 531 ff.; A. Truyol Serra, „Spanien und der völkerrechtliche Schutz der Menschenrechte", in W. Fiedler and G. Ress (eds.), op. cit., 915 ff.

[397] UNTS vol. 78, p. 277.

[398] BGBl. 1955 II, p. 210.

[399] UNTS vol. 75, p. 13. With regard to the continuing relevance of all Geneva Conventions (with their amendments), which in reality has not diminished, compare R. Geiß, "Das humanitäre Völkerrecht im Lichte aktueller Herausforderungen", in H.J. Heintze and K. Ipsen (eds.), op. cit., 45 ff.; K. Doehring, op. cit., 266 ff.

[400] UNTS vol. 75, p. 287; K. Doehring, op. cit., 263 ff.

[401] UNTS vol. 189, p. 150.

[402] BGBl. 1954 II, p. 619.

[403] UNTS vol. 606, p. 267.

[404] UNTS vol.249, p. 240.

[405] UNTS vol. 480, p. 43.

[406] UNTS vol. 729, p. 161.

[407] UNTS vol. 660, p. 195.

[408] BGBl. 1969 II, p. 2211.

[409] UNTS vol. 1015, p. 163. See K. Doehring, op. cit., 261 ff.

[410] UNTS vol. 1249, p. 13. See ibid.

[411] BGBl 1985 II, p. 1234.

[412] UNTS vol. 1465, p. 85.

[413] BGBl. 1993 II, p. 715.

[414] GAOR, 44th session, Resolution, No. 25 of December 12, 1989. In the context of International Criminal Law, Article 38 of the Covenant has a special relevance in so far as it forbids the recruitment of under-aged child soldiers (also see the Facultative Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts of May 25, 2000, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography of May 25, 2000.

[415] UNTS vol. 1975, p. 45.

[416] UNTS vol. 2056, p. 211.

[417] Attachment to Resolution of the General Assembly No. 56/83 (K. Doehring, op. cit., 168 f.). This attachment produced by the International Law Commission is significant by itself although the aim was not anymore pursued to convert the elaboration into a formal convention. However, it is moreover an indicator for individual responsibilities when it comes to violations of international law. Indeed, Article 58 provides that the other provisions are without prejudice to questions of the individual liability under international law of persons acting on behalf of a State. By having ruled that, the General Assembly acknowledged the existence of individual (criminal) liability within international law. — The attachment leaves the question unanswered whether a State will liable for any action, which private individuals carry out in contravention of international law (K. Doehring, op. cit., 364; J. Wolf, "Zurechnungsfragen bei Handlungen von Privatpersonen" (1985) 45

ZaöRV 232 ff.; A. Verdross and B. Simma, op. cit., 850 ff.; I. Seidl-Hohenveldern, op. cit., 354–357).

418 UNTS vol. 2515, p. 3 (including the Facultative Protocol to the Convention on the Rights of Persons with Disabilities of December 13, 2006).

419 BGBl. 1956 II p. 564.

420 BGBl. 1959 II p. 998.

421 BGBl. 1961 II p. 82.

422 BGBl. 1964 II p. 1262.

423 BGBl. 1995 II p. 540.

424 BGBl. 1989 II p. 946.

425 BGBl. 1998 II p. 1315.

426 BGBl. 1997 II, p. 1408.

427 There is in fact an indisputable internal connection between the further development of International Humanitarian Law and the further development of human rights protection (general and specific, related to specific fields) (H.J. Heintze, "Fortentwicklung des humanitären Völkerrechts durch den Menschenrechtsschutz", in H.J. Heintze and K. Ipsen (eds.), op. cit., 163 ff.).

428 Regarding the part that national Red Cross organizations are playing in producing customary humanitarian law, see H. Spieker, "Zusammenarbeit des Deutschen Roten Kreuzes mit dem Institut für Friedenssicherungsrecht und Humanitäres Völkerrecht", in H.J. Heintze and K. Ipsen (eds.), op. cit., 36 ff.

429 UNTS 1125, p. 609.

430 H. Fischer, "Das 'Harmonische Dreieck': Die organische Verknüpfung von Forschung, Lehre und Praxis am IFHV von 1988–2008", in H.J. Heintze and K. Ipsen (eds.), op. cit., 16 f.

431 Ibid., 17.

432 See for the entire problematic — nationally as well as internationally — C. Hess, "Die rechtliche Aufarbeitung von Kriegsverbrechen und schwerwiegenden Menschenrechtsverletzungen — eine Analyse aus der Perspektive der Opfer", in J.-P. Cuvillier (ed.), *Internationale Göttinger Reihe, Band 6* (Cuvillier 2007) 13 ff., 123 ff.

433 R. Hofmann, "Durchsetzung von Ansprüchen von Kriegsopfern — Sind wir heute weiter als 1949?", in H.J. Heintze and K. Ipsen (eds.), op. cit., 133 ff.

434 M. Dauster, "Victims of Crime and Criminal Proceedings in Germany", in *The 7th International Scientific Conference of the Faculty of Law of the University of Latvia. Legal Science: Functions, Significance and Future in Legal Systems I* (University of Latvia Press 2019) 429 ff.; see also H. Satzger, op. cit., 256–258 with regards to the ICC.

435 Slovenia could reach cease of fire after a 10-days armed conflict with the Yugoslavian Army. Croatia was at war between 1991 and 1995. See E. Hösch, *Geschichte der Balkanländer. Von der Frühzeit bis zur Gegenwart* (C.H. Beck 2002) 266–297; M.J. Calic, Südosteuropa. Weltgeschichte einer Region (C.H. Beck 2016) 565–605.

436 By the referendum of February 29/March 1, 1992, a majority of voters voted for the independence of BiH. On March 2, 1992, BiH declared its independence and seceded from Yugoslavia. As the Serbian part of the population did not agree on the newly established State of the Republic of Bosnia and Herzegovina, armed

conflicts broke out. As the Serbian troops were supported by the Yugoslavian Army, the conflict turned into an international conflict. The BiH war ended on December 14, 1995, when the so-called Dayton Peace Accord was signed in Paris.

437 ICJ Judgment of February 26, 2007 (BiH vs. Serbia and Montenegro) in ICJ Reports 2007, 43 (No. 179) also clarifying that genocide is not only a crime, which individuals only can commit. It is either an offense, which a State under public international law can commit. This comment was exactly the point of view that the Nuremberg Military Tribunal made in its verdict (G. Werle, "Einleitung VStGB Rn. 7", op. cit.; Matthias Fink, Srebrenica. Chronologie eines Völkermords oder Was geschah mit Mirnes Osmanovic, Hamburg 2015; see also BGHSt 46, 292 ff.); A. Hagedorn, "Absolute Immunität der Vereinten Nationen. Der Völkermord von Srebrenica als Lackmustest", in H.J. Heintze and K. Ipsen (eds.), op. cit., 201 ff.

438 Resolution No. 827 of May 25, 1993. The ICTY terminated its functions on December 31, 2017. For the time after the closure of the ICTY, as well as ICTR, the Security Council installed, by the Resolution of 1966, an "International Residual Mechanism" supporting both courts in resolving outstanding legal and other case related questions (K. Ambos, op. cit., 126; H. Satzger, op. cit., 228 ff.).

439 In particular, right-wing publicists and politicians in Serbia and later in Croatia also debated the courageous step of the UN Security Council very controversially. The tribunal was criticized as a manifest of the "winners' justice", which was mainly directed against Serb people. Later, when the ICTY's "completion strategy" was implemented by installing the War Crime Chamber at the Court of BiH, the same arguments were used in order to discredit the national jurisdiction of BiH on war crimes. During the existence of the ICTY, the tribunal was criticized because of the robust approaches, which the Prosecutor, a body of the Tribunal, undertook in order to press countries, in particular Serbia, to extradite prominent figures like Slobodan Milosevic, Ratko Mladic, and Radovan Karacic. Other voices finally raised the issue of the court's efficiency and long-lasting trials together with the costs that the court's activities caused.

440 Resolution No. 995 of November 8, 1994. J.A. Williamson, "An overview of the international criminal jurisdiction operating in Africa" (2006) 88(861) International Review of the Red Cross 111–132.; H. Satzger, op. cit., 231 ff.

441 With respect to the so-called Hybrid Courts, see H. Satzger, op. cit., 232–234.

442 G. Werle, "Einleitung VStGB Rn. 13", op. cit.

443 UN Treaties Series vol. 2187 No. 38544. The question arises not only in connection with the establishment of the ICC, but in general with a view to prosecution for violations of International Humanitarian Law, whether this might have any preventive effect for the future (H.P. Kaul, "Abstrafung der Täter — Ein Instrument zur Prävention?", in H.J. Heintze and K. Ipsen (eds.), op. cit., 153 ff.).

444 R. Geiß and N. Bulinckx, "International and Internationalized Criminal Tribunals: A Synopsis" (2006) 88(861) International Review of the Red Cross 49–65.

445 Article 2 of the Statute. K. Ambos, op. cit., 129 f.

446 Article 1 phrase 1; Article 4 paragraph 1 of the Statute.

447 About 12% out of about 145 million Euros in 2018; K. Ambos, op. cit., 133 f.

448 BGBl. 2000 II p. 1393. See K. Ambos, op. cit., 126 ff.; H. Satzger, op. cit., 235 ff. See also the 5th Lecture "International Criminal Law in the National Arena".

449 BGBl. I, p. 2071.

[450] BGBl. I, p. 1566.
[451] H. Satzger, op. cit., 259–261.
[452] Amendment to the Statute of December 15, 2017.
[453] H. Satzger, op. cit., 245–248 and with regards to the impact on the national system, ibid., pp. 248–252.
[454] Clause VI of the Preamble of the Rome Statute. See H. Satzger, op. cit., 248 ff.
[455] BGBl. 2002 I p. 2254 amended by the Act of December 22, 2016 (BGBl. 2016 II p. 3150).
[456] The promulgated last version of November 13, 1998 (BGBl. 1998 I p. 3322) with the last amendment by Article 2 of the Federal Act of June 19, 2019 (BGBl. 2019 I p. 844). The Criminal Code remains applicable besides the CCIL, to which the Criminal Code is supplementary. A criminal act committed e.g. in armed conflicts may represent a war crime according to CCIL and simultaneously murder according to Section 211 of the Criminal Code.
[457] Section 1 CCIL — regardless by whom and where such crimes were committed (see K. Doehring, op. cit., 506 ff. for the principles of national criminal jurisdiction and their interrelation to International Public Law). With respect to the four major aims of CCIL, see G. Werle, "Einleitung VStGB Rn. 34", op. cit. With regards to the universality of German jurisdiction see K. Ambos, "§1 VStGB Rn. 1", in C. Safferling (ed.), *Münchener Kommentar zum Strafgesetzbuch, Band 8 Nebenstrafrecht III* (3 edn, C.H. Beck 2018). — A recent example of the universal jurisdiction of German authorities is a case, which started at the High Court of Appeals in Koblenz. The Federal Prosecutor General investigated into the history of two Syrian refugees, who moved to Germany in about 2012 after the unrest in Syria had broken out and who were identified by victims of their crimes as high-ranking members of one of the Syrian Secret Services. Not only did the Syrian Secret Services maintain secret prisons where opposition members of the Assad regime were imprisoned, but they gained notoriety for their (mass) tortures, extra-legal killings, and mass graves (G. Le Caisne, *Codename Caesar. Im Herzen der syrischen Todesmaschine* (2nd edn, C.H. Beck 2016). It is exactly the systematic torturing in Syrian secret prisons, upon which the German Federal Prosecutor General based his indictment to the High Court of Appeals in Koblenz. As far as it is known in public, it will be the first indictment ever, which has been filed against members of the Syrian torture machinery (M. Baumstieger, L. Kampf and R. Steinke, "Der Prozess" *Süddeutsche Zeitung* 90 (18/19 April 2020) 11 ff.; EPD, "Prozessauftakt gegen Assads Folterknechte" *Süddeutsche Zeitung* 95 (24 April 2020) 9).
[458] Bosnia and Herzegovina, including other countries like Croatia and Serbia, at the end of 1990s and the beginning of the 2000s were faced with the so-called "exit- or completion strategy" of the ICTY. The ICTY never in its existence disposed of sufficient capacities to go after all alleged war crimes, which had been committed in the Western Balkans during the time of the conflicts in former Yugoslavia, which ended by the Dayton Peace Accord of 14 December 1995. Due to such lack of capacity but also due to the length of the proceedings before the ICTY in the turn of the millennium, it became obvious that national authorities in Bosnia and Herzegovina, Croatia, and Serbia were called upon to become responsible for prosecuting all international felonies, which the ICTY could not comply with.

The "exit-or completion-strategy" was a plan about what the ICTY in the time of its existence could comply with and what had to be transferred to national authorities and their responsibility. Bosnia and Herzegovina at that turning point had not enacted a national Criminal Code. The substance criminal law was subject to regulations by the country's entities, the Federation of Bosnia and Herzegovina on the one hand and the Republika Srpska on the other hand. However, their criminal codes had not adopted the crimes, as having been set forth by the Rome Statute and the ICTY rules. Furthermore, politically speaking, the ICTY and other players doubted whether it would be feasible to let the entities' institutions to prosecute those war crime cases, which the ICTY was unable to tackle. In clear terms: Everybody was internationally afraid that Serb courts could not adjudicate Serb perpetrators, and Bosnian courts would be unable to put Muslim perpetrators on trial. Upon demands of the "International Community", the High Representative to Bosnia and Herzegovina decided to create an entirely new national criminal legislation, which included "war crimes", and to create institutions on the national level, which had to take care of such "war crimes" prosecutions. It then happened so, Bosnia and Herzegovina enacted a new Criminal Code in 2003 (BiH Official Gazette No. 3/03 [with recent amendments Official Gazette No. 40/15]) and incorporated the Rome Statute material crimes in that new code. Parallel to this code, Bosnia and Herzegovina gave jurisdiction over war crime prosecution to the Court of Bosnia and Herzegovina (M. Dauster, "Das Staatsgericht von Bosnien und Herzegowina als Strafgericht", in *Strafverteidiger Forum [StraFo]* (2006) 316–319). A War Crime Chamber was established within the court and became effective in March 2005. The (national) Criminal Code of Bosnia and Herzegovina, which reflected the crimes as set forth by the Rome Statute, entered into force in March 2003. Other countries in the region took Bosnia's Criminal Code as a model and amended their criminal legislation accordingly.

459 M. Fahrner, *Staatsschutzstrafrecht. Einführung und Grundlagen* (Richard Boorberg Verlag 2020) 417 ff.; B. Schmitt, "§142a Rn. 1 f", in L. Meyer-Goßner and B. Schmitt, *Strafprozessordnung* (62nd edn, C.H. Beck 2019); H. Meyer, "§142a Rn. 2 f.", in R. Hannich (ed.), *Karlsruher Kommentar zur Strafprozessordnung* (8th edn, C.H. Beck 2019); U. Franke, "§ 142a Rn. 2 ff.", in V. Erb, R. Esser, U. Franke, K. Graalmann-Scheerer, H. Hilger and A. Ignor (eds.), *Löwe-Rosenberg, Die Strafprozessordnung und das Gerichtsverfassungsgesetz, Zehnter Band* (26th edn, De Gruyter 2010); O.R. Kissel and H. Mayer, *Gerichtsverfassungsgesetz Kommentar* (7th edn, C.H. Beck 2013) §142a Rn. 2. As regards the Police, Germany concentrated respective investigations within the Federal Bureau of Investigation by Section 4 paragraph 1 No. 4 of the Act on the Federal Bureau of Investigation, etc. of June 1, 2017 (BGBl. 2017 I, p. 1354; BGBl. 2019 I, p. 400). The Federal Bureau of Investigation itself concentrated this challenge within a Central Department on Combating War Crimes (M. Fahrner, op. cit., 423 f.).

460 Section 142a paragraph 1 sentence 1 of the Court Constitution Act in the version published on May 9, 1975 (BGBl. 1975 I, p. 1077 — last amended by Article 8 paragraph 1 of the Act of July 8, 2019 [BGBl. I, p. 1002]). Section 142a of the Court Constitution Act also sets up a mechanism between the Federation and the Federal States on transferring cases of minor significance to the respective offices of the Prosecutor Generals in the States and on a strict reporting system which

regulates what is to happen if State authorities get aware of a criminal act falling under the jurisdiction of the Federation according to Section 120 of the Court Constitution Act.

461 Article 30 of the Basic Law (S. Korioth, "Art. 30 Rn. 1", op. cit., commenting that the regulation of Article 30 is almost obsolete as other regulations of the Constitution precisely distribute the powers between the Federation and the *Länder*. Korioth explains the existence by historical reminiscences before the background of the Occupation Regime (ibid. Rn. 4–6).

462 Signed by the Federal Republic of Germany but not ratified yet (M. Breuer, "Art. 13 Rn. 28", in U. Karpenstein and F.C. Mayer (eds.), op. cit.)). The Convention itself does not grant a specific court system with two (or more) instances (EGMR, January 17, 1970 Rs. 2689/65 Rn. 25).

463 Section 120 of the Courts' Constitution Act (late promulgation of May 9, 1975 (BGBl. I, p. 1077) but includes the amendment(s) to the Act by Article 8 (1) of the Act of July 8, 2019 [BGBl. I, p. 1002]) (M. Fahrner, op. cit., 406 f.; B. Schmitt, "§120 Rn. 1 f", in L. Meyer-Goßner and B. Schmitt, *Strafprozessordnung* (62nd edn, C.H. Beck 2019); B. Feilcke, "§120 Rn. 1–3", in R. Hannich (ed.), *Karlsruher Kommentar zur Strafprozessordnung* (8th edn, C.H. Beck 2019); O.R. Kissel and H. Mayer, op. cit., §120 Rn. 2 ff.; U. Franke, "§120 Rn. 4 ff.", op. cit.

464 BGHSt 53, 128 ff.

465 U. Franke, "§120 Rn. 22 ff.", op. cit.

466 M. Fahrner, op. cit., 407 ff.

467 S. Hobe, "Der asymmetrische Krieg als Herausforderung der internationalen Ordnung und des Völkerrechts", in H.J. Heintze and K. Ipsen (eds.), op. cit., 69 ff. — Most of the accused of these trials, who are charged of terrorism in Syria according to Section 129a, 129b of the German Criminal Code, justify their participation in the Syrian civil war with their fight against the inhuman Assad regime they want to overthrow and to support their brothers and sisters in Syria against the devilish suppression by the regime. In this context, the highly interesting question arises under international law as to how it is to be judged that states support such terrorist organizations and even invade and occupy parts of the country plagued by civil war — with the unspoken aim of causing the regime change as a result. Regarding the legality of such modern form of occupation, see K. Schmalenbach, "Das modern Recht der Okkupation — ein Instrument des Regimewechsels?", in H.J. Heintze and K. Ipsen (eds.), op. cit., 113 ff.

468 M. Noortmann, "Aufständische Gruppen und private Militärunternehmen — Theoretische Überlegungen zur Position bewaffneter nicht-staatlicher Akteure im humanitären Völkerrecht", in H.J. Heintze and K. Ipsen (eds.), op. cit., 187 ff.

469 Two of the Federal Supreme Court of Justice's Senates are placed in Leipzig, the remaining Senates at the main seat in Karlsruhe. This second seat of the Federal Supreme Court of Justice in Leipzig may be explained by the historical background of the German court system, as the Federal Supreme Court of Justice is considered a successor of the former Reichsgericht, which the Courts Constitution Act of 27 January 1877 (RGBl. 1878, p. 41 [the law entered into force on 1 January 1879]) had established as Germany's Supreme Court on civil and criminal matters with its seat in Leipzig. When the German Reich collapsed and the unconditional surrender was signed on May 8, 1945, the Reichsgericht ceased

to function and was formally dissolved by Article 1 paragraph 2 of Law No. 2 of the Military Government for Germany (Official Gazette No. 3 [1945] p. 4). Germany's division during the Cold War hindered the Reichsgericht's re-establishment. The second seat of the Federal Supreme Court of Justice is a historical reminiscence of the former Reichsgericht. The Reichsgericht's Palace of Justice now houses the Federal Supreme Administrative Court and can be visited as a tourist attraction.

[470] The Federal Supreme Court of Justice (Bundesgerichtshof) is Germany's highest court in civil and criminal matters. Besides the Federal Supreme Court of Justice, the German Constitution of 23 May 1949 established four more Supreme Courts, one for Tax and Customs Matters (Bundesfinanzhof in Munich), one for Administrative Matters (Bundesverwaltungsgericht in Leipzig), one for Labor Matters (Bundesarbeitsgericht in Erfurt) and the fourth one for Social Welfare Matters (Bundessozialgericht in Kassel). A Federal Supreme Court above all those highest federal courts was never instituted, although such Supreme Court was originally foreseen by the constitution in the earliest version.

[471] Section 333–358 of the German Criminal Procedure Code (in the version published on 7 April 1987 [BGBl. 1987 I p. 1074; 1319] — as most recently amended by Article 3 of the Act of 23 April 2014 [BGBl. 2014 I p. 410]).

[472] Federal Supreme Court of Justice also controls pretrial custody in cases as referred to by Section 120 of the Courts' Constitution Act be it upon appeal, be it *ex officio* if custody is lasting longer than 6 months prior to the main trial's commencement. It also has jurisdiction on appeals against decisions of the investigative judge of Federal Supreme Court of Justice and of the trial court preceding the verdict.

[473] M. Fahrner, op. cit., 432 ff.

[474] Ibid., 445 f.

[475] Ibid., 441 ff. *inter alios*: exclusion of the public.

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Exercise of Criminal Jurisdiction by Germany and International Law

На английском языке

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