

Punishment Based on Customary Law?

The Crime against Humanity of Deportation and Enforced Transfer According to § 7 (1) (4) of the German Völkerstrafgesetzbuch (International Law Criminal Code)

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I. Introduction

The German International Law Criminal Code – the Völkerstrafgesetzbuch (VStGB) – is now being actually applied. This was illustrated only recently by a decision of the Bundesgerichtshof (BGH – Federal Court of Justice) about whether the presumed leader of a rebel militia operating in Congo was to be kept in pre-trial detention. The Court affirmed that the defendant was to be deemed a suspect regarding crimes against humanity under the VStGB.¹ It remains to be seen how the criminal trial proceeding will develop. However, the opportunities offered to German courts by the VStGB as a new instrument for prosecuting crimes against humanity, genocide, and war crimes are to be welcomed. Whereas there may be valid criticism of the way in which international law is implemented in specific cases, there can be little objection to the principle of prosecuting the most serious crimes.²

However, certain limits should be observed not only when applying international criminal law in specific cases, but also in defining the substantive crimes involved. Safeguards protecting the defendant are especially important in cases of prosecution for the most serious crimes. It is thus striking that certain provisions of the VStGB contain legal conceptions which lack clear definition and which are unusual in German criminal law generally. More specifically, the VStGB contains a number of references to customary international law.³ Certain acts are, for instance, classified as criminal offences if they fail to comport with such customary law.⁴ Consider, for example, the provision of § 7 (1) (4) VStGB.⁵ The con-

duct addressed in this paragraph deals with acts of deportation and enforced transfer of a person concerned through expulsion or other coercive acts from the area in which the victim is lawfully present, into another state or region, in breach of a general rule of international law. The act has to be committed in the context of an extensive or systematic attack against any civilian population. The German wording of § 7 (1) (4) VStGB is:

“Wer im Rahmen eines ausgedehnten oder systematischen Angriffs gegen eine Zivilbevölkerung [...] einen Menschen, der sich rechtmäßig in einem Gebiet aufhält, vertriebt oder zwangsweise überführt, indem er ihn unter Verstoß gegen eine allgemeine Regel des Völkerrechts durch Ausweisung oder andere Zwangsmaßnahmen in einen anderen Staat oder in ein anderes Gebiet verbringt, [...]“.

The requirements that the victim must be staying lawfully (“rechtmäßig”) in the area and that the offence must be committed in breach of a general rule of international law (“Verstoß gegen eine allgemeine Regel des Völkerrechts”) constitute references to – inter alia – customary international law. The reference is dynamic, i.e. it refers to developing customary international law, instead of statically referring to customary international law as it was when the VStGB entered into force.⁶ Hence, changes in customary international law can have direct impact on the scope of application of § 7 (1) (4) VStGB. The legislator explains that references of this type are meant to allow for further rights-enhancing developments of customary international law to be reflected in the VStGB.⁷ This may indeed be a valid aim, however, it must be noted that such references appear inconsistent with one of the basic principles of German criminal law, namely the principle that there shall be no punishment without prior legal enactment (*nulla poena sine lege*). This principle is enshrined not only on a constitutional level (art. 103 [2] of the Grundgesetz [GG – the German constitution]), but also very prominently in sub-constitutional law (§§ 1 and 2 of the German Strafgesetzbuch [StGB – Federal Crime Code]). Thus, the situation gives rise to the question of whether the application of cus-

in einem Gebiet aufhält”; “Verstoß gegen eine allgemeine Regel des Völkerrechts“); § 9 (1) VStGB (“völkerrechtswidrig”); § 9 (2) VStGB (“völkerrechtswidrig”); § 10 (1) Sentence 1 (2) VStGB (“Schutz [...], der Zivilpersonen oder zivilen Objekten nach dem humanitären Völkerrecht gewährt wird”); § 11 (1) Sentence 1 (2) VStGB (“Objekte [...], solange sie durch das humanitäre Völkerrecht als solche geschützt sind”); § 11 (1) Sentence 1 (5) VStGB (“unter Verstoß gegen das humanitäre Völkerrecht”).

⁶ See *Kuhli* (fn. 4), p. 119.

⁷ See BT-Drs. 14/8524, p. 22 (regarding § 7 [1] [10] VStGB).

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¹ See BGH JZ 2010, 960 (criminal trial procedure against Ignace Murwanashyaka, presumed leader of the “Forces Démocratiques de Libération du Rwanda“ [FDLR]); annotation: *Safferling*, JZ 2010, 965.

² See *Günther*, in: *Beulke/Lüderssen/Popp/Wittig* (ed.), *Das Dilemma des rechtsstaatlichen Strafrechts*, Symposium für Bernhard Haffke zum 65. Geburtstag, 2010, p. 79.

³ *Jähnke*, ZIS 2010, 463 (467).

⁴ See for this aspect: *Kuhli*, *Das Völkerstrafgesetzbuch und das Verbot der Strafbegründung durch Gewohnheitsrecht*, 2010, *passim*.

⁵ Apart from § 7 (1) (4) VStGB it is: § 7 (1) (5) VStGB (“Folge völkerrechtlich zulässiger Sanktionen”); § 7 (1) (9) VStGB (“Verstoß gegen eine allgemeine Regel des Völkerrechts”); § 7 (1) (10) VStGB (“aus anderen nach den allgemeinen Regeln des Völkerrechts als unzulässig anerkannten Gründen”); § 8 (1) (6) VStGB (“Person, die sich rechtmäßig

tomary international law – pointed to by written law – can still be seen as punishment under *lex scripta*. This again leads to the issue of whether such references should be permissible – which shall be discussed in part IV below. Before embarking on this subject, however, preliminary explanations are called for – first, on the VStGB in general (part II), followed by an examination of the provision of § 7 (1) (4) VStGB (part III).

II. The Völkerstrafgesetzbuch

1. International Law as Background

The VStGB entered into force on 30 June 2002. It was developed in close connection with the Rome Statute of the International Criminal Court (ICC), which in turn was ratified by a large part of the international community at the Rome Conference on 17 July 1998, and entered into force on 1 July 2002 – one day after enactment of the VStGB in Germany. On 11 March 2003, the International Criminal Court took up work at The Hague.

The creation of this court represents a turning-point in the development of international criminal law, the ICC being the first international criminal court whose jurisdiction is not limited to a certain period of time or a certain conflict zone. However, this wide jurisdiction does not mean the ICC has primary competence. The punishment of serious crimes against international law shall primarily remain a responsibility of each state.⁸ To that effect, paragraph 10 of the preamble of the Rome Statute as well as art. 1 (2) state that the ICC “shall be complementary to national criminal jurisdictions”. According to this principle of complementarity, the International Criminal Court has, as a matter of principle, no jurisdiction over crimes which are also being tried by a national court, or for which the proceedings have been finally concluded by such a court. Art. 17 of the Rome Statute, however, contains an exception to this principle, namely that when the state in question is unwilling and unable seriously to investigate and prosecute a certain crime.⁹ In this context, unwillingness means, principally, a state shielding its own offenders by carrying out a pseudo-trial against them.¹⁰

⁸ *Duffy/Huston*, in: *Kreß/Lattanzi* (ed.), *The Rome Statute and Domestic Legal Orders*, Vol. 1, General Aspects and Constitutional Issues, 2000, p. 29 (p. 31); *Jeßberger/Powell*, *SACJ* 14 (2001), 344 (348); *Werle/Jeßberger*, *JZ* 2002, 725 (726).

⁹ *Arsanjani*, *AJIL* 93 (1999), 22 (27 et seq.); *Bassiouni*, *Introduction to International Criminal Law*, 2003, p. 500 et seq.; *Wirth/Harder*, *ZRP* 2000, 144 (146); *Satzger*, *NStZ* 2002, 125; *Werle*, *JZ* 2001, 885 (886); *Roitzheim*, *DRiZ* 2001, 448; *Razesberger*, *The International Criminal Court, The Principle of Complementarity*, 2006, p. 29.

¹⁰ *Schabas*, *An Introduction to the International Criminal Court*, 2nd edition 2004, p. 67 et seq.; *Seidel/Stahn*, *Jura*, 1999, 14 (16); *Stahn*, *EuGRZ* 1998, 577 (589); see *Holmes*, in: *Lee* (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, 1999, p. 41 (p. 48 et seq.).

The principle of complementarity enshrined in the Rome Statute takes into account a number of considerations: First, the territorial sovereignty of the state where the criminal offence is committed, as well as the personal jurisdiction of the offender’s and the victim’s home state are respected.¹¹ Second, states which, through the respective legislative acts, have declared themselves competent and which succeed in capturing the offender, should be given the opportunity of carrying out their own criminal proceedings.¹² The concept of a decentralized global criminal justice, moreover, is based on realistic considerations about the capacity of the International Criminal Court – which will only be able to prosecute a fraction of all offences against international law.¹³ Although the Rome Statute does not contain a general¹⁴ obligation (which would hardly be politically realizable) for member states to punish their citizens for the offences it establishes,¹⁵ a state which adapts its criminal law provisions to the norms of the Statute acts in line with its spirit.¹⁶ The Rome Statute relies on a positive stance towards international criminal law as well as a policy within individual states to avoid the prosecution of their own citizens by an international court.¹⁷

This is the background against which the German VStGB was passed. It constitutes an adaptation of German criminal law to the Rome Statute¹⁸ in respect of the principle of complementarity and is hence aimed to avoid possible prosecution of German soldiers by an international court.¹⁹ The enactment of the VStGB is meant to ensure Germany’s own ability to prosecute offences for which the International Criminal Court could intervene. However, in order to avoid capacity overload in German criminal justice, § 153f of the German Strafprozessordnung (StPO – German Federal Code of Criminal Procedure) provides for special possibilities of dismissing cases dealing with offences under the VStGB.²⁰

¹¹ *BVerfG NJW* 2011, 2569 (2569).

¹² *Stahn*, *EuGRZ* 1998, 589.

¹³ See *Kreß*, *Vom Nutzen eines deutschen Völkerstrafgesetzbuchs*, 2000, p. 7; *Meseke*, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem Römischen Statut des Internationalen Strafgerichtshofes*, 2004, p. 276; *Werle/Jeßberger*, *SACJ* 14 (2001), 726 et seq.

¹⁴ An exception is Art. 70 (4) (a) Rome Statute, which codifies a duty to punish. According to this Article each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in art. 70 Rome Statute, committed on its territory, or by one of its nationals (see *Satzger*, *NStZ* 2002, 125).

¹⁵ *Jeßberger/Powell*, *SACJ* 14 (2001), 348; *Werle*, *JZ* 2001, 886; *A. Zimmermann*, *NJW* 2002, 3068.

¹⁶ See *Cassel*, *New England Law Review* 35 (2001), 421 (423); *A. Zimmermann*, *ZRP* 2002, 97 (98).

¹⁷ *Satzger*, *NStZ* 2002, 125 et seq.

¹⁸ *Werle/Jeßberger*, *JZ* 2002, 725.

¹⁹ *Hermisdörfer*, *DRiZ* 2000, 70.

²⁰ See *BVerfG NJW* 2011, 2569; *Pawlik*, *ZIS* 2006, 274 (291 et seq.); *Singelnstein/Stolle*, *ZIS* 2006, 118.

Apart from the principle of complementarity codified in the Rome Statute, there are other reasons for the creation of the VStGB. Firstly, it is set to offer a recognition of the specific injustice of crimes against international law. Secondly, introducing a comprehensive canon of international law into German law was meant to enhance legal clarity. Furthermore, the VStGB aims at promoting and disseminating international humanitarian law.²¹ As a result, a new legislation comprising 14 paragraphs was introduced, in addition to and independent of the StGB, facilitating German courts in dealing with crimes against international law.

2. Content and Structure of the VStGB

The VStGB is divided into two parts, with the first one containing the general legal principles (§§ 1-5 VStGB), and the second one codifying criminal offences against international law (§§ 6-14 VStGB). Despite the VStGB being an independent law, its first part provides only for limited deviations from the StGB.²² § 2 VStGB states that general criminal law – notably, the StGB – is applicable on crimes against international law unless stated otherwise in §§ 1, 3, 4, 5 VStGB. In § 1 VStGB, the universal jurisdiction over the relevant crimes of the VStGB is codified; § 3 VStGB stipulates certain specific exemptions from criminal liability; § 4 VStGB regulates criminal liability of military commanders and superiors;²³ § 5 VStGB eliminates a statute of limitation for most crimes under the VStGB.

The second part of the VStGB is, in contrast, independent from the StGB.²⁴ It is divided into three parts and comprises the criminal offences of genocide (§ 6 VStGB), crimes against humanity (§ 7 VStGB), war crimes against persons (§ 8 VStGB), war crimes against property and special rights (§ 9 VStGB), war crimes against humanitarian operations and emblems (§ 10 VStGB), war crimes involving use of prohibited methods of making war (§ 11 VStGB), war crimes involving the implementation of prohibited means of making war (§ 12 VStGB), and breach of duty of supervision (§ 13 VStGB). § 14 VStGB punishes a military or civilian commander for failing to inform the officials about certain criminal acts committed in breach of the VStGB.

III. § 7 (1) (4) VStGB

1. Widespread or systematic attack

In § 7 (1) (4) VStGB, displacement and enforced transfer of a person are defined as crimes against humanity. This category of international crimes is characterized by the fact that its core injustice consists of a singular illegal act, which arises

from a wider context of actions – the chapeau or Gesamttat.²⁵ § 7 (1) VStGB states that the single illegal act – in subsection (4), deportation and enforced transfer – is committed in the context of a widespread or systematic attack against a civilian population.

With regard to the definition of a widespread or systematic attack against a civilian population, the explanatory statement accompanying the German government's legislative proposal for the VStGB clarifies that, in line with international law,²⁶ it does not necessarily comprise a military attack in terms of international humanitarian law.²⁷ Instead, the explanatory statement points to the legal definition in art. 7 (2) (a) of the Rome Statute.²⁸ If one applies this definition to § 7 (1) (4) VStGB, an attack against a civilian population consists of repeated illegal acts as defined in subsections (1) to (10) of § 7 (1) VStGB carried out against a civilian population in support of or implementing state policies or policies imposed by another organization. Thus, the attack constituting the chapeau of § 7 (1) (4) VStGB could for instance be made up of a combination of killings (§ 7 [1] [1] VStGB), rapes (§ 7 [1] [6] VStGB), and enforced transfer (§ 7 [1] [4] VStGB).²⁹ As there is no further specification concerning the notion of “a civilian population”, this category can even comprise people of the same nationality as the offender.³⁰ The terms “widespread” and “systematic” are employed in such a way that they describe two alternative crimes: a quantitative dimension of the attack on the one hand and a qualitative one on the other.³¹ Whereas “widespread” refers to the

²¹ BT-Drs. 14/8524, p. 12; see *Meseke* (fn. 13), p. 270.

²² See *Hannich*, ZIS 2007, 507 (509 et seq.).

²³ See *Burghardt*, ZIS 2010, 695.

²⁴ For the relationship between the second part of the VStGB and the StGB see: *T. Zimmermann*, GA 2010, 507; *Hertel*, HRRS 2010, 339; *Basak*, HRRS 2010, 513; *Safferling*, JA 2010, 81 (85).

²⁵ See *Dixon/Hall*, in: Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edition 2008, Art. 7 notes 3 et seq.; *Robinson*, in: Lee (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, 2001, p. 57; *Blanke/Molitor*, AVR 39 (2001), 142 (167); *Rückert/Witschel*, in: Fischer/Kreß/Lüder (ed.), *International and National Prosecution of Crimes Under International Law, Current Developments*, 2001, p. 59, p. 70 et seq.

²⁶ See *Mettraux*, HarvILJ 43 (2002), 237 (246); *Dixon/Hall* (fn. 25), Art. 7 note 8; v. *Hebel/Robinson*, in: Lee (fn. 10), p. 79, p. 92 et seq.; *Robinson*, AJIL 93 (1999), 43 (45 et seq.); *Rückert/Witschel* (fn. 25), p. 71.

²⁷ BGH JZ 2010, 960 (962); *Werle/Burchards*, in: Joecks/Miebach (ed.), *Münchener Kommentar zum Strafgesetzbuch*, Vol. 1, 2nd edition 2011, § 7 VStGB note 23.

²⁸ See DT-Drs. 14/8524, p. 20.

²⁹ ICTR (Trial Chamber), Judgment of 21.5.1999 – ICTR-95-1-T (Prosecutor v. Kayishema/Ruzindana), para. 122; *Werle/Burchards* (fn. 27), § 7 VStGB note 23.

³⁰ See *Mettraux*, HarvILJ 43 (2002), 237 (254).

³¹ See *Robinson*, AJIL 93 (1999), 43 (47).

large number of victims³² among others, “systematic” implies organized use of violence.³³

2. Deportation or Enforced Transfer

The singular illegal act according to § 7 (1) (4) VStGB consists of deportation and enforced transfer of a person through expulsion or other coercive acts from the area in which the person is lawfully present, into another state or region in breach of a general rule of international law. The definition of coercion is not limited to physical compulsion, but includes any kind of psychological threat.³⁴ Hence, according to the International Criminal Tribunal for the former Yugoslavia (ICTY) deportation is classified as an illegal act even if the victim consents as long as consent is given only to avoid experiencing an even harsher consequence.³⁵ For this reason, the ICTY has often questioned a victim’s consent by investigating whether the victim “was not faced with a genuine choice as to whether to leave or to remain in the area”.³⁶

A further condition stated in § 7 (1) (4) VStGB is that when the crime is committed, the victim must be lawfully staying in the area from which it is to be deported. Whether this is the case is determined in accordance with international law.³⁷ This is why the explanatory statement accompanying the government’s legislative proposal for the VStGB specifies that national legislation which is in breach of international law is irrelevant when determining whether a person is lawfully staying in a certain area.³⁸ In this respect, international law is not limited to international treaties but – as mentioned above – comprises customary international law as well. The principle that every person has the right to stay on the territory of the country of his or her nationality is one example.³⁹ Hence, according to international law, it is basically illegal for a state to expel its own nationals.⁴⁰

Furthermore, according to § 7 (1) (4) VStGB, the single illegal act must be committed in breach of a general rule of

international law. Thus, according to legislative intent, a breach of universal customary international law is necessary, which means that the provision of § 7 (1) (4) VStGB constitutes a dynamic reference to universal customary international law. Regional customary international law is deemed irrelevant, here.⁴¹ According to the explanatory statement accompanying the government’s legislative proposal for the VStGB, acting in breach of a general rule of international law means that there are no factual grounds for transfer measures, which is the case for example when a victim is displaced from his or her group’s ancestral territory based solely on racial grounds and in connection with a so-called “ethnic cleansing” policy. Transferring a population group for safety reasons, however – for example in case of possible natural disasters or military action during an armed conflict – would not constitute a crime according to § 7 (1) (4) VStGB.⁴²

With regard to the effect of the illegal action, § 7 (1) (4) VStGB requires the offender to deport or forcibly transfer the victim. According to customary international law, there is a difference between those two terms in that the former involves deporting the victim into another country whereas the latter refers to transfer within the territory of one country.⁴³ The wording of § 7 (1) (4) VStGB is unclear in this respect since “in einen anderen Staat oder in ein anderes Gebiet” (to another country or region) could from a grammatical point of view refer to both deportation and enforced transfer. However, it is unlikely that the German legislator meant to depart from international law here. Ultimately – as the ICTY rightly emphasized – differentiating between the two terms is of little practical relevance in any case: Firstly, in humanitarian law the two terms are often used cumulatively, and secondly, any kind of transfer usually involves a traumatic experience for the victim.⁴⁴

IV. The Question of the Appropriateness of Dynamic References to Customary International Law in § 7 (1) (4) VStGB

The question of the extent to which the references in § 7 (1) (4) VStGB are valid must be examined with regard to art. 103 (2) GG. This article states that an act may be punished only if it was defined by a law as a criminal offence before the act

³² BGH JZ 2010, 960 (962). – See ICTY (Trial Chamber), Judgment of 3.3.2000 – IT-95-14-T (Prosecutor v. Blaškić), para. 206; Clark, in: Politi/Nesi (ed.), *The Rome Statute of the International Criminal Court, A Challenge to Impunity*, 2001, p. 75 (p. 91); Dixon/Hall (fn. 25), Art. 7 note 11.

³³ ICTY (Trial Chamber), Judgment of 31.7.2003 – IT-97-24-T (Prosecutor v. Stakić), para. 625.

³⁴ Werle/Burchards (fn. 27), § 7 VStGB note 62. – See ICTY (Trial Chamber), Judgment of 17.10.2003 – IT-95-9-T (Prosecutor v. Simić), para. 125; Goodwin-Gill, BYIL 47 (1974-1975), 55.

³⁵ ICTY (Trial Chamber), Judgment of 17.10.2003 – IT-95-9-T (Prosecutor v. Simić), para. 125.

³⁶ ICTY (Trial Chamber), Judgment of 2.8.2001 – IT-98-33-T (Prosecutor v. Krstić), para. 147; see ICTY (Trial Chamber), Judgment of 17.10.2003 – IT-95-9-T (Prosecutor v. Simić), para. 125.

³⁷ See Meseke (fn. 13), p. 205.

³⁸ BT-Drs. 14/8524, p. 21.

³⁹ Blumenwitz, in: Blumenwitz (ed.), *Flucht und Vertreibung*, 1987, p. 36.

⁴⁰ Meseke (fn. 13), p. 206.

⁴¹ BT-Drs. 14/8524, p. 21; Werle/Burchards (fn. 27), § 7 VStGB note 63; see Kuhli (fn. 4), p. 121 et seq.

⁴² BT-Drs. 14/8524, p. 21. See Blumenwitz (fn. 39), p. 3 et seq.; Kimmich, in: Blumenwitz (fn. 39), p. 95 et seq.

⁴³ Werle/Burchards (fn. 27), § 7 VStGB note 60. See ICTY (Trial Chamber), Judgment of 2.8.2001 – IT-98-33-T (Prosecutor v. Krstić), para. 521; Bassiouni, *Crimes Against Humanity in International Criminal Law*, 1992, p. 301; Meseke (fn. 13), p. 202 et seq.; Clark (fn. 32), p. 84.

⁴⁴ ICTY (Trial Chamber), Judgment of 2.8.2001 – IT-98-33-T (Prosecutor v. Krstić), para. 522 et seq.; see ICTY (Trial Chamber), Judgment of 17.10.2003 – IT-95-9-T (Prosecutor v. Simić), para. 123.

was committed.⁴⁵ Hence, the Grundgesetz codifies the principle of “nullum crimen, nulla poena sine lege”, establishing certain conditions not only with regard to the legal source for the creation of a criminal law, but also to the content of the criminal law provision.⁴⁶ Art. 103 (2) GG is read – inter alia – as a prohibition against justifying (or aggravating) a criminal prohibition on the grounds of customary law.⁴⁷

The question of whether § 7 (1) (4) VStGB and the German constitution are in conflict is difficult for two reasons: Firstly, customary international law is to a certain extent a special type of customary law, and secondly, in § 7 (1) (4) VStGB customary law is only applied indirectly, through references in written law. The following analysis shall thus be concerned with two different issues: In section 1., it shall address the question of whether the prohibition against justifying a criminal prohibition on the grounds of customary law according to art. 103 (2) GG includes customary international law. The issue of the application of customary (international) law through a written law shall be discussed in section 2.

1. Art. 103 (2) GG and Customary International Law as Grounds for Criminalizing Conduct

The question of whether art. 103 (2) GG prohibits justifying a criminal prohibition on the grounds of customary international law revolves around the expression “gesetzlich” (by a law) in this constitutional provision. It is crucial to analyze whether this expression also applies to customary international law. The terms “law” and “by a law” cannot be defined without a relation to the constitution and thus there can be no definition beyond time and space,⁴⁸ since all throughout history the terms have stood for different conceptions.⁴⁹ Hence, regarding art. 103 (2) GG, there is no such thing as a specific concept of “law” underlying positive law a priori,⁵⁰ which means that a possible meaning of the term “law” in art. 103 (2) GG has to be derived from positive law itself. From this point of view one can distinguish between law in a formal sense and law in a substantive sense. The former concept is connected to the development or rather the authorship of a law whereas the latter concept is connected to the content.⁵¹ According to this doctrine, every act of the legislator’s will which is developed in line with the (formal) proceedings required by the constitution is a law in the formal sense, irre-

spective of its content. In contrast, any legal norm in general is meant to be a law in the substantive sense, according to the doctrine. Hence, a definition of “law” in a substantive sense would very well include customary (international) law.⁵²

It is indeed true that two concepts of “law” exist in the German legal system. The differentiation between both types of law is reflected in the German constitution at several points.⁵³ Art. 104 (1) Sentence 1 GG, for instance, specifically employs the term “eines förmlichen Gesetzes” (which means law in a substantive sense) and the wording of art. 59 (2) Sentence 1 GG includes the form of a federal law (“[die] Form eines Bundesgesetzes”). Hence, the German Federal Constitutional Court stated that the language usage in the Grundgesetz concerning the word “Gesetz” (law) is not standardized. The word is used in the formal as well as in the substantive sense.⁵⁴ More examples can be found in sub-constitutional law, for instance art. 2 of the Einführungsgesetz zum Bürgerlichen Gesetzbuch (EGBGB – Introductory Law of the German Civil Code).⁵⁵

Thus, the possible sense of the term “law” comprises a formal as well as a substantive meaning, the latter including customary (international) law. The general reading of art. 103 (2) GG therefore results from a limiting conception, which in turn – as has been shown elsewhere by the *author*⁵⁶ – stems from the principles of legal certainty,⁵⁷ the separation of powers⁵⁸ and democracy, with special consideration of the Wesentlichkeitstheorie.⁵⁹ The last one – the Wesentlichkeitstheorie – states that matters that are essential for the exercise

⁵² See *Starck*, Der Gesetzesbegriff des Grundgesetzes, 1970, p. 21 et seq.; *Ossenbühl* (fn. 48), note 9; *Schneider* (fn. 49), note 14.

⁵³ *Stern* (fn. 51), p. 567.

⁵⁴ BVerfGE 1, 184 (189).

⁵⁵ Other subconstitutional laws contain similar wording, for example § 12 of the Einführungsgesetz zur Zivilprozessordnung (EGZPO – Introductory Law of the German Federal Code of Civil Procedure) or § 7 Einführungsgesetz zur Strafprozessordnung (EGStPO – Introductory Law of the German Federal Code of Criminal Procedure).

⁵⁶ *Kuhli* (fn. 4), p. 73 et seq.

⁵⁷ See BVerfGE 28, 175 (183); 85, 69 (73); 87, 363 (391); 92, 1 (12); 95, 96 (131); *Krey*, Keine Strafe ohne Gesetz, 1983, note 122; *Krey/Weber-Linn*, in: *Schwind et. al.* (ed.), *Festschrift für Günter Blau zum 70. Geburtstag am 18. Dezember 1985*, 1985, p. 123 (p. 145); *Schönke*, MDR 1947, 85 (86); *Kunig* (fn. 46), Art. 103 note 17.

⁵⁸ See *Ebner von Eschenbach*, *Wieviel Unrecht verträgt der deutsche Rechtsstaat?*, *Verfassungsrechtliche Probleme der Verurteilungen von „Mauerschützen“*, 2000, p. 67; *Grünwald*, ZStW 76 (1964), 1 (14); *Schünemann*, *Nulla poena sine lege?*, *Rechtstheoretische und verfassungsrechtliche Implikationen der Rechtsgewinnung im Strafrecht*, 1978, p. 9; *Krey* (fn. 57), note 122; *Krey/Weber-Linn* (fn. 57), p. 145; *Kunig* (fn. 46), Art. 103 note 17.

⁵⁹ See *Krey* (fn. 57), note 122; *Krey/Weber-Linn* (fn. 57), p. 130 et seq., 145; *Kunig* (fn. 46), Art. 103 note 17; *Classen*, GA 1998, 215 (224); *Grünwald* (fn. 58), p. 13 et seq.

⁴⁵ The German wording of art. 103 (2) GG is: “Eine Tat kann nur bestraft werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Tat begangen wurde”.

⁴⁶ *Kunig*, in: *Münch/Kunig* (ed.), *Grundgesetz-Kommentar*, Vol. 3, 4th/5th edition 2003, Art. 103 note 21.

⁴⁷ BVerfGE 26, 41 (42); 64, 389 (393); 75, 329 (340).

⁴⁸ *Ossenbühl*, in: *Isensee/Kirchhof* (ed.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. 3, *Das Handeln des Staates*, 2nd edition 1996, § 61 note 5.

⁴⁹ *Schneider*, *Gesetzgebung*, 3rd edition 2002, note 13.

⁵⁰ *Achterberg*, DÖV 1973, 289.

⁵¹ *Stern*, *Das Staatsrecht der Bundesrepublik Deutschland*, Vol. 2, *Staatsorgane, Staatsfunktionen, Finanz- und Haushaltsverfassung, Notstandsverfassung*, 1980, p. 564; *Ossenbühl* (fn. 48), note 9.

of fundamental rights by citizens, have to be regulated in legislative acts. Hence, the question of whether art. 103 (2) GG prohibits justifying a criminal prohibition on the grounds of customary international law must be answered considering those principles.

The principle of legal certainty holds that each individual must be able to grasp the concrete scope of application of legal regulations affecting his interests.⁶⁰ Citizens are to foresee possible state proceedings against them and adapt their conduct accordingly.⁶¹ Considering the difficulties an individual might face when attempting to obtain information on the content of regulations in unwritten law, one can conclude that the principle of legal certainty prohibits justifying a criminal prohibition on the grounds of customary international law. The principle of the separation of powers enshrined in the German constitution also supports this conclusion. According to this principle, the legislative, executive and judicial bodies of the government are separated entities and have clearly separated powers, designated to them in art. 20 (2 and 3) GG. The principle of the separation of powers has two main objectives: First, it is meant to ensure that the legislative, executive and judicial bodies complement, control and limit each other in order to constrain the power of the state and thus to protect the individual's freedom.⁶² Second, the principle of the separation of powers is meant to provide for an adequate distribution of state functions and powers among the different bodies according to their respective structure.⁶³ Following the principle of the separation of powers, justifying a criminal prohibition on the grounds of customary international law should be inadmissible, since, if a German criminal court based its sentence on regulations of customary international law, it would be doing so at the expense of the national legislator, just as it would be the case for a court applying customary national law. The principle of democracy with special consideration of the *Wesentlichkeitstheorie* also leads to the same conclusion. According to this principle, matters that are essential for the exercise of fundamental rights by citizens, have to be regulated in legislative acts.⁶⁴ Since imposing a sentence implies limiting certain fundamental rights, and considering the fact that punishment entails ethical censure,⁶⁵ codifying criminal offences constitute a primary obligation of the parliament as legislator. In this

respect, it is irrelevant whether a German court decides on the basis of customary national or international law.

In conclusion, considering the principles of legal certainty, the separation of powers, and democracy, with special consideration of the *Wesentlichkeitstheorie*, art. 103 (2) GG prohibits justifying a criminal prohibition on the grounds of customary international law.⁶⁶ However, the question of whether this constitutional provision includes cases in which customary (international) law is applied indirectly, through reference in written law, remains. This issue shall be discussed in the following.

2. Art. 103 (2) GG and References to Customary (International) Law in written Criminal Law

Just as it was the case with the question discussed in the above section, the following question of whether references to customary (international) law in criminal law are permissible cannot be answered merely by considering the wording of the constitutional provision. The statement in art. 103 (2) GG about a punishment having to be defined "gesetzlich" (by a law) offers only limited guidance. For this reason, the issue of the admissibility of references to customary (international) law in criminal law must be investigated considering the rationale of art. 103 (2) GG, which in turn is connected to the principles of legal certainty, the separation of powers, and democracy, with special consideration of the *Wesentlichkeitstheorie*.

In the case of a dynamic reference to customary (international) law in written laws, the principle of legal certainty might be affected. However, the instances of such dynamic references to customary law contained in written laws differ from the cases in which criminal prohibitions are justified directly by customary law – which are highly problematic considering the principle of legal certainty. In the former cases the written laws do not only refer to customary law but also specifically stipulate certain elements of a criminal offence. If these offer a satisfactory description of the criminal offence as a whole, the potential addressee of the norm will still be able to identify the area of life that the referenced customary (international) law belongs to.

From the elements of a criminal offence described in § 7 (1) (4) VStGB, for example, one can conclude that the feature which refers to customary international law, namely the breach of a general rule of international law, refers only to the part of customary international law that touches upon transfer measures. For this reason, *Satzger's*⁶⁷ argument that the reference to a breach of duty according to customary international law in § 7 (1) (4) VStGB establishes a criminal offence which is not codified in any *lex scripta*, is to be rejected. His view fails to reflect a systematic approach according to which even the scope of an element of crime defined only by customary international law may be influenced by other elements or provisions which are less problematic. This illustrates that in consideration of the principle of legal cer-

⁶⁰ *Zippelius/Würtenberger*, Deutsches Staatsrecht, 32nd edition 2008, § 12 note 62.

⁶¹ BVerfGE 13, 261 (271).

⁶² BVerfGE 3, 225 (247); 7, 183 (189); 9, 268 (279); 22, 106 (111); 30, 1 (28); 67, 100 (130); 68, 1 (86); 95, 1 (15); *Hesse*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20th edition 1995, note 476; *Ebner von Eschenbach* (fn. 58), p. 69.

⁶³ BVerfGE 68, 1 (86); 90, 286 (364); 95, 1 (15); 98, 218 (251 et seq.); *Hesse* (fn. 62), note 482.

⁶⁴ BVerfGE 20, 150 (157 et seq.); 41, 251 (260); BVerwGE 47, 201 (201, 203).

⁶⁵ *Kühl*, Strafrecht, Allgemeiner Teil, 6th edition 2008, § 10 note 2.

⁶⁶ See *Wilkitzki*, ZStW 99 (1987), 455 (461).

⁶⁷ *Satzger*, NStZ 2002, 125 (131); see *Jähnke*, ZIS 2010, 463 (467).

tainty it is not generally forbidden to include certain features of a criminal offence which are in themselves rather vague (whether they be references to customary law or any other “simply vague” features), but which are codified within a sufficiently narrow legal framework. Hence, the principle of legal certainty does not stand in opposition to dynamic references to customary law in written laws as long as the legal framework provides sufficient guidance.

The same holds true for the principle of the separation of powers. The fact that the legislature enacts a criminal statute in which certain elements of criminal offences are defined by dynamic references to customary (international) law does not in itself constitute a violation of the principle of the separation of powers. It is true that in a given case the deciding judge might considerably influence the interpretation of a principle of customary law to be applied. However, as long as the legislator creates a sufficiently narrow framework for the remaining elements of the criminal offence, the room for interpretation seems adequately limited. Hence, it would be acceptable with regard to the freedom of the individual which is to be protected and with respect to the adequate distribution of state functions among legislation and jurisdiction. Thus, the principle of the separation of powers, just as the principle of legal certainty, is in itself not opposed to dynamic references to customary (international) law in written laws provided that additional elements of the criminal offence create a sufficiently narrow framework. With respect to the third foundation of the prohibition of justifying a sentence on the grounds of customary law, the principle of democracy with special consideration of the *Wesentlichkeitstheorie*, the result of the analysis is the same. Since imposing a sentence implies limiting certain fundamental rights, criminal offences, as a rule, have to be codified in legislative acts. However, this does not mean that the principles require every element of a criminal offence to be meticulously specified by the legislator. In fact, dynamic references to customary (international) law in written laws are acceptable as long as further elements of the criminal offence which are not based on customary law create a sufficiently narrow framework. The fact that in the case of dynamic references to customary law the content of regulation containing the reference may change without the democratically legitimized legislator being involved⁶⁸ seems acceptable as long as the above mentioned condition is met.

It has thus been shown that the three foundations of the prohibition of justifying a sentence on the grounds of customary law – and, as a consequence, the prohibition itself – do not hinder dynamic references to customary (international) law provided that the remaining codified elements of the respective criminal offence allow for a sufficiently narrow legal framework. However, little is to be gained from this conclusion when there are no specific criteria to mark a sufficiently narrow legal framework that is to be filled by customary (international) law. This issue may be solved by considering the principle of clarity in criminal law which is strongly

connected to the prohibition of basing a prohibition on the grounds of customary law and which can be derived from the same section of the constitution, namely art. 103 (2) GG. Due to the fact that customary law is usually difficult to investigate and hence discernable to the individual only within limits, it can be regarded as insufficiently defined law. It is therefore suggested that the principle of clarity should be used when defining the criteria to mark a sufficiently narrow legal framework that is to be filled by customary (international) law. According to the Federal Constitutional Court, this legal principle establishes the legislator’s responsibility to outline the preconditions of criminal liability with sufficient precision so that the scale and the purview of the facts constituting an offence are recognizable and can be established through interpretation.⁶⁹ At the same time, however, the Court dictates that the clarity requirements for a criminal law must not be overstated.⁷⁰ In principle, this conclusion is to be welcomed. It is impossible to avoid a certain degree of indefiniteness given that ultimately, every term allows for several interpretations.⁷¹ Furthermore, the Federal Constitutional Court itself underlined the fact an unduly strict interpretation of the principle of clarity in criminal law would lead to the law becoming too rigid and casuistic.⁷² Hence, as a rule, the addressee of the prohibition needs to be able to foresee, on the basis of the legal regulation, whether a certain behavior is liable to prosecution.⁷³ In the interest of consistency, this must mean that the legislature must, with regard to art. 103 (2) GG, be permitted, under certain circumstances, to include elements which are (in themselves) indeterminate, as long as the remaining elements allow for citizens to assume the risk of being punished. In other words: Single indeterminate elements within the definition of a criminal offence are admissible provided that the remaining elements of the criminal offence offer a description of the behavior prohibited that allows for the person to adapt to the legal requirements accordingly.⁷⁴ Only if that is the case, the individual will be able – even without any knowledge of the scope of the indeterminate element of the offence – to recognize whether his behavior entails a risk of constituting a criminal offence. Under these conditions, the negative impact on the principle of legal certainty seems acceptable.

The same applies to the principle of the separation of powers. The possible options for interpretation of elements of a criminal offence, as well as the identification of a certain principle of customary international law to be applied, do not compromise the freedom of the individual which is protected by the principle of the separation of powers as long as the legislator stipulates additional elements of the offence – which

⁶⁹ BVerfGE 47, 109 (120); 75, 329 (341); 87, 209 (223 et seq.). See BVerfGE 25, 269 (285); 92, 1 (12).

⁷⁰ BVerfGE 48, 48 (56).

⁷¹ *Roxin*, Strafrecht, Allgemeiner Teil, Vol. 1, 4th edition 2006, § 5 note 67.

⁷² BVerfG NJW 2010, 3209 (3210); BVerfGE 45, 363 (371).

⁷³ See BVerfGE 71, 108 (115); 47, 109 (121); 75, 329 (341); 85, 69 (73); 87, 209 (224); 87, 363 (391 et seq.); 92, 1 (12).

⁷⁴ *Kuhli* (fn. 4), p. 188 et seq.

⁶⁸ See *Moll*, *Europäisches Strafrecht durch nationale Blankettstrafgesetzgebung?*, 1998, p. 74.

offer sufficiently clear guidance to enable the person to avoid liability. The principle of the separation of powers also aims for an adequate distribution of state functions among the different bodies (according to their respective structure). Under the conditions described above, this distribution is indeed protected. Ultimately, the same holds true for the principle of democracy with special consideration of the *Wesentlichkeitstheorie*. Under the conditions postulated above, in particular the fact that the content of the referred norm of customary law – in cases of dynamic references to customary law in written laws – may be modified without the competent and democratically legitimized legislator being involved seems acceptable.

Ultimately, applying the argument developed above to § 7 (1) (4) VStGB leads to the following conclusion: If one disregards the elements of the criminal offence which refer to customary international law (victim staying lawfully in the area; breach of a general rule of international law), the remaining part of the definition of the offence includes all cases in which, in the context of a widespread and systematic attack on a civilian population, a person is deported or forcibly transferred to another country or region through expulsion or any other coercive measure. Considering this description of the chapeau and the elements of the singular illegal act which do not refer to customary international law, one can indeed argue that the respective areas of life are described in a reasonably clear and defining manner.⁷⁵ Since an individual should, as a rule, be able to deliberately avoid these areas of life, the elements of the criminal offence described in § 7 (1) (4) VStGB which contain a reference to customary international law are embedded in a sufficiently narrow legal framework. Hence, the provision is not in breach of art. 103 (2) GG.

V. Conclusion

Although it is now certain that dynamic references to customary international law in criminal law may be admissible – and that in the case of § 7 (1) (4) VStGB they are indeed admissible – this does not necessarily mean that this legal concept is generally desirable. This essay has shown how § 7 (1) (4) VStGB touches upon – though certainly without breaching – fundamental principles of the German constitutional system. In certain cases there may very well be sound reasons for exhausting certain limits of admissibility in criminal law. In this respect, the justification of references to customary international law put forward by the legislator of the VStGB was mentioned above, namely the need to allow for further human rights enhancing developments of customary international law to be reflected in the VStGB. Still, reservations against this legal concept remain. These are attributable to the fact that in consideration of the nature of criminal law as an *ultima ratio*, criminal offences are, as a matter of principle, to be defined as clearly as possible. Furthermore, the reservations stem from the fact that, from a political point of view, the implementation of international law might be compromised if certain definitions of criminal offences appear to be

inadmissible. In isolated cases, references to customary international law in criminal law may seem sensible – however, they should, as far as possible, remain an exception.

⁷⁵ See BT-Drs. 14/8524, p. 20.