



Editorial

- Transatlantic Legal Cooperation
Annette Weerth

Articles

- Cultured Meat – Opportunities and Challenges from the Perspective of Food Law in the EU and the U.S.
Andreas Wehlau
- The Genocide against the Yazidis in the Focus of the German Federal Court of Justice
Edward Schramm
- Would You Like a Bit More? – A Transatlantic View on Allegedly Misleading Food Presentations
Debbie Berman, Kate Spelman, Julia Hirata and Benedikt Burger
- The European Corporate Sustainability Reporting Directive & European Sustainability Reporting Standards
Romy de Galan, Yentl Coenradie and Jacques Kröner
- The German Redress Action
Patrick Schroeder and Kristina Weiler
- Reform of the English Arbitration Act 1996 – The Aggregation of Marginal Gains or a Missed Opportunity?
George Burn and Nadia Hubbuck
- Israel's Legislative Plan – the Supreme Court Strikes Down the Basic Law Amendment Regarding the Reasonableness Doctrine
Roy Schöndorf, Saar A. Pauker, Benny Winston and May Dar

Cases

- CJEU Clarifies Threshold for Non-Material Data Protection Damages
Simon Clemens Wegmann and Moritz Stilz

Editorial Board

George A. Bermann, James H. Boykin, Franco Ferrari, Stephan Harbarth, Claudia Junker, Juliane Kokott, Alexander Lorz, Thomas Meiers, Thomas Pfeiffer, Catherine Rogers, Norbert Röttgen, Giesela Rühl, Anahita Thoms, Stephan Wilske, Diane P. Wood

Editors-in-Chief

Stephan Wilske and James H. Boykin

Transatlantic Law Journal

In cooperation with DAJV
Deutsch-Amerikanische Juristen-Vereinigung e.V.

TLJ 2/2024

March 2024 • Volume 2 • Issue 2 • Pages 49–96

Editorial Board

George A. Bermann, *Professor at Columbia Law School*; James H. Boykin, *Partner at Hughes Hubbard & Reed*; Franco Ferrari, *Professor at NYU School of Law*; Stephan Harbarth, *President of the German Constitutional Court*; Claudia Junker, *General Counsel for Deutsche Telekom AG*; Juliane Kokott, *Advocate General, Court of Justice of the European Union*; Alexander Lorz, *Minister in the German Federal State of Hessen*; Thomas Meiers, *Chief Governance and Legal Officer at SEAT, S.A. and CUPRA*; Thomas Pfeiffer, *DAJV President and Professor at Heidelberg University*; Catherine Rogers, *Professor at Bocconi University*; Norbert Röttgen, *Member of German Parliament and Foreign Affairs Committee*; Giesela Rühl, *Professor at Humboldt University Berlin*; Anahita Thoms, *Partner at Baker McKenzie*; Stephan Wilske, *Partner at Gleiss Lutz*; Diane P. Wood, *Director of the American Law Institute and Senior Judge of the U.S. Court of Appeals for the 7th Circuit*

Editorial Team

Stephan Wilske and James H. Boykin (editors-in-chief), Zeldá Bank, Björn P. Ebert, Daniel Felz, Todd J. Fox, Martin Gusy, Lukas Hollerung, Blerina Jasari, Clemens Kochinke, Tamara Kraljic, Ian Pate, Martin Schulz, Jan-Christian Spetzger, Allison Torline, Friedrich Weyland.

Content

Editorial

- 49 · Annette Weerth
Transatlantic Legal Cooperation

Articles

- 52 Andreas Wehlau
Cultured Meat – Opportunities and Challenges from the Perspective of Food Law in the EU and the U. S.
- 58 Edward Schramm
The Genocide against the Yazidis in the Focus of the German Federal Court of Justice
- 62 Debbie Berman/Kate Spelman/Julia Hirata/Benedikt Burger
Would You Like a Bit More? – A Transatlantic View on Allegedly Misleading Food Presentations
- 65 Romy de Galan/Yentl Coenradie/Jacques Kröner
The European Corporate Sustainability Reporting Directive & European Sustainability Reporting Standards
- 71 Patrick Schroeder/Kristina Weiler
The German Redress Action
- 76 George Burn/Nadia Hubbuck
Reform of the English Arbitration Act 1996 – The Aggregation of Marginal Gains or a Missed Opportunity?
- 79 Roy Schöndorf/Saar A. Pauker/Benny Winston/May Dar
Israel's Legislative Plan – the Supreme Court Strikes Down the Basic Law Amendment Regarding the Reasonableness Doctrine

Case Law

- 82 Simon Clemens Wegmann/Moritz Stilz
CJEU Clarifies Threshold for Non-Material Data Protection Damages
- 85 Matthew Adams
Abitron Austria GmbH v. Hetronic International, Inc.

88 Björn P. Ebert/Stephan Wilske
A Look at the Transatlantic Bookshelf

In a Nutshell

91 In a Nutshell

Last Words by Dr. Strangelaw

95 A Parody of Procedural Economy

ISSN 2941-3052

TLJ
Transatlantic Law Journal

Editor in Chief:

Prof. Dr. Stephan Wilske (Responsible according to German press law), Gleiss Lutz Hootz Hirsch PartmbB Rechtsanwälte, Steuerberater, Lautenschlagerstr. 21, 70173 Stuttgart email: editors@tlj.law

Contact person for the publisher:

Dr. Sebastian Pech c/o Verlag C.H. BECK oHG, Wilhelmstr. 9, 80801 Munich, Germany; postal address: Postfach 400340, 80703 Munich, Germany; email: sebastian.pech@beck.de.

Manuscripts and other submissions: All submissions are to be sent to editors@tlj.law. No liability arises for unsolicited submissions. The acceptance to publication must be made in text form. Through acceptance the author transfers to the Verlag C.H.BECK the exclusive geographical and unlimited temporal right to reproduce and distribute in physical form, the right to grant public access or any reproduction thereof, the right to include in databases, the right to store on electronic data carriers and the right to the distribution and reproduction thereof as well as the right to other use in electronic form. This also in-

cludes any usage rights that are presently unknown. This does not affect the author's mandatory secondary right (§ 38 (4) of the German Copyright Act (UrhG)) after the expiry of 12 months following publication.

Guidelines for submissions:

For formal requirements refer to editors@tlj.law.

Copyright and publisher's rights: All contributions published in this journal are protected by copyright. This also applies to the published court decisions and their summaries to the extent they have been edited or compiled by the contributor or managing editor. The copyright protection also applies to databases and other similar systems. With the exception of the narrow uses permitted by German copyright law, no part of this journal may in any form be reproduced, distributed, made publicly accessible, included in databases, saved on data carriers or reproduced, distributed or utilised in any electronic form without written approval from Verlag C.H.BECK.

Advertisements: Verlag C.H.BECK oHG, Anzeigenabteilung, Wilhelmstr. 9, 80801 Munich (Germany); postal address: Postfach 400340, 80703 Munich, Germany. Media-advice: phone: +49(0)89 381 89-687; fax: +49(0)89 381 89-589.

Management, production, advertisements, technical information: phone: +49(0)89 381 89-609; fax: +49(0)89 381 89-589; email: anzeigen@beck.de Contact person for advertisements: Dr. Jiri Pavelka.

Publishers: Verlag C.H.BECK oHG, Wilhelmstr. 9, 80801 Munich, Germany; postal address: Postfach 400340, 80703 Munich, Germany; www.beck.de; phone: +49(0)89 381 89-0; fax: +49(0)89 381 89-398.

Bank account: Postbank München IBAN: DE82 7001 0080 0006 2298 02, BIC: PBNKDEFFXXX.

Registration Court (Registergericht): Local Court of Munich (Amtsgericht München), HRA 48045; Managing partners: Dr. Hans Dieter Beck and Dr. h. c. Wolfgang Beck, both are publishers in Munich.

Publication: Every two months.

Subscription charges 2024: Yearly € 250.00 (incl. VAT). Issue price € 45.00 (incl. VAT). Costs of delivery are not included. Invoicing is at the beginning of a payment period. Complaints about copies that have not been received may only be made within six weeks following the date of publication. For members of Deutsch-Amerikanische Juristen-Vereinigung (DAJV) e.V. the price is included in the membership fee.

Orders may be made in every bookstore and through the publisher Verlag C.H.BECK.

Customer Service:

phone: +49(0)89 381 89-750
fax: +49(0)89 381 89-358
email: kundenservice@beck.de

Cancellation:

Details on the cancellation policy are available under:
<https://www.beck-shop.de>

Change of address: Timely notification of a change of address is requested. When informing of a change of address, please provide the name of the journal as well as the new and previous address.

Notification according to Art. 21 (1) GDPR:

The Deutsche Post AG may inform the Verlag C.H.BECK oHG of a change of address if no forwarding instructions have been given. An objection may be made at any time to the Deutsche Post AG. The objection does not have retrospective effect.

Printers: Druckerei Himmer, Steinerne Furt 95, 86167 Augsburg.



on cultured meat indicates that the use of hormones plays a key role in the first three steps of breeding, development and propagation of cell and tissue cultures.⁵⁹ It is well known that one of the fiercest trade disputes between the U.S. and the European Community developed over the import ban on American beef from cattle treated with growth hormones. While growth hormones are used in U.S. cattle farming without a veterinary prescription, with only limited monitoring for residues, the European Community – led by the precautionary principle – has reservations about “hormone meat” which is believed to have potential carcinogenic effects.⁶⁰ The European Community’s ban of the use of hormones in cattle fattening⁶¹ gave rise to a WTO dispute.⁶² The question of whether a ban on the use of hormones in cattle fattening was justified from a scientific point of view, or for reasons of preventive health protection, ultimately remained unanswered. However, it became clear that the risk assessment for the use of growth hormones in meat production in Europe and the United States is very different. It does not require clairvoyant abilities to recognize that this debate will be revived as soon as the industrial production of cultured meat has established itself to such an extent that exports become economically viable. Before then, however, the question of the use of hormones will arise in any European authorization procedure under the Novel Food Regulation.

In contrast, the likelihood that issues relating to the use of genetically modified organisms (“GMO”) will play a role in the approval and marketing of cultured meat is low. Cultured meat based on GMO is unlikely to have a chance on the European market due to a lack of consumer acceptance. What’s more, research and production circles have stated that GMO technology is not necessary for the successful production of cultured meat and should therefore not be used in the EU. The additional hurdles imposed by Regulation (EC) No. 1829/2003 of 22 September 2003 on genetically modified food and feed will therefore probably not have to be overcome by producers of cultured meat.

VIII. Conclusion

Cultured meat is a technology of the future that offers great opportunities, but at the same time has to contend with a wide range of regulatory requirements as well as other forms of resistance fueled by the apparent (and arguably absurd) fear that cultured meat will render conventional meat production obsolete. In a transatlantic comparison, regulation differs in that the EU has a general ban on novel cultured meat products in the Novel Food Regulation, which can only be overcome through a prior application and authorization procedure,

while the U.S. uses voluntary consultation procedures and agency guidelines on meat hygiene to apply the existing laws that apply to all foods alike in such a way that even without **premarket approval**, it is guaranteed that cultured meat is as safe as other foods produced using other methods.

Given these different approaches on both sides of the Atlantic, it is not surprising that two food companies in the U.S. have already succeeded in developing cultured meat products to market maturity and making them available to consumers. The combined approach of (i) voluntary consultation and (ii) strict requirements for the approval of producers for continuous monitoring in accordance with meat and poultry hygiene laws has proven to be more innovation-friendly and also more efficient than the EU’s Novel Food Regulation, with its complicated application and approval process and its extremely high (and nearly impossible to meet) “*no safety risk*” standard.

With both European and American food companies announcing that they will seek authorizations for cultured meat products in the EU, it will be interesting to see how the challenges that could arise from the use of growth factors, hormones and non-animal scaffolding materials will be dealt with. As desirable as the widespread use of cultured meat would be from an animal welfare and environmental point of view, it is to be expected that – given the current legal situation in the EU – the strict (and arguably excessive) safety requirements laid down in the Novel Food Regulation will prevail, with the result that authorizations for novel cultured meat products will remain the exception. A modification of the authorization requirements in Art. 7 of the Novel Food Regulation could improve the situation by stating that novel foods only have to be “*as safe as*” comparable foods produced using other methods. A comparative analysis with practices employed by U.S. authorities, as set forth in this article, may contribute towards such an understanding. ■

59 *Chrikil Hocquette, Ibid.*, pp. 2, 7.

60 *Cf. Wolfram Wetzig*, Bedeutung des SPS-Abkommens der WTO für das europäische Lebensmittelrecht und umgekehrte Diskriminierung am Beispiel des Hormonverbots, *Zeitschrift für das gesamte Lebensmittelrecht (ZLR)*, Issue 1 2000, 11 (20 ff.).

61 Directive 81/602/EEC, as well as Directives 88/146/EEC and 88/299/EEC, later replaced by Directive 96/22/EC of 29 April 1996 concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of β -agonists.

62 *Cf. the detailed analysis of the WTO Appellate Body’s decision by Christine Godt*, Risikoregulierung im Weltmarkt, *Europäisches Wirtschafts- und Steuerrecht (EWS)*, Issue 6 1998, 202 (204 ff.); see also *Meinhard Hilff/Barbara Eggers*, Der WTO-Panelbericht im EG/U.S.A.-Hormonstreit, *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)*, Issue 18 1997, 559 (562).

Professor Dr. Edward Schramm, Jena*

The Genocide against the Yazidis in the Focus of the German Federal Court of Justice

In a landmark decision from November 2022,¹ the German Federal Court of Justice (Bundesgerichtshof, “BGH”) for Criminal Matters largely dismissed the remedy of appeal on points of law (Revision) by an Islamic State (“IS”) fighter against a judgement by the Frankfurt Higher Regional Court (Oberlandesgericht, “OLG”),² in which the IS supporter had been sentenced to life imprisonment for genocide and other criminal offences against the Yazidis. This was the first ruling worldwide that the brutal actions of IS against the Yazidi

* Edward Schramm is professor at the University of Jena. At his chair, he specializes in criminal law, criminal procedure law, international criminal law, family criminal law as well as law and literature. He is a partner in comparative law projects with Tbilisi State University (Georgia), most recently with a focus on international criminal law. <https://www.rewi.unf-jena.de/schramm>.

1 Bundesgerichtshof (BGH) [Federal Court of Justice] 30 November 2022 – 3 StR 230/22, BGHSt 67, 180 (Ger.).

2 Oberlandesgericht Frankfurt am Main (OLG Frankfurt) [Frankfurt Higher Regional Court] 30 November 2021 – 5-3 StE 1/20 – 4 – 1/20, juris (Ger.).

group in Iraq constituted a genocide and thus the participation in it could fall under the most serious offence in international criminal law.

I. The Relevant Event

As the OLG Frankfurt explains in more detail in its decision,³ the Yazidis, who were originally ethnic Kurds, form a religious community that predominantly inhabits areas in the north-west of Iraq (around 500,000 Yazidis) and Syria. Their common religion is characterized by monotheism. Their faith contains elements of Zoroastrianism, Christianity and Islam, with seven angels taking center stage. For IS supporters, however, angels are embodiments of Satan and the Yazidis are therefore devil worshippers and polytheists, which is why the religion and its members should be completely destroyed. In August 2014, IS carried out a major military attack on the Yazidis in the northern Iraqi region around Sinjar, between Mosul and Rakka. In the aftermath, IS obliged male Yazidis to convert to Islam, forced them into labor, enslaved Yazidi women and girls as labor or sex slaves and executed members of the Yazidi religious community *en masse*. The two victims, a Yazidi woman (“F”) and her four-year-old girl (“R”), were also captured by IS and sold as slaves in Syria.

There, the defendant Taha al-J. (“A”) – an Iraqi IS fighter married to the German IS supporter J. W. (“C”) – worked as the head of an IS office. In June 2015, he bought F and R as slaves and later took them to Falluja in Iraq, where he lived with C. In the couple's household, F and R were subjected to the instructions of A, who completely controlled their lives, forbade them to leave the house, gave them too little food, forced them to perform Islamic prayers and abused them on a daily basis. The girl was also ‘lent’ to a stranger overnight without her mother's consent. The two Yazidi victims suffered physically and psychologically to a great extent as a result of this treatment.

One day in August or September 2015, A asked F to stand barefoot in the sun on the stone floor of the courtyard surrounding the house at lunchtime. At that time, the daytime temperature was as high as 51 degrees Celsius (124 degrees Fahrenheit) in the shade. As instructed by A, F went back into the house and returned to cleaning work. However, A was furious because R had urinated on a mattress due to illness. To punish and discipline the five-year-old girl, he tied her hands to the outside grille of a window in the courtyard, exposing the immobile girl completely to direct sunlight. After fastening her, A returned to the house. When he came back to the courtyard some time later, he untied R, who had suffered a heat stroke in the meantime. As he could have foreseen, she had either already died from it or died in the immediate aftermath. He refused to allow the mother to see her child one last time and accompany her to hospital.

In summer 2017, F regained her freedom and finally fled to Germany via northern Iraq.⁴ The German Federal Public Prosecutor General's Office then opened an investigation against C, who had returned to Germany in 2016,⁵ and against A, who was arrested in Athens in 2019 on the basis of a European arrest warrant and transferred to Germany.⁶

II. German Responsibility for the Prosecution of International Crimes in Iraq and Syria

Syria and Iraq are – like China, Israel, Turkey and the U. S. – not States Parties to the Rome Statute („ICC Statute“) of

the International Criminal Court (“ICC”) and are therefore not members of this criminal tribunal.⁷ Unlike some other non-States Parties, such as Ukraine,⁸ these countries have not submitted to the jurisdiction of the ICC in The Hague. How does this justify the jurisdiction of a German criminal court over the international crimes committed in Iraq and Syria?

Germany is one of the (currently 124) States Parties to the ICC Statute. According to the underlying “*indirect enforcement model*”, the prosecution of international offences falls primarily within the remit of these countries.⁹ The ICC merely supplements domestic criminal jurisdiction in certain cases, especially if the States Parties are unwilling or unable to ensure prosecution (so-called “*complementarity principle*“ according to Art. 1 and Art. 17 (1) ICC Statute).¹⁰ In terms of substantive law, the prosecution of international crimes in Germany is ensured by the Codes of Crimes against International Law (*Völkerstrafgesetzbuch*, “VStGB“) and the implementation of the principle of universal jurisdiction: According to § 1 (1) VStGB, there is a quasi-universal jurisdiction of the German criminal justice system for the international crimes of genocide (§ 6 VStGB or Art. 6 ICC Statute), crimes against humanity (§ 7 VStGB or Art. 7 ICC Statute) and war crimes (§ 8 – § 12 VStGB or Art. 8 ICC Statute). This does not require a direct link (*i.e.* a connection between the offence and Germany):¹¹ The offences need not have been committed or prepared in Germany, nor have been committed or participated in from Germany. It is also not necessary for a German to have been involved or become a victim. These three international offences affect humanity as a whole and thus the interests of every state. In addition the law is aimed at making it more difficult for international offenders to find a safe haven in a foreign country.

The assessment is different only in the case of the offence of aggression (§ 13 VStGB or Art. 8 ICC Statute): Here, Germany also requires a domestic connection, *i.e.* a German perpetrator or an offence directed against the Federal Republic of Germany (§ 1 (2) VStGB).¹²

However, there is a certain restriction on criminal prosecution in Germany according to the special criminal procedural

3 OLG Frankfurt 30 November 2021 – 5-3 StE 1/20 – 4 – 1/20, para. 62–112.

4 Germany is the country with the world's largest Yazidi diaspora community (more than 200,000 Yazidis); see *Elisabeth Baier*, *juris Praxisreport Strafrecht (jurisPR-StrafR)*, Issue 4 2023, para. 1.

5 For her later conviction, cf. BGH 9 March 2023, 3 StR 246/22, *Strafverteidiger (StV)*, Issue 10 2023, 665.

6 OLG Frankfurt 30 November 2021 – 5-3 StE 1/20 – 4 – 1/20, para. 28.

7 Cf. the compilation of the States Parties (22. February 2024) at <https://asp.icc-cpi.int/states-parties>.

8 *Mayeul Hieramente*, *Russlands Einmarsch in die Ukraine: Ein Fall für den Internationalen Strafgerichtshof?* Ad Legendum 2022, 117; *Claüs Kreß*, *Die völkerstrafrechtliche Dimension des russischen Angriffskriegs gegen die Ukraine*, *Kriminalpolitische Zeitschrift (KriPoZ)*, Vol. 7 2023, 342; *Edward Schramm*, *Völkerstrafrechtliche Dimensionen des Krieges in der Ukraine*, *Deutsch-Russische Rechtszeitschrift (DRRZ)*, Vol. 7 2022, 127 (138).

9 *William A. Schabas*, *The International Criminal Court: A Commentary on the Rome Statute* (2. ed. 2016), p. 47; *Helmut Satzger*, *Internationales und Europäisches Strafrecht* (10. ed. 2022), § 12 para. 8 ff.

10 *Robert Esser*, *Europäisches und Internationales Strafrecht*, § 21 para. 22 ff. (3. ed. 2023); *Edward Schramm*, *Internationales Strafrecht* (2. ed. 2018), chap. 2 para. 20.

11 *Kai Ambos*, *Internationales Strafrecht*, § 3 para. 99 ff. (5. ed. 2018); *Christoph Safferling*, *Völkerstrafrecht in Eric Hilgendorf/Hans Kudlich/Brian Valerius (ed.), Handbuch des Strafrechts* (Vol. 6, 2022), § 65 para. 171.

12 Persons involved in Russia's war of aggression against Ukraine can therefore not be prosecuted by the German criminal justice system; cf. *Schramm*, *DRRZ* 2022, 127 (138).

provision for international offences in § 153f Para. 1 Cl. 1 of the German Code of Criminal Procedure (*Strafprozessordnung*, “StPO”): the Federal Public Prosecutor General’s Office can refrain from prosecuting international offences if the accused is not resident in Germany and such a residence is not to be expected.¹³

These proceedings also show the extent to which judicial resources are used in the prosecution of international offences: The main criminal proceeding in this case in Frankfurt lasted from April 2020 to November 2021, with a total of 58 court session days.¹⁴

III. The Accusation of Genocide (*Völkermord*)

The German version of the statute, § 6 VStGB, unlike Article 6 ICC Statute, is titled *Völkermord* (murder of people), not “genocide”.¹⁵ § 6 VStGB extends its protection to the Yazidis: They form a religious group, and as they are characterized by particular cultural traditions that have evolved over time, they should also be counted as an ethnic group.¹⁶

Broadly speaking, § 6 (1) (Nos. 1 – 5) VStGB uses the same five acts as Art. 6 ICC Statute for what can constitute the criminal offence. The first two of these acts are relevant to the charge against A.

1. Killing a Member of the Group

The act of killing a member of a group under § 6 (1) (No. 1) VStGB (= Art. 6 (b) ICC Statute) seems to be the most relevant to the present case due to the death of R. Unlike the plural in Art. 6 (a) ICC Statute (“*killing members of the group*”), in § 6 (1) (No. 1) VStGB the killing of even a single person is sufficient. The German wording reflects the international consensus in case law and international legal literature:¹⁷ firstly, genocide focuses on the individual act in question. Secondly, the first Element of Crime to Art. 6 (a) of the ICC Statute also uses the definition: “*The perpetrator killed one or more persons*”.¹⁸ It would therefore have been enough for Art. 6 (I) VStGB that A only wanted to kill R.

The words “*killing*” in Article 6 of the ICC Statute and “*töten*” in § 6 (1) (No. 1) VStGB does not include reckless or even negligent causing of death, but only intentional homicide.¹⁹ But the genocide was denied by OLG and BGH for lack of subjective intent reasons: The Court was not convinced that A had acted with intent to kill. In my opinion, however, it would have been justifiable to come to the opposite conclusion due to A’s highly life-threatening actions. The five-year-old girl, who was physically weakened, starved and ill due to the continuous abuse, was tied up in the midday heat with her arms right and left at head height and exposed to direct sunlight at 50 degrees in the shade for several minutes. In German criminal law exists a certain basic form of intent which is called “*dolus eventualis*” (*bedingter Vorsatz*).²⁰ This intention is generally sufficient for intentional offenses, also for § 6 VStGB.²¹ This intention consists of the two elements of (1) awareness of danger and (2) a certain acceptance of the success or at least a certain indifference towards it. The knowledge of the risk and the hostile indifference of A towards the physical integrity of R could certainly have argued for an intent to kill in the form of this *dolus eventualis*.

2. Serious Physical or Mental Injury

However, this is irrelevant to the outcome, as according to the second punishable act of Art. 6 (1) (No. 2) ICC Statute, genocide also exists if a member of this group suffers ser-

ious physical or psychological harm. This is to be understood as the serious and long-lasting impairment of a person’s ability to lead a normal and constructive life.²² With this formula developed by the ICTY, the BGH rightly rejects a specific German narrower interpretation of § 6 VStGB. The German § 6 (1) (No. 2) VStGB does attempt to concretize the concept of serious bodily harm by an explicit legal reference to the more narrowly formulated “*serious bodily harm*” of § 226 of the German Criminal Code (*Strafgesetzbuch*, “StGB”). However, this reference is not conclusive and the restrictive result would contradict the Elements of Crime mentioned above.²³ The girl was beaten by A for weeks, received too little food and was exposed to direct sunlight in the midday heat, *i. e.* she suffered massive physical harm over a long period of time. The Court considered the mother to have sustained serious psychological harm in that she had to endure her daughter’s continuous suffering for weeks without being able to intervene, was forbidden to accompany the child to hospital after the heatstroke, and was also kept in the dark about the whereabouts of the body.²⁴

The BGH next addresses the question of whether it is objectively necessary for the act to threaten the total or partial destruction of the group (rather a concrete dangerous offense),²⁵ or whether it is sufficient that the act contributes or tends to contribute to the destruction (rather an abstract dangerous offense).²⁶ The Elements of Crime of the ICC Statute speak in favor of such a contribution or danger component, as does the case law of the International Court of Justice, the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia.²⁷ The enslavement and mistreatment of the two Yazidi women were an appropriate contribution to the dan-

13 Julia Geneuss, *Völkerrechtsverbrechen und Verfolgungsermessens*, 2013, p. 221 ff.

14 Press Release of the OLG Frankfurt No. 78/2021 (30.11.2021).

15 It would have been better – also for the international discourse – to give the provision the term “genocide”, which was created by Raphael Lemkin and taken up by the UN in its 1949 convention; cf. Safferling, *Ibid.*, § 65 para. 171.

16 See, for example, the emphasis on the ethnic aspects of the Yazidis in Armenia, in Garnik Asatryan, Victoria Arakelova, *The Ethnic Minorities of Armenia*, p. 10 (2002).

17 ICC-02/05-01/09, Nr. 20 – Prosecutor v. Al Bashir; *Kreß* in *Münchener Kommentar zum StGB* (4. ed. 2022), Volume 9, § 6 para. 49; *Schabas, Ibid.*, p. 138.

18 The so-called Elements of Crime were defined by the preparatory commission of the Rome-Statute and are shall assist the Court in the interpretation and application of articles 6, 7 and 8, consistent with the Statute (Art. 9 (1) 1 ICC Statute; *Schabas, Ibid.*, p. 322; *Gerhhard Werle/Florian Jeßberger*, *Völkerstrafrecht* (5. ed. 2020), para. 236.

19 *Kai Ambos*, *Internationales Strafrecht*, § 7 para. 142; *Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst*, *An Introduction to International Criminal Law and Procedure* (3. ed. 2014), p. 215.

20 *Claus Roxin/Luis Greco*, *Strafrecht Allgemeiner Teil* (5. Ed. 2020), § 12 para. 21; *Vogel/Bülte* in *Leipziger Kommentar zum StGB* (13. Ed. 2023), Volume 1, § 15 para. 98.

21 *Gerson* in *Leipziger Kommentar zum StGB* (13. Ed. 2023), Volume 20, § 6 para. 102.

22 BGH, 30 November 2022 – 3 StR 230/22, BGHSt 67, 180 (187) para. 24; *Gerson, Ibid.*, § 6 para. 63.

23 *Stefanie Bock*, Anmerkung zu BGH: *Völkermord durch schwere Misshandlung – Konkurrenzen*, *Neue Juristische Wochenschrift* (NJW), Issue 16 2023, 1138 (1145).

24 BGH, 30 November 2022 – 3 StR 230/22, BGHSt 67, 180 (188) para. 27.

25 See *Ambos*, *Internationales Strafrecht*, § 7 para. 132.

26 *Internationale Strafgerichtshof für das ehemalige Jugoslawien (IStGHJ) [International Criminal Tribunal for the former Yugoslavia]*, 27 September 2006, *Krajsnik*, IT-00-39-T, para. 862; *Werle/Jeßberger*, *Völkerstrafrecht*, para. 897.

27 BGH, 30 November 2022 – 3 StR 230/22, BGHSt 67, 180 (188) para. 34.

ger that this religious minority will be destructed. With regard to the further question of whether it depends on the isolated behavior of the perpetrator or on a connection with similar acts of other IS fighters, the BGH, after carefully analyzing international case law, opts for the contextual solution²⁸ and convincingly affirms such an embedding of the specific event in the collective persecution of the Yazidis.

3. The Intent to Destroy

Intent with regard to the objective requirements of § 6 (1) (No. 2) VStGB was not a problem for the OLG Frankfurt and the BGH.²⁹ Both then made important statements on the interpretation of the intent (*dolus specialis*)³⁰ required by the genocide offence to destroy the protected group in whole or in part. In the literature on international criminal law, the knowledge of being involved in an act of destruction or at least the realization of such a plan is sometimes taken as a basis.³¹ However, it is more compelling to emphasize the will component: the intended purpose moves to the center, as this intention traditionally characterizes the act.³² And A's intention was, due to his functional status as an IS-fighter, to destroy the religious group of the Yazidis (*dolus directus* 1st degree).

The Court rightly categorized it as irrelevant that the destruction of the Yazidi group was only an interim goal in order to ultimately establish an Islamic caliphate. This already makes sense because genocide, as the extermination of the European Jews under National Socialism shows, is typically committed in order to pursue further goals (such as the enrichment of the possessions of those who were murdered or the establishment of a so-called „*thousand-year empire*“ by the Nazis). This interpretation of genocidal intent is also in line with international case law.³³ Although it is difficult for the courts to prove such an intent to destroy, in the present case the Regional Court had affirmed this intent, which was not criticized by the BGH.

However, the BGH continues to assume a broad understanding of the intention to commit genocide. It is true that international case law requires that the perpetrator must strive for the physical-biological destruction of the group.³⁴ The BGH on the other hand includes attacks on the „*social*“ existence of the group to suffice in the case of the purely physical survival of its members. This German interpretation is supported not only by the wording, which does not require physical destruction, but also by the genocide acts of § 6 (1) (No. 2 – 4), which can only be reconciled with an understanding of a group's „*social*“ destruction.³⁵ In the literature on international criminal law, there is a growing number of voices that would like to see the destruction of the socio-cultural identity of the group to be adequate, as well.³⁶ According to the prevailing understanding in Germany, § 6 VStGB therefore contains elements of cultural genocide, but only in the subjective elements of the offence.³⁷ In the present case, this difference is irrelevant, as it is quite obvious that the destruction was intended both in biological-physical and social terms.

IV. Crimes against Humanity and War Crimes

Furthermore, A's appeal was also unsuccessful insofar as A was convicted of a crime against humanity by causing serious physical or mental harm resulting in death pursuant to § 7 (1) (No. 8), (3) VStGB (= Art. 7 (1)(k) ICC Statute). However, the conviction under § 8 (1) (No. 6) VStGB (=

Art. 8 (2) (a)(vii) ICC Statute) for aiding and abetting a war crime by displacement was not upheld by the BGH. The IS militia had indeed committed such an offence. However, since the Yazidis were returned to Iraq, the Frankfurt Higher Regional Court should have made findings on the extent to which this led to the promotion or intensification of the expulsion. The conviction for assault resulting in death, according to § 227 StGB, was also overturned, as crime against humanity or war crimes, which provide aggravated sentences for death, also have an individual protective character. The BGH left open the question of whether § 6 VStGB has a collective protective function or also protects the individual legal interests of the group members specifically affected by the individual act.³⁸

V. Conclusion and Outlook

For the German criminal justice system, the BGH's decision established precedent for other Yazidi cases: There was the subsequent conviction of the convicted man's wife, C, for aiding and abetting genocide,³⁹ followed by a judgement by the OLG Hamburg, in which a five-year prison sentence was also imposed on an IS returnee who had used a Yazidi woman as a domestic slave in Syria on the charge of aiding and abetting genocide against the Yazidis.⁴⁰ However, the decision of the BGH also deserves international attention because the Court applies, specifies, and develops principles for how to interpret the offence of genocide. The BGH seamlessly linked these principles to the case law of the international criminal tribunals in terms of the objective elements of the offence.⁴¹ But the BGH nevertheless still adhered to its national, broad social interpretation in terms of the intent to destroy. Furthermore, with this decision, the German judiciary continues its prosecution of international crimes in the contemporary context of the Syrian civil war and IS: a few months earlier, two employees of the Syrian secret service were sentenced to long prison terms for crimes against humanity for atrocities committed in an Assad regime prison.⁴² As Germany has hosted a large number of refugees from the civil war zones of Syria and Iraq in recent years, it can be assumed that there are other perpetrators of international crimes among them who will have to answer to German courts in the coming years. ■

28 BGH, 30 November 2022 – 3 StR 230/22, BGHSt 67, 180 (192) para. 38.

29 BGH, 30 November 2022 – 3 StR 230/22, BGHSt 67, 180 (189) para. 29; OLG Frankfurt 30 November 2021 – 5-3 StE 1/20 – 4 – 1/20 para. 710 ff.

30 Safferling, *Ibid.*, § 65 para. 93; Schabas, *Ibid.*, p. 132.

31 So-called „*knowledge-based interpretation*“; cf. Ambos, *Internationales Strafrecht*, § 7 para. 146; Bock, NJW 2023, 1145; Krefß, *Ibid.*, § 6 para. 82.

32 So-called „*purpose-based interpretation*“; cf. BGH, 21.5.2015 – 3 StR 575/14; Baier, *jurisPR-StrafR*, Issue 4 2023, para. 1; Schramm, *Internationales Strafrecht*, chap. 2 para. 43.

33 Cf. Baier, *jurisPR-StrafR*, Issue 4 2023, para. 1; In-depth-analysis at Krefß, *Ibid.*, § 6 para. 78 ff.

34 Cf. the references at Bock, NJW 2023, 1138, 1154; Krefß, *Ibid.*, § 6 para. 78 ff.

35 Krefß, *Ibid.*, § 6 para. 72.

36 Krefß, *Ibid.*, § 6 para. 72.

37 Ambos, *Internationales Strafrecht*, § 7 para. 152; Schramm, *Internationales Strafrecht*, chap. 2 para. 43a.

38 Bock, NJW 2023, 1145.

39 Cf. BGH 9 March 2023 – 3 StR 246/22, StV 2023, 665 (Ger.).

40 OLG Hamburg 27 July 2022 – 3 St 2/22, *juris* (Ger.).

41 Baier, *jurisPR-StrafR*, Issue 4 2023, para. 1.

42 E.g. Press Release No. 54/2022 3 May 2022 to the unpublished judgement BGH 20 April 2022 – 3 StR 367/21.