DEVELOPMENTS

Report – Recent Case Law of the *Bundesgerichtshof* (Federal Court of Justice) in *Strafsachen* (Criminal Law)

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A. Introduction

Reporting on one year of the *Bundesgerichtshof's* (BGH – Federal Court of Justice) jurisprudence in criminal affairs is always a delicate matter. We have decided to limit ourselves to report on a variety of cases, which are reported in the official records of the BGH and edited by members of the Court. The Court's official journal, *Entscheidungen des Bundesgerichtshofs in Strafsachen* (BGHST), gives a fair mixture of decisions, which the judges themselves consider important enough to be included therein. However, the triage of decisions found there entails but a small portion of the BGH's work, chosen case-by-case without taking heed of producing a representative share. In order to come to a reasonable number of decisions to include in this report we had to leave aside several decisions notwithstanding their importance. We abstain from reporting on the case of *El Motassadeq*, who was charged with abetting in murder in 3066 cases in connection with the 9/11-attacks in the USA and was acquitted for lack of evidence.[1] This case has been reported extensively elsewhere.[2] We also desist from reporting on the *Gartenschläger* case, which deals with a special incident at the former German-German boarder.[3] A

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[1] BGHST 49, 112.

[2] Christoph Safferling, *Terror and Law – Is the German Legal System able to deal with Terrorism?* - The Bundesgerichtshof (Federal Court of Justice) decision in the case against El Motassadeq, 5 GERMAN LAW JOURNAL (GLJ) 515 (2004), *available at* http://www.germanlawjournal.com/article.php?id=428; Loammi Blaauw-Wolf, *The Hamburg Terror Trials – American Political Poker and German Legal Procedure: An Unlikely Combination to Fight International Terrorism*, 5 GLJ 791 (2004), *available at* http://www.germanlawjournal.com/article.php?id=473.

[3] BGHST 50, 16. Gartenschläger was convicted to life imprisonment in the former GDR at the age of 17. He was redeemed as prisoner by West-Germany after almost ten years in severe detention. In the following years he managed to reveal that the GDR had installed anti-personnel-mines and spring guns to prevent boarder trespassing. This caused a major political uproar as the GDR was thus exposed to

survey of recent decisions of the BGH in the context of the former East-German regime was included in last year's report to the Annual for German and European Law (AGEL).[4]

This report includes, however, a variety of issues, which have either caused a high amount of public attention at the time the crime was committed or the decision was issued, or have some kind of international or transnational connection.

B. Substantive Criminal Law

I. Sadomasochistic Murder

A case, which caused a real uproar in German society,[5] is that of the "Kannibale von Rotenburg" (the cannibal of Rotenburg).[6] The facts of the case are truly distasteful: the accused searched via the Internet for a male person who was willing to be killed and eaten. Shortly after puberty he developed sexual fantasies, where he would experience highest feelings of lust while slaughtering another person. He had furnished a slaughter-room in his house to this end. In early 2001, the accused found his victim. This person suffered from a progressive form of sexual masochism and connected his highest imaginative sexual lust with the amputation of his penis. In the following the accused and this victim met and agreed to persue a penis amputation on the victim. In the course of this the victim died due to massive loss of blood caused by the amputation. The accused videoed the whole proceeding, as well as the subsequent dissection of the dead body. His sexual excitement, however, did not arise when segregating the body but only afterward by watching the video.

The *Landgericht* (LG – Regional Court) of Kassel in Hesse convicted the accused to eight and a half years of imprisonment for manslaughter. The prosecutor appealed this judgment opining that the accused should have been convicted for murder

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have lied barefacedly claiming no such instruments existed. Gartenschläger was killed by special unit of GDR secret service while attempting to dismantle another mine at the boarder fence as proof for his allegations.

[4] Ralph Grunewald & Christoph J.M. Safferling, *Report – Bundesgerichtshof Strafsachen (Federal Court of Justice, Criminal Law) – 2002/2003*, 2/3 ANNUAL OF GERMAN & EUROPEAN LAW (AGEL) 378-398 (Russell Miller and Peer Zumbansen eds., 2004/2005).

[5] See Arthur Kreutzer, *Einverständliches Töten als Mord? Kriminologische, strafrechtliche und justizkritische Bemerkungen zum Revisionsurteil im Kannibalenfall*, 88 MONATSSCHRIFT FÜR KRIMINOLOGIE UND STRAFRECHTSREFORM (MSCHRKRIM) 412 (2005).

[6] BGHST 50, 80. Commented on by Hans Kudlich, JURISTISCHE RUNDSCHAU (JR) 228 (2005).

instead of manslaughter.[7] The BGH revealed the judgment and ordered a retrial before the *Landgericht* in Frankfurt/Main.

Cannibalism is, as such, not prohibited by a specific norm. The law governing this case is rather complicated, differentiating between manslaughter according to § 212 *StGB* (Strafgesetzbuch – German Criminal Code) and murder according to § 211 StGB.[8] Disregarding the exact relationship between these two norms,[9] an intentional killing qualifies as a murder according to German law only if at least one of the named circumstances is met.[10] Several of these conditions could be fulfilled here: First, the accused could have acted in order to satisfy his sexual desires. What proves problematic in this regard is the fact that the accused could not satisfy himself sexually by killing his victim but could do so only by watching the video of the killing afterwards. The BGH clarified two issues here: It suffices that the accused aims at satisfying his sexual desires through the act of killing, he need not achieve it while doing so.[11] Furthermore it suffices that the accused wants to satisfy himself sexually afterward by regarding a video of the killing. By this behavior the accused shows that he subordinates the life of others to the satisfaction of his sexual lust, which is considered condemnable and punishable by law.

Second, the accused could have acted to make another crime possible – another criterion by which a killing qualifies as a murder according to § 211 StGB. This

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[7] BGHSt 50, 80, 84.

[8] §211 Murder. (1) The murderer shall be punished with imprisonment for life. (2) A murderer is, whoever kills a human being out of murderous lust, to satisfy his sexual desires, from greed or otherwise base motives, treacherously or cruelly or with means dangerous to the public or in order to make another crime possible or cover it up.

§213 Manslaughter. (1) Whoever kills a human being without being a murderer, shall be punished for manslaughter with imprisonment for not less than five years. (2) In especially serious cases imprisonment for life shall be imposed.

[9] Since long the BGH favours the view according to which § 211 StGB is to be read as an independent norm (cf. BGHSt 50, 1), whereas the prevailing view in literature reads § 211 StGB as a norm that merely qualifies manslaughter according to § 212 StGB. This discrepancy is not only academic in nature, but influences the punishability of the aider and abetter to a killing by virtue of § 28 StGB; see § 211 MN 45-55: ALBIN ESER, STRAFGESETZBUCH – KOMMENTAR (Adolf Schönke & Horst Schröder, eds., 27th ed. 2006).

[10] For a more detailed description of German law concerning murder and manslaughter see Philipp Hoffmann, *The "La Belle" Trial: The Sentencing of a Terrorist Bomber under German Criminal Law*, 6 GLJ 667, 670-675 (2005), available at http://www.germanlawjournal.com/pdf/Vol06No03/PDF_Vol_06_No_03_667-687_Developments_Hoffmann.pdf.

[11] This has been stated in previous decisions, *see* BGH 2 NStZ 464 (1982).

other crime could be seen in § 168 StGB – disturbing the peace of the dead.[12] The slaughtering after the killing amounts to indecent behavior regarding the respect for the deceased.[13] The killing itself was, therefore, necessary in order to fulfill § 168 StGB.

The accused claimed on appeal that his act did not amount to murder but only to homicide upon request according to § 216 StGB.[14] The BGH denied this claim. Homicide upon request would require that the perpetrator be mainly driven by wish of the victim to die. This was obviously not the case here.

On retrial the accused was convicted for murder and sentenced to life imprisonment on 9 May 2006.[15] He has appealed against the judgement again, which, at the time of writing, was still pending.

In a less spectacular case, the BGH[16] had to decide whether a violation of a person in connection with sadomasochistic acts would constitute bodily injury according to § 223 StGB or would amount to injury by consent in § 228 StGB.[17] If the victim consents to the bodily injury, the act is only unlawful and, thus, punishable if the violation is contrary to the good morals. The opinion of the former *Reichsgericht* (RG – High Court of the German Empire) that any sadomasochistic act would violate the good morals[18] is to be considered as outdated.[19] It has as such to be

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[12] § 168 Disturbing the Peace of the Dead. (1) Whoever, without authorization, takes away the body or parts of the body of a deceased person, a dead fetus or parts thereof or the ashes of a deceased person from the custody of the person entitled thereto, or whoever commits insulting mischief thereon, shall be punished with imprisonment for not more than three years or a fine. (2) Whoever destroys or damages a place for laying-in-state, burial site or public place for remembering the dead, or whoever commits insulting mischief there, shall be similarly punished. (3) An attempt shall be punishable.

[13] BGHST 50, 80, 88-90.

[14] § 216 Homicide upon Request. (1) If someone is induced to homicide by the express and earnest request of the person killed, then imprisonment from six months to five years shall be imposed. (2) An attempt shall be punishable.

[15] See FRANKFURTER RUNDSCHAU, 10 May 2006, p. 8; see also DER TAGESSPIEGEL (The Daily Looking Glass) at: http://archiv.tagesspiegel.de/archiv/10.05.2006/2521273.asp (last visited 28 November 2006).

[16] BGHST 49, 166.

[17] § 223 Bodily Injury. (1) Whoever physically maltreats or harms the health of another person, shall be punished with imprisonment for not more than five years or a fine. (2) An attempt shall be punishable.

§ 228 Consent. Whoever commits bodily injury with the consent of the injured person only acts unlawfully if the act is, despite the consent, contrary to good morals.

[18] RG JURISTISCHE WOCHENSCHRIFT (JW) 2229 (1928).

accepted as an existing form of sexual life. The question as to whether a violation of good morals is implied depends on objective criteria, which is to be seen in the amount and seriousness of the danger for the life and limb of the victim.[20]

Both decisions show that the BGH has to deal with all sorts of gruesome behaviour and does so with a great deal of professional understanding for all sorts of sexual deviation and practices. The judges took into account the psychiatric evidence at hand and tried to evaluate the personality of the accused persons notwithstanding the common incomprehensibility of the act. At the same time the BGH tried to meet the expectations of the public in severe and sustainable punishment.

II. World War II: Reprisals as Crimes

When German courts deal with war crimes committed during World War II, the international community is particularly alert and interested in the outcome.[21] In 2002, a Hamburg *Landgericht* (Regional Court) convicted Friedrich Engel, a former SS-Obersturmbannführer (Lieutenant Colonel), for the murder of 59 Italian prisoners near Genoa, Italy. On appeal the BGH decided to stay the proceedings, because of the advanced age of the accused (95 years), even though the court would have preferred to refer the case back to the Landgericht.[22] This involved the BGH formally overturning the Landgericht decision.[23]

In Italy, Engel had already been convicted *in absentia* in 1999.[24] The Italian military court in Turin tried him for the killing of 246 Italians arising out of four different

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[19] BGHSt 49, 166, 172.

[20] BGHSt 49, 166, 173.

[21] REBECCA WITTMANN, THE NORMALIZATION OF NAZI CRIME IN POSTWAR WEST GERMAN TRIALS, IN: THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945, 196-202 (Herbert Reginbogin & Christoph Safferling eds., 2006).

[22] BGHSt 49, 189-201.

[23] This decision has been criticized. On one hand Italian activists demanded the completion of the trial (http://www.cultura.toscana.it/eccidi/rassegna_stampa/doc/engel.shtml, last visited October 10, 2006), on the other hand, in Germany, some critics asked for an acquittal (GÜNTER BERTRAM, *Zweierlei Maß? – Der 5. Strafsenat des BGH erledigt den Hamburger Fall Engel*, NEUE JURISTISCHE WOCHENZEITSCHRIFT (NJW) 2278, 2280 (2004).

[24] See the website of the Italian ministry of defence for the decision: http://www.difesa.it/GiustiziaMilitare/RassegnaGM/Processi/CriminiGuerra/Siegfried.htm (last visited October 10, 2006) and for the English translation of the decision: http://www.associazioni.milano.it:4080/isec/ita/memoria/engsent.htm (last visited October 10, 2006). It may be noted that the Italian judgement calls the accused, Siegfried Engel, using the fourth name of

incidents, including 59 prisoners killed at the Turchino Pass close to Genoa, which became object of the later German proceedings. At the time of the crime Engel was head of the Genoa branch of the SS intelligence unit and was in charge of the reprisals against Italian partisans. At a briefing of the heads of intelligence in April 1944, at which Engel was present, the chief commander of the German intelligence forces in Italy, notably a lawyer, declared that the reprisal rule to kill 10 Italians for every German killed by partisans was in accordance to the international laws of war.

After a bomb attack on a German cinema in May 1944, in which five or six German marines were killed and 17 injured, the accused was ordered by his superior to carry out the respective reprisal. In order to avoid resistance and/or riots by the population the accused planned and executed the reprisal in secret. 60 prisoners from the Marassi prison, mostly young men, were chosen and told that they were to be transported to another prison. On 19 May 1944, five days after the cinema bombing, for reasons unknown, only 59 men were taken to the Turchino Pass, about 25 km from Genoa, close to a pit dug by Jewish prisoners two days previously.

Since the German intelligence did not have enough personnel, two groups of marines were charged with the execution. After arriving at the pass the prisoners were led, in groups of four to eight men, about 500-600 meters to the pit where they were then shot. The captives were bound in pairs and forced to walk onto a plank over the open grave. Following prisoners heard the shootings on their way to the pit. Immediately before they were killed they had to look on their dead fellow victims lying in the pit. Neither a priest nor a medical practitioner was present. Standing 15 meters from the pit the accused supervised the executions. The following day he instructed a Genoa newspaper to report on the reprisal.

Given that the BGH stayed the proceedings because of the age of the accused, its legal opinion on the merits of the case are to be regarded as *obiter dicta*. Nonetheless, the court set out how it would have decided if it had not been required to stay the trial. Its reasoning regarding the application of international criminal law is groundbreaking and, therefore, very worthwhile to be reported. The first issue the court had to deal with arose from the general view that at the time of the killings the international community generally accepted the legality of reprisal killings under the laws of war. Did that mean that the killings organised by the accused were legitimate? The second legal issue involved the *actus reus* and

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Friedrich Wilhelm Konrad Siegfried Engel, whereas in the German judgement he is called Friedrich Engel, using his first name.

mens rea of murder regarding the element of cruelty. Does the standard of what is "cruel" and what is not differ in wartime as opposed to times of peace? This question was of particular significance to the overall procedure, since the crime would have been time-barred under the German laws of limitation, if the accused had been charged with manslaughter and not murder.[25]

The Hamburg Landgericht had recognised the legitimacy of reprisals of the kind in question, but held that the accused exceeded the boundaries of such a legitimate measure, because he carried out the killings in an unnecessarily cruel manner. In contrast, the BGH declared that the reprisal rules and any execution order illegal, even though the international community, at the time, considered the rule to be in accordance with customary international law.[26] Despite the acceptance of the legitimacy of the reprisal rule during World War II, the rule requires re-appraisal in the light of today's understanding of human rights. The killing of "innocent" persons in revenge for attacks of partisans cannot be accepted as a legally valid rule, since it is a grave violation of the basic human right to life.[27] Killing numerous defenseless people who have no connection whatsoever to the deeds for which they are killed in revenge of cannot be regarded as legal. It follows that an order given to carry out such killings cannot be a valid defense.

Regarding the question of cruel killing, the BGH agreed with the Landgericht that the *actus reus* was fulfilled, confirming that there is no different notion of cruelty in war times. What is regarded cruel at one time is to be regarded cruel at *all* times. The killing of the Italian prisoners, to which the accused was a co-perpetrator,[28] was carried out in a cruel manner. To force the victims to walk to and stand at their own grave, with the knowledge that they would be shot to fall onto the dead bodies of fellow victims and be buried together in a mass grave went beyond the mere purpose of killing. The BGH added that this method resembled the systems applied in the concentration camps of the Nazis.

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[25] The limitation period of manslaughter in Germany is 30 years, § 78 (3) No 1 StGB. Murder has been excluded from limitation in Germany since 1969 due to the 9th Strafrechtsänderungsgesetz. (StrÄndG – Criminal law amendment statute), 4 August 1969 (BGBl. I 1065[1969] and the 16th StrÄndG, 16 July 1979 (BGBl. I 1046 [1979]).

[26] See Verzijl, *International Law in Historical Perspective*, et subs.; Stefan Oeter, *Handbook of Humanitarian Law in Armed Conflicts*, MN 476-479 (Fleck ed., 1995).

[27] BGHST 49, 193 ff.

[28] Since the soldiers who shot the prisoners were from the Kriegsmarine (navy), the accused was not the commander in charge and, therefore, not responsible as commander.

Nevertheless, the BGH held that the *mens rea* regarding a cruel killing was not sufficiently set out by the court of first instance.[29] The specific *mens rea* necessitates a "merciless and cold attitude" in relation to the objectively cruel behaviour. Underlining the particulars of military hierarchy and wartime customs the BGH declared that merely establishing that the accused obeyed orders without questioning these is insufficient to satisfy the required *mens rea*. Moreover, it is necessary to show that the accused knew of an alternative, less painful, method of killing the prisoners. If the accused had knowledge of such an alternative method, but nonetheless decided to proceed with the more painful procedure, the *mens rea* of a cruel killing is satisfied and, thus, the accused would be liable for murder under German law. Furthermore, the BGH commented that the required state of mind could not be easily established from the facts of the case since it is not evident how 59 prisoners could be killed secretly in a different, i.e. less painful manner. Therefore, it would be necessary to investigate anew. This would have required the procedure to be referred back to the Landgericht, which the BGH refused to do on account of the age of the accused.

Since the BGH stayed the proceedings and discussed the merits of the case merely as *obiter dicta*, there is a clear risk of underestimating the importance of the decision. Unlike prior decisions, which declared the national law of oppressive regimes (e.g. the Nazi-Law or the GDR-Law) to be non-binding and incapable of supporting a defense to a crime, this BGH decision goes beyond the national scope. It courageously states that even international agreements cannot legitimize serious violations of human rights. It may be noted that since consequentially such agreements create no valid law, there is no danger of infringement of the rule against retrospectivity.[30] On the other hand, the stay of proceedings seems justified[31] since the capacity of a 95 year old accused to participate in his trial up to its final conclusion is extremely uncertain.[32] No matter how unappealing this may be, no trial should be continued just for the mere sake of it. This approach is also in conformity with the modern understanding of human rights.

III. Trans-border CD-deals

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[29] BGHST 49, 193 ff.

[30] See for criticism in relation to this aspect Günter Bertram, *Zweierlei Maß? – Der 5. Strafsenat des BGH erledigt den Hamburger Fall Engel,* NEUE JURISTISCHE WOCHENZEITSCHRIFT (NJW) 2278, 2279 (2004).

[31] See for a famous precedence the decision regarding the former GDR Head of State Erich Honecker, Berliner Verfassungsgerichtshof (BerlVerfGH) NEUE JURISTISCHE WOCHENZEITSCHRIFT (NJW) 515 (1993); an English translation of this judgement is available at 100 ILR 393.

[32] Indeed Friedrich Engel passed away in February 2006, only two years after the BGH decision.

Despite the globalization of the world market intellectual property rights remain regulated by the principle of territoriality that governs the copyright laws of the nations. Accordingly, infringements of copyright can only be prosecuted pursuant to the laws of the country in which the violation took place. Cross-national transactions may unveil loopholes in this international patchwork system.

In the case in question, proceedings were initiated *ex officio* by the office of the public prosecutor before the Frankfurt Landgericht under § 109 UrhG (Urheberrechtsgesetz - German copyright statute[33]). The Generalbundesanwalt (Attorney General) declared the matter an issue of particular public interest.[34]

The accused was the manager of a German company, which agreed to produce compact music discs for its Bulgarian contractor. Between May 1994 and January 1996, in pursuance to the respective orders of its Bulgarian principal the accused's firm produced over 300,000 compact discs, recording music of famous international pop artists, in a factory located in Germany. A carrier company was commissioned with the transportation of the goods, via air, to Bulgaria.

The Bulgarian principal had produced an attestation of the official Bulgarian collecting society for musical performing and reproduction rights "Musikautor" according to which all authors of the relevant music had consented to the production of audio recordings. After the first two orders the agent of the Bulgarian company responded to an inquiry made by the accused, stating that the Bulgarian firm could not sell any rights to the German company, since it only held rights for Bulgarian territory. Whereas the Bulgarian firm claimed to hold the authors' rights, none of the contract parties tried to obtain the consent of the holders of the audio recording rights.

The key question the BGH had to decide was whether the principle of territoriality prevented the court to convict the accused for the infringement of intellectual property rights. It held that notwithstanding the principle of territoriality criminal liability had to be approved since the violations of law took place, in part, in Germany.

The court held that, firstly, the copying of the compact discs must be regarded as a reproduction in Germany, even though the accused intended to deliver the copies

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[33] See, for an English translation of the German copyright law, the website of the Oxford University Comparative Law Forum: http://www.iuscomp.org/gla/statutes/UrhG.htm (last visited October 10, 2006).

[34] BGHST 49, 93-112.

to Bulgaria. The BGH stated "reproduction" in accordance to §§ 108 (1) No 5, 85, 16 UrhG to be a separate offence, additional to that of unauthorized distribution; the latter dealing separately with the question where the products are placed in circulation.[35] Since the copies were produced in Germany with the intent to make them accessible to the public, the accused was found guilty of the unauthorized reproduction of audio recordings and was, therefore, liable for copyright infringement.

Furthermore, the BGH found the accused criminally liable for distributing the recordings under §§ 108 (1) No 5, 85, 17 UrhG. It is true that the accused did not intend to deliver the CDs on German territory. However, he handed them over to a transport company within German territory. The BGH held this to be sufficient to satisfy the *actus reus* of "distribution," because the goods left the company's internal processes. Since the accused could no longer exercise control over the products they were deemed as "put in circulation."[36] It follows that the sending abroad of a product through an independent carrier is not to be regarded as a mere preparatory step for distribution abroad, but in fact, constitutes its distribution within Germany. The BGH stated that this interpretation is inline with the statute's general purpose to control every utilization of the products and protect the rights of the copyright holder in every possible way.

According to the BGH, the application of the relevant German criminal law was not hindered by the fact that the holder of the intellectual property rights was not a German national. Under § 126 (3) UrhG non-German companies and individuals enjoy protection of German copyright law as provided by international treaty. This provision makes reference to the Geneva "Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms" of 1971.[37] It follows that German copyright law can be applied where the producer of the audio recording is a national of one of the signatory states of the convention. In the case before the BGH, almost all the copyright holders in question came from the USA, which, like Germany, ratified the convention in 1974.[38]

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[35] BGHSt 49, 102.

[36] BGHSt 49, 105, 106.

[37] See, for the full text of the convention the website of the World Intellectual Property Organisation, http://www.wipo.int/treaties/en/ip/phonograms/trtdocs_wo023.html (last visited October 10, 2006).

[38] BGHSt 49, 100, 101.

The Bulgarian principal could not have conveyed any rights for Germany, because the Bulgarian firm had no rights for German territory, which it could have transferred (*Nemo dat quot non habet*). Nor had there been a *bona fide* purchase, since the accused was well informed about the limitation of the rights of his company's contractor by the attestation issued. According to the attestation the Bulgarian firm clearly had no authorization by the producers of the audio recordings, but merely by the authors of the music.

Thus, the required *mens rea* was also satisfied, as the accused acted with, at the very least, *dolus eventualis*. The BGH pointed out that the accused might have acted in the mistaken belief that the consent by his Bulgarian principal entitled him to the reproduction and distribution of the CDs in Germany. This, however, would have been a mistake in law, which according to § 17 StGB can only affect liability if it could not have been avoided by the accused.[39] The BGH held that this was not the case.

On these grounds the BGH dismissed the appeal of the accused. However, it also dismissed the appeal of the prosecution, which sought a conviction for unlawful exploitation on a commercial basis (§ 108a UrhG). The BGH declared that not every criminal act that is committed in the frame of a company's business is committed on a commercial basis within the meaning of German criminal law statutes.[40] Categorized as a more serious offence, it presupposes that the relevant act is repeated with a long-term aim of gaining an economic advantage in order to create a commercial basis for the perpetrator. This was not the case in the proceedings before the BGH, as the accused was a manager employed by his company, who received no commission capable of inferring an indirect commercial profit from the copyright violations.

The judgement of the BGH is an important statement in relation to the international protection of intellectual property rights. It is a decision which should go some way in closing legal loopholes created by the principle of territoriality; at least as far as German copyright law is concerned. However, the BGH judgement falls somewhat short of completely closing the gaps. It can be inferred from the court's reasoning that the accused may not have been held criminally liable if he had opened up a pressing plant in Bulgaria and produced the music CDs there.

[39] According to § 17 StGB the accused is held responsible, on principle, if he could have avoided his mistake in law. However, the sentence may be mitigated.

[40] It is quite common in German Criminal Law to construe a more serious form of an offence by including the element "on commercial basis." Accordingly, the element can be found in numerous penal provisions.

Similarly, he may not have satisfied the *actus reus* of unauthorized distribution of audio recordings, if he had transported the CDs using the company's own transportation means instead of commissioning an external carrier. These differences should clearly not be the deciding factors upon which criminal liability is determined. Having said this, the decision highlights the difficulties imposed on national law by the globalized commercial markets. In a world where commercial globalization has outpaced legal harmonization, national jurisdictions are faced with inconsistencies and are required to resolve these on a national level.

IV. Psychiatric Experts at and on Trial: Expert Witness Opinions and Criminal Liability of Experts

In two very interesting corresponding decisions, the BGH dealt with the primary situations in which psychiatric experts may become involved in criminal proceedings: firstly, psychiatrists may be called as expert witnesses in order to give evidence regarding the mental state of the accused. Secondly, psychiatrists may find themselves the subject of criminal proceedings, where their expert opinion has lead to the release of a mentally ill perpetrator, who subsequently commits further offences.

The first decision concerns the difficulties regarding the evaluation of an expert psychiatric opinion brought in a horrific murder case, involving a 21year old accused, who had killed his cousin in his grandmother's house, where they used to live together.[41] For reasons unknown, he suffocated his victim with a cushion. He then proceeded to cut-up the girl in a very time-consuming manner; lifting off her skin, severing her breasts and genitals, dismembering her skeleton bone by bone and separating the inner organs. He placed the single parts in plastic bags and hid them in the house, with the exception of the girl's head and hip-bone, which he brought to a quarry, where he smashed and buried them. The defendant also heated a lot of the body parts in an oven at the house. When the police found the body parts, they also found a lot of rice sticking to them. However, it could not be established with any degree of certainty, that the perpetrator had eaten parts of the body.

The Landgericht Koblenz found that the man had committed manslaughter.[42] However, the court took the view that the perpetrator could not be convicted for

[41] BGHST 49, 347 ff.

[42] None of the special elements/circumstances required by German law for the offence of murder could be proven.

manslaughter because according to § 20 StGB[43] he lacked the capacity to be adjudged guilty. The court based this view on the opinion of a psychiatric expert witness. It also followed the expert's opinion as far as the expert considered the man to be a future danger to the public in accordance with section 63 StGB.[44] Under this provision, the Landgericht ordered the accused to be placed in a psychiatric hospital. The defense objected to the expert opinion and produced a counter expert opinion which highlighted defects in the original expert opinion, regarding both the methods applied and conclusions reached. Nevertheless. the Landgericht, without looking into the accuracy of the expert's opinion, dismissed the defense motion to bring new evidence, i.e. the submission of another psychiatric expert opinion, under section 244 (2) 2 StPO.[45]

On the defense appeal, the BGH held that it is the court's task to guide as well as to review the work of expert witnesses. It is not sufficient for the court to take note of the answers to the questions at issue and then blindly take trust in the outcome.[46] Judicial control, according to the BGH, must embrace the fact basis, methods, and the content of the expert opinion. The court must enquire whether these aspects meet the standards established by expert literature and the relevant jurisdiction. Furthermore, it must be ascertained that the results of the expert opinion are verifiable and correspond with acknowledged systems of classification.[47] The BGH held that the expert opinion in question did not attain the required standards since it lacked, for instance, a sexual anamnesis, a detailed case history of the accused

[43] § 20 StGB: "Whoever upon commission of the act is incapable of appreciating the wrongfulness of the act or acting in accordance with such appreciation due to a pathological emotional disorder, profound consciousness disorder, mental defect or any other serious emotional abnormality, acts without guilt." Available at http://www.iuscomp.org/gla/statutes/StGB.htm, (last visited October 10, 2006).

[44] § 63 StGB: "If someone committed an unlawful act and at the time lacked capacity to be adjudged guilty (§ 20) or was in a state of diminished capacity § 21), the court shall order placement in a psychiatric hospital if a comprehensive evaluation of the perpetrator and his act reveals that, as a result of his condition serious unlawful acts can be expected of him and he therefore presents a danger to the general public." Available at http://www.iuscomp.org/gla/statutes/StGB.htm, (last visited October 10, 2006).

[45] According to this provision of German procedural law a motion for new evidence may be dismissed when the facts in question have been proven sufficiently by a prior, sound, expert opinion given by a qualified individual.

[46] BGHST 49, 352.

[47] Acknowledged systems of forensic psychiatry are, for instance, the "International Classification of Diseases, Injuries, and Causes of Death" (ICD-10) or the "Diagnostic and Statistical Manual of Mental Disorders" (DSM – IV).

personal relationships, and an overall evaluation of his biography and psychological development.[48]

The issue that the expert report was required to address arose from the application of § 20 and § 63 StGB. § 20 StGB provides that perpetrators suffering from mental disturbances to a certain extent cease to be criminally responsible.[49] Under § 63 StGB a placement in a psychiatric hospital must be ordered if the accused is likely to commit further offences and is considered to be a danger to the public. The BGH stated that the application of § 20 necessitates a precise description of the mental state of the accused. This follows from the fact that § 20 names two alternative forms of mental disturbances that need to be separately identified, i.e. the incapability of appreciating the wrongfulness of one's actions and the ability to act in accordance with such appreciation. In this respect, the expert must come to a precise conclusion even when the alternatives may not be easily differentiated or may occasionally overlap. Establishing control standards for the courts, the BGH declared that an expert opinion regarding § 20 must at least be based on a general analysis of the defendant's personality and history and a study of the circumstances of its life and behaviour.[50] Furthermore, it must lay out how the mental disturbance effectuated the accused's acts at the time of the crime.[51] The expert opinion in question did not meet these requirements since the expert had answered the § 20 issue in the affirmative, arguing merely that in any case one of its two alternatives was fulfilled at the time of the crime.

Similarly, the BGH required a precise and distinct description of the mental state of the accused regarding § 63.[52] High standards are essential here, since the application of this provision may result in admission to a psychiatric hospital for life. The expert opinion must be clear on why the expert speculates that the accused will commit further crimes and therefore poses a public danger.

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[48] BGHSt 49, 353, 357.

[49] It should be noted that although § 20 primarily contains aspects which resemble the English concept of insanity it does not create a defence as such. Rather, it provides the general condition applicable to every criminal offence under German law that the accused is mentally capable to appreciate the wrongfulness of his/her actions and act accordingly. The burden of proof regarding these circumstances lies on the prosecution.

[50] BGHSt 49, 352.

[51] BGHSt 49, 356.

[52] BGHSt 49, 351 et subs.

The court must assess whether the expert opinion meets these requirements. Additionally, the BGH stated that judges must check whether an expert opinion is flawed with logical errors, inconsistencies or other defects. This duty is seen to be more pressing, where the defense produces a counter expert opinion which points out such weaknesses. In the case in question, the oral testimony given by the expert witness in court deviated from the opinion in his written report. The BGH emphasized that an expert may modify his/her opinion, but in such a case a clear explanation as to why and how he/she has come to "change his/her mind" is required.[53] No such explanation was given in the case discussed. Furthermore, the court's duty to review the expert witness extends to the language used in the opinion. It may indicate bias or a lack of impartiality on the part of the expert witness. In such a case a fresh, independent and objective expert opinion must be obtained. In the case in question, the expert witness had partly made use of rather pejorative and despising wording when describing the accused. In addition, the expert had expressed his appraisals in a sophisticated, but rather artificial way, making use of unusual terminology.[54] This hindered other experts to re-examine the statements of the expert witness.

This BGH decision provides fundamental guidelines for handling expert witness opinions in court. It underlines the duty of judges to control the reliability and verifiability of opinions of experts. Judges cannot free themselves of their judicial responsibility by simply referring to an expert opinion. However, it must be noted that some difficulties regarding the precision and verifiability of psychiatric expert terminology still remain. These have their root in the different systems applied in practice for the categorization of mental defects.[55] It should be an additional duty of an expert witness to point out and explain, wherever relevant to the case, why he/she has favoured one particular classification system over another.

The second case in which the BGH dealt with psychiatric experts concerned the criminal liability of the experts themselves.[56] The BGH urged the lower court to examine experts' reports and opinions thouroughly. Between 1980 and 1988 a 34 year old perpetrator had been sentenced to overall 17 years imprisonment for sexual offences, assault and theft. In 1986, under East-German law, he was sent to a

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[53] BGHSt 49, 357.

[54] BGHSt 49, 353.

[55] Norbert Nedopil, M.D., 10 JURISTISCHE RUNDSCHAU (JR), 216, 217 (2005) (Nedopil points out that the American system differs from the WHO-system. Prof. med. Nedopil is head of the Forensic Psychiatry Clinic of the University of Munich).

[56] BGHSt 49, 1-7.

psychiatric hospital. On furlough, he committed several attempted rapes of women. During his trial *inter alia*, a narzistic personality was established upon which the man was once again admitted to a psychiatric hospital.

The two accused were the chief psychiatrists at the hospital, whose attempts to treat the man through behavioural therapy remained unsuccessful. In 1997, the patient managed to escape from the not-so=secure-hospital using sheets that he had tied together. He was recaptured and returned to the hospital. In February 1998. he was granted furlough, from which he did not return. During his leave he committed two robberies before he was once again captured. After seven months of imprisonment he was sent back to the hospital. The two accused psychiatrists confirmed his continuing drive to commit crimes and assessed him to be therapeutically incurable. Although another psychiatrist at the hospital warned against the risks, in October 1998 the two accused agreed to grant the patient another furlough. The patient did not return form an alleged walk with his girlfriend. By June 1999 he had murdered two elderly women and committed eight dangerous assaults, some involving sexual harassment. The Landgericht Berlin subsequently sentenced him to life imprisonment, establishing the particular gravity of his guilt.[57]

The accused psychiatrists were charged with recklessly causing the assault (§ 229 StGB) of eight women and the reckless killing (§ 222 StGB) of two women. The Landgericht Potsdam held that the patient could have escaped from the clinic without the consent of the chief psychiatrists, as indeed had happened on previous occasions. Finding that the consent of the accused was not a *sine-qua-non* condition of the later assaults and murders committed by their patient the court held that the chain of causation had been broken. Consequently, the Landgericht found that the required *actus reus* had not been established and accordingly acquitted the psychiatrists. The court did not see the need to consider whether or not the psychiatrists had acted recklessly and, indeed, did not address the issue in its judgement.

The BGH took a contrary view, regarding the furloughing in which the patient caused the assaults and death of the women in question. It held that the Landgericht had neglected to apply the *sine qua non* test in the correct manner. The BGH stated that in cases involving recklessness the *sine qua non* test negates the causation, where non-reckless behaviour would have produced the same consequences. However, for the purpose of this rather speculative test, only a

[57] The establishment of the particular gravity of the guilt hinders the prisoner from obtaining a future reduction of the sentence, § 57a (1) StGB.

nonreckless behaviour may be added hypothetically. For the rest, the test must be based on the unaltered facts of the case. The *Landgericht* Potsdam, however, assumed that the patient would have decided to escape anyway and would have found an alternative way to do so. According to the BGH, this amounted to mere speculation and was, therefore, an inadmissible alteration of the facts. It pointed out that the fact that the patient escaped years before in a similar situation bore no relevance to the *sine qua non* test. Following this line of argument, the patient would not have encountered his victims nor would he have had the opportunity to commit the crimes, had he not have been given permission by the physiatrists to leave the clinic. Hence, the element of causation was satisfied.

Finding that the chain of causation had not been broken, the BGH referred the case back to the Landgericht for revision which was now required to address the issue of recklessness/to establish whether the accuseds actually acted recklessly or not. Whilst leaving the question of whether the psychiatrists acted recklessly in the particular case to be decided by the Landgericht, the BGH set down guidelines regarding the standards, which psychiatrists must meet when furloughing patients. The law regulating the granting of furloughs is contained in regional public law statutes. In the case in question the applicable law was the Brandenburg Statute on the Assistance, Protection Measures, and Execution of Court Orders for the Placement of Mentally Ill Persons in Psychiatric Hospitals.[58] According to this law, exceptionary measures such as furloughs could only be granted if they were in accordance with the purpose of the preceding court order.

The BGH stated that placing a patient diagnosed as incurable on furlough, must be deemed to contravene the purpose of the placement order to protect the public. Where psychiatrists grant furlough in spite of such an order, they take the risk of being held criminally accountable for the subsequent consequences. According to the BGH, the Landgericht needs to establish the real conviction of the accused. Where a patient is diagnosed as curable, psychiatrists are given a degree of discretion regarding the granting of furlough. However, even here the furlough must be therapeutically justifiable and there must be no foreseeable danger of he patient abusing the privilege. Regarding the evaluation of the accused's prediction the BGH has specified two aspects that the Landgericht should take into account. Firstly, the psychiatrists had established a narzistic disturbance in their patient's personality, a defect that is known to lower the inhibition to commit crimes. Secondly, the patient had abused his right to furlough/leave on previous occasions.

[58] Brandenburgisches Gesetz über die Hilfen und Schutzmaßnahmen sowie den Vollzug gerichtlich angeordneter Unterbringung für psychisch Kranke.

In both cases discussed, the BGH was required to address the issue of judicial control over the opinions of psychiatric experts. Whereas in the first case the BGH set down detailed guidelines regarding the testimony of psychiatric expert witnesses, the court was less precise in the second decision concerning the criminal liability of psychiatrists. Given the BGH's reasoning, it seems difficult to say under which conditions a psychiatrist may grant a furlough to a patient who has been placed in custody under § 63 StGB. If a perpetrator has committed serious crimes before, how can one ever be certain that there is no risk that he/she will not do so again whilst on furlough. The BGH neglected to clearly define what exactly the requirements for a responsible psychiatrist's decision are. It is doubtful that the standards applicable when the perpetrator was first admitted to the hospital should apply later when furlough is being considered.

C. Procedural Law

I. Plea Bargaining

1. The General Problem Concerning Plea-bargaining

Plea-bargaining is a common phenomenon in German courtrooms or, rather, in the Judges' chambers.[59] It is, however, not foreseen in the *Strafprozessordnung* (StPO – German Criminal Procedure Code), and is incompatible with the German procedural system.[60] On the other hand, the bitter truth is that prosecutors and judges are, in practice, not capable of dealing properly with protracted and complicated proceedings in particular in the area of *Wirtschaftsstrafrecht* (economic

[59] One of the first academic publications on plea-bargaining stems from Karl F. Schumann, *Handel mit der Gerechtigkeit* (1977), a comparison between US American procedural law and the StPO under the provocative title "bargaining justice." For general treaties on the conflict of German Criminal Procedure and plea-bargaining, see Bernd Schünemann, *Absprachen im Strafverfahren? Grundlagen, Gegenstände und Grenzen. Gutachten B zum 58. Deutschen Juristentag*, (1990) and Stefan Braun, *Die Absprache im deutschen Strafprozess* (1998). It is almost common sense among legal scholars, that plea bargaining conflicts with the following principles of German criminal procedure: (1) the fair trial, (2) legality-principle, (3) the principle of an inquisitorial trial, (4) the principle of a public, oral and immediate trial, (5) the presumption of innocence, and (6) the freedom from self-incrimination. Compare the list given by Werner Beulke/Helmut Satzger, *Der fehlgeschlagene Deal und seine prozessualen Folgen*, BGHSt 42, 191, in: 37 JURISTISCHE SCHULUNG (JUS) 1072 (1997).

[60] Many academics have outspokenly declared plea-bargaining as illegal, compare Bernd Schünemann, *Wetterzeichen einer untergehenden Strafprozesskultur?*, 13 STRAFVERTEIDIGER (STV) 657 (1993) with further references. In BGHST 50, 40, 51 the BGH accepts that the StPO is, in principle, hostile towards bargaining.

criminal law).[61] They are, thus, rather depending on an informal short-cut instead of implementing the formal procedure as foreseen in the procedural code in its pure form in order to come to terms with the masses of criminal prosecutions.[62] Bargaining in the shadow of the StPO is more delicate and dangerous for the accused compared to the Anglo-American system because there is no guilty plea.[63] Therefore. the bargain is about a full-scale confession on behalf of the defendant and not about a plea. Whereas the plea pertains to a certain charge, a confession pertains to the facts and leaves the question of how to legally interpret the act up to the judge.[64] The accused buys a pig in a poke. To reduce the risk, the judge usually offers some relatively precise insight into the possible sanction. Cases have been reported where the judge offered two-year imprisonment on probation in case of a confession and predicted seven years imprisonment, should the accused decline

[61] See, for the point of view of two of the most prominent German defense counsels, Hans Dahs, *Absprachen im Strafprozess – Chancen und Risiken*, 8 NEUE ZEITSCHRIFT FÜR STRAFRECHT (NStZ) 153 (1988), Gunter Widmaier, *Der strafprozessuale Vergleich*, 6 StV 357 (1986).

[62] *Dieter Meurer, Dogmatik und Pragmatismus - Marksteine der Rechtsprechung des BGH in Strafsachen*, 53 NJW 2936, 2944 (2000); Thomas Weigend, *Eine Prozeßordnung für abgesprochene Urteile?* 19 NStZ 57 (1999); see also BGH 57 NJW 2536, 2539 (2004).

[63] For a general introduction into the guilty plea procedure and why it is not commonly adopted in Continental Europe, see CHRISTOPH SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 268-76 (Oxford Univ. Press 2003).

[64] The judge may make use of the confessed facts as he wishes, see BGHSt 38, 102 and BGHSt 42, 191; see for a critical review Beulke/Satzger (note 59) and Ralph Kölbel, *Geständnisverwertung bei missglückter Absprache*, 23 NStZ 232 (2003). This is due to the fact that the German procedural system is not by any means consensual as is the Anglo-American criminal procedure, see Weigend (note 62), 63.

cooperation.[65] The threat, which is implied in this so called *Sanktionsschere*,[66] leaves the accused in a case of Hobson's choice.[67]

In a number of decisions, the BGH dealt with the general legality of plea-bargains and adopted an overall restrictive approach.[68] After several decisions,[69] the BGH established in BGHSt 43, 195 a number of basic provisions under which plea-bargaining can be realized. They are e.g. that any participant of the trial must be involved in the bargain, the decision must be made public and written down on the record,[70] and only the upper limit of the sentence may be promised by the court. In contrast, it is not allowed to deal questions of guilt or the legal evaluation of the facts.[71]

2. The Decision BGHST 50, 40

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[65] BGH 20 STV 556, 557 (2000): in this case the accused hit his wife for no reason once with such impact that she died of cerebral hemorrhaging. Such an act would not lead to a murder charge as in English law (implied malice), but to a charge according to § 227 StGB: Bodily Injury Resulting in Death, which is to be punished with no less than three years imprisonment in ordinary cases and from one to ten years in less serious cases. The *Landgericht* of Darmstadt offered two years on probation contrasted with seven years imprisonment if the accused did not confess. Since the accused declined the offer he was convicted to seven years imprisonment. To justify this rather harsh punishment, the *Landgericht* pointed at the missing remorse on the side of the accused. The BGH quashed the conviction but for different reasons, and ordered a re-trial at a different *Landgericht* as it considered the judges in Darmstadt biased.

[66] Literally translated this means "a pair of sanction-scissors," metaphorically describing the drifting apart of the lowest possible adequate and the harshest yet adequate punishment as a pair of scissors. The law pertaining to the implementation of the exact amount of punishment is laid down in §§ 46 to 51 StGB. It is commonly agreed that there does not exist one, and only one, just amount of punishment. The court, rather, has a certain margin within the frame of a lowest possible and a hardest possible amount of punishment (so called *Spielraumtheorie*); in detail: Franz Streng, *Strafrechtliche Sanktionen*, MN 480-85 (2nd ed., 2002).

[67] Such behaviour on the side of the judges could, in extreme cases, amount to unlawful coercion, which would be punishable according to § 240 StGB; see explicitly VOLKER ERB, *Absprachen im Strafverfahren als Quelle unbeherrschbarer Risiken für den Rechtsstaa*t, in: RECHT DER WIRTSCHAFT UND DER ARBEIT IN EUROPA: GEDÄCHTNISSCHRIFT FÜR WOLFGANG BLOMEYER, 743 (Rüdiger Krause, Winfried Veelken, Klaus Vieweg, eds., 2004).

[68] At first the BGH (BGHST 37, 99) stated that plea-bargaining is "basically not unlawful" implicitly following an earlier decision of the BVerfG (40 NJW 2662 [1987]).

[69] Lutz Meyer-Goßner, *Strafprozessordnung, Einl*, MN 119 d (49th ed. 2006).

[70] A violation of this publicity requirement, however, does not equal a violation of the principle of a public trial, which would lead to a so called *absoluter Revisionsgrund* (absolute ground for appeal) by virtue of § 338 No. 6 StPO; see BGHST 49, 255.

[71] These criteria have been approved by several decisions, cf. BGHST 49, 84, 88; 50, 40, 49-50.

The discussion about plea-bargaining has not cooled down even after these cornerstones were set by the BGH. In contrast, the BGH has been criticized for acting as legislator and circumventing the provisions of the StPO.[72] The Third Penal Senate of the BGH, itself, uttered doubts regarding the legality of plea-bargaining and has attempted to bring the case to the so-called *Große Senat* (Grand Senate) of the BGH.[73]

a) The Procedural Idiosyncrasy

Before we report on the contents of the decision, we shall insert a few words of explanation for the reader, who is not familiar with the organization of the criminal courts in Germany.[74] The BGH consists of several panels with five judges each, which are called *Senate*.[75] In criminal matters there are five senates, each of which has a different geographic and substantive competence.[76] Naturally, these different bodies do not always agree in substance. This necessitates a procedure, which guarantees an even jurisprudence in Germany. In the case at hand the Third Penal Senate of the Court sought to diverge from prior jurisprudence of other Penal Senates on the question.[77] Pursuant to § 132 (2) GVG the *Großer Senat* (Grand Senate, consisting of the President of the BGH plus ten judges) must convene to resolve such disparities. But initially, and before the *Große Senat* is called upon to decide the matter, the Third Penal Senate must inquire of the other panels to permit them to change their jurisprudence in line with the proposed new holding of the Third Penal Senate.[78] In the meantime, the other *Senates* have issued their opinion on the matter. As the First[79] and Second Senate[80] claimed to hold on to their prior

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[72] Weigend (note 62), 57 et subs.; BERND SCHÜNEMANN, *Die Absprachen im Strafverfahren*, in: FESTSCHRIFT FÜR RIEß, 525, 536 (Ernst-Walter Hanack, Hand Hilger, Volkmar Mehle, Gunter Widmaier, eds., 2002).

[73] BGH 57 NJW 2536, 2539 (2004).

[74] The organization of the Court in Germany is laid down in the *Gerichtsverfassungsgesetz* (GVG – Judicial Organization Act), 27 January 1877 (RGBL. 41 [1877]) in the version of 1 January 1975 in: BGBL. I 1077 [1975] as amended 5 May 2004, in BGBL. I 718 [2004].

[75] The information is also available at http://www.bundesgerichtshof.de/.

[76] Thus, the cases at hand originating from Duisburg and Lüneburg fall within the competence of the Third Senate, which is concerned with appeals stemming from the regions of Celle, Düsseldorf, Oldenburg and Schleswig, according to the allocation of duties of the BGH 2005, available at http://www.bundesgerichtshof.de.

[77] 43 BGHSt 195; in prior cases a waiver of the right to appeal was not void in general, but only in the case of undue pressure. If the waiver was merely encouraged by the *Landgericht*, it was held to be valid.

[78] This procedure is laid down in § 132 (3) GVG.

[79] Decision of the 1st Senate of 26 November 2003 - 1 ARs 27/03 = 24 STV 115 (2004).

jurisprudence,[81] the Third Senate has, indeed, transferred the matter to the *Großen Senat* and not only because of the diverging opinions amongst the individual Senates, but also because of the importance of the matter.[82]

b) The Substance of the Decision

In substance the case is about whether it is admissible to agree on a waiver of the right to appeal in the course of a procedural deal, whether a court can encourage such a waiver, and whether a declaration of waiver by the accused is valid if the court was involved in such declaration or encouraged a waiver of the right to appeal. The *Große Senat* took the time to issue a well-reasoned decision. It, not only decided on the questions laid before it. but also elaborated on some of the most severe critical points.

As answer to the question, the *Große Senat* held that the courts may not participate on a discussion of a waiver of the right to appeal and must abstain from encouraging such a waiver. Furthermore, the accused is to be instructed that he is free to appeal against the judgment disregarding any bargain. A declaration of waiver would be void if the accused was not instructed in this qualified way.[83]

In its reasoning, the *Große Senat* points at the necessity to regulate the plea bargaining as an existing phenomenon. Defending itself against the allegation to have violated the principle of a separation of powers the BGH stresses that a code and indeed any norm must be interpreted according to the social and political reality. Although the StPO does in itself not entail consensual elements, the code does contain certain provisions, which can be a guideline for the legality of plea-bargaining. The BGH names two reasons: first, it is a requirement of the *Rechtsstaat* to aim for an expeditious trial.[84] The BGH points, second, to the witnesses and, in particular, the victim-witnesses. They have a right to a fair trial stemming from the constitutional provision of a social state in Art. 20 *Grundgesetz* (GG – German

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[80] Decision of the 2nd Senate of 28 January 2004 - 2 ARs 330/03 = 24 StV 196 (2004).

[81] The other two 4th (decision of 25 November 2003 - 4 ARs 32/03 = 24 StV 4 [2004]) and 5th Senate (decision of 29 October 2003 - 5 ARs 61/03 = 24 StV 4 [2004]) agree with the 3rd Senate.

[82] Decision of the 3rd Senate of 15 June 2004 - 3 StR 368/02 and 3 StR 415/02 = 24 StV 473 (2004) = 57 NJW 2536 (2004).

[83] See BGHSt 50, 40, 56-63.

[84] Interestingly, the BGH does not mention the right to a speedy trial according to Art. 6 § 1 ECHR; see Safferling (note 63) 250-256 (2003).

Constitution). The protection of the victims can be enhanced if by a deal with the accused a testimony in court can be prevented.[85]

This interpretation of victims' rights by the BGH is fairly new and a little surprising. The participation of victims has, thus far, been dealt with in a rather cautious way as the aim of a criminal trial has been seen mainly in the establishing of the guilt of the accused person. The role of the victims was cut back to that of a witness. Now the victims are given a prominent place by the BGH, as their protection warrants a reinterpretation of the StPO.[86] This seems dangerous, as the tightly balanced system that the StPO establishes does not foresee a strong position for the victim. Also the BGH's first point is questionable. Even if a speedy trial is desirable, the rights of the accused must not be sacrificed for the sake of expediting the proceedings.

c) Summary

Notwithstanding these critical remarks about the reasoning of the *Große Senat*, the outcome of the decision is laudable. Plea-bargaining has become more and more an essential facet of German criminal procedure. As there are no statutory limits for this process that exist outside the bounds of ordinary statutory procedure, the BGH has established a special obligation to curb the potential use of plea-bargaining as a means to elude procedural rights. In the meantime, the legislator has shown some activity encouraged by the *Große Senat*[87] and issued a proposal for a statute on bargaining in criminal procedure.[88] This has provoked further discussion about the best criminal procedure.[89] The outcome is yet to be seen.

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[85] BGHSt 50, 40, 53-55.

[86] BGHSt 50, 40, 55 refers to a Chamber-decision of the BVerfG 2 BvL 4/98 (February 27, 2000), http://www.bundesverfassungsgericht.de/entscheidungen/lk20000227_2bvl000498.html. In this decision, however, quite the opposite has been laid down, as the Chamber points to the possibility for a victim to act as a private accessory prosecutor. Only in this position would the victim have had unique procedural rights according to §§ 397, 397a, 400 StPO).

[87] BGHSt 50, 40, 55-56.

[88] Referentenentwurf eines Gesetzes zur Regelung der Verständigung im Strafverfahren, 18 May 2006.

[89] See e.g., the statement of the *Deutsche Anwaltsverein* (German Lawyers' Association) at http://www.anwaltverein.de/03/05/2006/46-06.pdf (last visited 28 November 2006) and of the *Strafverteidigertag* (Defence Lawyers' Association) at http://www.strafverteidigervereinigungen.org/STVT_Frankfurt1.htm (last visited 28 November 2006). See also, Matthias Jahn, *Die Konsensmaxime in der Hauptverhandlung*, 118 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT (ZStW) 427 (2006).

II. Preventive Detention

In recent years, preventive detention has become one of the most controversial topics in criminal law in Germany.[90] On one-side, politicians driven by unprecedented pressure by public media, the yellow press in particular, implemented several new measures to detain criminals for security reasons. On the other, most criminologists keep on warning against the use of ever more restricted measures as they are too restrictive and, after all, unnecessary.[91] The *BVerfG* has found itself trapped between these camps and has handed down two debatable decisions[92] on the basis of which the *Bundestag* (Federal Parliament) passed the *Gesetz zur Einführung der nachträglichen Sicherungsverwahrung* (Introduction of Supplementary Preventive Detention Act) and introduced § 66b StGB and § 275a StPO.[93]

By virtue of § 66b StGB, a convicted person can be detained even after the enforcement of sentence if there are "new grounds" to believe that the person in question is dangerous for the general public, i.e. if he is highly likely to re-offend. This norm completes the, now, threefold system of preventive detention: in the ordinary course of events, the court that decides on the guilt of the accused may order preventive detention by virtue of § 66 StGB if the accused has already been convicted to prison sentences at least two previous times and an evaluation of his personality shows a *Hang zu erheblichen Straftaten*, a propensity to commit serious crimes. In cases where such prognosis is uncertain the court may reserve preventive detention for later decision according to § 66a StGB.[94] The new § 66b StGB blasts

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[90] A short historical sketch can be found at Herbert Tröndle & Thomas Fischer, *Strafgesetzbuch und Nebengesetze*, § 66b MN 2-6 (53rd ed. 2006).

[91] For a thorough description and discussion of the issue in English, see Frieder Dünkel & Dirk van Zyl Smit, *Preventive Detention of Dangerous Offenders Re-examined: A Comment on two decisions of the German Federal Constitutional Court (BVerfG – 2 BvR 2029/01 of 5 February 2004 and BVerfG – 2 BvR 834/02 – 2 BvR 1588/02 of 10 February 2004) and the Federal Draft Bill on Preventive Detention of 9 March 2004*, in 5 GLJ 619 (2004), available at http://www.germanlawjournal.com/article.php?id=453.

[92] BVerfG of 5 Feburary 2004, 2 BvR 2029/01, in: 57 NJW 2004, 739 and BVerfG of 10 Feburary 2004, 2 BvR 834/02, 1588/02, in: 57 NJW 2004, 750 = BVERFGE 109, 190; see Dünkel & van Zyl Smit (note 91), 619.

[93] Gesetz (Act) of 23 July 2004 (BGBL. I S. 1838); see also BT-Drucks. 15/2887; critically reviewed by e.g. Jörg Kinzig, *Umfassender Schutz vor dem gefährlichen Straftäter?: Das Gesetz zur Einführung der nachträglichen Sicherungsverwahrung*, 24 NSTZ 655 (2004); Klaus Laubenthal, *Die Renaissance der Sicherungsverwahrung*, 116 ZSTW 703 (2004); and with a view to the ECHR: Joachim Renzikowski, *Die nachträgliche Sicherungsverwahrung und die Europäische Menschenrechtskonvention*, JURISTISCHE RUNDSCHAU (JR) 271 (2004).

[94] As to the relationship between § 66 and § 66a StGB see BGHST 50, 188, 192-194.

this system, in which the Court that decides on the guilt and the sentence of the accused decides also on security measures as without prior reservation a Court, normally the same panel at the *Landgericht* which has tried the case in the first place,[95] may now order supplementary preventive detention after the conviction.

The supplementary preventive detention is meant as an exceptional measure applicable only to rather rare individual cases.[96] Nevertheless, in BGHSt 50 alone, there are three decisions pertaining to preventive detention,[97] which show the practical importance the provision has gained only one year after its implementation.[98] The BGH has both expanded and restricted the applicability of the norm.

First, it has held that supplementary preventive detention can also be imposed if the offender has already been released.[99] Second, it has clarified that "new grounds" for both the dangerousness and the *Hang*, the propensity to commit serious crimes of the detained person[100] can only pertain to circumstances which arose or were detected after the conviction.[101] It does not suffice to interpret "old grounds" in new light.[102] The discontinuation of therapeutic treatment during detention can be such a circumstance, but only if the *Gesamtwürdigung*, i.e., the evaluation of the entire personality of the detained person, his criminal behavior and his development during imprisonment reinforces his sustained dangerousness. This evaluation warrants expert evidence by two external examiners with psychiatric or psychological expertise according to § 275a (4) StPO.[103]

Looking at the amount of decisions that have already been handed down by the BGH and several *Oberlandesgerichte* concerning § 66b StGB, one can assume that the

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[95] See § 275a StPO and §§ 74, 24 II GVG and § 74f GVG.

[96] See the materials: BT-Drucks. 15/2887; and BVerfG 57 NJW 750, 757 (2004).

[97] BGHSt 50, 121; 180; 275.

[98] An evaluation of § 66b StGB from a practitioners viewpoint can be found at: Susanne Folkers, *Die nachträgliche Sicherungsverwahrung in der Rechtsanwendung*, 26 NStZ 426 (2006).

[99] BGHSt 50, 180, 182-185.

[100] BGHSt 50, 275.

[101] BGHSt 50, 121, 125; 50, 180, 187 and OLG Frankfurt 10 Neue Zeitschrift für Strafrecht-Rechtsprechungsreport (NStZ-RR) 106, 107 (2005); see also BT-Drucks. 15/2887, p. 12.

[102] BGHSt 50, 180, 188; 275; OLG Koblenz 25 NStZ 97, 99 (2005); Folkers, *supra* at note 98, 426, 428.

[103] BGHSt 50, 121, 129-30.

public prosecutor is making rather excessive use of his right to apply for supplementary preventive detention according to § 275a I StPO. The judiciary is well advised to be rather cautious in imposing this measure in order to safeguard the rights of the accused. The BGH has, in his first decisions regarding this new legislation, shown that he is willing to do so.

D. Conclusion

The time under review has seen several important developments of German criminal law and procedure in the jurisprudence of the BGH. Some of the issues, like the standing of medical examiners and psychiatric experts before the court and their responsibility for their expert opinions, are classical problems, so to speak. Whereas the days of *Franz von Liszt* (1851-1919), who believed that the individual guilt of the offender can be determined like a mathematical equation,[104] are long gone, it is still unclear what influence the expert may or may not have on judges.[105] In a related area, the question of preventive detention for dangerous individuals and the recent creation on § 66b StGB meet several difficulties regarding the precise ambit of criminal law. The middle path between the constitutionality of the measure and the repressive attitude of public opinion is still to be found.

Finally, the issue of the legality of the "plea bargaining" under German criminal procedural law is. for the time being, unclear. After a time of heavy resistance on the part of criminal law scholars, and a relatively free and excessive use of the "deal" by the ordinary courts, there seems to be a more constructive spirit governing the discussion today, which will ultimately lead to an amendment of the German Code of Criminal Procedure.[106]

One can, as we think, observe two main developments from the year under review: (1) criminal law is developing further into a more repressive instrument, which is expected to not only do justice to perpetrators and victims but also to prevent future crimes and secure allegedly dangerous individuals. (2) criminal procedure is to be made fit for a swift conviction and a speedy trial. Both developments, which are obviously interrelated, produce difficulties concerning the rights of the

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[104] Under the auspices of natural positivism, see FRANZ VON LISZT, LEHRBUCH DES DEUTSCHEN STRAFRECHTS 158, 162 (14th&15th ed. 1905).

[105] The question has become relevant in one of the most spectacular white-collar crimes in Germany, the so-called "Flow-Tex-Trial;" BGHSt 48, 4.

[106] See Matthias Jahn & Martin Müller, Der Widerspenstigen Zähmung, *Aktuelle Gesetzgebungsvorschläge zu den Urteilsabsprachen im Strafprozess*, JURISTISCHE ARBEITSBLÄTTER 681 (2006).

accused.[107] This expansion of criminal law needs to be carefully watched in order to prevent a deviation from requirements of the *Rechtsstaat*, the rule of law. Not always does the BGH operate as a watchdog in this regard.

[107] As to this development, see JESUS MARIA SILVA-SANCHEZ, DIE EXPANSION DES STRAFRECHTS (2003) and very critical PETER-ALEXIS ALBRECHT, DIE VERGESSENE FREIHEIT (2003), and the English version: FORGOTTEN FREEDOM (2004).

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