

Practice relating to formation and evidence of customary  
International law:

- Decisions of the German Federal Constitutional Court<sup>1</sup> -

**A. Brief introduction to relevant German legislation**

**I. Verification procedure, Article 100 (2) Basic Law for the Federal Republic of Germany<sup>2</sup> (hereinafter “Basic Law”)**

Pursuant to Article 25 Basic Law general rules of international law form an integral part of federal law.<sup>3</sup> According to the Federal Constitutional Court the threshold of “general rules of international law”, as used in article 25 of the German Basic Law is met if a rule is recognized as binding by a large majority of States, which need not necessarily include Germany.<sup>4</sup>

Pursuant to Article 100 (2)<sup>5</sup> of the Basic Law, German courts are obliged to submit the question concerning the application of a general rule of international law in an individual case to the Federal Constitutional Court, if the following two conditions are met: (1) the court concerned with the question has substantial doubts about the existence and/or content of a general rule of international law and (2) the decision depends on the clarification of these doubts.<sup>6</sup> Serious doubts always exist if the court would, in its decision, depart from the opinion of a constitutional body, from the decisions of higher German, foreign or international courts, or from the doctrine of acknowledged scholars of international law.<sup>7</sup> According to the case-law of the Federal Constitutional Court, questions limited to the scope of a general rule of international law may also be submitted. Thus, the so-called “verification procedure” of Article 100 (2) Basic Law also contributes to the interpretation and specification of general rules of international law.<sup>8</sup>

If objectively serious doubts exist regarding the existence or the scope of a general rule of international law, a court that does not refer the case to the Federal Constitutional Court to clarify the question, as a general rule, infringes the right to one's lawful judge under Article 101(1) sentence 2<sup>9</sup>, which is equivalent to a fundamental right. It is the primary purpose of the verification procedure to prevent and remedy, whenever possible, violations of international law that are due to the erroneous application or to the disregard of rules of

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<sup>1</sup> “Bundesverfassungsgericht“.

<sup>2</sup> Basic Law (“Grundgesetz”) for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 21 July 2010 (Federal Law Gazette I p. 944).

<sup>3</sup> Article 25 Basic Law:

“The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.”

<sup>4</sup> *Inter alia* Federal Constitutional Court, 2 BvM 1/60, of 30 October 1962 and 2 BvM 1/62, of 30 April 1963.

<sup>5</sup> Article 100 (2) Basic Law: “If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court.”

<sup>6</sup> *Cf.* Decision of the Bundesverfassungsgericht, 2 BvR 1506/03, para. 33.

<sup>7</sup> 2 BvR 1506/03, para. 36; 2 BvR 793/07, para. 17; BVerfGE 23, 288 [319]; 96, 68 [77].

<sup>8</sup> 2 BvR 793/07, para. 13; BVerfGE 15, 25 [31 et seq.]; 64, 1 [13 et seq.]; 96, 68 [77].

<sup>9</sup> Article 101 (1) 2 Basic Law: “No one may be removed from the jurisdiction of his lawful judge.”

international law by German courts, and which might establish responsibility under international law on the part of Germany.<sup>10</sup>

Moreover, the procedure is also supposed to ensure the uniformity and reliability of the rules of international law across states, and in this respect, it is an element of the German Basic Law's openness to international law. Thus, the Federal Constitutional Court indirectly dedicates itself to the cause of enforcing international law and thereby reduces the risk of non-compliance with international law.<sup>11</sup>

However, within this procedure, the findings of the Federal Constitutional Court regarding the applicability of general rules of international law retain the character of a preliminary decision. It is the competent court, not the Federal Constitutional Court, which has to apply the verified general rule of international law to the case before it.<sup>12</sup>

## II. The constitutional complaint<sup>13</sup>, Article 93 (1) N° 4a) Basic Law

By contrast, if the existence and scope of a general rule of international law is in question within the context of a constitutional complaint, it is the Federal Constitutional Court itself which has to decide upon that matter.

The constitutional complaint is a remedy to protect constitutional rights, such as basic rights and certain related rights<sup>14</sup>. The complainant alleges that his or her constitutional rights have been violated by the act of a German public authority or court. The complaint can normally be brought only after all regular remedies have been exhausted.

The Federal Constitutional Court has to examine the applicability of customary international law in this procedure if the complainant bases his or her claim (also) on a presumed general rule of international law, or in case he or she argues that the competent court has infringed the right to his lawful judge<sup>15</sup> by not referring the case to the Federal Constitutional Court for clarification.<sup>16</sup>

### **B. General approach of the Federal Constitutional Court (hereinafter “Court”) regarding the identification of rules of customary international law**

In principle, the Court approaches the topic by citing Article 25 of the Basic Law<sup>17</sup> and by stating that general rules of international law must be respected in the interpretation and application of provisions of domestic law by the administrative authorities and the courts.<sup>18</sup> In several cases, the Court further emphasizes that Article 25 Basic Law also obligates the courts to refrain from anything that lends effectiveness to acts of non-German organs of

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<sup>10</sup> 2 BvR 1506/03, para. 38; BVerfGE 58, 1 [34]; 59, 63 [89].

<sup>11</sup> 2 BvR 1506/03, para. 38; cf. BVerfGE 61, 1 [21].

<sup>12</sup> 2 BvR 793/07, para. 13.

<sup>13</sup> “Verfassungsbeschwerde“.

<sup>14</sup> Basic rights: Art. 1 - 19 GG; related rights: Art. 20 (4), Art. 33, Art. 38, Art. 101, Art. 103, Art. 104 GG.

<sup>15</sup> See supra note 7.

<sup>16</sup> 2 BvR 1506/03, para. 32-36.

<sup>17</sup> See supra note 3.

<sup>18</sup> BVerfGE 23, 288 [300]; 31, 145 [177 et seq.]; 2 BvR 955/00 and 2 BvR 1038/01, para. 90.

state authority that are in violation of general rules of international law in the territorial scope of the Basic Law.<sup>19 20</sup>

Subsequently, the Court habitually declares<sup>21</sup> that the term “general rules of international law” as used in article 25 of the German Basic Law primarily refers to customary international law that is of universal validity, which is complemented by accepted general principles of law<sup>22</sup>. The Court defines customary international law quoting the PCIJ as “usage generally accepted as expressing principles of law“. From this it follows, according to the Court, that the evolution of customary international law depends on two preconditions: firstly, on conduct that is continuous in time and as uniform as possible, and which takes place with a broad and representative participation of states and other subjects of international law; secondly on the conviction of these actors that they act in the framework of what is required and permitted or necessary under international law.<sup>23</sup> According to the Court it suffices if a rule is recognized as binding by an overwhelming majority of States, which need not necessarily include Germany.<sup>24</sup>

Following the analysis of the theoretical foundations, the Court ascertains the existence and scope of general rules within the meaning of Article 25 Basic Law by consulting the relevant state practice extensively. Thereby, the Court focuses on the conduct of organs of state authority that are competent to act for that State. In general, this will be the government or the head of state. In addition to that, acts from other organs of state authority (such as acts of the legislature or of the courts) are taken into account to the extent that their conduct is directly relevant under international law.<sup>25</sup>

When analysing judicial decisions on a certain question the Court is in particular concerned with the question whether the respective practice is sufficiently wide spread.<sup>26</sup>

The court has taken the view that, notwithstanding the principle that judicial decisions, as well as teachings in the field of international law can – in accordance with Article 38 (1) (d) of the Statute of the ICJ – only be consulted as subsidiary means for the determination of rules of customary international law, recent legal developments on the international level have to be taken into consideration when ascertaining state practice. These

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<sup>19</sup> BVerfGE 75, 1 [18 et seq.]; 2 BvR 1506/03, para. 45; 2 BvR 955/00 and 2 BvR 1038/01, para. 93.

<sup>20</sup> Where applicable, the Court points out that Article 25 Basic Law does not relate to provisions that are contained in international agreements. Treaties under international law are to be applied and interpreted by the ordinary and specialized courts and tribunals. Their jurisdiction derives from Article 59 (2) of the Basic Law, whereupon treaties under international law require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of a federal law and hence enjoy the characteristics of such laws. cf. BVerfGE 15, 25 [32-35]; 16, 27 [33]; 18, 441 [450]; 58, 1 [34]; 59, 63 [89]; 94, 315 [328]; 99, 145 [160]; 2 BvM 1/03, para. 34; 2 BvR 1290/99, para. 12; 2 BvR 1206/98, para. 51. Article 59 (2) Basic Law: “Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply mutatis mutandis.”

<sup>21</sup> BVerfGE 15, 25 [32 et seq.]; 16, 27 [33]; 23, 288 [317]; 109, 13 [27]; 118, 124 [134]; 2 BvR 1475/07, para. 20.

<sup>22</sup> The Court perceives accepted general principles of law as accepted legal principles, which are consistently applied in the different domestic legal systems and which can be transferred to interstate relations (*inter alia* 2 BvR 1475/07, para. 20.

<sup>23</sup> Cf. BVerfGE 66, 39 [64 et seq.]; 95, 96 [129]; 96, 68 [86 et seq.]; 2 BvR 38/06, para. 23; 2 BvR 1506/03, para. 50; 2 BvR 1243/03, para. 48; 2 BvR 1475/07.

<sup>24</sup> *Inter alia* Federal Constitutional Court, 2 BvM 1/60, of 30 October 1962 and 2 BvM 1/62, of 30 April 1963; cf. 2 BvM 1/03, para. 30.

<sup>25</sup> BVerfGE 46, 342 [headnote 6]; 94, 315 [332]; 2 BvR 1506/03, para. 45; 2 BvR 1243/03, para. 49.

<sup>26</sup> Cf. 2 BvR 1506/03, para. 59; 2 BvR 2660/06, para. 43.

developments are characterised by an advancing differentiation and an increase of recognized subjects of international law. Hence, according to the Court, the acts of bodies of international organizations, and in particular of international courts deserve special attention in this context.<sup>27</sup> In consequence the Court refers also to decisions of international courts and their assessment on the existence of a certain rule of customary international law.<sup>28</sup>

The Court has also referred to the work and drafts of the *International Law Commission* as being of particular relevance in assessing whether a particular rule forms part of international customary law.<sup>29</sup>

Finally the Court has also referred to international treaties and the statutes of international tribunals to appraise if a certain principle forms part of customary international law.<sup>30</sup>

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<sup>27</sup> BVerfGE 96, 68 [87]; 2 BvR 1506/03, para. 52; 2 BvR 1243/03, para. 50.

<sup>28</sup> 2 BvR 1506/03, para. 57 et seq.

<sup>29</sup> 2 BvM 9/03, para. 64; English abstract of this decision at:

<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>.

<sup>30</sup> 2 BvR 38/06, para. 28 et seq.

**Annex**

**Index of Decisions of the German Federal Constitutional Court dealing with the identification of rules of international customary law**

**Decisions of the German Federal Constitutional Court from 1998-2013 (online):**

<http://www.bundesverfassungsgericht.de/entscheidungen.html> (German original)

<http://www.bundesverfassungsgericht.de/en/decisions.html> (authorized translations into English)

<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm> (English abstracts): enter the citation of the respective decision (e.g. 2 BvR 38/06) into the search mask

2 BvR 2660/06	13.08.2013	<a href="http://www.bundesverfassungsgericht.de/entscheidungen.html">http://www.bundesverfassungsgericht.de/entscheidungen.html</a>
2 BvR 1475/07	04.09.2008	<a href="http://www.bundesverfassungsgericht.de/entscheidungen.html">http://www.bundesverfassungsgericht.de/entscheidungen.html</a>
2 BvR 793/07	30.01.2008	<a href="http://www.bundesverfassungsgericht.de/entscheidungen.html">http://www.bundesverfassungsgericht.de/entscheidungen.html</a>
2 BvM 1/03	05.05.2007	<a href="http://www.bundesverfassungsgericht.de/entscheidungen.html">http://www.bundesverfassungsgericht.de/entscheidungen.html</a> <a href="http://www.bundesverfassungsgericht.de/en/decisions.html">http://www.bundesverfassungsgericht.de/en/decisions.html</a>
2 BvR 38/06	04.12.2007	<a href="http://www.bundesverfassungsgericht.de/entscheidungen.html">http://www.bundesverfassungsgericht.de/entscheidungen.html</a> <a href="http://www.codices.coe.int/NXT/gateway.dll?f=templates&amp;fn=default.htm">http://www.codices.coe.int/NXT/gateway.dll?f=templates&amp;fn=default.htm</a>
2 BvM 9/03	06.12.2006	<a href="http://www.bundesverfassungsgericht.de/entscheidungen.html">http://www.bundesverfassungsgericht.de/entscheidungen.html</a> <a href="http://www.codices.coe.int/NXT/gateway.dll?f=templates&amp;fn=default.htm">http://www.codices.coe.int/NXT/gateway.dll?f=templates&amp;fn=default.htm</a>
2 BvR 955/00 and 2 BvR 1038/01 (joint decision)	26.10.2004	<a href="http://www.bundesverfassungsgericht.de/entscheidungen.html">http://www.bundesverfassungsgericht.de/entscheidungen.html</a> <a href="http://www.bundesverfassungsgericht.de/en/decisions.html">http://www.bundesverfassungsgericht.de/en/decisions.html</a>
2 BvR 1506/03	05.11.2003	<a href="http://www.bundesverfassungsgericht.de/entscheidungen.html">http://www.bundesverfassungsgericht.de/entscheidungen.html</a> <a href="http://www.bundesverfassungsgericht.de/en/decisions.html">http://www.bundesverfassungsgericht.de/en/decisions.html</a>
2 BvR 1243/03	05.11.2003	<a href="http://www.bundesverfassungsgericht.de/entscheidungen.html">http://www.bundesverfassungsgericht.de/entscheidungen.html</a>
2 BvR 1290/99	12.12.2000	<a href="http://www.bundesverfassungsgericht.de/entscheidungen.html">http://www.bundesverfassungsgericht.de/entscheidungen.html</a> <a href="http://www.bundesverfassungsgericht.de/en/decisions.html">http://www.bundesverfassungsgericht.de/en/decisions.html</a> (abstract only)
2 BvR 1206/98	29.10.1998	<a href="http://www.bundesverfassungsgericht.de/entscheidungen.html">http://www.bundesverfassungsgericht.de/entscheidungen.html</a>

**Decisions of the German Federal Constitutional Court from 1962-1997:**

Entscheidungen des Bundesverfassungsgerichts, J.C.B. Mohr (Paul Siebeck), Tübingen (German)

Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany, Volume 1/Part I: International Law and Law of the European Communities (1952-1989), Nomos Verlagsgesellschaft Baden-Baden, Karlsruhe 1992 (English summarized versions)

Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany, Volume 1/Part II: International Law and Law of the European Communities (1952-1989), Nomos Verlagsgesellschaft Baden-Baden, Karlsruhe 1992 (English summarized versions)

Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany, Volume 3: Questions of Law Arising from German Unification (1973-2004), Nomos Verlagsgesellschaft Baden-Baden, Karlsruhe 2005 (English summarized versions)

<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm> (English abstracts)

BVerfGE 96, 68 (2 BvR 1516/96)	10.06.1997	Entscheidungen des Bundesverfassungsgerichts, 96. Band, J.C.B. Mohr (Paul Siebeck), Tübingen 1998 (English abstract available: <a href="http://www.codices.coe.int/NXT/gateway.dll?f=templates&amp;fn=default.htm">http://www.codices.coe.int/NXT/gateway.dll?f=templates&amp;fn=default.htm</a> )
BVerfGE 95, 96 (2 BvR 1851/94)	24.10.1996	Entscheidungen des Bundesverfassungsgerichts, 95. Band, J.C.B. Mohr (Paul Siebeck), Tübingen 1997
BVerfGE 94, 315	13.05.1996	Entscheidungen des Bundesverfassungsgerichts, 94. Band, J.C.B. Mohr

(2 BvL 33/93)		(Paul Siebeck), Tübingen 1997 (English abstract available: <a href="http://www.codices.coe.int/NXT/gateway.dll?f=templates&amp;fn=default.htm">http://www.codices.coe.int/NXT/gateway.dll?f=templates&amp;fn=default.htm</a> )
BVerfGE 92, 277 (2 BvL 19/91)	15.05.1995	Entscheidungen des Bundesverfassungsgerichts, 92. Band, J.C.B. Mohr (Paul Siebeck), Tübingen 1995 (Summarized translations into English available: Decisions of the Bundesverfassungsgericht, Vol. 3, Karlsruhe 2005)
BVerfGE 75, 1 (2 BvM 2/86)	31.03.1987	Entscheidungen des Bundesverfassungsgerichts, 75. Band, J.C.B. Mohr (Paul Siebeck), Tübingen 1995
BVerfGE 66, 39 (2 BvR 1160/83)	16.12.1983	Entscheidungen des Bundesverfassungsgerichts, 66. Band, J.C.B. Mohr (Paul Siebeck), Tübingen 1984 (Summarized translations into English available: Decisions of the Bundesverfassungsgericht, Vol. 1/Part II, Karlsruhe 1992)
BVerfGE 64, 1 (2 BvR 678/81)	12.04.1983	Entscheidungen des Bundesverfassungsgerichts, 64. Band, J.C.B. Mohr (Paul Siebeck), Tübingen 1984 (Summarized translations into English available: Decisions of the Bundesverfassungsgericht, Vol. 1/Part II, Karlsruhe 1992)
BVerfGE 61, 1 (1 BvR 1376/79)	22.06.1982	Entscheidungen des Bundesverfassungsgerichts, 61. Band, J.C.B. Mohr (Paul Siebeck), Tübingen 1983
BVerfGE 59, 63 (2 BvR 1058/79)	10.11.1981	Entscheidungen des Bundesverfassungsgerichts, 59. Band, J.C.B. Mohr (Paul Siebeck), Tübingen 1982
BVerfGE 58, 1 (2 BvR 1107, 1124/77 und 195/79)	23.06.1981	Entscheidungen des Bundesverfassungsgerichts, 58. Band, J.C.B. Mohr (Paul Siebeck), Tübingen 1982
BVerfGE 46, 342 (2 BvM 1/76)	13.12.1977	Entscheidungen des Bundesverfassungsgerichts, 46. Band, J.C.B. Mohr (Paul Siebeck), Tübingen 1978 (Summarized translations into English available: Decisions of the Bundesverfassungsgericht, Vol. 1/Part I, Karlsruhe 1992)
BVerfGE 31, 145 (2 BvR 225/69)	09.06.1971	Entscheidungen des Bundesverfassungsgerichts, 31. Band, J.C.B. Mohr (Paul Siebeck), Tübingen 1972
BVerfGE 23, 288 (2 BvR 544/63)	14.05.1968	Entscheidungen des Bundesverfassungsgerichts, 23. Band, J.C.B. Mohr (Paul Siebeck), Tübingen 1968 (Summarized translations into English available: Decisions of the Bundesverfassungsgericht, Vol. 1/Part I, Karlsruhe 1992)
BVerfGE 18, 441 (2 BvR 227/64)	07.04.1965	Entscheidungen des Bundesverfassungsgerichts, 18. Band, J.C.B. Mohr (Paul Siebeck), Tübingen 1965
BVerfGE 16, 27 (2 BvM 1/62)	30.04.1963	Entscheidungen des Bundesverfassungsgerichts, 16. Band, J.C.B. Mohr (Paul Siebeck), Tübingen 1964 (Summarized translations into English available: Decisions of the Bundesverfassungsgericht, Vol. 1/Part I, Karlsruhe 1992)
BVerfGE 15, 25 (2 BvM 1/60)	30.10.1962	Entscheidungen des Bundesverfassungsgerichts, 15. Band, J.C.B. Mohr (Paul Siebeck), Tübingen 1964 (Summarized translations into English available: Decisions of the Bundesverfassungsgericht, Vol. 1/Part I, Karlsruhe 1992)