

FEDERAL COURT OF JUSTICE

ORDER

of

30 November 2022

3 StR 230/22

Code of Crimes against International Law, CCAIL (*Völkerstrafgesetzbuch*, VStGB) section 6 (1) no. 2, section 7 (1) nos. 3, 5, 8 and 9, section 7 (3)

1. Serious bodily or mental harm within the meaning of section 6 (1) no. 2 of the CCAIL and section 7 (1) no. 8 of the CCAIL is to be understood as harm that results in a grave and long-term disadvantage to the member of the protected group's ability to lead a normal and constructive life.
2. Under the rules on *concursum delictorum* ("concurrency of offences"), a crime against humanity can supersede a general criminal provision that protects individual legal interests.
3. The forms of commission listed in section 7 (1) of the CCAIL are to be legally regarded not merely as contingent variants of the same offence, but as separate offences. Where the same conduct leads to the commission of several different offences (*ungleichartige Tateinheit*), the relationship between these offences is one of "true concurrence" (*Idealkonkurrenz*).

Federal Court of Justice, order of 30 November 2022 - 3 StR 230/22 -
Frankfurt am Main Higher Regional Court in the criminal proceedings

against

for genocide and other offences

ECLI:DE:BGH:2022:301122B3STR230.22.0

In accordance with section 349 (2) and (4) and, by way of analogy, section 354 (1) of the Code of Criminal Procedure (*Strafprozessordnung*, StPO), the Third Criminal Panel of the Federal Court of Justice, having heard the Appellant and the Federal Public Prosecutor General, decided unanimously on 30 November 2022 – in respect of 2. on application by the Prosecutor – as follows:

1. On the Defendant's appeal on points of law, the judgment of Frankfurt am Main Higher Regional Court of 30 November 2021 is amended to the effect that he is guilty of genocide, committed in true concurrence with the crimes against humanity of enslavement, torture, causing serious bodily or mental harm and deprivation of liberty, each resulting in death, as well as the war crime against persons of torture resulting in death.
2. The remainder of the appeal on points of law is rejected.
3. The Appellant is to bear the costs of the appeal, the specific costs incurred in this respect in the adhesion procedure and the necessary expenses incurred by the victim acting as both private accessory prosecutor and joinder plaintiff in the appellate proceedings on points of law.

Reasons:

1 The Higher Regional Court found the Defendant guilty of "genocide, committed in true concurrence with a crime against humanity resulting in death, a war crime against persons resulting in death, aiding a war crime against persons in two cases arising from the same conduct, as well as bodily harm resulting in death." It therefore sentenced him to life imprisonment. Furthermore, it determined the standard for taking into account time already served in foreign extradition detention and made a decision on adhesion. In the grounds for his appeal on points of law, the Defendant complains of violations of both procedural and substantive law. In response to the substantive complaint, the verdict of guilt is amended as set out under point 1 of the operative part of this order. In all other respects, the appeal is ill-founded within the meaning of section 349 (2) of the Code of Criminal Procedure.

A.

2 I. The Higher Regional Court made the following findings:

3 In its endeavours to establish a worldwide Islamic caliphate, the terrorist organisation "Islamic State" (IS), which is militarily active in the civil war zones in Syria and Iraq, persecuted the Yazidi minority, who predominantly live in the area around the Sinjar Mountains in northern Iraq. In order to bring about the complete destruction of the Yazidi religion, of Yazidism as such and its followers, IS fighters carried out a centrally planned, organised and coordinated

military attack against the members of the group living in the Sinjar region in the night of 2 to 3 August 2014. In the period that followed, the IS forced male Yazidis to convert to Islam, they subjected them to forced labour, enslaved Yazidi women and girls, and carried out mass executions of members of the religious community.

4 The Defendant, who approved of the IS's actions against the Yazidi religious group, had been in R. in Syria since at least March 2015 and was active there as the head of the IS office for "Ru.", a religious practice of exorcising spirits to heal suffering. In June 2015, he bought two female Yazidi slaves, the private accessory prosecutor and her daughter Re., born on 5 June 2010. They had been captured by members of the IS during the military attack on the Sinjar region in the summer of 2014. About two weeks after buying them as slaves, the Defendant displaced them from Syria to F. in Iraq. He then forced them to stay there for several weeks, and also forced the private accessory prosecutor to work in his household, which he kept with the woman he had taken as a wife according to Islamic rites. The two Yazidi slaves were made to comply with the Defendant's instructions. He exercised complete control over their lives, forbade them to leave the property, provided them with too little food, forced them to perform regular Islamic prayer rites and mistreated them on a daily basis in order to discipline them and keep them submissive. As a result, they lived in constant fear of him.

5 The private accessory prosecutor and Re. endured extreme physical and psychological suffering as a consequence of the conditions of life dictated by the Defendant and his treatment of them. By causing them serious physical and mental harm, he intended to make a targeted contribution, in line with IS

ideology, to the destruction of the Yazidi religion, Yazidism as such and its – in his view worthless – members in order to further the establishment of an Islamic caliphate.

6 On a day in August or September 2015, the Defendant instructed the private accessory prosecutor at around midday to stand out in the sun in bare feet on the stone floor of the courtyard surrounding the house. At that time, daytime temperatures in F. reached as high as 51 degrees Celsius in the shade. At the Defendant's command, the private accessory prosecutor went back into the house after a while and, as instructed, returned to her cleaning work. Meanwhile, the Defendant was furious because Re. had urinated on a mattress due to illness. In order to punish and discipline the five-year-old, he tied her hands at head height to the outside railings of the living room window in the courtyard. The girl, who was thus unable to move, was exposed to the direct force of the sun. After tying her up, the Defendant returned to the house. When he went back into the courtyard after some time, he untied Re., who had suffered a heat stroke in the meantime. As he could have foreseen, she had either already died of heat stroke, or she died in the period immediately after.

7 II. The Higher Regional Court refrained from prosecuting the Defendant for any offences other than those under the Code of Crimes against International Law and the offence of bodily harm resulting in death in accordance with section 154 (2) and section 154a (2) of the Code of Criminal Procedure (*Strafprozessordnung*, StPO), and arrived at the following legal assessment of these findings:

8 It held that the Defendant had committed genocide under section 6 (1) no. 2 of the Code of Crimes against International Law (CCAIL) by knowingly and intentionally causing serious bodily harm to the daughter of the private accessory prosecutor – regardless of the fact that her death was only caused through negligence – and by causing the private accessory prosecutor serious mental harm, with these being perpetrated with the objective of destroying the religious group of the Yazidis as such. In addition, the Higher Regional Court found that he had unlawfully and culpably committed the offence of a crime against humanity resulting in death pursuant to section 7 (1) and (3) of the CCAIL; his conduct, which formed part of the widespread and systematic attack by the IS against the Yazidi civilian population, fulfilled the following constituent elements from the list contained in subsection (1) in respect of both victims: “Enslavement and trafficking” (no. 3), “torture” (no. 5), “causing severe physical or mental harm” (no. 8) and “severe deprivation of physical liberty” (no. 9). The Higher Regional Court assessed further that the Defendant had also incurred criminal liability for a war crime against persons resulting in death pursuant to section 8 (1) no. 3 (torture) and section 8 (4) sentence 1 of the CCAIL, and for aiding a war crime against persons in two cases arising from the same conduct in accordance with section 8 (1) no. 6 (“deports or forcibly transfers”) and section 2 of the CCAIL, and section 27 (1) and section 52 of the Criminal Code (*Strafgesetzbuch*, StGB). The court held that, in connection with the non-international armed conflict taking place in Syria and Iraq at the time, the Defendant had not only treated two persons who were to be protected under international humanitarian law (section 8 (6) no. 2 of the CCAIL) in a cruel and inhumane manner, but also, by forcibly displacing them to F., he had promoted the IS’s practice of deporting and transferring Yazidi women and girls by himself subjecting the private accessory prosecutor and her daughter to this very practice. Finally, the Higher Regional

Court also found him guilty of bodily harm resulting in death under section 223 (1) and section 227 (1) of the Criminal Code in the case of the daughter Re. It held that the offence of genocide, the crime against humanity, the two war crimes against persons and the offence under general criminal law were committed in true concurrence (i.e. the different offences all arose from the same conduct).

B.

9 I. The procedural complaints are without success for the reasons set out in the written application (*Antragsschrift*) of the Federal Public Prosecutor General.

10 II. The comprehensive substantive review of the judgment conducted in response to the Defendant's objection to the Higher Regional Court's application of substantive law results only in an amendment to the verdict of guilt. On the basis of the findings made without error of law by the Higher Regional Court, the Defendant is guilty of genocide, committed in true concurrence with the crimes against humanity of enslavement, torture, causing serious bodily or mental harm and deprivation of liberty, each resulting in death, as well as with the war crime against persons of torture resulting in death, but he is not guilty of aiding the war crime against persons of deportation in two cases arising from the same conduct or of bodily harm resulting in death. In all other respects, the judgment does not contain any errors of law that are detrimental to the Defendant. The sentence remains unaffected by the change in the verdict of guilt.

11 1. With the exception of its *concursum delictorum* assessment, the Higher Regional Court's conviction of the Defendant for genocide under section 6 (1) no. 2 of the CCAIL, crimes against humanity resulting in death under section 7 (1) nos. 3, 5, 8 and 9 each in conjunction with section 7 (3) of the CCAIL and a war crime against persons resulting in death under section 8 (1) no. 3 in conjunction with section 8 (4) sentence 1 of the CCAIL stands up to judicial review (see 3. below). Thus, further evaluation is required only with regard to the criminal liability established for the offence of causing serious bodily or mental harm under section 6 (1) no. 2, section 7 (1) no. 8 and section 7 (3) of the CCAIL.

12 a) The Defendant is guilty of genocide. It is true that his conduct did not fulfil the requirements of the variant of the offence set out in section 6 (1) no. 1 of the CCAIL, since, according to the findings of the Higher Regional Court, the Defendant's intent did not extend to Re.'s killing, as required by section 2 of the CCAIL, section 15 of the Criminal Code (cf. MüKoStGB/Kreß, 4th ed., section 6 of the CCAIL margin no. 70; MüKoStGB/Weigend/Kuhli, 4th ed., section 2 of the CCAIL margin no. 8); however, his conduct did fulfil the requirements of the variant set out in section 6 (1) no. 2 of the CCAIL. The latter offence variant is fulfilled if the perpetrator causes serious physical or mental harm – in particular of the kind described in section 226 of the Criminal Code – to a member of the national, racial, religious or ethnic group which he intends to destroy in whole or in part. According to the findings made in the Higher Regional Court's judgment, these requirements are satisfied.

13 aa) The Defendant acted with the necessary individual intent to commit genocide.

14 The individual objective modalities of the offence listed under section 6 (1) of the CCAIL only acquire their particular wrongfulness as genocide offences if, as the provision requires, the perpetrator is driven by the intention to destroy one of the protected groups as such in whole or in part (on section 220a of the Criminal Code (old version), cf. Federal Court of Justice, judgment of 30 April 1999 - 3 StR 215/98, BGHSt 45, 64, 86). The sought result must be preceded by the perpetrator's subjective intent to commit the offence – a subjective intent, moreover, which is not necessarily linked to the objective elements of the offence and which may indeed go beyond them (*überschießende Innentendenz*) (regarding section 220a of the Criminal Code (old version) see Federal Court of Justice, judgment of 21 February 2001 - 3 StR 372/00, BGHSt 46, 292, 295). This subjective element of unlawfulness of the offence requires that the perpetrator personally seeks, i.e. that it is his or her specific volition to cause, the complete or partial destruction of the group, at least in terms of its social existence (see Federal Court of Justice, judgment of 21 May 2015 - 3 StR 575/14, BGHR VStGB section 6 Intent 1 margin no. 13; on section 220a of the Criminal Code (old version) BGH, order of 21 February 2001 - 3 StR 244/00, BGHR StGB section 220a Intent 1; also BGH, order of 29 August 1996 - AK 30/96, BGHR StGB section 220a Suspicion 2). It is sufficient if the result sought by the perpetrator is an intermediate objective; the destruction need not represent an ultimate objective, nor must it be his driving cause or motivation (see Federal Court of Justice, judgment of 21 May 2015 - 3 StR 575/14, BGHR VStGB section 6 Intent 1 margin no. 16).

15 The Higher Regional Court based its decision on these legal standards. It established and proved in detail that the Defendant, in his actions against the private accessory prosecutor and her daughter, personally wanted to destroy in

a targeted manner the definable religious group of the Yazidis as such – the Yazidi religion, Yazidism and its members – in line with IS ideology, and that this intention constituted a “decisive motivation”. As stated, it is irrelevant that, according to the findings made in the judgment, this was only an intermediate objective of the Defendant and that he pursued the ultimate objective of establishing an Islamic caliphate in line with IS ideology, in which "apostates" – such as Yazidis – unlike "people of the book" – such as Jews and Christians – should in principle have no right to exist.

16 bb) The Defendant caused at least serious physical harm to the five-year-old girl and in any case serious mental harm to the private accessory prosecutor, in both cases knowingly and intentionally.

17 (1) Serious harm within the meaning of the variant of the offence of section 6 (1) no. 2 of the CCAIL caused to the member of the protected group is to be understood as harm “that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life” (ICTY, judgments of 2 August 2001 - IT-98-33-T - Krstic, margin no. 513; of 8 April 2015 - IT-05-88/2-A - Tolimir, margin no. 201 et seq., 215; of 24 March 2016 - IT-95-5/18-T - Karadzic, margin no. 543). Physical or mental consequences of bodily harm of the kind described in section 226 (1) of the Criminal Code are not prerequisites; however, the reference to the offence of serious bodily harm does give an indication of the necessary severity of the physical or health-related disadvantages caused by the harmful conduct. This understanding is based on the following considerations:

- 18 (a) The provision of section 6 (1) no. 2 of the CCAIL is largely the same as the previous provision of section 220a (1) no. 2 of the Criminal Code, which was valid until 29 June 2022. In order to ensure greater clarity, the wording of the Criminal Code was merely amended to the extent that the plural “members” (“*Mitgliedern*” in the original German) was replaced by the singular “a member” (“*einem Mitglied*”) (cf. on section 220a (1) no. 1 of the Criminal Code (old version) Federal Court of Justice, judgment of 30 April 1999 - 3 StR 215/98, BGHSt 45, 64, 70; also Gropengießer/Kreicker in Eser/Kreicker [eds.], *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, vol. 1, 2003, pp. 99, 101; MüKoStGB/Kreiß, 4th ed., section 6 VStGB margin nos. 49, 52).
- 19 Section 220a was inserted into the Criminal Code by the Act of 9 August 1954 (Federal Law Gazette II p. 729) on the accession of the Federal Republic of Germany to the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide (Federal Law Gazette 1954 II p. 730 et seqq.). The German legislature had deliberately opted for a generally close alignment of the wording of the newly introduced provision with Article II of the Genocide Convention, in which the objective and subjective elements of the crime of genocide under international criminal law are rendered as constituent elements of the offence under German law (see Federal Court of Justice, judgment of 30 April 1999 - 3 StR 215/98, BGHSt 45, 64, 79 with further references; MüKoStGB/Kreiß, 4th ed., section 6 VStGB margin nos. 26, 28). This provision of the international treaty specifies under (b) "causing serious bodily or mental harm to members of the group" as one of the acts covered, where this is "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

20 However, in the government draft of 23 December 1953 for an Act on the Accession of the Federal Republic of Germany to the Genocide Convention, the second variant in subsection 1 of the planned section 220a of the Criminal Code was still worded as follows: “causing bodily harm of the kind described in section 224 (old version of the Criminal Code) to members of the group.” The intention behind this alignment with the former criminal provision on serious bodily harm was to define the offence of genocide as precisely as possible and to ensure a uniform interpretation regarding the consequences of serious bodily harm in the Criminal Code (Bundestag printed paper II/162 p. 2, 4). It was not until the Bundestag Committee on the Legal System and Constitutional Law deliberated on 3 May 1954 that the second variant of the offence under section 220a (1) of the Criminal Code was drafted with wording that corresponds to the currently valid provision of section 6 (1) no. 2 of the CCAIL. The reason for this was that, in the opinion of participants at that meeting, the offence of serious bodily harm (alone) did not fully cover serious mental harm. It was for this reason that the committee members – deviating from the wording of the unanimously approved legislative proposal – used the addition “especially” in reference to mental harm alone (cf. German Bundestag, 2nd parliamentary term, 16th Committee, Protocol No. 13 [13th session on 3 May 1954], p. 12 et seq.; MüKoStGB/Kreß, 4th ed., section 6 VStGB margin no. 50 et seq.).

21 However, whether or not this aspect of legislative history has any bearing on the interpretation of serious physical and mental harm within the meaning of section 220a (1) no. 2 of the Criminal Code (old version) is not of essential relevance here. It is also not of relevance whether or not the Panel's judgment of 20 April 1999 (3 StR 215/98, BGHSt 45, 64) handed down for crimes of genocide in the former Yugoslavia provides a consistent understanding of the

constituent elements of this provision and of section 224 (1) of the Criminal Code (old version) (cf. loc. cit., p. 84).

22 (b) At the latest since the point in time when section 220a of the Criminal Code (old version) was replaced by section 6 of the CCAIL, it is no longer possible to justify a restrictive interpretation of the wording of the law. An interpretation according to which serious (bodily) harm within the meaning of section 6 (1) no. 2 can only be established if it results in the impairments of the kind described in section 226 (1) of the Criminal Code would run counter to the intention of the legislature when the Code of Crimes against International Law was introduced.

23 This largely independent set of regulations was intended to transpose the criminal provisions of the Rome Statute of the International Criminal Court (ICC Statute) into German law. The objective was to ensure that the Federal Republic of Germany would itself always be in a position to prosecute crimes that fall within the jurisdiction of the International Criminal Court (ICC). The German legislature saw the alignment with the criminal provisions of the ICC Statute, including the Elements of Crimes formulated for this purpose, as a necessary step towards the transposition of established customary international law into national law, as it considered that the customary body of international criminal law was essentially enshrined in the ICC Statute. The legislature wished to ensure that the legal situation in Germany would be consistent with the ICC Statute, its Elements of Crimes and its interpretation by the ICC, taking into account the case law of other international criminal courts (see Bundestag printed paper 14/8524, p. 12 et seq.; Federal Court of Justice, judgment of 27

July 2017 - 3 StR 57/17, BGHSt 62, 272 margin no. 19; Werle/Epik, JZ 2018, 261, 262; differing opinion: Berster, ZIS 2017, 264, 265).

24 With regard to the provision of Article 4 no. 2 (b) of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute), which is identical in content to Article 6 (b) of the ICC Statute, it is recognised that bodily or mental harm is to be deemed serious if it results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life (ICTY, judgments of 2 August 2001 - IT-98-33-T - Krstic, margin no. 513; of 8 April 2015 - IT-05-88/2-A - Tolimir, margin no. 201 et seq., 215; of 24 March 2016 - IT-95-5/18-T - Karadzic, margin no. 543). The matter has also been settled in a similar manner with regard to Article 2 no. 2 (b) of the Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), which is also worded identically (cf. ICTR, judgment of 12 September 2006 - ICTR-00-55A-T - Muvunyi, margin no. 487). A merely temporary health disadvantage is not sufficient, although it does not have to be permanent or irreversible (see ICTR, judgments of 2 September 1998 - ICTR-96-4-T - Akayesu, margin no. 502; of 21 May 1999 - ICTR-95-1-T - Kayishema et al., margin no. 110; of 12 March 2008 - ICTR-01-66-A - Seromba, margin no. 46; on the matter as a whole, Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., margin no. 897 with further references).

25 The adoption of this definition from international criminal law for the offence variant under section 6 (1) no. 2 of the CCAIL has proven to be an appropriate reflection of the legislative intent behind the introduction of the Code of Crimes against International Law (also MüKoStGB/Kreß, 4th ed., section 6 VStGB, margin no. 50). Indeed, a footnote in the Elements of Crimes concerning the offence variant under Article 6 (b) of the ICC Statute itself explains that the

causing of serious bodily and mental harm may include inhuman or degrading treatment, which also speaks in favour of such a broader understanding of this variant of the offence in comparison with section 226 (1) of the Criminal Code. Although the Elements of Crimes are not legally binding, in accordance with Article 9 (1) sentence 1 of the ICC Statute, they do however provide assistance in interpreting the offences set out in Articles 6, 7, 8 and 8 *bis* of the ICC Statute (cf. Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., margin no. 235 et seqq.). They can also be consulted to provide assistance in application under German law (cf. Federal Court of Justice, order of 8 September 2016 - StB 27/16, BGHR VStGB section 8 (1) no. 9 Person who is to be protected 1 margin no. 22; Werle/Epik, JZ 2018, 261, 262; Ambos [critical], NJW 2017, 3672).

26 (2) The Higher Regional Court based its legal assessment on the aforementioned understanding of the elements of section 6 (1) no. 2 of the CCAIL and was correct in observing that the Defendant intentionally caused serious bodily harm to Re. and serious mental harm to the private accessory prosecutor.

27 The physical impairment of the private accessory prosecutor's five-year-old daughter was the result of continued corporal punishment over several weeks which included the Defendant beating her on a daily basis, among other forms of punishments. The assaults were sometimes so severe that the girl had to stay in bed for several days. Finally, the Defendant exposed the five-year-old girl to direct sunlight in the midday heat, having tied her up with her arms right and left at head height, which had very serious consequences for her health – regardless of the fact that he did not cause her death intentionally. In addition, he did not provide enough food for the child, who was still developing physically,

and thus left her continually hungry. The impairments were not merely of a temporary nature, but were of an indefinite duration and had at this stage already lasted for a considerable period of time.

28 The psychological impairment suffered by the private accessory prosecutor herself was caused not only by her own conditions of life as were dictated by the Defendant over several weeks – characterised by violence, deprivation of liberty, forced labour, forced prayer, deprivation and fear – but in particular by the fact that she had to endure her daughter's suffering without being able to prevent it. As a consequence, for example, on one occasion the private accessory prosecutor wet herself after she and the girl had been beaten. On another occasion, the Defendant threatened to kill the child. After the child had suffered heatstroke, he refused to allow the mother to go with her child to the hospital. Nor would he inform her about the whereabouts of the body. The private accessory prosecutor still requires psychological counselling today.

29 In view of all the above, the bodily harm caused to Re. and the mental harm caused to the private accessory prosecutor, which were both encompassed by the Defendant's intent, must be classified as serious because, as he was aware, they caused a grave and long-term disadvantage to his victims' ability to lead a normal and constructive life. As was also found by the Higher Regional Court, the severity of the harm must furthermore be assessed as being comparable to impairments resulting from bodily harm within the meaning of section 226 (1) of the Criminal Code.

30 cc) There is much to suggest that the variant of the offence set out in section 6 (1) no. 2 of the CCAIL contains – in addition to the intention to commit genocide – a further element that requires an "objective suitability" to bring about the intended result. If this unwritten element were to be defined, it would have to mean either that the perpetrator's harmful conduct is suitable to bring about the complete or partial destruction of the group as such, or that the harmful conduct is connected to a clearly recognisable pattern of similar conduct by others against the group and the overall course of action is suitable to cause this destruction. Ultimately, however, it need not be determined whether such a restrictive interpretation of section 6 (1) no. 2 of the CCAIL is in fact necessary in the present case. On the one hand, the findings in the Higher Regional Court's judgment show that these requirements were fulfilled in respect of the second alternative; on the other hand, no further conditions can be imposed on an objective element of this kind. In particular:

31 (1) The requirement of actual suitability to bring about the intended result can be deduced from the Elements of Crimes on Article 6 of the ICC Statute, particularly since the explanatory memorandum on the draft Act to Introduce the Code of Crimes against International Law submitted by the Federal Government expressly refers to these provisions with regard to the offence under section 6 of the CCAIL (see Bundestag printed paper 14/8524 p. 19).

32 According to no. 4 of the Elements of Crimes on Article 6 (b) of the ICC Statute, an element of the crime of genocide by causing serious bodily or mental harm is that the conduct in question "took place in the context of a manifest pattern of similar conduct directed against that group or ... could itself effect such destruction". This suggests that this provision of international criminal law should

not apply if the perpetrator's actions, considered both in isolation and in conjunction with similar actions by others, were unsuitable from the outset to bring about the intended result.

33 (2) The assumption that the crime of genocide includes an unwritten element concerning the objective relationship between the causing of serious harm and the intended (partial) destruction of the group is consistent with the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Court of Justice (ICJ).

34 The ICTY and the ICTR have recognised such a requirement in principle. However, it is not uniformly defined in the Tribunals' individual decisions. On the one hand, the necessary degree of the harm caused is described as being such as "to contribute or tend to contribute to the destruction of the group or part thereof" (ICTY, judgments of 27 September 2006 - IT-00-39-T - Krajsnik, margin no. 862; of 12 December 2012 - IT-05-88/2-T - Tolimir, margin no. 738; cf. Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., margin no. 897). A similar understanding is found in a judgment of the ICJ of 3 February 2015 (Croatia v. Serbia, I.C.J. Reports 2015, 3 margin no. 157). On the other hand, the Tribunals have also developed the formulation – drawing on the work of the United Nations International Law Commission (Yearbook of the International Law Commission 1996, Volume II, Part 2 [YILC 1996 II-2], p. 46 no. 14) – that the harm caused to the members must be "of such a serious nature as to threaten its destruction in whole or in part" (ICTR, judgments of 12 March 2008 - ICTR-01-66-A - Seromba, margin no. 46; of 20 December 2012 - ICTR-99-54-T - Ngirabatware, margin no. 1326; ICTY [almost identical], judgment of 8 April

2015 - IT-05-88/2-A - Tolimir, margin no. 212; cf. Ambos, *Internationales Strafrecht*, 5th ed., section 7 margin no. 132 with further references; Ambos [rejecting], *Treatise on International Criminal Law, Volume II*, 2014, p. 12).

35 In any case, the definition in the former of the aforementioned decisions comes close to the element of objective suitability to bring about the intended result assumed here. The wording ("to contribute or tend to contribute") indicates that the perpetrator's conduct should not be considered on its own in determining culpability, but must rather be assessed according to the circumstances of the case in the context of similar conduct by others.

36 The latter of the aforementioned decisions can be understood as being based on the threat of the intended result arising ("to threaten") (cf. Ambos, *Internationales Strafrecht*, 5th ed., section 7 margin no. 132). However, such a criterion is essentially consistent with the element of suitability. After all, if an act is suitable to bring about an intended result, there will ordinarily be a corresponding risk if the act has actually taken place. It need not be determined here whether or not the relevant wording chosen by the international criminal tribunals is based on an understanding that, when assessing such a threat of destruction, consideration must only be given to the perpetrator's actions viewed in isolation from other factors. Such an interpretation of the ICTY and ICTR Statutes is not immediately apparent from these decisions. In any case, this would not be decisive for the offence variant under section 6 (1) no. 2 of the CCAIL (cf. MüKoStGB/Kreß, 4th ed., section 6 VStGB margin no. 50).

37 (3) The Defendant's actions, which caused serious harm to the private accessory prosecutor and Re., were, in conjunction with similar actions by other

IS members, suitable to cause the destruction of the religious group of the Yazidi Kurds.

38 According to the findings made in the Higher Regional Court's judgment, the Defendant's conduct formed part of the centrally planned action against the Yazidis living in the Sinjar region. The private accessory prosecutor and her daughter had been captured during the military attack and subsequently sold as slaves. Their enslavement by the Defendant provided a framework for the physical and psychological abuse carried out by him and also formed part of an overall course of events that featured a multitude of similar acts, all driven by an unconditional desire for destruction. In particular the organised enslavement of women and girls, especially where it involved religious re-education, served to destroy the religious minority of the Yazidis in order to establish an Islamic caliphate. Overall, the actions were suitable to bring about the intended result, i.e. the (partial) destruction of this group as such.

39 b) The Defendant is guilty of a crime against humanity by causing serious bodily or mental harm resulting in death (section 7 (1) no. 8 and section 7 (3) of the CCAIL).

40 Based on the findings of the Higher Regional Court, the Defendant intentionally caused at least serious bodily harm to the daughter of the private accessory prosecutor and in any case caused serious mental harm to the private accessory prosecutor herself. He therefore committed offence no. 8 in the list of individual offences under section 7 (1) of the CCAIL. When drafting section 7 (1) no. 8 of the CCAIL, the legislature took the deliberate decision to adopt the wording used for the variant of the offence of genocide set out in section 220a (1) no. 2 of the Criminal Code (old version) and subsequently in section 6 (1) no.

2 of the CCAIL (see Bundestag printed paper 14/8524 p. 22; Gropengießer/Kreicker in Eser/Kreicker [eds.], *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, vol. 1, 2003, p. 137 et seq.). Consequently, for this crime against humanity it is likewise sufficient – but also necessary – that the harm caused to the injured person result in a grave and long-term disadvantage to the person's ability to lead a normal and constructive life (cf. MüKo-StGB/Werle/Jeßberger, 4th ed., section 7 VStGB margin no. 99 [reference to section 226 of the Criminal Code only as an example], 102).

41 It is not necessary to expand in any greater detail here on the fact that the IS carried out an extensive and systematic attack against the Yazidi civilian population living in the Sinjar region (cf. Federal Court of Justice, decisions of 17 June 2010 - AK 3/10, BGHSt 55, 157 margin no. 24 et seqq.; of 9 February 2021 - AK 5/21, juris margin no. 32 et seq. with further references), that the Defendant's actions were functionally integrated into this overall offence (cf. Federal Court of Justice, decision of 7 October 2021 - AK 43/21, juris margin no. 24 with further references), and that his actions, as he could have predicted, resulted in Re.'s death.

42 2. However, the conviction for aiding the war crime against persons by deportation in two cases arising from the same conduct (section 8 (1) no. 6 of the CCAIL, section 27 (1) and section 52 of the Criminal Code) and for bodily harm resulting in death (section 223 (1) and section 227 (1) of the Criminal Code) is to be annulled.

43 a) The Defendant did not – after the fact – aid (*sukzessive Beihilfe*) the war crime against persons through deportation within the meaning of section 8

(1) no. 6 of the CCAIL, which was committed by IS members against the private accessory prosecutor and her daughter and against the Yazidis in general.

44 aa) It is true that the unlawful actions of members of the terrorist organisation fulfilled the constitutive elements of section 8 (1) no. 6 of the CCAIL. According to this provision, whoever, in connection with an international or non-international armed conflict, deports or forcibly transfers, by expulsion or other coercive acts, a person who is to be protected under international humanitarian law (section 8 (6) of the CCAIL) from an area in which they are lawfully present to another State or another area in contravention of a general rule of international law, will incur criminal liability.

45 (1) This criminal provision is modelled on the provisions of Article 8 paragraph 2 (a) (vii) of the ICC Statute concerning international conflicts, and Article 8 paragraph 2 (e) (viii) of the ICC Statute concerning non-international conflicts, which the German legislature combined into one norm, while retaining their substantive content (see Bundestag printed paper 14/8524 p. 27). The latter of the two provisions is derived from Article 17 (1) sentence 1 of the Second Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 (Federal Law Gazette 1990 II p. 1637; hereinafter: PA II). This states that the displacement of the civilian population may not be ordered for reasons related to a conflict unless the security of the civilians involved or imperative military reasons so demand. This provision draws on the legal concepts relating to international armed conflict set out in Article 49 (1) and (2) of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Federal Law Gazette 1954 II p. 917; henceforth: GC IV) (see

Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., margin no. 1343). However, section 8 (1) no. 6 of the CCAIL does not criminalise the ordering of the displacement, but the displacement itself, whereby it is sufficient if the displacement affects only one person to be protected under international humanitarian law (see Bundestag printed paper 14/8524 p. 27; MüKoStGB/Geiß/Zimmermann, 4th ed., section 8 VStGB margin no. 170, 172; on the restriction of the offence to civilians in accordance with Article 147 GC IV, cf. Gropengießer/Kreicker in Eser/Kreicker [eds.], *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, vol. 1, 2003, p. 172).

46 By naming deportation and forcible transfer as criminal acts, section 8 (1) no. 6 of the CCAIL covers any form of forced actual displacement from an area in which the persons are lawfully present to another place against their free will (see Bundestag printed paper 14/8524 pp. 20, 27; MüKoStGB/Geiß/Zimmermann, 4th ed., section 8 VStGB margin no 173 et seq.) – to a place outside the territory of the state in the case of deportation, and to a place within the state in the case of transfer (on international law, see Werle/Jeßberger, *Völkerrecht*, 5th ed., margin no. 1343). Both alternatives require action in violation of a general rule of international law within the meaning of Article 25 of the Basic Law (*Grundgesetz*) (cf. MüKoStGB/Geiß/Zimmermann loc. cit., margin no. 26, 177).

47 (2) The conduct of the IS members during the attack against the Yazidis living in the Sinjar region fulfils the constituent elements of section 8 (1) no. 6 of the CCAIL.

48 According to the findings of the Higher Regional Court's judgment, the IS systematically abducted Yazidi women and children. Under threat of armed

force, the IS first displaced them to holding sites, then on to group accommodation not far away. The IS then forcibly distributed them across the areas they occupied, primarily to M. and R. Women and older girls were then "brought to market" directly from these group accommodation sites to be sold as domestic slaves and sex slaves; they were also brokered via centralised slave markets and online auctions, and later also "traded" privately. On 3 August 2014, the private accessory prosecutor and her daughter Re. were also captured in this manner by IS fighters in the Sinjar region close to their hometown. They were forcibly displaced to R. by members of the organisation via various stopover points in Iraq. There they were bought and sold as slaves several times before they ultimately came into the Defendant's possession.

49 The Yazidi civilians were persons to be protected under international humanitarian law within the meaning of section 8 (6) no. 2 of the CCAIL (on the requirements for this, see Federal Court of Justice, judgment of 20 December 2018 - 3 StR 236/17, BGHSt 64, 10 margin no. 78 et seqq., 84 et seqq.; order of 4 April 2019 - AK 12/19, NStZ-RR 2019, 229, 231). The forced displacement of these people to other areas fulfilled the requirement of having a functional connection to the non-international armed conflict in Iraq at the time (cf. Federal Court of Justice, judgment of 27 July 2017 - 3 StR 57/17, BGHSt 62, 272 margin no. 55 with further references; order of 17 October 2019 - AK 56/19, juris margin no. 38). The actions of the IS members who carried out the offences in this context, for which there were no legitimate objective grounds, violated a general rule of international law expressed in the provisions of the GC IV and the PA II (cf. Bundestag printed paper 14/8524 pp. 21, 27;

MüKoStGB/Geiß/Zimmermann, 4th ed., section 8 VStGB margin no. 179 with further references).

50 bb) However, the Higher Regional Court made no findings in support of its assessment that the Defendant assisted in the commission of this main offence within the meaning of section 27 (1) of the Criminal Code.

51 (1) By displacing the private accessory prosecutor and Re. from Syria to F. in Iraq, the Defendant did not make a conducive contribution as an aider to the offence by intensifying the act of their deportation.

52 An instance of aiding after the fact by promoting the main offence after its completion but before its substantive cessation (cf. Federal Court of Justice, judgment of 24 June 1952 - 1 StR 316/51, BGHSt 3, 40, 43 et seq.; order of 5 May 2021 - 3 StR 465/20, NStZ-RR 2021, 374 with further references) cannot be established here. The deportation of the private accessory prosecutor and her daughter was completed after the IS members had abducted them from the Sinjar region in Iraq, bringing them across the state border into Syria. The fact that the Defendant then returned them from there to Iraqi territory does not intensify the act constituting the offence or the result of the offence itself. This is all the more true as F. is not situated significantly further away from the place of their capture than R., and it has not been shown or is not otherwise evident that the two Yazidi women were lawfully present on Syrian territory.

53 (2) Neither with these or other acts directed against the private accessory prosecutor and Re., nor in any other way, did the Defendant make a contribution to promoting the IS's general practice of deportation and transfer, and particularly not through the psychological aiding of an offence (cf. Federal Court

of Justice, order of 11 January 2022 - 3 StR 452/20, juris margin no. 33 with further references).

54 It must be acknowledged that, in the case of organised mass crimes, the leaders who order or direct the commission of the offence may themselves also be influenced psychologically (see Federal Court of Justice, judgment of 20 December 2018 - 3 StR 236/17, BGHSt 64, margin no. 107). This may be the case in particular if the leaders are in a position to draw upon a fixed structure of willing, obedient and reliable subordinates in order to execute a criminal enterprise that they themselves have contemplated. The recognisable willingness of such subordinates to commit certain criminal acts can strengthen the decision-makers' resolve to order the corresponding offences (cf. Federal Court of Justice, orders of 20 September 2016 - 3 StR 49/16, BGHSt 61, 252 margin no. 23 et seqq.; of 6 June 2019 - StB 14/19, BGHSt 64, 89 margin no. 78). However, it has not been established that the Defendant was himself involved in such a manner in the practice of deportation and transfer, itself constituting a system for the practical implementation of the centrally ordered forced displacement of Yazidi civilians.

55 b) Due to an "apparent" or "false concurrence" (*Gesetzeskonkurrenz*), the offence of bodily harm resulting in death is subsumed by the crimes against humanity resulting in death under section 7 (1) no. 5 and 8 and section 7 (3) of the CCAIL as well as by the war crime against persons resulting in death under section 8 (1) no. 3 and section 8 (4) sentence 1 of the CCAIL (on the application of sections 7 and 8 of the CCAIL alongside section 6 of the CCAIL, see MüKoStGB/Kreß, 4th ed., section 6 margin no. 110; MüKoStGB/Werle/Jeßberger, 4th ed., section 7 VStGB margin no. 142 et seq.;

MüKoStGB/Ambos, 4th ed., above section 8 VStGB margin no. 47). Whether or not this also applies to the offence of genocide under section 6 (1) no. 2 of the CCAIL does not need to be decided here (cf. on section 220a of the Criminal Code (old version) Federal Court of Justice, judgment of 30 April 1999 - 3 StR 215/98, BGHSt 45, 64, 85, 91; also MüKoStGB/Kreß loc. cit., margin no. 107).

56 Under the rules on *concursum delictorum*, an offence under general criminal law that protects individual legal interests can be superseded not only by a war crime against persons (see Federal Court of Justice, judgment of 28 January 2021 - 3 StR 564/19, BGHSt 65, 286 margin no. 82), but also by a crime against humanity. This is because, irrespective of the protective purpose of section 6 of the CCAIL (cf. on the one hand Federal Court of Justice, judgment of 30 April 1999 - 3 StR 215/98, BGHSt 45, 64, 81 et seq. [on section 220a of the Criminal Code (old version)]; order of 3 February 2021 - AK 50/20, StV 2021, 596 margin no. 48; Gropengießer/Kreicker in Eser/Kreicker [eds.], *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, vol. 1, 2003, p. 96 et seqq.; but also Ambos, *Internationales Strafrecht*, 5th ed., section 7 margin no. 125; MüKoStGB/Kreß, 4th ed., section 6 margin no. 1 et seq.; Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., margin no. 870, each with further references), section 7 of the CCAIL also serves – among other things – to protect the inalienable rights of the individual persons affected by the objective criminal acts (see Federal Court of Justice, order of 3 February 2021 - AK 50/20, loc. cit., margin no. 45).

57 Cases of "apparent" or "false concurrence" (*Gesetzeseinheit/Gesetzeskonkurrenz*) arise where a conduct violates several criminal provisions, but only one of the provisions needs to be applied in order

to capture the wrongdoing of the conduct, with the other offences being subsumed by that single provision (cf. in general Federal Court of Justice, order of 29 April 2020 - 3 StR 532/19, NStZ-RR 2020, 243 with further references; also Federal Court of Justice, order of 11 June 2020 - 5 StR 157/20, BGHSt 65, 36 margin no. 19 et seqq.; judgment of 28 January 2021 - 3 StR 564/19, BGHSt 65, 286 margin no. 82 [on section 8 of the CCAIL]). This is the case with section 223 (1) and section 227 (1) of the Criminal Code in relation to section 7 (1) nos. 5 and 8, section 7 (3), section 8 (1) no. 3 and section 8 (4) sentence 1 of the CCAIL. In the context of an attack on the civilian population or in connection with armed conflict, both the fatal infliction of serious bodily or mental harm and the fatal infliction of substantial bodily or mental harm or suffering (torture) also amount to bodily harm resulting in death – at least in common and typical cases. Exceptional cases in which the injured person's death is solely attributable to mental harm or suffering that does not fulfil the elements of section 223 (1) of the Criminal Code seem hardly conceivable and need not be considered when assessing the relationship between norms under the rules on *concursum delictorum*.

58 Where an accessory prosecution offence within the meaning of section 395 (1) no. 3 of the Code of Criminal Procedure is superseded by another offence, this has no bearing on the actual right to private accessory prosecution because the declaration of joinder may not be impeded by a merger or "apparent concurrence" (*Gesetzeskonkurrenz*) between the offence liable to public prosecution (*Offizialdelikt*) and the accessory prosecution offence (cf. KK-StPO/Allgayer, 9th ed., section 395 margin no. 19 with further references).

59 3. For the rest, the revised verdict of guilt is based on the following
assessment of the concurrence of norms (*concursum delictorum*):

60 a) With regard to the crimes against humanity resulting in death under
section 7 (1) nos. 3, 5, 8 and 9 and section 7 (3) of the CCAIL, the four listed
offences committed by the Defendant are deemed to be distinct offences
committed by the same conduct (*ungleichartige Idealkonkurrenz*). These distinct
offences must therefore be included in the operative part of the judgment. For
this, it is advisable (cf. section 260 (4) sentence 5 of the Code of Criminal
Procedure) to use the abbreviated designations given in the explanatory
memorandum to the draft Act to Introduce the Code of Crimes against
International Law: enslavement, torture, causing serious physical or mental harm
and deprivation of liberty (see Bundestag printed paper 14/8524 p. 20 et seqq.).

61 aa) The fact that the offences listed under section 7 (1) are distinct
offences that can be simultaneously committed by the same conduct is clear in
particular from the protective purpose and structure of the provision. The crime
against humanity differs in this respect from genocide, where the described
forms of commission do not constitute independent offences, but rather are
variants of the same offence, with each variant being characterised by the
perpetrator's particular intent to commit genocide (see Federal Court of Justice,
judgment of 30 April 1999 - 3 StR 215/98, BGHSt 45, 64, 81 et seq. [on section
220a of the Criminal Code (old version)]; order of 3 February 2021 - AK 50/20,
StV 2021, 596 margin no. 48).

62 The individual offences regulated in subsection 1 of section 7 of the
CCAIL, which, as outlined above, at least also serves to protect inalienable
rights, cover an extensive range of individual legal interests, namely: life, health,

freedom and sexual self-determination (cf. MüKoStGB/Werle/Jeßberger, 4th ed., section 7 VStGB margin no. 1). Accordingly, even though the general rules for offences against inalienable rights do not apply without restriction to crimes against humanity (see Federal Court of Justice, order of 3 February 2021 - AK 50/20, StV 2021, 596 margin no. 49) – which is not the case for war crimes against persons (see Federal Court of Justice, judgment of 28 January 2021 - 3 StR 564/19, BGHSt 65, 286 margin no. 80) – it is clear that the offences listed under section 7 (1) of the CCAIL – just as with section 8 (1) of the CCAIL (see, for example, Federal Court of Justice, order of 21 September 2020 - StB 28/20, juris margin no. 24) – should be legally regarded not as modalities of the same offence, but rather as distinct offences in their own right (cf. more recently Federal Court of Justice, orders of 4 May 2022 - AK 17/22, NStZ-RR 2022, 227, 228; of 12 October 2022 - AK 32/22, juris margin no. 8; also MüKoStGB/Werle/Jeßberger loc. cit. margin no. 144). This conclusion is further supported by the fact that the provision contains a categorisation with graduated degrees of wrongdoing, which is reflected in the three different sentencing ranges for the individual offences.

63 In addition, the assumption that different offences were violated by the same conduct (i.e. a situation of "true concurrence") is also in line with the case law of the international criminal courts, according to which the individual variants of the crime against humanity can in principle be committed in parallel (see, for example, ICTY, judgment of 12 June 2002 - IT-96-23 and IT-96-23/1-A - Kunarac et al., margin no. 179, 186; see Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., margin no. 1121 with further references).

64 bb) No exception can be made to this principle for the offences of section 7 (1) nos. 3, 5, 8 and 9 of the CCAIL because none of them is superseded by any other. This also applies to the crime against humanity by causing serious bodily or mental harm: While Art. 7 (1) letter k of the ICC Statute ("other inhumane acts of a similar character"), on which section 7 (1) no. 8 of the CCAIL is based (see Bundestag printed paper 14/8524 p. 22; MüKoStGB/Werle/Jeßberger, 4th ed., section 7 VStGB margin no. 98), was conceived as a subsidiary "catch-all" provision (see Ambos, *Internationales Strafrecht*, 5th ed., section 7 margin no. 219; Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., margin nos. 1115, 1122), the same cannot be said of the corresponding national criminal provision. Indeed, due to the requirement of specificity pursuant to Art. 103 (2) of the Basic Law (*Grundgesetz*), the constituent elements of the national provision were deliberately formulated more narrowly than the international provision it was modelled on (see Bundestag printed paper 14/8524 p. 22); as a result, that offence too embodies a specific wrongdoing.

65 b) Insofar as the general rules for offences against inalienable rights are applicable (see a] aa] above), it is true that – contrary to the Higher Regional Court's opinion – a single substantive act can be deemed to have violated a criminal provision several times (*gleichartige Tateinheit*) if (partially) identical conduct is carried out against several different victims (cf., in general, Federal Court of Justice, order of 4 April 2019 - AK 12/19, juris margin no. 60; also Federal Court of Justice, judgment of 28 January 2021 - 3 StR 564/19, BGHSt 65, 286 margin no. 80). However, for the sake of the clarity and comprehensibility of the verdict of guilt, the Panel refrains from including this aspect of *concursum delictorum* in the operative part of the decision (cf. Federal Court of Justice, order

of 31 May 2016 - 3 StR 54/16, NStZ-RR 2016, 274, 275; judgment of 28 January 2021 - 3 StR 564/19, loc. cit., margin no. 84).

66 c) The verdict of guilt is to be amended in accordance with section 354 (1) of the Code of Criminal Procedure. This amendment is not precluded by the provision of section 265 of the Code of Criminal Procedure as the Defendant could not have defended himself more effectively than he did. The prohibition of *reformatio in peius* pursuant to section 358 of the Code of Criminal Procedure does not prevent the verdict of guilt from being made in part more severe (see Federal Court of Justice, order of 7 September 2022 - 3 StR 165/22, juris margin no. 30).

67 4. The sentence is upheld. It can be ruled out that the Higher Regional Court would have refrained from imposing the life imprisonment sentence provided for as a standard sentence under section 6 (1) of the CCAIL and would instead have found that the facts constituted a less serious case under section 6 (2) of the CCAIL if it had found the Defendant not guilty of aiding a war crime against persons through deportation and had correctly assessed the relationship between the offences under the rules of *concursum delictorum*. In view of the large number of other more serious offences committed by the Defendant as a perpetrator, the offence of aiding was evidently not of decisive importance for the choice of sentencing range. The relationship between the offences under the rules of *concursum delictorum* does not ordinarily have any bearing on the degree of wrongdoing and culpability, and that is also the case here (cf., for example, Federal Court of Justice, orders of 25 June 2019 - 3 StR 130/19, juris margin no. 9 with further references; of 3 November 2021 - 3 StR 231/21, juris margin no. 18).

68 III. Given the minor success of the appeal, it cannot be considered inequitable to charge the Defendant with the entire costs of his appeal (section 473 (4) of the Code of Criminal Procedure).

Prior instance:

Frankfurt am Main Higher Regional Court, 30/11/2021 - 5 - 3 StE 1/20 - 4
- 1/20