

FEDERAL COURT OF JUSTICE

IN THE NAME OF THE PEOPLE

JUDGMENT

3 StR 246/22

of

9 March 2023 in

the criminal proceedings

against

inter alia for the crime against humanity of enslavement resulting in death

ECLI:DE:BGH:2023:090323U3STR246.22.0

On the basis of the hearing of 26 January 2023, the Third Criminal Panel of the Federal Court of Justice, at its sitting on 9 March 2023 attended by:

Presiding Judge at the Federal Court of Justice

Judges at the Federal Court of Justice

sitting as associate judges,

Federal Public Prosecutor at the Federal
Court of Justice

representing the Federal Public
Prosecutor General

Rechtsanwalt

- present in court -,

Rechtsanwältin

- present in court -

acting as defence counsel,

Rechtsanwältin

- present in court -

representing the joint plaintiff

Justizamtsinspektorin

Certifying Officer of the Court Registry

ruled as follows:

In response to the appeal on points of law (*Revision*) lodged by the Federal Public Prosecutor General, the judgment handed down by Munich Higher Regional Court on 25 October 2021 is set aside insofar as it concerns the individual penalty imposed for the crime against humanity of enslavement resulting in death (and for other criminal offences arising from the same conduct) and insofar as it concerns the aggregate sentence; the associated factual findings, however, are upheld in each case.

To the extent that the judgment is set aside, the case is remitted to a different criminal division of the Higher Regional Court for a new hearing and decision, including in relation to the costs of the appeal.

In the name of the law

Reasons:

1 The Higher Regional Court found the defendant guilty on two counts of participation as a member in a foreign terrorist organisation. In one of these counts, the conduct in question also satisfied the elements of two crimes against humanity by enslavement, one resulting in death. The same conduct also satisfied the elements of the following offences: aiding (by omission) an attempt to commit murder; aiding (by omission) an attempt to commit the crime against humanity of killing a person; and aiding (by omission) an attempt to commit the war crime of killing a person. The Higher Regional Court therefore sentenced the defendant to an aggregate prison sentence of ten years. It also rendered an 'adhesion' decision [a decision on the civil law claims of the victim].

2 Based on an objection to the Higher Regional Court's application of substantive law, the Federal Public Prosecutor General lodged an appeal to the detriment of the defendant, challenging the individual penalty imposed for the crime against humanity of enslavement resulting in death (and for the other offences arising from the same conduct) as well as challenging the aggregate sentence. The appeal is successful.

3 1. The Higher Regional Court established the following:

4 As part of its efforts to create a global Islamic state, the terrorist
organisation 'Islamic State' (IS), which was militarily active in the civil-war regions
of Syria and Iraq, began persecuting the group of approximately 300,000 Yazidis
living in the northern Iraqi region between Mosul and Raqqa, around the city of
Sinjar. From early August 2014, IS carried out an operation to destroy and
enslave the civilian Yazidi population. Its fighters enacted their plans to advance
on the Sinjar area, killing many thousands of men and capturing large numbers
of women and girls. At least 5,000 of the captured Yazidi women, including the
joint plaintiff and her young daughter R., were deported to Syria via a system of
transport routes and assembly points. From there, they were sold as slaves –
some of them more than once.

5 At the end of August 2014, the defendant travelled from Germany to an
area in Syria that was under IS control in order to offer herself for marriage to a
member of the organisation who was unknown to her at that time. The defendant
then also joined the organisation. She was initially housed in various IS women's
accommodations, where she was subject to IS orders. She received a regular
cash allowance from IS, as well as special payments known as 'spoils of war'. At
the end of 2014, the defendant married a member of the organisation before an
IS court. Between her stays in the women's accommodations, she lived in the
home of the IS member until their divorce sometime around February 2015.

6 In June 2015, the defendant entered into a marriage before an IS court in
Ra. with A., an active member of IS who has since been convicted by final and
binding judgment. Prior to this, A. had bought the joint plaintiff and her daughter
as slaves. He and the defendant travelled with them to F. in Iraq. In the summer
of 2015, they held the two Yazidi women there as 'domestic slaves' for
approximately one and a half months. The defendant ordered the joint plaintiff to
run the household for her. Together with A., she demanded that the joint plaintiff
and R. follow Islamic prayer rituals multiple times a day and gave the child a
Muslim name. A. mistreated them both as a means of punishment and discipline,
partly on his own initiative and partly following complaints from the defendant. He

beat the joint plaintiff on an almost daily basis and, on several occasions, also beat her daughter. The defendant observed this behaviour repeatedly. Through her actions, she knowingly and intentionally promoted the IS policy of destroying the Yazidi religion and enslaving the female Yazidi population.

7 In early August 2015, A. tied the five-year-old R. to the outer railings of a window in the courtyard of his house in very hot weather, leaving her exposed to direct sunlight and unable to use her legs to support herself. The defendant failed to intervene, even when she realised that the victim's life was in danger. The girl died as a result of having been tied up and left hanging outside. By the time the defendant had wilfully accepted the child's death, however, it would no longer have been possible to save her.

8 On the day of the incident (or shortly thereafter), the defendant held a pistol to the head of the joint plaintiff, who was crying for her child, and threatened to shoot her if she did not stop.

9 2. The Higher Regional Court ruled that the organisation-related activities undertaken by the defendant as a member of IS (other than the enslavement of the joint plaintiff and her daughter) constituted one count of participation as a member in a foreign terrorist organisation (section 129a (1) no. 1, section 129b (1) of the Criminal Code, *Strafgesetzbuch* – StGB). For this, it imposed an individual custodial term of two years and six months on the defendant. The enslavement perpetrated by the defendant as a member of IS (in association with her husband A.) – including the resulting death of the child – was considered by the Higher Regional Court as a separate count, with the defendant's conduct satisfying the elements of two crimes against humanity by enslavement, one resulting in death (section 7 (1) no. 3 and section 7 (3) of the Code of Crimes against International Law – *Völkerstrafgesetzbuch*, VStGB); by the same conduct that gave rise to those crimes against humanity, the Higher Regional Court found that the defendant had also committed the following offences: aiding an attempt to commit murder (section 211 StGB) by omission (section 13 (1), sections 22, 23 (1), section 27 (1) StGB); aiding an attempt to commit the crime against humanity of killing a person (section 7 (1) no. 1 VStGB) by omission; aiding an attempt to commit the war crime of killing a person (section 8 (1) no. 1, (6) no. 2 VStGB) by omission; and participation as a member in a foreign terrorist

organisation. When calculating the punishment for this conduct, the Higher Regional Court applied the most severe penalty as stipulated by section 52 (2) StGB, based on the penalty range defined in section 7 (4) alternative 1 VStGB for less serious cases of the crime against humanity of enslavement resulting in death. On this basis, it imposed an individual custodial term of nine years.

II.

10 The appeal on points of law lodged by the Federal Public Prosecutor General is well-founded in its challenge of the judgment.

11 1. According to the notice of appeal and the statement of grounds, the Federal Public Prosecutor General challenges only the decision imposing the individual penalty for the second count, which involved the joint plaintiff and her daughter (hereinafter: “count 2”) and the decision imposing the aggregate sentence. The Federal Public Prosecutor General has not challenged the findings associated with these two decisions. This is a valid limitation on the scope of the appeal. Given the judgment's internal logic, both aspects can be legally and factually assessed independently of the unchallenged part of the judgment, without necessitating a review of the remainder of the judgment. The same also applies to the other individual penalty imposed. There is no reason to fear that the aggregate decision – issued in stages – could exhibit internal contradictions following this partial appeal (for the applicable legal standards based on consistent past decisions, see, for example, Federal Court of Justice, judgment of 2 March 1995 - 1 StR 595/94 BGHSt [Rulings of the Federal Court of Justice in Criminal Cases] Vol. 41, p. 57, p. 59; order of 2 December 2004 - 3 StR 246/04, BGHR StPO [Previous decisions of the Federal Court of Justice relating to the Code of Criminal Procedure] on ‘§ 344 (1) Beschränkung 16 [Limitation of appeal 16]’; judgment of 10 August 2017 - 3 StR 275/17, juris para. 8; on excluding a judgment's findings from the appeal on points of law, cf. Wiedner in BeckOK StPO, 46th ed., §344 para. 20). The decision on adhesion does not fall within the scope of the appeal lodged by the Federal Public Prosecutor General (cf. Federal Court of Justice, judgment of 15 December 2022 - 3 StR 245/22, juris para. 17 with further references).

12 2. As regards the individual penalty imposed for count 2, the Higher Regional Court's application of substantive law in the judgment does not stand up to review. There are serious legal concerns about the Higher Regional Court's conclusion that the circumstances constitute a less serious case of the crime against humanity of enslavement resulting in death pursuant to section 7 (4) alternative 1 VStGB.

13 a) The decisive factor in classifying a case as less serious is whether the overall circumstances of the offending conduct, including all subjective aspects and the character of the offender, deviate from the average of typically occurring cases to such an extent that it appears necessary to apply the special [reduced] penalty range (see Federal Court of Justice, orders of 14 May 2019 - 3 StR 503/18, NStZ-RR 2019, p. 344, p. 345; of 10 March 2022 - 1 StR 35/22, juris para. 5, in each case with further references). This is to be determined by the trial court following an overall assessment of all circumstances relevant to the determination of penalty. Only by comprehensively weighing these factors can a decision be made as to whether the standard penalty range is appropriate for the particular circumstances of the case, or whether this would be unduly harsh because of overriding mitigating circumstances (cf. Federal Court of Justice, order of 19 February 2015 - 2 StR 343/14, BGHR StGB [Previous decisions of the Federal Court of Justice relating to the Criminal Code] on '§ 250 Abs. 3 Strafrahmenwahl 2 [Choice of penalty range 2]', para. 4). It is essentially for the trial court to decide whether individual circumstances are to be considered mitigating or aggravating (see Federal Court of Justice, order of 10 April 1987 - GSSt [Grand Panel for Criminal Matters] 1/86, BGHSt Vol. 34, p. 345, p. 350; judgment of 12 January 2016 - 1 StR 414/15, NStZ-RR 2016, p. 107, p. 108) and to what extent it attaches decisive weight to them (see Federal Court of Justice, judgments of 13 October 2016 - 4 StR 239/16, juris para. 56; of 27 July 2017 - 3 StR 490/16, wistra 2018, p. 209 para. 65; and on the matter as a whole: Miebach/Maier in MüKoStGB, 4th ed., on '§ 46' para. 115-116; Schäfer/Sander/van Gemmeren, Praxis der Strafzumessung, 6th ed., para. 1107ff., in each case with further references); however, there are some circumstances that are necessarily to be considered favourable or detrimental to the offender when determining the penalty (cf. examples from past decisions in LK/Schneider, StGB, 13th ed., § 46 para. 316).

14 The court hearing the appeal on law may only interfere with the determination of penalty, including the choice of the penalty range, if the considerations on which the penalty was based are inherently incorrect, if the legally recognised purposes of the penalty have been violated, or if the penalty imposed is so far removed from its objective of justly offsetting the offender's guilt that it is no longer considered to fall within the margin of discretion granted to the trial court. When setting out the considerations underlying the penalty, the trial court is required only to state the reasons which were decisive in determining the penalty (section 267 (3) sentence 1 of the Code of Criminal Procedure – *Strafprozessordnung*, StPO). An exhaustive list of all possible considerations is neither mandatory nor possible. The fact that a particular aspect relevant to the determination of penalty is not explicitly mentioned does not necessarily mean that the court did not recognise or consider it (see Federal Court of Justice, judgments of 4 April 2019 - 3 StR 31/19, juris para. 15; of 5 May 2022 - 3 StR 412/21, NStZ-RR 2022, p. 290, p. 292). An error in law is considered to exist, however, if it is clearly evident from the reasons for the judgment that the court failed to consider a key circumstance that characterised the offence (cf. Federal Court of Justice, judgment of 7 November 2007 - 1 StR 164/07, wistra 2008, p. 58, p. 59 with further references).

15 b) Based on the legal standards set out above, the Higher Regional Court's choice of penalty range constitutes an error in law.

16 aa) With regard to the application of the special penalty range provided for in section 7 (4) alternative 1 VStGB, it is already doubtful whether the Higher Regional Court carried out the necessary overall assessment of all circumstances relevant for the determination of penalty. It is true that the Higher Regional Court stated at the beginning of its review that it regarded this to be a 'less serious case in view of all the circumstances surrounding the offence and the offender' (judgment copy (JC), p. 59). However, in its subsequent assessment that the present case deviates significantly 'from the average of cases subject to the standard penalty range', there were gaps in the Higher Regional Court's argumentation (JC, p. 59).

17 When discussing the relevant aspects in this regard, the Higher Regional Court (division for crimes against the state) addressed only two circumstances

that might have precluded the assumption of a less serious case: the defendant's behaviour following the crime – namely her intention to return to IS territory in 2018 – and the fact that her criminal conduct also satisfied the elements of further offences. However, the Higher Regional Court did not discernibly address the aggravating circumstances it considered to be decisive for the determination of penalty in the narrower sense (section 267 (3) sentence 1 alternative 2 StPO), namely that the enslavement extended over a period of one and a half months and had no foreseeable end for the victims. It is unclear why a discussion of these aspects was not deemed necessary when examining whether the circumstances constituted a less serious case, while a discussion of other potentially aggravating circumstances was.

18 bb) In any event, there is an error in law in the Higher Regional Court's assessment of the criminal offences that arose from the same conduct as the crime against humanity of enslavement resulting in death, in particular the offence of aiding (by omission) an attempt to commit murder, of aiding (by omission) an attempt to commit the crime against humanity of killing a person, and of aiding (by omission) an attempt to commit the war crime of killing a person (JC, pp. 62-63.). As evidenced by the reasons for the judgment, the Higher Regional Court found these offences to be irrelevant for assessing whether the circumstances constituted a less serious case pursuant to section 7 (4) alternative 1 VStGB. It therefore failed to recognise that the violation of several laws by the same conduct generally has an aggravating effect in substantive law. This is particularly true when – as here – the case involves participation in attempted homicide offences.

19 (1) The Higher Regional Court's statements concerning the commission of other offences by the same conduct begin by asserting that this circumstance does not rule out a less serious case. Thus, the aggravating nature of this circumstance was erroneously rejected from the outset. What the wording does *not* indicate is that the Higher Regional Court, having considered this circumstance to be an aggravating factor in its overall balancing, ultimately decided not to accord it any decisive weight (which would have been legally unobjectionable).

20 (2) The subsequent statements do not suggest anything different either. With regard to the offence of aiding (by omission) attempted intentional killing,

the Higher Regional Court stated that special mitigating circumstances established by law must be taken into account (section 13 (2), section 23 (2), section 27 (2) sentence 2, section 28 (1) StGB) and that, as a result, the minimum penalty for the offences of section 211 StGB, section 7 (1) no. 1 VStGB and section 8 (1) no. 1 VStGB should be set 'in each case' at a custodial sentence of no less than three years, even if the optional reduction in penalty range were not applied. This, the court stated, is 'far below the standard penalty range provided for in section 7 (3) and section 7 (4) VStGB' (JC, pp. 62-63).

21 It is unclear what the Higher Regional Court intended to say with this. Irrespective of whether the minimum penalty was calculated correctly, these statements – even in the overall context of the reasons for the judgment – do not indicate that the court, despite the introductory wording used, did consider the other offences arising from the same conduct to have an aggravating effect and that it subsequently only accorded this aggravating effect a reduced weight in its overall balancing. Insofar as the Higher Regional Court concluded that these other criminal offences should carry a minimum penalty of just three years' imprisonment – due to the necessary mitigations – rather than the minimum penalty stipulated in section 7 (4) alternative 1 VStGB, the Higher Regional Court's subsequent assessment that this minimum penalty falls 'far' short of the five-year minimum penalty is not comprehensible (cf. for example section 49 (1) no. 3 StGB).

22 It is clear from the provision of section 52 (2) sentence 1 StGB that, where several offences are committed by the same conduct, the trial court must base its sentencing on the statutory provision which provides for the most severe penalty. But this does not mean that the commission of further offences by the same conduct cannot be used as an argument for applying the standard penalty range stipulated in the provision relevant for determining the penalty.

23 It should furthermore be noted that the Higher Regional Court also classified the penalties in section 7 (4) alternative 1 VStGB as the standard penalty range rather than the special penalty range. While not relevant to the decision, this incorrect designation indicates a further misunderstanding of the provisions on less serious cases.

24 (3) In light of the above, it is to be feared that the Higher Regional Court erred in law by assuming that it could not classify the additional offences arising from the same conduct as precluding the application of the special penalty range of section 7 (4) alternative 1 VStGB because it could not apply the same minimum penalty to any of them.

25 cc) It is also at least questionable that the defendant's motives for the offence, which can clearly be classified as evidencing contempt for humanity, were not mentioned as a factor to her detriment, either during the determination of penalty range or during the determination of penalty in the narrower sense.

26 (1) Motives and objectives that evidence contempt for humanity – as well as those that are xenophobic in nature (see Federal Court of Justice, judgment of 20 August 2020 - 3 StR 40/20, BGHR StGB on '§ 60 Absehen, fehlerhaft 1 [Dispensing with penalty, erroneously 1]', para. 13/14) – are generally deemed to be significant in criminal sentencing law. This is established by section 46 StGB, which is the central provision for the sanctioning of unlawful and culpable conduct; for the purpose of clarification, these types of motives have been explicitly listed in subsection (2) sentence 2 of the provision since 1 August 2015 (see Bundestag Printed Paper 18/3007, p. 7, 14).

27 By introducing the catch-all criterion of 'other motives and objectives evidencing contempt for humanity', the legislator is aiming to cover other recognised prohibitions of discrimination. This criterion is intended to apply in cases where the perpetrator reveals a certain ideology in committing the offence (see Federal Court of Justice, judgment of 20 August 2020 - 3 StR 40/20, BGHR StGB on '§ 60 Absehen, fehlerhaft 1 [Dispensing with penalty, erroneously 1]' para. 13/14; Maier in MüKoStGB, 4th ed., on '§ 46' para. 211) whereby the supposed 'otherness' of a group of people is used as justification for disregarding the human rights of the victims and violating their human dignity. Examples mentioned in the legislative materials include 'motives or objectives directed against religious orientation' (Bundestag Printed Paper 18/3007, p. 15).

28 (2) As far as count 2 is concerned, it would appear logical to classify the defendant's motives for enslaving the two Yazidi women as evidencing contempt

for humanity. This is evident in particular from the following findings made in the judgment:

29 The defendant had become convinced that a highly conservative form of Islam was the 'real' Islam and, following the proclamation of the 'caliphate' by IS, she considered it her religious duty to move to IS territory and join them. By 'holding' the joint plaintiff and her daughter as slaves – something she did together with the member of the organisation to whom she was married according to Islamic rites – she knowingly and intentionally promoted the IS policy of destroying the Yazidi religion and enslaving 'the Yazidi people' (JC, p. 14). This was the context in which the defendant and A. forced the joint plaintiff and her daughter to follow Islamic prayer rituals several times a day. They forced R. to use a false Muslim name, which even her mother was forced to use in addressing her. The defendant was aware of some of the abuse perpetrated by A.; indeed, it was partly done on her initiative. After the girl's death, the defendant held a pistol to the head of the grief-stricken joint plaintiff and threatened to shoot her if she did not stop crying.

30 (3) The challenged judgment fails to address any motives or objectives evidencing contempt for humanity that the defendant may have had towards the Yazidi people on the basis of her religious beliefs.

31 In determining the penalty, the Higher Regional Court addressed the defendant's 'fundamentalist interpretation of Islam' only insofar as it took into account as a mitigating factor the finding that she felt obliged – 'at least' subjectively – to submit to A.'s will (JC, p. 62). In the reasons for the judgment, there is no mention of the fact that the defendant's violation of the fundamental rights of persons with other beliefs was clearly rooted in this specific interpretation of her faith. Irrespective of this, the finding that the defendant was merely submitting to the man to whom she was married according to Islamic rites is hard to reconcile with her behaviour after the death of the young girl: Apparently unmoved by the event, the defendant personally used a firearm to stop the mother from crying, thus disregarding the latter's most basic emotional needs.

32 In examining whether the circumstances constituted a less serious case, the Higher Regional Court found in the defendant's favour that 'the killing' of the

five-year-old girl was not motivated by the 'overall campaign of IS against the Yazidi people'. However, contrary to the argument put forward by the defence, this does not mean that the Higher Regional Court gave any further consideration to the motives for the offence or that it did so to the detriment of the defendant. It merely expresses the Higher Regional Court's finding that, while the defendant regarded the enslavement as part of the widespread and systematic attack conducted by IS against the civilian population (which she personally condoned), she did not regard the resulting death of the child in this way. This does not mean that such a far-reaching conclusion can be drawn, especially since the defendant only fulfilled the requirement of section 7 (3) VStGB through acting negligently.

33 (4) When assessing the penalty for the crime against humanity of enslavement resulting in death, the prohibition on considering circumstances that are already statutory elements of the offence, as set forth in section 46 (3) StGB, does not mean that motives and objectives evidencing contempt for humanity cannot be taken into account. These motives – which are clearly evident in the defendant's case – do not constitute elements of section 7 (1) no. 3 and section 7 (3) VStGB. The provision of section 7 VStGB – with the exception of the individual offence in subsection (1) no. 10 – does not provide for any subjective elements of wrongdoing that correspond to the motives or objectives listed in section 46 (2) StGB (cf. Werle/Jeßberger in MüKoStGB, 4th ed., on '§ 7 VStGB' para. 45).

34 Nor do the defendant's motives constitute a subjective circumstance typically associated with the crime against humanity of enslavement (on the significance of typical overall circumstances for section 46 (3) StGB, cf. LK/Schneider, StGB, 13th ed, on '§ 46' para. 258; Schäfer/Sander/van Gemmeren, Praxis der Strafzumessung, 6th ed., para. 705ff.; Schönke/Schröder/Kinzig, StGB, 30th ed., on '§ 46', para. 45c, in each case with further references). It is true that if forms of slavery or modern slavery-like practices (cf. Werle/Jeßberger in MüKoStGB, 4th ed., on '§ 7 VStGB', para. 58) are applied as part of a systematic or widespread attack against a civilian population, this calls into question humanity itself, i.e. the minimum standard of the rules on human coexistence (see Werle/Jeßberger, Völkerstrafrecht [International criminal law], 5th ed., para. 971 with further references.); in general, crimes against humanity derive their criminal dimension under international law from the intensity of the

violation of fundamental individual rights protected under human rights law (cf. Werle/Jeßberger in MÜKoStGB, loc. cit., para. 6). However, such crimes do not automatically involve motives or objectives evidencing contempt for humanity within the meaning of section 46 (2) StGB.

35 As explained under (1) above, these statutory elements cover the deliberate violation of recognised prohibitions of discrimination. In the case of the defendant, the religious orientation of the two Yazidi women was clearly a decisive factor in whether and how the offence was committed. The latter is particularly evident from the forced “re-education” of the two victims towards Islam. The defendant was aware of and even condoned the intent of the IS leaders who ordered the attack on the Yazidis of the Sinjar region, namely to destroy this religious group as such. This intent is a prerequisite for the crime of genocide under section 6 VStGB.

36 (5) The above interpretation is in line with the case law of the International Criminal Court (ICC).

37 The ICC has repeatedly applied Rule 145(2)(b)(v) of its binding Rules of Procedure and Evidence (see Werle/Jeßberger, Völkerstrafrecht, 5th ed., para. 238 with further references) in conjunction with Article 21 (3) of the Rome Statute of the International Criminal Court (ICC Statute) to crimes against humanity (Article 7 ICC Statute). According to those provisions, if the perpetrator committed a crime under international law for any motive involving discrimination – e.g. on the grounds of religion – the ICC must take this into account as an aggravating circumstance (for a similar assessment by the International Criminal Tribunal for the former Yugoslavia on the motive of religious discrimination, see Zeccola, Die Strafzumessung im Völkerstrafrecht unter besonderer Berücksichtigung der Rechtsprechung der Ad-hoc-Tribunale der Vereinten Nationen, 2018, pp. 113-114.). In the past, however, the ICC has declined to consider it an aggravating circumstance when the discrimination forms one of the elements of a crime against humanity; this is the case with the crime of persecution under Article 7 (1) (h) of the ICC Statute, but not with the crime of enslavement under Article 7 (1) (c) of the ICC Statute (see judgments of 6 May 2021 - 2021 ICC-02/04-01/15 - Ongwen, para. 145, 168; of 15 December 2022 - 2021 ICC-02/04-01/15 A2 - Ongwen, para. 336ff., 359).

38 (6) In light of all the above, it would appear necessary to discuss the
defendant's motives evidencing contempt for humanity when determining the
penalty. However, given that the choice of penalty range has already been
demonstrated to be legally flawed for the reasons set out under bb) above, there
is no need for a final decision as to whether the sentence should also be set aside
for this reason (cf. also Bundestag Printed Paper 18/4357 pp. 5-6).

39 c) The individual penalty of nine years' imprisonment imposed for count 2
is based on the aforementioned legal error (section 337 (1) StPO). Had this error
not been made, the Higher Regional Court might not have concluded that the
circumstances constituted a less serious case pursuant to section 7 (4)
alternative 1 VStGB. If that had been the case, an individual custodial penalty of
at least ten years would have been required under the standard penalty
framework of section 7 (3) alternative 1 VStGB.

40 3. The individual penalty imposed in count 2 is therefore set aside. Since
the basis for the aggregate sentence no longer exists, it too must be set aside.

41 The factual findings established in each case are without fault and remain
unaffected by the legally defective (or at least legally questionable) evaluations.
These findings can therefore be upheld (section 353 (2) StPO). The new trial court
is free to make additional findings that do not contradict those that have been
upheld.

III.

42 To the extent that the judgment is set aside, a fresh decision is required.
With a view to the future main hearing, the Federal Court of Justice would like to
point out the following:

43 The Federal Court of Justice does not support the view expressed by the
Federal Public Prosecutor General that when the Higher Regional Court
examined the existence of a less serious case, it was required – in setting out the
reasons for the judgment – to 'establish' and 'define' an average case as a point
of reference for the choice of penalty range, since a 'normative or statistical
standard or normal case' does not exist for the crime against humanity by

enslavement resulting in death. As is the case with other offences, this is not required by law.

44 The decision on whether to apply the standard or special penalty range is taken on the basis of an assessment by the trial court; the decision depends on whether the case as a whole – and not just the offending conduct itself – is considered less serious (see Federal Court of Justice, judgment of 26 June 1991 - 3 StR 145/91, NStZ 1991, 529, 530 with further references). Thus, in the overall balancing, consideration must be given not only to the aggravating and mitigating factors characterising the commission of the offence – with the trial court deciding how the individual factors are to be assessed as set out under II. 2. a) above – but also, for example, to the circumstances following the commission of the offence which may be significant in an individual case. This may include a possible confession, the stabilisation of personal circumstances, assistance in solving the case, or particularly drastic consequences arising from the offence or the proceedings (consistent past decisions; cf. for example Federal Court of Justice, order of 5 November 2020 – 4 StR 201/20, NStZ-RR 2021, 11, 12; also Schäfer/Sander/van Gemmeren, Praxis der Strafzumessung, 6th ed., para. 1108-1109.).

Prior instance:

Munich Higher Regional Court, 25/10/2021 - 8 St 9/18