

FEDERAL COURT OF JUSTICE

ORDER

AK 4/24

of

21 February 2024

Reference: yes
BGHSt: no
Publication: yes

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

The general immunity of public officials does not apply in the case of crimes against international law, regardless of the status and rank of the perpetrator. The fact that foreign officials are excluded from this functional immunity if they commit crimes against international law is an indisputable part of customary international law.

In order for conduct to qualify as the crime against humanity of enslavement under section 7 (1) no. 3 of the Code of Crimes against International Law, it is not absolutely necessary for the perpetrator to have exercised an arrogated 'right of ownership' over the victim for a longer period of time; this is merely one indicator of enslavement and does not mean that the possibility of enslavement is excluded in short-term cases.

Federal Court of Justice, order of 21 February 2024 - AK 4/24

in the investigation proceedings
against

for *inter alia* the crime against humanity of torture

ECLI:DE:BGH:2024:210224BAK4.24.0

On 21 February 2024, after hearing the accused and his defence counsel, the Third Criminal Panel of the Federal Court of Justice ruled in accordance with sections 121 and 122 of the Code of Criminal Procedure (*Strafprozessordnung – StPO*) as follows:

The accused is to remain in remand detention.

If necessary, another review of the accused's detention is to be carried out by the Federal Court of Justice in three months.

Until then, responsibility for detention review lies with the court that has jurisdiction under the general provisions.

Reasons:

I.

1. The accused was arrested on 2 August 2023 on the basis of an arrest warrant issued by the examining judge at the Federal Court of Justice on 26 July 2023 (4 BGs 52/23) and has been held in remand detention without interruption ever since. The original arrest warrant was later replaced by a new arrest warrant dated 25 January 2024 (4 BGs 6/24) containing further allegations.

2. 1. The current arrest warrant contains allegations against the accused for 16 separate acts that he allegedly committed in the period between December 2012 and November 2015 in Damascus (Syrian Arab Republic):

3. a) with one and the same act (case II.1. in the arrest warrant of 25 January 2024; III.1.a.aa. in this document)

4. - as part of a widespread and systematic attack directed against a civilian population, he tortured a person in his custody or otherwise under his control by causing that person substantial physical or mental harm or suffering where such harm or suffering did not arise only from sanctions that are compatible with international law, and severely deprived a person of their physical liberty in contravention of a general rule of international law,

5. - in connection with a non-international armed conflict, he treated a person who was to be protected under international humanitarian law cruelly or inhumanly by causing them substantial physical or mental harm or suffering, especially by torturing or mutilating that person,

6. - he abducted a person and took possession of them with the aim of exploiting their concern for their own welfare, in order to unlawfully force a person to refrain from doing something, thereby causing damage to the assets of the coerced person in order to unjustly enrich a third party,

7. - he unlawfully forced a person to refrain from doing something by using another dangerous implement and by inflicting severe physical abuse during the act, thereby causing damage to the assets of the coerced person,

8. b) with a further act (case II.2. in the arrest warrant of 25 January 2024; III.1.a.bb. in this document)

9. - as part of a widespread and systematic attack directed against a civilian population, he tortured a person in his custody or otherwise under his control by causing that person substantial physical or mental harm or suffering where such harm or suffering did not arise only from sanctions that are compatible with international law,
10. - in connection with a non-international armed conflict, he treated a person who was to be protected under international humanitarian law cruelly or inhumanly by causing them substantial physical or mental harm or suffering, especially by torturing or mutilating that person,
11. - he physically abused another person and harmed their health, using a dangerous implement and life-threatening treatment, including by acting jointly with another party,
12. c) with a further act (case II.3.a. of the arrest warrant of 25 January 2024; III.1.a.cc. in this document)
13. - as part of a widespread and systematic attack directed against a civilian population, he enslaved 26 persons, arrogating to himself a right of ownership over them, tortured a person in his custody or otherwise under his control by causing that person substantial physical or mental harm or suffering where such harm or suffering did not arise only from sanctions that are compatible with international law, and severely deprived 26 persons of their physical liberty in contravention of a general rule of international law,
14. - in connection with a non-international armed conflict, he treated a person who was to be protected under international humanitarian law cruelly or inhumanly by causing

them substantial physical or mental harm or suffering, especially by torturing or mutilating that person,

15. d) with a further act (case II.3.b. of the arrest warrant of 25 January 2024; III.1.a.dd. in this document)

16. as part of a widespread and systematic attack directed against a civilian population, he enslaved 26 persons, arrogating to himself a right of ownership over them, and severely deprived 26 persons of their physical liberty in contravention of a general rule of international law,

17. e) with two further acts (case II.4.a. of the arrest warrant of 25 January 2024)

18. as part of a widespread and systematic attack directed against a civilian population, he in each case enslaved at least one person, arrogating to himself a right of ownership over them, and severely deprived at least one person of their physical liberty in contravention of a general rule of international law,

19. f) with two further acts (case II.4.b. of the arrest warrant of 25 January 2024)

20. - as part of a widespread and systematic attack directed against a civilian population, he in each case enslaved one person, arrogating to himself a right of ownership over that person, and severely deprived one person of their physical liberty in contravention of a general rule of international law,

21. - using threats of present danger to life and limb, he in each case took movable property belonging to another person from another person with the intention of unlawfully appropriating the property for himself, while carrying a weapon,

22. g) with eight further acts (cases II.5. and II.6. of the arrest warrant of 25 January 2024)
23. - he in each case pillaged in connection with a non-international armed conflict,
24. - using threats of present danger to life and limb, he in each case took movable property belonging to another person from another person with the intention of unlawfully appropriating the property for himself, carrying a weapon in one case (case II.6. of the arrest warrant of 25 January 2024) and using a weapon in the other seven cases (case II.5. of the arrest warrant of 25 January 2024).
25. 2. The arrest warrant of 25 January 2024 assumes that the accused has incurred criminal liability for the aforementioned conduct under the following provisions: section 7 (1) nos. 3, 5 and 9, section 8 (1) no. 3, section 8 (6) no. 2 and section 9 (1) alternative 1 of the Code of Crimes against International Law; section 223 (1), section 224 (1) nos. 2, 4 and 5, section 239a (1), section 249 (1), section 250 (1) no. 1 (a), section 250 (2) nos. 1 and 3 (a), section 253 (1), sections 255 and 25 (1) and (2), sections 52 and 53 of the Criminal Code (*Strafgesetzbuch – StGB*).
26. 3. The Federal Public Prosecutor General applied for the accused's remand detention to be continued beyond six months insofar as this is called for in light of the updated arrest warrant of 25 January 2024. The examining judge at the Federal Court of Justice thereupon submitted the case files to the Panel for a decision on the continuation of the accused's detention in accordance with section 121 (2) and (4) of the Code of Criminal Procedure.

II.

27. A decision in special proceedings to review the accused's detention is currently pending. The accused has now been in remand detention for more than six months. It is true that the new arrest warrant of 25 January 2024 contains additional offences that the accused is alleged to have committed (cases II.4. to II.6. of that arrest warrant). These additional offences are not covered by the 'same offence' requirement in section 121 (1) of the Code of Criminal Procedure (on this matter, see Federal Court of Justice, orders of 20 September 2023 - AK 54/23, NStZ-RR 2023, 349, 350; of 3 February 2021 - AK 50/20, NStZ-RR 2021, 155; of 25 July 2019 - AK 34/19, NStZ 2019, 626 para. 7; Böhm in MüKoStPO, 2nd ed., on '§ 121', para. 26 ff.; Krauss in BeckOK StPO, 50th ed., on '§ 121', para. 6; Meyer-Goßner/Schmitt, StPO, 66th ed., on '§ 121', para. 11). The reason for this is that the specific events underlying the new allegations only became known to the investigating authorities when questioning witness A. on 21 September 2023 and witness K. on 19 December 2023. Nevertheless, the new allegations in the updated arrest warrant do not currently justify remand detention either individually or collectively (on this requirement, see Federal Court of Justice, orders of 19 October 2023 - AK 58/23, juris paras. 7, 21; of September 2023 - AK 54/23, NStZ-RR 2023, 349, 350; of 25 July 2019 - AK 34/19, NStZ 2019, 626 para. 7 f.; of 6 April 2017 - AK 14/17, juris para. 7; Böhm in MüKoStPO, 2nd ed., on '§ 121', para. 31a; Krauß in BeckOK StPO, 50th ed., on '§ 121', para. 7; Meyer-Goßner/Schmitt, StPO, 66th ed., on '§ 121', para. 11).
28. According to the new allegations, the accused – who participated in the non-international armed conflict in Syria as a member of a pro-Assad militia – stopped civilians at a checkpoint operated by his militia in the At-Tadamon district of Damascus on four occasions in 2013, arrested those civilians and took them to another location where they were required to perform forced labour (cases II.4.a. and II.4.b. of the arrest warrant of 25 January 2024). As regards the specific facts of these four acts, the allegations are entirely based on the statements made by witness K. on 19 December 2023. This means that while the level of suspicion is currently sufficient for an indictment, it is not strong enough to justify remand detention. In respect of the first two cases, the witness merely stated that – from a distance of between 700 and 800 metres away – he had seen the accused (whom he knew to be a member of a militia loyal to the regime) repeatedly stopping people at a checkpoint and then driving away with them. However, he could not be specific about when these incidents had

occurred. Based on what he had seen with his own eyes, he could not say what had happened to the people concerned. But he had later heard that they had been required to perform forced labour. In the other two cases, witness K. merely testified as a 'hearsay witness' that his two brothers had told him that they had each been stopped by the accused at a checkpoint and had been forced to perform military support work on the front line between the Syrian military and the opposition forces; they had been required to move sandbags. Furthermore, the accused had taken their money and mobile phones, keeping them for himself. The brothers themselves have not yet been questioned.

29. The other new allegations – namely that the accused entered a grocery store in At-Tadamon on at least one occasion between mid-2013 and November 2015 and took vegetables without paying for them, that he took money from the store owner and that he was involved in at least six other similar acts committed by other members of his militia (cases II.5. of the arrest warrant of 25 January 2024) – are supported by a witness statement made by the store owner A. on 21 September 2023. Nevertheless, there is currently no strong suspicion that the accused thereby committed a war crime against property (section 9 (1) alternative 1 of the Code of Crimes against International Law – pillaging). It is true that the overall circumstances of the accused's activity in the Damascus district of At-Tadamon during the relevant period – as described by this witness and others – do indicate a functional connection between the accused's conduct and the armed conflict, as required by the provision (in this respect, see Federal Court of Justice, order of 17 November 2017 - AK 54/16, juris para. 29; judgment of 27 July 2017 - 3 StR 57/17, BGHSt 62, 272, para. 55; LK/Hiéramente/Gebhard, StGB, 13th ed., on '§ 9 VStGB', para. 5; Werle/Jeßberger, Völkerstrafrecht, 5th ed., para. 1216 ff., in particular para. 1222). But while this establishes a level of suspicion that is sufficient to indict the accused, it falls short of establishing strong suspicion. If the accused merely committed the acts 'during' the armed conflict – which is not an unrealistic possibility – this would be insufficient to establish criminal liability for a war crime under section 9 (1) of the Code of Crimes against International Law. There are also concerns regarding the assumption that the victim was a member of the 'adverse party'; this also applies to the accusation of pillaging (cf. Federal Court of Justice, orders of 4 April 2019 - AK 12/19, NStZ-RR

2019, 229, 231; of 11 January 2018 - AK 75-77/17, juris para. 32; Ambos in MüKoStGB, 4th ed., on '§ 9 VStGB', para. 3, 7; Werle/Jeßberger, Völkerstrafrecht, 5th ed., para. 1373; for a critical position on this point, see LK/Hiéramente/Gebhard, StGB, 13th ed., on '§ 9 VStGB', para. 26 ff.). Furthermore, regarding the theft of goods allegedly carried out by other members of the militia, it is unclear to what extent the accused was specifically involved. Assuming that the acts allegedly committed by the accused against witness A. are criminally punishable as (particularly) aggravated robbery under section 249 (1), section 250 (1) no. 1 (a) and section 250 (2) no. 1 alternative 1 of the Criminal Code or as (particularly) aggravated extortion under section 253 (1), section 255, section 250 (1) no. 1 (a) and section 250 (2) no. 1 alternative 1 of the Criminal Code, in each case in conjunction with section 7 (2) no. 2 of the Criminal Code, and assuming that the Federal Public Prosecutor General still has jurisdiction to prosecute by virtue of ancillary competence even in the absence of a war crime against property under section 9 (1) of the Code of Crimes against International Law (in this regard, see Federal Court of Justice, orders of 12 August 2021 - 3 StR 441/20, BGHSt 66, 226, para. 14; of 20 September 2012 - 3 StR 314/12, juris para 20; of 13 January 2009 - AK 20/08, BGHSt 53, 128 para. 39), remand detention would be unjustified on this basis since the value of the stolen goods is not currently known, the statements made by witness A. suggest that the amount of money demanded by the accused was low, and the proportionality of an arrest warrant (section 120 of the Code of Criminal Procedure) cannot therefore be assessed.

30. The same applies to the updated arrest warrant's new allegation that – as first recounted by witness K. during his questioning on 19 December 2023 – the accused entered a pharmacy in the At-Tadamon district of Damascus in 2013 carrying a Kalashnikov assault rifle and demanded various items of medication, whereupon the pharmacist – in fear of physical violence if he refused – handed them over to the accused (case II.6. of the arrest warrant of 25 January 2024).

III.

31. The requirements for continuing to hold the accused in remand detention beyond six months are satisfied.

32. 1. The accused is strongly suspected of having committed the acts listed under II.1. to II.3.b. of the arrest warrant of 25 January 2024, which were already the subject of the original arrest warrant of 26 July 2023.
33. a) According to the current state of the investigation, there is a strong level of suspicion as regards the following facts:
34. After the outbreak of the internal Syrian conflict in 2011, the accused – who lived in Damascus at the time – joined a pro-government ‘Shabiha militia’ (Lijan Shaabiyah), which operated in the At-Tadamon district of Damascus, and he served as one of its local leaders. He reported directly to ‘Abu M.’, the head of the militia. Towards the end of 2012, the group was integrated into the state paramilitary organisation National Defence Forces (NDF) and worked closely with the Syrian military intelligence service. The district militia’s task was to collaborate with the Syrian intelligence service in suppressing oppositional elements in At-Tadamon during Syria’s non-international armed conflict, which had been underway since at least the beginning of 2012. The militia used violence against actual or perceived opponents of the regime. They set up street checkpoints where they stopped and sometimes arbitrarily arrested civilians, abducting them for the purpose *inter alia* of forcing them to perform military support work in nearby combat zones.
35. The accused – who was well known in the neighbourhood and who went by the nickname ‘Abu H. Trucks’ because of his previous jobs as a truck driver and operator of construction machinery – patrolled the streets along with other militiamen under his command, wearing a military uniform and carrying a weapon with the aim of intimidating the local civilian population. He moreover acted in a commanding capacity at militia checkpoints. In this role, he made arbitrary arrests and forced civilians to hand over money and valuables. In particular, he often stopped large numbers of working-age men, taking away their identity documents and forcibly transferring them in groups of between 10 and 30 men to nearby sections of the front between the Syrian army and opposition fighters, where they were deployed as forced labour, filling sandbags, building

barricades and digging trenches for the entire day while being exposed to a high risk of death or injury from the fighting.

36. aa) At some (not yet precisely established) time during the first eight months of 2013, witness S. was arrested by members of the accused's militia at a checkpoint called 'Baraka' in At-Tadamon. He was handcuffed and taken to a temporary prison nearby. This occurred because the witness had demanded to be paid for work he had done for a wife of 'Abu M.', the head of the militia. The idea was to persuade him to drop his demands. After the witness had been detained for two hours, he was taken to another room where he met the accused, whom he knew personally. The accused told him to 'forget about' the pay claim and struck him in the face with his right and left hand. A few hours later, two or three other militiamen came into the room and, on the orders of the accused, beat the witness over a period of one and a half hours with plastic pipes about 1.2 metres long and two centimetres in diameter. The following day, the witness – who was still being held captive – was again beaten with the plastic pipes at the accused's behest. After falling to the floor, he was kicked in the head, causing a bleeding laceration that has left a permanent visible scar. The militia then released the witness. Following the mistreatment, he had been persuaded to drop his claim and had informed the accused of his decision (case II.1. of the arrest warrant of 25 January 2024).
37. bb) One day in autumn 2014, the accused – together with 'Abu M.' and another militiaman – was checking civilians who were queuing to buy bread outside a bakery near the 'Baraka' checkpoint. After checking the ID of one of the people waiting in the queue and realising that he came from a district controlled by opposition forces, they began insulting him and then 'Abu M.' struck him in the face with his hand. This gesture by the militia leader was taken by the others – i.e. the accused, the third militiaman and a member of the Syrian military intelligence service who had joined them – as a sign to start punching the victim themselves. The victim fell to the ground, whereupon the accused (who was wearing military boots) and the other two kicked him at least twenty times each. The victim was asked something by 'Abu M.' but failed to respond after not understanding the question in the midst of being unrelentingly kicked and punched. The accused thereupon grabbed the victim by the hair, slammed his head onto the pavement and said to him: 'If the boss asks you a question, you answer, you son of a bitch!' The accused then bound the victim's hands with a cable tie and threatened him with further

abuse. The accused and the third militiaman then lifted the victim (who was bleeding from his mouth and nose) off the ground and placed him on the back of a militia pick-up truck that 'Abu M.' had summoned by phone. The accused then drove off in the truck with the victim, who was most probably subjected to further abuse elsewhere (case II.2. of the arrest warrant of 25 January 2024).

38. cc) In December 2012 at a checkpoint near the 'Kastana' tile factory on the edge of At-Tadamon, the accused – armed with a Kalashnikov assault rifle – stopped a person who in the present investigation proceedings is known anonymously as witness 'Z_20_04_70017'. When the witness got out of his car, the accused took his ID from him and ordered him to accompany him to the 'Kastana' factory. Once there, the accused forced him and 25 other civilians to load sandbags onto vehicles, including that of the witness. Afterwards, the witness and the other civilians had to drive their vehicles to the office of 'Abu M.' on Daaboul Street in At-Tadamon and were told to leave their vehicles there, in a location exposed to enemy fire. When the witness said that he needed the car himself, the accused instructed five militiamen to deal with him, whereupon they ganged together and severely beat the witness with their fists. The accused then drove away with the other 25 forced labourers, while the witness was ordered to wait on site. When the accused returned in a car some time later, he noticed that the witness was about to enter another building. In order to prevent what he suspected to be an escape attempt, the accused drove his car at the witness. The witness was hit on the right shoulder, causing him considerable pain. Some time later, the witness – who by this point had been in the hands of the militia for several hours – was allowed to leave (case II.3.a. of the arrest warrant of 25 January 2024).

39. dd) One day in June or July 2014 (the exact date is not currently ascertainable), witness 'Z_20_04_70017' again encountered the accused near the 'Kastana' factory. The accused was again in the process of stopping working-age men, detaining them against their will and forcing them to carry out military support work for the Syrian regime. The accused stopped the witness, took his ID from him and ordered him to go to the 'Kastana' factory and wait there together with other civilians arrested by the accused. After the accused had detained another 25 or 30 people by stopping vehicles, he drove the witness and the other 25 or more detainees to the office of 'Abu M.' on Daaboul Street in At-Tadamon. There, the witness and the other civilians were required to perform

forced labour, carrying sandbags across the road, into a building, onto the fourth floor and piling them up by the windows as protection against enemy fire. The accused used a stick to urge the detainees to do the work, striking certain individuals among them – although not the witness. In total, the witness and the other detainees dragged and stacked about 350 sandbags between 10 a.m. and their ‘release’ at 6 p.m. Because the location where the forced labour had to be performed was right on the front line between Syrian government forces on the one side and groups of opposition fighters on the other, the witness and the other detainees repeatedly came under fire from both sides during the work. The witness was narrowly missed by a sniper’s bullet that day; it was purely by chance that none of the forced labourers suffered any physical harm (case II.3.b. of the arrest warrant of 25 January 2024).

40. b) The strong suspicion against the accused (section 112 (1) sentence 1 of the Code of Criminal Procedure) regarding the events described above is based on the following:

41. aa) The accused admitted to a former flatmate in B. and subsequently to a fellow inmate in remand detention that he had been involved in the Syrian war on the government side and had participated in acts of violence aimed at suppressing the opposition movement in the civilian population. His membership in the National Defence Forces (NDF), his involvement with them in the At-Tadamon district of Damascus and his participation in acts of violence directed at the opposition movement in the local civilian population were confirmed by the numerous witnesses heard during the investigation who lived there at the time, knew the accused, were aware that he worked for the militia and for the National Defence Forces in At-Tadamon and understood what this work entailed – including activities such as torturing detained civilians, extorting protection money and using the checkpoints operated by the group to apprehend civilians and compel them to perform forced labour. This testimony is corroborated by 27 video files that originated from a member of the Syrian military intelligence service, documenting mass executions by the intelligence service and the National Defence Forces in At-Tadamon in 2013. The accused is most probably visible in one of the videos; according to a witness, he was the machine operator responsible for digging out the pits next to which the victims were executed.

42. bb) In terms of the accused being strongly suspected of having committed the specific acts described above, as alleged in the arrest warrant of 25 January 2024, the following points are of relevance:
43. (1) The testimony given by witness S. in describing the act committed against him in 2013 is consistent with the above details (see III.1.a.aa.). In addition, he clearly identified the accused from a set of photographs that were presented to him. The assumption that the witness was beaten with plastic pipes at the behest of the accused is based on the accused's prominent function within the militia and his direct involvement in the events surrounding the act.
44. (2) The strong level of suspicion that the accused and his associates violently attacked a (presumed) member of the opposition outside a bakery in autumn 2014 (see III.1.a.bb. above) derives from the statements of the anonymous witness 'Z_25_08_70017', who was also queuing for bread outside the bakery and who observed the incident, describing the details during his examination in a way that was consistent with the events described above.
45. (3) Witness 'Z_20_04_70017' described the acts committed against him in December 2012 (see III.1.a.cc. above) and June/July 2014 (see III.1.a.dd. above) in detail during two police examinations in the investigative proceedings. Several other witnesses confirmed during questioning that the accused had arrested people at checkpoints and had forced them to perform military support work for the regime on the front line of the conflict; these statements corroborate the testimony of witness 'Z_20_04_70017'.
46. For further details on the already obtained evidence that establishes the strong suspicion against the accused, please refer to part IV. of the arrest warrant of 25 January 2024.
47. 2. In legal terms, it can thus be concluded that the accused has most probably incurred criminal liability for the following offences under the Code of Crimes against International Law:
48. - in case II.1. of the arrest warrant of 25 January 2024 (see III.1.a.aa. above) the crime against humanity of torture, with the same conduct also constituting the crime against

humanity of deprivation of liberty and the war crime of torture pursuant to section 7 (1) nos. 5 and 9, section 8 (1) no. 3 of the Code of Crimes against International Law;

49. - in case II.2. of the arrest warrant (see III.1.a.bb. above) the crime against humanity of torture, with the same conduct also constituting the war crime of torture pursuant to section 7 (1) no. 5, section 8 (1) no. 3 of the Code of Crimes against International Law;
50. - in case II.3.a. of the arrest warrant (see III.1.a.cc. above) the crime against humanity of enslavement, with the same conduct also constituting the crime against humanity of deprivation of liberty and the war crime of torture pursuant to section 7 (1) nos. 3, 5 and 9, section 8 (1) no. 3 of the Code of Crimes against International Law;
51. - in case II.3.b. of the arrest warrant (see III.1.a.dd. above) the crime against humanity of enslavement, with the same conduct also constituting the crime against humanity of deprivation of liberty pursuant to section 7 (1) nos. 3 and 9 of the Code of Crimes against International Law.
52. Looking at specific aspects in more detail:
53. a) The general immunity of public officials does not represent a procedural obstacle in the present case; the accused is not entitled to the kind of functional immunity under customary international law which would prevent him from being prosecuted by another state for the acts he is alleged to have committed. It is true that the accused was most probably acting in the service of the Syrian state, with the result that his conduct must be considered to be state action by the regime. If individuals carry out sovereign acts for a foreign state, they are – under certain circumstances – entitled to functional immunity derived from state immunity, irrespective of whether or not they enjoy formal status as servants of the state. However, the general immunity of public officials does not apply in the case of crimes against international law, regardless of the status and rank of the perpetrator. The fact that this functional immunity for foreign officials is excluded in the case of crimes against international criminal law is an indisputable part of customary international law (cf. Federal Court of Justice, judgment of 28 January 2021 - 3 StR 564/19, BGHSt 65, 286 para. 163 ff. with further references [in relation to war crimes against persons by subordinate officials]; ICTY [Appeals Chamber], judgment of 29

October 1997 - IT-95-14-AR 108 [Blaskic], para. 41; Israel Supreme Court, judgment of 29 May 1962 [Eichmann], *International Law Reports* 36 [1968], 277, 308 ff.; IMT, judgment of 1 October 1946, www.legal-tools.org/doc/45f18e, p. 56; see also Ambos in *MüKoStGB*, 4th ed., before '§ 3', para. 135 ff.; Ambos, *StV* 2021, 557 f.; Cassese et al., *Cassese's International Criminal Law*, 3rd ed., 240 ff.; LK/Esser/Gerson, *StGB*, 13th ed., on '§ 2 VStGB', para. 48 f.; Frank/Barthe, *ZStW* 133 [2021], 235, 238 ff.; Jeßberger/Epik, *JR* 2022, 10 ff.; Kreicker, *Völkerrechtliche Exemtionen*, Vol. 1, 2007, 175 ff.; Kreicker, *JR* 2015, 298, 299 ff.; Kreß in Ambos [ed.], *Rome Statute of the ICC*, 4th ed., on Art. 98, para. 22 ff.; Kreß in *MüKoStGB*, 4th ed., on '§ 6 VStGB', para. 117; Kreß, *NJW* 2021, 1335; Werle, *JZ* 2021, 732, 733 ff.; Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., para. 807 ff.). This functional immunity differs from the unrestricted personal immunity that the highest-ranking state officials (such as heads of state) are granted under international law, protecting them against prosecution by foreign states. Such personal immunity is not subject to any exceptions in this respect, not even in the case of crimes against international law – i.e. not even in the case of acts whose criminalisation is directly rooted in general customary international law (cf. ICJ, judgment of 14 February 2002 - 837 - *Democratic Republic of the Congo v. Belgium* - ICJ Reports 2002, 3 para. 51 ff. [see also *EuGRZ* 2003, 563]; LK/Esser/Gerson, *StGB*, 13th ed., on '§ 2 VStGB', para. 50; Kreicker, *Völkerrechtliche Exemtionen*, Vol. 2, 2007, 729 ff.; Kreicker, *JR* 2015, 298, 302 f.; Kreicker, *ZIS* 2009, 350, 355; Kreß in *MüKoStGB*, 4th ed., on '§ 6 VStGB', para. 117; Kreß, *GA* 2003, 25, 33; Werle/Jessberger, *Völkerstrafrecht*, 5th ed., para. 819).

54. b) In functional terms, all the separate acts committed by the accused were embedded within the overall context that section 7 (1) of the Code of Crimes against International Law requires for all the individual offences that constitute crimes against humanity. They were all part of an intentional attack on the civilian population that can be qualified as both widespread and systematic. According to sufficiently validated findings, the Assad regime's campaign against the opposition in Syria satisfied these elements at least from late April 2011 onwards, i.e. in the period when the offences were committed (cf. Federal Court of Justice, orders of 3 February 2021 - AK 50/20, *NStZ-RR* 2021, 155, 156; of 6 June 2019 - *StB* 14/19, *BGHSt* 64, 89 para. 55 ff.).
55. aa) A 'civilian population' means a sizeable group of people sharing certain distinguishing characteristics who are attacked because of those characteristics (e.g.

living in the same geographical area or sharing a common political outlook). A defining aspect of an attack directed against a civilian population is that it is aimed at the individual victims first and foremost as members of the group rather than as individuals. The definition does not, however, require that the attack be directed against the entire population living in an area. It is sufficient if action is taken against a significant number of individuals (cf. Federal Court of Justice, orders of 7 October 2021 - AK 43/21, juris para. 19; of 3 February 2021 - AK 50/20, NStZ-RR 2021, 155, 156; of 6 June 2019 - StB 14/19, BGHSt 64, 89 para. 56; judgment of 20 December 2018 - 3 StR 236/17, BGHSt 64, 10, para. 164). If a state power targets its own civilian population, this too can qualify as a crime against humanity; outside of armed conflicts, crimes against humanity often stem from unilateral action of this nature (cf. Federal Court of Justice, orders of 7 October 2021 - AK 43/21, juris para. 19; judgment of 6 June 2019 - StB 14/19, BGHSt 64, 89, para. 56).

56. An 'attack directed against a population' is a course of conduct which involves the multiple commission of the individual offences referred to in section 7 (1) of the Code of Crimes against International Law and which is driven by some form of collective entity (a state or an organisation) (cf. Federal Court of Justice, order of 6 June 2019 - StB 14/19, BGHSt 64, 89 para. 57). A 'widespread' attack is understood as meaning an attack carried out on a large scale with a high number of victims; in particular, this can result from the fact that the attack is directed against a large number of people or covers a large geographical area. An attack is to be deemed 'systematic' if the use of violence is organised, and planned in the sense that action is methodical (cf. Federal Court of Justice, orders of 7 October 2021 - AK 43/21, juris para. 20; of 3 February 2021 - AK 50/20, NStZ-RR 2021, 155, 156; of 6 June 2019 - StB 14/19, BGHSt 64, 89 para. 57).
57. bb) According to sufficiently validated findings, the Assad regime's campaign against the opposition in Syria during the Arab Spring satisfied these required constituent elements from the end of April 2011 at the latest, when it began using violence against demonstrators and other opposition members (including those merely perceived as such). From this point onwards, the regime attacked its own civilian population using severe violence in a planned and organised manner against demonstrators and (actual or perceived) members of the opposition in order to crush the protest movement. These members of civil society were persecuted, arrested, imprisoned, tortured and killed with

the aim of putting a stop to the uprisings. The planned and regular use of force by the security forces, specifically the intelligence services, was aimed at intimidating citizens in order to prevent future protests. The accused's conduct as a member of the Syrian National Defence Forces was part of the regime's attack against its own civilian population.

58. This attack was widespread and systematic. This is evidenced by the large number of relevant violent acts committed by the state over a substantial period of time. It is also evidenced by the large number of victims. The systematic nature of the attack is further underlined by the fact that the actions of the security forces were centrally organised and commanded by the top political and military officials close to the President (cf. Federal Court of Justice, orders of 3 February 2021 - AK 50/20, NStZ-RR 2021, 155, 156; of 5 September 2019 - AK 47/19, juris para. 36; judgment of 6 June 2019 - StB 14/19, BGHSt 64, 89, para. 58 ff.).
59. cc) It does not need to be established here whether an 'attack against the population' within the meaning of section 7(1) of the Code of Crimes against International Law must also necessarily include a 'policy element', i.e. whether it must have been undertaken pursuant to or in furtherance of a state or organisational policy to commit such an attack (cf. Federal Court of Justice, orders of 9 February 2021 - AK 5/21, juris para. 37; of 6 June 2019 - StB 14/19, BGHSt 64, 89, para. 61; judgment of 20 December 2018 - 3 StR 236/17, BGHSt 64, 10, para. 168; order of 17 June 2010 - AK 3/10, BGHSt 55, 157, para. 26). This is because it is self-evident in the present case.
60. c) The two acts that the accused most probably committed against witness 'Z_20_04_70017' and the 25 other simultaneously arrested persons who were required to perform forced labour (see III.1.a.cc. and dd. above) each qualify as the crime against humanity of enslavement pursuant to section 7 (1) no. 3 of the Code of Crimes against International Law.
61. aa) One prerequisite for satisfying the elements of this offence is that the perpetrator exercise an arrogated 'right of ownership' over a person (cf. Federal Court of Justice, orders of 12 October 2022 - AK 32/22, juris para. 40; of 4 May 2022 - AK 17/22, NStZ-RR 2022, 227, 228; of 9 February 2021 - AK 5/21, BGHR VStGB, on '§ 7 (1)

Menschenhandel 1' [Human trafficking 1], para. 39 with further references; Bundestag Printed Paper 14/8524 p. 20; ICC [Trial Chamber IX], judgment of 4 February 2021 - ICC-02/04-01/15 [Ongwen], para. 2711 ff.; Werle/Jeßberger in MüKoStGB, 4th ed., on '§ 7 VStGB', para. 57; Werle/Jeßberger, Völkerstrafrecht, 5th ed., para. 1022). However, since no such right of ownership over a person can exist *de jure*, the offence of enslavement *de facto* includes comparable treatment in which the perpetrator subjects a person to their will and their interests and denies them the liberty to act in a self-determined manner. Significant indications of enslavement include the perpetrator having control over the victim's movements, the victim being vulnerable, the victim suffering acts of abuse, and the victim being financially controlled or economically exploited. Enslavement does not necessarily have to involve the victim being 'bought' or 'sold' using money or any other form of consideration, nor does the perpetrator's exercise of a 'right of ownership' necessarily have to last for a prolonged period of time. These aspects can nonetheless provide strong indications of enslavement (cf. Federal Court of Justice, orders of 12 October 2022 - AK 32/22, juris para. 40; of 4 May 2022 - AK 17/22, NStZ-RR 2022, 227, 228; of 9 February 2021 - AK 5/21, BGHR VStGB, on '§ 7 (1) Menschenhandel 1' [Human trafficking 1], para. 39; likewise the international criminal courts: ICC [Trial Chamber IX], judgment of 4 February 2021 - ICC-02/04-01/15 [Ongwen], para. 2712 ff.; ICC [Trial Chamber II], judgment of 7 March 2014 - ICC-01/04-01/07 [Katanga], para. 975 f.; ICTY [Trial Chamber], judgment of 22 February 2001 - IT-96-23-T [Kunarac et al.], para. 542; SCSL [Trial Chamber II], judgment of 18 May 2012 - SCSL-03-01-T [Taylor], para. 447; see also LK/Esßer, StGB, 13th ed., on '§ 7 VStGB', para. 99 f.; Werle/Jeßberger, Völkerstrafrecht, 5th ed., para. 1024).

62. The meaning of enslavement under international criminal law has thus clearly moved away from the traditional concept of enslavement under international law (see also LK/Esßer, StGB, 13th ed., on '§ 7 VStGB', para. 99), with the result that forced labour – which in itself is not a crime against humanity – often qualifies as the crime against humanity of enslavement in cases where deprivation of freedom of movement is also involved, especially if the forced labour has to be performed without compensation and can have negative health consequences for the person concerned (cf. ICTY [Appeals Chamber], judgment of 17 September 2003 - IT-97-25-A [Krnjelac], para. 194 ff.; ICTY [Trial Chamber], judgment of 15 March 2002 - IT-97-25-T [Krnjelac], para. 358 f., 373; of 22 February 2001 - IT-96-23-T [Kunarac et al.], para. 542; see also Werle/Jeßberger

in MüKoStGB, 4th ed., on '§ 7 VStGB', para. 61; Werle/Jeßberger, Völkerstrafrecht, 5th ed., para. 1027 ff.).

63. Measured against these standards, the accused committed the offence of enslavement within the meaning of international criminal law. Witness 'Z_20_04_70017' and the other 25 persons were arrested, taken to the front line and forced to perform hard labour at risk of death. They were entirely controlled by the will and interests of the accused and other militiamen and could no longer act with self-determination. They were deprived of their freedom of movement. The accused and his militia exploited witness 'Z_20_04_70017' and the other victims by utilising their labour without remuneration; in addition to depriving the detainees of their liberty, they also therefore exploited them economically.
64. bb) The fact that the detention and forced labour only lasted for a short duration does not prevent the conduct from qualifying as enslavement under section 7 (1) no. 3 of the Code of Code of Crimes against International Law.
65. (1) It is true that witness 'Z_20_04_70017' and the other persons arrested by the accused were not held by the accused and his militia as forced labourers for a particularly long period of time; in both cases, the detention and the forced labour ended on the same day. However, in order for conduct to qualify as enslavement under section 7 (1) no. 3 of the Code of Crimes against International Law, it is not absolutely necessary for the perpetrator to have exercised an arrogated 'right of ownership' over the victim for a longer period of time; this is merely one indicator of enslavement and does not mean that the possibility of enslavement is excluded in short-term cases (cf. Federal Court of Justice, orders of 12 October 2022 - AK 32/22, juris para. 40; of 4 May 2022 - AK 17/22, NStZ-RR 2022, 227, 228; of 9 February 2021 - AK 5/21, BGHR VStGB, on '§ 7 (1) Menschenhandel 1' [Human trafficking 1], para. 39).
66. (2) The case law of the international criminal courts similarly indicates that the situation does not necessarily have to last for an indeterminate or at least prolonged period of time in order for the conduct to qualify as the crime against humanity of enslavement. The duration is merely one factor that must be taken into account in the overall assessment of the case (cf. ICC [Trial Chamber IX], judgment of 4 February 2021 - ICC-

02/04-01/15 [Ongwen], para. 2714; ICTY [Appeals Chamber], judgment of 12 June 2002 - IT-96-23 [Kunarac et al.], para. 121; ICTY [Trial Chamber], judgment of 22 February 2001 - IT-96-23-T [Kunarac et al.], para. 542; SCSL [Trial Chamber II], judgment of 18 May 2012 - SCSL-03-01-T [Taylor], para. 447; see also LK/Esser, StGB, 13th ed., on '§ 7 VStGB', para. 99; Werle/Jeßberger in MüKoStGB, 4th ed., on '§ 7 VStGB', para. 58; Werle/Jeßberger, Völkerstrafrecht, 5th ed., para. 1024). In this respect, the International Criminal Court has stated the following: 'The law also does not establish a minimum period of enslavement. (...) the duration of the exercise of powers attaching to the right of ownership is a factor to be taken into account in the specific circumstances of the case.' (ICC [Trial Chamber IX], judgment of 4 February 2021 - ICC-02/04-01/15 [Ongwen], para. 2714).

67. (3) In the present case, the required overall assessment of all the circumstances shows that the accused's actions against witness 'Z_20_04_70017' and the other simultaneously arrested persons qualified as the crime against humanity of enslavement, regardless of the relatively short time during which they were detained and used for forced labour. This is because the other circumstances have such relevance and give such a clear indication that the accused arrogated to himself a 'right of ownership' over the detainees that they outweigh the fact that the situation only lasted for a short period of time: the persons concerned had their identity cards taken away, making it impossible for them to move around Damascus with any degree of freedom. The overall behaviour of the accused and the other militiamen made the victims realise beyond any doubt that they had to entirely comply with their commands and that any resistance would be met with severe physical abuse. They had to perform hard physical labour right on the front line at substantial risk to life and limb and without food or other provisions, whereby the decision on the type, location and duration of the forced labour lay entirely with the accused and his militiamen. During the period of their forced labour, which in one case lasted a whole working day and in the other case lasted at least several hours, they were at the mercy of the accused and other members of the National Defence Forces, who exploited them economically by using their labour without paying them and who prevented them from doing their normal jobs. For example, witness 'Z_20_04_70017' was arrested on his way to work. The circumstances thus show that the detention and forced labour were characterised by such disregard for the liberty and

well-being of the persons concerned and by such exploitation of their labour that the time factor recedes into the background.

68. cc) Given the direct mortal danger to which the victims were exposed while working and the fact that they were required to perform military support work, there is no justification under international law for the forced labour, regardless of Article 5(1)(e) of the Second Additional Protocol (with regard to the war crime of forced labour under customary international law, see Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., para. 1308).
69. d) In allegedly committing the acts to the detriment of witness S. (see III.1.a.aa. above), against a civilian outside a bakery in autumn 2014 (see III.1.a.bb. above) and to the detriment of witness 'Z_20_04_70017' in December 2012 (see III.1.a.cc. above), it is furthermore most probable that the accused also incurred liability for the crime against humanity of torture under section 7 (1) no. 5 of the Code of Crimes against International Law. The victims were under the accused's control. They were physically abused – beyond any sanctions compatible with international law – either by the accused or, at his behest, by other members of his militia whose conduct the accused controlled as their commander. It is true that the infliction of physical or mental harm or suffering only falls under section 7 (1) no. 5 of the Code of Code of Crimes against International Law if the harm or suffering is 'substantial'; the same applies to the war crime of torture under section 8 (1) no. 3 of the Code of Code of Crimes against International Law. The 'substantial' criterion requires that the offending conduct cause a sufficiently high degree of impairment; this element – which limits criminal liability – is intended *inter alia* to exclude minor cases from the provision's scope of application. Whether the harm or suffering is 'substantial' must be assessed by taking all the circumstances of the case into account, in particular the nature of the offending conduct and its context. As with section 8 (1) no. 3 of the Code of Crimes against International Law, the extent of the impairment must clearly exceed that of physical assault within the meaning of section 223 (1) of the Criminal Code. This does not mean, however, that extreme pain or permanent damage to health are necessary; particularly serious or permanent consequences within the meaning of section 226 of the Criminal Code are not required to satisfy the elements of the offence (cf. Federal Court of Justice, order of 3 February 2021 - AK 50/20, NStZ-RR 2021, 155, 156 with further references; judgment of 28 January 2021 - 3 StR 564/19, BGHSt 65, 286 para. 65 ff.; orders of 5 September 2019

- AK 47/19, juris para. 38; of 6 June 2019 - StB 14/19, BGHSt 64, 89, para. 63; of 17 November 2016 - 3 StR 54/16, juris para. 27; Werle/Jeßberger in MüKoStGB, 4th ed., on '§ 7 VStGB', para. 75). Since the 'substantial' criterion applies to physical or mental damage or suffering, the actual physical and psychological effects caused must be taken into particular consideration. Furthermore, the type, context and duration of the treatment may also have to be taken into account, as must the condition of the victims (cf. Federal Court of Justice, judgment of 28 January 2021 - 3 StR 564/19, BGHSt 65, 286 para. 73).

70. Measured against these standards, the mistreatment to which the victims were most probably exposed was substantial. They were arbitrarily detained and brutally abused. Witness S. was severely mistreated on repeated occasions over a long period of time by several people hitting him with pipes. The civilian who was attacked outside a bakery in autumn 2014 was also attacked by several people and seriously injured. Given the severity of the attack on witness 'Z_20_04_70017', the harm he suffered in December 2012 (see III.1.a.cc. above) must also be considered substantial within the meaning of section 8 (1) no. 3 of the Code of Crimes against International Law as he was not only beaten by a group of five militiamen but was also deliberately hit by a car driven by the accused, suffering further injury as a result.
71. e) In committing the acts to the detriment of witness S. (see III.1.a.aa. above) and witness 'Z_20_04_70017' as well as the other 25 persons who were also arrested and required to perform forced labour (see III.1.a.cc. and dd. above), the accused most probably also incurred liability for the crime against humanity of deprivation of liberty under section 7 (1) no. 9 of the Code of Crimes against International Law (on the terminology, see Federal Court of Justice, order of 30 November 2022 - 3 StR 230/22, BGHSt 67, 180 para. 60). The accused's conduct prevented the witnesses from freely leaving the location; they were deprived of their freedom of movement. The fact that witness 'Z_20_04_70017' and his fellow detainees were allowed to move around the site while performing the forced labour does not mean they continued to enjoy freedom of movement: they were prevented from leaving the site by the militiamen guarding them (cf. Bundestag Printed Paper 14/8524, p. 22; Werle/Jeßberger in MüKoStGB, 4th ed., on '§ 7 VStGB', para. 104; Werle/Jeßberger, Völkerstrafrecht, 5th ed., para. 1045). The detentions violated international law because they amounted to arbitrary deprivations of liberty without there first being any proceedings that satisfy rule-of-law requirements (in

this respect, see Werle/Jeßberger in MüKoStGB, 4th ed., on '§ 7 VStGB', para. 106; Werle/Jeßberger, Völkerstrafrecht, 5th ed., para. 1046).

72. Moreover, the deprivations of liberty were severe within the meaning of section 7 (1) no. 9 of the Code of Crimes against International Law. On the one hand, the element of 'severity' results in criminal liability being excluded in cases involving short-term restrictions of liberty (cf. Bundestag Printed Paper 14/8524, p. 22), but on the other hand it also means that the assessment must include an overall consideration of the circumstances surrounding the offending conduct. As a result, deprivations of liberty may – in individual cases – fall under section 7 (1) no. 9 of the Code of Code of Crimes against International Law even if they are not of long duration. This is the case if the deprivation of liberty is associated with additional burdens for the victim beyond interference with their freedom of movement – e.g. arising from poor detention conditions, from mistreatment or from the victim's inability to foresee the duration of their detention (cf. LK/Esser, StGB, 13th ed., on '§ 7 VStGB', para. 226).
73. In the present case, the deprivations of liberty were not of short duration: witness S. was detained for more than a day and witness 'Z_20_04_70017' was detained for several hours on each occasion. Furthermore, the offending conduct was associated with serious additional burdens for the victims, such as the unforeseeable duration of the deprivation of their liberty (at least for witness S.) and the high risk of death to which witness 'Z_20_04_70017' and the 25 other simultaneously arrested detainees were exposed while being forced to work on the front line.
74. f) Insofar as the accused's conduct satisfied the elements of various different criminal offences under section 7 (1) of the Code of Crimes against International Law – namely the crime against humanity of enslavement, the crime against humanity of torture and the crime against humanity of deprivation of liberty – he must be regarded as having concurrently committed several different offences with the same conduct. This is due to the nature of section 7 of the Code of Crimes against International Law, which contains a number of separate offences rather than just setting out variations of the same offence (cf. Federal Court of Justice, orders of 30 November 2022 - 3 StR 230/22, BGHSt 67,

180 para. 60 ff.; of 12 October 2022 - AK 32/22, juris para. 8, 32; of 4 May 2022 - AK 17/22, NStZ-RR 2022, 227, 228).

75. g) The acts allegedly committed by the accused to the detriment of witness S. (see III.1.a.aa. above), against a civilian outside a bakery in autumn 2014 (see III.1.a.bb. above) and to the detriment of witness 'Z_20_04_70017' in December 2012 (see III.1.a.cc. above) can most probably (also) be regarded as amounting to the war crime of torture (section 8 (1) no. 3 of the Code of Code of Crimes against International Law).
76. aa) The protests against the government of President Bashar al-Assad that had been smouldering since February 2011 suddenly escalated from 15 March 2011 onwards following the repressive and violent action taken by the Syrian security forces, militias and army against demonstrators and opposition members. The resulting militarisation of the protest movement fed into an armed uprising that engulfed large parts of the country in early 2012 and escalated into a full-scale civil war. From this point onwards at the latest, Syria was gripped by a non-international armed conflict within the meaning of section 8 (1) of the Code of Crimes against International Law, fought between the Syrian regime with the official army, police, security forces and civilian militias on the one side and numerous different fighting groups on the other (cf. Federal Court of Justice, orders of 22 February 2022 - AK 3/22, NStZ-RR 2022, 153; of 13 October 2021 - AK 44/21, juris para. 7, 24; of 20 April 2021 - AK 30/21, juris para. 10; judgment of 27 July 2017 - 3 StR 57/17, BGHSt 62, 272, para. 11 f.; order of 17 November 2016 - AK 54/16, juris para. 7, 23).
77. bb) The offending acts were committed in connection with the non-international armed conflict in Syria. The requisite functional connection [between the offending acts and the armed conflict] is considered to be present if the armed conflict is of essential importance for the perpetrator's ability and decision to commit the acts, for the manner in which the acts are committed, or for the purpose of the acts; it is not sufficient if the acts are merely committed 'during' the armed conflict (cf. Federal Court of Justice, orders of 17 October 2019 - AK 56/19, juris para. 38; of 4 April 2019 - AK 12/19, NStZ-RR 2019, 229, 231; of 17 November 2017 - AK 54/16, juris para. 29; judgment of 27 July 2017 - 3 StR 57/17, BGHSt 62, 272, para. 55: cf. also Ambos in MüKoStGB, 4th ed., on '§ 8 VStGB', para. 35; Werle/Jeßberger, Völkerstrafrecht, 5th ed., para. 1216 ff. with references to the case

law of the international criminal courts). This requirement was satisfied here. In each instance, the acts had their origins in checks carried out by the National Defence Forces, who were aligned with the Syrian regime in the armed conflict. These acts were part of the campaign against the opposition. The mistreatment of witness 'Z_20_04_70017' was inherently linked to him being forced to perform military support work.

78. cc) The victims were most probably persons to be protected under international humanitarian law, namely persons who were taking no active part in the hostilities and who were in the power of the adverse party (section 8 (6) no. 2 of the Code of Crimes against International Law). They were civilians who were not involved in the fighting. They found themselves in the power of the accused and his accomplices, i.e. in the power of a militia aligned with the Syrian regime. In any case, it can be assumed (i.e. there is a strong level of suspicion) that the Syrian regime and thus also the accused's militia were – from the standpoint of the victims – an 'adverse party' within the meaning of section 8 (6) no. 2 of the Code of Crimes against International Law (on this element, see Federal Court of Justice, order of 4 April 2019 - AK 12/19, NStZ-RR 2019, 229, 231; judgment of 20 December 2018 - 3 StR 236/17, BGHSt 64, 10 para. 84 ff.; order of 17 November 2016 - AK 54/16, juris para. 26), although this will need to be further clarified in the further course of the proceedings. The campaign conducted by the National Defence Forces was characterised by the fact that they targeted opponents of the regime among the Syrian civilian population. Indeed, this was the precise aim of the campaign. Based on an assessment of the facts, there are currently strong indications that the victims belonged to the side opposed to the Syrian regime. It should be noted that in complex civil war situations involving large numbers of state and non-state actors with a wide variety of interests – as was the case in the Syrian civil war – any person who pursues objectives contrary to the intentions of the perpetrator's side in the conflict can be described as belonging to the adverse party (cf. Federal Court of Justice, order of 4 April 2019 - AK 12/19, NStZ-RR 2019, 229, 231; judgment of 20 December 2018 - 3 StR 236/17, BGHSt 64, 10 para. 86; order of 17 November 2016 - AK 54/16, juris para. 26).
79. dd) There is a strong suspicion that the accused, together with members of his militia, treated the victims inhumanly by causing them substantial physical and mental suffering within the meaning of section 8 (1) no. 3 of the Code of Crimes against International Law. The offence of treating a person inhumanly by causing substantial physical or

mental harm or suffering must be interpreted broadly. Nonetheless, as with the crime against humanity of torture (section 7 (1) no. 5 of the Code of Crimes against International Law), the mistreatment of the victim must be 'substantial'. In section 8 (1) no. 3 of the Code of Code of Crimes against International Law too, the 'substantial' criterion requires that the offending conduct cause a sufficiently high degree of impairment. Among other things, this serves to exclude minor cases from the scope of application. Whether the harm or suffering is 'substantial' must be assessed by taking all the circumstances of the case into account, in particular the nature of the offending conduct and its context. As with section 7 (1) no. 5 of the Code of Crimes against International Law, the extent of the impairment must clearly exceed that of physical assault within the meaning of section 223 (1) of the Criminal Code (cf. Federal Court of Justice, judgment of 28 January 2021 - 3 StR 564/19, BGHSt 65, 286 para. 65 ff.; order of 17 November 2016 - AK 54/16, juris para. 27). Since the 'substantial' criterion applies to the physical or mental damage or suffering, the actual physical and psychological effects caused must be taken into particular consideration. Furthermore, the type, context and duration of the treatment may also have to be taken into account, as must the condition of the victims (cf. Federal Court of Justice, judgment of 28 January 2021 - 3 StR 564/19, BGHSt 65, 286 para. 73). Measured against these standards, the 'substantial' criterion was satisfied here; in this regard, please refer to the above remarks with regard to the accused most probably incurring criminal liability under section 7 (1) no. 5 of the Code of Crimes against International Law.

80. ee) The accused's presumed criminal liability for the war crime of torture arises from the same conduct as his presumed criminal liability for crimes against humanity.
81. h) The offences under the Code of Crimes against International Law are subject to German criminal jurisdiction in accordance with the principle of universal jurisdiction enshrined in section 1 sentence 1 of the Code of Crimes against International Law.
82. 3. The question of whether the accused's conduct in cases II.1. to II.2. of the arrest warrant of 25 January 2024 also makes him concurrently liable under general criminal law – in case II.1. for abduction for the purpose of extortion (section 239a (1) of the Criminal Code) and particularly aggravated extortion resembling robbery (section 253 (1), section 255, section 250 (2) nos. 1 and 3 (a) of the Criminal Code); in case II.2. for

dangerous bodily harm (section 223 (1), section 224 (1) nos. 2, 4 and 5 of the Criminal Code) – is not relevant for the present decision on continued detention; it does not therefore need to be discussed here (cf. the explanations under V.2. in the arrest warrant of 25 January 2024). The continuation of the accused's remand detention is in any case justified by his criminal liability under the Code of Crimes against International Law.

83. 4. The competence of the Federal Public Prosecutor General to prosecute the offences which the accused is alleged to have committed – and by extension, the competence of the examining judge at the Federal Court of Justice to issue the decisions on the accused's detention (section 169 (1) of the Code of Criminal Procedure) – arises from Art. 96 (5) nos. 2 and 3 of the Basic Law (*Grundgesetz* – GG) and section 142a (1) sentence 1 of the Courts Constitution Act (*Gerichtsverfassungsgesetz* – GVG) in conjunction with section 120 (1) no. 8 of the Courts Constitution Act.
84. 5. In any case, there is a risk of flight within the meaning of section 112 (2) no. 2 of the Code of Criminal Procedure. If the accused were to be released, he would be more likely to evade the criminal proceedings than to reappear for them.
85. In the event of him being convicted for the offences described under III.1.a. above, the accused can expect to receive a considerable prison sentence. This is because under section 7 (1) of the Code of Crimes against International Law, the minimum sentence for the crimes against humanity of enslavement and torture is a five-year prison term. In less serious cases (a category into which the present case seems unlikely to fall based on the current state of the investigation), the minimum sentence is a two-year prison term in accordance with section 7 (2) of the Code of Crimes against International Law. The accused is strongly suspected of having committed several acts of this nature; each one inflicted substantial physical and mental abuse on the victims and must therefore be considered serious.
86. Given the potential severity of the custodial sentence, the accused has a strong incentive to abscond. There are no counteracting circumstances that would sufficiently reduce this danger. In this respect, the assumption that the accused is likely to abscond does not require absolute certainty regarding the pertinent facts; it is sufficient for the assumption to be based on the same degree of probability that is required for establishing the strong

suspicion that a person committed an offence (cf. Federal Court of Justice, orders of 5 October 2018 - StB 43 and 44/18, juris para. 37; of 2 November 2016 - 3 StR 35/16, juris para. 11).

87. The accused, who has Syrian citizenship, has no ties in Germany. Before being arrested, he was registered in B. as residing in a refugee centre. In reality, however, he lived in various other places. He did not have a paid job or any other form of employment. In the time between the accused first entering Germany in 2016 as a person allegedly persecuted for political reasons and him being arrested, he spent several periods living in Turkey – sometimes for long stretches of time. His wife and children also live there. According to intercepted telecommunications, he was thinking about travelling back to Turkey again shortly before he was arrested.
88. The question of whether there is furthermore a risk of evidence being suppressed (section 112 (2) no. 3 of the Code of Criminal Procedure) – an assumption made in the arrest warrant of 25 January 2024 in light of the accused's efforts to circumvent the restrictions imposed on him in custody by making covert contact with family members and persuading them to make statements that would exonerate him – is not relevant for the present decision regarding his continued detention and can be left open.
89. Under the given circumstances, the purpose of the accused's remand detention cannot be achieved by less severe measures within the meaning of section 116 (1) of the Code of Criminal Procedure.
90. 6. The requirements for continuing to hold the accused in remand detention beyond six months (section 121 (1) of the Code of Criminal Procedure) are satisfied. The particular difficulty and unusual extent of the investigations have made it impossible to reach a decision yet, thereby justifying the continuation of the remand detention. The proceedings have so far been conducted with the particular urgency required in cases where detention is involved.
91. The investigations have been and still remain extremely wide-ranging and complex; the case documents now fill 53 box files. 38 witnesses have so far been examined at various locations in Germany and Austria, often with the help of interpreters. Requests for mutual

legal assistance have been made to the United Kingdom, Denmark and the USA. Traffic data obtained from the accused's communication on social networks has been examined, and 27 pieces of evidence seized from the accused when he was arrested (including two mobile phones) have been analysed. Furthermore, several expert opinions have been obtained, including an opinion by an Islamic scholar on the situation in the Damascus district of At-Tadamon since 2011 and an opinion on the National Defence Forces (NDF) – the organisation to which the accused most likely belonged (as a militiaman) when committing the acts described here. In addition, 27 video files showing the torture and killing of civilians by the NDF in At-Tadamon have been analysed and the recorded speech has been translated.

92. For further details on the investigations conducted since the accused's arrest, please refer to the Federal Criminal Police Office's memorandum of 11 January 2024 describing these investigations.
93. In a letter to the Panel dated 29 January 2024, the Federal Public Prosecutor General stated that the investigations are expected to be concluded in February 2024; charges are expected to be brought before the Hanseatic Higher Regional Court by March 2024 at the latest. It can therefore be assumed that the proceedings will continue to be conducted with the required urgency in future.
94. 7. Finally, after weighing the accused's fundamental right to liberty on the one hand and the public interest in prosecution on the other, the decision to continue holding the accused in remand detention is not currently disproportionate to the importance of the case and the penalty to be anticipated in the event of a conviction (section 120 (1) sentence 1 of the Code of Criminal Procedure).

Schäfer

Paul

Kreicker