DEVELOPMENTS

The "La Belle" Trial: The Sentencing of a Terrorist Bomber Under the German Penal Code

By Philipp Hoffmann[*]

A. Introduction

In June 2004, the *Bundesgerichtshof* (BGH - Federal Court of Justice) handed down a verdict in one of the longest trials involving terrorist criminal activities in German history.[1] The so called "La Belle" case provided legal action resulting from the bombing of the discotheque "La Belle" in West Berlin in 1986, which, at the time, was attended mostly by American soldiers. The BGH had to review the ruling of the *Berliner Landgericht* (LG - District Court), where the trial started in November 1997. After 281 days of trial and 170 witnesses a guilty verdict was handed down by the Berliner LG, which found the defendants guilty of murder and of aiding and abetting murder in the deaths at the "La Belle." Four defendants were sentenced to prison terms ranging between 12 and 14 years. In its final ruling on the case, the BGH, in principal, affirmed the verdict of the lower court by overruling most of the appellate claims of the prosecution, the defendants and the joint plaintiffs.

B. The Facts of the Case [2]

In 1986 relations between the USA and Libya were growing increasingly difficult. At that time the defendant Yasser Chraidi, who was a member of a Palestinian terror organisation, was accredited with the *Lybisches Volksbüro* in East Germany (LVB – Libyan embassy). The defendant Eter was an employee of the Libyan ministry of propaganda and a member of the so called "revolution committee." He was in contact with the LVB and stayed in East Berlin in 1985 and 1986. The last two of the four defendants, Ali Chanaa and Verene Chanaa, had been working as spies in East Germany for the East German *Ministerium für Staatssicherheit* (MfS – Ministry of

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[1] BGH, Judgment 24 June 2005 – 5 StR 306/03, 25 NStZ 35 (2005) = 57 NJW 3051 (2004).

[2] The facts of the case are reprinted in BGH, 57 NJW 3051, 3051-52 (2004).

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State Security) since 1982. Ali Chanaa was principally assigned responsibility for obtaining all possible information about Arabs living in West Berlin.

During March of 1986, Libyan officials instructed the LVB to assault American institutions in West Germany. The defendants Eter and Ali Chanaa then inspected various American facilities in West Berlin as well as places where large numbers of Americans congregated, such as discotheques. From three suitable targets, the LVB decided that the discotheque "La Belle" would become the object of the intended assault. On April 4, 1986, the wife of the defendant Yasser Chraidi transported approximately 1.5 kg of explosive, which had been provided by the LVB, to the defendant Verene Chanaa. It remained unclear throughout the trial, which one of the defendants, Verene and Ali Chanaa, Chraidi, or Eter, constructed the bomb and instructed the defendant Verene Chanaa in its operation. Verene Chanaa then transported the bomb in a bag to the discotheque and activated the time fuse. At that time, about 200 people were present inside the discothèque.

The bomb exploded at about 1:45 am on April 5, 1986. Three persons died because of fatal injuries they suffered from the explosion. Many others suffered severe injuries of various degrees.

In respect to the motivation of the defendants, the Berliner LG found that Eter and Chraidi had decided to participate in this bombing in order to not only harm the USA but to secure a higher rank within the LBV. The motivation of Ali and Verene Chanaa remained unclear.

C. The Rulings

The Berliner LG found the defendant Verene Chanaa guilty of collaborative murder in three cases concomitantly with attempted murder in 104 cases in coincidence with wilful causation of an explosion. The court sentenced her to 14 years of imprisonment. The defendants Ali Chanaa and Eter were convicted of accessory to these murders and were sentenced to 12 years of imprisonment. The defendant Chraidi was also convicted of accessory to murder in three cases and attempted murder in 104 cases. He was sentenced to 14 years of imprisonment.

The prosecution, the defendants and the joint plaintiffs based their appeal on several alleged violations of the law; only two of these are of general interest and will be reviewed here.

I. Aiding and Abetting Murder

The Berliner LG convicted and sentenced the defendants Chraidi, Ali Chanaa and Eter for the crime of accessory to murder, not of the crime of complicity to commit murder.[3] If convicted as accomplices, the defendants would have been sentenced as severely as the offender himself. On the other hand, the sentence for aiding and abetting in a crime must be mitigated by law.[4]

According to the jurisprudence of the BGH, *complicity* can be assumed if the participant in the criminal offence not only wants to support an offence committed by someone else, but wants to make his own contribution to the criminal action, accepting the criminal action as part of his or her own doing. *Aiding and abetting*, on the other hand, is characterized by the fact that the offender only wants to assist in someone else's offence, of which he is not in control. Hence, the decisive factors in distinguishing complicity and aiding/abetting include: the degree of the individual's interest in the success of the offence; the degree of its contribution towards the offence and its dominance within the group of offenders; and the question, whether the offender wants and views the offence as his or her own offence or as someone else's.[5]

Crucial to the Berliner LG's rejection of complicity was its conclusion that none of the defendants, Ali Chanaa, Chraidi or Eter, were involved in the transportation of the bomb to the discotheque and/or the ignition of the fuse. The court explicitly stated that since the executive employees of the LVB, who were not standing trial, took over the lead management, they were the principle coordinators. On the other hand, the court reasoned that the accused defendants never really controlled the plan; they merely carried it out.

The BGH confirmed that, because of the problematic and meagre available evidence, a conviction for aiding and abetting murder was an acceptable verdict.[6] The BGH acknowledged that the Berliner LG had to deal with inconsistent testimony from the defendants Ali Chanaa and Eter, and the testimony of other witnesses

[3] BGH, 57 NJW 3051, 3053 (2004).

[4] §§ 25 (II), 27 (I) and (II), 49 StGB (Strafgesetzbuch – Criminal Code); an English translation is available at http://www.iuscomp.org/gla/statutes/StGB.htm.

[5] *See* 37 BGHSt 289, 291 and HERBERT TRÖNDLE& THOMAS FISCHER, STRAFGESETZBUCH, § 25 MN 5a (52nd ed. 2004).

[6] BGH 57 NJW 3051, 3053-54 (2004).

remained fruitless. Hence, according to the principles of *in dubio pro reo*,[7] the lower court often had to assume the most favourable course of evidence for each defendant. For this reason, an active involvement in the planning of the attack on the discotheque could not be proven for any of the defendants Ali Chanaa, Chraidi and Eter. The BGH concluded that although a different appraisal of the involvement of the defendants could have been possible, in a case where the judgement on appeal clearly shows that the lower court took the entire circumstances of the case into account and correctly applied the above mentioned criteria to decide the question of guilt, the appellate court may not intervene and overrule the finding of a lower court just because a different judgement would have been possible. The BGH concluded that in such circumstances the court of appeal must recognize the other lower court's findings.[8] Hence, the BGH upheld the conviction of Ali Chanaa, Chraidi and Eter for *accessory* to the murder.

II. Murder Based on "Otherwise Base Motives"

The Berliner LG saw, in the killing of the visitors to the discotheque, a "treacherous" act which was committed "with means dangerous to the public."[9] On appeal, the BGH now further decided that the killing was also committed for "*otherwise base motives*."

1. Overview Of the Provisions

In order to understand the importance of this ruling, it is necessary to briefly sketch the provisions of the German Criminal Code that deal with intentional killing.

a) The History of the Statutes

The intentional killing of a human being is punishable according to §§ 211, 212 and 216 *Strafgesetzbuch* (StGB – Criminal Code).[10] The law differentiates between man-

[7] As for the meaning of this principle *see* CHRISTOPH SAFFERLING, TOWARDS AN INTENATIONAL CRIMINAL LAW, 260 (2003).

[8] Instead of all: BGH 18 StV 540 (1998); "Revision" is purely a review of the legal issues of a case. The facts have to be accepted as the Landgericht found them. In case the BGH is not content with the evidence and the facts, he will order a re-trial; *see* LUTZ MEYER-GOSSNER, STRAFPROZESSORDNUNG, vor § 333 MN 1 (47th ed., 2004).

[9] *See* BGH, 57 NJW 3051, 3054 (2004).

[10] The sections read as follows:

Section 211 Murder

(1) The murderer shall be punished with imprisonment for life.

slaughter and murder. This distinction ultimately comes from traditional criminal law theory: in the Germanic law, murder usually described the secret or concealed killing. The *Peinliche Gerichtsordnung* Charles V from 1532 distinguished both offences according to the fact, whether the crime was committed intentionally or in an affect. The *Reichsstrafgesetzbuch* (Imperial Criminal Code) from 1871 then used the criteria *Überlegung* (thoughtfulness) for differentiation:[11] there it was decisive that the killer was aware of the motives and reasons that would stop him from committing the crime, but weighs them against the motivations that push him towards committing the offence.[12]

Today, manslaughter refers to intentional killing, whereas murder consists of an intentional killing which displays the killing as a morally highly condemnable and especially dangerous act.[13] The subject of protection is the human life, which is protected in every phase and without any regard towards the attitude of life or the interest in living of the individual. Accordingly, the penal code guarantees an "absolute protection of life."[14]

b) Manslaughter, § 212 StGB

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(2) A murderer is, whoever kills a human being out of murderous lust, to satisfy his sexual desires, from greed or otherwise base motives, treacherously or cruelly or with means dangerous to the public or in order to make another crime possible or cover it up.

Section 212 Manslaughter

(1) Whoever kills a human being without being a murderer, shall be punished for manslaughter with imprisonment for not less than five years.

(2) In especially serious cases imprisonment for life shall be imposed.

Section 216 Homicide upon Request

(1) If someone is induced to homicide by the express and earnest request of the person killed, then imprisonment from six months to five years shall be imposed.

(2) An attempt shall be punishable.

[11] One could view in this requirement a parallelism to the English "malice aforethought"-requirement in murder; *C.f.* R. v. Mooney [1985] 1 All ER 1025.

[12] *See* Jähnke *in* LEIPZIGER KOMMENTAR, vor § 211 MN 35 et subs (11th ed., Hans-Heinrich Jescheck et. al, eds., 1993).

[13] *See* Maurach *in* STRAFRECHT BESONDERER TEIL TEILBAND 1, § 2 I MN 3 (9th ed. Maurach et al. eds. 2003).

[14] "Strafrechtlicher Rundumschutz", *see* Hartmut Schneider *in* MÜNCHENER KOMMENTAR StGB, vor §§ 211 MN 2 (Wolfgang Joecks & Klaus Miebach eds., 2004).

The offence of manslaughter requires the killing, the causing of the death, of a human being. It is without regard to the manner in which the offence is committed; manslaughter can either be committed by an active doing or by an omission of a necessary action if the offender has a duty to act.[15] Furthermore, the offender must have acted intentionally. It is sufficient that the offender at least has taken the death of the victim into account ("*bedingter Vorsatz*"): in those cases, the offender accepts the death of the person as a possible outcome or result of his action/omission and the offender accepts that risk. On the other hand, an offender only acts negligently, if he or she – although seeing the possibility of the death of the victim – trusts and believes that the action/omission will not lead to the death of the victim.[16] The rather high inhibition level ("*Hemmschwelle*") of killing another human being requires the courts to affirm such a *limited intention* in homicide cases only if the deciding judge took all circumstances, and especially those that spoke against the assumption of such a limited intent, sufficiently into account.[17]

c) Murder, § 211

Section 211 StGB deals with the capital crime of murder. Subsection 1 contains the sentence to be imposed upon a conviction for murder, whereas subsection 2 establishes the criteria for determining when a killing of a human being is to be considered as a murder. Since § 211 StGB necessarily requires the intentional killing of a human being in the meaning of § 212 StGB, § 211 StGB is a qualification of § 212 StGB, whereas § 212 StGB is the underlying elementary norm.[18]

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[15] The relevant section reads as follows:

Section 13 Commission by Omission

(1) Whoever fails to avert a result, which is an element of a penal norm, shall only be punishable under this law, if he is legally responsible for the fact that the result does not occur, and if the omission is equivalent to the realization of the statutory elements of the crime through action.

(2) The punishment may be mitigated pursuant to Section 49 subsection (1).

[16] *See, e.g.,* Claus Roxin, Strafrecht Allgemeiner Teil I, § 12 MN 21-31 (3rd ed., 1997).

[17] *See* Wessels & Hettinger, STRAFRECHT BESONDERER TEIL 1, MN 82 (28th ed. 2004); *see also* BGH, 21 NStZ 475, 476 (2001); and STEFAN MÜHLBAUER, DIE RECHTSPRECHUNG DES BUNDESGERICHTSHOFS ZUR TÖTUNGSHEMMSCHWELLE, 10-12 (1999).

[18] The BGH on the other hand, *see* § 211 and 212 StGB as two autonomous norms. The only relevant difference towards the above mentioned opinion occurs in case of § 28 StGB, but is too complex to be discussed in this paper and above all irrelevant for the issue at hand; *see* the analysis of Schneider (note 14) vor §§ 211 MN 132-36.

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Subsection 2 of § 211 StGB contains three groups that qualify a killing as murder. The first group of murder-criteria describes the increased damnability of the motivation for the killing. The second group is characterised by the highly dangerous or inhumane way of killing the victim. The third group finally punishes the particular unlawful aims of the offender. Hence, the first and third group deal with the attitude and motivations of the perpetrator and therefore the subjective side of the killing, the second group deals with the objective way in which the crime was committed.

i. The Criteria of the First Group

An offender kills with *murderous lust*, if it is important for the killer to see another human being die, if he or she kills because of mischief, swaggering, or as a pastime. The only reason for the crime is the killing of the victim itself.[19] The perpetrator kills *to satisfy his sexual desires* if he or she uses the killing as a way to find sexual satisfaction, i.e. if he or she seeks sexual satisfaction in the killing itself, kills in order to commit a sexual misdemeanor with the body, or accepts the death of the victim when committing a rape.[20] *Greed* is the increased, repelling, ruthless and unbridled seeing for pecuniary reward under every circumstance, even for the price of another human's life: characteristic is the immense disproportion between the purpose of the killing and the way the offender tries to achieve his of her goals.[21]

The last of the criteria in the first group, *otherwise base motives*, functions as a kind of catch-all requirement.[22] The criterion is fulfilled if the killer's motives stand on the lowest level according to common moral beliefs and - because of that – are especially condemnable, even contemptible.[23]

The motives of *murderous lust*, *satisfaction of sexual desires* and *greed* are examples of base motives for a killing that are explicitly enumerated in the law. Whether or not a motivation for a killing is otherwise "base" must be determined by reference to the entire circumstances of the offence as well as the personality and the life of the perpetrator.[24] The wording "otherwise base motives" addresses the big dispropor-

[19] *C.f.* 34 BGHSt 59.

[20] *See* LACKNER & KÜHL, STRAFGESETZBUCH, § 211 MN 4 (25th ed. 2004).

[21] *See* 10 BGHSt 399; 29 BGHSt 317.

[22] "Generalklausel," *see* Schneider, *supra* note 14, at § 211 MN 69.

[23] *See* 2 BGHSt 63, and 3 BGHSt 132, 133; 35 BGHSt 116, 126.

[24] *See* 35 BGHSt 116, 127.

tion between the reason for the killing and the unconsidered immolation of the victim in order to achieve the goal.[25] The autonomous and selfish recklessness of achieving the offender's interests is very decisive in those cases. The offender completely demotes the value of the victim's life.[26] Revengefulness, uncontrolled selfishness, anger about denied sexual intercourse, uncontrolled jealousy, or the killing of the victim in order to be able to marry the victim's wife in order to spend the money from the victim's life insurance are examples from the jurisprudence of these "otherwise base motives."[27]

ii. The Second Group of Murder Criteria

The second group of murder criteria describes the outer appearance of the offence and the especially condemnable way in which the killing was committed.

The killing is committed *treacherously*, if the perpetrator takes advantage of the defencelessness and the unsuspiciousness of the victim in a hostile manner when committing the crime.[28] A person is unsuspicious if an attack cannot be foreseen.[29] A victim is defenceless if, because he or she is unsuspicious, he or she does not have any or only a very limited possibility to defend him or herself.[30] This murder criterion must be applied in a restrictive way: some voices in the scholarly literature request a special mutual trust, which must exist between murderer and victim in order to characterize a killing as treacherous.[31] Other voices claim that a special emphasis needs to be made on the exploitation of the unsuspiciousness and defencelessness of the victim.[32] Accordingly, the crime must be committed in a malicious and devious way.[33] In any case, a killing is not treacherous if the killer first

[25] *See* BGH, 14 NStZ 34 (1994).

[26] *See* WOLFGANG JOECKS, STRAFGESETZBUCH, § 211 MN 16 (5th ed. 2004).

[27] Jealousy: 3 BGHSt 180; Selfishness: BGH 5 NStZ 454 (1985); Anger: BGH 13 NStZ 182 (1993).

[28] This is the common definition of the BGH: 2 BGHSt 251, 254; 9 BGHSt 385, 389; and 39 BGHSt 353, 368.

[29] *See* 7 BGHSt 218, 221; 32 BGHSt 382, 384.

[30] *See* Schneider, *supra* note 14, at § 211 MN 138.

[31] *See e.g.*, Winfried Hassemer, *Die Mordmerkmale, insbesondere "heimtückisch" und "niedrige Beweggründe* – BGHSt 23, 19, 11 JuS 626, 630 (1971) and EBERHARD SCHMIDHÄUSER, GESINNUNGSMERKMALE IM STRAFRECHT, 232-38 (1958); Albin Eser *in* Schönke & Schröder, § 211 MN 26 (26th ed., Adolf Schönke et. al eds., 2002) speaks of a prevailing view in legal writing.

[32] Overview in Lackner, *supra* note 20, at § 211 MN 6.

[33] *See* Wessels, *supra* note 17, at MN 108 et subs, GÜNTER SPENDEL, "HEIMTÜCKE" UND GESETZLICHE STRAFE BEI MORD 269-72 (1983).

had an open dispute with the later victim and thereby showed a hostile attitude towards the victim.[34] In such a case the victim could not have been unsuspicious at the time of the killing. Since a person "takes his unsuspiciousness with him to sleep," a sleeping person can be killed treacherously.[35] Children up to the age of three years normally are not able to develop a readiness to defend themselves, hence cannot be killed treacherously.[36] A victim, furthermore, is not defenceless if he or she has the possibility to defend himself or herself, e.g. the chance to flee. A killing is *cruel* if the victim suffers especially severe pain or physical torment because of a hard-hearted or ruthless attitude on the part of the perpetrator.[37] Since severe mental pain is sufficient, a killing is also cruel even if the killing itself is pain free. An offender commits the crime with *means dangerous to the public*, if the instrument that was used to commit the crime is generally capable of endangering many uninvolved people apart from the victim, since the offender is unable to control the instruments in the concrete situation.[38] The inability to control the instruments used and the offender's severe recklessness when unleashing those forces of nature are the reasons for the conviction of murder (as opposed to manslaughter) in such a case.[39] Hence, the criterion is fulfilled in cases of setting fire, flooding, or the poisoning of food in a common kitchen.[40]

iii. The Third Group of Murder Criteria

Finally, a homicide is classified as murder if the killing is committed in order to allow or conceal a different crime. The qualification as murder is justified here because the perpetrator kills the victim, the witness or a pursuer of a prior crime in order to avoid his or her own punishment.[41] Nonetheless it is sufficient if the killer wants to protect someone else's crime.[42]

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[34] *See* 20 BGHSt 301 and the recent case BGH 23 NStZ 425 (2003).

[35] *See* 23 BGHSt 119; and the recent house-tyrant case in 48 BGHSt 255, 256.

[36] From the jurisprudence of the BGH, *see* 8 BGHSt 216, 218.

[37] *See* 3 BGHSt 264.

[38] *See* Wessels, *supra* note 17, at MN 101

[39] *See* 34 BGHSt 13, 14; 38 BGHSt 353, 354: A pistol is therefore not a means dangerous to the public even if the accused could not control the weapon and accidentally shot an uninvolved bystander, *see also* Maurach, *supra* note 13, at § 211 MN 19.

[40] 1 OGHSt 86, Tröndle & Fischer, *supra* note 5, at § 211 MN 24.

[41] *See* 15 BGHSt 291.

[42] 9 BGHSt 180, Tröndle & Fischer, *supra* note 5, at § 211 MN 26.

d) The Sentence for Murder

Section 211 (I) StGB punishes every murder with a mandatory sentence of life imprisonment; § 212 (II) StGB imposes imprisonment of at least 5 years for manslaughter. The *Bundesverfassungsgericht* (BVerfG – Federal Constitutional Court) decided in 1977 that unless further offences are to be expected from the perpetrator, no punishment may indeed be executed life long.[43] In the eyes of the BVerfG it is part of a humane penal system that even the criminals, who have been convicted to a life term, must stand a chance in principle of returning to an ordinary life outside prison. Today, § 57 a StGB states that after 15 years of served sentence, the prisoner is to be released on probation, unless the original trail court positively determined the particular gravity of the convicted person's guilt ("*besondere Schwere der Schuld*").[44] Therefore, the question as to the "*besondere Schwere der Schuld*" proves as decisive concerning the question of when a murder-convict will be released on bail. Whether or not there is a particular gravity is for the *Landgericht* to decide at the same time as the decision on the "ordinary" guilt verdict.[45]

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[43] *See* 45 BVerfGE 187.

[44] The relevant section reads as follows:

Section 57a Suspension of the Remainder of a Punishment of Imprisonment for Life

(1) The court shall suspend execution of the remainder of a punishment of imprisonment for life and grant probation, if:

1. fifteen years of the punishment have been served;

2. the particular gravity of the convicted person's guilt does not require its continued execution; and

3. the requirements of Section 57 subsection (1), sent. 1, nos. 1 and 3 are present.

Section 57 subsection (1), sent. 2 and subsection (5) shall apply accordingly.

(2) Any deprivation of liberty undergone by the convicted person as a result of the act shall qualify as punishment served within the meaning of subsection (1), sentence 1, no. 1.

(3) The term of probation shall be five years. Sections 56a subsection (2), sent. 1, 56b to 56g and 57 subsection (3), sent. 2, shall apply accordingly.

(4) The court may fix terms not exceeding two years, before the expiration of which an application by the convicted person to suspend the remainder of the punishment and grant probation shall be inadmissible."

[45] This was decided by the Federal Constitutional Court in 86 BVerfGE 288. This decision is still debated, but has been accepted by the general practice; for an overview, *see* Tröndle & Fischer, *supra* note 5, at § 57a MN 7-18; and FRANZ STRENG, STRAFRECHTLICHE SANKTIONEN, MN 229 (2nd ed. 2002). The question is to be determined by a general evaluation of the offence and the personality of the offender; *see* 40 BGHSt 360.

There is no statutory limitation for murder.[46] For manslaughter the statutory limitation is 20 years.[47] Despite the clear wording of § 211 (I) StGB, it is highly disputed, whether indeed every murderer needs to be sentenced with life imprisonment, or whether in some cases a conviction for murder nevertheless can be declined because the circumstances of the case do not support the assumption of a killing as especially and highly condemnable.[48] In this context the case of a battered and sexually abused woman is often cited who treacherously killed her husband when he started to attack her again. In that case the woman could not rely on the excuse of self-defence. There are voices in the judicial literature that call for a punishment only for manslaughter in such cases.[49] Other scholars demand that the extenuating cause of § 213 StGB,[50] which *expressis verbis* only applies in cases of manslaughter, nevertheless must also be applied to such murder cases.[51] The BGH always refused to convict only for manslaughter in these cases, but nevertheless accepted that, in few cases where the life long sentence obviously would seem to be inappropriate, the extenuating cause of § 49 (I) No 1 StGB[52] may be applied.[53] But since all those

[46] The same is true for genocide, *see* § 78 (II) StGB; the former statutory limitation for murder and genocide has first been delayed (1969) and then been lifted entirely (1979); nevertheless the statutory limitation has led to quite some extraordinary decisions like in the Caiazzo case 48 NJW 1297 (1995) where a former Wehrmachtsoffizier was charged with the killing of civilians.

[47] § 78 (III) StGB

[48] *See* Maurach, *supra* note 13, at § 211 MN 24

[49] Eser, *supra* note 31, at § 211 MN 10, *see also* the recent case before the BGH in 48 BGHSt 255. The battered wife in this case killed her husband when he was asleep. The Court stated that this was a treacherous act but ordered a re-trial for diminished responsibility.

[50] The relevant section reads as follows:

Section 213 Less Serious Case of Manslaughter

If the person committing manslaughter was provoked to rage by maltreatment inflicted on him or a relative or a serious insult by the person killed and was thereby immediately torn to commit the act, or in the event of an otherwise less serious case, the punishment shall be imprisonment from one year to ten years.

[51] Maurach, *supra* note 13, at § 2 III A 3; Peter Riess, *Zur Abgrenzung von Mord und Totschlag*, *in* 21 NJW 628, 630 (1968)

[52] The relevant section reads as follows:

Section 49 Special Statutory Mitigating Circumstances

(1) If mitigation is prescribed or permitted under this provision, then the following shall apply to such mitigation:

1. Imprisonment for not less than three years shall take the place of imprisonment for life;

2. In cases of imprisonment for a fixed term, at most three-fourths of the maximum term

attempts to approach this problem are contrary to the written law and thus probably unconstitutional, the only correct way in such cases is to apply the murder criteria in a restrictive manner, especially the criterion "treacherous." But, in cases where the act of the offender still fulfils a murder criterion, the life-long sentence must be applied.

2. The Rulings of the Courts in Respect to the Murder issue in the "La Belle" Case

The Berliner LG ruled that the bombing was a treacherous murder committed with means dangerous to the public.[54] On the other hand, that court explicitly refused to convict the defendants of a murder committed because of "otherwise base motives."[55] The Berliner LG stated that the political motivation of a killing could not fulfill the criterion of "otherwise base motives." It based its conclusion on the existence of a pluralism of different views and beliefs that needed to be taken into account.[56]

The BGH, on the contrary, held that a killing is committed because of "otherwise base motives," if people, who are not involved in the political distress, get killed by a bomb explosion. The BGH repeated its long jurisprudence which has held that the question is to be determined by the circumstances of the individual case, including the requirement that the motivation for the killing needs to stand on the lowest possible moral level.[57] In the eyes of the BGH, the random and distinctive and

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provided may be imposed. In case of a fine the same shall apply to the maximum number of daily rates;

3. An increased minimum term of imprisonment shall be reduced:

in the case of a minimum term of ten or five years, to two years;

in case of a minimum term of three or two years, to six months;

in case of a minimum term of one year, to three months;

in other cases to the statutory minimum.

(2) If the court may in its discretion mitigate the punishment pursuant to a norm which refers to this provision, then it may reduce the punishment to the statutory minimum or impose a fine instead of imprisonment.

[53] BGHSt 30, 105

[54] *See* BGH 57 NJW 3051,3054 (2004).

[55] *Id.*

[56] *See* the judgement of the LG Berlin reported in BGH 57 NJW 3051, 3056-57 (2004).

[57] *Id.* at I. 3. a.

therefore arbitrary selection of uninvolved victims fulfils this requirement. The court further reasoned that the devastating effect of a bomb is blatantly inhuman.[58]

The BGH furthermore reasoned that the foreign Libyan background of the defendants, where this attack might even have been accepted because of some sort of political blindness, could not be a relevant point for a German court: the distinction of the lowest moral level needs to be made according to the attitudes and views prevalent in Germany, but not according to those of a foreign group or civilisation that does not approve the German moral and juridical attitudes.[59]

3. Consequences for the Appeal

The BGH rejected all other points of the appeal that were brought forward, and in the end only disagreed with the Berliner LG's ruling on one point. The BGH, unlike the Berliner LG, also convicted the defendants Ali Chanaa, Eter and Chraidi for aiding and abetting the murder committed for "otherwise base motives."

In a case where an appeal is (partly) successful, the BGH usually overrides the ruling of the lower court and refers the case back to that court for re-trial.[60] In the "La Belle" case, however, the BGH instead followed its jurisprudence in which it has held that it may uphold the conviction of a lower court if one murder criterion was negated incorrectly but another one affirmed correctly and in respect to the negated criterion no further fact-finding is necessary.[61] If on the contrary, the appellate court cannot decide according to the findings of the lower court whether a murder criterion indeed was fulfilled, the lower court must try the case again.[62] In the "La Belle" case, the BGH concluded that the findings of the Berliner LG were sufficient for it to affirm the applicability of the murder criterion "otherwise base motives." Furthermore, the BGH concluded that a reference back to the Berliner LG was not necessary with respect to the concrete sentence for the defendants: since the sentences for the defendants were already located on the upper range of the possible scale for a murder conviction, the additional affirmation of a murder criterion would not have had any consequences on the sentence of the defendants.

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[58] *See* BGH 57 NJW 3051, 3054 (2004).

[59] *See also* BGH 57 NJW 1466 (2004).

[60] §§ 353 (I), 354 (II) StPO; an English translation is available at http://www.iuscomp.org/gla/statutes/StPO.htm.

[61] 41 BGHSt 222, BGHR StPO § 353 I Teilaufhebung 1.

[62] *See* Section 353 (I) and (II) stop.

E. Discussion of the Court's Ruling

Overall, the ruling of the BGH is laudable. In some parts, the ruling conveys that the BGH had the ultimate desire to finally end this case after so many years by upholding the ruling of the Berliner LG, probably also for the sake of the victims and their families. The most important and far-reaching impact of this ruling was the additional conviction of the defendants as murderers because of "otherwise base motives."

Although the decision was correct in this special case, a *general* assumption of the applicability of this murder criterion in every bombing attack with a terrorist background, as the BGH seems to argue, cannot be accepted.

I. Reason for the Assumption of the Applicability of the "Otherwise Base Motives" Criterion

It first seems necessary to clarify what the correct reason for the conviction of murder, pursuant to the "murder because of otherwise base motives" criterion, is in a case like this.

One view argues that a racially motivated killing which was committed apart from any individual conflict with the victim needs to be considered as a murder "of otherwise base motives," because the negation of the victim's personal value in such a case is especially condemnable.[63] Furthermore, a racially motivated killing contradicts every democracy's clear decision towards tolerance.[64] However, this cannot be a convincing argument: the killing of a human being always and necessarily contains the negation of the victim's right to life. Hence, this thought is the reason to punish the perpetrator because of the offence of manslaughter, but it cannot at the same time justify a conviction of murder without any further circumstances that make the offence look *especially* condemnable. In addition, the criminal offence of "murder" surely does not protect the tolerant living coexistence of human beings, but only protects the life of a human being. Hence, the killing because of the victim's race is intolerant, but this fact alone may not justify a conviction for murder on the basis of the "otherwise base motives" criteria.

Maurach argues that a perpetrator commits a murder because of "otherwise base motives," if he uses "a human life to demonstrate and push through his own politi-

[63] These are sometimes called "hate crimes," *see e.g.,* HANS-JÖRG SCHNEIDER, KRIMINOLOGIE DER GEWALT 43 (1994).

[64] *See* Schneider, *supra* note 14, at § 211 MN 83 and Jähnke, *supra* note 12, at § 211 MN 28.

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cal goals or to keep others from following their political goals."[65] This justification is also not convincing. First, the "political motivation" of a killing is not a very reliable criterion to differentiate between manslaughter and murder, since it is more than difficult to define what a political motivation is in the first place and when such a motivation indeed exists.[66] Moreover, the question arises in what way a perpetrator who kills because of a religious belief is then to be punished. Will the crime that was committed to "demonstrate someone's own *religious* beliefs or to keep others from following their beliefs" also be considered a murder? If this were to be the case, then obviously every killing according to one's inner beliefs would be murder, so that the criterion of a *politically* motivated killing again would be useless. If, on the contrary, this killing would be treated only as manslaughter, the verdict would imply an incomprehensible privilege for the religious fanatic offenders.

The BGH reasoned that the conviction of murder pursuant to the "otherwise base motives" criteria was justified in the "La Belle" case because of the disastrous effect that usually takes places with the uncontrollable use of bombs and called such a killing *per se* inhuman.[67] But in fact, the criterion of the uncontrollability of the method used for the killing is the relevant starting point for the murder criterion "means dangerous to the public." By affirming that criterion the especial damnability of using such weapons for the killing is already "consumed" and accounted for. It is, therefore, not convincing to use the very same starting point to affirm a second murder criterion pointing toward the "lowest moral level" on the objective way of committing the killing, especially since there is a special murder criterion available.

Following Michael Walzer, the correct justification for a murder conviction for reasons of "otherwise base motives" in a bombing attack lies in the indistinctive and therefore random killing of uninvolved people: the victims were not representatives of the special politics the perpetrator was fighting against, but they are only members of a certain group. This differentiates the terrorist killing from a political assassination: in the latter case, the attack is aimed at one political leader; in the case of a terrorist attack, the offence points at uninvolved people.[68] The severe contemptibility of the offence now is that the victims were murdered not for things

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[65] *See* Maurach, *supra* note 13, at § 211 MN 38.

[66] *See* Lars Brocker, *Die Tötung des politischen Gegners und § 211 Abs. 2 StGB*, JR 13 (1992).

[67] BGH 57 NJW 3051, 3054 (2004).

[68] *See* Dirk v. Selle, *Zur Strafbarkeit des politisch motivierten Tötungsverbrechens*, 53 NEUE JURISTISCHE WOCHENZEITSCHRIFT 992, 996 (2000) *and* MICHAEL WALZER, JUST AN UNJUST WAR. A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 197 (2nd ed., 1992).

they had done but just because of who they were.[69] The special condemnability of the killing indeed lies in the fact that the offender avoids the argument with the political opponent but uses a third party quasi as hostages and even sacrifices their lives to promote his or her political agendas. As far as the BGH based its verdict of murder on the "otherwise base motives" criteria because of the random killing of uninvolved people, the judgement can indeed be valid and convincing.

II. Political Murder

There has been a long discussion in German judicial literature whether a political murder, where the offender eliminates selectively a specific political opponent, needs to be treated differently from a "normal" homicide.[70] Some argue that, in such a case, the intolerance of the offender, the malice of his mental thoughts and the animosity against society expressed by such an act is especially condemnable and makes every killing for political reasons a murder on the basis of the "otherwise base motives" criteria.[71] The only possible limit for a conviction of murder could be the right to defeat society and democracy, which is mentioned in Art. 20 IV *Grundgesetz* (GG -- German Basic Law / Constitution).[72] The overwhelming number of authors[73] support the alternative reasoning and argue that political motivations are not *per se* "otherwise base motives." Since all murder criteria contain some elements of selfishness, the goal that the offender seeks with his killing for himself needs to be the decisive factor. Hence, in case the political murder is committed because of some egoistic striving for power or because of a personal hate towards the political enemy, the crime then will be punished as a murder. If, on the other side, the offender acted out of a real or alleged "interest of the public,"[74] then the killing only shall be considered as manslaughter. The perpetrator's willingness to give up and sacrifice his own life during the crime might be an indication of such a "public interest."[75]

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[69] *See* Walzer, *supra* note 68, at 200.

[70] Overview in Brocker, *supra* note 66, and Oliver Zielke, *Politische Motivation als niedriger Beweggrund im Sinne des § 211 Abs. 2 StGB*, JR 136 (1991).

[71] Instead of all: Jähnke, *supra* note 12, at § 211 MN 29, and Brocker, *supra* note 66, at 13.

[72] Art. 20 (4) Grundgesetz reads as: "All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available."

[73] Dreher & Tröndle, *supra* note 5, at §211 MN 13, Maurach, *supra* note 13, at MN 38, Eser, *supra* note 31, at § 211 MN 20

[74] "Allgemeine Interessen"; this requirement is treated very restrictive in the literature and jurisdiction of the BGH, *see e.g.*, BGH 3 NJW 434 (1950).

[75] Eser, *supra* note 31, at § 211 MN 20.

Because the judgement in the "La Belle" case only states very little about the motivation of the defendants, the question how the above mentioned opinions would respond to this case can not be answered. But it can be assumed that both of the mentioned opinions would convict the defendants as murderers. The first mentioned opinion, according to which every political killing is necessarily a murder, would surely convict for murder, since the defendants definitely could not rely on a possible constitutional right to defend democratic society.[76] But, the supporter of the alternative view would also come to the conclusion that, although the defendants did not commit the crime because of a personally motivated struggle for power, they committed the crime because of rivalry and hate towards their political opponent and therefore acted for egoistic reasons. Such attitudes necessarily exclude the assumption of an alleged "public interest" of the crime.[77] Besides that, the defendants were not willing to sacrifice their own life for their crime.

But moreover, a possible privilege for a political murderer in terms of the above mentioned opinions could not be granted to terrorists in the first place: in the case of a political assassination, the offender kills a specified political enemy, whereas in case of a terrorist attack, the victims are solely killed because of their belonging to a special group, hence attacked as uninvolved people. The strong inner political beliefs of the offender that indeed might make a political assassination "understandable" and more comprehensible may not play the same role when such uninvolved people get killed instead. The opponent of the offender is not targeted, but a third party is. This may then not privilege the wrongdoing of the offender as it might do so in case of a political assassination, so that in the end the above mentioned discussion is not applicable for the present case.

III. Foreign Beliefs

Finally, it must be determined whether the fact that most of the defendants in the "La Belle" case were foreigners should have any influence on their murder conviction because of "otherwise base motives." In this context, the cases of *Blutrache* (vendetta)[78] need to be mentioned. Here, the (foreign) offender believes that the victim had damaged his personal or his family's honour. According to the strongest inner beliefs of the offender, the only way to re-establish this honour is by the killing of the person who perpetrated the dishonour. Some (few) foreign cultures in-

[76] As would be privileged according to Art. 20 IV Grundgesetz – *see supra* note 72.

[77] Schneider, *supra* note 14, at § 211 MN 84.

[78] From the case law *see* BGH 48 NJW 602 (1995), BGH 16 StV 208 (1996), BGH 57 NJW 1466 (2004).

deed punish those avengers more leniently or not at all.[79] The question now arises, whether such foreign cultural moral beliefs and customs have to be considered by a German court in the determination of "otherwise base motives." In the end, there is consensus in the judicial literature and jurisprudence that foreign values, which the offender understands as binding upon him or herself, in principal, must be taken into account and, hence, can ultimately lead to the negation of the "otherwise base motives" criteria of a killing.[80] Yet it is highly disputed, how those foreign beliefs shall be taken into account.

One scholarly opinion and even some Senates of the BGH[81] argue that foreign values and beliefs already need to be considered when judging the motives that made the offender commit the crime. Because the judgement on the "base motives" takes all circumstances of the case and the personality of the offender into account, the personal background of the offender, his foreign values and beliefs are important parts towards this question.[82]

On the contrary, it seems much more convincing that, as the deciding Fifth Senate of the BGH[83] stated in the "La Belle" case, only the local German beliefs can be the relevant standard for a German court to decide upon the question of the "lowest moral level." This reasoning is convincing because the result otherwise would establish an inequality before the law, since the same offence could be punishable as a murder for a German defendant but not for a foreign defendant. Moreover, foreigners would come to be treated differently among each other, depending on their religious beliefs and background.[84] For example, a Turkish defendant from the relatively open minded metropolis of Ankara would have to be treated differently from his compatriot, who originates from the strictly conservative South-Eastern

[79] The vendetta is still a vital element of the common law practiced for example in the rural areas of Northern Albania and parts of Afghanistan, *see* VG Oldenburg 12 A 1019/98. Although on the other hand the Turkish legislator recently explicitly outlawed the vendetta it is today nonetheless still practiced in some few Turkish families. For a very recent vendetta among in Germany living Turks, *see*: Sueddeutsche Zeitung, SZ 21 February 2004, p. 1.

[80] *See* Schneider, *supra* note 14, at § 211 MN 92, Jähnke, *supra* note 12, at § 211 MN 39, BGH in 17 StV 565 (1997) and 16 StV 208 (1996).

[81] This was the 4th Senate of the BGH in the case reported in 17 StV 565 (1997) and Lackner, *supra* note 20, at § 211 MN 5.

[82] *See* the comment of Michael Köhler in 35 JZ 238 at 240 (1980) of the decision of the BGH reprinted in 35 JZ 238 (1980).

[83] The second senate followed this ruling: 16 StV 209,209 (1996), 22 NStZ 369,370 (2002).

[84] *See* Schneider, *supra* note 14, at § 211 MN 94.

part of Turkey, since the attitudes in both places will vary heavily and hence the standard of the moral level.

Nevertheless this second opinion acknowledges that the murderer must have had the intention to commit the killing out of "otherwise base motives," which are determined according to German standards. But in order to have that intention, the offender must have been able to *understand* that the killing would be treated in Germany as a killing because of "otherwise base motives," hence stands on the lowest moral level according to local beliefs. That being so, if the offender according to his personal capability and possibilities did not know about the circumstance that made his motives stand on that lowest moral level or if it was impossible for him to dominate and volitionally operate his emotional reactions that govern his actions,[85] he then cannot be convicted for murder for lack of *mens rea*. The BGH hence reasoned in prior cases that a foreigner who only lived for a very short time in Germany and was still massively influenced by his foreign values and beliefs and was not able to loosen himself from them yet, could not be punished as a murderer when he commits a vendetta in Germany.[86]

The very same principle must be applied in terrorists cases such as the "La Belle" case: if the offender, who comes from a foreign culture that approves and even supports the committed crime and if the offender was still so very much attached to the foreign culture that he was unable to understand the German way of judging on "otherwise base motives," then it is possible to show that this terrorist does not have the necessary intention that would allow a conviction for murder because of "otherwise base motives." Therefore, although from an objective way of looking at the offence German law would consider the committed crime as murder because of "otherwise base motives," the defendant then could only be punished for manslaughter.

In the "La Belle" case all defendants had lived in East and West Berlin for many years prior to the crime. All of them knew, understood and comprehended the local German values and beliefs. Because of that, they were all able to evaluate the criteria "otherwise base motives" or at least judge correctly on the lowest moral level according to German standards. Thus they acted with the necessary intent and knowledge, so that in the end the foreign backgrounds of the defendants could also not influence their sentence.

[85] BGH 48 NJW 602, 603 (1995).

[86] BGH 16 StV 208 (1996) and 22 NStZ 369 (2002).

F. Conclusion

The ruling of the BGH is for the most part convincing. As far as the BGH seems to assume that each and every killing with a terrorist background as such will always have to be treated as a murder out of "otherwise base motives," it does not recognise its own jurisprudence, which requires courts to take other foreign values and views into account. This view, when applied, could ultimately mean that even a terrorist in some circumstances, cannot be convicted as a murderer, unless of course he or she fulfils other murder criteria with the killing, which will regularly be the case as in the decision discussed here. Because of this rather undistinguished decision and the impression that the entire ruling was motivated by the intention to uphold the lower court's ruling in any event, the judgement of the BGH, although acceptable in its final result, does have a moldy aftertaste.

Because of the undistinguished ruling as to the assumption of "otherwise base motives" in terrorist killings, one now could argue that the court therefore wanted to give a general judgement with a preventive effect, setting the signal that terrorist activities will not be tolerated but strictly punished by German courts. Such a judgement would surely serve the general and undifferentiated call in the unsettled public for harsher and tougher sentences in today's times and might mean that Germany finally moves away from "Old Europe." But such a general judgement should give rise to objections: obviously every defendant has to be punished according to his or her own guilt and crime, but not according to current world affairs. It would be intolerable if the same case was to be decided differently, depending on whether it was judged in the 1970s when the terrorist group RAF was at its peak in Germany, or in the relatively peaceful times in the 1990s, or today, after September 11.

But indeed, the verdict of the BGH cannot be interpreted as a ruling with such an intent: despite the fact, that the ruling was inexact in at least one point, it is a just verdict that shows the Court's clear effort to try this individual case. The BGH, for example, did not punish the defendants as severe as possible just because of the terrorist background of the crime. The Court accepted the conviction for aiding and abetting the murder instead of demanding a conviction because of collaborative murder and also allowed for the lower sentence of the defendant Verene Chanaa because of mental-health problems, although this question was disputed among medical experts.[87] The verdict therefore stands in line with earlier decisions of the BGH where the Court held an assumed terrorist's procedural rights over his con-

[87] BGH 57 NJW 3051, 3055 (2004).

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viction.[88] It can only be hoped that the BGH will continue to decide future cases involving terrorist activities on their own merits and apart from an alleged "zeitgeist," but next time recalling its own jurisprudence.

[88] *See* the El Motassadeq case concerning the 9/11 attack in BGH 57 NJW 1259 (2004) reviewed by Safferling in 5 GERMAN L.J. 515 (2004).

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