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THE ISSUE OF «TRIAGE» IN GERMAN CRIMINAL LAW

The article deals with the issue of “triage” through the prism of the legal concept of the “justifying conflict of duties», which has triggered considerable debate in Germany in particular with regard to the Covid pandemic. Attention is brought to problems associated with criteria, on the basis of which a physician has to give priority to saving certain patients; the question is raised whether the legislator should establish such a “ranking” of criteria to which the physician must adhere or whether the physician should be left free to decide whom to save. It is also discussed whether the physician can be held criminally responsible for the death of the other patient. An overview of the legal assessment of the three forms of triage in Germany is given. The author also addresses the question of the legal consequences for the physician if he makes a decision for improper motives.

Keywords: triage, forms of triage, justifying conflict of duties, medical treatment, criminal liability, concept of “extraneous motives”.

Problem statement. The Covid pandemic, which reached Germany in March 2020 at the latest, has added a new aspect to the legal concept of the “justifying conflict of duties”. The question is whether physicians can be prosecuted for manslaughter or bodily injury (by omission) if the ventilators available in a hospital are not sufficient to ensure adequate medical care for the patients admitted.

The term “triage” actually originates from the field of military medicine and is currently also gaining relevance in Ukraine. Due to the Russian war of aggression, Ukraine is now in a terrible war. This war and in this context specifically the missile attacks have the consequence that many people in Ukraine are killed or injured. The injured people are admitted to clinics, where medical treatment is required and, in many cases, - especially in times of war - treatment options will be limited.

In typically discussed cases of Triage, only one ventilator in a hospital is available and two people are admitted at the same time, who can only be saved by being connected to that ventilator. However, the doctor on duty is technically obliged to provide both patients with sufficient care. If he fails to do so and a patient dies as a result of the

lack of medical treatment, then – with the appropriate intent – criminal liability on the part of the physician for death by omission stands to reason.

In the aforementioned cases, however, the physician cannot save both patients, since he has only one ventilator at his disposal. He can therefore only save one of the patients and must allow the other patient to die. This inevitably raises the question of whether he can be held criminally responsible for the death of the other patient. However, since no one is obliged to perform the impossible, criminal liability must be ruled out in this case. In this context, the question is at what level of criminal liability (constituent element, unlawfulness, culpability) criminal liability no longer applies.

Analysis of the latest researches and publications. The situation of “triage”,¹ which has not yet become reality in Germany, at least officially, unfortunately already gained tragic significance in other European countries at the beginning of the year 2020. In German criminal legal literature, it triggered a discussion about how to decide in such cases (on this topic see the publication by Brech, A. (2008) “Triage and law - Patient selection in mass emergencies of those in need of help in disaster medicine. A contribution to the justice debate in health care “; Scholten, K. (2011) “Triage - On the criminal liability of medical selection decisions “)² – and whether there are or should be binding criteria in such an emergency on the basis of which a physician has to decide (Ast, S. (2020) “Quieta non movere? Medical selection criteria and termination of treatment in the event of a conflict of duties from a criminal perspective; Hilgendorf, E., Hoven, E., Rostalski, F. (2021) “Triage in (criminal law) science”³. It

¹ The term “triage” derives from the French “trier” (to sort, select, choose). It has its origins in military medicine. There, it denotes a (selection) procedure according to which (medical) assistance must be provided if, in times of war and emergency, the number of persons in need of help exceeds the human or material resources of the relief forces; cf. Kern, B.-R./Rehborn, M., in: Laufs, A./Kern, B.-R./Rehborn, M. (eds.). R./Rehborn, M. (eds.), *Handbuch des Arztrechts*, C.H. Beck, Munich, 5th ed. 2019, § 21 Rn. 24.

² On this topic, however, see the 2008 publication by Brech, A., *Triage und Recht - Patientenauswahl beim Massenanfall Hilfebedürftiger in der Katastrophenmedizin. Ein Beitrag zur Gerechtigkeitsdebatte im Gesundheitswesen*, Duncker & Humblot, Berlin, 2008; furthermore - also dating from earlier times - Scholten, K., *Triage - Zur Strafbarkeit ärztlicher Auswahlentscheidungen*, Verlag Dr. Kovac, Hamburg, 2011.

³ Cf. on this issue only Ast, S., *Quieta non movere? Ärztliche Auswahlkriterien sowie der Behandlungsabbruch im Fall einer Pflichtenkollision aus strafrechtlicher Sicht*, *Zeitschrift für internationale Strafrechtsdogmatik* 2020, 268; Coca-Vila, I., *Strafrechtliche Pflichtenkollision als Institut der Maximierung der Zahl der Überlebenden? Eine Kritik der utilitaristischen Wende in der Triage-Diskussion*, *Goltdammer’s Archiv für Strafrecht* 2021, 446; Engländer, A./Zimmermann, T., *«Rettungstötungen» in der Corona-Krise? Die Covid-19-Pandemie und die Zuteilung von Ressourcen in der Notfall- und Intensivmedizin*, *Neue Juristische Wochenschrift* 2020, 1398; Gaede, K./Kubiciel, M./Saliger, F./Tsambikakis, M., *Rechtmäßiges Handeln in der dilemmatischen Triage-Entscheidungssituation*, *Zeitschrift für Medizinstrafrecht* 2020, 129; Hoven, E., *Die «Triage»-Situation als Herausforderung für die Strafrechtswissenschaft*, *Juristenzeitung* 2020, 449; Jäger, C./Gründel, J., *Zur Notwendigkeit einer Neuorientierung bei der Beurteilung der rechtfertigten Pflichtenkollision im Angesicht der Corona-Triage*, *Zeitschrift für internationale Strafrechtsdogmatik* 2020, 151; Merkel, R./Augsberg, S., *Die Tragik der Triage - straf- und verfassungsrechtliche Grundlagen und Grenzen*, *Juristenzeitung* 2020, 704; Sowada, C., *Strafrechtliche Probleme der Triage in der Corona-Krise*, *Neue Zeitschrift für Strafrecht* 2020, 452; see also the articles in Hilgendorf, E./Hoven, E./Rostalski, F. (eds.), *Triage in der (Strafrechts-)Wissenschaft*, Nomos, Baden-Baden 2021.

furthermore needs to be asked whether such criteria should be created by the legislator, or whether they should be developed by jurisprudence or the literature or whether the physician in triage cases should be free in his decision and subject only to his conscience (Gaede K., Kubiciel M., Saliger F., Tsambikakis M. (2020) "Lawful action in the dilemmatic triage decision-making situation")⁴.

Main part of the research paper.

Types of triage. In principle, three forms of triage can be distinguished: The "classic" form of triage is the situation of so-called "ex-ante" triage mentioned above. Here, two emergency patients are admitted to the hospital at the same time, but the physician has only one ventilator available and can therefore save only one of them.

Next there is the situation of the so-called "ex-post" triage.⁵ In this case, a patient is already connected to a ventilator but has only a slight chance of survival. Now another patient with a higher chance of survival is admitted. The question now arises whether the physician may withdraw the ventilator from one patient in order to make it available to the other patient with a higher chance of survival.

In addition, a third form of triage is being discussed, the so-called "preventive triage". Here, a patient admitted to the hospital with a low chance of survival is denied connection to a ventilator because patients with a higher probability of survival are likely to be admitted soon who need the ventilator just as urgently and who, if they were admitted at the same time, could be given priority.⁶

While "ex-ante" triage is generally regarded as a problem of justifiable conflict of duties, "ex-post" triage and "preventive" triage are said to be legally impermissible according to the prevailing view.

„Ex-ante“ triage. First of all, the case of "ex-ante" triage should be discussed. In German academic literature, this is generally regarded as permissible. This is predominantly seen as a case of a "collision of duties" which, according to the prevailing view, leads to a justification of the physician.⁷ The opposing view, however, regards cases of

⁴ This is the claim of Gaede, K./Kubiciel, M./Saliger, F./Tsambikakis, M., *Rechtmäßiges Handeln in der dilemmatischen Triage-Entscheidungssituation*, *Zeitschrift für Medizinstrafrecht* 2020, 129 (130); in contrast, Merkel, R./Augsberg, S., *Die Tragik der Triage - straf- und verfassungsrechtliche Grundlagen und Grenzen*, *Juristenzeitung* 2020, 704 (705).

⁵ Critical of the use of these terms Jäger, C./Gründel, J., *Zur Notwendigkeit einer Neuorientierung bei der Beurteilung der rechtfertigen Pflichtenkollision im Angesicht der Corona-Triage*, *Zeitschrift für internationale Strafrechtsdogmatik* 2020, 151 (152), who instead proposes the terms "Aufnahmetriage" (admission triage) and "Fortsetzungstriage" (continuation triage); along these lines also Sowada, C., *Strafrechtliche Probleme der Triage in der Corona-Krise*, *Neue Zeitschrift für Strafrecht* 2020, 452.

⁶ Cf. Coca-Vila, I., *Strafrechtliche Pflichtenkollision als Institut der Maximierung der Zahl der Überlebenden? Eine Kritik der utilitaristischen Wende in der Triage-Diskussion*, *Goltdammer's Archiv für Strafrecht* 2021, 446 (452, 457); Engländer, A./Zimmermann, T., *„Rettungstötungen“ in der Corona-Krise? Die Covid-19-Pandemie und die Zuteilung von Ressourcen in der Notfall- und Intensivmedizin*, *Neue Juristische Wochenschrift* 2020, 1398 (1401); Merkel, R./Augsberg, S., *Die Tragik der Triage - straf- und verfassungsrechtliche Grundlagen und Grenzen*, *Juristenzeitung* 2020, 704 (706);

⁷ Engländer, A./Zimmermann, T., *„Rettungstötungen“ in der Corona-Krise? Die Covid-19-Pandemie und die Zuteilung von Ressourcen in der Notfall- und Intensivmedizin*, *Neue Juristische Wochenschrift* 2020, 1398 (1400 f.); Gaede, K./Kubiciel, M./Saliger, F./Tsambikakis, M., *Rechtmäßiges Handeln in der dilemmatischen Triage-Entscheidungssituation*, *Zeitschrift für Medizinstrafrecht* 2020, 129 (132); cf. also BGH (Federal Court of Justice), *Beschluss vom 30.7.2003 – 5 StR 221/03*, *Amtliche Sammlung vol. 48*, p. 307 (311).

a conflict of duties as merely grounds for exculpation.⁸ However, the detailed questions according to which the physician has to make his decision in cases of a conflict of duties are controversial.

There is a broad spectrum of opinions here. This spectrum ranges from a fundamental freedom of the physician to decide which of several equally endangered patients should benefit from the saving treatment, to binding guidelines which the physician must follow and which limit his decision-making competence.⁹

Before dealing with this question, however, it is first necessary to take a look at the “classic” cases of a conflict of duties.¹⁰ Here, too, it must be asked whether there are binding criteria that dictate which of the various persons must be given priority in the rescue. Here, a “standard case” should be mentioned, which can be found in every textbook: A father takes his son, his daughter and their friend, who are all six years old and non-swimmers, out on a lake in a pedal boat. Once there, the boat capsizes. The father now correctly recognizes that it will only be possible for him to save one of the children, which he does.¹¹ In this case, the father has in any case fulfilled the element of the crime of homicide by omission with regard to the other children. After all, it would have been possible for him to save a different child as well, which he also knew.

However, the conflict situation is taken into account - at least by the predominant view - at the justification level by granting him grounds for justification by way of “justifying conflict of duties”. If one focuses on the overall event, the father was only able to save one of the children, but not all three. In this respect, however, the killing of the other two children (by omission) cannot constitute an injustice.¹² Therefore, the

§ Fischer, T., *Strafgesetzbuch und Nebengesetze, Kommentar*, C.H.Beck, Munich, 69th ed. 2022, preliminary remarks § 32 Rn. 11a; Jescheck, H.-H./Weigend, T., *Lehrbuch des Strafrechts, Allgemeiner Teil*, Dunker & Humblot, Berlin, 5th ed. 1996, § 33 V 1c, 2; Nomos Kommentar zum Strafgesetzbuch-Paeffgen, H.-H./Zabel, B., Nomos, Baden-Baden, 5th ed. 2017, preliminary remarks §§ 32 ff. Rn. 174.

⁹ Critical of the latter view is Ast, S., *Quieta non movere? Ärztliche Auswahlkriterien sowie der Behandlungsabbruch im Fall einer Pflichtenkollision aus strafrechtlicher Sicht*, *Zeitschrift für internationale Strafrechtsdogmatik* 2020, 268 (274), who assumes that even if the legislature lays down certain selection criteria, these are not binding under criminal law.

¹⁰ Cf. Heinrich, B., *Strafrecht Allgemeiner Teil*, Kohlhammer, Stuttgart, 6th ed. 2019, para. 513.

¹¹ In contradiction only Freund, G./Rostalski, F., *Strafrecht Allgemeiner Teil*, Springer, Berlin, 3rd ed. 2019, § 6 Rn. 96 ff.; *Münchener Kommentar zum Strafgesetzbuch-Freund, G.*, C.H. Beck, Munich, 4th ed. 2020, § 13 Rn. 196 f., who deny the fulfillment of the element of the crime for the behavior in question.

¹² Thus in conclusion Erb, V., *Der rechtfertigende Notstand*, *Juristische Schulung* 2010, 17 (29); Krey, V./Esser, R., *Deutsches Strafrecht, Allgemeiner Teil*, Kohlhammer, Stuttgart, 6th ed. 2020, Rn. 630 ff.; Küper, W., *Kollidierende Pflichtenmehrheit oder singuläre Pflichteinheit? - Zur Rekonstruktion und Rehabilitierung der rechtfertigenden Pflichtenkollision*, *Festschrift für Rudolf Rengier zum 70. Geburtstag*, C.H. Beck, Munich, 2018, p. 67; Rengier, R., *Strafrecht Allgemeiner Teil*, C.H. Beck, Munich, 12th ed. 2020, § 49 Rn. 41; Rönnau, T., *Grundwissen - Strafrecht: Rechtfertigende Pflichtenkollision*, *Juristische Schulung* 2013, 113 (113 ff.); Roxin, C./Greco, L., *Strafrecht Allgemeiner Teil, Band I - Grundlagen: Der Aufbau der Verbrechenslehre*, C.H. Beck, Munich, 5th ed. 2020, § 16 Rn. 119; Schönke, A./Schröder, H.-Sternberg-Lieben, D., *Strafgesetzbuch, Kommentar*, C.H. Beck, Munich, 30th ed. 2019, preliminary remarks §§ 32 ff. Rn. 73.

suggestion that this is only grounds for exculpation, but not for justification of the actor, cannot be followed either.¹³

For the law cannot demand impossible actions from the offender (*impossibilium nulla obligatio est*). However, such a justification should only exist if there is a collision of duties of equal rank.¹⁴ In the aforementioned case of the boat trip, two equally important duties to act collide with regard to the father's own two children. If the father saves his son, the failure to save the daughter cannot be unlawful.¹⁵ The father's motivation as to why he saves the son and not the daughter is also irrelevant. It is therefore irrelevant whether he saves the son only because he considers boys to be fundamentally more valuable than girls or because he wants to "get one over on his wife", since she always prefers the daughter.¹⁶ Only if the father does nothing at all and stands idly by while both children drown can he be held responsible under criminal law.

In the case of a collision of unequal duties of conduct, on the other hand, the perpetrator must fulfill the "higher-ranking" duty.¹⁷ In this case, it is assumed that the

¹³ This is a minority opinion in the literature; cf. Fischer, T., *Strafgesetzbuch und Nebengesetze, Kommentar*, C.H. Beck, Munich, 69th ed. 2022, preliminary remarks § 32 Rn. 11a; Jescheck, H.-H./Weigend, T., *Lehrbuch des Strafrechts, Allgemeiner Teil*, Dunker & Humblot, Berlin, 5th ed. 1996, § 33 V 1c, 2; *Nomos Kommentar zum Strafgesetzbuch-Paeffgen, H.-H./Zabel, B., Nomos, Baden-Baden*, 5th ed. 2017, preliminary remarks §§ 32 ff. Rn. 174.

¹⁴ BGH, decision of 28.5.2002 - 5 StR 16/02, *Amtliche Sammlung*, vol. 47, p. 318 (322); BGH, decision of 30.7.2003 - 5 StR 221/03, *Amtliche Sammlung*, vol. 48, p. 307 (311); Baumann, J./Weber, U./Mitsch, W./Eisele, J.-Mitsch, W., *Strafrecht. Allgemeiner Teil*, Gieseking, Berlin, 12th ed. 2016, § 21 Rn. 101; Gropp, W./Sinn, A., *Strafrecht Allgemeiner Teil*, Springer, Berlin, 5th ed. 2021, § 5 Rn. 329; Kühl, K., *Strafrecht Allgemeiner Teil*, Vahlen, Munich, 8th ed. 2017, § 18 Rn. 137; *Leipziger Kommentar zum Strafgesetzbuch-Rönnau*, T., De Gruyter, Berlin, New York, 13th ed., 2020 ff., preliminary remarks § 32 Rn. 117; *Münchener Kommentar zum Strafgesetzbuch-Erb*, V., C.H. Beck, Munich, 4th ed. 2020, § 34 Rn. 47; *Münchener Kommentar zum Strafgesetzbuch-Schlehofer*, H., C.H. Beck, Munich, 4th ed. 2020, preliminary remarks § 32 Rn. 260; Rengier, R., *Strafrecht Allgemeiner Teil*, C.H. Beck, Munich, 12th ed. 2020, § 49 Rn. 41 f.; Roxin, C./Greco, L., *Strafrecht Allgemeiner Teil, Band I - Grundlagen: Der Aufbau der Verbrechenslehre*, C.H. Beck, Munich, 5th ed. 2020, § 16 Rn. 118, 122;

¹⁵ Cf. on the collision of two obligations to refrain of equal rank or an obligation to act and refrain of equal rank Rengier, R., *Strafrecht Allgemeiner Teil*, C.H. Beck, Munich, 12th ed. 2020, § 49 Rn. 43 ff; Rönnau, T., *Grundwissen - Strafrecht: Rechtfertigende Pflichtenkollision*, *Juristische Schulung* 2013, 113 (113 f.); rejecting the collision of different duties to refrain Gropp, W./Sinn, A., *Strafrecht Allgemeiner Teil*, Springer, Berlin, 5th ed. 2021, § 5 Rn. 311; Jakobs, G., *Strafrecht Allgemeiner Teil*, De Gruyter, Berlin, New York, 2nd ed. 1991, 15/15a; Kindhäuser, U./Zimmermann, T., *Strafrecht Allgemeiner Teil*, Nomos, Baden-Baden, 10th ed. 2021, § 18 Rn. 2; Roxin, C./Greco, L., *Strafrecht Allgemeiner Teil, Band I - Grundlagen: Der Aufbau der Verbrechenslehre*, C.H. Beck, Munich, 5th ed. 2020, § 16 Rn. 117.

¹⁶ *Nomos Kommentar zum Strafgesetzbuch-Neumann*, U./Zabel, B., Nomos, Baden-Baden, 5th ed. 2017, § 34 Rn. 132a; Roxin, C./Greco, L., *Strafrecht Allgemeiner Teil, Band I - Grundlagen: Der Aufbau der Verbrechenslehre*, C.H. Beck, Munich, 5th ed. 2020, § 16 Rn. 121; Schönke, A./Schröder, H.-Sternberg-Lieben, D., *Strafgesetzbuch, Kommentar*, C.H. Beck, Munich, 30th ed. 2019, preliminary remarks §§ 32 ff. Rn. 77;

¹⁷ Kindhäuser, U./Zimmermann, T., *Strafrecht Allgemeiner Teil*, Nomos, Baden-Baden, 10th ed. 2021, § 18 Rn. 5; *Leipziger Kommentar zum Strafgesetzbuch-Rönnau*, T., De Gruyter, Berlin, New York, 13th ed. 2020 ff., preliminary remarks § 32 Rn. 115; *Münchener Kommentar zum Strafgesetzbuch-Schlehofer*, H., C.H. Beck, Munich, 4th ed. 2020, preliminary remarks §

guarantor duty arising from personal ties (with regard to one's own children) is considered to be of higher priority than the guarantor duty arising from voluntary acceptance of responsibility (with regard to the friend).¹⁸ If the father saves the friend (and not his children) in this case, he would be liable to prosecution for manslaughter by omission.

The question as to which of several duties to act is of higher priority and whether there is a certain "ranking" of the guarantor duties is certainly open to debate. With regard to the "ex ante" triage to be assessed here, however, it is precisely a matter of dispute whether such a "coequal" guarantor obligation is always to be assumed in the case of two patients with whom there is no personal relationship on the part of the physician and the guarantor obligation therefore arises merely from the treatment contract or the "de facto acceptance" of the treatment.

The question therefore arises as to whether there are certain criteria that lead to a "higher-ranking" guarantor obligation towards a patient. This would have the consequence that he acts justifiably only if he fulfills this higher-ranking duty. Controversially discussed as criteria are:

- the urgency of the treatment¹⁹
- the priority principle with regard to hospitalization²⁰
- the chances of success of a cure²¹

32 Rn. 253; Rengier, R., *Strafrecht Allgemeiner Teil*, C.H. Beck, Munich, 12th ed. 2020, § 49 Rn. 42; Roxin, C./Greco, L., *Strafrecht Allgemeiner Teil, Band I - Grundlagen: Der Aufbau der Verbrechenslehre*, C.H. Beck, Munich, 5th ed. 2020, § 16 Rn. 122; different view *Leipziger Kommentar zum Strafgesetzbuch-Jescheck*, H.-H., De Gruyter, Berlin, New York, 11th ed., 1992 ff., preliminary remarks § 13 Rn. 80 (at least in the case of non-weighable legal interests); Joecks, W./Jäger, J., *Studienkommentar StGB*, C.H. Beck, Munich, 13th ed. 2021, § 13 Rn. 77; also critical *Systematischer Kommentar zum Strafgesetzbuch-Stein*, U., Carl Heymanns, Cologne, 9th ed. 2017, § 13 Rn. 45.

¹⁸ Otto, H., *Grundkurs Strafrecht, Allgemeine Strafrechtslehre*, 7th ed. 2004, De Gruyter, Berlin, New York, § 8 Rn. 194.

¹⁹ On the criterion of urgency, see Gaede, K./Kubiciel, M./Saliger, F./Tsambikakis, M., *Rechtmäßiges Handeln in der dilemmatischen Triage-Entscheidungssituation*, *Zeitschrift für Medizinstrafrecht* 2020, 129 (134); Sowada, C., *Strafrechtliche Probleme der Triage in der Corona-Krise*, *Neue Zeitschrift für Strafrecht* 2020, 452 (455 f.).

²⁰ On the priority principle, see Engländer, A./Zimmermann, T., „Rettungstötungen“ in der Corona-Krise? Die Covid-19-Pandemie und die Zuteilung von Ressourcen in der Notfall- und Intensivmedizin, *Neue Juristische Wochenschrift* 2020, 1398 (1401); also Rönna, T./Wegner, K., *Grundwissen - Strafrecht: Triage*, *Juristische Schulung*, 2020, 403 (405), who refer to Section II, § 4 of the *Sachsenspiegel* with regard to this principle, and (critically) Gaede, K./Kubiciel, M./Saliger, F./Tsambikakis, M., *Rechtmäßiges Handeln in der dilemmatischen Triage-Entscheidungssituation*, *Zeitschrift für Medizinstrafrecht* 2020, 129 (133).

²¹ On the criterion of probability of success Gaede, K./Kubiciel, M./Saliger, F./Tsambikakis, M., *Rechtmäßiges Handeln in der dilemmatischen Triage-Entscheidungssituation*, *Zeitschrift für Medizinstrafrecht* 2020, 129 (133); Jäger, C./Gründel, J., *Zur Notwendigkeit einer Neuorientierung bei der Beurteilung der rechtfertigen Pflichtenkollision im Angesicht der Corona-Triage*, *Zeitschrift für internationale Strafrechtsdogmatik* 2020, 151; critically Engländer, A./Zimmermann, T., «Rettungstötungen» in der Corona-Krise? Die Covid-19-Pandemie und die Zuteilung von Ressourcen in der Notfall- und Intensivmedizin, *Neue Juristische Wochenschrift* 2020, 1398 (1402); Schönke, A./Schröder, H.-Sternberg-Lieben, D., *Strafgesetzbuch, Kommentar*, C.H. Beck, Munich, 30th ed. 2019, preliminary remarks §§ 32 ff. Rn. 74.

- the probability of survival of the persons concerned²²
- the age (or potential further lifetime²³) of the patient²⁴
- any contributory negligence on the part of the patient with regard to the situation triggering the emergency situation (e.g., the patient's contributory negligence for his severe illness if, for example, he or she refused to receive a vaccination)²⁵, or
- the patient's employment in an occupation of systemic importance.²⁶

The question, then, is whether these may be permissible evaluation criteria, potentially leading to a higher-ranking duty. In any case, there seems to be agreement that social background or status, ethnicity, religion, gender or political or sexual orientation must not play a role in the decision.²⁷ On the other hand, it has also been suggested that in such cases no specific criteria should be used, but that - at least in ambiguous cases - the decision should simply be determined by lottery.²⁸

²²Critical with regard to survival probability Engländer, A./Zimmermann, T., „Rettungstötungen“ in der Corona-Krise? Die Covid-19-Pandemie und die Zuteilung von Ressourcen in der Notfall- und Intensivmedizin, *Neue Juristische Wochenschrift* 2020, 1398 (1402).

²³In favor of considering life expectancy as a criterion Hoven, E., Die «Triage»-Situation als Herausforderung für die Strafrechtswissenschaft, *Juristenzeitung* 2020, 449 (451 f.); in opposition Engländer, A./Zimmermann, T., «Rettungstötungen» in der Corona-Krise? Die Covid-19-Pandemie und die Zuteilung von Ressourcen in der Notfall- und Intensivmedizin, *Neue Juristische Wochenschrift* 2020, 1398 (1400); on this also Hörnle, T./Wohlers, W., The Trolley Problem Reloaded. Wie sind autonome Fahrzeuge für Leben-gegen-Leben-Dilemmata zu programmieren? *Goldammer's Archiv für Strafrecht* 2018, 12 (28); Taupitz, J., Verteilung medizinischer Ressourcen in der Corona-Krise – Wer darf überleben? *Zeitschrift Medizinrecht* 2020, 440 (448).

²⁴In favor of considering age as a criterion Hoven, E., Die «Triage»-Situation als Herausforderung für die Strafrechtswissenschaft, *Juristenzeitung* 2020, 449 (450 ff.); in opposition Engländer, A./Zimmermann, T., «Rettungstötungen» in der Corona-Krise? Die Covid-19-Pandemie und die Zuteilung von Ressourcen in der Notfall- und Intensivmedizin, *Neue Juristische Wochenschrift* 2020, 1398 (1402); Gaede, K./Kubiciel, M./Saliger, F./Tsambikakis, M., Rechtmäßiges Handeln in der dilemmatischen Triage-Entscheidungssituation, *Zeitschrift für Medizinstrafrecht* 2020, 129 (133 f.); Merkel, R./Augsberg, S., Die Tragik der Triage - straf- und verfassungsrechtliche Grundlagen und Grenzen, *Juristenzeitung* 2020, 704 (709 f.).

²⁵In favour Münchener Kommentar zum Strafgesetzbuch-Schlehofer, H., C.H. Beck, Munich, 4th ed. 2020, preliminary remarks §§ 32 ff. Rn. 261; Roxin, C./Greco, L., *Strafrecht Allgemeiner Teil, Band I - Grundlagen: Der Aufbau der Verbrechenslehre*, C.H. Beck, Munich, 5th ed. 2020, § 16 Rn. 123; in opposition Leipziger Kommentar zum Strafgesetzbuch-Rönnau, T., De Gruyter, Berlin, New York, 13th ed. 2020 ff., preliminary remarks §§ 32 ff. Rn. 122; Sowada, C., *Strafrechtliche Probleme der Triage in der Corona-Krise*, *Neue Zeitschrift für Strafrecht* 2020, 452 (454); see also Schönke, A./Schröder, H.-Sternberg-Lieben, D., *Strafgesetzbuch, Kommentar*, C.H. Beck, Munich, 30th ed. 2019, preliminary remarks § 32 Rn. 74.

²⁶Dissenting Jäger, C./Gründel, J., Zur Notwendigkeit einer Neuorientierung bei der Beurteilung der rechtfertigen Pflichtenkollision im Angesicht der Corona-Triage, *Zeitschrift für internationale Strafrechtsdogmatik* 2020, 151 (162).

²⁷Gaede, K./Kubiciel, M./Saliger, F./Tsambikakis, M., Rechtmäßiges Handeln in der dilemmatischen Triage-Entscheidungssituation, *Zeitschrift für Medizinstrafrecht* 2020, 129 (132); Merkel, R./Augsberg, S., Die Tragik der Triage - straf- und verfassungsrechtliche Grundlagen und Grenzen, *Juristenzeitung* 2020, 704 (705);

²⁸On this, Engländer, A./Zimmermann, T., „Rettungstötungen“ in der Corona-Krise? Die Covid-19-Pandemie und die Zuteilung von Ressourcen in der Notfall- und Intensivmedizin,

lision of duties. That is because there is no collision of two duties to act, but rather a collision between a duty to act (duty to rescue a patient) and a duty to refrain (duty to refrain from actively killing a patient by withdrawing the ventilator),

It is therefore to be regarded as unlawful to actively withdraw the ventilator from an already ventilated patient. This is correct. The prohibition on actively killing a person by withdrawing the ventilator takes precedence over the requirement to help dying people in this specific case. This is because the patient has already acquired a „secure status“ on the basis of trusting the already ongoing treatment strategy of the physician.³⁰ Because the physician has already given the patient cause to trust him, he may not retroactively undermine that trust by unilaterally stopping the treatment without warning. If one were to see this differently, one would also have to face the question whether it should be permissible to remove an organ from a dying patient thereby causing his death, if another patient who urgently needs that organ could thereby be saved by the organ transplantation.³¹

“Preventive” triage. Finally, “preventive” triage will be discussed. Here, a patient admitted to the hospital with a low chance of survival is refused connection to a ventilator because patients with a higher probability of survival are likely to be admitted soon who need the ventilator just as urgently and could be given priority if they were admitted at the same time. In this case, the physician is regularly considered to have an obligation - at least in principle - to provide assistance to a patient who was admitted earlier. This applies even if it is to be expected that patients with a higher probability of survival will be admitted a short time later who need the ventilator just as urgently.³²

Even if this patient, who is expected to arrive later, would have been given priority if he had been admitted at the same time (or if it would have been possible for the physician to save the other patient in any case by way of his free decision), the principle of priority applies here. The person who is admitted first and needs help is entitled to receive this help. Because at the moment when the connection to the ventilator is necessary, the situation of a justifying conflict of duties does not yet exist, so that a corresponding justification fails.³³

Influence of extraneous considerations on the decision. The last question to be addressed here is how to decide if the physician uses extraneous considerations when deciding which patient to connect to a ventilator. The answer to this question is evident, if one has already decided that there are binding criteria according to which the physician must decide in cases of “ex-ante” triage and he does not adhere to them.

³⁰ Merkel, R./Augsberg, S., Die Tragik der Triage – straf- und verfassungsrechtliche Grundlagen und Grenzen, Juristenzeitung 2020, 704 (711 f.).

³¹ This is correctly pointed out by Lindner, J., Kann eine Empfehlung des Deutschen Ethikrates ein unvermeidbaren Verbotsirrtum nach § 17 Satz 1 StGB begründen? Zeitschrift für Medizinstrafrecht 2020, 199.

³² Cf. Coca-Vila, I., Straftliche Pflichtenkollision als Institut der Maximierung der Zahl der Überlebenden? Eine Kritik der utilitaristischen Wende in der Triage-Diskussion, Goldammer's Archiv für Strafrecht 2021, 446 (452, 457); Merkel, R./Augsberg, S., Die Tragik der Triage - straf- und verfassungsrechtliche Grundlagen und Grenzen, Juristenzeitung 2020, 704 (706); Rönnau, T./Wegner, K., Grundwissen - Strafrecht: Triage, Juristische Schulung, 2020, 403 (406 f.).

³³ Thus clearly Rönnau, T./Wegner, K., Grundwissen - Strafrecht: Triage, Juristische Schulung, 2020, 403 (406 f.).

Just think of the case where a regulation is made to the effect that only the probability of success of the treatment, and never the age of the patient, may play a role in the decision. If, however, the physician decides to save a child instead of a pensioner, even though the probability of success of saving the pensioner would be higher than that of the child in the specific case, this would lead to criminal liability. If the criteria are regarded as binding, unequal obligations towards the patients would exist, with the consequence that the physician would be denied justification. For the reasons mentioned above, however, this is to be rejected.

However, the pursuit of extraneous motives is also and especially conceivable if one assumes that the physician has a free decision-making authority in cases of “ex-ante” triage. This can occur in two cases. On the one hand, it might be considered - and this has already been discussed above - that the physician attaches central importance to the skin color, origin or gender of the person to be rescued when deciding whom to save (“I prefer to save Germans rather than foreigners”). But it is also possible that the doctor saves the person who pays the most for his rescue.

Here, however, it must be noted first of all that the concept of “extraneous motives” can be problematic, because one must already ask at this point whether an objective decision between two individuals, insofar as it is a matter of life or death, is possible at all. Here, too, it must always be assumed that unconscious aspects may play a role in the decision made, which are hardly reviewable from a legal point of view. On the other hand, however, decisions can also be made consciously on the basis of subjective points of view, without this necessarily being regarded as reprehensible. For example, if the physician deliberately saves the patient who has not acted negligently with regard to his infection.

Already in these situations, the question arises as to whether criminal law may “interfere” here or whether it must - at least up to a certain point - accept such subjectively made decisions. For precisely when the physician is left free to make decisions in this dilemma situation, it would hardly be appropriate to want to examine (and correct) every subjective evaluation through the lens of criminal law.

At this point, reference should be made to another case in German jurisprudence in which a similar problem arose. It concerned manipulations in the context of the distribution of post-mortem donated livers (hence the title of the decision: The Liver Allocation Case).³⁴ Here, a doctor was caring for patients waiting for a liver donation. He falsely reported several of his patients as dialysis patients to the central institution responsible for the distribution of donor livers. As a result, these patients achieved significantly better rankings on the waiting list, which meant that they were allocated an organ more quickly. However, this meant that the patients who were actually ahead of them if the information was correct were pushed to the back of the list and therefore had to wait longer for a donor liver. In view of the known scarcity of donor organs, it could not be ruled out that the patients who had been pushed back on the waiting list

³⁴ BGH, judgment of 28.6.2017 - 5 StR 20/16, Amtliche Sammlung, vol. 62, p. 223; on this, Ast, S., Die Manipulation der Organallokation. Vereiteln von Rettungshandlungen als mittelbare Täterschaft, *Höchstrichterliche Rechtsprechung in Strafsachen* 2017, 500; Duttge, G., Manipulationen in der Transplantationsmedizin und die Frage nach ihrer angemessenen Sanktionierung, *Zeitschrift für Lebensrecht* 2018, 130; Greco, L., Objektive Zurechnung als Vorsatzgegenstand? Überlegungen aus Anlass des BGH-Urteils zum Göttinger Transplantationsskandal (BGHSt 62, 223), *Goldammer’s Archiv für Strafrecht* 2018, 539.

as a result of the manipulation were unable to obtain a donor liver precisely because of their lower position on the list and therefore died.

The Federal Court of Justice acquitted the physician in this case because, on the one hand, he was only accused of a formal violation of the provisions of the guidelines of the German Medical Association and, on the other hand, he allegedly lacked intent to kill or inflict bodily harm. The case is also interesting because the physician explained his actions by saying that it was known that other physicians also regularly carried out manipulations for the benefit of their own patients.

While in this constellation one can thoroughly argue about the reprehensibility of the doctor's actions, the cases already mentioned are clear with regard to the classification of reprehensibility: If the doctor favors a patient because of the color of his skin or his religion, or because he pays him money for his treatment, he is acting from unfair motives and is therefore acting reprehensibly.³⁵ Especially acting in exchange for payment is problematic.

After all, it is certainly understandable in human terms that relatives of a person admitted to hospital, knowing the situation, offer the doctor, who decides on life and death, a large sum of money if he decides in favor of "their" relative within the framework of "ex-ante" triage.

Corresponding agreements on injustice ("wrongful agreement") are also conceivable in advance. For example, such an agreement can already be made if it is foreseeable that a sick relative might soon be transferred to the intensive care unit ("save my mother for 100,000 euros if she is hospitalized in a triage situation"). In the worst case, an illegal market with fixed prices could develop here, which would exclude anyone who could not afford a life-saving service of this kind. This would, however, reach a level that is structurally similar to that of the classic corruption of public officials whose criminal liability is without any serious doubt. If one assumes, however, that the physician in the respective triage situation is completely free in his decision as to which person is to be treated, then in such a case there are also "duties of conduct of equal rank".

According to the prevailing view, however, this means that even unfair motives or extraneous considerations cannot render a decision that is in principle permissible unlawful.³⁶ For the motives why the person concerned decides to save one patient and

³⁵ Gaede, K./Kubiciel, M./Saliger, F./Tsambikakis, M., Rechtmäßiges Handeln in der dilemmatischen Triage-Entscheidungssituation, *Zeitschrift für Medizinstrafrecht* 2020, 129 (132); Merkel, R./Augsberg, S., Die Tragik der Triage – straf- und verfassungsrechtliche Grundlagen und Grenzen, *Juristenzeitung* 2020, 704 (705).

³⁶ Thus clearly Rönna, T./Wegner, K., *Grundwissen - Strafrecht: Triage*, Juristische Schulung, 2020, 403 (404): "Even if [the physician] is guided by morally highly reprehensible motives, this is not a matter of criminally relevant wrongful death or injury"; Hoven, E./Hahn, J., *Strafrechtliche Fragen im Zusammenhang mit der Covid-19-Pandemie*, Juristische Arbeitsblätter 2020, 481 (482): "Out of which motives [the physician] prefers one patient to another is irrelevant for the criminal law evaluation of his actions; he remains unpunished even if he makes his decision out of discriminatory - for example ideological or racist - considerations"; cf. also Jäger, C./Gründel, J., *Zur Notwendigkeit einer Neuorientierung bei der Beurteilung der rechtfertigten Pflichtenkollision im Angesicht der Corona-Triage*, *Zeitschrift für internationale Strafrechtsdogmatik* 2020, 151 (152): 'A [...] respectable motive is [...] not required'; likewise Merkel, R., *Forschungsobjekt Embryo*, Deutscher Taschenbuchverlag, Munich, 2002, p. 153 Fn. 202;

against saving the other are irrelevant. Here, too, a human life is ultimately saved - on the basis of equally important duties of conduct - and the loss of an absolute and thus equivalent legal interest is thus averted. Precisely because of the equal value of the lives of all human beings, the legal system must (“grudgingly”) credit the physician for the rescue work performed.³⁷

If one were to see this differently, one would punish the physician only on the basis of his inner motives, which would ultimately amount to the advocacy of an (in itself unacceptable) attitude-based criminal law.³⁸ Therefore, the physician must be granted extensive freedom of choice here, even if he is guided by extraneous considerations.³⁹

Such a restriction of the justification would hardly meet the requirements of the principle of certainty in Art. 103 (2) of the German constitution (“what is still a fair motive and what is already an unfair motive”).⁴⁰ In this respect, there is a non-justiciable (“lawless”) space within the obligations of conduct of equal rank.⁴¹ Following these thoughts, one arrives at the decisive question of whether the dominance of extraneous considerations or unfair motives on the part of the physician can actually constitute an “unlawful act of homicide” here,⁴² or whether it is not rather a case of unlawful discrimination or corruption that is to be assessed independently.⁴³

However, this is not to be sanctioned by the offense of homicide, but by other offenses - possibly yet to be created. This is also the case if one looks at extraneous considerations in the “standard” cases of a justifying conflict of duties in the form of

³⁷ Leipziger Kommentar zum Strafgesetzbuch-Rönnau, T., De Gruyter, Berlin, New York, 13th ed., 2020 ff., preliminary remarks § 32 Rn. 127; Roxin, C./Greco, L., Strafrecht Allgemeiner Teil, Band I - Grundlagen: Der Aufbau der Verbrechenslehre, C.H. Beck, Munich, 5th ed. 2020, § 16 Rn.121; Satzger, H., Die rechtfertigende Pflichtenkollision, Juristische Ausbildung 2010, 753 (757); Sowada, C., Strafrechtliche Probleme der Triage in der Corona-Krise, Neue Zeitschrift für Strafrecht 2020, 452 (455).

³⁸ Brech, A., Triage und Recht - Patientenauswahl beim Massenanfall Hilfebedürftiger in der Katastrophenmedizin. Ein Beitrag zur Gerechtigkeitsdebatte im Gesundheitswesen, Duncker & Humblot, Berlin, 2008, p. 355; Roxin, C./Greco, L., Strafrecht Allgemeiner Teil, Band I - Grundlagen: Der Aufbau der Verbrechenslehre, C.H. Beck, Munich, 5th ed. 2020, § 16 Rn. 121.

³⁹ Jäger, C./Gründel, J., Zur Notwendigkeit einer Neuorientierung bei der Beurteilung der rechtfertigenden Pflichtenkollision im Angesicht der Corona-Triage, Zeitschrift für internationale Strafrechtsdogmatik 2020, 151 (161).

⁴⁰ Brech, A., Triage und Recht – Patientenauswahl beim Massenanfall Hilfebedürftiger in der Katastrophenmedizin. Ein Beitrag zur Gerechtigkeitsdebatte im Gesundheitswesen, Duncker & Humblot, Berlin, 2008, p. 358; Engländer, A./Zimmermann, T., „Rettungstötungen“ in der Corona-Krise? Die Covid-19-Pandemie und die Zuteilung von Ressourcen in der Notfall- und Intensivmedizin, Neue Juristische Wochenschrift 2020, 1398 (1400).

⁴¹ Engländer, A./Zimmermann, T., „Rettungstötungen“ in der Corona-Krise? Die Covid-19-Pandemie und die Zuteilung von Ressourcen in der Notfall- und Intensivmedizin, Neue Juristische Wochenschrift 2020, 1398 (1400); cf. also Jakobs, G., Strafrecht Allgemeiner Teil, De Gruyter, Berlin, New York, 2nd ed. 1991, 15/6 Fn. 11.

⁴² Dissenting Merkel, R./Augsberg, S., Die Tragik der Triage - straf- und verfassungsrechtliche Grundlagen und Grenzen, Juristenzeitung 2020, 704 (709).

⁴³ On the assessment of extraneous considerations as a potential act of corruption Merkel, R./Augsberg, S., Die Tragik der Triage – straf- und verfassungsrechtliche Grundlagen und Grenzen, Juristenzeitung 2020, 704 (714).

duties of conduct of equal rank. If a father saves his son instead of his daughter in a case of conflicting duties because he regards sons as fundamentally more valuable, this constitutes improper discrimination, but in this respect, it does not constitute an unlawful act of homicide, since the father is generally permitted to save the son instead of the daughter. If the physician saves a patient who is more sympathetic to him than another, this cannot be judged differently. If he saves a patient because the latter offers him money to connect him to a respirator, this is a classic case of corruption, but ultimately also not an unlawful act of homicide. However, the German corruption offenses, above all § 299a of the German Criminal Code (StGB), do not currently cover this case.⁴⁴

Conclusion. The present analysis has thus shown that in the field of “triage” there are different forms which need to be assessed in different ways from a legal point of view. While in the case of “ex-ante” triage there is a justifiable conflict of duties if the physician can save only one of several dying patients, the cases of “ex-post” triage and “preventive” triage are to be judged differently. Here, the physician is prohibited from removing a patient who is already connected to the ventilator in order to make it available to another patient (“ex-ante” triage). He is also prohibited from not connecting a patient to the ventilator because it is expected that another patient might be admitted soon who needs the ventilator in the same way (“preventive triage”). The analysis has further shown that extraneous considerations or unfair motives in connection with the selection of persons to be rescued in triage situations do not exclude a justification on the grounds of a “justifiable conflict of duties”. This is because these extraneous motives do not constitute an unlawful act of homicide if there is a classic constellation of equivalent duties of conduct in which the physician is fundamentally free in his decision.

A corresponding subjective selection on the basis of extraneous considerations can - if corresponding criminal offences existed, which, however, would first have to be created - constitute an independent discrimination or corruption offence, but not a homicide. In the future, the question will need to be answered whether the legislator could bring about a different solution by creating binding decision-making criteria. This would be possible if, through the creation of certain criteria for the physician in triage situations, unequal duties of conduct could be established, the violation of which would lead to the denial of a justification on the grounds of a justifiable conflict of duties. However, this should be viewed critically, since it would force the physician to undertake a comprehensive examination of various criteria which can hardly be predicted with certainty and which would lead to a delay in medical treatment in dilemma situations in which rapid action is required.

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⁴⁴ On this *Merkel, R./Augsberg, S., Die Tragik der Triage – straf- und verfassungsrechtliche Grundlagen und Grenzen*, *Juristenzeitung* 2020, 704 (714 Fn. 81).

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