



## The Road to Koblenz:

Pathways for international justice through the exercise of universal jurisdiction in Germany.

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Dr. Mónica Castillejos-Aragón



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Konrad Adenauer Foundation, New York Office.

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**Credit:** Thomas Frey/dpa Pool/dpa/Alamy Live News.

© Koblenz, Germany. 13th Jan, 2022. Syrian Fadwa Mahmoud comes out of the building of the Koblenz Higher Regional Court holding a picture of her partner and her son, both of whom have disappeared in prisons of the Assad regime since 2012.

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2024

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Dr. Mónica Castillejos-Aragón



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Why did it take those two decades? But more importantly: Why did it ultimately happen so that a new chapter in the enforcement of international criminal law was opened? In this “new German spirit”, the Bundestag unanimously enacted the VStGB to contribute to the domestic pillar of the emerging global international criminal justice system. The VStGB entered into force in the summer of 2002, in parallel with the ICC Statute...



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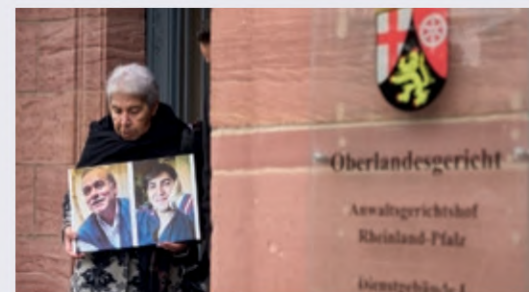
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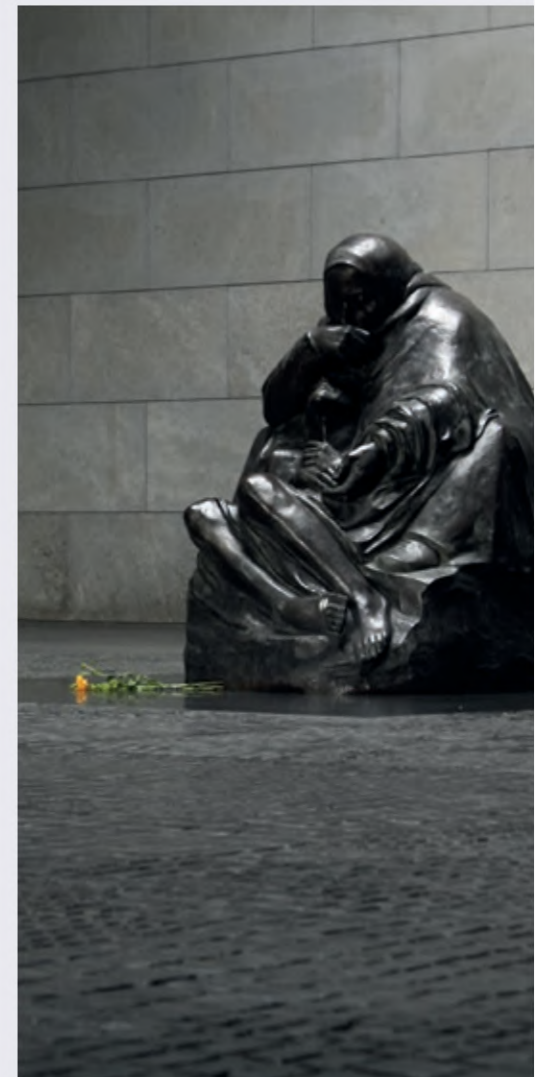
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“Those who commit crimes must be held accountable.”

## Preface

This simple yet essential principle in the domain of domestic law is generally not disputed and it ensures trust in judicial systems. Unfortunately, in the international domain, legal principles do not enjoy the same degree of commitment due to permanent tensions between law without a supreme authority empower enough to enforce it, on the one hand, and the politics and power of states, on the other hand. Thus, compliance and enforcement of international law by states is often a *political decision*. States committed to its rules and principles demonstrate their willingness to overcome a Hobbesian state of international relations and the pure right of the strong. Although the perception and scope of international law has undergone a significant transformation over the past decades, we are still far away from an ideal recognition of a prevailing international rule of law. Despite setbacks as recently witness with Russia's war of aggression against Ukraine there are also signs of hope and progress. One significant progress in this realm was the establishment of the International Criminal Court (ICC) in July 2002. As one of the driving forces behind the Rome Statute, Germany amongst many other states - made the *political decision* to enforce its rules and commit to its principles. However, Germany's commitment was not immediate; it took years for domestic authorities to realize a new understanding of such international rules in general and the practical application of the Rome Statute in its domestic jurisdiction.

Despite such emergent understanding, the German government decided to recognize the principle of universal jurisdiction in its domestic legislation to prosecute international crimes such as genocide, crimes against humanity, and war crimes. In doing so, the German government incorporated the principle into national law through the Code of Crimes Against International Law (VStGB). **This major legislative effort has led to the prosecution of a number of individuals involved in the commission of severe crimes including the historical verdict of the Koblenz Higher Regional Court against two Syrian nationals for crimes against humanity, torture, murder, dangerous bodily harm, and sexual violence.** As it is presented in this study, the exercise of the universal principle within national jurisdiction is an important step to make sure that those who commit heinous crimes are held accountable. Germany has not been alone in this effort; there are other nations that have also embraced such commitment. In fact, the German model as discussed in this study - is far from being perfect, but it also presents a remarkable example of political willingness reflected in the establishment of specific conditions for domestic authorities to fulfill the promises pursued in the Rome negotiations.

**Thomas Tödtling**

Konrad Adenauer Foundation, New York Office

Executive Director



Justitia, Lady Justice, standing with scale and sword at the Strafjustiz Gebäude (criminal justice building) in Hamburg.  
@Jannis Werner / Alamy Stock Photo

## Foreword

### “Un procès historique”

This is how the French representative, in an Arria-formula meeting held by the United Nations Security Council on accountability in the Syrian Arab Republic in 2021, called the trial against a former official of President Bashar al-Assad's security apparatus, before the Koblenz Higher Regional Court (*Oberlandesgericht*), that had resulted, in February 2021, in a conviction for a crime against humanity. The French delegate had reason to be emphatic: the Koblenz Higher Regional Court's judgment was the first ruling of a domestic court worldwide that Assad's violent crackdown on his own people constituted a crime against humanity. The case marks a shining example of the utility of the exercise of universal jurisdiction combined with the recognition of a customary law exception from functional immunity in a situation whether neither an international criminal court nor a national criminal court of the accused is available to exercise its jurisdiction over the relevant crimes under international law.

For a long time in the history of international criminal law, little pointed in the direction that Germany could ever be playing such a role. In the Inter-War Period, a German scholar summarized the prevailing mood as follows:

(I)t has gone almost unnoticed by the German public that a movement to establish an international criminal jurisdiction has started after the World War. The German reservation is rooted in the fact that this movement has at its origin the allegation of Germany's responsibility for and during the war. Such allegation made it impossible for a German to take a positive attitude towards the said movement.

The “German reservation” should persist for many more decades. Germany's wars of aggression and the German atrocities committed in the course of these wars, formed the subject matter of international criminal law's foundational precedent, the Nuremberg Judgment of 1946, and it took a long time until Germany made its peace with that jurisprudential milestone. Still in 1980, two years after the International Law Commission had resumed its work on the Nuremberg Principles, Germany, when it took the floor in the United Nations, it spoke out against international criminal law without great diplomatic clouding: the German delegation voiced serious doubts about the usefulness of resuming the discussion about the Nuremberg principles. It was deemed questionable whether it would be possible to pronounce rules of international criminal law which could gain support from the international community. Only in the immediate lead-up to the 1998 Rome Conference on the establishment of the International Criminal Court (ICC), the official German position underwent a decisive change, in fact a change so fundamental that William R. Pace, the American convenor of the global coalition of non-governmental organisations for an international criminal court, passed the following verdict:

No country can be prouder than Germany of their participation and support for the ICC. The German refusal to accept what they called ‘an alibi court’, and their resistance to the highly publicised threats from the United States to the German leaders during the Rome conference deserves great appreciation by the world community.

**In this “new German spirit”, the Bundestag unanimously enacted the VStGB to contribute to the domestic pillar of the emerging global international criminal justice system. The VStGB entered into force in the summer of 2002, in parallel with the ICC Statute.** This meant a fundamental change of Germany's legal landscape, but “on the ground” not much really happened for years to come. In fact, it took almost two decades until the Koblenz Higher Regional Court breathed life into the VStGB.



The Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court met in Rome from 15 June to 17 July 1998. Secretary-General Kofi Annan speaks at a ceremony for the opening of the signature of the Treaty on the Establishment of an International Criminal Court at City Hall (“Il Campidoglio”) of Rome, Italy.

@ UN Photo.

**Why did it take those two decades? But more importantly: Why did it ultimately happen so that a new chapter in the enforcement of international criminal law was opened?** This is the core of a remarkable story, told in the following study by Dr. Mónica Castillejos-Aragón, a distinguished international human rights lawyer with rich institutional experience. Based on meticulous research, Dr. Castillejos-Aragón, explains that the road to Koblenz and beyond was possible because of the piecemeal putting into place of what she calls the “German system of universal jurisdiction”—a setting, which has opened the space for a positive interaction of a number of normative and institutional factors. Obviously, in order to set up the system and to make it work, dedicated individuals were necessary at all levels. Crucially, Dr. Castillejos-Aragón does not leave it by making the latter point in the abstract. Rather, along the way of her work, she has identified a large number of the relevant with a view to integrating their voices into her account. Hereby, Dr. Castillejos-Aragón manages to make several generations of a widely branched German family of international criminal lawyers, a family too large for all members to have got to know each other personally, appear on the scene, and to show how they have been acting, everybody at his or her place, in the pursuit of an overarching goal, guided, as it were, by an invisible common thread she uncovered—for the first time—in this study. Through this narration technique, Dr. Castillejos-Aragón has instilled a high degree of authenticity in her account which, also as a result thereof, makes for fascinating reading.

Dr. Castillejos-Aragón deserves praise for having produced a document of very considerable value from the perspectives of contemporary legal history and legal sociology. Perhaps even more importantly, Dr. Castillejos-Aragón is to be commended for making the German experience fully accessible to readers in other countries than Germany who are considering ways to provide their national systems with the best equipment possible. Rightly, Dr. Castillejos-Aragón does not present the German system as “perfect”. Rather, from her study emerges the picture of a vibrant German construction site for justice. But it is Dr. Castillejos-Aragón's powerful core policy message that this construction site—this has now reached such an advanced stage that the building work in other countries, while necessarily being embedded in the relevant national legal culture, might well draw some important inspiration from it. This in turn could help enabling the criminal justice systems in those States to strengthen their contribution to the much-needed world-wide solidary domestic enforcement of the *ius puniendi* of the international community as a whole over genocide, crimes against humanity, war crimes and the crime of aggression.

**Prof. Dr. Claus Kress**

Director of the Institute of International Peace and Security Law at the University of Cologne

Professor of International and Criminal Law

# Executive Summary

## The Konrad Adenauer Foundation, New York Office (KAS)

embarked on a historical and prospective analysis of the conditions that have enabled Germany to exercise universal jurisdiction over core crimes that affect the international community as a whole.

The Higher Regional Court in Koblenz decided two emblematic cases under the principle of universal jurisdiction. In February 2021, after 108 days of trial proceedings, the court found that acts of murder, torture, and sexual violence had been committed in Syria's al-Khatib intelligence service detention center, marking the first time that members of President Bashar al-Assad's regime had to answer for crimes committed in Syria. This was also the first domestic court worldwide to recognize Assad's violent crackdown on his people as a crime against humanity. In October 2019, Germany's Federal Public Prosecutor's Office charged two Syrian men with crimes against humanity. The trial, which started in Koblenz in April 2020, focused on two defendants, *Eyad A and Anwar R*, who were former officials of Assad's security apparatus. In February 2021, the Koblenz Higher Regional Court sentenced *Eyad A* to four and a half years in prison, followed by *Anwar R's* conviction two years later in January 2022. These rulings represented an unprecedented state action against impunity for brutalities committed under the Assad regime. Various higher regional courts across Germany, however, have also rendered similar landmark decisions under the principle of universal jurisdiction, adding significantly to the world's understanding of international criminal law and its application to domestic jurisdictions. According to experts interviewed for this study, Germany has been at the forefront of pursuing accountability for the most serious international crimes in recent decades.

**What accounts for such prosecutorial and judicial assertiveness in Germany? Under what conditions is this litigation and prosecution possible before German courts?** Conventional wisdom offers at least two responses to these questions. First, the country's still fairly novel legal framework, which includes the permission to exercise of so-called wide or pure universal jurisdiction, and second, the investment of substantial government resources for investigating and prosecuting international crimes domestically. This study, however, offers additional insights to understand more fully why Germany is becoming a leading place to "go globally" to seek redress for victims of international atrocities. The study does not focus on substantive judicial outcomes but on the various legal, institutional, and structural conditions that paved the road to the decision of the Higher Regional Court in Koblenz in 2021. **The findings of this study show that Germany has created an exceptional system, referred to here by the author as the "German system of universal jurisdiction - *Das deutsche System der Weltgerichtsbarkeit*."** This system has made Germany one of the world's foremost legal forums to hold perpetrators accountable for international crimes. The German system of universal jurisdiction comprises eight elements. Analyzing these elements together - and not in isolation — provides a deeper understanding of Germany's pivotal role in prosecuting international crimes and its overall contribution to seeking justice and accountability.

### These elements are:

1. Solid legal framework - Völkerstrafgesetzbuch (VStGB).
2. Government financial resources and political support.
3. Development of judicial precedents favoring accountability from the higher regional courts to the Federal Court of Justice and the Federal Constitutional Court, including the abandonment of the legitimizing link doctrine, the decision upholding the non-application of the principle of functional immunity in cases involving the commission of international crimes and the recognition of the right of equal and real access to court proceedings by members of the media.
4. Innovative legal remedies utilized by the Federal Public Prosecutor General Office.
5. Joint cooperation at the regional and international levels.
6. Litigation and advocacy of civil society organizations.
7. Independent media coverage.
8. Independent justice institutions.

Figure 1. The German System of Universal Jurisdiction



The process of envisioning, designing, and testing the system over the past two decades has not been immune to diplomatic, political, and institutional challenges as this study documents; however, it is also embedded with lessons learned and positive response from the actors-the architects, involved in this outstanding process. The unprecedented transformation of Germany’s institutional and legal culture during this time allows us to understand Germany’s remarkable domestic contribution more clearly. This study becomes even more relevant given that on November 1, 2023, Germany’s government approved a draft submitted by the Ministry of Justice that will amend and expand the content of the VStGB. The draft was submitted to the Bundesrat (the Federal Council) for further discussion and analysis, which will officially begin in the first quarter of 2024. If adopted, these reforms will revamp the German criminal justice system a second time, amending the VStGB, the German Criminal Code and the Code of Criminal Procedure.

Mainly, the author hopes the present study will serve as a guiding beacon and encourage other jurisdictions across the globe to envision a model based on these legal and institutional frameworks and continue international and domestic efforts to fight against impunity when the world needs it most.

March 21, 2024.

# About the Foundation



Monument to Konrad Adenauer at Konrad Adenauer Foundation in Berlin.

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**Freedom, justice, and democracy** are basic principles underlying the work of Konrad-Adenauer-Stiftung (KAS). As a political foundation, KAS advocates for democracy and the rule of law, the vision of a unified Europe, a social market economy, a multilateral ruled-based order and a firm alignment of German foreign policy with the transatlantic community of values.

The KAS New York Office provides new perspectives into the discussions on multilateralism, sustainable development, and peace and security. It serves as a liaison between more than 100 KAS offices worldwide for experts, local partners, and the United Nations, as well as for national and international think tanks, NGOs, and universities based in New York and elsewhere.

## About *the* Author

Dr. Mónica Castillejos-Aragón is an international human rights lawyer. Since 2018, she has managed the rule of law and international justice portfolio of the Konrad Adenauer Foundation, New York Office, where she has attained wide-ranging experience engaging in the rule of law, peacebuilding, international justice, and UN-related projects. Trained as a social scientist, she holds Doctor of the Science of Law (J.S.D.) and Master of Laws (LL.M.) degrees from the University of California at Berkeley School of Law, where she was invited to join the prestigious “Mellon Sawyer Seminar on the Dilemmas of Judicial Power in Comparative Perspective” in 2008 at the Center for the Study of Law and Society. She graduated *cum laude* from Instituto Tecnológico Autónomo de México, Department of Law (ITAM).

She has spent her career working globally to advance access to justice and the rule of law with special emphasis on courts, international tribunals, and people-centered justice in comparative perspectives. She has served as a senior legal advisor to UN independent experts, including the UN Special Rapporteur on the Independence of Judges and Lawyers, for whom she worked for five years and contributed to drafting numerous thematic reports on contemporary challenges to the independence of justice worldwide. She worked as a clerk at the Supreme Court of Mexico for four years, and thereafter served as an attorney at the Attorney General's Office. She has worked for various human rights organizations and joined causes devoted to seeking access to justice and accountability for crimes committed in international and non-international contexts. She is a lecturer in comparative law and of international criminal law at the University of California, Berkeley School of Law.



**Dr. Mónica Castillejos-Aragón**  
Program Manager Rule of Law

**Image Credit:**  
Koblenz Higher Regional Court.



## Acknowledgments

*“During this term of parliament, we had many controversies on legal policy issues. Germany's commitment to an international order of criminal law and criminal justice was not and is not controversial, though, but constitutes a firm common ground of German legal and foreign policy.”*

Christian Democrat **Norbert Röttgen** delivered a memorable statement during the final parliamentary reading of the VStGB in 2002.

This study is based on desk research conducted in the United States and Germany. It is substantially supported by scholarship written by leading German legal practitioners, scholars, and former International Criminal Court (ICC) judges, including **Dr. Hans-Peter Kaul**; government officials, diplomats and academics who negotiated the Rome Statute that created the ICC; experts who advocated for and drafted the Code of Crimes Against International Law (VStGB); statements of permanent representatives officials of the German Permanent Mission to the United Nations in New York (UN).

The analysis benefited greatly from conversations with bright, sharp-witted, and generous with their time legal experts on this subject who serve in different sectors and capacities in Germany and abroad. These include former Madam Minister of Justice, **Dr. Herta Däubler-Gmelin**, who launched and led the process of elaboration and adoption of the German *corpus juris* to fully implement the Rome Statute of the ICC into national law, including through the pivotal German Code of Crimes Against International Law.

The author also held in-depth interviews with prominent academic experts and authors who also served as German delegators during the Rome Statute negotiations and as members of the working group whom the Ministry of Justice tasked with drafting the VStGB in October 1999. These include **Dr. Claus Kress**, the director of the Institute of International Peace and Security Law at the University of Cologne and a professor of international and criminal law; **Dr. Thomas Weigend**, a retired professor at the University of Cologne; and **Dr. Andreas Zimmermann**, a professor of international and European law at the University of Potsdam.

Considering the significant contribution to the model presented in this study, the author expresses a debt of gratitude to **Dr. Ute Hohoff**, a Judge at the Federal Court of Justice, who is responsible for appeals in cases brought under the German Code of Crimes Against International Law; **Dr. Corinna Diesel**, a judge at the Higher Regional Court in Koblenz; **Dr. Laurent Lafleur**, a judge at the Higher Regional Court in München and head of the Press Office for Criminal Matters and **Dr. Bianca Von Arnim**, a judge at the Higher Regional Court in Frankfurt for their generous time and willingness to reflect with the author the exercise of universal jurisdiction from a judicial perspective.

The author also held in-depth virtual conversations with leading members of the German academy: **Dr. Stefanie Bock**, professor of criminal law, criminal procedure, international criminal law, and comparative law at Philipps University of Marburg and co-director of the International Research and Documentation Centre for War Crimes Trials; **Dr. Julia Geneuss**, Professor for German and International Criminal Law, Criminal Procedural Law and Comparative Law at the University of Bremen, and a leading expert on prosecuting crimes under international law and **Dr. Florian Jessberger**, who holds the chair in Criminal Law, Criminal Procedure, International Criminal Law, and Modern Legal History at Humboldt-Universität zu Berlin and serves as the director of the Franz von Liszt Institute for International Criminal Justice.

The author would also like to thank the following experts for sharing their first-hand experience litigating, advocating, and reporting on universal jurisdiction cases: **Dr. Wolfgang Kaleck**, secretary general of the European Center for Constitutional Rights and Human Rights (ECCHR); **Dr. Andreas Schüller**, director of the ECCHR's International Crimes and Accountability program; **Mr. Roger Lu Philips**, legal director of the Syria Justice and Accountability Center in Washington, D.C., and a leading expert on universal jurisdiction worldwide; **Dr. Markus Sehl**, an attorney and deputy editor-in-chief of the Legal Tribune Online, and **Dr. Silke Voss-Kyeck**, a seasoned human rights advocate, researcher, and policy advisor for Berlin's German Institute for Human Rights.

The author is also thankful for the insightful conversations held with **Mr. Michael Hasenau**, Legal Advisor at the German Permanent Mission to the United Nations in New York and **Ms. Laetitia Husson**, Senior Legal Officer, and Head of the Support and Sharing Section at the International, Impartial and Independent Mechanism for Syria (IIIM). Furthermore, a deep appreciation to **Philo K. Holland**, a law student at the University of Wuerzburg, who conducted legal research and outreach in Germany, and to **Isabel Vicaria**, KAS legal intern for translating this study into German language.

Special thanks to **Mr. Thomas Tödting**, the Executive Director of the Konrad Adenauer Foundation, New York Office, to **Mrs. Andrea E. Ostheimer**, the Executive Director of the Konrad Adenauer Foundation, Geneva Office, and to **Dr. Franziska Rinke**, Policy Advisor Rule of Law and International Law for creating the conditions to document, pursue this study to completion and generate spaces for further reflection.

Finally, to comprehend the ongoing VStGB reform efforts, this report considered remarks from experts in the hybrid public event, *Kein Sicherer Hafen für Kriegsverbrecher* (No Safe Haven for War Criminals), hosted by the German Bundestag in Berlin on June 26, 2023. The author followed the discussion remotely.

The author conducted the interviews remotely via Zoom and phone calls. Each expert consented to be quoted and approved of the remarks included in this study. The Konrad Adenauer Foundation, New York Office commends the experts for their generosity and openness in discussing Germany's pioneering contributions to the exercise of universal jurisdiction.



## INTRODUCTION

## The Road to Koblenz: Pathways for international justice through the exercise of universal jurisdiction in Germany

On March 6, 2021, *The Washington Post* published a compelling article titled “Why Germany is Becoming a Go-To Destination for Trials on the World’s Crimes.” In it, Andreas Schüller, program director for international crimes at Berlin’s European Center for Constitutional and Human Rights (ECCHR), stated, “**At the moment, it [Germany] is the place to go globally.**”<sup>1</sup> The article describes at least two essential reasons to answer the question “Why Germany?” First, the country’s novel legal framework, which includes the exercise of so-called wide or pure universal jurisdiction, and second, the investment of substantial government resources for investigating and prosecuting international crimes domestically. This analysis, however, offers additional insights to understand more fully—paraphrasing Schüller—why Germany is becoming the place to “go globally” to seek redress for victims of international atrocities. In particular, it answers the following questions: *What accounts for such prosecutorial and judicial assertiveness in Germany? Under what conditions is this litigation and prosecution possible before German courts? How has Germany’s exercise of universal jurisdiction to prosecute gross violations of human rights impacted the national and international levels? Finally, how have German justice institutions contributed overall to addressing and providing justice to victims of atrocities around the world?*

Koblenz, Germany. 13th Jan, 2022. Syrian Fadwa Mahmoud comes out of the building of the Koblenz Higher Regional Court holding a picture of her partner and her son, both of whom have disappeared in prisons of the Assad regime since 2012.

@Thomas Frey/dpa  
Pool/dpa/Alamy Live News

<sup>1</sup> Loveday Morris, “Why Germany Is Becoming a Go-to Destination for Trials on the World’s Crimes,” *The Washington Post*, March 6, 2021, accessed May 21, 2021, [https://www.washingtonpost.com/world/europe/germany-war-crimes-justice/2021/03/05/b45372f4-7b78-11eb-8c5e-32e47b42b51b\\_story.html](https://www.washingtonpost.com/world/europe/germany-war-crimes-justice/2021/03/05/b45372f4-7b78-11eb-8c5e-32e47b42b51b_story.html).

This study is organized as follows. **Section I** provides a brief historical overview of the quest to end impunity based on the idea that certain offenses should not go unpunished. It also underlines the need to bring perpetrators to justice. **Section II** illustrates how Germany's progressive views during the Rome Statute negotiations defined its future leading role in procuring accountability for the commission of international crimes through wide or pure universal jurisdiction. **Section III** describes Germany's response to the international stalemate that occurred during the Rome Statute negotiations. It discusses how, on June 26, 2002, German parliamentarians reacted to the stalemate by adopting an unprecedented act that introduced the Code of Crimes Against International Law (*Völkerstrafgesetzbuch*; VStGB) into the German legal system. **Section IV** exemplifies how German higher regional courts have increasingly moved to fill the interstices of the Rome Statute that created the International Criminal Court (ICC) and have rendered emblematic decisions, including the landmark Koblenz case, that are changing the course of international criminal law. **Section V** discusses the international impact of Germany's global leadership in prosecuting international crimes, particularly through its participation in the UN Sixth Committee (Legal Affairs) and other relevant high-level UN forums. **Section VI** discusses this study's core analysis, offering a unique perspective on the following questions: *what accounts for Germany's prosecutorial and judicial assertiveness at the domestic level, and what conditions have made this possible?* This section contributes to the discussion initiated by the 2021 *Washington Post* article and incorporates additional factors that have enabled German courts to prosecute international crimes. Finally, **Section VII** responds to the central question implied in this analysis: *What is the future of universal jurisdiction in Germany?*

As described in this study, Germany has strategically established several conditions to sustain an accountability agenda that recent judicial developments have proven highly effective. While this process has not been immune to diplomacy and political setbacks, it is embedded with lessons learned, allowing us to identify what else might be required to continue leading this remarkable domestic effort by other jurisdictions.

On November 21, 1945, at the Palace of Justice at Nuremberg, Justice Robert H. Jackson gave his opening remarks for the first trial in history for crimes against peace, emphasizing the court's crucial responsibility: **"The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated."**<sup>2</sup> Justice Jackson's words continue to resonate with current issues concerning the tension between protecting human rights, seeking accountability for perpetrators, and redressing victims of international crimes. The development of these international legal standards must include discussions on whether perpetrators of international crimes should be prosecuted in international tribunals or foreign domestic courts to end their impunity.<sup>3</sup>

<sup>2</sup> Robert H. Jackson, "Opening Statement Before the International Military Tribunal," Robert H. Jackson Center, November 21, 1945, accessed March 21, 2023, <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/>.

<sup>3</sup> Dapo Akande (2004). "International Law Immunities and the International Criminal Court," *The American Journal of International Law* 98, no. 3: 407–433, accessed February 4, 2023, DOI: 10.2307/3181639.

## SECTION 1



# Ending a culture of impunity at last



”  
*“Where impunity is left unaddressed, it provides fertile ground for the recurrence of conflicts and repetition of violence.”*

A visitor in the exhibition at the Memorial to the Nuremberg Trials in Nuremberg, Germany.  
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## Section 01

# Ending a culture of impunity at last

The failure to bring those who violate human rights to justice constitutes a major barrier to accountability and denies victims their rights to justice and redress. As the world witnesses repeated heinous acts worldwide, the quest to prosecute perpetrators of the most dreadful crimes continues to be a symbolic priority for the international community. The military, paramilitary, or other governmental actors often tolerate or even order extreme violence and other forms of war-related brutality and benefit from impunity. The international community has forged ahead in outlawing and punishing atrocities committed during armed conflicts through the development of international humanitarian law. However, countless atrocities committed against vulnerable groups continue to go unpunished <sup>4</sup>. As former ICC judge Silvia Fernández de Gurmendi noted, **“Prosecutions continued to be rare at the national level and non-existent at the international level. While the normative development was extraordinary, impunity flourished as there was no effective enforcement of international law.”**<sup>5</sup> Without credible international enforcement mechanisms, violations of international humanitarian law continue with glaring impunity. Hence, Sang-Hyun Song, the former ICC president, expressed, “Where impunity is left unaddressed, it provides fertile ground for the recurrence of conflicts and repetition of violence.”<sup>6</sup>

<sup>4</sup> Barbara Bedont and Katherine Hall-Martinez, “Ending Impunity for Gender Crimes Under the International Criminal Court,” *Brown Journal of World Affairs* 6, no. 1 (1999): 65–86, accessed February 4, 2023, <https://www.jstor.org/stable/24590222>; Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” *The American Journal of International Law* 95, no. 1 (2001): 7–31, accessed February 4, 2023, <https://doi.org/10.2307/2642034>.

<sup>5</sup> International Criminal Court, *Keynote remarks given by Judge Silvia Fernández de Gurmendi at the plenary session of the 16th Session of the Assembly of States Parties to the Rome Statute on the topic of the 20th anniversary of the Rome Statute* (New York: International Criminal Court, December 13, 2007): 1, accessed May 15, 2023, <https://www.icc-cpi.int/sites/default/files/itemsDocuments/171213-pres-stat-ASP-20.pdf>.

<sup>6</sup> Sang-Hyun Song, “The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law,” *UN Chronicle*, no. 4, (December 2012), accessed May 20, 2023, <https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law>.

In the aftermath of the Second World War, the international community articulated an unparalleled call for justice. Several initiatives have since been undertaken in this regard.<sup>7</sup> The International Military Tribunals of Nuremberg and Tokyo, for example, laid the foundations for international criminal justice and were influential in establishing the ICC.<sup>8</sup> These international tribunals were followed by the adoption of significant norms and principles, such as the Convention on the Prevention and Punishment of the Crime of Genocide, the four Geneva Conventions, and the Nuremberg Principles.<sup>9</sup> These reflected a long-standing recognition of “the role of international criminal justice in a multilateral system that aims to end impunity and establish the rule of law.”<sup>10</sup> On July 17, 1998, this vision materialized when 120 nations adopted the Rome Statute and, under the auspices of the UN, accepted the first-ever permanent, independent judicial institution with jurisdiction over individuals accused of genocide, crimes against humanity, and war crimes. As such, when the Rome Statute was officially implemented on July 1, 2002, the ICC was inaugurated as the first permanent international criminal court.

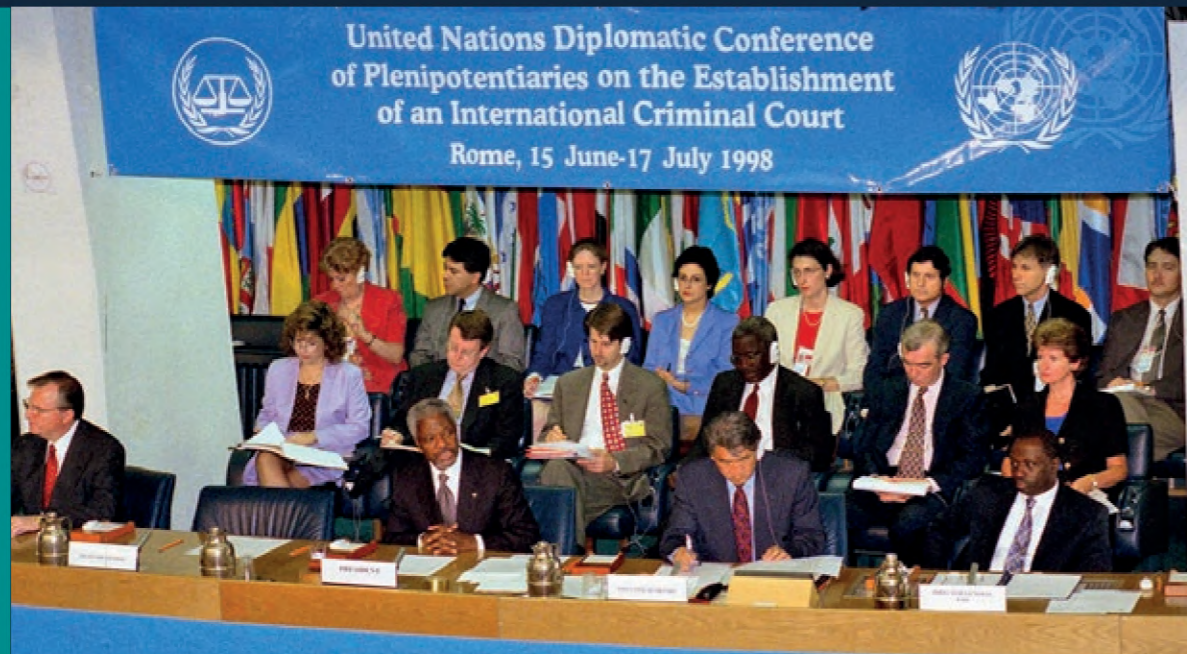
<sup>7</sup> Ibid.

<sup>8</sup> Keynote remarks given by Judge Silvia Fernández de Gurmendi, p. 1.

<sup>9</sup> UN General Assembly, *Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, Draft resolution submitted by the President of the General Assembly, 67th sess.* (New York: United Nations, 2012–2013), accessed March 14, 2023, <https://digitalibrary.un.org/record/734369?n=en>.

<sup>10</sup> Ibid.

## SECTION 2



# The German pursuit for universality in Rome

### Section 02

## The German pursuit for universality in Rome

The creation of the ICC was viewed as a historic opportunity to address the limitations and challenges faced by previous international treaties and tribunals aimed at identifying, investigating, and prosecuting global crimes.<sup>11</sup> Early in the negotiations, the parties generally agreed that, *inter alia*, the ICC would have a complementary function, allowing states to investigate and prosecute crimes and assuming jurisdiction only as a last resort when national systems failed to act effectively. Another significant issue concerned the Rome Statute and whether international law would allow the ICC to prosecute crimes within its jurisdiction *ratio materiae* [subject matter] based on universality. In response to this question, and in an attempt to end the impunity gap, national representatives presented various proposals granting the ICC different jurisdictions.<sup>12</sup> In February 1996, the German delegation comprising leading legal experts introduced one of the most far-reaching proposals. This was known as “the German proposal.”<sup>13</sup>

The German proposal was based on the rationale that international law gives individual states the power to exercise universal jurisdiction over the core crimes listed in Article 5 of the Rome Statute.<sup>14</sup> On this topic, the head of the German delegation, Hans-Peter Kaul, believed that if the international community “[f]ollowed the rationale that states must be entitled to do collectively what they have the power to do individually, then states may agree to confer this individual power over a judicial entity they have established, sustain together, and which acts on their behalf.”<sup>15</sup> Thus, the debate focused on whether universal jurisdiction existed at the national level. Germany became deeply involved in the preconditions of the ICC jurisdiction and proactively promoted universality in the prosecution of international crimes. As Claus Kress, a member of the German delegations, described, “The motivation behind that proposal was that if states could prosecute those crimes, then an international criminal court should be able to do it *a fortiori*.”<sup>16</sup> Thus, the German delegation, together with the so-called “like-minded states” group, advocated for “automatic” jurisdiction<sup>17</sup> that would grant the ICC jurisdiction over any offense committed *anywhere*, regardless of whether the suspect was present in a national territory that was party to the statute [emphasis added].<sup>18</sup>

<sup>11</sup> The UN Security Council passed the following resolutions: S/RES/827 (1993) “On the establishment of the International Criminal Tribunals for the Former Yugoslavia” and S/RES/955 (1994) “On the establishment of International Tribunal for Rwanda and adoption of the Statute of the Tribunal.”

<sup>12</sup> The proposals are categorized as: “The German Proposal,” “The Korean Proposal,” “The United Kingdom Proposal,” and the “Informal Package Proposal of the P-5,” see *The International Criminal Court. The Making of the Rome Statute*, ed. Roy S. Lee, (The Hague: Kluwer Law International, 1999), 127–141.

<sup>13</sup> UN Preparatory Committee, *Report of the Preparatory Committee on the Establishment of an International Criminal Court* (New York: United Nations, 1998), accessed March 14, 2023, <https://digitallibrary.un.org/record/253772?ln=en> (German Proposal 1, UN Doc. A/51/22). The German delegation was mainly composed of Kai Ambos, Petra Arnold, Hans-Jörg Behrens, Petra Hasse, Willibald Hermsdörfer, Frank Jarasch, Hans-Peter Kaul, Andreas Klassen, Ralf König, Claus Kress, Christina Meinecke, Gabriele Schaub, Heidrun Schrimmer, Hansjörg Strohmeyer, Rolf Welberts, Ged Westdickenberg, Andreas Zimmermann, and Wolfgang Gärtner.

<sup>14</sup> Article 5 provides that the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression. See Sharon Williams, “The Rome Statute on the International Criminal Court—Universal Jurisdiction or State Consent—To Make or Break the Package Deal,” *International Law Studies* 75 (n.d.), 544–546; Elizabeth Wilmschurst, “Jurisdiction of the Court” in *The International Criminal Court, The Making of the Rome Statute*, ed. Roy S. Lee, (The Hague: Brill-Nijhoff, 1999), 127–141.

<sup>15</sup> Hans-Peter Kaul, “Preconditions to the Exercise of Jurisdiction” in *The Rome Statute of the International Criminal Court: A Commentary*, eds. Antonio Cassese, Paula Gaeta, and John R.W.D. Jones, (New York: Oxford University Press, 2003), 587–589.

<sup>16</sup> Claus Kress, interview by author, Zoom, July 31, 2023.

<sup>17</sup> On July 9, 1998, Hans-Peter Kaul, then-acting head of the German Delegation in the Committee of the Whole, used for the first time the terms “inherent” and “automatic” in the same way to mean that the ICC was vested with universal jurisdiction upon ratification by states. However, as Sharon Williams notes, those terms must be contrasted with the term “automatic” as used in the Korean Proposal, the United Kingdom Proposal, the Bureau Proposal, and in the final text of the Statute, where although acceptance of the Court’s jurisdiction is automatic, there are preconditions. Williams, “The Rome Statute on the International Criminal Court,” p. 561.

<sup>18</sup> Olympia Bekou and Robert Cryer, “The International Criminal Court and Universal Jurisdiction: A Close Encounter?” *The International and Comparative Law Quarterly* 56, no. 1 (2007), 49–68, accessed April 10, 2023, <https://www.jstor.org/stable/4498052>. The Resolution adopted by the 17th Commission of the Institute of International Law on Universal Criminal Jurisdiction with regard to the crime of genocide, crime against humanity and war crimes defined the universality of universal jurisdiction, noting, “Universal jurisdiction in criminal matters, as an additional ground of jurisdiction, means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law.” Christian Tomuschat, “Universal Jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes” (Krakow: Justitia et Peace, Institute of International Law, 2005) p. 2.

On March 23, 1998, the German delegation submitted a formal paper to the Preparatory Committee on the Establishment of an International Criminal Court. In it, the delegation detailed its proposal and reiterated that, under current international law, all states may exercise universal criminal jurisdiction concerning acts of genocide, crimes against humanity, and war crimes, regardless of the offenders' or victims' nationalities and where the crime was committed. This means that, in a given criminal case, each state can exercise its own national criminal jurisdiction, regardless of whether the custodial state, territorial state, or any other state has consented to it. Extensive international practice and *opinio iuris* continue to support this proposal. The German argument merits a lengthy quotation.

There is no reason why the ICC—established on the basis of a Treaty concluded by the largest possible number of States—should not be in the very same position to exercise universal jurisdiction for genocide, crimes against humanity, and war crimes in the same manner as the Contracting Parties themselves. By ratifying the Statute of the ICC, the State Parties accept in an official and formal manner that the ICC can also exercise criminal jurisdiction with regard to these core crimes.<sup>19</sup>

In accordance with international law, the German delegation sought to offer an alternative to various restrictive measures related to state consent or opting-in/opting-out proposed by other state members.<sup>20</sup> At least some states, including Germany, considered these approaches detrimental to the future of the ICC.<sup>21</sup> The German proposal would grant the ICC the same jurisdictional authority given to states under international law and would transfer this authority to the ICC by ratifying the Rome Statute. Legal scholars agree that the German proposal was appropriate for establishing a permanent international criminal court aimed at resolving past inadequacies of international tribunals, ending impunity, and deterring the commission of serious crimes.<sup>22</sup>

<sup>19</sup> Kaul, "Preconditions to the Exercise of Jurisdiction," 587–598. See also the Preparatory Committee on the Establishment of an International Criminal Court, The Jurisdiction of the International Criminal Court, an informal discussion paper submitted by Germany to the UN in New York, March 1998,

<https://www.legal-tools.org/doc/5e6109/pdf/>. (UN Doc. A/AC.249/1998/DP.2).

<sup>20</sup> Kaul, "Preconditions to the Exercise of Jurisdiction," 598.

<sup>21</sup> *Ibid.*, 583–613.

<sup>22</sup> Williams, "The Rome Statute on the International Criminal Court." In contrast to the statutes governing the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), the Rome Statute, for instance, deals comprehensively with gender-based crimes.



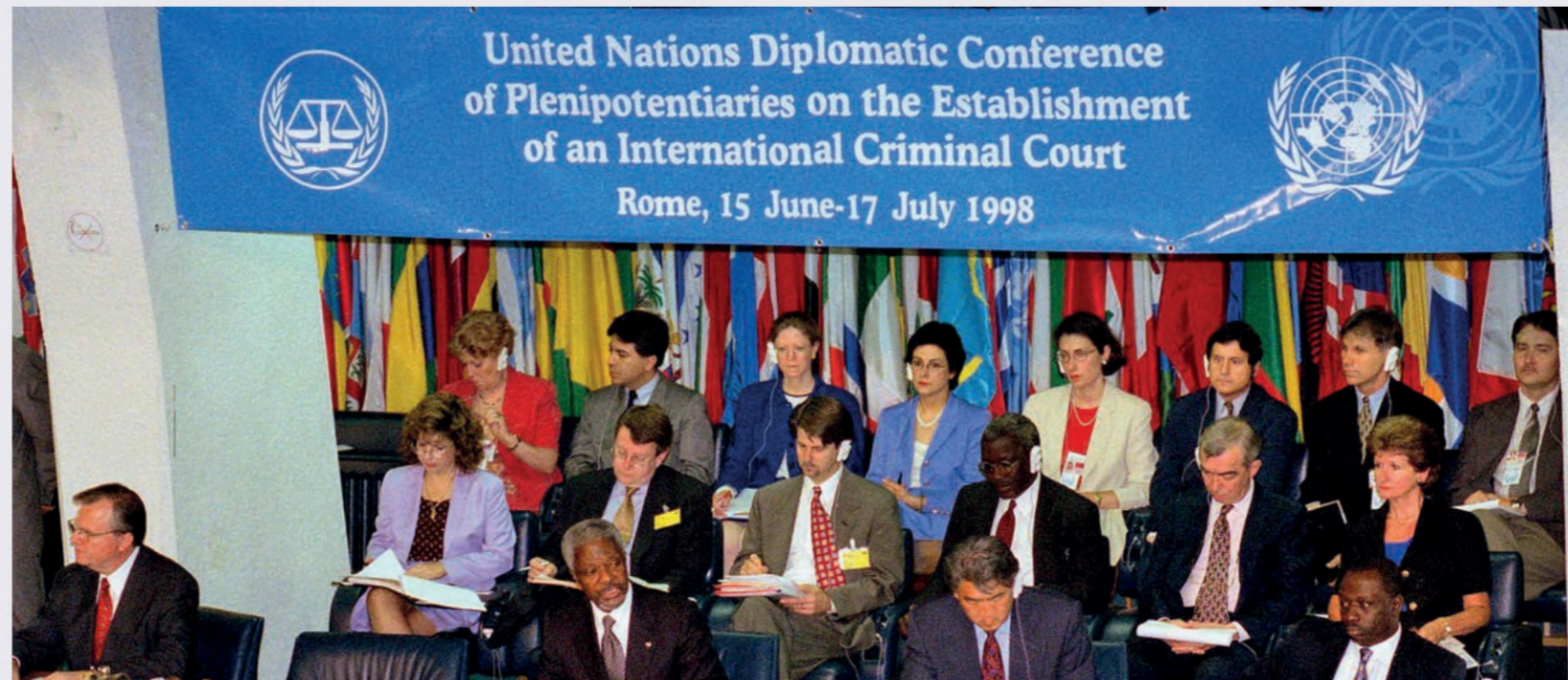
*There is no reason why the ICC—established on the basis of a Treaty concluded by the largest possible number of States—should not be in the very same position to exercise universal jurisdiction for genocide, crimes against humanity, and war crimes in the same manner as the Contracting Parties themselves. By ratifying the Statute of the ICC, the State Parties accept in an official and formal manner that the ICC can also exercise criminal jurisdiction with regard to these core crimes.<sup>19</sup>*

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court opens a five-week session today. Secretary-General Kofi Annan (third from right, head-table), attended the session.

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Under customary international law, criminal conduct that undermines global interests and offends universal conceptions of public policy should be universally condemned. Hence, the progressive German model of universal jurisdiction bestowed any state the power to take custody of *hostis humanis generis* [enemies of humankind] and gave them legitimate, legal grounds to prosecute these cases in the interest of the international community.<sup>23</sup> Additionally, the German proposal included another relevant nuance that gave the ICC universal jurisdiction over the catalog of crimes listed in Article 5 without requiring consent from each interested state.<sup>24</sup>

Initially, the German proposal drew dedicated support from quite some state delegations and from almost all NGOs.<sup>25</sup> However, more support was needed to form a majority. In contrast, some members strongly opposed the doctrine of universality, including the five permanent members of the Security Council (P5). As Andreas Zimmermann, a former member of the German delegation during the ICC negotiations, described, "It was obvious that China, the United States, Russia, France, and the United Kingdom had a common position when it came to the Security Council's referral [to the ICC] and the role of the Security Council vis-à-vis the ICC, generally."<sup>26</sup> The permanent members argued that the UN did not need to broaden the jurisdiction scheme because the Security Council could always refer the situation to the ICC. However, the German delegation opposed a strong reliance on the Security Council, as Zimmermann explained, "**Germany was concerned that nothing could be achieved without the prior determination of the Security Council.**" A like-minded group comprising roughly 60 states aligned with Germany on this issue. In fact, almost every impermanent state member preferred a more effective jurisdictional scheme independent of the Security Council's referral.<sup>27</sup> Nonetheless, as the Rome Statute negotiation progressed, the German proposal was eventually abandoned, and the Statute did not recognize the doctrine of universality.<sup>28</sup> Yet, as some had argued, if the German proposal had been accepted, the ICC, in its present state, would only exercise universal jurisdiction when a national system was unable or unwilling to investigate or prosecute effectively. Therefore, the principle of universality would not have divested national criminal courts of their primary role in prosecuting listed crimes.<sup>29</sup>



The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court opens a five-week session today.

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Notably, the German proposal was excluded from the discussion paper presented at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 6, 1998.<sup>30</sup> The conference attendees argued that the proposal needed more support from other delegations to warrant further consideration and discussion. In response to the delegations' opposition, Hans-Peter Kaul, who would become the ICC's first German judge, cautioned about potential challenges if automatic universal jurisdiction was not recognized. His remarks merit quotation at length.

*The general or regular jurisdiction of the Court under Article 12 is weak because only the fulfilment of the quite restrictive preconditions that either the State on whose territory the crime was committed (territorial state) or the State of which the suspect is a national (nationality State) are a party to the Statute will lead to the Court having jurisdiction. Acceptance of the Statute by the custodial State or the State of the nationality of the victim does not result in the Court having jurisdiction. Therefore, if there is an internal war—the most generic form of conflict today—and neither the territorial State nor the nationality State or a State party or does not consent ad hoc, and there is no Security Council referral, perpetrators of core crimes will have nothing to fear from the ICC... [...] Article 12 is further weakened by numerous procedural hurdles and so-called "safeguards provisions" such as the one contained in Article 18, applicable only to the jurisdiction triggered by a State complaint or by the Prosecutor.<sup>31</sup>*

The creation of the ICC is widely considered a landmark accomplishment in the development of international criminal law. Likewise, the Rome Statute was a groundbreaking international treaty in that it was the first to criminalize certain acts, including gender-based crime provisions. Unfortunately, as former minister Herta Däubler-Gmelin pointed out, "The preamble's optimism and determination to end impunity did not permeate enough for member states to ratify or adequately incorporate international provisions into domestic jurisdiction."<sup>32</sup> Three years after the ICC officially opened at The Hague, Hans-Peter Kaul called on the legal community to remain sober and realistic about the ICC's role and functions and not overlook the basic fact that it could only be as strong as the state parties allowed.<sup>33</sup> His words resonate even today; although Germany signed the Rome Statute on December 10, 1998, and deposited its instrument of ratification on December 11, 2000, as of 2023, many states have yet to ratify it, creating stark regional disparities.<sup>34</sup> This situation remains a global problem as impunity is on the rise.<sup>35</sup>

<sup>23</sup> Ibid.

<sup>25</sup> The Rome Treaty Conference Monitor, July 10, 1998, 1–2, 2, "23 States displayed their dismay that universal jurisdiction was not reflected." Also note the reaction of the German Delegation, as expressed in a statement by Hans-Peter Kaul, Acting Head of Delegation, in the CW on July 9, 1998, which was also one of dismay and reiterated the belief that their approach was legally sound "and acknowledged in international legal doctrine as well as through extensive State practice." See, Williams, "The Rome Statute on the International Criminal Court," p. 562. The NGOs that joined the proposal included the International Committee of the Red Cross, the International Commission of Jurists, Lawyers Committee for Human Rights, and Amnesty International and Human Rights Watch.

<sup>24</sup> Ibid.

<sup>26</sup> Andreas Zimmermann, interview by author, Zoom, October 12, 2023.

<sup>27</sup> Ibid.

<sup>28</sup> Hans-Peter Kaul, "Special Note: The Struggle for the International Criminal Court's Jurisdiction," *European Journal of Crime, Criminal Law, and Criminal Justice* 6, no. 4 (1998), 48–60, accessed [February 17, 2023],

<https://doi.org/10.1163/15718179820518610>

<sup>29</sup> Williams, "The Rome Statute on the International Criminal Court," 546.

<sup>30</sup> United Nations, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, vol. 1, Final Documents, (A/CONF.183/13) (Rome: Uniter Nations, June 15–July 17 1998), accessed [February 17, 2023],

[https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings\\_v1\\_e.pdf](https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf)

<sup>31</sup> Williams, "The Rome Statute on the International Criminal Court," p. 612.

<sup>32</sup> Herta Däubler-Gmelin, 2008. Explanatory Memorandum: Co-Operation with the International Criminal Court (ICC) and its Universality, Parliamentary Assembly, (Strasbourg: Council of Europe, 2008).

<sup>33</sup> Hans-Peter Kaul, "Construction Site for More Justice: The International Criminal Court after Two Years," *American Journal of International Law* 99, no. 2 (April 2005), 370–384.

<sup>34</sup> As of 2023, 123 countries are States Parties to the Rome Statute of the ICC. Of these, 33 are African, 19 are Asian-Pacific, 18 are Eastern European, 28 are Latin American and Caribbean, and 25 are Western European or other. 31 States have signed the Rome Statute but have not ratified it yet. Two States have withdrawn from the Rome Statute: Burundi and The Philippines

<sup>35</sup> Däubler-Gmelin, "Explanatory Memorandum," 2–20.

## SECTION 3



# The historic passage of the Code of Crimes Against International Law, VStGB

### Section 03

## The historic passage of the Code of Crimes Against International Law, VStGB

The political compromise involving significant jurisdictional limitations which was the result of the complex Rome Statute negotiations raises the following question: *Do German authorities continue exercising universal jurisdiction in response to the restraints in Rome or as a strategy to advance its domestic accountability agenda?*

This study provides evidence of the latter. In 1998, the German delegation submitted another paper to the Preparatory Committee on the Establishment of an International Criminal Court, reiterating that the "approach based on the principle of universal jurisdiction was legally sound and acknowledged in international legal doctrine as well as through extensive state practice."<sup>36</sup> The P5's reticence to the German proposal reflected a misunderstanding of existing state practices and *opinio iuris* under international laws and treaties. In keeping with the complementarity principle in Article 17, the state parties should have discharged their obligations to prosecute core crimes wherever possible to minimize the burden on the ICC.<sup>37</sup> In contrast, most states adopted a more conservative approach. In practice, the Court's jurisdictional limitations weigh even more heavily in view of taxing vetoes against Security Council referrals of situations to the ICC, a fact that has contributed to member states increasingly pressing for reforms in the UN architecture.<sup>38</sup> The Council's veto power is the primary source of contention, as illustrated by Russia and China's 2014 veto against referring the Syrian situation to the ICC. At the same time, this veto forms the background for Germany's emerging leading role in prosecuting international crimes.

<sup>36</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

<sup>37</sup> Kaul, "Construction Site for More Justice: The International Criminal Court after Two Years," 379.

<sup>38</sup> Mónica Castillejos-Aragón, Erica Mumford, and Teresa Val, "Busy Week at the East River," Konrad-Adenauer-Stiftung, New York Office, October 5, 2023.



Following the adoption of the Rome Statute, its ratification and full and effective national implementation by all parties became equally crucial. For the complementarity principle to work, national jurisdictions needed to adopt domestic legislation prohibiting crimes within the ICC's jurisdiction. Germany's incorporation of this legislation surpassed international expectations.

Kress described:

**"Naturally, after Rome, a core group of legal experts discussed what should be the appropriate reaction of the German legislature to such an international breakthrough."<sup>39</sup>**

<sup>39</sup> Kress, interview; Gerhard Werle and Florian Jessberger, "International Criminal Justice Is Coming Home: The New German Code of Crimes against International Law," *Criminal Law Forum* 13, no. 2 (June 2002), 199; Julia Geneuss, "Fostering a Better Understanding of Universal Jurisdiction," *Journal of International Criminal Justice* 7, no. 5 (November 2009): 945–962.

<sup>40</sup> Claus Kress, "Vom Nutzen eines deutschen Völkerstrafgesetzbuchs," *Nomos Verlagsgesellschaft*, 40 (2006); Claus Kress, "Universal Jurisdiction over International Crimes and the Institut de Droit International," *Journal of International Criminal Justice*, no. 4 (2006), 561–585, accessed August 20, 2023, <https://doi.org/10.1093/jicj/mqj037>.

<sup>41</sup> Kress, interview.

<sup>42</sup> The scholarly members of the VStGB drafting committee were Dr. Horst Fischer, Dr. Thomas Weigend, Dr. Gerhard Werle, Dr. Andreas Zimmerman, Dr. Kai Ambos, and Dr. Claus Kress. This information was obtained through interviews conducted with Kress on July 31, 2023, and Andreas Zimmermann on October 12, 2023.

Kress also explained how his 2000 publication formed part of a debate over the need to adopt a criminal code under international law that prescribed "genuine" universal jurisdiction.<sup>40</sup> Eventually, the government acted in line with his proposal.<sup>41</sup> In October 1999, Herta Däubler-Gmelin, the Federal Minister of Justice, Joschka Fischer, the Minister of Foreign Affairs, and Rudolf Scharping, the Federal Minister of Defense formed a group of legal experts comprising academics, attorneys, and government officials and entrusted them with the task to codify the entire *corpus* of crimes under international law in the form of a special German statute: the VStGB.<sup>42</sup>

While discussing both the political and historical context leading to the adoption of the VStGB, Dr. Herta Däubler-Gmelin, Germany's former Federal Minister of Justice confirmed that the Code of Crimes Against International Law came into being on her initiative as Federal Minister of Justice.<sup>43</sup> Minister Däubler-Gmelin further explained that States agreed, especially Germany, that the ICC could only handle a few cases: **"We, therefore, wanted to ensure that ICC Member States with properly functioning constitutional institutions could relieve the burden of the international criminal tribunal through national laws consistent with the Rome Statute. Germany is one of those countries."**<sup>44</sup> Under her leadership, she asked a group of eminent international lawyers to prepare a draft submitted to the Bundestag for decision. "The VStGB has long since become a model for other federal states," she noted.<sup>45</sup> The group was responsible for formulating the preliminary draft of the VStGB and finalized it in 2001.<sup>46</sup>

On June 26, 2002, a month prior to the Rome Statute's implementation and after a lengthy parliamentary discussion, the Bundestag *unanimously* passed an act introducing the unprecedented VStGB.<sup>47</sup> The parliament's political forces united in this effort. Christian Democrat Norbert Röttgen delivered a memorable statement during the final parliamentary reading of the VStGB in 2002: "During this term of parliament, we had many controversies on legal policy issues. Germany's commitment to an international order of criminal law and criminal justice was not and is not controversial, though, but constitutes a firm common ground of German legal and foreign policy."<sup>48</sup> The legislators also amended substantial provisions of the German Criminal Code (*Strafgesetzbuch*; StGB) and the Code of Criminal Procedure (*Strafprozeßordnung*; StPO) and the Court Constitution Act (*Gerichtsverfassungsgesetz*; GVG).<sup>49</sup> The code was finally adopted on June 30, 2002.<sup>50</sup>

<sup>43</sup> Madam Minister Herta Däubler-Gmelin, interview by author, phone and email, December 28, 2023.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> Werle and Jessberger, "International Criminal Justice Is Coming Home," 199.

<sup>47</sup> Madam Minister Herta Däubler-Gmelin, interview; Federal Law Gazette I, p. 2254, accessed January 9, 2023, [https://www.gesetze-im-internet.de/englisch\\_vstgb/englisch\\_vstgb.html](https://www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.html)

<sup>48</sup> Deutscher Bundestag, Plenarprotokoll 14/2 3 3, reprinted in *Materialien zum Völkerstrafgesetzbuch. Dokumentation des Gesetzgebungsverfahrens* 95

<sup>49</sup> Elisabeth Handl, "Introductory Note to the German Act to Introduce the Code of Crimes Against International Law," *International Legal Materials* 42, no. 4 (2003), 995–997, accessed March 11, 2023, <https://www.jstor.org/stable/20694396>.



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Undoubtedly, the VStGB reflected the aspirations of the German proposal in Rome. **"In the VStGB commission, there were some experts who were active in the Rome Statute negotiations, and they thought the universality principle was the right way to deal with core crimes,"** said Thomas Weigend, who helped draft it.<sup>51</sup> In this context, the Bundestag opted for a unitary solution by incorporating core ICC criminal offenses into domestic law. Before the VStGB's passage, the German Criminal Code had only authorized universal jurisdiction over the crime of genocide (former Section 220a of the German Criminal Code) and crimes that Germany was obligated to prosecute through treaties, such as drug offences and pornography.<sup>52</sup> Murder, grievous bodily harm, rape, and enforced disappearance had to be prosecuted as ordinary crimes.<sup>53</sup> German nationals could be prosecuted for such crimes domestically even if they committed them abroad, but otherwise the territoriality principle was determinative. Weigend described how the VStGB authorized German authorities for the first time to prosecute these crimes against humanity and war crimes based on the principle of universality.<sup>54</sup>

<sup>50</sup> An official English translation is available here: Code of Crimes against International Law (CCAIL), accessed January 15, 2023, [https://www.gesetze-im-internet.de/englisch\\_vstgb/index.html](https://www.gesetze-im-internet.de/englisch_vstgb/index.html)

<sup>51</sup> Thomas Weigend, interview by author, Zoom, October 17, 2023.

<sup>52</sup> Wolfgang Kaleck, "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008," *Michigan Journal of International Law* 30, no. 3 (2009), 927. ISSN: 2688–5522, <https://repository.law.umich.edu/mjil/vol30/iss3/12>

<sup>53</sup> Human Rights Watch, *The Legal Framework for Universal Jurisdiction in Germany*, 2014, accessed April 23, 2023, [https://www.hrw.org/sites/default/files/related\\_material/10914German\\_0.pdf](https://www.hrw.org/sites/default/files/related_material/10914German_0.pdf); Werle and Jessberger, "International Criminal Justice Is Coming Home," 191–224.

<sup>54</sup> Weigend, interview.

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Moreover, the act distinguished between the law's applicability and the courts' exercise of jurisdiction.<sup>55</sup> According to the first sentence of VStGB §1, the law applies to all crimes against international law, including serious criminal offenses designated therein, even if the offense is committed abroad and bears no relation to Germany.<sup>56</sup> This clause is one of the most far-reaching and important innovations of the German legal system as it provides for the exercise of pure universal jurisdiction. Procedurally, the StPO §153f outlines the prosecutors' and courts' jurisdiction over extraterritorial offenses under the VStGB, including the right to decline to prosecute if the alleged crime was committed abroad, the accused does not possess German nationality, resides outside of Germany and German residence is not anticipated. Regardless, Germany recognizes that the principle of mandatory prosecution can be unrealistic. For example, if a prosecutor learns of an alleged international crime while watching TV or reading a newspaper, they would be obligated to begin investigating the situation immediately. As such, the StPO §153f provides a series of conditions that limit Germany's ability to prosecute extraterritorial offenses by a foreigner under the VStGB.<sup>57</sup> This provision prevents Germany's criminal law system from overloading and becoming "newspaper justice."<sup>58</sup>

## What are the compelling reasons behind the passage of the VStGB?

The Bundestag, in its Explanatory Memorandum to the Act of 2002 (*Bundestagsdrucksache 14/8524*), provided various reasons for the German government to adopt the VStGB. From historical and international law perspectives, for example, Bundestag members recalled Germany's decisive role in the intense negotiations that established the ICC. The memorandum describes the long path to the Rome Statute, from the creation of the military criminal tribunals of Nuremberg and Tokyo to the establishment of ad hoc criminal tribunals for Rwanda and the former Yugoslavia.<sup>59</sup> Stefanie Bock, reflecting on this legal framework, noted, "*It is unique for Germany as we are linked with the prosecution of international crimes to our past. Germany has a historical responsibility to prosecute these crimes.*"<sup>60</sup> Judge Ute Hohoff coincided with Bock's reflection and highlighted Germany's historical obligation to investigate and prosecute international crimes: "We see these cases as part of our historical responsibility."<sup>61</sup> Additionally, the Memorandum discussed the role of the UN's International Law Commission (ILC), the presentation of the first draft of the codification of crimes under international law, and the UN's establishment of a Preparatory Committee, which would eventually become the global authority responsible for drafting the statute for a permanent international criminal tribunal.<sup>62</sup>

<sup>55</sup> Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, (Oxford: Oxford University Press, 2003), 141–157

<sup>56</sup> It is important to note that the second sentence of §1 of the VStGB does not grant the power to exercise universal jurisdiction over the crime of aggression. In some way, this more limited jurisdiction of German courts over the crime of aggression reflects the distinct restraints that, as a result of the late agreement reached in the summer of 2010 at the first Review Conference on the ICC Statute in Kampala, curtail the ICC's exercise of jurisdiction of this crime; Claus Kress, *On the Activation of ICC's Jurisdiction over the Crime of Aggression*, *Journal of International Criminal Justice* 16 (2018), 1–18.

<sup>57</sup> Reydams, *Universal Jurisdiction*, 146; Werle and Jessberger, "International Criminal Justice Is Coming Home," 213.

<sup>58</sup> For a specific commentary on the scope of StPO §153f, see Claus Kress, "C. Nationale Umsetzung des Völkerstrafgesetzbuches Öffentliche Anhörung im Ausschuss für Menschenrechte und Humanitäre Hilfe des Deutschen Bundestages—Kurzstellungnahme," *Zeitschrift für Internationale Strafrechtsdogmatik* 13, (2007), 515–525; Mark Swatek–Evenstein, "Julia Geneuss, Völkerrechtsverbrechen und Verfolgungsermessens: Sec. 153f StPO im System Völkerrechtlicher Strafrechtspflege" [Crimes against International Law and the Discretion to Prosecute], *Journal of International Criminal Justice* 13, no. 1 (March 2015): 203–[iii]

<sup>59</sup> UN Doc. S/Res/827, May 25, 1993; Bundestag Drucksache 13/57; UN Doc. S/Res/955, November 8, 1994, Bundestag Drucksache 13/7953.

<sup>60</sup> Stefanie Bock, interview by author, Zoom, October 30, 2023. See, Stefanie Bock, "Western Sahara and Universal Jurisdiction in Germany," *Revue Belge de Droit International / Belgian Review of International Law* 43, no. 1 (2010): 43–60.

<sup>61</sup> Judge Ute Hohoff, interview by author, Zoom, December 12, 2023.

<sup>62</sup> United Nations, *Draft Code of Crimes Against the Peace and Security of Mankind*, (UN Doc. A/51/10), 48th sess. (New York: United Nations, 1996).

Indeed, the first sentence of Section 1 of the VStGB contains two key elements.<sup>63</sup> First, the code applies to *all* offenses against international law, *even if the offense is committed abroad and bears no relation to Germany*. Second, the provision grants German court's jurisdiction over international crimes *independent of the place* where the crime was committed and other statutory links for exercising jurisdiction [emphasis added].<sup>64</sup>

Overall, the VStGB provides a legal framework for prosecutors and courts to investigate. From a domestic perspective, the Memorandum echoed the German proposal by decisively stating that core international crimes are subject to universal jurisdiction and that crimes against the vital interests of the international community *transcend borders* [emphasis added].# The Bundestag's message was direct: Those who commit atrocities should not feel safe and would eventually be held accountable. and prosecute international crimes, including genocide (§ 6 VStGB), crimes against humanity (§ 7 VStGB), and war crimes (§ 8–12 VStGB). It vastly expands the scope of Germany's criminal law system and incorporates it into its language. However, the VStGB's most unique feature is that it adequately mirrors the German proposal for automatic universal jurisdiction in Rome. As Florian Jessberger explained, "The adoption of the VStGB in 2002 and, in particular, the extremely broad provision of Section 1 that includes the principle of pure universal jurisdiction is one of the main contributions of Germany to the development of case law on universal jurisdiction."<sup>65</sup>

<sup>63</sup> § 1 VStGB. This Act shall apply to all criminal offences against international law designated under this Act, to offences pursuant to sections 6 to 12 even when the offence was committed abroad and bears no relation to Germany. For offences pursuant to section 13 that were committed abroad, this Act shall apply independently of the law of the place where the act was committed if the perpetrator is German or if the offence is directed against the Federal Republic of Germany. For the second sentence of § 1 VStGB dealing with the crime of aggression.

<sup>64</sup> As far as crimes under the VStGB, except for the crime of aggression, are concerned, the law provides for the application of universal jurisdiction without a need for a domestic connection. (Soweit es um Verbrechen nach dem VStGB geht, sieht das Gesetz die Geltung des Weltrechtsprinzips ohne die Notwendigkeit eines Anknüpfungspunktes im Inland vor.) See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

<sup>65</sup> Florian Jessberger, interview by author, Zoom, September 15, 2023; Christoph Safferling, "Review of German Participation in the Nuremberg Trials and Its Implications for Today" in *The Nuremberg War Crimes Trial and Its Policy Consequences Today*, ed. Beth A. Griech-Polelle, (Münich: Nomos, 2020).



In the courtroom of the Koblenz Higher Regional Court. The Code of Criminal Procedure stands before the start of proceedings. © Alamy Stock Photo

**"The adoption of the VStGB in 2002 and, in particular, the extremely broad provision of Section 1 that includes the principle of pure universal jurisdiction is one of the main contributions of Germany to the development of case law on universal jurisdiction."<sup>65</sup>**

## SECTION 4



# From the law in the books to its application by higher regional courts



Koblenz, Germany. 23rd Apr, 2020. Joint plaintiffs and judges, including the presiding judge Anne Kerber (back, 2nd from left), stand at the beginning of the trial at the Higher Regional Court. Today the trial against two defendants accused of involvement in Syrian state torture begins.  
@ Thomas Lohnes/AFP Pool/dpa/Alamy Live News

### Section 04

## From the law in the books to its application by higher regional courts

Despite the VStGB's comprehensive and progressive language, several years passed before the written law was fully realized in concrete cases and the law became action. As Kress pointed out, it is pertinent to note that German authorities only fully recognized the VStGB's content after a lengthy process: "The German Federal Public Prosecutor was initially quite hesitant to activate the VStGB's full potential. Legal institutions had limited manpower."<sup>66</sup> During the early years, for instance, human rights NGOs attempted to bring politically sensitive cases before the Federal Public Prosecutor's Office.<sup>67</sup> However, Kress explained that the Office was not yet ready to apply an unknown law. Thus, those entrusted to put the law into practice were initially unenthusiastic about it.<sup>68</sup> "It has been a slow process, but things gradually developed," Kress asserted.<sup>69</sup> In addition, Kress recalled that "together with an official of the Foreign Office, we established a German-speaking working group of international criminal lawyers (*Arbeitskreis Völkerstrafrecht*)."<sup>70</sup> The purpose of this group was to build momentum, internalize the law domestically, and foster dialogue among scholars and practitioners. This working group has had an enormous impact over the years.<sup>71</sup> Likewise, Judge Laurent Lafleur commented on the working group's importance and mentioned that practitioners, lawyers, judges, and prosecutors at all levels participated in it, discussing contemporary dilemmas surrounding international criminal law.<sup>72</sup> Thus, years after the VStGB's passage, Germany had yet to establish its reputation as a consistent defender of the rights of victims of atrocities—and the rights of the accused—as fit an advanced, lawful democracy. The Syrian conflict became the first plausible opportunity to test Germany's domestic commitment to prosecuting international crimes.

<sup>66</sup> Kress, interview.

<sup>67</sup> In the September 15<sup>th</sup> interview, Jessberger also used the *Kundus* case to exemplify situations where the prosecutor opened an investigation but decided to dismiss the case. For an in-depth analysis of the cases against U.S. Secretary of Defense Donald Rumsfeld, see Kai Ambos, "International Core Crimes, Universal Jurisdiction and Sec. 153f of the German Criminal Procedure Code: A Commentary on the Federal Prosecutor General and the Stuttgart Higher Regional Court in the Abu Ghraib/Rumsfeld Case," *Criminal Law Forum* 18, no. 1 (2007), 43–58; "Oberlandesgericht Stuttgart: Center for Constitutional Rights v. Rumsfeld et al.," *International Legal Materials* 45, no. 1 (January 2006): 122–126.

<sup>68</sup> Most German legal literature that comments on this specific period of the VStGB's history reflects on complex cases, including criminal complaints filed against the U.S. Secretary of Defense Donald Rumsfeld for torture at the Abu Ghraib prison in Iraq and at Guantanamo; the Chinese President Jiang Zemin for persecution of members of the Falun Gong community; the Interior Minister of Uzbekistan Zokirjon Almatov for the Andijan massacre, and the then Turkish Prime Minister and current President Recep Tayyip Erdoğan for crimes against the Kurdish population.

<sup>69</sup> Kress, interview; Florian Jessberger, "A Short History of Prosecuting Crimes under International Law in Germany," *Journal of International Criminal Justice*, October 24, 2023, 8, accessed [November 3, 2023],

<https://doi.org/10.1093/jicj/mqad039>; Andreas Schüller, "The Role of National Investigations in the System of International Criminal Justice - Developments in Germany", in *Sicherheit und Frieden (S+F) / Security and Peace*, 2013, Vol. 31, No. 4, Themenschwerpunkt: Zehn Jahre Internationaler Strafgerichtshof – Wirken und Wirkung / Ten Years of International Criminal Court – Impact and Effect (2013), pp. 226–231.

<sup>70</sup> 10 Jahre Arbeitskreis Völkerstrafrecht. Geburtstagsgaben aus Wissenschaft und Praxis, ed. Claus Kress, (Sievers u. Partner, 2015); also see Franz-von-Liszt-Institut, Arbeitskreis Völkerstrafrecht, access August 20, 2023,

<https://fi.berlin/arbeitskreis-voelkerstrafrecht/>

<sup>71</sup> Kress, interview.

<sup>72</sup> Judge Laurent Lafleur, interview by author, Zoom, October 20, 2023.

## What accounts for such prosecutorial and judicial assertiveness in Germany?

“[Government] support has been built by events,” Andreas Schüller noted about Germany’s Syrian refugee situation.<sup>81</sup> Syria’s humanitarian crisis has a long and complex history with appalling results. In mid-2021, Germany reported almost 1.24 million refugees and 233,000 asylum seekers, making it Europe’s largest host country for refugees. Half of the refugees were from Syria.<sup>82</sup> *“Wir schaffen das [We will manage]; I put it simply, Germany is a strong country,”* Angela Merkel, the former German chancellor said while addressing the rising number of migrants—primarily from Syria, Iraq, and Afghanistan—applying for asylum in 2015.<sup>83</sup> Germany—as of 2023 accommodates nearly 60 percent of Syrian citizens in the European Union.<sup>84</sup> Furthermore, in past years, “the [German] government has allocated more financial resources for prosecution and accountability as any other jurisdiction as a result of the humanitarian crisis in Syria,” Schüller said.<sup>85</sup> Roger Phillips, legal director of the Syria Justice and Accountability Center, also commented, *“In addition to any humanitarian principle, there is a strong incentive in prosecuting crimes being perpetrated by those who surreptitiously sought refugee status in Germany.”*<sup>86</sup>

The *Anwar R and Eyad A* trial was one of the most emblematic cases decided under the principle of universal jurisdiction.<sup>76</sup> In October 2019, Germany’s Federal Public Prosecutor’s Office charged the men with crimes against humanity. The trial, which started in Koblenz in April 2020, focused on two defendants, Anwar R and Ewan A, who were former officials of President Bashar al-Assad’s security apparatus.<sup>77</sup> In February, 2021, after 108 days of trial proceedings, the Koblenz Higher Regional Court found Anwar R guilty as a co-perpetrator of acts of murder, torture, and sexual violence committed in the al-Khatib Intelligence Service detention center, marking the first time that a member of the Assad regime had to answer for crimes. Most importantly, it was the first domestic court worldwide that ruled Assad’s violent crackdown on his own people a crime against humanity.<sup>78</sup> In February 2021, the Koblenz Higher Regional Court sentenced Eyad A to four and a half years in prison, followed by Anwar R’s conviction in January 2022.<sup>79</sup> These rulings represented a notable first state action in the fight against impunity for the brutalities committed under Assad’s regime.<sup>80</sup>

<sup>76</sup> Legal advocates, scholars, and experts interviewed for this report agreed that the Higher Regional Court in Koblenz decision sentencing Eyad A and Anwar R is the exemplary landmark ruling under the principle of universal jurisdiction. Interviews conducted with Andreas Schüller on June 29, 2023; Julia Geneuss on July 5, 2023; and Roger Phillips on July 5, 2023; Wolfgang Kaleck and Patrick Kroger (Hrsg.) (eds.), *Syrische Staatsfolter vor Gericht/Syrian State Torture on Trial* (Bonn: Bundeszentrale für politische Bildung, 2023).

<sup>77</sup> Alia Malek, “How a Syrian War Criminal Was Brought to Justice—In Germany,” *The New York Times Magazine*, January 25, 2022, accessed August 21, 2023, <https://www.nytimes.com/2022/01/25/magazine/germany-trial-syria.html>

<sup>78</sup> Antonia Klein and Patrick Kroger, “A Historic Trial—with Missed Opportunities” in *Torture in Syria on Trial in Koblenz. A Documentation of the Al-Khatib Proceedings* (Berlin: European Center for Constitutional and Human Rights, 2020); Interview with Professor Claus Kress, Pioneering achievements of the German Judiciary with a global impact, *Deutschlandfunk*, December 10, 2021, accessed in November 28, 2023, <https://www.deutschlandfunk.de/verbrechen-menschlichkeit-gericht-100.html>

<sup>79</sup> Koblenz Higher Regional Court judgments on January 13, 2023 and February 24, 2021, 1 StE 9/19 and 3/21; Wolfgang Kaleck and Patrick Kroger, “Syrian Torture Investigations in Germany and Beyond,” *Journal of International Criminal Justice* 16, no. 1 (2018), 165, accessed September 25, 2023, DOI:10.1093/jicj/may014; Syria Justice and Accountability Centre and International Research and Documentation Centre for War Crime Trials, *The Trial of Anwar Raslan and Eyad Al-Gharib*, accessed October 10, 2023, <https://syriaaccountability.org/the-trial-of-anwar-raslan-and-eyad-al-gharib/>

<sup>80</sup> France and Sweden made similar efforts in March and April 2021, respectively.

<sup>81</sup> Andreas Schüller, interview by author, Zoom, June 29, 2023.

<sup>82</sup> Data from the UNHCR field office unit at Nürnberg; “Germany,” UNHCR Global Website, accessed August 30, 2023, <https://www.unhcr.org/countries/germany>

<sup>83</sup> Philip Oltermann, “How Angela Merkel’s Great Migrant Gamble Paid Off,” *The Guardian*, August 30, 2020.

<sup>84</sup> Malek, “How a Syrian War Criminal Was Brought to Justice,” 2022.

<sup>85</sup> Schüller, interview.

<sup>86</sup> Roger Phillips, interview by author, Zoom, July 5, 2023. See, Syria Justice and Accountability Centre “Report: Universal Jurisdiction Under Scrutiny: A Quantitative Analysis of 250+ Syrian Cases,” (Washington DC: SJAC, June 29, 2023).



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## a) Rendering justice from the bottom up: the Anwar R and Eyad A cases in Koblenz

As of 2023, 15.3 million people in Syria require humanitarian assistance, including 7 million children and 4.5 million women. The UN reports that between March 2011 and March 2021, more than 350,000 people were killed in the Syrian conflict. However, the number of fatalities is likely higher.<sup>73</sup> Despite repeated international calls for accountability for Syria’s war crimes and crimes against humanity—including the 2013 findings of the UN-appointed Commission of Inquiry—Russia and China’s vetoes prevented the Security Council from adopting a resolution referring the situation to the ICC.<sup>74</sup> Nevertheless, 13 members of the Council supported this resolution, which would have authorized the ICC to investigate the Syrian situation that witnessed thousands of civilian fatalities, millions of displacements, and widespread human rights violations. Without a far-reaching international criminal tribunal, victims, prestigious civil society organizations and legal advocates turned their hopes and legal resources to the principle of universal jurisdiction.

In response, German courts—particularly the higher regional courts (*Oberlandesgerichte*; OLG);—moved to fill the interstices of the Rome Statute and the restraints of the permanent criminal tribunal to seek accountability for atrocities committed by a non-state party, Syria.<sup>75</sup>

<sup>73</sup> Michelle Bachelet, UN High Commissioner for Human Rights, Presentation of the report on civilian deaths in the Syrian Arab Republic, 50th sess. (Geneva: Human Rights Council, June 30, 2022), accessed September 7, 2023, <https://www.ohchr.org/en/statements/2022/06/presentation-report-civilian-deaths-syrian-arab-republic>

<sup>74</sup> “Russia, China Block Security Council Referral of Syria to International Criminal Court,” *UN News*, May 22, 2014, accessed June 15, 2023, <https://news.un.org/en/story/2014/05/468962#:~:text=Despite%20repeated%20appeals%20by%20senior>

<sup>75</sup> See also Higher Regional Court of Stuttgart judgment of September 28, 2015 (5–3 StE 6/10) and Higher Regional Court of Frankfurt judgments of February 18, 2014, and December 29, 2015 (retrial) (5–3 StE 4/10–4–3/10 and 1/15). For a more substantial commentary on these rulings, see Kai Ambos, “The German Rwabukombe Case: The Federal Court’s Interpretation of Co-perpetration and the Genocidal Intent to Destroy,” *Journal of International Criminal Justice* 14, no. 5 (December 2016), 1221–1234, accessed June 15, 2023, <https://doi.org/10.1093/jicj/mqw056>. Jessberger, “A Short History of Prosecuting Crimes under International Law in Germany.”

<sup>76</sup> Jessberger, “A Short History of Prosecuting Crimes under International Law in Germany.”



The Koblenz Higher Regional Court  
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The Koblenz ruling was also influential in that the German federal public prosecutor has gathered evidence on potential crimes that Assad himself may have committed.

This information could be used in the future, for instance, when he is no longer president, or if charges are leveled against him by the International Criminal Court or a UN special tribunal.<sup>87</sup> Philips stressed that “Germany has been in the forefront of the universal jurisdiction bringing to justice perpetrators of atrocity crimes in a number of different conflicts, but in particular for the Syrian conflict.”<sup>88</sup>

It is relevant to note that cases involving crimes against humanity are particularly challenging because of the absence of an international treaty that provides legal guidelines for state action. The Bundestag responded to this limitation by including in the VStGB a definition of crimes against humanity closely modeled after the relevant provision in the ICC Statute. In fact, the VStGB departed from judicial precedents requiring a link between the crime and Germany, as will be discussed later in this study.<sup>89</sup> Koblenz’s Higher Regional Court found the attacks against Syrians to be widespread and systematic. For many, this historic decision is one of Germany’s most representative contributions to the development of precedents in universal jurisdiction and international criminal law.<sup>90</sup>

<sup>87</sup> In November 2017, the ECCHR filed two criminal complaints before the German Public Prosecutor General addressing war crimes and crimes against humanity in Syria. See, ECCHR, “Torture Under the Assad Regime” (n.d.), accessed [June 29, 2023], <https://www.ecchr.eu/en/case/torture-under-the-assad-regime/>

<sup>88</sup> Philips, interview

<sup>89</sup> Federal Court of Justice judgment, *Neue Juristische Wochenschrift*, January 28, 2021, 1326. For an (unofficial) English translation, see 61 ILM (2022) 4837/.

<sup>90</sup> Wolfgang Kaleck; Patrick Kroker, “Syrian Torture Investigations in Germany and Beyond,” *Journal of International Criminal Justice* 16, no. 1 (March 2018): 165–192.



The Koblenz proceeding was also possible because the suspect did not have functional immunity despite having acted in their official capacity. The fundamental international legal principle that functional immunity does not apply to international crime proceedings was recognized as early as the groundbreaking Nuremberg judgment delivered in 1946. While discussing the significance of the Koblenz decision, Laetitia Husson, a senior legal official at the International, Impartial and Independent Mechanism for Syria (IIIM), commented that the decision transmitted two forceful messages to the international community: “Germany is not a safe haven for perpetrators and [...] the principle of functional immunity does not apply to Government officials who committed crimes.”<sup>91</sup>

Most importantly, she remarked, “The IIIM’s team often hears from victims and survivors about how the Koblenz case brought them back hope and faith in the justice system.”<sup>92</sup> As will be discussed below, Germany’s Federal Court of Justice confirmed this principle in a landmark decision a year before the Koblenz judgment.<sup>93</sup>

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“Germany is not a safe haven for perpetrators and [...] the principle of functional immunity does not apply to Government officials who committed crimes.”<sup>91</sup>

<sup>91</sup> Laetitia Husson, interview by author, Zoom, December 8, 2023.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid., 483; Remarks made by Claus Kress before the UN Security Council’s Arrria-formula meeting on accountability in the Syrian Arab Republic. The meeting took place on Monday, November 29, 2023, in New York City. A second judgment against another Syrian intelligence official immediately followed this landmark judgment. A number of criminal proceedings have been conducted or are ongoing against members of the Islamic State.

The Koblenz case was not an isolated case. In fact, this ruling had a catalyst effect *vis-à-vis* other higher regional courts, influencing subsequent higher regional court judgments in Frankfurt and Munich, among others. In this context, Geneuss notes, “There are a number of rather small cases where German courts convicted members of ISIS for, usually, war crimes, and these decisions followed the legal *rationale* of the cases decided by the regional courts in Koblenz and Frankfurt.”<sup>94</sup> “These judicial findings [...] are pioneering achievements by the German judiciary with a global impact,” Kress stressed.<sup>95</sup> For example, the Higher Regional Court in Frankfurt found that the so-called Islamic State’s attack against the Yazidi religious minority constituted genocide.<sup>96</sup> “In my experience from the Taha A.-J case, this case was also important for the Yazidi women for them to realize that someone heard them and that someone publicly recognized that the actions of ISIS members are wrong,” Judge Von Arnim noted.<sup>97</sup>

During her interview, Judge Hohoff lauded the work of the German judiciary in addressing various challenges in deciding universal jurisdiction cases.<sup>98</sup> From the Federal Court of Justice perspective, she acknowledged that important precedents have been established favoring accountability for international crimes. However, she also emphasized the ability of higher regional court judges to overcome numerous obstacles to deliver justice to victims of international crimes, especially in complex and lengthy proceedings.<sup>99</sup> During the conversation, Judge Hohoff clarified various legal challenges and discussed relevant progress achieved in *Anwar R., Eyad A., Taha A.-J., Jennifer W.*, and Germany’s most recent accountability victory, *Bai L.*<sup>100</sup> “In a pioneering effort, German domestic courts are calling these crimes by their true name: genocide and crimes against humanity,” Judge Hohoff asserted.

Regionally, Germany’s higher regional courts have made manifold contributions, including overcoming international legal loopholes, paving the way to prosecute crimes against humanity, and promoting justice.<sup>101</sup> They offer victims, survivors, witnesses, and advocates a safe legal forum, respond to their petitions for justice, assume responsibility for investigating atrocities, and seek accountability on their behalf. In an interview for the *Badische Neueste Nachrichten*, Peter Frank, Germany’s Federal Public Prosecutor General, noted that the “trials against members of the Syrian regime and against members of the terrorist militia ISIS are a great success. [...] Through our work, we were able to make significant contributions to the further development of substantive international criminal law and its application to current circumstances.” Frank’s message was clear and unmistakable: “Germany must not become a safe haven for war criminals.”<sup>102</sup>

“In my experience from the Taha A.-J case, this case was also important for the Yazidi women for them to realize that someone heard them and that someone publicly recognized that the actions of ISIS members are wrong,” Judge Von Arnim noted.<sup>97</sup>

<sup>94</sup> Julia Geneuss, interview by author, Zoom, July 5, 2023; The Federal Public Prosecutor General, “Indictment Filed against an Alleged Member of the Foreign Terrorist Organisation ‘Islamic State (ISIS)’ on Counts of Crimes against Humanity and War Crimes, Among Others,” Press Release, June 6, 2022, accessed July 14, 2023, <https://www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/EN/aktuelle/Pressemitteilung-vom-29-06-2022-Englisch.html>; The Federal Public Prosecutor General, “Indictment against a Suspected Member of the Foreign Terrorist Organisation ‘Islamic State (IS)’ on Counts of Crimes against Humanity, War Crimes, and Aiding and Abetting Genocide, Among Others,” Press Release, April 14, 2022, accessed July 14, 2023, <https://www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/EN/aktuelle/Pressemitteilung-vom-12-04-2022-Englisch.html>

<sup>95</sup> Interview with Professor Claus Kress; See, Pioneering achievements of the German Judiciary with a global impact, Deutschlandfunk, December 10, 2021.

<sup>96</sup> Judge Bianca Von Arnim, interview by author, Zoom, November 27, 2023; OLG Frankfurt am Main – 5 – 3 StE 1/20 – 4 – 1/20 – Beschluss vom 30. November 2021.

<sup>97</sup> Ibid.

<sup>98</sup> Judge Ute Hohoff, interview by author, Zoom, December 12, 2023.

<sup>99</sup> Judge Ute Hohoff, interview.

<sup>100</sup> In November 2023, a Higher Regional Court in Celle, Germany sentenced a Gambian death squad member Bai L. to life imprisonment, convicting him of crimes against humanity among other charges, at the end of the country’s first trial for abuses committed under President Yahya Jammeh’s regime.

<sup>101</sup> Over the past 20 years, the primary focus of criminal investigation on universal jurisdiction has been on offenses committed in Africa, the Middle East, Afghanistan, the Chechen Republic, Armenia, Pakistan and, most recently, Ukraine. The charges primarily concern war crimes, crimes against humanity and, in some cases, genocide.

<sup>102</sup> “Für Frank sind die Verfahren gegen die Angehörigen des syrischen Regimes sowie gegen Mitglieder der Terrormiliz IS ein großer Erfolg. „Durch unsere Arbeit konnten wir wesentliche Beiträge zur Fortentwicklung des materiellen Völkerstrafrechts und dessen Anwendung auf aktuelle Sachverhalte leisten. „Die Botschaft sie klar und unmissverständlich: „Deutschland darf kein sicherer Hafen für Kriegsverbrecher werden.“ See, Martin Ferber, “Attorney General from Karlsruhe: ‘Germany must not become a safe haven for war criminals’ [Generalbundesanwalt aus Karlsruhe: ‘Deutschland darf kein sicherer Hafen für Kriegsverbrecher werden’],” *Badische Neueste Nachrichten*, July 12, 2022, accessed August 30, 2023, <https://bnn.de/karlsruhe/generalbundesanwalt-peter-frank-bundesanwalt-schaft-zwei-neue-referrate-ermittlung-gegen-kriegsverbrecher>

## SECTION 5



Accounting for justice and accountability in the cross-border context: Germany before the United Nations

## Section 05

## Accounting for justice and accountability in the cross-border context: Germany before the United Nations

The debate over Germany's leading role in the exercise of universal jurisdiction goes beyond the national borders. Consistent with the proposal advocated in Rome and Berlin, Germany has also debated this issue before the UN, discussing its implications and its overall effectiveness in redressing victims of the gravest international crimes. The Permanent Mission of Germany to the United Nations, located in New York, has played a pivotal role in accounting for progress in this area.

This opportunity typically occurs before the UN General Assembly's Sixth Committee (Legal). The Sixth Committee's has various purposes, including examining the exercise of universal jurisdiction, and state delegations have vigorously debated the definition, scope, and application of universal jurisdiction since its formation.<sup>103</sup> Indeed, for several years, the Sixth Committee's agenda has included an item entitled "The scope and application of the principle of universal jurisdiction," which serves as the principal international forum for legal discussion on this matter.<sup>104</sup> Most member states agree that in essence, universal jurisdiction should only be applied to the gravest international crimes, including war crimes, genocide, crimes against humanity, slavery, torture, piracy, terrorism, and aggression.<sup>105</sup>

Regardless of the general consensus, delegations also have conflicting views on universal jurisdiction, including a more conservative approach. For example, some have cautioned states to place clear limitations; otherwise, the exercise could potentially be misused, abused, or damage domestic legal processes.<sup>106</sup> "The exercise must not be allowed to become a wildfire, uncontrolled in its spread and destructive of orderly legal processes." In contrast, other delegations support its exercise: "A strict application of the principle of *aut dedere aut judicare* [either extradite or prosecute] under relevant international treaties, working alongside the application of universal jurisdiction under customary international law, could contribute to deterring the most serious crimes. Furthermore, such efforts would enhance the fight against impunity."<sup>107</sup>

<sup>103</sup> Report of the Secretary-General, *The scope and application of the principle of universal jurisdiction* (New York: UN General Assembly, 2017) (A/72/112.).

<sup>104</sup> Request for the Inclusion of an Additional Item in the Agenda of the Sixty-Third Session. The Scope and Application of the Principle of Universal Jurisdiction, UN Sixth Committee, UN General Assembly, July 23, 2009, (A/63/237/Rev.1).

<sup>105</sup> Commentary by Mr. Klusmann of the Permanent Mission of Germany to the UN. See Agenda item 82: Report of the International Law Commission on the work of its seventy-second session (continued), UN General Assembly, December 9, 2021, (A/C.6/76/SR.24).

<sup>106</sup> UN Sixth Committee, *Tackling Scope, Application of Universal Jurisdiction; Sixth Committee Speakers Debate Best Venue for Further Discussions on Principle's Definition; Delegates Conclude Consideration of Special Committee on Charter of United Nations*. New York: General Assembly, October 11, 2017) (GA/L/3571).

<sup>107</sup> Ibid. Geneuss, Julia, *Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU-EU Expert Report on the Principle of Universal Jurisdiction* (November 2009). *Journal of International Criminal Justice*, Vol. 7, Issue 5, pp. 945-962, 2009, <http://dx.doi.org/mq068>.



Claus Kress, Professor of International Law and Crime (Germany), addresses the Security Council Arria-formula meeting on Accountability in the Syrian Arab Republic  
@UN Photo/Manuel Elias



Omar Alshogre, Syrian student and detention survivor, addresses the Security Council Arria-formula meeting on Accountability in the Syrian Arab Republic.  
@UN Photo/Manuel Elias



Catherine Marchi-Uhel, Head of the International, Impartial and Independent Mechanism, addresses the Security Council Arria-formula meeting on Accountability in the Syrian Arab Republic.  
@UN Photo/Manuel Elias

On October 13, 2023, the Sixth Committee held the latest meeting on universal jurisdiction. The meeting revealed that member states held deeply fractured views on the exercise, its interaction with national legal frameworks, and the probable risk that perpetrators of the most heinous crimes might escape justice.<sup>108</sup> As human rights violations continue to occur globally, Liechtenstein's delegate welcomed encouraging developments in universal jurisdiction and commended German courts for championing the principle by prosecuting atrocity crimes committed in Syria.<sup>109</sup> While finding common ground on the issue continues to be a challenge, the Sixth Committee offers a forum for Germany to account for its positive impact on the exercise of universal jurisdiction in the absence of international accountability mechanisms.<sup>110</sup> Germany's permanent representatives have reiterated their commitment to the exercise on multiple occasions.<sup>111</sup> They also keep member states informed of various institutional actions implemented by the Federal Criminal Police Office and the Office of the Federal Public Prosecutor General to investigate human rights violations.<sup>112</sup> Notably, although the representatives have repeatedly expressed Germany's unreserved support for the ICC and its preference that the Security Council refer cases to it; they also recognize the benefits of universal jurisdiction and favor it as an alternative method for prosecuting the gravest crimes.<sup>113</sup> The representatives have also detailed how the VStGB has set the stage for prosecutors and judges to effectively convict perpetrators.<sup>114</sup> Georg Klusmann, for example, reported, "Courts are hearing cases involving torture, crimes against humanity and war crimes, committed by members of the Syrian regime and by members of [the] Islamic State of Iraq and the Levant (ISIL/Da'esh [...]) there is no safe haven for perpetrators of international crimes against criminal prosecution in Germany."<sup>115</sup>

<sup>108</sup> UN Sixth Committee, *The scope and application of the principle of universal jurisdiction*, 78<sup>th</sup> sess. (New York: General Assembly, October 13, 2023) (A/78/130).

<sup>109</sup> Ibid.; See also, Agenda item 86: UN Sixth Committee, *The scope and application of the principle of universal jurisdiction* (New York: General Assembly, May 27, 2022) (A/C.6/76/SR.14).

At the October 13, 2023, meeting, the German delegate, Mr. Michael Hasenau, also reported on several judgments delivered on crimes committed against the Yazidi community and the Federal Court of Justice's 2022 conviction of a Da'esh member—the first of its kind.<sup>116</sup> As of 2023, Germany is conducting over 100 investigations into international crimes.<sup>117</sup>

The German legal profession has also been essential in reporting on progress in the exercise of universal jurisdiction, and Syria's humanitarian crisis offered an opportunity to do so. On November 29, 2022, the Security Council convened an Arria-formula meeting on "Accountability in the Syrian Arab Republic."<sup>118</sup> Omar Alshogre, a Syrian refugee and human rights activist, noted how countries like Germany have already taken legal actions against key Syrian officials: "In doing so, Germany has challenged the limitations of the international justice system and used its national courts to uphold basic principles of human rights and international law," he said.<sup>119</sup> During the meeting, Kress recounted how national judicial proceedings have been the most important to date in the application of VStGB, which enables Germany to prosecute international crimes while observing due process. This jurisdictional power enabled Germany's Federal Public Prosecutor Office to initiate broader investigations into crimes allegedly committed in Syria as early as September 2011. "Germany's Federal Public Prosecutor's Office and Germany's Police Agency were well prepared when, several years later, the accused flew to Germany," Kress noted.<sup>120</sup> Similarly, Catherine Marchi-Uhel, head of the IIMM for Syria, stressed the meeting's significance for the victims and survivors of the Syrian tragedy, for the courageous civil society actors who risked their lives to document atrocities, and for the prosecutors and judges abroad who pieced together distant events to contribute some form of justice to the devastating situation. Marchi-Uhel also reminded the Security Council, "Justice for accountability, respect for human rights, and compliance with international humanitarian law is not a question of politics. It is and will always be a question of principle."<sup>121</sup>

<sup>110</sup> Remarks by Ms. Bade of the Permanent Mission of Germany to the United Nations, 75th sess., February 8, 2021; UN Sixth Committee, *Agenda item 87: The scope and application of the principle of universal jurisdiction* (New York: General Assembly, February 8, 2023) (A/C.6/75/SR.11); UN Sixth Committee, *Agenda item 86: The scope and application of the principle of universal jurisdiction* (New York: General Assembly, May 27, 2022) (A/C.6/76/SR.14).

<sup>111</sup> Remarks by Ms. Bade, 75th sess.; Agenda item 87.

<sup>112</sup> UN Sixth Committee, *The scope and application of the principle of universal jurisdiction, Report of the Secretary-General* (New York: UN General Assembly, July 21, 2021). For previous comments submitted by Germany, see A/65/181, A/72/112 and A/74/144.

<sup>113</sup> Remarks by Ms. Bade, see *Statement by Germany, Sixth Committee, Universal Jurisdiction*, (A/C.6/75/SR.11), November 20, 2020, accessed May 12, 2023, (A/C.6/75/SR.11).

<sup>114</sup> Remarks of representative of the Permanent Mission of Germany to the United Nations, *The scope and application of the principle of universal jurisdiction* (New York, Report of the Secretary-General, June 22, 2017) (A/72/112) and the scope and application of the principle of universal jurisdiction, Report of the Secretary-General prepared on the basis of comments and observations of Governments on July 29, 2010 (A/65/181).

<sup>115</sup> Remarks given on at the UN on October 22, 2021. Concluding Debate on Universal Jurisdiction Principle, Sixth Committee Speakers Wrestle with Challenging Balance Between State Sovereignty, Fighting Impunity, (GA/L/3642).

<sup>116</sup> 3 StR 230/22.

<sup>117</sup> UN Sixth Committee, *The scope and application of the principle of universal jurisdiction*, 12th meeting, 78 sess., A/78/130 (ICITY: General Assembly, October 13, 2023). See, BT-Drs.20:2851 (*auf die kleine Anfrage der Abgeordneten Clara Bünger, Nicole Gohlke, Göky Akbulut, weiterer Abgeordneter und der Fraktion DIE LINKE*); Remarks of the representative of the Permanent Mission of Germany to the United Nations, *The scope and application of the principle of universal jurisdiction* (ICITY), Report of the Secretary-General, July 18, 2022 (A/77/186).

<sup>118</sup> Estonia, France, the United Kingdom, and the United States co-hosted this meeting jointly with non-Council members Belgium, Canada, Germany, Georgia, Liechtenstein, the Netherlands, Qatar, Sweden, and Turkey.

<sup>119</sup> Remarks made by Omar Alshogre before the UN Security Council's Arria-formula meeting on accountability in the Syrian Arab Republic. The meeting took place on Monday, November 29, 2023, in New York City.

<sup>120</sup> Remarks made by Claus Kress before the UN Security Council's Arria-formula meeting on accountability in the Syrian Arab Republic. The meeting took place on Monday, November 29, 2023, in New York City.

<sup>121</sup> Remarks made by Catherine Marchi-Uhel before the UN Security Council's Arria-formula meeting on accountability in the Syrian Arab Republic. The meeting took place on Monday, November 29, 2023, in New York City.

## SECTION 6



TITLE

# Deconstructing the German system of universal jurisdiction



## Section 06

## Deconstructing the German system of universal jurisdiction

Having analyzed the domestic and international frameworks of Germany's quest for universality, we must now address the question: *what conditions have facilitated the decisions rendered by Germany's higher regional courts, particularly in the Koblenz trial and other landmark cases?* Modern international criminal law frameworks are inherently restricted in budget and jurisdiction. In response to these limitations, Germany created a progressive system enabling the domestic prosecution of serious international crimes. While discussing the current landscape of the exercise of universal jurisdiction, Wolfgang Kaleck commented: "In the past, there were sometimes two or three countries with numerous universal jurisdiction cases and, at some point, they have overburdened them. Germany gave a good example of investigating, prosecuting, and even trying complex crimes like torture in the Assad regime, but there is still a lack of investigation of corporate actors. This effort would be worthy if other countries could follow."

As such, this study describes how the German system comprises a cohesive group of interrelated and interdependent components that facilitate the investigation, prosecution, and trial of international crimes under the rule of law with the hope that other jurisdictions create their own conditions and join the global fight against impunity. The system is influenced by its context, defined by its structures and components, and manifested through these components' relationships as detailed below.

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As previously stated, the *Washington Post* attributed Germany's effectiveness to its solid legal framework and generous government resources. However, this study argues that other factors are involved. While the VStGB and financial resources are a necessary component, it was insufficient to trigger prosecutorial and judicial assertiveness toward the investigation, prosecution, and trial of international crimes. In contrast, as we have witnessed in past years, the German "system" only became actively operational and consequential when other conditions and synergies came into play. Thus, German justice authorities became institutionally capable of investigating and deciding landmark cases on serious international crimes. "Why Germany?" The continuously evolving and improving German system provides a more comprehensive answer to this question.

Interestingly, the system's components operate as a single structure rather than isolated entities. Thus, if one component is strengthened or weakened, this affects the other components or the whole system. This understanding is critical, especially given the upcoming legislative discussion over the VStGB reforms in 2024. The author refers to this system as the German system of universal jurisdiction—*Das deutsche System der Weltgerichtsbarkeit*. As noted, the German system of universal jurisdiction ('the system') comprises eight elements: **1) a solid legal framework; 2) government financial resources and political support 3) development of judicial precedents favoring accountability; 4) innovative legal remedies utilized by the Federal Public Prosecutor General Office; 5) joint international cooperation; 6) litigation and advocacy of civil society organizations; 7) engaged media coverage; and 8) independent justice institutions.**

## Section 06

## Deconstructing the German system of universal jurisdiction

### 1) Solid legal framework

## 1) Solid legal framework

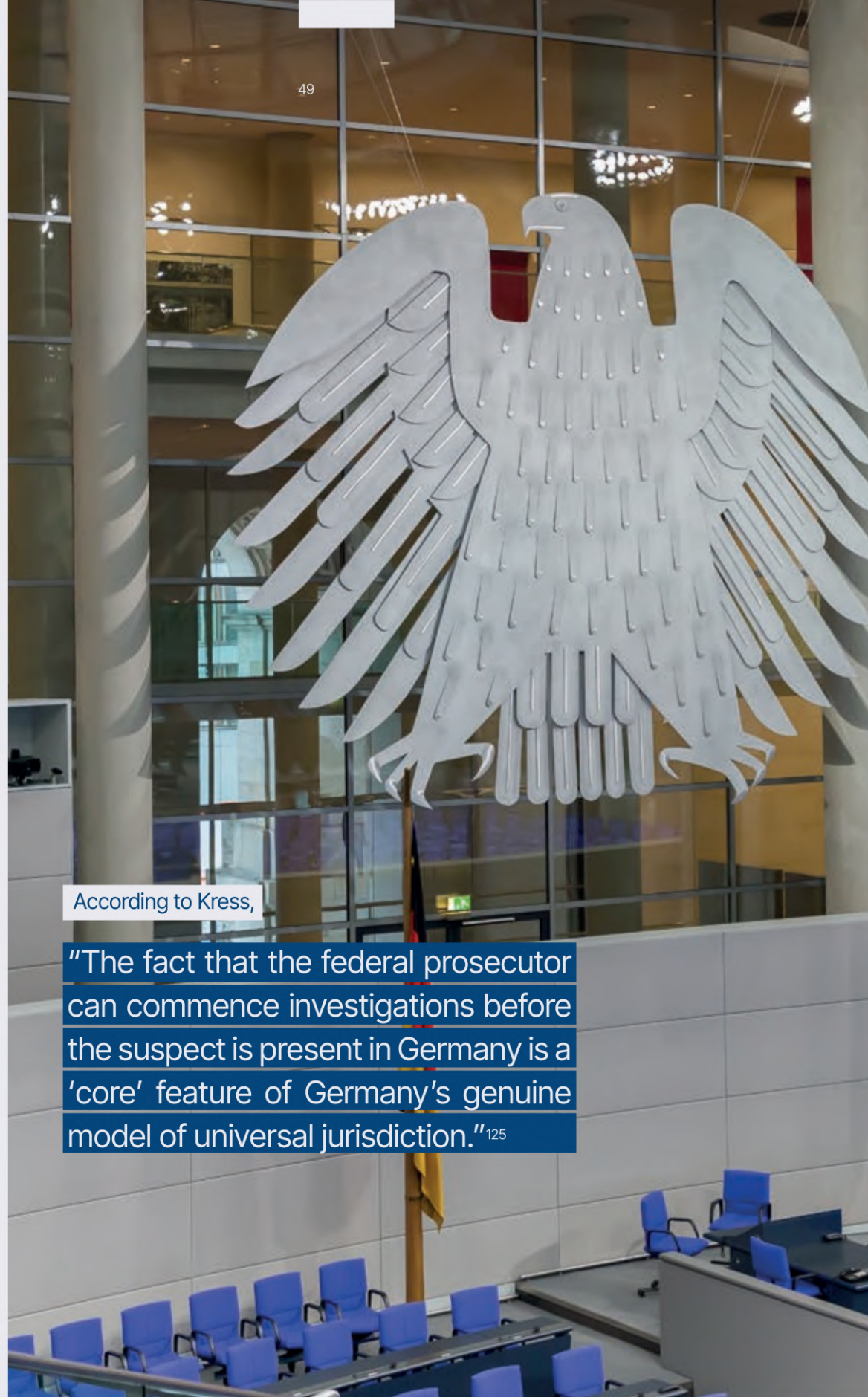
The interviewees identified a recurring variable that accounted for Germany's effective investigation and prosecution of international crimes. In line with the *Washington Post* article, this variable was the passage of the VStGB and the amendments of the German Criminal Code (StGB) and the Code of Criminal Procedure (StPO). Schüller and Geneuss agreed, "The law is well done. Germany has good substantive law and procedural law structures."<sup>122</sup> *What makes the German legal framework solid?* Germany's approach to universal jurisdiction is remarkably progressive compared to other European countries.<sup>123</sup> While some international conventions establish regimes as *aut dedere aut judicare* [either extradite or prosecute], also referred to as regimes of universal jurisdiction, these are distinct from genuine universal jurisdiction. Kress explained that Germany's system is conceived of as "genuine" for various reasons. First, the universal jurisdiction included in the VStGB is not coupled with a treaty or with the signing parties of treaties; it is applied universally, i.e., regardless of where the alleged crime took place. Second, it is genuine because it does not require the suspect's presence to initiate the investigation. A treaty usually establishes a duty to exercise jurisdiction only if the suspect is present. The state can choose whether to proceed with the case internally or extradite the suspect. However, under Section 1 of the VStGB, the exercise of universal jurisdiction is not dependent on a treaty or the presence of the suspect.<sup>124</sup> According to Kress, "The fact that the federal prosecutor can commence investigations before the suspect is present in Germany is a 'core' feature of Germany's genuine model of universal jurisdiction."<sup>125</sup>

<sup>122</sup> Schüller, interview; Geneuss, interview.

<sup>123</sup> For example, *Trial International* has reported that the legal framework for universal jurisdiction varies from one country to another. Although many countries limit the application of universal jurisdiction—to the perpetrator's presence inside the country's borders, for example—others, such as Germany, have adopted more flexible standards. See, Jennifer Triscone, "Universal Jurisdiction, The Only Hope for Prosecuting International Crimes Committed in Syria," *Trial International*, September 6, 2021.

<sup>124</sup> Kress, interview.

<sup>125</sup> Kress, interview.



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**"The fact that the federal prosecutor can commence investigations before the suspect is present in Germany is a 'core' feature of Germany's genuine model of universal jurisdiction."**<sup>125</sup>

As explained above, the VStGB provides the legal framework for courts to investigate and prosecute crimes under international law, including genocide, crimes against humanity, and war crimes. Regardless, as Kress noted, those crimes are broadly similar of the definition adopted by the Rome Statute; "there are sections where the German VStGB goes a little further because we thought the Statute did not fully capture the state customary international law, and "we went beyond [it]."<sup>126</sup>

Similarly, Geneuss remarked on Germany's most significant contribution to universal jurisdiction, stating that "we have a broad norm on universal jurisdiction that does not require any link to Germany whatsoever. [...] Other states have a more limited version of universal jurisdiction. For example, they only have jurisdiction to investigate a crime when the perpetrator is present in their country."<sup>127</sup> Germany's more expansive understanding of universal jurisdiction makes its legal system an accessible forum for prosecuting international crimes. However, the law alone had little immediate impact. Germany had yet to develop additional conditions to establish its reputation as an adamant advocate for victims of atrocities. This study builds on these conditions.

<sup>126</sup> Kress, interview.

<sup>127</sup> Geneuss, interview.



Section 06

## Deconstructing the German system of universal jurisdiction

### 2) Government financial resources and political support

## 2) Government financial resources and political support

German legal experts agree with the *Washington Post* that Germany's progressive legal framework depends heavily on government resources and the Bundestag's political support. In fact, in 2019, the Parliament issued a legislative petition called "small question inquiry" [*Kleine Anfrage*]. In response, the German government recognized that "the basic prerequisite for the prosecution of international crimes is thus, in particular, to ensure the effective work of the Federal Public Prosecutor General [*Generalbundesanwalt*; GBA] and the Federal Criminal Police Office [*Bundeskriminalamt*; BKA]. This required, above all, appropriate staffing, training, and constant optimization of procedural processes, including the area of international mutual legal assistance."<sup>128</sup> Furthermore, the German Permanent Mission acknowledged that "A solid legal framework needs a government response to implement it."<sup>129</sup> In this context, Husson also pointed out Germany's leadership in the prosecution of crimes committed in Syria: "Germany's political response is a sign of commitment to end impunity. The volume of investigations, prosecutions, and trials are tangible results of such commitment. Germany's is the only jurisdiction whose resources match the purpose of universal jurisdiction."<sup>130</sup>

Thus, having more clarity about the scope and application of the VStGB, the Federal Public Prosecutor General's Office, as the central actor in the prosecution of international crimes, gradually implemented a strategy that embraced the commitment that Germany would not become a place of refuge for criminals. Following this, the Office substantially expanded its human and financial resources.<sup>131</sup> These included government-funded specialized police and prosecutorial units devoted to international criminal investigations. For example, the Unit for Central Tasks comprises five units, including the Crimes Against International Law Unit, which is divided into two International Criminal Law Units, S4 and S5 (*Völkerstrafrecht I and II*).<sup>132</sup> Likewise, the Federal Criminal Police Office (*Bundeskriminalamt*; BKA) houses the Central Unit for the Fights Against War Crimes and Further Offenses pursuant to the Code of Crimes Against International Law (*Zentralstelle für die Bekämpfung von Kriegsverbrechen*; ZBKV). The ZBKV collects and analyzes information on these crimes and submits evidence to the federal public prosecutor general for legal assessment and further proceedings where warranted. The BKA and ZBKV also follow the tenet: "No safe haven for the perpetrators and no impunity" (*Das bedeutet: Deutschland darf kein sicherer Ort und Rückzugsraum für Völkerstraftäter sein, einer Straflosigkeit muss entgegengewirkt werden*). As Schüller and Silke Voss-Kyeck noted, as of 2023, prosecutors and police have more resources to conduct investigations. "Over the past 15 years, prosecutors and investigators have become more experienced and better trained in these matters."<sup>133</sup>

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*"Germany's political response is a sign of commitment to end impunity. The volume of investigations, prosecutions, and trials are tangible results of such commitment. Germany's is the only jurisdiction whose resources match the purpose of universal jurisdiction."*<sup>130</sup>

<sup>128</sup> BT-Drs. 19/12354. "Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Katja Keul, Margarete Bause, Kai Gehring, weiterer Abgeordneter der Fraktion BÜNDNIS 90/DIE GRÜNEN."

<sup>129</sup> Remarks by Ms. Bade of the Permanent Mission of Germany before the United Nations; Handl, "Introductory Note to the German Act to Introduce the Code of Crimes Against International Law," 2003.

<sup>130</sup> Husson, interview.

<sup>131</sup> Jessberger, "A Short History of Prosecuting Crimes under International Law in Germany," 8.

<sup>132</sup> Established in 2009 and in October 2018, respectively. See, GBA, February 12, 2020. The Federal Public Prosecutor General, Organizational Chart, accessed June 11, 2023, <https://www.generalbundesanwalt.de/EN/About-us/organigramm/Organigramm-node.html?jssessionid=012EC2464D6A8C439D2C48ECE518E906.intranet671>

<sup>133</sup> Schüller, interview; Silke Voss-Kyeck, interview by author, Zoom, November 2, 2023.

The judiciary has also been responsive to that trend. Judge Bianca Von Arnim of the Higher Regional Court in Frankfurt also confirmed that higher regional courts established specialized units for international crimes-including the 5. *Strafsenat des Oberlandesgerichts Frankfurt am Main*, adding, "The Federal Court of Justice, a court of appeals, also created a special unit for international crimes."<sup>134</sup> When analyzing how Germany's higher regional courts contribute to the exercise of universal jurisdiction, we must also consider its judges' serious, professional, and meticulous approach to studying universal jurisdiction cases. As Judge Lafleur noted, "**These courts are composed of highly professional and experienced judges on the field.**"<sup>135</sup> Further, the Koblenz cases also initiated a sophisticated yet unprecedented judicial dialogue between higher regional court judges. For instance, Judge Lafleur described the professional collaboration between judge's ruling on state security crimes (i.e., terrorism or espionage) and those ruling on international crimes in higher regional courts, emphasizing that members of the chambers regularly interact. "If one of these chambers makes a ruling on a certain case, it will send an anonymized copy to the other higher regional courts for study. There is a high level of exchange of information on legal issues," he explained.<sup>136</sup> He further emphasized how both the Federal Court of Justice and the higher regional courts promote knowledge exchange: "The Federal Court of Justice normally organizes a conference once per year and meets with higher regional courts judges to hold discussions on current legal subjects." *The Deutschen Richterakademie* [German Judicial Academy] is organizing conferences on state security issues and international crimes. Usually once per year there will be a conference where Federal judges will meet with higher regional courts judges to hold intellectual discussions on compelling legal subjects. Higher regional courts judges will meet once a year-each year in a different Bundesland-to discuss latest developments in international crimes and state security crimes.<sup>137</sup> "Judges are usually eager to learn about the latest updates. [...] We are all interested in getting trained," he stressed.<sup>138</sup>

Judge Hohoff confirmed Judge Lafleur's commentary, stressing the significance of this annual meeting as another institutional channel to discuss and study new developments and case law rendered by the ICC, the German Federal Court of Justice, the International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR).<sup>139</sup> Speaking on behalf of the Koblenz judiciary, Judge Diesel said: "The ministry of justice, which is responsible for legal training of judges, offers a variety of legal training for judges, not only about universal jurisdiction in particular but also in other relevant areas of international criminal law."<sup>140</sup>

<sup>134</sup> Judge Bianca Von Arnim, interview.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Judge Laurent Lafleur, interview.

<sup>138</sup> Ibid.

<sup>139</sup> Judge Ute Hohoff, interview.

<sup>140</sup> Judge Corinna Diesel, interview by author, Zoom, November 16, 2023.



The German Parliament (Deutscher Bundestag)  
@ iStock

In 2020, the Permanent Mission also informed the Sixth Committee that since 2002, the Federal Public Prosecutor General Office had increased the number of male and female prosecutors in terrorism cases, and public prosecutors had been actively communicating with international networks for informational and training purposes.<sup>141</sup> In particular, ZBKV employees in the BKA participate in national and international training programs with Interpol, Europol (in cooperation with the ICC), among others.<sup>142</sup>

As such, even though Germany's legal framework is important, this effort was not only about changing the laws but also about giving the authorities the means to investigate the crimes. Political willingness became essential to do that. Julia Geneuss supported this proposition and highlighted another important feature: Germany's willingness and ability to prosecute these cases, at least at the moment. Geneuss explained that "the Federal Public Prosecutor General has different departments whose members are competent to investigate and prosecute these crimes. The same applies to the federal police. There are financial resources and well-trained professionals who do the work. These factors are not always present in other states. Sometimes states have the legal framework, but they lack financial resources to conduct these investigations."<sup>143</sup> Roger Phillips confirmed Geneuss' assessment based on his cross-border experience, adding that some states willingly defer the prosecution of these crimes to countries who want to take the lead: "Some states are following and supporting but not leading. Germany is taking the lead."<sup>144</sup>

This political support indicates a commitment to further domestic development of international criminal law. For example, Germany's Ministry of Justice recently reiterated a commitment to resolving gaps in criminal liability and strengthening victims' rights, saying, "**No matter whether in Bucha, in Damascus or elsewhere—the following must apply everywhere: When the weapons speak, the law is not silent.**"<sup>145</sup> Since 2017, the GBA has initiated investigations into crimes committed in Syria, Côte d'Ivoire, Gambia, South Sudan, Democratic Republic of Congo, Iraq, Nigeria, Afghanistan, Mali, Sri Lanka, Cameroon, Somalia, Armenia, Russian Federation (Chechnya), Pakistan, Ukraine, Central African Republic, and Sudan.<sup>146</sup> In 2002, Federal Public Prosecutor Peter Frank responded to national and international calls to intervene in crises involving alleged criminal activity by increasing the institutional capacity. He also announced that two Office of the Attorney General departments were already active in these matters. Subsequently, the Bundestag approved funding for two new departments, each with nine positions, to investigate international crimes committed in Ukraine.<sup>147</sup>

<sup>141</sup> Remarks by Ms. Bade of the Permanent Mission of Germany to the United Nations; Handl, "Introductory Note to the German Act to Introduce the Code of Crimes Against International Law," 2003.

<sup>142</sup> For more information about training programs, see BT-Drs. 19/12354, "Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Katja Keul, Margarete Bause, Kai Gehring, Weiterer Abgeordneter der Fraktion BÜNDNIS 90/DIE GRÜNEN."

<sup>143</sup> Geneuss, interview.

<sup>144</sup> Phillips, interview.

<sup>145</sup> Marco Buschmann, "Fortentwicklung des Völkerstrafrechts: Bundesjustizminister legt Vorschläge vor" (Further development of international: Federal Minister of Justice Present Proposal.), Bundesministerium der Justiz, February 23, 2023 accessed November 20, 2023 [https://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2023/0223\\_VSTGB.html](https://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2023/0223_VSTGB.html).

<sup>146</sup> BT-Drs. 19/12354, "Antwort der Bundesregierung."

<sup>147</sup> Ferber, "Attorney General from Karlsruhe: 'Germany must not become a safe haven for war criminals'"; Lana Kampf, "What German Investigators Can Do in Putin's War [Was deutsche Ermittler in Putins Krieg ausrichten können]," Süddeutsche Zeitung, July 12, 2022, accessed August 25, 2023, <https://www.sueddeutsche.de/politik/ukraine-russische-kriegsverbrechen-generalbundesanwalt-1.5543675>

## Section 06

Deconstructing the German  
system of universal jurisdiction3) Rendering judicial precedents  
favoring accountability

### 3) Rendering judicial precedents favoring accountability

#### a. Abandoning the "Legitimizing Link" Doctrine

Although Germany's higher regional courts exercise universal jurisdiction, the German Federal Court of Justice (*Bundesgerichtshof*; BGH) also contributed to the German system by abandoning a long-standing precedent demanding a "legitimizing link" between the crime and Germany. Thus, changing judicial precedents to favor accountability is another essential component of the German system. While the German Criminal Code gave German courts universal jurisdiction over the crime of genocide regardless of whether there was any legitimizing link, *the VStGB empowered them to exercise universal jurisdiction even when the offense was committed elsewhere and bears no relation to Germany* [emphases added].

The Federal Court of Justice (BGH) has thus developed its jurisprudence to expand the exercise of universal jurisdiction. However, this was not always the case. It previously adopted a more constrained approach, demonstrating that judicial attitudes have considerably changed to favor accountability for international crimes. The BGH rendered a series of decisions in the mid-70s and 90s that attest to major evolutions in extraterritorial jurisdiction and the non-interference principle.<sup>148</sup> These decisions reveal the gradual shift from an entrenched and narrow approach to universal jurisdiction to the complete relinquishment of the "legitimizing link" doctrine favoring domestic accountability for the commission of international crimes.<sup>149</sup>

<sup>148</sup> The BGH triggered a significant debate for its judgements issued in 1976, 1994, 1997, 1999, 1998 and 1999.

<sup>149</sup> The author relied on English translations provided in Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, 141–157.

<sup>150</sup> *Bundesgerichtshof*, October 20, 1976.



German Federal Court of Justice.  
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#### Public Prosecutor v. Dost

On October 20, 1976, the BGH decided the case *Public Prosecutor v. Dost*. Dost, a Dutch national, was arrested, prosecuted, and convicted for distributing drugs to German youth, who used or sold them in the country. Although Dost appealed the conviction, this decision elaborated more broadly on the limits of state jurisdiction. Among other arguments, the court "inclined to accept the proposition that any extension of state criminal jurisdiction to offenses committed abroad by aliens *requires the presence of some factor, connecting the case to the forum*, which constitutes a justifiable basis for the exercise of jurisdiction [emphasis added]". The decision caused debate when the court affirmed that "a country may exercise universal jurisdiction even when there are no clear criteria under international law for determining the weight to be given to those factors." The court also asserted that German authorities must not exercise universal jurisdiction arbitrarily and that doing so required a legitimizing link between the forums.<sup>150</sup>

#### Public Prosecutor v. Tadić

During the 90s, the BGH decided several cases related to war and ethnic violence in the former Yugoslavia. One case was *Public Prosecutor v. Tadić*.<sup>151</sup> Similar to recent events, during this time, Germany was admitting Bosnian refugees fleeing from this conflict. In 1992, Tadić, a Bosnian refugee, was alleged to have participated in brutalities against Muslim detainees in Serbian concentration camps. Tadić was eventually charged with aiding and abetting genocide, the commission of murder, and grievous bodily harm. The court reasoned that "German law applied to genocide committed abroad independently from the law of the territorial state (so-called universality principle). [...] *International law does not forbid this and that there is a legitimizing link in the concrete case.*" [emphasis added] Without this link, the court stated, the forum state violates the non-interference principle requiring states to respect the sovereignty of the other states. *Tadić's* voluntary residence for several months in Germany, his establishment of his center of interest in the country, and his arrest in Germany constituted a link [emphasis added].

#### Public Prosecutor v. Djajic

In 1997, the BGH decided another Bosnian-related case: *Public Prosecutor v. Djajic*.<sup>152</sup> Djajic, who arrived in Germany and resided in there for several years, was also arrested and charged with genocide, murder, and hostage-taking in Bosnia. The ICTY and Bosnian authorities refused to rule on the proceedings. Following a similar rationale to *Public Prosecutor v. Tadić*, the court reaffirmed that while considerations of international law are important, the fact that the prosecution of a foreigner for crimes committed abroad also serves an interest of the state of residence must also be considered. The court acknowledged that the ICTY and the competent territorial state did not wish to participate in the proceedings. Most importantly, the court judgment set the tone for Germany's future global reputation, reading: "Germany has an interest not to be perceived by the international community as a haven for international criminals."<sup>153</sup>

<sup>151</sup> *Ibid.*, February 13, 1994.

<sup>152</sup> *Ibid.*, May 23, 1997.

<sup>153</sup> Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, 141–157.

## | X v SB and DB and Public Prosecutor v. Jorgić

In December 1998, after Germany signed the Rome Statute, the BGH upheld its legitimizing link doctrine and decided on two additional cases.<sup>154</sup> *In X v. SB and DB*, unidentified Bosnian refugees filed a complaint against SB and DB.<sup>155</sup> However, the defendants' presence in Germany was not indicated. The case was promptly dismissed due to no established point of contact (legitimate link). The court repeated previous reasonings, stating that the sovereignty of other states could hardly be assured without a meaningful point of contact. Thus, judges reasoned that *only the presence of the victim of a crime is not an appropriate basis to exercise German jurisdiction, which bears no relation to the offense and the offender*. Similarly, in the 1992 case *Public Prosecutor v. Jorgić*, a long-time resident of Germany returned to the former Yugoslavia during the war.<sup>156</sup> Upon returning to Germany, he was arrested and charged with genocide of Bosnian Muslims. The ICTY and the Bosnian authorities once again refused to hear the case. The Supreme Court of Düsseldorf eventually found Jorgić guilty of genocide. The accused appealed the court decision, contending that Germany's universal jurisdiction was incompatible with the Geneva Convention. The BGH decided this case by referring to the legitimizing link doctrine developed in *Tadić*. Among other reasonings, the BGH held that the universality principle applies to certain acts that endanger the legal interests of the international community. The court also distinguished this principle from the representation principle in that does not require double criminality and non-extradition.

## | Public Prosecutor v. Sokolović

On November 29, 1999, one year before Germany's ratification of the Rome Statute and the same year that the VStGB began being drafted, the BGH ruled on the *Public Prosecutor v. Sokolović* case. This case was also related to the war in the former Yugoslavia, and the defendant was found guilty of genocide in concurrence with grievous bodily harm. The BGH upheld the conviction. Nonetheless, the case's most far-reaching contribution was that the judges ultimately relinquished the legitimizing link doctrine. The judgment reasoned: ***"The Court is inclined to consider that such additional legitimizing links are not necessary [ ] when Germany, in executing an internationally legally binding obligation-based on international conventions-prosecutes an extraterritorial offense by a foreigner against a foreigner and punishes according to German law, a violation of the non-interference principle can scarcely be alleged [emphasis added]."***

Prior to *Sokolović*, the legitimizing link doctrine prompted great criticism from the German scholarly community. Reydams details a competing discourse between what he calls the old and new schools of German international criminal law.<sup>157</sup> In contrast, the new school, comprising a younger generation of legal scholars, argued that the absence of a legitimizing link did not constitute unlawful interference with the domestic affairs of the territorial state. Eventually, the new school's view prevailed in the BGH's case law and was successfully incorporated into the VStGB.

<sup>154</sup> Germany signed the Rome Statute on December 10, 1998.

<sup>156</sup> *Ibid.*

<sup>155</sup> *Bundesgerichtshof*, December 11, 1998.

<sup>157</sup> Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, 156.



## b. Non-application of the Principle of Functional Immunity

Major judicial developments continued after *Sokolović*. Stefanie Bock commented that another judgment rendered by the BGH significantly contributed to the development of international criminal law standards regarding the principle of functional immunity.<sup>158</sup> In a rare judicial practice, the BGH decided to address *ex officio* one of the most contemporary issues in national and international law: The application or rather non-application-of the principle of functional immunity.<sup>159</sup> Under classic customary international law, functional immunity bars domestic courts and prosecutors from exercising jurisdiction over (former) foreign state officials for conduct carried out in their official capacity.<sup>160</sup> It is of paramount importance for the domestic enforcement of international criminal law through the exercise of universal jurisdiction whether this classic rule also applies in national proceedings for crimes under international law since such crimes are very often committed by State officials. This legal issue has drawn further attention because of the International Law Commission's (ILC) Draft Article 7, which states that "functional immunity *does not* apply in relation to, *inter alia*, genocide, crimes against humanity, and war crimes." As Jessberger described it, the language of this provision remains contentious within and outside the ILC as to whether state officials have immunity when it comes to prosecuting crimes under international law.<sup>161</sup>

However, this legal debate eventually reached the German Federal Court of Justice: Following a first-instance decision of the Higher Regional Court in München (OLG), the BGH reviewed the case of a Lieutenant Lomri Baridman of the Afghan National Army (ANA). Baridman, who fled to Germany from Afghanistan in 2015, forced three suspected Taliban members to disclose the secret locations of persons and weapons and subjected them to extreme physical violence. In the indictment, the Federal Public Prosecutor General argued that his conduct amounted to the war crimes of torture (as codified in the VStGB) and of gravely humiliating and degrading a person protected under international humanitarian law. Although the OLG convicted the accused and imposed a two-year prison sentence, it also concluded that the conduct of the accused did not qualify as a war crime of torture but "only" as an ordinary crime of causing dangerous bodily harm and coercion punishable under the Code of Criminal Procedure (StPO). The Federal Public Prosecutor General and the defendant appealed the judgment to BGH. On January 28, 2021, the BGH found that the accused did not enjoy immunity for his crimes *regardless of his commission while performing his duties for the State of Afghanistan*. [Emphasis added]

<sup>158</sup> Case No 3 STR 564/19; Stefanie Bock, interview with the author, Zoom, October 30, 2023.

<sup>160</sup> Aziz Epik, "No Functional Immunity for Crimes under International Law before Foreign Domestic Courts: An Unequivocal Message from the German Federal Court of Justice," *Journal of International Criminal Justice* 19, no. 5 (November 2021), 1263–1281, accessed September 9, 2023, <https://doi.org/10.1093/jicj/mqab071>

<sup>159</sup> Claus Kress, "On Functional Immunity of Foreign Officials and Crimes under International Law: The Jan. 28, 2021, Judgment of Germany's Federal Court of Justice," *Just Security*, March 21, 2021.

<sup>161</sup> Florian Jessberger, interview by author, Zoom, September 15, 2023.



This ruling became a landmark decision for various reasons: First, the BGH's decision to address-by its own motion<sup>162</sup> the question of functional immunity is noteworthy. Following the groundbreaking Nuremberg judgment of 1946, the BGH had decided that functional immunity was non-applicable in criminal proceedings for crimes under international law. In anticipation to future rulings, this landmark decision was rendered a year before the Koblenz judgment.<sup>162</sup> A second major contribution is the sophisticated dialogue that developed between the BGH and the Federal Public Prosecutor General Office. This dialogue is unique in that it developed outside of the typical contentious framework of judicial proceedings. Instead, judges and prosecutors conversed as architects of the system described in this study. This dialogue reached its peak when BGH judges conferred, in open Court, with Christoph Barthe, a senior public prosecutor about whether functional immunity (immunity *ratio materiae*) existed for crimes under international law.<sup>163</sup> Bock described: How the BGH judges departed from judicial conventions by holding a second oral hearing to address a question not argued by the parties: did customary international law contain any rules barring domestic courts from exercising criminal jurisdiction against former state officials for crimes under international law?<sup>164</sup>



*How the BGH judges departed from judicial conventions by holding a second oral hearing to address a question not argued by the parties: did customary international law contain any rules barring domestic courts from exercising criminal jurisdiction against former state officials for crimes under international law?<sup>164</sup>*

As part of this dialogue, Federal Public Prosecutor Frank argued that under international law, functional immunity does not apply to foreign and international criminal proceedings for crimes, regardless of the state official's rank.<sup>165</sup> Frank supported this with a detailed historical analysis of functional immunity and its development, ranging from the legal reasoning behind the 1946 Nuremberg judgment and the Adolf Eichmann case rendered by the Supreme Court of Israel to state practices and their *opinio iuris* accepted as law.<sup>166</sup> The BGH mirrored Frank's submission significantly but was cautious regarding the relevant crimes and state officials because it confined its actual decision to war crimes committed by subordinate State officials. But the accompanying reasoning clearly has a wider potential: After a long discussion, German judges confirmed that state officials do not enjoy functional immunity in proceedings for crimes under international law, a position that the German government has yet to fully embrace at the international level.<sup>167</sup>

<sup>162</sup> Epik, "No Functional Immunity," 1263–1281.

<sup>163</sup> Kress, "Functional Immunity of Foreign State Officials Before National Courts."

<sup>164</sup> Stefanie Bock, interview.

<sup>165</sup> Peter Frank and Christoph Barthe, "Immunity of Foreign State Officials Before National Courts. A Stress Test for Modern International Criminal Law," *Journal of International Criminal Justice* 19, no. 3 (July 2021), 697–716, accessed September 9, 2023, <https://doi.org/10.1093/jicj/jmqab042>

<sup>166</sup> Ibid.

<sup>167</sup> Kress, "Functional Immunity of Foreign State Officials Before National Courts.," its most recent comments submitted to the ILC, the German government stated that the non-applicability of functional immunity in proceedings for "the most serious crimes under international law" might be seen as "norm of customary international law 'in statu nascendi'"; See, Comments and Observations by the Federal Republic of Germany on the draft articles on "Immunity of State officials from foreign criminal jurisdiction", November 2023, sub 7.; [https://legal.un.org/ilc/sessions/75/pdfs/english/iso\\_germany.pdf](https://legal.un.org/ilc/sessions/75/pdfs/english/iso_germany.pdf)



Federal Constitutional Court, Karlsruhe, Baden-Wuerttemberg, Germany.  
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### c. Ruling on Equal Access to Court Proceedings

This study also emphasizes the Federal Constitutional Court (*Bundesverfassungsgericht: BVerfG*)-Germany's highest tribunal contribution to promoting accountability and judicial transparency in court proceedings under the principle of universal jurisdiction. The case arose from the Koblenz trial and the request of legal advocate to access translations of court proceedings. Naturally, the language of the courts is German. Therefore, the proceedings are conducted in German, and judicial outcomes, including press releases on arrests, indictments, and verdicts, are often published exclusively in German. However, the ECCHR highlights one notable exception: the Koblenz Higher Regional Court press release communicating the case verdict was published in German, English, and Arabic. Although this was atypical, the higher regional courts' transparency policies during international proceedings have caused debates and even litigation. For example, the ECCHR, noting that the witness testimony transcripts were absent and did not reach the intended audiences, presented two motions to the Koblenz court. The motions, which supported the demands of foreign Syrian trial observers, reached the Federal Constitutional Court. Another case involved a trial in which the plaintiffs and the accused were given a translation. The United States-based Syria Justice and Accountability Centre requested access to the translation, but the higher regional court denied it. This decision was appealed, and the case reached the Federal Constitutional Court (*Bundesverfassungsgericht: BVerfG*). The BVerfG mandated the court to provide the Syrian journalists access to the translation.<sup>168</sup> An excerpt from the ruling merits a lengthy quotation:

**The Chamber reiterates that the fundamental right of freedom of the press gives media representatives a right to equal and real access to court hearings for reporting purposes.** It cannot be ruled out that, under special circumstances, this entitlement also includes a right to admission of aid needed to access the proceedings' content. Given this, weighing the consequences in view of the particular interest of the Syrian media and the public informed by them in the present criminal proceedings requires the issuance of the requested temporary injunction.<sup>169</sup>

This is truer in view of the fact, emphasized by the applicant, that, in this case, the Federal Republic claims to possess jurisdiction, that would not exist under ordinary circumstances, but which precisely results from the distinct character of the crimes in question which concerns the international community as a whole.<sup>170</sup>



Koblenz, Germany. 23rd Apr, 2020. The places between journalists and visitors in a courtroom at the Higher Regional Court closed due to the Corona pandemic, are marked with slips of paper. @ Thomas Lohnes/AFP Pool/dpa/Alamy Live News

<sup>168</sup> 1 BvR 1918/20 (August 18, 2020); *Bundesverfassungsgericht, "Syria torture trial" - Syrian journalists' urgent application for approval of aids for translation into Arabic successful*, Press Release No. 79/2020, August 20, 2020, accessed on October 19, 2023. <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2020/bvg20-079.html>

<sup>169</sup> Ibid.

<sup>170</sup> Ibid., para. 11



Philips considered this ruling a considerable judicial development in favor of accountability and transparency. Aside from allowing Syrian journalists and international media access to the translation, Philips also maintained, "The ruling stands for the proposition that these trials have international importance, and the victims' communities who were impacted by these atrocities should have access to them."

Another concern is the documentation of universal jurisdiction trials. The Tahir Institute for the Middle East requested that the OLG in Koblenz record and tape the final stage of the historic trial proceedings.<sup>171</sup> One petitioner, Florian Jessberger, stated, "***The Auschwitz trials, the Stammheim trial and numerous international criminal proceedings demonstrate that the documentation of such historic trials, also through original recordings, are a highly valuable contribution to addressing the past, to education of future generations and not the least for research purposes. The recordings of the Syria trial could play an equally important role.***"<sup>172</sup> The request was not granted. Experts agree that the recording of these trials is essential because of their international and historical dimensions. While the Syrian torture trials resulted in landmark decisions, there are no public official records of the proceedings.

On November 1, 2023, the German government approved the VStGB's latest amendment draft proposal.<sup>173</sup> After a first reading, the draft is now before the Legal Committee (*Rechtsausschuss*) of the Bundestag.<sup>174</sup> Germany's Ministry of Justice reinforced its commitment to the further develop German international criminal law. With the approved draft [VStGB] law, Germany will strengthen the rights of victims of those affected by international crimes, facilitate the reception of German proceedings, and close gaps in criminal liability in German law.<sup>175</sup> The draft intends to authorize media representatives to use interpreters in court proceedings if they do not speak German. The Federal Ministry of Justice will also commission English translations of groundbreaking judgments on international criminal law so that the non-German-speaking public worldwide can access them. There is no better example of the synergies and response developed between the German government, the courts and civil society organizations. While discussing these ongoing VStGB reform efforts, Voss-Kyeck stated, "It makes me quite optimistic that this [trend] will continue."<sup>176</sup>

<sup>171</sup> The Tahir Institute for the Middle East filed a similar petition requesting that the court record and tape the final stage of the historic trial proceedings. 23 academics from Germany and elsewhere, research institutions, human rights organizations, and the ECCHR sent a motion to the Higher Regional Court in Koblenz. The motion demanded that the final stage of the proceedings (e.g., the closing statements and verdict) be taped to preserve them for future generations. This motion was unsuccessful. See "TIMEP Joins Court Motion on Historic Syria Trial in Koblenz," *Tahir Institute for Middle East Policy*, July 1, 2021, accessed July 17, 2023, <https://timep.org/2021/07/01/timep-joins-court-motion-on-historic-syria-trial-in-koblenz/>

<sup>172</sup> This statement was cited in the press release: "TIMEP Joins Court Motion on Historic Syria Trial in Koblenz."

<sup>173</sup> Entwurf eines Gesetzes zur Fortentwicklung des Völkerstrafrechts, BT-Drucksache 20/9471, 27.11.2023; for the point of view of the Bundesrat, the second Chamber of Germany's Legislature, see BR-Drucksache 568/23, 15.12.2023.

<sup>174</sup> For the first reading, see Deutscher Bundestag, Plenarprotokoll 20/141, 17877-17885.

<sup>175</sup> Marco Buschmann, *Bundesregierung Beschließt Gesetzentwurf Zur Fortentwicklung Des Völkerstrafrechts*, Bundesministerium der Justiz, Berlin, November 1, 2023

<sup>176</sup> Silke Voss-Kyeck, interview.

## Section 06

Deconstructing the German  
system of universal jurisdiction4) Innovative legal remedies employed  
by the German Federal Public Prosecutor General

## 4) Innovative legal remedies employed by the German Federal Public Prosecutor General

### a. Structural Investigations

Under German law, the ability to introduce proceedings under the VStGB rests exclusively with the federal public prosecutor general. It is well-documented, however, that building solid universal jurisdiction cases is persistently challenging, mostly due to the nature and scale of the crimes.<sup>177</sup> Judges Hohoff, Lafleur, and Diesel concurred that remote investigations are particularly difficult.<sup>178</sup> For the sake of fair trials, prosecuting and adjudicative authorities are bound by the same mandates as ordinary criminal investigations, including utmost respect for standards of proof. However, prosecutors, police, and judges are often unable to travel to the crime site to document the scene and collect evidence. Other challenges include unsafe environments and the inability to locate victims and witnesses willing to testify. Judge Lafleur confirmed these observations using the case of *Jennifer W* decided at the Higher Regional Court in Munich- which along with the *Taha A.-J* case, marked the first time anywhere in the world that an IS member has been put on trial for the group's persecution of the Yazidi people.<sup>179</sup> He described how witnesses often live abroad and contacting them for statements is difficult. He also mentioned that, unlike ordinary crimes, these investigations and trials occur thousands of kilometers away from the crime scene.<sup>180</sup>

Similarly, Judge Bianca Von Arnim, who administered the *Taha A.-J* case, detailed the difficulties associated with deciding universal jurisdiction cases. In addition to geographical challenges and the impossibility of inspecting crimes scenes, she noted, "We interact with victims and witnesses who speak a different language, cultural background and, often times, we do not know their whereabouts."<sup>181</sup> She also mentioned that in these cases, gathering statements for the investigation and hiring highly qualified translators and context experts to intervene in the main hearing is difficult. Likewise, judges have no authority to enforce Germany's victim and witness protection when witnesses live in countries where such protection does not apply. Finally, she stressed, "There is another major challenge of avoiding re-traumatization of victims in repeated questioning [...] We [judges] have to be really careful and sensitive."<sup>182</sup>

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*“There is another major challenge of avoiding re-traumatization of victims in repeated questioning [...] We [judges] have to be really careful and sensitive.”*<sup>182</sup>

<sup>177</sup> “Evidentiary Challenges in Universal Jurisdiction Cases,” *Trial International: Universal Jurisdiction Annual Review 2019* #UJAR, 41–55.

<sup>178</sup> Judge Laurent Lafleur, interview; Judge Corinna Diesel, interview; Judge Ute Hohoff, interview.

<sup>179</sup> Judge Laurent Lafleur, interview. The Higher Regional Court in Munich extended 14-year prison sentence on former “Islamic State” member *Jennifer W.* for her role in allowing a young Yazidi girl, named only as Rania, to die of thirst in Iraq in 2015. *Jennifer W.*, from a small town in the German state of Lower Saxony, had been found guilty of the killing, as well as membership in a terrorist organization and sentenced to 10 years in prison in an initial trial in 2021. But that sentence was deemed too lenient by state prosecutors, who appealed.

<sup>180</sup> On October 25, 2021, the Higher Regional Court of Munich found *Jennifer W.* guilty of membership in a foreign terrorist organization, aiding and abetting attempted murder as well as attempted war crimes and a crime against humanity. She was sentenced to ten years in prison. The Federal Public Prosecutor subsequently appealed the sentence, demanding life imprisonment.

<sup>181</sup> Judge Bianca Von Arnim, interview.

<sup>182</sup> *Ibid.*



To overcome these obstacles, the Federal Public Prosecutor General Office has implemented an “anticipatory justice” model through so-called structural investigations [*Strukturermittlungsverfahren*]. Unlike traditional investigatory models, which tend to be reactive *after* the commission of a crime, a structural investigation is a novel legal remedy used to collect evidence of an alleged crime before identifying individual suspects. This anticipatory justice model allows prosecutors to foresee international criminal investigations by collecting evidence such as victim and witness testimonies, documents, pictures, and videos.<sup>183</sup> In these situations, the prosecution investigates the context of the crime rather than specific individuals. This pioneering model, displaying some resemblance to preliminary investigations at the ICC, allows prosecutors to charge suspects, seek extradition when they are known to be in foreign territories and take immediate action by filing legally sound indictments when they enter Germany. Significantly, prosecutors conducting structural investigations gather evidence not only for domestic proceedings but also preserve the evidence for future international court cases or foreign domestic proceedings. Prosecutor Frank alluded to this practice in a recent statement made to the *Welt am Sonntag* newspaper concerning the Ukrainian situation, saying, “At the moment, we are focusing on mass killings in Bucha and attacks on Ukraine's civil infrastructure.” He then described the goal: “Prepare for a possible later court case-whether in Germany or with our foreign partners or an international court.”<sup>184</sup>

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<sup>183</sup> “Evidentiary Challenges in Universal Jurisdiction Cases,” *Trial International: Universal Jurisdiction Annual Review 2019* #UJAR, 41–55.

<sup>184</sup> “Germany Has ‘Hundreds’ of Pieces of Ukraine War Crime Evidence,” *AFP, Radio Free Europe Radio Liberty*, February 23, 2023, accessed October 13, 2023, <https://www.rferl.org/a/ukraine-germany-war-crimes-evidence/32256425.html>



As discussed above, the Syrian conflict became a defining moment in Germany's integration of structural investigations that would develop into substantial universal jurisdiction cases. In 2011, the German Federal Prosecutor opened the first structural investigation into war crimes and crimes against humanity committed in Syria. A former Syrian military police official, commonly referred to as Caesar, released over 53,000 graphic photographs taken from May 2011 to August 13. The images documented the horrors committed under Assad's regime, including noticeable marks of torture and inhuman treatment of hundreds of civilians.<sup>185</sup> These photographs, known as the "Caesar Files," significantly advanced the case; in response, the German government provided resources for further criminal investigation. The Institute of Forensic Medicine at the University of Cologne evaluated these files, and the compiled evidence proved that crimes against humanity had been committed in Syria. In commenting on the case, Philips said, "German prosecutors are conducting structural investigations which have provided a framework under which individual prosecutions can move forward [...] This is a positive example for other states to follow. There have been several high-profile cases, such as the Koblenz proceedings."<sup>186</sup>

Regarding this case, Husson described how Germany became at the forefront of international cooperation in the investigation of crimes committed in Syria. "German authorities fostered the first-ever joint investigation team with the ILM and France on the 'Caesar Files' case," she noted. ***"It has been a fruitful cooperation. German authorities paved the way for effective international cooperation and exchange of evidence and information not only with the ILM but also with other jurisdictions, which are pursuing similar efforts."***<sup>187</sup>

<sup>185</sup> "Caesar' Photos Document Systematic Torture," ECCHR, February 12, 2020, accessed June 9, 2023, <https://www.ecchr.eu/en/case/caesar-photos-document-systematic-torture/>

<sup>186</sup> Garance Le Caisne, "They Were Torturing to Kill!': Inside Syria's Death Machine," *The Guardian*, November 1, 2015, accessed July 21, 2023, <https://www.theguardian.com/world/2015/oct/01/they-were-torturing-to-kill-inside-syrias-death-machine-caesar>

<sup>187</sup> Husson, interview.

<sup>188</sup> Kress, interview.

<sup>189</sup> Ibid.

<sup>190</sup> Geneuss, interview.

<sup>191</sup> Ibid.

Kress also commented on the Syrian investigation, recalling that "The activity of Germany's federal public prosecutor started earlier through the introduction of structural investigations. The federal prosecutor decided to prepare for future investigations or cases as a result of the large influx of Syrian refugees in Germany."<sup>188</sup> He observed, "It was a wise decision because there were a number of suspects—former members of Syria's secret service—living in Germany, and, eventually, the Federal Prosecutor's Office was able to turn those structural investigations into individual cases." ***In retrospect, he confirmed that the 1999 VStGB committee had a situation like Syria in mind when they drafted the code.***<sup>189</sup>

The Syrian humanitarian crisis allowed German legal institutions to test the exercise of universal jurisdiction on a subsidiary basis when a more convenient forum state or international jurisdiction was unavailable to prosecute the crimes. Specifically, the Syrian government's unwillingness to investigate and prosecute these cases and the ICC's lack of jurisdiction allowed the VStGB to fulfill its original promise. Geneuss alluded to this situation in her discussion of the Syrian cases, stressing how Germany's structural investigations contributed to its prosecution of international crimes.<sup>190</sup> Geneuss explained that structural investigations resemble the preliminary examinations conducted by the ICC in that neither investigates a specific suspect nor crime.<sup>191</sup> Instead, they focus on the whole conflict context of the alleged crime. Schüller remarked on the value of this unique investigatory method, saying, "If one [a structural investigation] is open, they are usually quite strong and promising, and the prosecutor and police have more space to investigate and collect evidence for their investigations."<sup>192</sup> Judge Von Arnim also noted that the structural investigation into the Yazidi genocide case enable prosecutors to interview over one hundred witnesses. Prosecutors used these statements to gather sufficient grounds for indictment.<sup>193</sup>

<sup>192</sup> Schüller, interview. Andreas Schüller, "The Role of National Investigations in the System of International Criminal Justice - Developments in Germany", 2013.

<sup>193</sup> Judge Bianca Von Arnim, interview.

In March 2022, the Federal Public Prosecutor General initiated a structural investigation into Ukrainian war crimes in the context of the Russian war of aggression, extending them to crimes against humanity.<sup>194</sup> According to official statements, it is collecting evidence and testimonies from Ukrainian refugees living in Germany.<sup>195</sup> In fact, a specialized unit was recently established to oversee these investigations. Likewise, prestigious international NGOs have been reporting annually on landmark cases based on Germany's structural investigations.<sup>196</sup> In June 2022, the BKA's President also confirmed that "the Federal Prosecutor General, on whose behalf we are investigating, is currently conducting a structural investigation, but not yet any proceedings against individual suspects. But in the end, of course, we want to hold perpetrators accountable," he said.<sup>197</sup> In various statements to the UN Sixth Committee, representatives of the Permanent Mission of Germany to the United Nations (the Permanent Mission) have confirmed the Federal Public Prosecutor General often initiates structural investigations into international crimes based on information also received from the German migration authority.<sup>198</sup>

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***“the Federal Prosecutor General, on whose behalf we are investigating, is currently conducting a structural investigation, but not yet any proceedings against individual suspects. But in the end, of course, we want to hold perpetrators accountable,”***

<sup>194</sup> Statement by the Federal Republic of Germany, Sixth Committee – Agenda item 85: The scope and application of the principle of universal jurisdiction (New York: Permanent Mission of Germany to the United Nations, 2022), accessed April 9, 2023, [https://www.un.org/en/ga/sixth/77/pdfs/statements/universal\\_jurisdiction/12mtg\\_germany.pdf](https://www.un.org/en/ga/sixth/77/pdfs/statements/universal_jurisdiction/12mtg_germany.pdf)

<sup>195</sup> Ibid.

<sup>196</sup> *Trial International* provides specific details on structural investigations initiated against Syrians suspected of war crimes and crimes against humanity committed between 2011 and 2013; serious crimes under international law committed by non-state armed groups in Syria and Iraq since 2014; four brothers for serious crimes under international law allegedly committed in Syria in November 2012; alleged war crimes committed in Syria in March 2013; former member of the Free Syrian Army; Iraqi citizens and alleged members of ISIS for crimes committed in 2014; crimes committed by a terrorist organization Jabhat al-Nusra in the Damascus area; alleged serious crimes under international law committed in the Democratic Republic of the Congo by the Democratic Forces for the Liberation of Rwanda (*Forces Démocratiques de Libération du Rwanda; FDLR*); alleged crimes committed by the Taliban and war crimes committed in Afghanistan; U.S. officials in CIA detention centers and other US overseas detention centers and alleged war crimes committed in Gaza during the Operation "Protective Edge" between July 8 and August 26, 2014, among many others. See, "Universal Jurisdiction Annual Review: Overcoming Evidentiary Challenges Through Collaboration" *Trial International*, March 1, 2019.

<sup>197</sup> Martin Lutz and Uwe Müller, Interview with: BKA President Holger Münch: Our Clear Goal is to Identify those responsible for atrocities, *Wams/Welt.de/WELT*, June 18, 2023.

<sup>198</sup> Permanent Mission of the Federal Republic of Germany to the United Nations, Statement by the Federal Republic of Germany at the Sixth Committee on "The scope and application of the principle of universal jurisdiction," New York, October 2021, accessed July 10, 2023, [https://www.un.org/en/ga/sixth/76/pdfs/statements/universal\\_jurisdiction/15mtg\\_germany.pdf](https://www.un.org/en/ga/sixth/76/pdfs/statements/universal_jurisdiction/15mtg_germany.pdf)

## b. Cumulative prosecutions

Cumulative prosecutions (*kumulative Strafverfolgung*) are another novel legal recourse frequently used by the Federal Public Prosecutor General Office to join the global fight against impunity, which is also another novel component of the German system. Cumulative investigations are conducted when crimes are committed simultaneously. For example, crimes of terrorism and war crimes often occur concurrently, and offenders are aggregately prosecuted for both offenses. To avoid impunity, prosecutors accumulate charges where there is strong evidence of the commission of one crime but limited evidence of the other.<sup>199</sup> Cumulative prosecution is similar to the practices of other European countries in that it ensures full accountability and holds foreign terrorists accountable for terrorism offenses but also for war crimes, crimes against humanity, and genocide.<sup>200</sup> The European Union Agency for Criminal Justice Cooperation (Eurojust) and the Genocide Network Secretariat have underlined the growing significance of cumulative prosecutions to secure justice for victims and maximize sentences.<sup>201</sup> As of 2022, Eurojust and the Genocide Network Secretariat have documented Germany's first and second specialized units' (S4 and S5) competency to investigate, prosecute, and litigate core international crimes and cumulatively prosecute these crimes and terrorism.<sup>202</sup>

While describing the role of the higher regional courts since 2002, Judge Von Arnim asserted, "Another significant feature is that defendants have also been charged with terrorism. **During the course of criminal investigations on terrorism, prosecutors have also found evidence of war crimes, crimes against humanity, and genocide.** These charges often go along with each other."<sup>203</sup> Judge Hohoff also highlighted the significance of cumulative prosecutions; in particular, she underscored how Germany's Public Prosecutor General changed [his] policy to allow for simultaneous charges to be filed against perpetrators of crimes of terrorism and against international law.<sup>204</sup> The BGH and higher regional courts in Koblenz, Frankfurt, Stuttgart, Düsseldorf, and Munich have decided several cases based on cumulative prosecutions, resulting in substantial prison sentences.<sup>205</sup>

<sup>199</sup> Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-Related Offences (The Hague: Network for Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes, 2020).

<sup>200</sup> Ibid.

<sup>201</sup> 10 Years On: Main Developments in the Fight Against Impunity For Core International Crimes in the EU (The Hague: The Genocide Network, 2022), accessed August 23, 2023, <https://www.eurojust.europa.eu/sites/default/files/assets/developments-in-the-fight-against-impunity-for-core-international-crimes-in-the-eu.pdf>

<sup>202</sup> Cumulative prosecution is particularly advantageous for addressing the acts of spouses of foreign terrorists. Gathering sufficient evidence to prosecute such women for membership in a terrorist organization is often difficult. In these cases, German courts have, for example, found that the occupation of a flat from which victims of Da'esh fled constituted appropriation of property—a war crime (§ 9 VStGB). Additionally, the courts found that a mother committed the war crime of conscripting or enlisting children after she sent her own child to a Da'esh military training camp (§ 8 Abs. 1 Nr. 5 VStGB). See, UN Permanent Mission of Germany to the United Nations, Statement by the Federal Republic of Germany before the UN Sixth Committee on "The scope and application of the principle of universal jurisdiction, October 21, 2021; Bachelet, Presentation of the report on civilian deaths in the Syrian Arab Republic.

<sup>203</sup> Judge Bianca Von Arnim, interview.

<sup>204</sup> Judge Hohoff, interview.

<sup>205</sup> Decisions rendered by the Federal Court of Justice: BGH 3 StR 57/17, BGH AK 22/19 and AK 56/19. Decisions rendered by the higher regional courts: 5-2 StE 10/16 - 9 - 2/16, 5-2 StE 11/18, 5-2 StE 11/18, III-2 StS 2/19, 5-3 StE 6/19, among others. See Eurojust Report.

## Section 06

# Deconstructing the German system of universal jurisdiction

## 5) International and Regional Cooperation

## 5) International and Regional Cooperation

Germany's commitment to prosecuting international crimes is not solely a domestic effort but the result of a professional and well-established collaboration between regional and international organizations. The German system has particularly benefited from strong partnerships with European states and crucial mechanisms created by the UN. This international cooperation has resulted in more international instruments and treaties, which offer a legal basis for judicial and law enforcement to cooperate in extradition, mutual legal assistance, and joint investigations. For example, in 2002, the Council of Europe established the European Network for investigation and prosecution of genocide, crimes against humanity, and war crimes (Genocide Network). This network has become a leading organization in fostering cooperation among European countries for the investigation and prosecution of international crimes. In past years, Germany has also joined international investigation teams to collect, consolidate, preserve, and analyze available evidence used for national and international criminal proceedings. BKA President Holger Münch noted to the Welt media outlet, "War refugees from Ukraine are being informed about the German police investigations. Anyone who can and would like to provide information will first receive a questionnaire designed by us. This then forms the basis for further investigations, such as questioning witnesses and victims. So far, we have received a three-digit number of tips. All of this happens via international exchange with Europol [the European police], for example, where there is a database for the structured recording of information."<sup>206</sup> Münch also explained that like the police, judicial authorities use European agencies like Eurojust to cooperate and exchange information.<sup>207</sup>

Judge Diesel also highlighted Europol's cooperation with the Koblenz investigation to secure witness testimonies, explaining, "The cooperation of the European police was fundamental. The police detained witnesses who interacted with the accused in Syria. Amongst other evidence, those witnesses revealed the activities of the accused. Without their testimonies, the prosecutors could not have been able to conduct their investigations, nor we [judges] would have been able to conduct the trial as it happened."<sup>208</sup> Judge Von Arnim coincided with Judge Diesel's account. While describing the *Taha A.-J* case, Judge Von Arnim also discussed the difficulties of securing effective legal assistance at the international level. These difficulties included delayed responses to information requests and a lack of cooperation from authorities operating in conflicted regions.<sup>209</sup> She emphasized, "**International cooperation is indispensable in universal jurisdiction cases.**"<sup>210</sup> As an example, the Investigative Team to Promote Accountability for Crimes Committed by Da'esh / ISIL (UNITAD) has successfully provided German justice authorities with Iraq-related documents, judgments, and helpful information about witnesses' whereabouts.<sup>211</sup> Likewise, the International, Impartial and Independent Mechanism (IIIM) and the Commission for International Justice and Accountability (CIJA) provided the prosecutor with relevant information and data.

<sup>206</sup> Martin Lutz and Uwe Müller, Interview with BKA President Holger Münch: Our Clear Goal is to Identify those responsible for atrocities, WamS/Welt.de/WELT, June 18, 2023, accessed on November 28, 2023.

[https://www.bka.de/DE/Presse/Interviews/2022/220620\\_InterviewMuenchWamS.html](https://www.bka.de/DE/Presse/Interviews/2022/220620_InterviewMuenchWamS.html)

<sup>207</sup> Ibid.

<sup>208</sup> Judge Diesel, interview.

<sup>209</sup> Judge Bianca Von Arnim, interview.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid.



EU Agency for Criminal Justice Cooperation (Eurojust)  
@Shutterstock / T. Schneider

Husson confirmed Judge Von Arnim's observation. While describing similar challenges pertaining to international criminal proceedings, Husson underlined the importance of jurisdictions joining forces to circumvent these difficulties to ensure proper investigation and prosecution of international crimes, including those committed in Syria.<sup>212</sup> "**International cooperation not only allows better coordination with regard to volumes of investigations, but also it minimizes re-traumatization of victims and survivors. International cooperation in the Syrian context has become essential,**" she noted.<sup>213</sup> During her interview, Husson also described two models of cooperation with domestic jurisdictions.<sup>214</sup> The first is responding to requests for assistance. These requests often focus on information about the suspect and the incident under investigation. Second, the IIIM offers language translation assistance to prosecutors, elaborates contextual analyses, and helps identify and locate witnesses willing to testify before courts. As of 2019, the IIIM has received 318 requests for assistance from 16 different jurisdictions worldwide, relating to 231 investigations into the Syrian conflict.<sup>215</sup>

<sup>212</sup> Husson, interview.

<sup>213</sup> Ibid.

<sup>214</sup> Ibid.

<sup>215</sup> Husson, interview.

<sup>216</sup> Statement by the Federal Republic of Germany, Statement by Germany at the UN General Assembly Meeting "Prevention of Armed Conflict" Debate on the International, Impartial and Independent Mechanism (IIIM) (New York: Permanent Mission of Germany to the United Nations, April 25, 2023), accessed December 8, 2023, <https://new-york-un.diplo.de/un-en/-/2594226>

<sup>216</sup> Ibid.

To support Judge Von Arnim's observation, Annette Ludwig, political advisor at the German Permanent Mission to the United Nations, delivered a statement underlying the Head of the IIIM for her work and her dedication to justice and accountability for the most serious crimes committed in Syria: "We are most grateful to Ms. Marchi-Uhel and her team for their continued engagement," she noted.<sup>216</sup> The IIIM has a tangible impact. On 23 February 2023, the Higher Regional Court of Berlin sentenced an individual to life in prison, inter alia, for a particularly serious war crime and four counts of murder committed in Syria in 2014. It was established that the perpetrator had launched a grenade into a crowd of civilians waiting for food in Damascus. "This conviction was based on evidence provided by IIIM and made possible thanks to the outstanding cooperation between the mechanism and the German Federal Prosecutor General."<sup>217</sup>

Kress, speaking before the United Nations, used Germany's legal intervention in the Syrian situation and the Koblenz trial as a modern example of transnational cooperation in international criminal investigations. He explained how, during the investigations, German authorities used a German/French investigation team to obtain witness testimonies in France.<sup>218</sup> They also benefited from the findings of the UN Independent International Commission of Inquiry on the Syrian Arab Republic, established in 2011 by the UN Human Rights Council (UNHRC). In fact, the Koblenz trial used three reports by the commission as evidence.<sup>219</sup> Paulo Sergio Pinheiro, chair of the commission, said of this, "Verdicts such as today's represent much-needed progress towards achieving justice for victims and survivors of war crimes in Syria—despite the fact that pathways to accountability remain curtailed in Syria and at the UN Security Council."<sup>220</sup>

<sup>218</sup> Remarks made by Claus Kress before the UN Security Council's Arria-formula meeting on accountability in the Syrian Arab Republic.

<sup>219</sup> UN High Commissioner of Human Rights, *UN Panel Welcomes Landmark Guilty Verdict in Germany's Prosecution of Former Syrian Intelligence Officer for Crimes Against Humanity* (New York: United Nations, 2022).

<sup>220</sup> Ibid.

## Section 06

Deconstructing the German  
system of universal jurisdiction6) Building bridges in the quest for accountability:  
The role of civil society organizations6) Building bridges in the quest for accountability:  
The role of civil society organizations

Another core component of the German system of universal jurisdiction is the active role of civil society and advocacy organizations. The German case offers a unique opportunity to reflect on how civil society actors participate in the formal process of international criminal justice at the domestic level. Naturally, the relationship between state authorities and civil society is not always uncomplicated. In the German case, understanding the roles and functions of the multiple actors involved in the exercise of universal jurisdiction in Germany turned out to be a fairly long process. In 2008 and 2014, for example, Amnesty International and Human Rights Watch, respectively, reported on the initial challenges of engaging with justice institutions, particularly in the early years of the VStGB's adoption.<sup>221</sup> These reports objected the procedural discretion granted in Article 153f of the VStGB and decisions not to investigate a situation.<sup>222</sup>



Berlin, Germany. 01st Mar, 2017. Wolfgang Kaleck, attorney and human rights activist, and founder of the European Center for Constitutional and Human Rights (ECCHR), as seen in Berlin @ Photo: Michael Kappeler/dpa/Alamy Live News

Voss-Kyeck recalled these difficulties emerging when the first universal jurisdiction cases appeared before German authorities.<sup>223</sup> She discussed one of the first contentious cases involving the former Uzbek Interior Minister's alleged crimes against humanity in 2006, describing how this "triggered the first serious discussion of how Germany could become a real champion of universal jurisdiction."<sup>224</sup> Voss-Kyeck also observed that the situation has changed. While assessing progress and challenges from 2006 to 2022 - the year the Koblenz case was decided—she recognized major developments requiring time, practice, and international contexts.<sup>225</sup>

<sup>221</sup> Germany: End Impunity through Universal Jurisdiction. *No Safe Haven*, Berlin, Amnesty International, 2008, 1–118; *The Legal Framework of Universal Jurisdiction in Germany* (United States of America: Human Rights Watch, 2014).

<sup>222</sup> Ibid.

<sup>223</sup> Silke Voss-Kyeck, interview.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid.

Despite these challenges, rights advocates and German justice institutions have masterfully engaged in different dynamics in past years to identify new pathways for collaboration and possibilities to bring justice to victims of international crimes. As documented in this study, when actors, institutions, and the government had clearly defined roles for implementing the VStGB, their interactions positively evolved. Regarding this, Wolfgang Kaleck noted: *“We play different roles. What is important is to do it in the most professional way, and that means that we also try to understand how the public prosecutor’s function. It is essential to find a fine balance between criticism and cooperation.* Over the years, we have developed a mutual understanding of our different approaches. This is something positive. We [civil society] have been given important impulses, and sometimes, we have successfully intervened in legal procedures.”<sup>226</sup>

<sup>226</sup> Wolfgang Kaleck, interview by author, phone call, October 27, 2023.



Koblenz, Germany. 23rd Apr, 2020. Plaintiffs stand next to ECCHR lawyers in the courtroom of the Higher Regional Court between corona screens before the start of the trial. Today the trial against two defendants accused of involvement in Syrian state torture begins. @ Alamy Stock Photo

Regarding the functions of civil society, Jessberger and Steinl conducted seminal research highlighting the various roles of NGOs engaged in strategic litigation for international criminal justice.<sup>227</sup> These range from raising public awareness, stimulating debate, and seeking law reforms to documenting violations, supporting survivors, and inspiring others to join the cause. According to the interviewees, civil society actors and victims’ rights groups have become essential agents in Germany’s pursuit of accountability and redress for victims of atrocities. German NGOs have cooperated with other strategic litigation organizations to develop useful strategies to pursue broader anti-impunity objectives and investigate and document serious human rights violations.<sup>228</sup> Since 2007, the Berlin-based European Center for Constitutional Rights (ECCHR) has played a decisive role in litigating universal jurisdiction cases on behalf of victims across the globe.<sup>229</sup> Wolfgang Kaleck, the general secretary of the ECCHR, reflected that the center’s role is not limited to strategic litigation, saying, “In addition to our legal work, we also file complaints, write articles or books, organize workshops and training.”<sup>230</sup>

As Andreas Schüller observed, **“These cases [under the principle of universal jurisdiction] would not be possible without civil society.”**<sup>231</sup> Fascinatingly, he pointed out that German rights-advocacy organizations also build bridges and foster trust between victims and German justice authorities. “We [the ECCHR] are intermediaries between survivors’ communities and the police and prosecutors. [...] Because of their experiences in their native countries, survivors are naturally distrustful of foreign police, and German police are also limited [in approaching] them.” Over the years, the ECCHR has developed solid connections in both directions, collaborating with exiled communities: with activists’ lawyers of those communities, but also, have a professional relation with prosecutors. Schüller described how his team provides the victims with safety and stability, legal support for asylum cases, and psychological support: “In the right environment, victims are more willing to engage, and their testimonies are stronger or focused, especially when they feel accompanied by members of the NGOs.”<sup>232</sup>

<sup>227</sup> Florian Jessberger and Leonie Steinl, “Strategic Litigation in International Criminal Justice: Facilitating a View from Within,” *Journal of International Criminal Justice* 20, no. 2 (May 2022), 379–401, accessed October 6, 2022, <https://doi.org/10.1093/jicj/mqac008>; Florian Jessberger; Julia Geneuss, “Litigating Universal Jurisdiction – Introduction,” *Journal of International Criminal Justice* 13, no. 2 (May 2015): 205–208

<sup>228</sup> “International Justice: What Role for Civil Society?” *Trial International*, Switzerland, July 16, 2021, accessed October 6, 2023, <https://trialinternational.org/latest-post/international-justice-what-role-for-civil-society/>

<sup>229</sup> Tatjana Coerschulte, “War Crimes in Ukraine Reported to the Attorney General,” *Frankfurter Rundschau*, June 26, 2023, accessed [July 8, 2023], <https://www.fr.de/politik/kriegsverbrechen-in-der-ukraine-beim-generalbundesanwalt-angezeigt-92365544.html>

The victims’ testimonies provide fundamental evidence and witness identification. Furthermore, NGO members often have prime access to their private pictures and videos. “Once we receive evidence from victims, we make sure that evidence is secured by competent authorities,” Schüller explained.<sup>233</sup> Judge Von Arnim also drew attention to the role of civil society organizations, describing the relations between prosecutors, the ECCHR, and Yazda-an NGO that helps collect information on cases.<sup>234</sup> These partnerships enable prosecutors to establish the facts of the case and support their indictments.

While commenting on the pivotal outcome of the Koblenz case, Kaleck described how civil society actors from Syria, with support from Germany and elsewhere, gathered evidence and testimonies submitted both inside and outside the courtroom.<sup>235</sup> **“Without the tireless and courageous efforts of Syrian activists, civil society organizations, and survivors of the violent dictatorship, the proceedings would likely not have taken place,”** Kaleck noted in the ECCHR’s report.<sup>236</sup> It is also relevant to highlight their essential role in facilitating conditions for the media to publicize litigation results. NGOs usually do substantial media work after the decision is rendered by the courts. Considering these are not easy topics to talk about in front of a camera, NGOs’ role in fostering a space of trust for victims to recount their experiences with journalists has been central to achieving that. The work of the ECCHR has been pivotal in getting these stories of these trials out to the public.

<sup>230</sup> Kaleck, interview.

<sup>231</sup> Schüller, interview.

<sup>232</sup> Ibid.

<sup>233</sup> Ibid.

<sup>234</sup> Judge Bianca Von Arnim, interview.

<sup>235</sup> *Torture in Syria on Trial in Koblenz. A Documentation of the Al-Khatib Proceedings*, (Berlin: ECCHR, 2020), 1–240.

<sup>236</sup> Ibid.

## Section 06

Deconstructing the German  
system of universal jurisdiction7) Independent media coverage  
in the courtroom

Koblenz, Germany, 23rd Apr, 2020. Senior public prosecutor Jasper Klinge (l) talks to journalists at the Koblenz court building after the end of today's trial day. © Alamy Stock Photo

7) Independent media coverage  
in the courtroom

Another relevant component of the system is the media. A growing number of studies illustrate how the courts intersect with the media and benefit from a professional, objective relationship to publicize outcomes.<sup>237</sup> While executive and legislative representatives often speak directly to the public to ensure that their messages are widely disseminated, judicial opinions tend to be lengthy, technically complex, and publicly inaccessible, especially when written in foreign languages.<sup>238</sup> The media is thus essential for the court to explain their judgments to the public. Journalists translate legal issues into layman's terms, raise awareness of human rights issues, and, together with civil society organizations, promote social action.

Germany exemplifies this critical intersection. According to Schüller, "The media provide support for current efforts and help to scrutinize judicial opinions in order to encourage public debate. The media is fundamental to informing international organizations and survivors' communities living abroad about the outcome of [universal jurisdiction] cases."<sup>239</sup>

<sup>237</sup> Katerina Linos and Kimberly Twist, "The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods," *The Journal of Legal Studies* 45, no. 2 (2016), 223–254, DOI: 10.1086/687365.

<sup>238</sup> Malek, "How a Syrian War Criminal Was Brought to Justice in Germany."

<sup>239</sup> Schüller, interview.

<sup>240</sup> Markus Sehl, interview by author, Zoom, November 9, 2023.

The media is essential. In particular, journalists explain to the public "why the German courts are deciding these cases. And why are these cases being prosecuted in Germany? We do explain the background of these cases." Markus Sehl, a legal journalist, agreed that these questions are pertinent, adding, "As a legal journalist, I see myself in the role of translator of cases. It is important to explain these universal jurisdiction cases to people who might have no legal background. Also, to keep expectations of what these processes can achieve realistically."<sup>240</sup>

In a separate interview, Geneuss also underscored this issue: "The media has a very important role to play when it comes to communicat[ing] to the victim's group the outcome of the decisions, but the media also needs to communicate to the German public why these proceedings are important to be decided in Germany."<sup>241</sup> She referred to the Koblenz decision, explaining that it received substantial media attention and that as a result "there was a lot of discussion about these trials. The media did a good job, especially in addressing the question of why the proceedings are held in Germany."<sup>242</sup> Finally, Sehl reflected on the possibility of journalists reporting on universal jurisdiction cases, noting, "As a legal journalist in Germany, we are in a privileged position to access and follow these cases. Unfortunately, this is not a matter of fact in such highly political processes in other countries."<sup>243</sup>

<sup>242</sup> Ingo Nathusius, HR, "The Difficult Search for the Perpetrators [Die schwierige Suche nach den Tätern]," *Tagesschau*, May 25, 2023, accessed August 15, 2023, <https://www.tagesschau.de/inland/generalbundesanwalt-ukraine-kriegsverbrecher-100.html>

<sup>243</sup> Sehl, interview.



## Section 06

Deconstructing the German  
system of universal jurisdiction

## 8) Independence of the justice system

8) Independence of  
the justice system

Independent justice is an indispensable companion of truth and of the German system. Genocide, war crimes, crimes against humanity, and other gross violations of human rights undermine the fabric of entire societies. In the aftermath of such dreadful events, establishing the truth about the commission of international crimes is essential.<sup>244</sup> Knowing the truth gives victims and relatives a sense of closure and restores their dignity. These aspirations can only be achieved through independent, impartial, and fair justice institutions.

However, while states are primarily responsible for exercising criminal jurisdiction against perpetrators of serious crimes committed in their territories, local justice mechanisms are often unavailable in regions experiencing widescale human rights abuse. By the time the atrocities occur, the judiciary's autonomy and the police and prosecutors' role in ensuring justice tend to be severely compromised.<sup>245</sup> When states are unable or unwilling to exercise their jurisdiction, accountability is severed, and impunity triumphs. Hostile states present grave challenges for prosecutorial teams attempting to convict offenders of serious international crimes. Domestic intimidation can be particularly problematic in conflicted regions, which are often susceptible to the fragile rule of law, the absence of legislation that regulates international crimes, inadequate law enforcement, a weakened justice system, and a disregard for due process. This situation is often exacerbated by a lack of public confidence in state authorities, corruption, and insufficient human and financial resources to impartially investigate and prosecute atrocities.

The Office of the High Commission of Human Rights has reported that "the failure of the legal system to protect individual rights and prosecute violators is often either a direct cause of, or a substantial contributing factor to, the conflict."<sup>246</sup> During an interview, Schüller pointed out that a history of corruption, discrimination, and abuse of power within judiciary institutions can destroy public confidence and perpetuate lawlessness and chaos.

The independence of the judiciary, prosecutors, and police is another component of the German system. An autonomous justice system is a *sine qua non* condition to ensure fairness and credibility and to reinforce the notion that even for domestic trials, the international community has a strong interest in accountability for mass abuses. The 2023 World Justice Project Rule of Law Index reinforces this assertion. Overall, out of 142 countries worldwide, Germany ranked 5 for the strongest adherence to the rule of law, preceded only by Denmark, Norway, Finland, and Sweden,<sup>247</sup> 4 for effective constraints on government powers,<sup>248</sup> 12 for no corruption,<sup>249</sup> 13 for open government,<sup>250</sup> 5 for respect of fundamental rights<sup>251</sup> and 6 for an effective criminal justice system.<sup>252</sup> Further, the 2023 EU Justice Scoreboard shows that in contrast to other European countries, Germany's independent justice institutions have among the strongest scores, with less than 10% of German respondents perceiving interference or pressure from government and politicians over the judicial function.<sup>253</sup> This study highlights that an independent judiciary system is not only a prerequisite to the rule of law but a fundamental guarantee of a fair trial of international proceedings.<sup>254</sup>

<sup>244</sup> Navanethem Pillay, "Establishing Effective Accountability Mechanisms for Human Rights Violations." UN Chronicle, 2012, accessed December 20, 2012,

<https://www.un.org/en/chronicle/article/establishing-effective-accountability-mechanisms-human-rights-violations>

<sup>245</sup> Neil J. Kritz, "Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights." *Law and Contemporary Problems* 59, no. 4 (1996): 127–52, accessed April 20, 2023,

<https://doi.org/10.2307/1192195>.

<sup>246</sup> Office of the United Nations High Commissioner of Human Rights, *Rule-of-Law Tools for Post-Conflict States: Monitoring Legal Systems*, (New York & Geneva: United Nations, 2006), 1–62.

<sup>247</sup> This factor relates to power to the extent to which those who govern are bound by law. It comprises the means, both constitutional and institutional, by which the powers of the government and its officials and agents are limited and held accountable under the law. It also includes nongovernmental checks on the government's power, such as a free and independent press. 2023 World Justice Project Rule of Law Index, 22. Accessed October 20, 2023,

<https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIIndex2023.pdf>

<sup>248</sup> This factor measures the extent to which those who govern are bound by law. It comprises the means, both constitutional and institutional, by which the powers of the government and its officials and agents are limited and held accountable under the law. It also includes nongovernmental checks on the government's power, such as a free and independent press. *Ibid.*, 28.

<sup>249</sup> Only preceded by Denmark, Norway, Singapore, Sweden, Finland, New Zealand, Netherlands, Luxembourg, Hong Kong, Canada, and the United Kingdom. The factor considers three forms of corruption: bribery, improper influence by public or private interests, and misappropriation of public funds or other resources. These three forms of corruption are examined with respect to government officers in the executive branch, the judiciary, the military, police, and the legislature. *Ibid.*, 29.

<sup>250</sup> This factor measures the openness of government defined by the extent to which a government shares information, empowers people with tools to hold the government accountable, and fosters citizen participation in public policy deliberations. This factor measures whether basic laws and information on legal rights are publicized and evaluates the quality of information published by the government. *Ibid.*, 30.

<sup>251</sup> This factor focuses on a menu of rights that are firmly established under the United Nations Universal Declaration of Human Rights and are most closely related to rule of law concerns. *Ibid.*, 31.

<sup>252</sup> This factor evaluates a country's criminal justice system. An effective criminal justice system is a key aspect of the rule of law, as it constitutes the conventional mechanism to redress grievances and bring action against individuals for offenses against society. An assessment of the delivery of criminal justice should take into consideration the entire system, including the *police, lawyers, prosecutors, judges, and prison officers*. *Ibid.*, 35.

<sup>253</sup> European Commission, Directorate-General for Justice and Consumers, *The 2023 EU Justice Scoreboard, Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, and the Committee of the Regions*. (European Commission: Luxembourg: Publications Office of the European Union, 2023), 1–65, [doi:10.2838/33482](https://doi.org/10.2838/33482).

<sup>254</sup> In Germany, the principle of judicial independence is anchored in the Constitution-the Basic Law: "Judges shall be independent and subject only to the law," as stated in Article 97, paragraph 1.

As Thomas Weigend observes, the German procedural system places great emphasis on the determination of “substantive truth” as a basis for a just and fair outcome to any criminal case, including those conducted under the principle of universal jurisdiction.<sup>255</sup> The criminal process is conceived as a sequence of two independent efforts to find the truth: first, by the prosecutor and the police, then by the trial court. Generally, the prosecutor is obliged to investigate as soon as the suspicion of a criminal offense becomes known to him (§ 160 sec. 1 Code of Criminal Procedure with the applicable exception of §153f). The police are also mandated to investigate criminal offenses and take all measures necessary to avoid the loss of evidence (§ 163 sec. 1 Code of Criminal Procedure). When an indictment is filed, the trial judge must collect all evidence necessary to establish guilt or innocence (§ 244 sec. 2 Code of Criminal Procedure).<sup>256</sup>

The 2023 WJP Rule of Law Index reveals that Germany is one of five countries globally with the most reliable and credible legal and institutional conditions to uphold the rule of law. German law and courts safeguard the right to a fair trial, and prosecutors and the police are mandated to follow them strictly. As Weigend explains, the Federal Constitutional Court has repeatedly declared that the right to a fair trial is part of the constitutional concept of *Rechtsstaat* (a state based on the rule of law) as guaranteed in Articles 20 sec. 3 and 28 sec. 1 of the Basic Law.<sup>257</sup> Under German law, the right to a fair trial includes recognizing and respecting the rights of both the victim and suspect. Unlike less advanced jurisdictions, Germany’s competent, independent, and impartial tribunals and law enforcement officials determine criminal charges, rights, and obligations, respecting due process on both sides, making it an appropriate forum to exercise universal jurisdiction. The interviewees confirmed this. While discussing the various challenges German authorities encounter during international criminal proceedings, Judge Lafleur said, **“We [judges] have to find a way to always have a fair trial. We judge an accused based on solid evidence of the commission of the crime.”**

<sup>255</sup> Thomas Weigend, “The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective,” in *Do Exclusionary Rules Ensure a Fair Trial? Ius Gentium: Comparative Perspectives on Law and Justice*, vol. 74, eds. Sabine Gless and Thomas Richter, (Cham: Springer, 2019), accessed October 20, 2023, doi.org/10.1007/978-3-030-12520-2\_3.

<sup>256</sup> Ibid.

<sup>257</sup> Ibid.

<sup>258</sup> Judge Corinna Diesel, interview.

<sup>259</sup> Ibid.

<sup>260</sup> Ibid.



Justitia (Lady Justice) sculpture on blurred Römer background, Frankfurt am Main, Germany. © Alamy Stock Photo

Judge Diesel also offered insights on this topic, describing various unforeseen challenges presented in the Koblenz trial, especially those involving the right to a fair trial and due process of law—specifically, the principle of acceleration, which is the legal requirement to initiate judicial proceedings within six months of arrest; the recollection of testimonies from witnesses living abroad; and the various threats made against witnesses or their relatives by Syrian security force members.<sup>258</sup> Interestingly, she also described the court’s ability to move forward with the prominent case, despite these unexpected obstacles, while maintaining the right to a fair trial: “The court has no legal power to force witness living outside Germany to come to Koblenz to testify [...] we established contact via email with any potential witnesses to encourage them to come to Germany. The court also made phone calls using translators, and we offered to cover their flights and accommodation.”<sup>259</sup> Judge Diesel described how the court provided psychological assistance to torture victims manifesting trauma and agreed to anonymize witnesses, when possible, to protect their personal integrity. She also addressed the request made by the public and journalists that the trial be translated into Arabic. As discussed above, this request was denied because, by law, the official language of court proceedings was German, and only the parties involved were allowed interpreters. “After the decision of the Federal Constitutional Court, we managed to offer this service to Arabic-speaking journalists as well. All these actions were taken without losing or affecting our impartiality and bearing in mind the rights of the accused,” she noted.<sup>260</sup>

Notably, the respect for due process of law standards is not exclusively a domestic concern. Husson also underlined the principles under which the IIMM collects and preserves evidence of crimes committed in Syria.<sup>261</sup> **“[The] IIMM abides by criminal law standards, involving maintaining an accurate and complete chain of custody that includes proper identification of the source, numbers, dates and times of collection.”**<sup>262</sup> Likewise, the IIMM respects the rights of the victims, and Husson described it as “a consent-driven organization.”<sup>263</sup> The mechanism can only share information about sources with their informed consent. When the victim’s integrity is at risk, the IIMM only offers evidence to requesting states and withholds personal identification.

Similarly, while discussing why Germany became an appropriate forum for universal jurisdiction cases, Voss-Kyeck stated, “The laws in Germany are for the victims as well as for the defendants”<sup>264</sup> and, according to Kaleck, “The rights of the defendants are also human rights for us; this is the right line.”<sup>265</sup> On this particular topic, Sehl reflected, “Apparently, in the Koblenz trial, [the] German rule of law institutions created an atmosphere in which witnesses were willing to testify despite their horrible experience and trauma.”<sup>266</sup>

<sup>261</sup> Husson, interview.

<sup>262</sup> Ibid.

<sup>263</sup> Ibid.

<sup>264</sup> Voss-Kyeck, interview.

<sup>265</sup> Kaleck, interview.

<sup>267</sup> Diego García-Sayán, Independence of Public Prosecutors, (Geneva: UN Special Rapporteur on the Independence of Judges and Lawyers: 2020) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/071/25/PDF/G2007125.pdf?OpenElement>

An effective justice system meets fundamental standards for the rule of law. It requires detailed and ongoing technical assessments of investigations and cases, protects, and defends the victim’s rights, procures a fair trial for the accused, and consistently monitors the legal system for compliance with domestic laws and international standards of fairness and due process. Its legal institutions are independent, impartial, and fully functional with reliable infrastructure. Its courts, judges, prosecutors, police, and defense attorneys each play a critical role in ensuring a fair and impartial legal process. Each of its institutions functions efficiently and cooperatively while providing just results based on the law and evidence. The German system meets all these conditions.

As documented throughout this study, Germany’s recent reputation in the investigation and prosecution of international crimes has made it an alternative forum to seek justice before independent and impartial authorities. In addition to the independent judiciary, the ability to decide which offenses should—or should not—be prosecuted is integral to prosecutorial independence and discretion. Commonly at the domestic level, the prosecutor must have the authority to pursue—or not pursue—charges in particular cases based on relevant facts and circumstances.<sup>267</sup> The exercise of universal jurisdiction closely depends on the institutional legitimacy of the Public Prosecutor General’s Office, demonstrating its independence is essential to Germany’s pioneering role. However, the language of §147 Nr. 1 of the Courts Constitution Act (*Gerichtsverfassungsgesetz*; GVG) casts a shadow of doubt in that respect. This provision is problematic as it leaves room, at least in theory, for subjecting a decision on whether to investigate an international crime to so-called external instruction (*externe Weisung*) issued by the Federal Minister of Justice. Although such an instruction has not occurred to date, the experts interviewed in this study said that **“the suggestion that States representatives could politically influence the decision to initiate investigations or prosecute the commission of international crimes may create an unnecessary mistrust”** in the reliable architecture of the German system of universal jurisdiction.<sup>268</sup> Relevant case law supports their proposition.

<sup>267</sup> ECCHR, *Stellungnahme zum Referentenentwurf eines Gesetzes zur Fortentwicklung des Völkerstrafrechts in Ergänzung zu den Stellungnahmen*, (Berlin: ECCHR, 2023), 26–27.

In the paradigmatic Joint Separate Opinion to the International Court of Justice's (ICJ) *Arrest Warrant Judgment* delivered in February 2002, judges addressed the significance of an independent justice system—referring to judges and prosecutors in the exercise of universal jurisdiction.<sup>269</sup> The argument merits an express quotation.

59. If, as we believe to be the case, a State may choose to exercise universal criminal jurisdiction in absentia, it must also ensure that certain safeguards are in place. [...] Further, such charges may only be laid by a prosecutor or judge d'instruction who acts in full independence, without links to or control by the government of that State.<sup>270</sup>

Reflecting on this topic, Kress called for further legislation to consider relinquishing the power of §147 Nr. 1 of the VVG-only - in VStGB proceedings and in accordance with the ICJ.<sup>271</sup> In his opinion, the 2024 reform bill could strengthen the institutional independence of the Public Prosecutor General's Office in Germany's pursuit of international accountability: **"The demand that justice must not only be done, but must also be seen to be done carries a particular weight in the field of international criminal justice' history, which is replete with allegations of political abuse."**<sup>272</sup> Thus, the abandonment of the power to direct instructions to the Federal Public Prosecutor General when it comes to the application of the VStGB would enhance the legitimacy of Germany's exercise of universal jurisdiction. Kress called for "the inclusion of this proposal in the 2024 Bundestag debate."<sup>273</sup>

<sup>269</sup> International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, (location: International Court of Justice, 2000), <http://www.icj.org/>.

<sup>270</sup> International Court of Justice, *Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal*, (location: International Court of Justice, 2000), para. 81–82,

<https://www.icj-cij.org/sites/default/files/case-related/12/11-21-20020214-JUD-01-05-EN.pdf>.

<sup>271</sup> Kress, interview; Claus Kress, "Deutsche Völkerstrafrechtspflege – Betrachtungen aus aktuellem Anlass." *Deutsche Richterzeitung*, no. 2 (2022): 75.

<sup>272</sup> Kress Interview.

<sup>273</sup> *Ibid.*

# OBERLANDESGERICHT KOBLENZ



Koblenz, Germany. 13th Jan, 2022. Jasper Klinger, Chief Public Prosecutor speaks at a press conference after the announcement of the verdict in the trial of defendant Anwar R., in what the Federal Prosecutor's Office says was the world's first criminal trial on state torture in Syria, the defendant was sentenced to life in prison for crimes against humanity.

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## Conclusion:

### What is the Future of Universal Jurisdiction in Germany?

*What is the future of universal jurisdiction in Germany?* The author concluded her interviews with this last question, and every interviewee agreed that Germany will exercise universal jurisdiction for years to come.<sup>274</sup> This study presents an alternative explanation to the original question: “Why Germany?” The findings show that Germany has created an exceptional system to prosecute and hold international criminals accountable. This system, referred to here as the “German system of universal jurisdiction,” comprises eight elements that have made Germany a foremost legal forum for victims to seek redress and placed it “at the forefront of pursuing accountability for the most serious international crimes in recent decades.”<sup>275</sup> These elements are 1) a solid legal framework; 2) government financial resources and political support; 3) development of judicial precedents favoring accountability; 4) innovative legal remedies utilized by the Federal Public Prosecutor General Office; 5) regional and international cooperation; 6) litigation and advocacy of civil society organizations; 7) engaged media coverage; and 8) independent justice institutions.

This analysis of the various elements as a *system*, not as isolated entities, offers new insights into Germany’s prominent role in prosecuting international crimes and developing international criminal law. As presented in this study, the Koblenz trial served as a catalyst for legal change. The investigation, prosecution and court proceedings were embedded in lessons learned that are being addressed in ongoing reform efforts of the VStGB. This study has become particularly relevant since, on November 1, 2023, the German Government approved a draft that will amend and expand the scope of the VStGB. The draft was submitted to the Bundesrat for further discussion and analysis, which will officially begin in the first quarter of 2024. If adopted, these reforms will entail a second revamp of the German criminal justice system that includes the amendment of the VStGB, the Criminal Code, the Code of Criminal Procedure.

Even though there are still ongoing challenges in the exercise of universal jurisdiction in Germany,<sup>276</sup> this study shows significant efforts taken by Germany, and the members of the Bundestag’s openness to finding common ground in making sure that international law is respected and war crimes, crimes against humanity, and genocide are not tolerated. It also describes the role of architects who paved the way to the Koblenz trial, including members of the German government and Bundestag, German negotiators on the ICC Statute and drafters of the VStGB, judges at the various levels, prosecutors, police officers, immigration authorities, counsels for the victims and defendants, legal scholars, members of civil society, international and regional partners, and domestic and international legal journalists. All essential building blocks of the German *System of Universal Jurisdiction*. Most importantly, it is the author’s hope this study will serve as a guiding beacon and encourage further reflection and engagement from other jurisdictions in Europe and elsewhere to strengthen their own *systems* and reinforce efforts to fight against impunity when the world needs it most.

<sup>274</sup> While drafting this study, on October 26, 2023, the Clooney Foundation for Justice filed three cases with German Federal prosecutors, requesting an investigation into crimes committed in Ukraine. The organization submitted detailed dossiers against the perpetrators and is representing 16 survivors and families of victims. One of the cases was filed jointly with CFJ’s long-standing partner, Ukrainian NGO Truth Hounds.

<sup>275</sup> Clooney Foundation for Justice, *CFJ files cases in Germany Against Russian Commanders for Crimes Committed in Ukraine*, Press Release, October 26, 2023.

<sup>276</sup> Particularly the recent dismissal of a criminal complaint against Myanmar’s generals for ongoing atrocity crimes, accessed November 30, 2023, <https://www.fortifyrights.org/mya-inv-2023-11-30/>

The November 2023 proposed amendment of the VStGB remarkably incorporates various pending challenges discussed by legal experts and advocates interviewed for this study—mainly derived from the Koblenz cases, which, echoing Dr. Silke Voss-Kyeck, is cause for optimism.<sup>277</sup>

Experts assessed the proposals heading in the right direction, but also made calls to adopt even more courageous legislative steps debate, especially in the area of sexual and gender-based violence; in the form of an official confirmation of the non-application of the principle of functional immunity in proceedings for alleged crimes under the VStGB; through an exception from the power to issue external instructions, as contained in §147 Nr. 1 of the Courts Constitution Act in proceedings under the VStGB; in the need for trial documentation for historical and future generations education, and as simple as it seems but adding more chairs and space in the courtroom for legal journalists and civil society would make a difference in reporting these landmark cases.<sup>278</sup>

#### The 2024 amendment proposes the following:

- 1 **Strengthening victims’ rights.** Victims of atrocities are given the following rights: to file lawsuits, to join judicial proceedings and appear as co-plaintiffs, to have a lawyer assigned to them, and to have access to psychosocial procedural support and procedural rights.
- 2 **Facilitating the outreach.** The reform calls for a better dissemination of German international criminal law cases. The amendment proposes the reform of Section 185 of the Court Constitution Act (GVB) to allow media representatives to use interpreters for court proceedings if they do not speak German. The Federal Ministry of Justice will also commission the English translation of groundbreaking judgments on international criminal law to reach non-German-speaking audiences around the world. The draft proposal also suggests facilitating the scientific and historical reception of international proceedings, including the possibility of filming, and recording proceedings.
- 3 **Changes in the VStGB and the Criminal Code—particularly with regard to sexual violence and enforced disappearances.** Section 7 VStGB (crimes against humanity) and Section 8 VStGB (war crimes against persons) should be adapted so that they also include the alternative offenses of sexual slavery, sexual assault, and forced abortion to ensure alignment with the corresponding norms of the Rome Statute of the ICC. In the offense of persecution as a crime against humanity (§ 7 VStGB), sexual orientation is added as an inadmissible reason for persecution. The offenses of using weapons whose splinters cannot be detected with X-rays and the use of permanently blinding laser weapons will also be added to the VStGB. In the case of enforced disappearance as a crime against humanity (§ 7 VStGB), the demand requirement will be deleted. In addition, the Criminal Code will contain a separate criminal offense of enforced disappearance in § 234b.

At the end of her interview, Judge Corinna Diesel of the Koblenz Higher Regional Court offered a valuable final reflection that is a worthy conclusion to this study. While describing a case that posed numerous unforeseeable and seemingly insurmountable challenges to the judges, she said, “No legal training could have prepared us for them [...] As you can see, we had to face quite a few challenges, but after 108 days [of the Koblenz trial], we managed to do so.”<sup>279</sup>

<sup>277</sup> Voss-Kyeck, interview.

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/071/25/PDF/G2007125.pdf?OpenElement>

<sup>278</sup> Stefanie Bock, *Vorsichtige Schritte in die richtige Richtung – Überlegungen zum Entwurf eines Gesetzes zur Fortentwicklung des Völkerstrafrechts in Kripoz 5*, (2003) 349–359, accessed October 19, 2023

<https://kripoz.de/wp-content/uploads/2023/09/bock-ueberlegungen-zum-entwurf-eines-gesetzes-zu-fortentwicklung-des-voelkerstrafrechts.pdf>

<sup>279</sup> Judge Diesel, interview.



The Mahmmal Memorial to the victims  
of war and tyranny, Berlin, Germany.  
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