

Germany's Pursuit of International Criminal Justice through Universal Jurisdiction

Introduction

On November 30, 2022, the German Federal Court of Justice (Bundesgerichtshof – BGH) upheld the first genocide conviction of an ISIS member who had enslaved two Yazidi women. This ruling reaffirmed the previous determination by the lower German Court that the convicted person had a special intent to destroy the Yazidi religious group, involving the brutal mistreatment of a five-year-old girl. This young girl had been subjected to horrific conditions, being tied to an outdoor grille with her hands raised at head height during lunchtime, in temperatures ranging from 38 to 51 degrees Celsius, without access to water or food. The girl suffered from heat stroke and lost her life.¹

This is just one example of numerous cases German courts are currently investigating and prosecuting under Germany's domestic universal jurisdiction statute. These cases involve individuals from various states and conflicts, such as Syria, Iraq, Sri Lanka, Afghanistan, Gambia, Ukraine, Rwanda, Democratic Republic of the Congo (DRC), and even Germany, with a significant focus on those who joined ISIS.²

These cases represent a noteworthy accomplishment in the domestic prosecution of international offenses, serving as a compelling example to other countries' legal systems. They highlight the potential effectiveness of domestic legal processes compared to alternative international mechanisms when it comes to holding individuals accountable for grave crimes. This becomes particularly apparent in situations where the International Criminal Court (ICC) lacks jurisdiction due to factors like the Syrian Conflict.³

This *Insight* will review the history of Germany's universal jurisdiction statute and describe some of the key features and cases.

How Does the German Legal System Address International Criminal Prosecution?

On December 10, 1998, the Federal Republic of Germany signed the Rome Statute of the ICC and later ratified it on December 11, 2000. In the interim period, Germany diligently took all necessary actions to align its national regulations with the Rome Statute, enabling its implementation. These actions encompassed amendments to the Basic Law and to several laws aimed at harmonizing domestic legislation, including the Code of Criminal Procedure (StPO), Courts Constitution Act (GVG), and notably, the establishment of the Code of Crimes against International Law (Völkerstrafgesetzbuch – VStGB).

The VStGB came into official effect on June 30, 2002, just one day before the Rome Statute. It is important to highlight that this unique legal approach, which involves having a dedicated code for international crimes alongside the national criminal code, is not exclusive to Germany. Comparable arrangements for incorporating the Rome Statute into national law can also be observed in the United Kingdom through the International Criminal Court Act 2001 and in Canada through the Crimes Against Humanity and War Crimes Act 2000.

In Germany's federal constitutional framework, jurisdiction for typical criminal offenses is vested in the individual federal states (Bundesländer). Nevertheless, Article 96(5) of the Basic Law outlines that the prosecution of international crimes is a federal matter. At the federal level, Germany operates a single court, the BGH, which exclusively handles appellate matters. The responsibility for investigating and prosecuting these international crimes is entrusted to the Generalbundesanwalt (Federal Public Prosecutor – GBA) situated in Karlsruhe, who works in coordination with the Bundeskriminalamt (Federal Criminal Police Office).

Prior to the VStGB coming into effect, German criminal law did not recognize international crimes except for genocide, as stipulated in former Section 220a StGB (Criminal Code of Germany). Neither crimes against humanity nor war crimes were explicitly covered by German criminal law. Offenses of an "international character" were prosecuted under national criminal law, such as charges related to bodily harm, murder, and manslaughter.

Since 2002, the GBA has been granted the authority to pursue cases universally related to genocide (Section 6 VStGB), crimes against humanity (Section 7 VStGB), and war

crimes (Sections 8-12 VStGB). However, regarding the crime of aggression outlined in Section 13 of the VStGB, the principle of universal jurisdiction applies only to a limited extent and primarily concerns German citizens or acts directed at Germany.

Following the enactment of the VStGB, there were only a restricted number of cases that led to legally binding judgments. Progress in the field of national and international criminal law was rather sluggish until 2015. However, a renewed impetus emerged as a consequence of conflicts in the Middle East. Consequently, the GBA experienced a surge in its caseload, which called for additional resources to effectively handle these cases.

Current Developments

The current situation in Syria and Iraq involves numerous cases in German courts, encompassing both state and non-state actors. These cases include:

- mutilations, as war crimes, where perpetrators were posing with beheaded corpses and have posted on social media platforms;
- kidnapping and torturing of civilians, as war crimes, where perpetrators abducted, tortured civilians and demanded ransom;
- killings, as war crimes;
- conscripting children under the age of fifteen years into the armed forces, as war crimes, where the wife of an ISIS member enrolled her child in the IS military training club known as the “Lion Cubs of the Caliphate”;
- directing attacks on humanitarian assistance, as war crimes;
- pillaging, as a war crime, where perpetrators seize and appropriate the property of civilians;
- directing military attacks against civilian population, as war crimes;
- systematic torture of prisoners as crimes against humanity by individuals who were member to Assad's regime; and
- genocide cases against Yazidi population.

Other cases include:

- killing as crimes against humanity in The Gambia between 2003-2006, where the alleged perpetrator killed a journalist and a member of the opposition;
- killing as war crime of governmental soldiers as member of the Tamil Tigers in Sri Lanka in 2008;⁴
- torturing, as crimes against humanity as member of the Afghan state forces;

- directing attacks by military means against civilian population as war crime in eastern Ukraine relating to Malaysian Airlines Flight 17;
- genocide case in Rwanda; and
- Crimes against humanity relating to the Kivu region in Democratic Republic of Congo.

Obstacles to Prosecution in Cases of “Foreign Crimes”

While the German authorities have the capacity to potentially prosecute these offenses universally, it's not a straightforward process due to the current framework of German criminal law. This framework is built upon the principle of legality, which mandates prosecution in most cases. The principle of legality, in conjunction with the principle of universal jurisdiction, also compels law enforcement agencies in Germany to conduct investigative activities to establish a foundation for possible future criminal prosecutions, regardless of whether the crime has a domestic connection or not.⁵

However, this wide prosecutorial discretion was deemed excessively broad, leading to the inclusion of a specific provision in Section 153f StPO which grants the public prosecutor's office the discretion to decide whether to pursue charges for crimes committed abroad. This provision only mandates prosecution when there is a domestic connection to Germany, such as when the suspect is in Germany or when the accused is a German citizen. Thus, numerous questions arise regarding how to determine the presence or absence of a domestic connection, especially in cases involving individuals in transit or those for whom transit is possible and expected.

This discretion is influenced by a multitude of logistical and practical hurdles that may either prompt or deter the prosecutor from initiating proceedings. Among the foremost concerns is the restricted awareness of foreign conflicts, encompassing unfamiliar cultural and contextual aspects. Additionally, the remoteness of evidence, victims, and witnesses is another significant obstacle. This is bound with language barriers potentially hindering effective communication and the prosecutor's comprehension of the evidential relevance. These obstacles open significant avenues for the defense should the prosecution proceed with legal action.

Inadequate resources and a lack of interest in foreign conflicts, especially when international relations and geopolitics are in the mix, can also exert significant influence on the prosecutor's decision to forego commencing the investigation. Prosecuting individuals linked to foreign conflicts has the potential to strain diplomatic ties with the relevant states, possibly triggering political tensions and diplomatic complexities.

The BGH has also determined that, in accordance with international law principles, there is no legal obstacle in the form of immunity that would hinder the prosecution of a member of the armed forces of a foreign state in Germany.⁶ Had the BGH ruled otherwise, it would have implied that German jurisdiction would be limited to non-state actors.

Interests of Affected Communities

Given that the ICC only considers cases that fall under its jurisdiction and exhibit a high level of seriousness, it falls upon member states to handle the prosecution of lower-ranking individuals.

When the German public prosecutor opts not to initiate proceedings because of the reasons mentioned above, especially because of the lack of domestic connection, this decision falls outside the purview of the courts. Consequently, the affected communities have no avenue to contest the prosecutor's choice to forego commencing legal actions. This situation thus can leave the victims of international crimes without recourse.

Furthermore, these victims are often forgotten due to international political considerations. If national prosecutorial authorities fail to prioritize these cases and attempt to excuse their inaction by citing a lack of domestic connections, they fail to send a strong message to both current and potential perpetrators that their actions will not be tolerated within their jurisdiction. It also allows perpetrators to potentially travel freely to that particular state without facing consequences for their crimes committed in a foreign country.

Conclusion

The universal jurisdiction cases brought before the German Court send a compelling message to victims' communities from various conflicts. They demonstrate that even if these cases do not fall within the jurisdiction of the ICC or other international mechanism, the domestic legal system can still address the atrocities these communities have endured and deliver justice. This is further exemplified by the growing trend of victims' communities and their representatives filing criminal complaints under universal jurisdiction, seeking investigations and arrest warrants against perpetrators who may be traveling internationally after the conflict has ended.⁷

It is essential to emphasize that, based on Nuremberg Principle I, every individual who commits an international crime should be held accountable, regardless of where or when

the crime took place. The only remaining question is who will ensure that justice is served and when it will happen.

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¹ Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 30, 2022, Beschluss 3 StR 230/22 (Ger.).

² See the cases in Christoph Safferling, Gurgun Petrossian, *Universal Jurisdiction and International Crimes in German Courts – Recent Steps Towards Exercising the Principle of Complementarity after the Entry into Force of the Rome Statute*, 11 EUR. CRIM. L.R. 242-263 (2021); see also Statement of Germany in the UNGA sixth committee, *The scope and application of the principle of universal jurisdiction* (Oct. 12, 2022), <https://new-york-un.diplo.de/un-en/-/2558190>.

³ See S.C. Res. S/2014/348 (May 22, 2014), https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_348.pdf (referring Syria to the ICC), vetoed by China and Russia.

⁴ The case was discontinued, as the suspect provided false information during his application for asylum.

⁵ Dirk Teßmer in: MüKo-StPO, 1st ed. 2016, § 153f, recital 17 (Ger.).

⁶ Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 21, 2021, Urteil, 3 StR 564/19, recital 12 et seq.

⁷ See, e.g., Myanmar activists, victims file criminal complaint in Germany over alleged atrocities, REUTERS, Jan. 24, 2023, <https://www.reuters.com/world/asia-pacific/myanmar-activists-victims-file-criminal-complaint-germany-over-alleged-2023-01-24/>; in relation to the Nagorno-Karabakh conflict, Ergänzung zur Strafanzeige beim Generalbundesanwalt in Karlsruhe wegen Kriegsverbrechen gegen Personen im Zusammenhang mit dem bewaffneten Konflikt um Berg-Karabach, dearjv Oct. 21, 2021, <https://dearjv.de/ergaenzung-zur-strafanzeige-beim-generalbundesanwalt-in-karlsruhe-wegen-kriegsverbrechen-gegen-personen-im-zusammenhang-mit-dem-bewaffneten-konflikt-um-berg-karabach/>.