

Universal Jurisdiction Law and Practice In Germany

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Introduction

This briefing paper was written by the Open Society Justice Initiative in partnership with TRIAL International and Allen & Overy. It provides an overview of the German national legal framework on universal jurisdiction, including statutory and case law, and its application in practice.

The briefing paper intends to contribute to a better understanding of domestic justice systems among legal practitioners who operate in the field of universal jurisdiction, to support the development of litigation strategies. It forms part of a series of briefing papers on selected countries.

The content is based on desk research with the support of pro bono lawyers from the relevant jurisdictions. In addition, interviews with national practitioners were conducted by the authors on the practical application of the law. Respondents are not named in order to protect their identity and affiliation with certain institutions or organizations.

Universal jurisdiction in this briefing paper is understood to encompass investigations and prosecutions of crimes committed on foreign territory by persons who are not nationals of the jurisdiction in question. This briefing paper focuses on the international crimes of genocide, war crimes, crimes against humanity, torture and enforced disappearance.

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Crimes invoking universal jurisdiction

In 2002, the Rome Statute of the International Criminal Court (Rome Statute) was domesticated into German law by the Code of Crimes against International Law (*Völkerstrafgesetzbuch* – VStGB).¹ The VStGB was amended by Article 1 of the Act of 22 December 2016,² effective as of 1 January 2017. With regard to jurisdiction, Section 1 VStGB specifically distinguishes between:

- Core crimes,³
- Aggression,⁴ and
- Other criminal offences.⁵

Under the VStGB, torture and enforced disappearance are only underlying crimes of crimes against humanity and war crimes, both of which invoke universal jurisdiction. German criminal law does not contain any other provisions explicitly allowing universal jurisdiction for torture or enforced disappearance as stand-alone crimes. Respective criminal actions can, however, also be prosecuted under general criminal law.⁶

1. Core crimes

All core crimes set forth in Sections 6 to 12 VStGB are subject to the principle of universal jurisdiction (*Weltrechtsprinzip*).⁷ Section 1 sentence 1 VStGB explicitly stipulates that respective criminal offences are punishable under the VStGB even when the offence was committed abroad and bears no relation to Germany (see limitations to this general principle under Universal Jurisdiction Requirements).

1.1 Genocide (Section 6 VStGB)

Prior to the adoption of the VStGB, the crime of genocide was set forth in Section 220a of the German Criminal Code (*Strafgesetzbuch* – StGB), which was based on the definition stipulated in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide dated 9 December 1948.⁸ This section was repealed with effect from 30 June 2002, and on the same day, Section 6 VStGB entered into force. The definition contained in Section 220a StGB was adopted almost unchanged in its wording. The definition is substantially the same as that contained in Article 6 Rome Statute.⁹

1 *Völkerstrafgesetzbuch* (Code of Crimes against International Law, hereinafter VStGB) of 26 June 2002, *Bundesgesetzblatt* (Federal Law Gazette, hereinafter BGBl.) 2002 I, p. 2254; cf. BT-Drucksache 14/8524.

2 BGBl. 2016 I, p. 3150.

3 Sections 6 to 12 VStGB.

4 Section 13 VStGB.

5 Sections 14 and 15 VStGB.

6 Sections 239, 239a, 239b, 340, 343 *Strafgesetzbuch* (German Criminal Code, hereinafter StGB).

7 Cf. Bundestag Drucksache (German Bundestag Travaux Préparatoires, hereinafter BT-Drucksache) 14/8524, p. 14.

8 Konvention über die Verhütung und Bestrafung des Völkermordes (Convention on the Prevention and Punishment of Genocide), BGBl. 1954 II, p. 729; cf. BT-Drucksache 14/8524, p. 19.

9 Cf. BT-Drucksache 14/8524, p. 19.

However, the German wording differs to the extent that it intentionally uses the grammatical singular with regard to the victims against whom the act is directed, whereas Article 6 Rome Statute more generally refers to a group. According to the travaux préparatoires, the German provision is explicitly applicable when relevant criminal actions are directed exclusively against any single member of a relevant group.¹⁰

Whereas Article 6(c) Rome Statute only refers to serious physical or mental harm – thus leaving certain room for interpretation – Section 6 paragraph 1 number 2 VStGB provides examples of physical harm by making reference to the kind of physical harm referred to in Section 226 StGB, which include injuries resulting in the victim either:

- losing sight in one or both eyes, hearing, speech or the ability to procreate;
- losing an important body limb or permanently losing the ability to use such; and/or
- being permanently and seriously disfigured or contracting a chronic illness, becoming paralyzed, mentally ill or disabled.¹¹

In contrast to the Rome Statute,¹² Germany has not explicitly adopted wording in the VStGB with respect to the direct or indirect public incitement of others to commit genocide. However, comparable actions can be punished in accordance with the general principles of the German Criminal Law provisions, which continue to apply in parallel to the VStGB according to Section 2 VStGB (see below Modes of Liability).¹³

1.2 Crimes against humanity (Section 7 VStGB)

The German legislature sought to define crimes against humanity in the VStGB as closely as possible to the wording of Article 7 Rome Statute.¹⁴ However, requirements of the German Constitution (*Grundgesetz* – GG), particularly the principle of legal certainty (*Bestimmtheitsgrundsatz*),¹⁵ set forth in Article 103 paragraph 2 GG and Section 1 StGB led to a more substantiated and narrow wording of Section 7 VStGB as compared to Article 7 Rome Statute, as stipulated below.

Crimes against humanity can be committed in times of peace as well as during international or non-international armed conflicts. Most underlying criminal acts are also punishable under the general principles of the German Criminal Law and – in accordance with Article 7 Rome Statute – constitute crimes against humanity by being committed as a part of a widespread or systematic attack directed against any civilian population. The following criminal actions can constitute crimes against humanity under Section 7 VStGB:

¹⁰ Cf. BT-Drucksache 14/8524, p. 19.

¹¹ The resulting physical harm has to be clinically measurable; a slight reduction in physical abilities is not sufficient. The mentioned criteria are to be applied restrictively, cf. Bundesgerichtshof (Federal Supreme Court, hereinafter BGH), 8 December 2010, 5 StR 516/10; BGH, 31 August 2017, ECLI:DE:BGH:2017:310817B4STR317.17.0.

¹² Article 6 in connection with Article 25(3)(e) Rome Statute.

¹³ Cf. BT-Drucksache 14/8524, p. 7, 19.

¹⁴ Cf. BT-Drucksache 14/8524, p. 19, 20.

¹⁵ The principle of legal certainty sets forth the requirement that a legal provision must be formulated in such a way that it is at least foreseeable which actions might fall under its scope. With respect to criminal law, this means that the basis for the penalty and the basis for the attribution of liability have to be certain.

1.2.1 Willful killing¹⁶

The crime of willful killing is defined in accordance with Article 7(1)(a) Rome Statute. The Rome Statute uses the term “murder” whereas Section 7 VStGB uses the term “killing a person.” The reason for the difference in language is that the term “murder” as used in the general German criminal law would require additional elements that are not necessary under the Rome Statute.¹⁷

1.2.2 Extermination¹⁸

In light of the close proximity to the crime of genocide, extermination is defined in accordance with former Section 220a paragraph 1 number 3 StGB. In contrast to Article 7(1)(b) and 7(2)(b) Rome Statute, the German provision requires the intent to destroy a population in whole or in part. In contrast to genocide, extermination is not limited to certain ethnic, racial, or religious groups and thus could in particular include social and political groups.¹⁹

1.2.3 Enslavement²⁰

The crime of enslavement is defined in accordance with Article 7(1)(c) and 7(2)(c) Rome Statute. The interpretation follows, in particular, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, Institutions and Practices Similar to Slavery dated 7 September 1956. Furthermore, the jurisprudence of the Criminal Tribunal for the former Yugoslavia should be taken into account.²¹

1.2.4 Deportation or forced transfer of persons²²

The crimes of deportation and forced transfer are substantially defined in accordance with Article 7(1)(d) and 7(2)(d) Rome Statute. The wording of the German provision, however, is slightly broader. With regard to the victims against whom the act is directed, Section 7 paragraph 1 number 4 VStGB only requires deportation or forcible transfer of a person, whereas Article 7(1)(d) Rome Statute more generally refers to the deportation or forcible transfer of population.

1.2.5 Torture²³

The crime of torture is defined in accordance with Article 7(1)(f) and 7(2)(e) Rome Statute.²⁴ The exception for lawful sanctions set out in Section 7 paragraph 1 number 5 VStGB only applies to forms of punishment that have been outlawed worldwide according to international customary law. Hence, forms of punishment that are at least

16 Section 7 para. 1 no. 1 VStGB.

17 Section 211 StGB refers to murder under specific aggravating circumstances.

18 Section 7 para. 1 no. 2 VStGB.

19 Cf. BT-Drucksache 14/8524, p. 20.

20 Section 7 para. 1 no. 3 VStGB.

21 Cf. BT-Drucksache 14/8524, p. 20; Prosecutor v. Kunarac et al., IT-96-23-T and IT-96-23/1-T, Judgement, 22 February 2001, para. 515 et seq.

22 Section 7 para. 1 no. 4 VStGB.

23 Section 7 para. 1 no. 5 VStGB.

24 Cf. BT-Drucksache 14/8524, p. 21.

regionally seen as legitimate are not considered torture; criminal liability under other regulations remains unaffected.²⁵

1.2.6 Sexual violence²⁶

The list of sex crimes generally follow Article 7(1)(g) and 7(2)(f) Rome Statute. However, sexual slavery and other forms of sexual violence of comparable gravity, which are explicitly listed in the Rome Statute, are replaced by the inclusion of the crime of sexual coercion within the meaning of Section 177 StGB.²⁷ Section 177 StGB criminalizes sexual acts performed against the victim or performed by the victim on the perpetrator or on a third person against the discernible will of the victim. The German provision lists additional non-consensual situations, including e.g. where the perpetrator takes advantage of the fact that the victim is unable to form or express a contrary will, takes advantage of a moment of surprise, or urges the victim to perform or accept the sexual act by threatening to inflict serious harm.²⁸

1.2.7 Enforced disappearance²⁹

The crime of enforced disappearance is substantially defined in accordance with Article 7(1)(i) and 7(2)(i) Rome Statute. Following the Rome Statute Elements of Crimes, the German provision distinguishes between two alternative criminal acts with the intention of removing that person from the protection of law for a prolonged period of time:

- (i) abducting that person on behalf of or with the approval of a state or a political organization, or otherwise severely depriving such person of his or her physical liberty, followed by a failure to immediately give truthful information, upon inquiry, on that person's fate and whereabouts, or
- (ii) refusing, on behalf of a state or a political organization or in contravention of a legal duty, to give information immediately on the fate and whereabouts of the person deprived of his or her physical liberty under the circumstances referred to under (i) above, or by giving false information thereon.³⁰

1.2.8 Causing serious physical or mental harm³¹

The crime of causing serious physical or mental harm (Zufügung schwerer körperlicher oder seelischer Schäden) set out in Section 7 paragraph 1 number 8 VStGB does not correspond to a Rome Statute crime against humanity. Physical harm encompasses in particular the kind of injuries referred to in Section 226 StGB (see above under Genocide).

25 Cf. BT-Drucksache 14/8524, p. 21.

26 Section 7 para. 1 no. 6 VStGB.

27 Cf. BT-Drucksache 14/8524, p. 21.

28 Section 177 para 2 StGB.

29 Section 7 para. 1 no. 7 VStGB.

30 Cf. BT-Drucksache 14/8524, p. 21.

31 Section 7 para. 1 no. 8 VStGB, defined in accordance with former Section 220a para. 1 no. 2 StGB.

1.2.9 Unlawful deprivation of physical liberty³²

The crime of unlawful deprivation of physical liberty is defined in accordance with Article 7(1)(e) Rome Statute.³³ The German provision does not explicitly list imprisonment as one form of deprivation of physical liberty. In contrast to Article 7(1)(e) Rome Statute, however, the German provision requires that the physical liberty was deprived in violation of customary international law as opposed to a violation of “fundamental rules of international law.”³⁴

1.2.10 Persecution³⁵

The crime of persecution is substantially defined in accordance with Article 7(1)(h) and 7(2)(g) Rome Statute and requires the deprivation or severe limitation of fundamental rights against an identifiable group or collectivity based on the same discriminatory grounds as listed in the Rome Statute. In contrast to the Rome Statute, however, the German provision does not require a connection with any other Rome Statute crime.³⁶ According to the travaux préparatoires, this nexus requirement was not incorporated into German law as it does not correspond to customary international law.³⁷

1.2.11 Apartheid³⁸

The crime of apartheid is substantially defined in accordance with Article 7(1)(j) and 7(2)(h) Rome Statute. However, the German provision requires the commission of another underlying crime and thus construes the crime of apartheid as a qualification of the crimes listed in Section 7 paragraph 1 StGB (*Qualifikationstatbestand*), whereas the Rome Statute Elements of Crime only require “an act of a character similar” to other underlying crimes.³⁹

1.2.12 Other inhumane acts

Due to the lack of compliance with the principle of legal certainty, the general clause contained in Article 7(1)(k) Rome Statute relating to other inhumane acts of a similar kind was not incorporated in Section 7 paragraph 1 VStGB.⁴⁰

1.3 War crimes (Sections 8 - 12 VStGB)

The Rome Statute sets forth war crimes in its Article 8, which contains around fifty offences. In the VStGB, war crimes are – without substantially deviating from the definitions set out in the Rome Statute⁴¹ – subdivided into five separate sections.⁴² To further facilitate the application of these provisions, the VStGB has for most parts

32 Section 7 para. 1 no. 9 VStGB.

33 Cf. BT-Drucksache 14/8524, p. 22.

34 Ibid.

35 Section 7 para. 1 no. 10 VStGB.

36 Cf. BT-Drucksache 14/8524, p. 22.

37 BT-Drucksache 14/8524, p. 22.

38 Section 7 para. 5 VStGB.

39 Cf. BT-Drucksache 14/8524, p. 22.

40 Cf. BT-Drucksache 14/8524, p. 22.

41 Cf. BT-Drucksache 14/8524, p. 23 et seq.

42 For an overview of the war crimes per the Rome Statute and their corresponding provisions in the VStGB, please refer to BT-Drucksache 14/8524, p. 24.

abolished the structural differentiation between war crimes committed in international armed conflicts and war crimes in non-international armed conflicts.⁴³ Crimes listed in

- Section 8 paragraph 3 VStGB (unlawful imprisonment of protected person, transfer of own population into occupied territory, forced recruitment of protected person, compelling service in hostile forces)
- Section 9 paragraph 2 VStGB (depriving nationals of hostile power of rights or actions) and
- Section 11 paragraph 3 VStGB (excessive damage to natural environment)

only apply in the context of an international armed conflict.⁴⁴

Most of the criminal offences in Sections 8 to 12 VStGB are also penalized in the StGB and constitute war crimes when committed in the context of an armed conflict.⁴⁵ The German provisions only exceed the scope of the Rome Statute where this complies with customary international law.⁴⁶ The VStGB distinguishes war crimes by the objective of the act as follows:

1.3.1 War crimes against persons⁴⁷

War crimes against persons include: willful killing (paragraph 1 number 1),⁴⁸ taking of hostages (paragraph 1 number 2),⁴⁹ torture or other inhumane treatment (paragraph 1 number 3),⁵⁰ sexual violence (paragraph 1 number 4),⁵¹ conscription or use of children in armed forces or hostilities (paragraph 1 number 5),⁵² unlawful deportation or transfer of persons (paragraph 1 number 6),⁵³ willful deprivation of the right of a fair and regular trial (paragraph 1 number 7),⁵⁴ exposure to the risk of death or of serious injury to health through medical/scientific experiments (paragraph 1 number 8),⁵⁵ gravely humiliating and degrading treatment (paragraph 1 number 9),⁵⁶ wounding of surrendered combatants (paragraph 2),⁵⁷ unlawful confinement (paragraph 3 number 1),⁵⁸ transfer of parts of a civilian population into occupied territory (paragraph 3 number 2),⁵⁹ and compelling of

43 Cf. BT-Drucksache 14/8524, p. 24.

44 Cf. BT-Drucksache 14/8524, p. 25.

45 Cf. BT-Drucksache 14/8524, p. 25.

46 Cf. BT-Drucksache 14/8524, p. 23.

47 Section 8 VStGB.

48 Corresponding to Article 8(2)(a)(i) Rome Statute.

49 Corresponding to Article 8(2)(a)(viii), 8(2)(c)(iii) Rome Statute.

50 Corresponding to Article 8(2)(a)(ii), Article 8(2)(a)(iii), Article 8(2)(b)(x), Article 8(2)(c)(i), Article 8(2)(e)(xi) Rome Statute.

51 Corresponding to Article 8(2)(b)(xxii), Article 8(2)(e)(vi) Rome Statute.

52 Corresponding to Article 8(2)(b)(xxvi), Article 8(2)(e) (vii) Rome Statute.

53 Corresponding to Article 8(2)(a)(vii), Article 8(2)(e)(viii) Rome Statute.

54 Corresponding to Article 8(2)(a)(vi), Article 8(2)(c)(iv) Rome Statute.

55 Corresponding to Article 8(2)(b)(x), Article 8(2)(e)(xi), Rome Statute.

56 Corresponding to Article 8(2)(b)(xxi), Article 8(2)(c)(ii) Rome Statute.

57 Corresponding to Article 8(2)(b)(vi), Article 8(2)(c) Rome Statute.

58 Corresponding to Article 8(2)(a)(vii) Rome Statute.

59 Corresponding to Article 8(2)(b)(viii) Rome Statute.

persons to serve in the forces of a hostile power (paragraph 3 number 3)⁶⁰ or to take part in operations of war directed against his or her own country (paragraph 3 number 4).⁶¹

1.3.2 War crimes against property and other rights⁶²

War crimes against property and other rights include: pillaging, destruction, appropriation and seizure of property (paragraph 1),⁶³ and the act of declaring rights and claims of nationals of a hostile party abolished, suspended or inadmissible in a court of law (paragraph 2).⁶⁴

1.3.3 War crimes against humanitarian operations and emblems⁶⁵

War crimes against humanitarian operations or emblems include: attacks against personnel and certain objects, including buildings and material involved in humanitarian assistance or peacekeeping missions in accordance with the Charter of the United Nations (paragraph 1 number 1),⁶⁶ attacks against personnel and certain material rightfully bearing the emblems of the Geneva Conventions (paragraph 1 number 2),⁶⁷ and causing a person's death or serious injury while making improper use of emblems of the Geneva Conventions (paragraph 2).⁶⁸

1.3.4 Prohibited methods of warfare⁶⁹

War crimes committed using prohibited methods of warfare include: attacks against a civilian population (paragraph 1 number 1),⁷⁰ attacks against civilian objects (paragraph 1 number 2),⁷¹ attacks causing excessive civil damages (paragraph 1 number 3),⁷² misusing the presence of civilians as a shield against operations of war (paragraph 1 number 4),⁷³ intentional starvation of civilians (paragraph 1 number 5),⁷⁴ declaring that no quarter will be given (paragraph 1 number 6),⁷⁵ treacherous killing or wounding (paragraph 1 number 7),⁷⁶ and attacks causing excessive damage to the natural environment (paragraph 3).⁷⁷

60 Corresponding to Article 8(2)(a)(v) Rome Statute.

61 Corresponding to Article 8(2)(b)(xv) Rome Statute.

62 Section 9 VStGB.

63 Corresponding to Article 8(2)(b)(xvi), Article 8(2)(b)(xiii), Article 8(2)(e)(v), Article 8(2)(e)(xii) Rome Statute.

64 Corresponding to Article 8(2)(b)(xiv) Rome Statute.

65 Section 10 VStGB.

66 Corresponding to Article 8(2)(b)(iii), Article 8(2)(e)(iii) Rome Statute.

67 Corresponding to Article 8(2)(b)(xxiv), Article 8(2)(e)(ii) Rome Statute.

68 Corresponding to Article 8(2)(b)(vii) Rome Statute.

69 Section 11 VStGB.

70 Corresponding to Article 8(2)(b)(i), Article 8(2)(e)(i) Rome Statute.

71 Corresponding to Article 8(2)(b)(iv) Rome Statute.

72 Corresponding to Article 8(2)(b)(iv) Rome Statute.

73 Corresponding to Article 8(2)(b)(xxiii) Rome Statute.

74 Corresponding to Article 8(2)(b)(xxv) Rome Statute.

75 Corresponding to Article 8(2)(b)(xii), Article 8(2)(e)(x) Rome Statute.

76 Corresponding to Article 8(2)(b)(xi), Article 8(2)(e)(ix) Rome Statute.

77 Corresponding to Article 8(2)(b)(iv) Rome Statute.

1.3.5 Prohibited means of warfare⁷⁸

War crimes of employing prohibited means of warfare include: employing poison or poisoned weapons (paragraph 1 number 1),⁷⁹ employing biological or chemical weapons (paragraph 1 number 2),⁸⁰ and employing certain bullets that expand or flatten easily in the human body (paragraph 1 number 3).⁸¹

1.4 Aggression (Section 13 VStGB)

Section 13 VStGB contains the crime of aggression, which was introduced in the VStGB by Article 1 of the Act of 22 December 2016,⁸² effective as of 1 January 2017, and is defined in accordance with Article 8*bis* of the Rome Statute.⁸³

1.5 Other crimes (Section 14, 15 VStGB)

Section 14 VStGB (violation of the duty of supervision) and Section 15 VStGB (omission in reporting a crime) are not subject to universal jurisdiction as set forth in the VStGB. Such criminal offences are subject to the general principles on territorial jurisdiction, in particular Sections 3 to 7 StGB.⁸⁴ This restriction is justified by the fact that proper investigations of such criminal offences would require insight into command and hierarchy structures that would regularly not be accessible in cases bearing no relation to Germany.⁸⁵

In contrast to the principle of command / superior responsibility which constitute a mode of liability, Sections 14 and 15 establish independent criminal offences (see below Responsibility of Commanders / Superiors).

The criminal offences under Sections 14 and 15 VStGB are considered less serious since they merely penalize (i) a breach of the duty of supervision which enables a subordinate to commit a crime pursuant to Section 6 to 13 VStGB that could have been foreseen and prevented by the superior or (ii) the omission to report such crime committed by a subordinate. In addition to the separate offences set forth in Sections 14 and 15 VStGB, responsibility of military commanders and other superiors is also set forth in Section 4 VStGB as a mode of liability (see below on Responsibility of Commanders and Civilian Superiors).

Modes of liability

The VStGB provides for two main categories of liability:

78 Section 12 VStGB

79 Corresponding to Article 8(2)(b)(xvii) Rome Statute.

80 Corresponding to Article 8(2)(b)(xviii) Rome Statute.

81 Corresponding to Article 8(2)(b)(xix) Rome Statute.

82 BGBl. 2016 I, p. 3150.

83 Inserted by Resolution RC/Res.6 of 11 June 2010.

84 Cf. Section 0 StGB.

85 Cf. BT-Drucksache 14/8524, p. 14.

(i) Individual criminal responsibility of the perpetrator for his or her own actions;⁸⁶ and

(ii) Responsibility of military commanders and civilian superiors for crimes committed by their subordinates.⁸⁷

Other than these, the VStGB does not stipulate any special modes of liability, e.g. for participation in a crime. Therefore, the general modes of liability set forth in the general criminal law of the StGB also apply to the crimes under the VStGB.⁸⁸

1. Responsibility of commanders / superiors

The VStGB distinguishes – in accordance with Article 28 Rome Statute – between military commanders and civilian superiors.⁸⁹ Furthermore, the VStGB includes superiors who are not in an official position of command, but have de facto control.⁹⁰

Under German law, Article 28 Rome Statute corresponds to Section 4 VStGB. According to Section 4 VStGB, if a commander/superior deliberately fails to prevent his or her subordinate from committing an offence set forth in Sections 6 to 13 VStGB, this person shall be responsible as if he or she committed the offence and, hence, be charged with the same crime.

Under Sections 14 and 15 VStGB – unlike Section 4 StGB – the commander/superior is not liable for the offence of the subordinate, but exclusively for his own breach of duty or omission. The violation of the duty of supervision (Section 14 VStGB) or the omission to report crimes of subordinates (Section 15 VStGB) are separate crimes which are not subject to universal jurisdiction (see above Other Crimes). Under Section 4 VStGB, the commander/superior can be sentenced like the direct perpetrator, whereas the commission of crimes under Sections 14 and 15 VStGB are punishable by a sentence of maximum five years.

2. General modes of liability

2.1 Co-perpetration

If the offence is committed jointly by more than one person, each of them is liable as a principal.⁹¹ The requirements of co-perpetration under German law are almost the same as those under Article 25(3)(d) Rome Statute and encompass joint perpetration under Article

⁸⁶ Sections 6 to 15 VStGB refer to the direct perpetrator.

⁸⁷ Section 4 VStGB.

⁸⁸ Cf. Section 2 VStGB.

⁸⁹ Section 4 para. 1 VStGB.

⁹⁰ Section 4 para. 2 VStGB.

⁹¹ Section 25 para. 2 StGB.

25(3)(a) Rome Statute. Under German law, a contribution in the preparatory stages of the crime may also be sufficient in certain cases.⁹²

2.2 Indirect commission

Any person who commits the offence through another person is also liable as the principal actor.⁹³ The requirements of indirect commission under German law are similar to those set forth in Article 25(3)(a) Rome Statute.

2.3 Ordering and inducing

Under German law, any person who intentionally orders/induces another to intentionally commit an unlawful act will be sentenced as if this person were the principal actor.⁹⁴ The requirements of ordering/inducing liability under German law are substantially the same as those applying to ordering/soliciting/inducing as referred to in Article 25(3)(b) Rome Statute.

2.4 Aiding and abetting

Under German law, any person who intentionally assists another in the intentional commission of an unlawful act shall be convicted and sentenced as an aider.⁹⁵ The requirements of German law are substantially the same as those set out for aiding and abetting in Article 25(3)(c) Rome Statute.

2.5 Membership liability

German law stipulates criminal liability for membership in a criminal organization, including one with the aim to commit genocide, crimes against humanity, and war crimes.⁹⁶ Such membership liability is a crime in itself and not merely a mode of liability. It is not mandatory that the members of an organization actually commit a crime; the intention to do so is sufficient. However, membership liability does not set forth the imputation of acts of members of the organization to other members. Membership liability does not apply if the offence relates to an organization outside the member states of the European Union, unless the offence was committed by way of an activity exercised within Germany or if the offender or the victim is a German or is found within Germany.⁹⁷

3. Case law

The case of Onesphore R.⁹⁸ shows how difficult the distinction between co-perpetration and aiding and abetting can be. The Higher Regional Court (*Oberlandesgericht*) of Frankfurt am Main found the Rwandan citizen Onesphore R. guilty of genocide that took

92 Cf. BGH, 12 September 2018; ECLI:DE:BGH:2018:120918B5STR232.18.0.

93 Section 25 para. 1 StGB.

94 Section 26 StGB.

95 Section 27 para. 1 StGB.

96 Section 129 para. 1 and Section 129a para. 1 StGB; cf. BGH, 28 June 2018, ECLI:DE:BGH:2018:280618BSTB11.18.0.

97 Section 129b para. 1 sentence 2 StGB.

98 Oberlandesgericht (Higher Regional Court) Frankfurt a.M., 29 December 2015, ECLI:DE:OLGHE:2015:1229.4.3STE4.10.4.1.15.0A.

place in the church of Kiziguro, Rwanda, in 1994 and sentenced him to life imprisonment. Together with other authority figures, the defendant, in his capacity as mayor of the Rwandan community of Muvumba, prepared and organized an attack against unarmed Tutsi who had sought refuge in a church compound. Onesphore R. was initially convicted of aiding and abetting the crime of genocide. After review by the Federal Supreme Court (*Bundesgerichtshof*) and referral back to the Higher Regional Court of Frankfurt, Onesphore R. was sentenced for jointly committing genocide as a co-perpetrator under former Section 220a StGB. He had not committed acts of killing himself, but the court regarded it as proven that he had made substantial contributions to the crime.

Temporal jurisdiction over crimes

1. Beginning of temporal jurisdiction

Article 103 paragraph 2 GG and Section 1 StGB stipulates that an act may only be punished by criminal law if criminal liability had been established by law before the act was committed. With this, German law forbids retroactive application of criminal law (*Rückwirkungsverbot*).

1.1 Genocide

The crime of genocide came into force on 22 February 1955 in Section 220a StGB and was subsequently transferred into Section 6 VStGB with substantially the same wording, effective as of 30 June 2002.⁹⁹ Prior to the adoption of the VStGB, the now suspended Section 6 number 1 StGB provided for universal jurisdiction regarding the crime of genocide.

While the VStGB itself is not applicable to criminal acts committed prior to its adoption,¹⁰⁰ relevant criminal acts may be prosecuted under the former Section 220a StGB. Therefore, acts committed prior to 22 February 1955 cannot be prosecuted under the crime of genocide at all. Acts committed after 30 June 2002 can be prosecuted under the VStGB, including under universal jurisdiction. Any relevant acts committed in between those two dates are subject to a case-by-case assessment by German criminal courts.

1.2 Other core crimes

The provisions relating to crimes against humanity and war crimes entered into force with implementation of the VStGB on 30 June 2002. Accordingly, only crimes committed after this date can be prosecuted under universal jurisdiction.

However, Section 6 number 9 of the StGB (which applies to acts before 2002) provides that regardless of where the crime was committed, general criminal law applies to acts that must be prosecuted on the basis of an international convention binding for Germany, such as the Four Geneva Conventions ratified in 1954 or the Convention against Torture

⁹⁹ BGBl. 1954 II, p. 729; BGBl. 1955 II, p. 210.

¹⁰⁰ The same is true for the Rome Statute according to its Article 24 para. 1.

ratified in 1990. For example, a case of torture committed before 30 June 2002 could qualify as causing grievous bodily harm under Section 226 StGB, with a statute of limitation of twenty years.¹⁰¹ At the time of this publication, the German Federal Supreme Court had not defined precisely what would be the temporal scope of German jurisdiction before 2002 for war crimes and torture cases.

1.3 Aggression

The crime of aggression entered into force on 1 January 2017.¹⁰² Accordingly, only relevant criminal acts committed after this date can be prosecuted under this provision. Prior to the enactment of this provision, however, German general criminal law contained a similar provision in the former Section 80 StGB since the German constitution stipulates that preparing or leading a war of aggression is a crime.¹⁰³

2. Statute of limitations

As regards the crimes contained in the Sections 6 to 13 VStGB, Section 5 VStGB explicitly stipulates that the statutes of limitations set forth in German general criminal law do not apply, stating that neither prosecution nor execution of sentences shall be subject to such limitations.

As regards the criminal offences of violation of the duty of supervision (Section 14 VStGB) and omission to report a crime (Section 15 VStGB), the VStGB does not specify a statute of limitations. Therefore, the general criminal law set forth in the StGB applies. Accordingly, criminal prosecution relating to those less serious criminal offences of the VStGB is no longer possible after a time span of five years.¹⁰⁴

Universal jurisdiction requirements

As regards the core crimes of genocide, crimes against humanity and war crimes, Section 1 sentence 1 VStGB does not stipulate any criteria restricting universal jurisdiction. One of the main objectives in adopting the VStGB was for Germany to ensure its ability to pursue crimes falling within the jurisdiction of the International Criminal Court (ICC).¹⁰⁵ However, in practice the prosecution has the discretion to refrain from investigating when certain requirements are not met (see below on Prosecutorial Discretion).

As regards the crime of aggression, Section 1 sentence 2 VStGB contains certain criteria restricting the principle of universal jurisdiction. The provision stipulates that the VStGB is only applicable if (i) the perpetrator is a German national or (ii) the offence is directed against the Federal Republic of Germany.

¹⁰¹ Cf. Section 79 para. 3 no. 2 StGB.

¹⁰² BGBl. 2016 I, p. 3151.

¹⁰³ Article 26 Grundgesetz (German Constitution, hereinafter GG).

¹⁰⁴ Section 78 para. 3 no. 4 StGB.

¹⁰⁵ Cf. BT-Drucksache 14/8524, p. 12.

Section 14 (violation of the duty of supervision) and Section 15 VStGB (omission to report a crime) are not subject to universal jurisdiction (see above Other Crimes).¹⁰⁶

1. Presence of the suspect

The presence of the suspect in Germany is not generally necessary for the investigation of core international crimes.¹⁰⁷ If the suspect is not physically present in Germany, prosecutors can still start investigations to secure all available evidence for a potential later trial.¹⁰⁸ However, under the procedural rule on prosecutorial discretion, prosecutors can refrain from investigating a crime under VStGB if the suspect is not present in Germany and there is no anticipation of his/her presence (see below on Prosecutorial Discretion).

Where there is no identified suspect, a structural investigation (*Strukturermittlungsverfahren*) can be opened.¹⁰⁹ The investigation is led by the Federal Prosecutor General and is not yet regulated in the law, as it refers to a general situation as opposed to a specific case as required by Section 264 of the German Criminal Procedure Code (*Strafprozessordnung – StPO*). Evidence accessible in Germany can be secured, e.g. by questioning potential witnesses and collecting visual evidence.¹¹⁰

Structural investigations are led irrespective of whether it is foreseeable that investigation proceedings on specific cases will arise. Evidence secured within the framework of such proceedings can be used in further investigative procedures or submitted to a foreign or international jurisdiction, if it falls under the framework of mutual legal assistance.¹¹¹

However, a trial can never be initiated without the accused being before the court. It is a mandatory requirement for a lawful process that defendants have the chance to defend themselves against the accusations brought against them.¹¹² Prosecutors would need to apply for an arrest warrant to the competent judge against the accused.¹¹³

If the defendant was present at the beginning of a trial, it can be legally admissible to pursue the trial without him or her, but only if one of the following exceptions is fulfilled:

106 Section 1 VStGB.

107 Cf. Section 1 VStGB.

108 Cf. BT-Drucksache 14/8524, p. 37 and 38; interview with a German prosecutor on 31 January 2019.

109 On structural investigations in the context of Syria, see Kaleck, *Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?*, in *Journal of International Criminal Justice*, Volume 16, Issue 1, 1 March 2018, p. 165-191.

110 Cf. Jessberger, *Stellungnahme vor dem Rechtsausschuss des Deutschen Bundestages zu dem Antrag der Abgeordneten Tom Koenigs u.a.*, (Opinion to the Law Committee of the German Bundestag on the Inquiry of MP Tom Koenigs et al.), 25 April 2016, p. 6.

111 Cf. Jessberger, *Stellungnahme vor dem Rechtsausschuss des Deutschen Bundestages zu dem Antrag der Abgeordneten Tom Koenigs u.a.* (Opinion to the Law Committee of the German Bundestag on the Inquiry of MP Tom Koenigs et al.), 25 April 2016, p. 5, 6.

112 Article 103 para. 1 GG.

113 Interview with a German prosecutor on 31 January 2019.

- the defendant leaves during the trial and has already been questioned and his or her further presence is not considered necessary and the defendant has been notified accordingly;¹¹⁴
- the defendant has intentionally caused his or her physical inability to stand trial;¹¹⁵ or
- the defendant has exhibited disorderly behavior during the trial.¹¹⁶

2. Double criminality

Under general criminal law, prosecution of crimes committed abroad is dependent on a double criminality requirement, where the criminal act in question must be criminalized in the state in which it was committed as well as in Germany. It must also involve a German national or a specific link to Germany.¹¹⁷ The crimes set forth in the VStGB, however, do not require double criminality. Hence, German law enforcement may start investigations and courts may pass a judgment even if the criminal act in question is not criminalized in the state in which it was committed.

3. Prosecutorial discretion

According to the principle of mandatory prosecution (*Legalitätsprinzip*), German prosecutors generally have the obligation to investigate and prosecute all crimes under the VStGB to avoid impunity and to gather evidence that might be of use in a later trial in country or abroad.¹¹⁸ (On thresholds to open investigations or issue indictments, see below [Investigation Stage](#).)

However, in certain situations prosecutors have the discretion on whether or not to investigate and prosecute such crimes. This prosecutorial discretion to bring public charges of VStGB crimes is regulated in Section 153f StPO.¹¹⁹

The procedural rule in Section 153f StPO gives the prosecutor the choice to deviate from the principle of mandatory prosecution in situations where there is no nexus to Germany.¹²⁰ Consequently, if the case bears a nexus to Germany, the competent prosecutor usually has a legal duty to begin an investigation. Without a nexus to Germany, the main principle is to give priority to the primary right and duty of international courts or prosecutors from the victims' or offenders' home states or the jurisdiction in which the crime was committed.¹²¹

114 Section 231 para. 2 Strafprozessordnung (Criminal Procedure Code, hereinafter StPO).

115 Section 231a StPO.

116 Section 231b StPO.

117 Sections 5 to 7 StGB.

118 Cf. BT-Drucksache 14/8524, p. 37.

119 Cf. BT-Drucksache 14/8524, p. 37; Section 153f StPO.

120 Cf. BT-Drucksache 14/8524, p. 37.

121 Cf. BT-Drucksache 14/8524, p. 37. For an example of an investigation that was closed due to open investigations before the ICC, see BGH, 26 January 2011, BGH 4 BGs 1/11.

According to Section 153f paragraph 1 and 2 StPO which embodies this nexus test, the prosecutor **may choose** to forgo investigation and prosecution if:

- no German national is suspected to have committed the offence;
- the offence was not committed against a German national;
- no suspect is, or is expected to be, present in Germany;
- the offence is being prosecuted by an international court or by the state where the offence was committed, or whose citizen committed the offence, or was injured by the offence.

The wording of Section 153f paragraph 1 and 2 StPO clearly states that the prosecutor has the discretion to decide whether or not to pursue the case, i.e. even if none of the above factors are met, the prosecutor may still choose to investigate and prosecute.

In practice, the exercise of prosecutorial discretion has shown that prosecutors investigate all cases where they can gather evidence in Germany or where victims or witnesses are present in German territory, even if none of the conditions listed in Section 153f paragraph 1 and 2 stop are fulfilled. They refrain from starting an investigation where there is no chance to gather evidence without resorting to mutual legal assistance, unless the suspect is of German nationality. Prosecutors use mutual legal assistance, but do not rely only on this evidence to build their cases.¹²²

Where evidence is not available in Germany, it remains a discretionary decision, meaning that the prosecutor could continue investigations, but prosecutors will in practice only do so in atypical cases, especially where there is a risk that effective prosecution by another state or the ICC cannot be guaranteed, e.g. because of corruption. If no investigations are led by another jurisdiction, however, it is the legal duty of German prosecutors to investigate crimes according to the principle of mandatory prosecution.¹²³

4. Political approval

Investigations and prosecutions of VStGB crimes under universal jurisdiction are not subject to any formal or informal political approval.¹²⁴

5. Subsidiarity

German law enforcement and courts are primarily competent to investigate and sentence crimes under the VStGB. Generally, they do not have a legal duty to step aside in favor of other jurisdictions. However, the prosecution has discretion to not initiate or discontinue investigations if the ICC or another state with territorial or active/passive personality jurisdiction establishes its own case (see above on Prosecutorial Discretion).¹²⁵ It is

¹²² Interview with European Center for Constitutional and Human Rights (hereinafter ECCHR) on 8 February 2019.

¹²³ Cf. BT-Drucksache 14/8524, p. 38.

¹²⁴ Such approval is e.g. necessary for prosecution of offences committed against representatives of foreign states on German territory, cf. Section 104a StGB.

¹²⁵ Section 153f para. 1, sentence 2, para. 2 no. 4 StPO; in BGH, 26 January 2011, BGH 4 BGs 1/11 the prosecution decided to close investigations due to on-going investigations before the ICC.

insufficient if the prosecution in another jurisdiction is only pursued as a pretense or without genuine willingness for justice.¹²⁶

Key steps in criminal proceedings

1. Investigation stage

As of February 2019, there are currently more than 80 investigations ongoing in Germany based on the principle of universal jurisdiction, divided between 11 prosecutors.¹²⁷ Investigations are open regarding crimes committed in the Middle East, including in Syria, Iraq and Libya, as well as in Africa, including in the Great Lakes region.

1.1 Initiation of an investigation

1.1.1 Competent authorities

The Federal Prosecutor General (Generalbundesanwalt) is the competent body to lead criminal investigations regarding crimes under the VStGB and chooses the police unit that will investigate crimes under the VStGB. In general, it will be the Federal Criminal Police Office (Bundeskriminalamt) that will be the competent police unit.¹²⁸ It reports to the Federal Prosecutor General. The Federal Prosecutor General's office is located at the German Federal Supreme Court (Bundesgerichtshof).

Within the Federal Criminal Police Office, investigations regarding core crimes are assigned to the Central Authority for Fighting War Crimes (*Zentralstelle für die Bekämpfung von Kriegsverbrechen – ZBKV*), or at the respective point of contact for ZBKV matters at the State level offices for criminal investigations (*Landeskriminalamt*).

1.1.2 Complaints by victims and/or NGO

Anybody – including victims and NGOs – can report an offence orally or in writing to any public prosecution office, the police, or to local courts.¹²⁹ It is advisable to address a complaint directly to the competent authorities listed above. However, any other aforementioned authority will refer a complaint to the competent authorities.

The complaint should be made in the German language if possible, since other languages may delay the process. However, people who cannot speak German will be supported appropriately, e.g. by an interpreter.¹³⁰ The application should include contact details, a full version of the facts, and any information available about the suspect.

1.1.3 Opening of investigations

Once prosecutors obtain notice of a possible crime, they are obligated to investigate the case unless the law provides otherwise (principle of mandatory prosecution).¹³¹ For

¹²⁶ Cf. BT-Drucksache 14/8524, p. 38.

¹²⁷ Interview with a German Prosecutor on 31 January 2019.

¹²⁸ Section 4 para. 1 no. 4 Gesetz über das Bundeskriminalamt (Law of the Federal Criminal Law Office).

¹²⁹ Section 158 para. 1 StPO.

¹³⁰ Section 158 para. 4 StPO.

¹³¹ Section 152 StPO; an example of an exception to this principle would be Section 153f StPO.

VStGB crimes, the law allows prosecutors to exercise discretion over the opening of investigations (see above under Prosecutorial Discretion).

The threshold to open an investigation is defined in Section 152 paragraph 2 StPO and provides that there must be sufficient factual indications (*zureichende tatsächliche Anhaltspunkte*) of a crime for the prosecutor to investigate.

1.1.4 Length of an investigation

German criminal law does not contain any specific rules on the length of an investigation. Since genocide, crimes against humanity, war crimes, and aggression are not subject to statute of limitations, such crimes could generally be prosecuted at any given time. However, the fair trial principle set forth in Article 6 European Convention of Human Rights might limit the length of an on-going investigation. Therefore, subject to the complexity of the individual case at hand, any investigation must be completed within a reasonable time.

1.2 Completion of investigations

1.2.1 Possible outcomes

At the end of the investigation, an indictment or termination order will be issued by the prosecutor and sent to the competent court.¹³² In case of an indictment, the competent court will subsequently order the opening of the trial if there appears to be reasonable grounds to suspect that the indicted accused has committed the offence.¹³³ Otherwise, it will issue a dismissal.¹³⁴

The suspect is to be indicted whenever there are **reasonable grounds to believe** that he or she might be convicted at the end of the trial (*hinreichender Tatverdacht*).¹³⁵ The bill of indictment shall indicate the criminal offence with which the accused is charged, the time and place of commission, the statutory elements and the penal provisions which are to be applied.¹³⁶

1.2.2 Possible challenges

If the investigation is closed because the prosecution is of the view that there are no reasonable grounds to believe the suspect might have committed the crimes, the victims can appeal this decision by filing a formal complaint to the official superior at the public prosecution's office. As the investigating body for crimes under the VStGB is the Federal Prosecutor General, the official superior is the Federal Prosecutor General him/herself.¹³⁷

¹³² Section 170 StPO.

¹³³ Section 203 StPO.

¹³⁴ Sections 203, 204 StPO.

¹³⁵ Section 170 StPO; interview with a German prosecutor on 31 January 2019.

¹³⁶ Section 200 StPO.

¹³⁷ Section 172 StPO.

If the Federal Prosecutor General decides not to grant the complaint, victims can resort to the Higher Regional Court.¹³⁸ If the Court finds that the threshold for an indictment is met, it can order the issuance of an indictment.¹³⁹

Where the prosecutor decides to exercise his or her discretion and refrain from investigations based on the factors listed in §153f StPO, the jurisprudence is not settled as to whether such a decision can be judicially challenged by victims.¹⁴⁰ The explicit wording of the law does not allow such a judicial review.¹⁴¹ However, the Higher Regional Court of Stuttgart ruling on an application for judicial review of the prosecutor's discretionary decision not to open investigations has previously examined if the conditions of §153f StPO are met and whether the prosecutor exercised his or her discretionary power in an arbitrary manner (and came to the conclusion that the decision of the prosecutor was valid).¹⁴² So far, no recourse against a decision from the prosecutor not to investigate using his or her discretionary power has been successful.¹⁴³

The accused cannot formally challenge an indictment except by defending himself or herself against the accusations in trial.¹⁴⁴ However, the indictment will be fully reviewed by the competent judge prior to the opening of a trial.¹⁴⁵

In case the court orders the opening of the trial, the accused can only challenge the accusations by standing trial. A dismissal by the court, on the other hand, can only be challenged by the Federal Prosecutor General.¹⁴⁶

1.3 Arrest warrant

An arrest warrant and pre-trial detention may be ordered against the accused regardless of whether the accused is located in Germany. It requires a **significant suspicion** (*dringender Tatverdacht*) that the alleged offence was committed by the suspect and, in addition, the existence of one of the following grounds for an arrest (*Haftgrund*):¹⁴⁷

- (i) it is established that the accused has fled or is in hiding;
- (ii) there is a risk that the accused will evade the criminal proceedings; or
- (iii) the accused's conduct gives rise to the strong suspicion that he or she will destroy, alter, remove, suppress, or falsify evidence; improperly influence the co-

138 Section 172 para. 2 StPO.

139 Section 175 StPO

140 See Singelstein and Stolle, *Völkerstrafrecht und Legalitätsprinzip – Klageerzwingungsverfahren bei Opportunitätseinstellungen und Auslegung des §153f StPO* (International criminal law and principle of mandatory prosecution – Judicial review of discretionary closure of investigations and interpretation of §153f StPO), ZIS 3/2006, January 2006.

141 Section 172 para 2 StPO.

142 Oberlandesgericht (Higher Regional Court) Stuttgart, 13 September 2005, 5 Ws 109/05: The Court found that the conditions in Section 153f StPO were met and that the prosecutor did not use the discretion in an arbitrary manner and thus rejected the application for judicial review.

143 Interview with a German prosecutor on 31 January 2019 and ECCHR on 8 February 2019.

144 Section 210 para. 1 StPO.

145 Cf. Münchener Kommentar zur Strafprozessordnung (Munich Commentary on the Criminal Procedure Code, hereinafter MüKo StPO), Section 170 para. 33.

146 Section 210 para. 2 StPO.

147 Section 112 para. 1 and 2 StPO; Cf. BGH, 21 April 2016, ECLI:DE:BGH:2016:210416BAK19.16.0.

accused, witnesses, or experts; or cause others to do so, and if, therefore, the danger exists that establishment of the truth will be made more difficult.¹⁴⁸

It is noteworthy that in case of alleged genocide by killing (Section 6 paragraph 1 number 1 VStGB) the above listed grounds are not required for an arrest warrant.¹⁴⁹

If the suspect is located in a country with which Germany has a multilateral or bilateral treaty regarding extradition, Germany can issue an arrest warrant and apply for the extradition of the suspect.¹⁵⁰ The extradition will be executed by the law enforcement authorities of the respective country.¹⁵¹

Even if a foreign state forbids extradition of its own citizens, potential suspects would face extradition as soon as they are present in a country with which Germany has an extradition treaty. Germany could also apply for a European arrest warrant, which should be executed by every member state of the European Union.¹⁵²

1.4 Victim rights and participation at investigation stage

Victims can join the proceedings as joint plaintiffs. However, a joint plaintiff status can only be obtained once the trial has been opened.¹⁵³ The status as joint plaintiff affords victims additional rights during trial, but do not confer special status during investigations (see below on Victim Rights and Participation at Trial Stage).

Irrespective of whether they have joint plaintiff status, victims have the following rights at investigation stage:

- the right to request information on whether the suspect is in custody;¹⁵⁴
- the right to appoint a lawyer or to be represented by a lawyer;¹⁵⁵ (at their own expense if victims are not entitled to be joint plaintiff, otherwise they will be reimbursed for the statutory costs if the defendant is sentenced for a crime that relates to the victim);¹⁵⁶
- the right to have a lawyer inspect the prosecution files or to obtain information from those files;¹⁵⁷
- the right to have a person the victim trusts present when the victim is interviewed;¹⁵⁸

148 Section 112 para. 2 StPO.

149 Section 112 para. 3 StPO.

150 See e.g. Council of Europe, European Convention on Extradition, 13 December 1957. For requests by foreign States to extradite a suspect from Germany to the foreign State, see provisions in Gesetz über die internationale Rechtshilfe in Strafsachen (Law on international mutual legal assistance in criminal procedures, hereinafter IRG).

151 Cf. IRG.

152 Cf. Rahmenbeschluss (Council Framework Decision) 2002/584/JHA.

153 Cf. Section 395 para. 1 StPO.

154 Section 406d para. 2 no. 2 to 4 StPO.

155 Section 406f para. 1 StPO.

156 Section 397a para. 2 StPO.

157 Section 406e StPO.

158 Section 406f para. 1 StPO.

- the right to be provided with an interpreter, if necessary;¹⁵⁹
- the right to protection e.g. by police presence at the residence, change of identity or appearance, and/or inclusion into a witness protection program (see below on [Witness and Victim Protection](#));
- the right to receive notice about the termination of the investigation.¹⁶⁰

There are no specific procedural rights for NGOs since they are neither victims of a criminal offense nor entitled to act as joint plaintiff.

2. Trial stage

2.1 Competent authorities

For crimes under the VStGB, Higher Regional Courts are competent.¹⁶¹ The domicile of the accused or the place of habitual residence determines which Higher Regional Court has local jurisdiction.¹⁶² Higher Regional Courts usually consist of a panel of five judges.

2.2 Possible challenges

In general, there are normally two methods of challenging a ruling: an appeal (*Berufung*),¹⁶³ during which the court will hear and consider the first-instance evidence anew and make its own findings on conviction or acquittal based thereon; and a revision (*Revision*),¹⁶⁴ which means the court's review is limited to the interpretation of matters of law.

However, rulings of Higher Regional Courts cannot be challenged by means of an appeal.¹⁶⁵ Since Higher Regional Courts are competent for crimes under the VStGB a first instance, such rulings can only be challenged by means of a revision. The competent court for the revision is the Federal Supreme Court.¹⁶⁶

Either the defendant or the prosecutor can challenge an unfavorable decision. Victims generally do not have a right to challenge a criminal decision unless they are joint plaintiffs (see below on [Victim Rights and Participation at Trial Stage](#)).¹⁶⁷

2.3 Victim rights and participation at trial stage

2.3.1 Joint plaintiff

For certain crimes against personal rights listed in Section 395 paragraph 1 StPO, such as murder and rape, the injured person – i.e. victims and certain relatives of a killed person –

¹⁵⁹ Section 158 para. 4; Section 397 para. 3 StPO.

¹⁶⁰ Section 406d para. 1 sentence 1 no. 1 StPO.

¹⁶¹ Section 120 para. 1 no. 8 Gerichtsverfassungsgesetz (Justice System Act, hereinafter GVG).

¹⁶² Section 8 StPO.

¹⁶³ Section 312 ff. StPO.

¹⁶⁴ Section 333 ff. StPO.

¹⁶⁵ Cf. Section 312 StPO which only allows appeals for lower courts.

¹⁶⁶ Section 133 GVG.

¹⁶⁷ Sections 400, 401 StPO.

has the option to join the public prosecutor as a joint plaintiff.¹⁶⁸ The same applies if joining the proceedings as joint plaintiff is necessary to safeguard the victim's interest, in particular where the consequences of the crime are grave.¹⁶⁹ Joint plaintiffs are entitled to a set of procedural rights, listed below, that allow them to participate in the proceedings. In addition, joint plaintiffs can (but do not have to) make a claim for reparation (see below on [Reparation for Victims in Criminal Proceedings](#)).

The crimes under the VStGB are not explicitly mentioned in Section 395 paragraph 1 StPO. However, victims of crimes under the VStGB and certain relatives of killed persons¹⁷⁰ can be admitted as joint plaintiffs because the underlying crimes also constitute crimes listed in Section 395 paragraph 1 StPO, e.g. murder. In addition, admission as a joint plaintiff can also be granted due to the serious consequences of a criminal act which could be applicable for VStGB crimes.¹⁷¹

The list of natural persons entitled to be joint plaintiffs is set out in Section 395 StPO and is exhaustive. It does not include legal persons, such as NGOs. In the case of *Onesphore R.*,¹⁷² for instance, joint plaintiffs were admitted to the proceedings. The joint plaintiffs in this case were surviving victims of a massacre and close relatives of those who had been killed.

Joining the public prosecutor as joint plaintiff is possible at any stage of the proceedings and the court decides about the application of a victim.¹⁷³ There is no strict evidentiary threshold to obtain the joint plaintiff status; the applicant only needs to make a plausible claim that he or she is a direct victim to join the procedure as a joint plaintiff.¹⁷⁴ Joint plaintiffs do not have to be present in Germany to be part of the proceedings.¹⁷⁵

A decision rejecting the admission of a joint plaintiff can be appealed by the victim and the public prosecutor. A decision granting admission as a joint plaintiff can be appealed by the accused and the public prosecutor.¹⁷⁶ As an exception, the court's decision cannot be challenged when the application is based on exceptional circumstances, such as gravity.¹⁷⁷

Once the trial is opened, joint plaintiffs enjoy a number of additional rights to regular victims, which entitle them to active participation during the trial. In particular, as a joint plaintiff, the victim has the right to:

- attend the trial;

¹⁶⁸ Section 395 para. 2 StPO.

¹⁶⁹ Section 395 para. 3 StPO.

¹⁷⁰ According to Section 395 para. 2 no. 1 StPO, victims whose children, parents, siblings, spouses or life partners were killed can become injured plaintiffs.

¹⁷¹ Section 395 para. 3 StPO.

¹⁷² Oberlandesgericht (Higher Regional Court) Frankfurt a.M., 29 December 2015, ECLI:DE:OLGHE:2015:1229.4.3STE4.10.4.1.15.0A.

¹⁷³ Section 395 para. 4 and Section 396 para. 2 StPO.

¹⁷⁴ Interview with a German prosecutor on 31 January 2019.

¹⁷⁵ Interview with a German prosecutor on 31 January 2019.

¹⁷⁶ Section 304 StPO.

¹⁷⁷ Section 396 para. 2 StPO.

- apply for the recusal of judges;
- apply for the rejection of expert witnesses;
- question the defendant and witnesses;
- challenge orders of the presiding judge;
- introduce evidence;
- make statements;
- receive the same information as the prosecution; and
- appeal decisions of the court.¹⁷⁸

2.3.2 General victims

Victims who do not join as joint plaintiffs have

- the right to witness protection in the courtroom;¹⁷⁹
- conducting the trial behind closed doors under certain circumstances;¹⁸⁰
- video recording in lieu of live testimony or video-link testimony under certain circumstances;¹⁸¹ and
- the right to a psycho-social support person in hearings.¹⁸²

2.3.3 Compensation claims

Victims can apply for compensation (see below Reparation). With regard to reparations, it does not make a difference whether the victim acts as a joint plaintiff or not.¹⁸³

2.3.4 Private prosecution

Only victims of petty offences (not applicable to VStGB crimes) can use private prosecution without the involvement of a public prosecutor under certain circumstances defined in Sections 374 to 394 StPO.

Rules of evidence

1. At investigation stage

1.1 Necessary information for a complaint

A complaint should be truthful and should describe the criminal events in as much detail as possible. An untruthful complaint constitutes a crime under Section 145d paragraph 1 StGB and Section 164 paragraph 1 StGB.

178 Section 401 StPO.

179 Section 247 StPO.

180 Section 172 GVG.

181 Section 247a para. 1 and Section 255a para. 2 StPO.

182 Section 406g StPO.

183 Sections 403 - 406c StPO

It does not matter whether this is done orally or in writing. A sworn statement is not necessary. In order to support the investigation, the statement should be as comprehensive and complete as possible. Other potential witnesses should be named and any available evidence should be presented.

1.2 Necessary evidence to open an investigation

To open an investigation, **sufficient factual indications** for a crime is enough (*zureichende tatsächliche Anhaltspunkte*).¹⁸⁴ The opening of an investigation does not require a specific type of evidence.¹⁸⁵

Under German law, the threshold to open investigations is rather low. However, mere suppositions are insufficient. The initial suspicion must be based on concrete facts. Such facts may also be based on a rumor or an assertion by a third party that is not completely unfounded, since the verification of certain indications is precisely the task of the investigation procedure.¹⁸⁶ Suspicions can be demonstrated, for instance, by testimonies, documentary evidence, or open source material.¹⁸⁷

1.3 Necessary evidence for an indictment

To justify an indictment, evidence gathered in the investigations has to support **reasonable grounds to suspect** that the person has committed a criminal offence (*hinreichender Tatverdacht*).¹⁸⁸ This is the case if the competent prosecutor considers the case to be capable of supporting a conviction with a high degree of certainty after evaluating the factual and legal situation at the end of the investigation stage.¹⁸⁹

1.4 Admissibility of evidence

1.4.1 General rules

The competent investigating authority is free to take all admissible evidence into account and will designate its weight at its discretion.¹⁹⁰ During the investigation proceedings, the prosecution can obtain all forms of evidence as long as the means to obtain them follow the legal requirements and limitations.¹⁹¹

1.4.2 Introduction of evidence by victims / NGOs

Before the investigation is completed, victims have the status of witnesses, which gives them the right to submit additional evidence or information to the authorities.¹⁹² NGOs are not parties and therefore cannot formally submit evidence to the court. However, they

¹⁸⁴ Section 152 para. 2 StPO.

¹⁸⁵ Cf. Section 152 para. 2 and Section 160 para. 1 StPO which only require factual grounds but not any specific evidence.

¹⁸⁶ MüKo StPO, Section 152, para. 38.

¹⁸⁷ Interview with a German prosecutor on 31 January 2019.

¹⁸⁸ Sections 170, 203 StPO.

¹⁸⁹ MüKO StPO, Section 170, para. 14. Interview with a German prosecutor on 31 January 2019.

¹⁹⁰ Section 244 para. 2 StPO.

¹⁹¹ Section 160 para. 1 and 4 StPO and Section 161 para. StPO.

¹⁹² A joint plaintiff status can only be obtained once the trial has been opened, cf. Section 395 para. 1 StPO.

might make evidence available during the investigations or trial that the court can consider once publicly known.

Prosecutors and NGOs cooperate in many ways during the investigation, in particular to find and collect evidence.¹⁹³ NGOs can point to potential witnesses by providing information on how they could be contacted and about which relevant parts of a case they could give testimony. Similarly, they can point to documents and can explain how a prosecutor could access them.¹⁹⁴

2. At trial stage

2.1 General rules

In its findings concerning guilt and punishment, the court can only use the types of evidence provided by the law, which are witnesses,¹⁹⁵ experts,¹⁹⁶ written materials,¹⁹⁷ and visual inspections.¹⁹⁸ The statement of the defendant is not evidence provided by law, but will be taken into consideration by the court.

According to Section 261 StPO, judges are free to assess the probative value of evidence.

2.2 Unlawfully obtained materials

Evidence can be disregarded if it has been obtained unlawfully or because of overriding principles such as the right to a fair trial or the general right to privacy. German courts distinguish between the obtaining of evidence, and the admissibility of evidence to be used for its final judgment.

If the evidence was unlawfully obtained (*Beweiserhebungsverbote*), this does not automatically mean that the evidence cannot be used to convict the defendant. Rather, the state interest in criminal prosecution must be weighed against the fundamental rights of the person concerned in the individual case, whereby the seriousness of the offence or procedural violation is decisive.¹⁹⁹

In some cases, the law explicitly forbids the use of unlawfully obtained evidence and excludes it from being used in court hearings (*absolute Beweisverwertungsverbote*). For example, Section 136a paragraph 3 sentence 2 StPO prohibits the reliance on evidence obtained by prohibited interrogation methods such as mistreatment or deception. In other cases, the existence of a prohibition to use evidence depends on a case-by-case examination (*relative Beweisverwertungsverbote*).

In some cases, evidence will be considered for the final ruling despite being obtained unlawfully, unless the defendant raises an objection against it (*Widerspruchslösung*). The defendant's obligation to object only applies where the violated rights may be waived by

193 Interview with a German prosecutor on 31 January 2019.

194 Interview with ECCHR on 8 February 2019.

195 Sections 48 to 71 StPO.

196 Sections 72 to 85 StPO.

197 Section 249 StPO.

198 Section 86 StPO.

199 BGH, 17 February 2016, ECLI:DE:BGH:2016:170216U2STR25.15.0; BGH, 20 May 2015, 4 StR 555/14.

the defendant, e.g. evidence obtained by unlawful interception of communications or unlawful undercover agents, or if the defendant has not been instructed about his right to remain silent before the first interrogation.

German law does not contain a general rule that would automatically render evidence inadmissible because it was gathered as a result of previously illegally obtained evidence (fruit of the poisonous tree). The court will consider the circumstances and determine admissibility on a case-by-case basis.

2.3 Introduction of evidence

During the trial, the prosecutor can introduce evidence to the court as the official leader of investigations. In addition, the accused can introduce evidence to prove his innocence. As a joint plaintiff, the victim has the right to introduce and request new evidence (see above on [Victim Rights and Participation at Trial Stage](#)).²⁰⁰ Without the status as joint plaintiff, victims can only introduce evidence by their own statements as a witness.

Any member of an NGO can be heard as a witness, providing that he or she can help establish the truth. In addition, a representative of an NGO might be heard by the court as an expert if he or she has certain relevant expert knowledge.²⁰¹ Yet, it can raise difficulties for the NGO, as they can be compelled to disclose information regarding their investigation.²⁰²

New evidence can be introduced at the trial stage until the end of the oral hearing.²⁰³ If the public prosecutor adds new charges during the main hearing in respect of further criminal offences committed by the defendant, the court may include them in the proceedings if it has jurisdiction over these charges and the defendant consents.²⁰⁴ Otherwise, new charges would have to be prosecuted in an additional trial.

2.4 Intervention by third parties (*amicus curiae*)

German procedural law is unfamiliar with the concept of *amicus curiae*. As a rare exception, according to Section 27a Act on the Federal Constitutional Court, third parties may be given the opportunity to comment. However, this provision only applies to the Federal Constitutional Court. Criminal law does not contain such a provision. Third parties are generally free to write to the court. However, there is no legal obligation of the court to read what is written or take it into account for the decision.

3. Open source materials

In principle, social media platforms can be used to provide evidence. Investigators are entitled to search platforms for evidence if the content is available to the public. Besides, they can confiscate data from the platform of publication under special circumstances.

200 Section 397 para. 1 StPO.

201 Interview with a German prosecutor on 31 January 2019.

202 Interview with a German prosecutor on 31 January 2019.

203 Section 246 para. 1 StPO.

204 Section 266 StPO: the defendant's decision to consent is dependent on the individual case. In case the defendant does not consent, the additional charges will most likely be brought against him or her in a subsequent trial and his or her cooperation might be taken into account with respect to the sentence.

It is unlawful to bypass private settings, or to fool the owner of the account into granting access to the non-public parts of the account under false pretenses. In such cases, investigators must comply with the strict requirements for online searches of an IT system used by a suspect.²⁰⁵

However, the courts commonly do not assume general inadmissibility of evidence obtained in this unlawful manner. Admissibility will depend on the balance between the interests of an effective prosecution of crimes, and the violation of the rights, especially the general right to privacy and informational self-determination of the defendant (see above Unlawfully Obtained Materials). In cases where only the public sphere (Sozialsphäre) is affected, the interest in an effective prosecution will generally take priority.

The main difficulty is to estimate the evidentiary value of pictures, messages, and videos, as they are prone to manipulation. There are no formal rules with respect to the assessment of evidentiary value. According to Section 261 StPO, judges are free to weigh the evidence. When gathering this type of evidence, prosecutors have to examine the origin of the information to make sure it will have probative value.²⁰⁶

Social media materials have been used by German courts in several proceedings to a varying extent. Most notably, on 29 August of 2016, the German police arrested Iraqi national Rami K. on suspicion of the commission of a war crime. The suspect allegedly posed for a photo while holding the severed heads of two Islamic State fighters who had been killed in combat. The photo was published on social media. The suspect confessed to the crime and was found guilty of war crimes and given a 20-month suspended sentence.²⁰⁷

In another case, the Federal Supreme Court decided to maintain an arrest warrant against the accused because of his profile pictures and contacts on Facebook. The accused, as a member of the group Jhabat al-Nusra, was accused of abduction of a United Nations peacekeeper during the non-international armed conflict in Syria. The victim recognized the perpetrator with the aid of the pictures published on Facebook and connections on Facebook showed his connection to the armed group.²⁰⁸

Witness and victim protection

The StPO and the Judicial System Act (*Gerichtsverfassungsgesetz – GVG*) contain a large number of provisions on the protection of witnesses and victims. These statutes also contain provisions specifically benefiting the victims of criminal offences independently of their role as witnesses.

The protective provisions range from the duty of examination with as little intrusion as possible to the removal of the accused during testimonies²⁰⁹ and the exclusion of the

²⁰⁵ Section 100b para. 2 no. 6 StPO.

²⁰⁶ Interview with a German prosecutor on 31 January 2019.

²⁰⁷ Oberlandesgericht (Higher Regional Court) Berlin, 01 March 2017, ECLI:DE:KG:2017:0301.2A172OJS26.16.3.1.0A.

²⁰⁸ BGH, 11 August 2016, ECLI:DE:BGH:2016:110816BAK43.16.0.

²⁰⁹ Section 247 StPO.

public during examinations.²¹⁰ The StPO also provides for the possibility to record a witness testimony on an audio-visual medium and to play the video recording in the main hearing instead of examining the witness again.²¹¹

In a case on the Democratic Republic of Congo, witnesses were protected through anonymity, and testified during trial via video link with facial and voice distortion. Their safety was successfully guaranteed. However, the charges in relation to their suffering were dropped because the defense could not fully cross-examine them due to the protective measures. Their evidence could only contribute to establishing the general situation on the ground and the commission of crimes by the rebel forces.²¹²

An examination may also take place separately from the other parties with the witness being in a different place and providing a simultaneous audio-visual transmission of the examination to the hearing.²¹³ With child witnesses, a number of the above provisions (e.g. removal of the accused or exclusion of the public during examination of the witness) are applicable with easier preconditions.

Outside the court, victims of unlawful intentional violence or threat of violence or victims of stalking or unreasonable harassment may apply to the civil courts for a protective measure. The court can then issue an order that the perpetrator is prohibited from coming within certain proximity of the dwelling of the aggrieved person or entering it, visiting places that are frequently used by the victim or establishing contact, which refers to all types of communication.²¹⁴

According to the Witness Protection Harmonization Act (*Zeugenschutzharmonisierungsgesetz*), the resettlement of persons at risk is one of the measures that are taken regularly within the witness protection program. However, a victim's inclusion in the program requires that a public prosecution office in Germany has instituted investigation proceedings in the case at issue.

Reparation for victims in criminal proceedings

The offender is generally obligated to compensate the victim for damages and may also have to pay compensation for pain and suffering. The victim's right to compensation does not depend on whether he or she acts as a joint plaintiff.²¹⁵

210 Section 172 GVG.

211 Section 255a para. 2 StPO.

212 Interview with ECCHR on 8 February 2019.

213 Section 274a StPO.

214 By means of an injunction against somebody unlawfully invading someone else's private sphere; cf. Section 1004 para. 1 Bürgerliches Gesetzbuch (German Civil Code, hereinafter BGB) in connection with Section 823 para. 1 BGB.

215 Cf. Sections 403 StPO.

1. Form of reparations

Compensation can, for example, include the expenses to repair a damaged item, but can also include lost wages or the cost of hospital treatment. The victim may also be entitled to financial compensation for pain and suffering, if the victim has suffered physical or psychological injury, loss of freedom, or the right of sexual self-determination.²¹⁶

In addition, the Victim Compensation Act (*Opferentschädigungsgesetz*) grants comprehensive benefits paid by the government to the victim of an intentional, unlawful physical assault, if it results in damage to the victim's health. It also entitles victims to compensation who are injured in the lawful defense against such an attack or who are injured in the context of a crime directed against another person.

2. Procedure

In general, civil courts are competent for compensation claims. However, as regards compensation of a victim in relation to a crime, such claims can also directly be brought in the context of the criminal proceedings before the criminal court (*Adhäsionsverfahren*).²¹⁷ This procedure only refers to compensation claims and therefore is different from the status of joint plaintiffs who have more participation rights (see above on [Joint Plaintiff](#)). The compensation claim has the advantage of not having to start a separate procedure with the civil courts.

The victim or heirs can introduce the claim orally or in writing.²¹⁸ The claim can be made once the trial is opened until the final oral hearing.²¹⁹ Afterwards, claims can only be made in a separate procedure with the competent civil court. The applicant should state a specific claim and provide the court with the circumstances leading to it, e.g. the precise extent of damages, and a substantiated description of pain suffered and bills for medical treatment.²²⁰ Furthermore, the applicant should hand in evidence to prove the claim. The court should indicate if the claim for compensation does not meet the required conditions. In case the court refuses to accept the compensation claim, the victim can challenge this decision.²²¹

If the victim and the offender are unable to agree on the amount of compensation for pain and suffering, the court will decide in the judgment (conviction).²²²

Victims who filed a compensation claim have the right to:

- attend hearings;²²³

216 Section 403 StPO in connection with Sections 823 and 253 BGB.

217 Sections 403 - 406c StPO.

218 Cf. Section 404 para. 1 StPO.

219 Ibid.

220 Ibid.

221 Section 406a StPO.

222 Section 406 StPO.

223 Section 404 para. 3 StPO.

- be represented by a lawyer;²²⁴
- apply for legal aid.²²⁵

They are also entitled to the above-listed rights of general victims who are not joint plaintiffs (see above General Victims).

Victims regularly file for compensation in the context of criminal proceedings. Most notably, claims are made for personal damages and compensation for pain and suffering including severe psychological damages. However, there is no significant jurisprudence on victim reparations in relation to crimes under the VStGB.

Immunities

1. General rules

The VStGB does not provide for specific immunities. However, customary international law is an integral part of German federal law and takes precedence over other laws and directly creates rights and duties.²²⁶ Therefore, immunities, e.g. the immunity of representatives of a state that are accepted as a general principle of customary international law, are recognized by German law. In addition, Sections 18 to 20 GVG explicitly stipulate immunities for diplomats, consular officers, and special mission immunities for representatives of states.

However, immunities do not bar the execution of an extradition request for the transfer of a person in custody or mutual judicial assistance communicated by a recognized international criminal court such as the International Criminal Court.²²⁷

Immunities have to be considered by the courts *ex officio*, meaning that courts have a duty to consider from the very beginning of a trial if prosecution is barred by immunities.

2. Special mission immunities

Germany has not ratified the Convention on Special Missions, but special mission immunities are recognized in Section 20 GVG to the extent provided for under customary international law.²²⁸ Special mission immunities will be granted to individuals who are officially invited by the government. It will not be granted to individuals coming to Germany for personal reasons.

224 Section 404 para. 5 StPO.

225 Ibid.

226 Article 25 GG.

227 Section 21 GVG.

228 Section 20. GVG; MüKo StPO, Section 20 GVG, para. 7-10; cf. BGH, 27 February 1984, 3 StR 396/83.

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