

## Universal Jurisdiction Gains New Momentum

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Despite intense discussions on universal jurisdiction, scepticism was generated a few years ago by significant setbacks in its practice and legislation in European jurisdictions like France, Spain and Belgium. Now, this legal tool is gaining new momentum, if not as spectacularly, as the foremost legal tool to address mass atrocities in Syria. This is the consequence of an international failure to prevent the commission of such crimes and to account for them, either on the domestic or regional level or at the International Criminal Court ('ICC') through a referral by the United Nations Security Council. Even if only a small number of States like Germany are willing and equipped to apply universal jurisdiction, its importance should not be underestimated. However, selectivity and double standards remain major concerns for the functioning and legitimacy of the international criminal justice system.

### 1. German Universal Jurisdiction Cases Regarding Syria

When the Syrian regime attacked peaceful protesters in 2011 and the first survivors of State violence arrived in Germany, the Federal Public Prosecutor opened a structural investigation based on Germany's universal jurisdiction over international crimes.<sup>1</sup> A structural investigation aims at securing evidence primarily within Germany that can later be used in personalized investigations or shared with foreign or international jurisdictions. As a result of this investigation, German prosecutors are at the time of writing investigating the individual responsibility of the head of the Syrian Air Force Intelligence, Jamil Hassan, for numerous killings, arbitrary detentions and torture.<sup>2</sup> This investigation led to an arrest warrant

against Hassan in June 2018.

It is exemplary for how structural investigations can lead to individualized warrants against suspects at the top of a chain of command. The investigation is a comprehensive enterprise, comprising witness interviews, document analysis – including comprehensive forensic expert reports about each of the more than 4,000 bodies displayed in the 'Caesar pictures'<sup>3</sup> – as well as the exchange and collaboration with war crimes units from other countries through bilateral or multilateral channels, such as the European Union Genocide Network.

In parallel with the structural investigations, the Federal Public Prosecutor has also used universal jurisdiction to prosecute individuals present in Germany for international crimes committed in Syria, such as cases of killings, torture and abduction.<sup>4</sup> Furthermore, universal jurisdiction investigations in Germany may also support prosecutions before foreign and international courts, through the sharing of the large amount of evidence secured over the past years, thus leading to more cases against State and non-State actors.

### 2. Activating the German Code of Crimes Against International Law

Considering the developments in Germany during the last two decades, it becomes more obvious why Germany finds itself at the forefront of universal jurisdiction cases in 2019. Back in 2002, Germany introduced the Code of Crimes Against International Law,<sup>5</sup> which in large part

dem Gebiet des Völkerstrafrechts", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2018, vol. 13, no. 12, p. 543.

<sup>3</sup> The 'Caesar pictures' are a set of thousands of photographs from a military photographer showing dead bodies with torture marks and prison numbers in Syria. The pictures were brought out of Syria and shared in a criminal complaint in Germany by the Caesar File Support Group and the ECCHR. See more information at ECCHR, "'Caesar' Photos document systematic torture", available on the ECCHR web site.

<sup>4</sup> See TRIAL International, ECCHR *et al.*, "Make Way for Justice #5: Universal Jurisdiction Annual Review 2018" (forthcoming).

<sup>5</sup> Available at <http://www.legal-tools.org/doc/a56805/>.

<sup>1</sup> Wolfgang Kaleck and Patrick Kroker, "Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?", in *Journal of International Criminal Justice*, 2018, vol. 16, no. 1, p. 165.

<sup>2</sup> See remarks by the head of the International Crimes Department of the Federal Prosecutor's Office remarks, Christian Ritscher: "Aktuelle Entwicklungen in der Strafverfolgung des Generalbundesanwalts auf

codified the core crimes of the ICC Statute in German domestic criminal law. The new law included universal jurisdiction for all core crimes, explicitly implemented the principle of universal jurisdiction in a broad form, but gave the competent Federal Public Prosecutor criteria for a discretionary decision to initiate an investigation or to dismiss a criminal complaint.<sup>6</sup>

Although the new law was praised as a model law and translated into several languages, no resources and capacities were provided for its enforcement. Civil society, therefore, acted on the basis of the new law and filed criminal complaints in order to initiate investigations of core international crimes. In 2004 and 2006, respectively, two criminal complaints were filed against high-level United States ('US') officials, among them the former Secretary of Defense, Donald Rumsfeld, as well as a former Director of the Central Intelligence Agency (CIA), George Tenet, for systematic torture in Iraq (Abu Ghraib prison) as well as at the Guantánamo Bay Naval Base.<sup>7</sup> Through these complaints, civil society and human rights lawyers sought to establish that nobody should be above the law and that core international crime cases should not only be pursued against refugees. The US cases had links to Germany through the US military bases in Germany and the presence of witnesses. The argument was made to secure such evidence for future trials.

Although the complaints were dismissed, they triggered a debate on how to 'activate' the new Code of Crimes Against International Law and how to provide the necessary resources to prosecutors and investigators in order to fulfil their mandate and investigate international crimes.<sup>8</sup> It took some more years until two leaders of the Rwandan rebel group FDLR were arrested in Germany in 2009. The subsequent trial lasted for more than four years and saw 320 days in court.<sup>9</sup> All actors involved (judges, prosecutors, investigators, lawyers, academics, media and civil society) gained different experiences from this major case. When it ended in September 2015 with two convictions, Germany was better prepared to take on Syrian cases. Especially in 2015 and 2016, with the growing number of refugees from Syria entering Germany, it was the right time to intensify the investigations, as more evidence through witnesses became available.

<sup>6</sup> In Article 153 lit. f of the Code of Criminal Procedure. See Andreas Schüller, "The Role of National Investigations and Prosecutions in the System of International Criminal Justice – Developments in Germany", in *Security and Peace (S+F)*, 2013, vol. 31, no. 4, p. 226.

<sup>7</sup> For more information, see ECCHR, "Rumsfeld Torture Cases", available on its web site.

<sup>8</sup> Human Rights Watch, "Universal Jurisdiction in Europe: The State of the Art", 2006 (<http://www.legal-tools.org/doc/6b61b4/>).

<sup>9</sup> ECCHR, "Weltrecht in Deutschland?", 2016 (<http://www.legal-tools.org/doc/26a4c7/>).

### 3. The Role of Civil Society Actors from Germany and Syria

The civil society organization both authors are affiliated with, the European Center for Constitutional and Human Rights ('ECCHR'), was founded in 2007, growing out of the first experiences of filing criminal complaints under the new universal jurisdiction laws addressing powerful State actors or transnational corporations.<sup>10</sup> On this basis, the ECCHR advocated for a specialized war crimes unit and sufficient resources for universal jurisdiction cases in Germany. As long as those were not in place, the ECCHR focused on the use of different legal tools<sup>11</sup> in its litigation, in other countries or before international courts. For the FDLR trial, the ECCHR, together with other civil society groups, established a trial monitoring system for the entire duration of the trial over four years. At the same time, the ECCHR began to develop long-term strategies and case-building for potential universal jurisdiction cases, for example, on Sri Lanka (for the 2009 civil war atrocities), Russia, Egypt (with survivors in Germany following the 2011 attacks on protesters), and then Syria.

With the growing number of Syrians in Germany, the ECCHR shifted its focus on those cases and soon after began to co-operate with Syrian partner organizations such as the Syrian Center for Legal Studies and Research, the Syrian Center for Media and Freedom of Expression as well as the Caesar Files Support Group. These collaborations led to the submission of four comprehensive formal criminal complaints in 2017, and a number of additional activities in support of the structural and personalized investigations (as witness-representative for dozens of survivors from Syria) or to advise survivors or insider-witnesses on German universal jurisdiction laws and policies. The activities do not only relate to judicial actions in Germany, but also to proceedings in a number of other countries, including against corporate actors such as Lafarge in France and criminal

<sup>10</sup> Co-author Wolfgang Kaleck was the lawyer submitting the complaints against US officials on behalf of the Center for Constitutional Rights in 2004 and 2006. He also filed cases against transnational corporations such as Mercedes Benz for its role in the Argentinean dictatorship back in 1998. See his previous FICHL Policy Brief "Double Standards in International Criminal Justice: A Long Road Ahead Towards Universal Justice", FICHL Policy Brief Series No. 37 (2015), Torkel Opsahl Academic EPublisher, Brussels, 2015 (<http://www.toaep.org/pbs-pdf/37-kaleck>) and his comprehensive analysis *Double Standards: International Criminal Law and the West*, Torkel Opsahl Academic EPublisher, Brussels, 2015 (<http://www.toaep.org/ps-pdf/26-kaleck>).

<sup>11</sup> Such as passive personality jurisdiction cases on Guantanamo for former detainees in Spain and France; dossiers against suspects with diplomatic immunity from Sri Lanka or Colombia that led to their immediate withdrawal from embassies in Europe or communications to the ICC Office of the Prosecutor on United Kingdom torture in Iraq or crimes against humanity in Colombia.

complaints filed in Austria.<sup>12</sup>

#### 4. The ‘Global Enforcer’ Approach to Universal Jurisdiction

A closer analysis of the practice in Germany with regard to Syria provides useful experience for other States that may wish to follow a similar path to strengthen and enforce accountability for core international crimes. Why is such an approach preferable? This question relates to the objectives and purposes of universal jurisdiction.

Universal jurisdiction cases and proceedings pursue a variety of objectives, which can roughly be separated into two approaches. On the one hand, the so-called ‘no safe haven’ approach aims to ensure that perpetrators cannot hide from justice anywhere. This follows from the *aut dedere aut judicare* (prosecute or extradite) principle and is based more on opportunity than on strategy: while those travelling or leaving a conflict region may be facing justice, there is no strategic case-building involved in bringing those bearing the greatest responsibility to trial. These universal jurisdiction cases depend on the presence of suspects in a third State, and they do not grow out of a global analysis of crimes committed in the conflict in question.

A different objective is the so-called ‘global enforcer’ or the ‘complementary preparedness’ approach.<sup>13</sup> Both stand for strategic case selection, so that the policy of national prosecution services is designed to prosecute those bearing the greatest responsibility for the crimes, in line with the ICC. This approach seems preferable as it enables the State to better fulfil its task of prosecuting international crimes on behalf of the international community, which is affected by those crimes as a whole. This derivative jurisdiction leads to a ‘complementary preparedness’, meaning that all States should secure evidence of international crimes available in their jurisdiction with a view to sharing it with other States or international courts that seek to prosecute the cases.<sup>14</sup> Any prosecution of core international crimes needs international co-operation and a division of labour, a concept which only the global enforcer approach may fully recognize. However, we are far away from a functioning system of international justice, since many States, including a number of European countries with established war crimes

units, do not have the necessary legislation in place that would allow investigators to secure such evidence.

Some States have contributed towards these objectives, as they assume their jurisdiction through traditional jurisdictional principles, such as in cases of victims of their nationality (passive personality principle). For example, the French arrest warrants against high-level Syrian officials are based on the disappearance of two French nationals in Syria.<sup>15</sup> This case permitted France to fully investigate the chain of command responsible for the enforced disappearances. However, the French war crimes unit remains limited as to whether or not French nationals become victims of an international crime. This restriction exists in many countries, preventing their war crimes units to fully investigate international crimes on behalf of the international community. Civil society initiatives in France as well as in Spain are trying to have the legislation amended in order to permit broader investigations.<sup>16</sup>

With such enabling legislation, States can share evidence and provide mutual support so that a variety of cases can be investigated across borders, potentially leading to arrest warrants against different groups of perpetrators. Within the European Union, there is also the possibility to create Joint Investigation Teams – as Germany and France did on Syria and the ‘Caesar pictures’ – that collaborate on investigations. Prosecutors from different countries can thus work together, making it possible for more States to contribute evidence and develop cases.

Internationally, the question remains whether a vehicle such as the International, Impartial and Independent Mechanism on international crimes committed in the Syrian Arab Republic (IIIM) will be able to establish a similar system of international investigative bodies that support prosecutors in domestic or international courts in strategic prosecutions.

All these avenues are needed in order to complement the efforts of the ICC and to get closer to a complementary preparedness among States and other investigative bodies in addressing international crimes at the highest levels of responsibility.

#### 5. Conclusion

Countless international crimes have been committed in Syria, by local State and non-State actors as well as by international actors on all sides, supported by economic profiteers. This tragedy can contribute to a further development and strengthening of international-crime prosecutions under the universal jurisdiction principle. But

<sup>12</sup> For more information, see ECCHR, “Lafarge in Syria – Accusations of complicity in grave human rights violations” and “The path to justice leads through Europe – e.g. Austria”, both available on its web site.

<sup>13</sup> Máximo Langer, “Universal Jurisdiction is Not Disappearing: The Shift from ‘Global Enforcer’ to ‘No Safe Haven’ Universal Jurisdiction”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 2, p. 245.

<sup>14</sup> Florian Jeßberger, “Towards a ‘complementary preparedness’ approach to universal jurisdiction – recent trends and best practices in the European Union”, in European Parliament, “Universal jurisdiction and international crimes: Constraints and best practices”, 2018, p. 46 (<http://www.legal-tools.org/doc/fb2d88/>).

<sup>15</sup> International Federation for Human Rights (FIDH), “Q&A on the Dabagh Case: French judges issue 3 international arrest warrants against top Syrian officials”, available on its web site.

<sup>16</sup> See, for example, Justicia Universal Ya, campaign web site.

we need to take into account the specific circumstances that make Syrian cases promising: the professional and very comprehensive documentation of crimes in Syria; linkage-evidence accessible through defectors; proximity of many victims and witnesses in Europe, especially in Germany; global politics with accountability on the agenda of some influential, mainly Western countries; and domestic politics in forum States such as Germany, France and Sweden, which for years have been building a system to prosecute international crimes domestically through structural investigation and close co-operation.

With the ICC struggling with its limited jurisdiction as well as a number of other issues some 15 years after its establishment, the focus of international justice is shifting back to universal jurisdiction. While this is promising, it also entails risks of overburdening and straining expectations linked to universal jurisdiction cases. These risks should be carefully assessed, so that such cases can be part of a global, long-term and comprehensive approach to justice and accountability. When discussing South Sudan, Yemen or other conflict situations, the use of universal jurisdiction there should be seen in the context of other justice and accountability processes that need to be developed. Each situation is unique: circumstances vary, including the political context, the presence and availability of victims and witnesses, and the quality of documentation. Universal jurisdiction can help to fill gaps, but not to carry the weight of the full expectations of affected communities. By default, it will only be able to deliver select justice, which is why we need a strong ICC as well as further regional and local accountability mechanisms and solutions.

In practice, how are we to get universal jurisdiction cases off the ground? First, in planning and building universal jurisdiction cases, the case-role, -involvement and -ownership of victims and affected societies are of the utmost importance as universal jurisdiction cases necessarily take place away from the conflict region. This alone limits the impact trials have in the affected societies.

Second, it is imperative that those who submit criminal complaints ensure that they fulfil the highest standards of quality.<sup>17</sup> This includes a professional treatment

<sup>17</sup> For more information on this topic here, see Andreas Schüller and Chantal Meloni, "Quality Control in the Preliminary Examination of Civil Society Submissions", in Morten Bergsmo and Carsten

of survivors, a proper analysis of perpetrator structures, and a solid legal analysis of the facts, modes of liability as well as formal or admissibility criteria. Complaints should provide or point to potential evidence in order to allow investigators to access witnesses, documents and so on. Evidence is a sensitive matter: in many jurisdictions, it is only the authorities themselves who can secure evidence, not private investigators.

It is essential that those who support international criminal justice take a critical approach to the use of universal jurisdiction and its selective nature. To ensure the credibility and legitimacy of universal jurisdiction cases, the lesson is the same as for the ICC: the laws need to be applied equally, regardless whether the perpetrator of torture, rape, air strikes or massacres are from weak or powerful countries.

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