The Principle of Universal Jurisdiction in German Criminal Law

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* Paper submitted by Florian Jessberger, Lichtenberg Professor of International and Comparative Criminal Law, Humboldt-Universitaet zu Berlin (florian.jessberger@rewi.hu-berlin.de), on behalf of the German national group to the Fourth Section of the AIDP’s XVIIIth World Congress. The author wishes to gratefully acknowledge the support of Julia Geneuss, Eva Bohle, and Marie Hesselbarth in the preparation of this paper.
Preliminary Remarks

It must first of all be appreciated that the AIDP has decided to put the principle of universal jurisdiction on the agenda of the forthcoming world congress.

With the rise of international criminal law, and within the wider context of the “internationalization” of criminal law, the principle of universal jurisdiction has become one of the central topoi of criminal law related academic and non-academic debates, and therefore fits extraordinarily well into the world congress’s overall subject: “Principal Challenges Posed by the Globalization of Criminal Justice”.

Needless to say, there is no lack of reports and statements by scientific associations and ad hoc composed groups of academics on the principle of universal jurisdiction.1 Yet, all those proposals for reform and model regulations are written from the point of view of international law. There is no question that this must be acknowledged. Nevertheless, against this background, the AIDP should rely on its specific expertise and emphasize the specifically criminal law related aspects of the principle of universal jurisdiction and its exercise – of course without losing sight of developments in international law. Some of those criminal law aspects are:

- limits to the exercise of universal jurisdiction under criminal law (e.g. principle of legality, principle of individual responsibility);
- coordination of concurrent jurisdictions, including the determination of the relationship between the principle of universal jurisdiction and other principles of criminal jurisdiction, and the principle of ne bis in idem;
- procedural limits to the exercise of universal jurisdiction (e.g. minimum standards for criminal proceedings based on universality);
- the relationship between universal jurisdiction and international cooperation in criminal matters.

The present questionnaire offers an excellent basis to develop these aspects on a broad comparative basis and to draft model regulations on universal jurisdiction which will have considerable impact on the legal and political debate.

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Summary: Key Features of German Legislation and Practice

In comparison with other jurisdictions, Germany has traditionally extended criminal jurisdiction far beyond German borders. Among other forms of jurisdiction, the principle of universality applies.

The most notable characteristics of the exercise of universal jurisdiction in Germany – which will later be explained in more detail – are:

- **The distinction between unconditional universal jurisdiction over international crimes and conditional universal jurisdiction over treaty-based-crimes.** Crimes punishable under customary international law – genocide, war crimes (in international conflicts and to a large extent also in non-international conflicts), crimes against humanity – are subject to universal jurisdiction without any restrictions. Under Section 1 VStGB German criminal law is applicable to these crimes even if they are committed abroad and have no specific link to Germany. In contrast, for the exercise of universal jurisdiction pursuant to Section 6 Nos. 2 to 8 StGB over treaty-based-crimes, an additional “legitimizing link” to the German territory or state is required; the same holds true for most cases under Section 6 No. 9 StGB.

- **The distinction between the scope of German criminal jurisdiction as a matter of substantive law and the scope of (procedural) duties to exercise this jurisdiction.** Even though German criminal procedure is governed by the Legalitätsprinzip (mandatory prosecution) as a matter of principle, the applicability of German criminal law does not automatically lead to a duty to prosecute on the part of German prosecution authorities and criminal courts in cases where the crime has been committed abroad. Under Sections 152 (2), 153f StPO mandatory universal jurisdiction exists only in relation to international crimes (genocide, crimes against humanity, war crimes), and only if a specific link to Germany can be established (e.g. the accused is found to be in or is expected to enter Germany). In all other cases of crimes committed abroad, the public prosecutor has discretion whether to prosecute or not.

- **The establishment of a hierarchy of jurisdictions as regards the prosecution of international crimes (“abgestufte Zuständigkeitspriorität“), laying down in particular the subsidiarity of the exercise of universal jurisdiction (“Auffangzuständigkeit“).** With regard to the prosecution of international crimes (genocide, crimes against humanity, war crimes), German criminal law establishes a flexible ranking of concurrent jurisdictions: primacy is given to the state of commission, the perpetrator’s home state and the home state of the victim(s) as well as to an international criminal court, Section 153f StPO; universal jurisdiction should, as a rule, only be exercised by Germany as a so-called Third-State if none of the aforementioned jurisdictions is willing and able to prosecute.

- **The distinction between preliminary proceedings and main proceedings (trial) as regards the requirement of the presence of the accused in Germany.** Preliminary proceedings may also be conducted in absentia; yet, the presence of the accused is required for the main proceedings. Furthermore, presence of the accused in Germany is decisive for the question whether or not the public prosecutor has a duty to prosecute (Sections 152 (2), 153f (1) StPO).
I. Recognition, Scope and Preconditions of the Exercise of Universal Jurisdiction

1. Is the Principle of Universal Jurisdiction Recognized in National Law?
2. Under which name – the universality principle, universal justice, universal jurisdiction, or global justice – has the debate over the principle developed?
3. If the principle has not yet been recognized in domestic law: Is the absence of recognition of the principle of universal jurisdiction justified by precise reasons? Do initiatives exist that aim to introduce the principle of universal jurisdiction in the near future? Did these efforts fail? If so, why?
4. If the principle is already recognized in domestic law, on what legal basis was this achieved? Through a law? In the absence of a law, by judicial decision? By international convention?

In German Criminal Law, the principle of universality is contained in Section 1 of the Code of Crimes Against International Law (Völkerstrafgesetzbuch – VStGB) and according to the traditional view and case law in particular in Section 6 of the Criminal Code (Strafgesetzbuch – StGB). Yet, the term “principle of universality” is not used in any statutory provision; instead, the above-mentioned provisions are headed “Acts Abroad Against Internationally Protected Legal Interests” (Section 6 StGB) and “Scope of Application” (Section 1 VStGB). However, in the decisions of German courts and in the academic discussion, the terms "Universalitätsprinzip" (universality principle), "Universalprinzip/-grundsatz" (principle of universal jurisdiction) und "Weltrechts(pflege)prinzip/-grundsatz" (principle of global justice) are used synonymously. The Federal Constitutional Court expressly declared that "for the applicability of German Criminal Law ... the principle of universality or principle of global justice constitutes a reasonable genuine link as it is required for extraterritorial cases concerning the principle of non-intervention under international law."

According to the above-mentioned provisions, German criminal law applies to the enumerated offences (see below) without regard for the nationality of the perpetrator or the nationality of the victim, even when these offences have been committed abroad. Section 6 StGB provides for German jurisdiction explicitly regardless of the law of the place where the crime was committed. Section 1 VStGB explicitly emphasizes that German criminal law is also applicable when the serious criminal offences involved ("Verbrechen") bear no relation to Germany. For other crimes not listed in Section 6 StGB or Section 1 VStGB, the principle of universal jurisdiction is not recognized.

Section 1 VStGB Scope of Application.
This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.

Section 6 StGB Acts Abroad Against Internationally Protected Legal Interests.
German criminal law shall further apply, regardless of the law of the place of their commission, to the following acts committed abroad:
1. (deleted)
2. serious criminal offences involving nuclear energy, explosives and radiation in cases under Sections 307 and 308 subsections (1) to (4), Section 309 subsection (2) and Section 310;
3. assaults against air and sea traffic (Section 316c);

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2 The German Federal High Court stated several times that Section 6 StGB recognizes or rather “concretizes” the principle of universal jurisdiction, see e.g. Federal High Court, in: Strafverteidiger 1999, p. 240; Federal High Court, in: Neue Juristische Wochenschrift 1991, p. 3104, and - concerning Section 6 No. 5 - in: BGHSt 27, p. 30, and in: BGHSt 34, p. 1 and p. 334; and - concerning the former Section 6 No. 1 - in: BGHSt 45, p. 64 and in: BGHSt 46, p. 292. For a critical view on this classification see e.g. Werle/Jessberger, § 6 Leipziger Kommentar, marg. No 9 et seq.
3 Also Section 370 (7) German Fiscal Law (Abgabenordnung) could be perceived as being subject to universal jurisdiction. However, understood correctly this regulation has to be classified under the aspect of (fiscal) state protection and the protection of European Union fiscal interests.
4. trafficking in human beings for sexual exploitation and for exploitation of workforce, as well as promotion of human trafficking (Sections 232 to 233a); 
5. unauthorized distribution of narcotics; 
6. dissemination of pornographic writings in cases under Sections 184a and 184b subsections (1) to (3), also in connection with Section 184c sentence 1; 
7. counterfeiting of money and securities (Sections 146, 151 and 152), payment cards and blank Eurochecks (Section 152b subsections (1) to (4), as well as their preparation (Sections 149, 151, 152 and 152b subsection (5)); 
8. subsidy fraud (Section 264); 
9. acts which, on the basis of an international agreement binding on the Federal Republic of Germany, shall also be prosecuted if they are committed abroad.

Although both Section 6 StGB and Section 1 VStGB – the former at least according to the prevailing view – are based upon the principle of universality, the exercise of jurisdiction in each case follows different rules. To comprehend the necessity to distinguish in this regard is key to the understanding of the universality principle in German law. The different concepts underlying Section 1 VStGB on the one hand and Section 6 StGB on the other are mirrored e.g. with regard to the underlying objective of the provision, the additional requirement of a legitimizing link, the competence of a specific court, the applicable procedural law (prosecutorial discretion!) and the issue of concurrent jurisdictions (for details see below). These distinctions have to be seen against the background of the nature of crimes included in Section 1 VStGB on the one hand – international crimes under customary international law – and in Section 6 StGB on the other – acts qualified as punishable under international treaties.

The main objective of the VStGB, which entered into force in 2002, was to align German substantive criminal law with the Rome Statute and to implement its penal regulations. This adaption took place in particular through the creation of provisions regarding crimes against humanity (Section 7 VStGB), war crimes (Sections 8 to 12 VStGB) and other international crime related offences (Sections 13 and 14 VStGB).

Section 6 StGB dates back to the criminal code of 1871 (Reichsstrafgesetzbuch – RStGB). Of course, its catalogue of extraterritorial crimes that can trigger universal jurisdiction has been expanded significantly through the years. Section 6 StGB assembles all cases which in the opinion of the legislator – here the provision differs from Section 5 StGB – concern internationally protected interests and to which German criminal law is applicable regardless of the law of the place of their commission. Until 2002, Section 6 StGB also included the crime of genocide (No. 1); in the course of the enactment of the VStGB, this provision has been incorporated into Section 1 VStGB. Now the only characteristic that all cases under Section 6 StGB share is that all of them concern interests protected "internationally", i.e. by international treaties binding on Germany. This merely formal similarity explains the heterogeneity of the catalogue of crimes. Other – more substantive – criteria of selection are not evident. Thus, among legal scholars some doubts have been expressed as to whether Section 6 StGB can be assigned to the principle of universal jurisdiction, or if some restrictions are to be made beyond the wording of the provision. The different opinions represented in the German discussion reflect diverse concepts of the scope of the principle of universal jurisdiction under international law. The positions range from one extreme – under international law, unconditional universal jurisdiction is only provided for international crimes in the narrow sense: genocide, crimes against humanity, war crimes (see e.g. Merkel, Weigend, Werle/Jessberger) – to a more moderate approach – besides international crimes sensu strictu, also terrorism, drug-trafficking, torture and trafficking in human beings are subject to universal jurisdiction under international law (see e.g. Ambos) – to a traditional point of view according to which universal jurisdiction can be exercised if only a legal interest has been acknowledged to be worthy of protection by an international treaty (see e.g. Gribbohm).
Until now, the **practical significance** of the provisions – both Section 1 VStGB and Section 6 StGB – has been relatively small.

As far as it is known, criminal proceedings have only been completed in the case of former **Section 6 No. 1** (genocide), and of Section 6 No. 5 (unauthorized distribution of narcotics) and No. 9 (duty of prosecution on the basis of an international agreement binding on Germany – Geneva Conventions, Anti-Torture Convention). From 1993 to 2004, the Federal Attorney General (**Generalbundes-anwalt**) initiated 128 criminal proceedings against 167 alleged perpetrators, especially on charges of genocide and war crimes. Most of the proceedings related to crimes perpetrated on the territory of the former Yugoslavia. About 100 of those criminal proceedings have been terminated; most of them were closed pursuant to Section 170 (2) German Code of Criminal Procedure (**Strafprozessordnung** - StPO) due to lack of evidence. Convictions based on the principle of universal jurisdiction subject to Section 6 No. 1 StGB were rendered by German courts e.g. against Nikola J. (Oberlandesgericht Düsseldorf 1997, sentenced to life imprisonment **inter alia** for genocide); Maksim S. (Oberlandesgericht Düsseldorf 1999, sentenced to nine years of imprisonment **inter alia** for aiding and abetting genocide); and Djuradj K. (Higher Regional Court of Bavaria 1999, sentenced to life imprisonment **inter alia** for genocide).

By contrast, no criminal court proceedings have been conducted concerning crimes under the **VStGB** since its entry into force in 2002. So far, the Federal Attorney General who is exclusively competent to prosecute these crimes has initiated preliminary proceedings concerning crimes contained in the VStGB in one single case only.\(^4\) None of the 65 complaints filed with the Federal Attorney General (until February 2007; see Bundestags-Drucksache 16/4267) seeking investigation of crimes defined under the VStGB has led to preliminary proceedings. These complaints were directed against, **inter alia**, the former U.S. Secretary of Defence **Donald Rumsfeld**\(^5\) for his involvement in human rights violations in Abu Ghraib, the former Chinese President **Jiang Zemin**\(^6\) for the suppression of members of Falun Gong, and the former Uzbek Interior Minister

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\(^4\) Since the entry-into-force of the VStGB 65 so-called observance files (**Beobachtungsvorgänge**) - investigations below the threshold of formal preliminary proceedings - have been opened.


On 14 November 2006 a second – revised and amended - complaint against Donald Rumsfeld and others was lodged. In April 2007 the Federal Attorney General again refused to open an investigation (Rumsfeld II). The German text of the complaint is available at http://kaleck.org/index.php?id=84,233,0,1,0 (visited June 2007).

Zokirjon Almatov\textsuperscript{7} for the Andijan massacre. The reasons given for the non-initiation of criminal proceedings were either a lack of sufficient factual evidence of the existence of a criminal offence (Section 170 (2) StPO), legal immunity under international law, or prosecutorial discretion according to Section 153f StPO (see below).

4. What is the recognized legal rationale? The nature of the crime dependent on the jurisdictional principle? The international obligations assumed by the State? A threat to the international legal order? A threat to the national legal order where an alleged international criminal is committed on national territory?

As regards the legal rationale behind the concept of universal jurisdiction in German law, a distinction must be made between Section 1 VStGB and Section 6 StGB.

Regarding the exercise of universal jurisdiction over genocide, crimes against humanity, and war crimes (Section 1 VStGB), the following key reasons have been invoked:

- Nature of the crime / threat to the international legal order: the crimes are directed against the "vital interests of the international community"\textsuperscript{8} and therefore against the international legal order. Germany does not act in its own interest, but on behalf of the international community as a whole.\textsuperscript{9} This approach - the state acting as an agent for the international community when prosecuting international crimes - is widely supported by legal academics. Moreover, crimes that have an impact on the international community are always also of concern to each of its individual members.

- Impunity: often states directly affected by the offence - in particular the state of commission - are typically neither willing nor able to protect the attacked legal interests or to prosecute the violations committed.\textsuperscript{10} The reason for the implementation of the principle of universal jurisdiction is to ensure complete and effective prosecution of the most serious crimes of concern to the international community.\textsuperscript{11}

The reasons for the exercise of universal jurisdiction over crimes included in Section 6 StGB are different. In contrast to Section 1 VStGB, the crimes included in Section 6 StGB are treaty-based crimes, not crimes based on customary international law. Those treaties signed by Germany establish a duty for the state parties to prosecute these acts. This becomes especially clear regarding the blanket provision of Section 6 No. 9 StGB:


\textsuperscript{8} Bundeslag-Drucksache 14/8524, p. 14.


\textsuperscript{11} Federal Constitutional Court, in: Neue Juristische Wochenschrift 2001, p. 1848.
[...acts which, on the basis of an international agreement binding on the Federal Republic of Germany, shall also be prosecuted if they are committed abroad.

- International obligations: the scope of universal jurisdiction under Section 6 StGB is based on the treaty obligations adopted by Germany, as found, for example, by the Federal High Court concerning the prosecution of drug related crimes. However, this position is questioned more and more by legal academics, who doubt that international treaties can be a basis per se for the exercise of universal jurisdiction.

5. What are the differences between the principle of universal jurisdiction and other criteria for the extraterritorial application of the criminal law (the principle of active personality, passive personality, aut dedere aut iudicare, or an auxilliary principle)?

In addition to the principle of universality, other principles governing the exercise of jurisdiction are valid under German criminal law. Thus, the principle of territoriality (Section 3 StGB), the principle of the flag (Section 4 StGB), the principle of protection (e.g. Section 5 No. 1 – No. 5 StGB), the active personality principle (e.g. Section 5 No. 8 lit. b StGB, Section 7 (2) No. 1 StGB), the passive personality principle (e.g. Section 5 No. 6 StGB, Section 7 (1) StGB) and the principle of vicarious administration of justice (Section 7 (2) No. 2 StGB) are recognized. The relevant provisions are attached as Appendix 1.

In contrast to the principles of active and passive personality, German criminal law can be based on the principle of universal jurisdiction regardless of the nationalities of the perpetrator and victim. Therefore, crimes committed abroad by foreigners against non-German citizens are also included. Unlike the protective principle, the principle of universal jurisdiction does not apply to crimes against the political or territorial integrity of Germany. Hence, universal jurisdiction is not – or is at least only to some (minor) extent – exercised in order to protect the state’s own interests. While the legislative objective of Section 5 StGB is to protect certain “domestic legal interests” against acts committed abroad, the aim of Section 6 is to defend the enumerated “internationally protected legal interests”. Compared to the principle of vicarious administration of justice, the exercise of universal jurisdiction does not require that the act is punishable at the place of its commission and does not depend on whether the accused was found to be on German territory and was not extradited.

6. Is the presence of a certain point of contact with the State that exercises it necessary?

With respect to the requirement of a legitimizing link to the German territory or state when exercising universal jurisdiction, a distinction must be made between Section 1 VStGB and Section 6 StGB:

Section 1 VStGB expressly clarifies that German law shall apply to all the serious criminal offences designated under the Code, even when the crime bears no relation to Germany. Concerning this matter, the legislative memo explains: "The (serious) crimes governed in the VStGB are all directed against the vital interests of the inter-

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12 In: BGHSt 30, p. 33; and in: BGHSt 34, 334.
13 However, the nationality of the perpetrator might be relevant – with respect to the principle of universal jurisdiction – concerning the (procedural) question whether the public prosecutor has a duty to prosecute or prosecutorial discretion, see Section 153f StPO and below.
14 The place of presence of the accused might be of relevance as regards the (procedural) question whether the public prosecutor has a duty to prosecute or prosecutorial discretion, see Section 153f StPO and below. See further Federal Constitutional Court, in: Neue Juristische Wochenschrift 2001, p. 1848; and Federal High Court, in: BGHSt 34, p. 334.
national community ... and therefore subject to the principle of universal jurisdiction. As a result of the specific nature of these crimes, the trial of crimes committed abroad, even by foreign citizens, is not at variance with the principle of non-intervention. For German criminal law to be applicable to offences committed abroad, no ‘legitimizing link’ is required for crimes under the VStGB.” (Bundestags-Drucksache 14/8524, p. 29). With this approach, the German legislature explicitly contradicted the restrictive interpretation of former Section 6 No. 1 StGB and of Section 6 No. 9 StGB by the Federal High Court (see below). However, whether a special genuine link to Germany can be established or not is decisive in determining whether a duty to prosecute (principle of mandatory prosecution) exists or whether the prosecutor has discretion (Section 153f StPO, see below). In brief: Under Section 1 VStGB, German authorities are entitled to prosecute international crimes committed abroad even if there is no connection to Germany, whereas a duty to prosecute is given only when a specific link can be established.

A clarification such as the one included in Section 1 VStGB is missing in Section 6 StGB. According to its wording, German criminal law applies to the enumerated crimes, regardless of the law of the place of commission, even when committed abroad by a non-German citizen. However, the Federal High Court has limited the scope of German jurisdiction with respect to Section 6 StGB by imposing additional requirements. The starting point of this jurisprudence has been the general statement that the exercise of German jurisdiction over crimes committed abroad by foreigners against foreigners would be inadmissible in cases in which no German and no legal or no public interest of the German state is harmed. The further arguments of this jurisprudence can be summarized as follows: first of all, as a basic precondition, the application of German criminal law to crimes committed abroad by foreigners against foreigners shall not violate any prohibition under international law; therefore, an “additional legitimizing link” is required that bears direct relation to German criminal prosecution. Otherwise the sovereignty of other states, in accordance with the principle of non-intervention, could "hardly" be guaranteed; moreover, the national criminal courts would be overburdened.

Such a legitimizing link has been recognized in cases where the defendant has close personal ties to Germany (domicile, country of regular residence, close social contacts), e.g. if the perpetrator lived in Germany for several years before committing the crime or is officially registered in Germany at the time of the commission of the crime and was arrested in Germany (see Federal High Court, in: BGHSt 46, p. 292; and BGHSt 45, 64; Federal High Court, in: Neue Zeitschrift für Strafrecht 1999, p. 236). A special link has also been recognized in cases where Germany was directly politically or militarily involved in a conflict within the state of commission (Federal High Court, in: BGHSt 45, p. 64). In contrast, according to case law no legitimizing link is established by the residence of one of the victims or the plaintiff in Germany.

As regards this restrictive interpretation of Section 6 StGB in cases of genocide and war crimes, the jurisprudence has been severely – and rightly - criticized by schol-

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15 See Federal High Court, in: BGHSt 34, p. 336; see also Eser, in: 50 Jahre Bundesgerichtshof – Festgabe aus der Wissenschaft, 2000, p. 3, at pp. 26 et seq.


ars. However, this discussion became obsolete with the entry into force of Section 1 of the VStGB (see above). Regarding the remaining areas of application, Section 6 Nos. 2 – 8 StGB, this interpretation, guided by the principles of international law, has been commented in the affirmative. Indeed, good arguments may be brought in favour of the requirement of an additional legitimizing link for all cases under Section 6 Nos. 2 to 8 StGB (*volkerrechtskonforme Reduktion*). Yet, the requirement of a legitimizing link is not convincing regarding Section Section 6 No. 9 StGB: if the exercise of national jurisdiction over extraterritorial crimes is in compliance with the provisions of an international treaty, a violation of the principle of non-intervention can hardly be invoked. However, the Federal High Court extended the requirement of a legitimizing link to Section 6 No. 9 StGB until 1999 (Federal High Court, in: BGHSt 45, p. 64), when it left the question explicitly open. In a subsequent decision (Federal High Court, in: BGHSt 46, p. 292), the Court rightly indicated that a legitimizing link might not be required under international law, in addition to the requirements of Section 6 No. 9 StGB.

7. Is the presence of the accused on the national territory necessary in order to establish universal jurisdiction? If yes, what is the rationale? Is it expressly recognized by national legislation? Is it matter of jurisprudential practice?

The presence of the accused on German territory is not required for the application of German criminal law under Sections 1 VStGB and 6 StGB. In contrast to Section 7 (2) No. 2 StGB (principle of vicarious criminal justice), where the defendant must be found to be in Germany, domestic criminal law under the universality principle also applies if the defendant is not present on German territory. As a consequence, *investigation* of a crime is admissible also on the basis of the universality principle even though the defendant is outside Germany. However, one exception may arise in cases in which German jurisdiction is exercised under Section 6 No. 9 StGB and the international treaty concerned establishes a duty to prosecute only if the defendant is found to be on national territory (*aut dedere aut iudicare*). Moreover, the place of presence of the accused is decisive in determining whether or not the public prosecutor has a duty to prosecute international crimes subject to universal jurisdiction under the VStGB: Section 153 F (1) StPO provides for prosecutorial discretion (only!) when the accused is not found to be on German territory.

However, the presence of the defendant is required for the main proceedings: German law does not allow for a *trial in absentia* (see Section 230 (2) StPO).

8. In your country, what are the crimes subject to universal jurisdiction and on which legal rationale (e.g. piracy, slavery, war crimes, crimes against humanity, genocide, torture, terrorism, drug trafficking, counterfeiting, environmental crimes, other crimes)?

**Section 1 VStGB** extends German jurisdiction under the universality principle to the following crimes:

- genocide (Section 6 VStGB);
- crimes against humanity (Section 7 VStGB);
- war crimes against persons (Section 8 VStGB);

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20 See Lackner/Kühl, Strafgesetzbuch, § 6, marg. no. 1; also *Ambos*, Internationales Strafrecht, § 3, marg. no. 102; *Hilgendorf*, in: Juristische Rundschau 2002, p. 82; and – for details – *Werde/Jessberger*, in: Leipziger Kommentar, § 6, marg. nos. 26 et seq.
war crimes against property and other rights (Section 9 VStGB);
war crimes against humanitarian operations and emblems (Section 10 VStGB);
war crimes consisting in the use of prohibited methods of warfare (Section 11 VStGB);
war crimes consisting in employment of prohibited means of warfare (Section 12 VStGB).

The provisions refered to in Section 1 VStGB are attached as Appendix 1.

For the most part, Sections 6 to 12 VStGB correspond with the definitions of international crimes recognized under customary international law, as laid down in Articles 6 to 8 of the ICC Statute. The definition of genocide (Section 6 VStGB) follows the definition of Article 6 of the ICC Statute and Article 2 of the Genocide Convention. Section 7 VStGB – crimes against humanity – follows the overall structure of Article 7 of the ICC Statute, although some specifications have been made to secure conformity with the principle of certainty. Sections 8 to 12 VStGB deal with war crimes committed in an international armed conflict and crimes that have been committed in the context of a non-international armed conflict. Here, the VStGB rearranges the definitions contained in Article 8 of the ICC Statute. Additional provisions, especially those of Additional Protocol I to the Geneva Conventions and the 1999 Protocol II to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, have been included to the extent they are part of customary international law.\textsuperscript{21} As already mentioned, the selection of the crimes subject to the principle of universality under Section 1 VStGB is based on the assumption that those crimes directly affect the international community as a whole.

According to Section 6 StGB, German criminal law is applicable to the following crimes regardless of the law of the place of their commission (\textbf{Section 6 Nos. 2 - 8 StGB}):

- serious criminal offences involving nuclear energy, explosives and radiation in cases under Sections 307 and 308 (1) to (4), Section 309 (2) and Section 310;
- assaults against air and sea traffic (Section 316c);
- trafficking in human beings for the purpose of sexual exploitation and for the purpose of exploitation of labour as well as encouraging trafficking in human beings (Sections 232 to 233a);
- unauthorized distribution of narcotics (including in particular dealing in drugs, but not their purchase for personal use or mere possession);
- dissemination of (violent, animal, and child) pornographic writings in cases under Sections 184a and 184b (1) to (3), also in conjunction with Section 184c (1);
- counterfeiting of money and securities (Sections 146, 151 and 152), payment cards and blank Eurochecks (Section 152a (1) to (4), as well as their preparation (Sections 149, 151, 152 and 152b (5);
- subsidy fraud (Section 264).

The quoted provisions are attached as Appendix 1.

For German law to be applicable according to Nos. 2 to 8, an “additional legitimizing link” is required (see above).

As a rule, an analogy of Section 1 VStGB and Section 6 Nos. 2 to 4 and 6 to 8 StGB in order to extend jurisdiction over crimes not mentioned in those provisions\(^{22}\) is barred by the principle of legality (*nullum crimen*) (Section 1 StGB, Art. 103 (2) GG, cf. Federal High Court, in: BGHSt 45, p. 64). This applies also to crimes committed concurrently; also then German jurisdiction is only applicable if they are subject to Sections 4, 5, or 7 StGB.\(^{23}\) For instance, German criminal law is not applicable pursuant to Section 6 No. 3 StGB for homicide committed with an assault against air or sea traffic (Section 316c StGB).\(^{24}\)

**Section 6 No. 9 StGB** must be regarded as a special case. According to this provision, German criminal law is applicable regardless of the law of the place of their commission for

- acts which, on the basis of an international agreement binding on the Federal Republic of Germany, shall also be prosecuted if they are committed abroad.

Section 6 No. 9 StGB provides for pure universal jurisdiction only if the particular international treaty explicitly authorizes its assertion. Only a few international agreements, such as the Geneva Conventions of 1949, stipulate a right (and duty) to prosecute crimes between non-nationals without a domestic reference (see Federal High Court, in: BGHSt 46, p. 292; Higher Regional Court of Bavaria, in: Neue Juristische Wochenschrift 1998, p. 392). Other treaties contain a duty to prosecute only when additional elements are present, e.g. when the perpetrator is a national of the respective state. In those cases, German jurisdiction is not exercised on the basis of the universality principle.

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\(^{22}\) In contrast to Nos. 2 to 4 and 6 to 8 the scope of applicability of German law according to Nos. 5 and 9 is not limited to certain specific provisions under the StGB. Section 6 No. 5 refers to the „unauthorized distribution of narcotics“ – such a special provision does not exist in German criminal law. And Section 6 No. 9 defines the scope of applicability by means of extra-provisional criteria – decisive is the duty to prosecute contained in an international treaty binding on Germany.

\(^{23}\) However, the Federal High Court assumed an „annex jurisdiction“ for the crime of murder (Section 211 StGB) according to the former Section 6 No. 1 (genocide) when the crime was committed in the context of genocide; in: BGHSt 46, p. 292; and in: BGHSt 45, p. 64., at pp. 69 et seq. (reprinted in: Juristenzeitung 1999, p. 1176); commented in the affirmative e.g. by Werle, in: Juristenzeitung 1999, p. 1176; see also Eser, in: 50 Jahre Bundesgerichtshof – Festgabe aus der Wissenschaft, 2000, p. 3, at p. 26. The Court argued that genocide as well as murder both require the killing of another person as *actus reus* and both normally fulfill the same special *mens rea* requirement. This „inner connection“ justifies the acceptance of an „annex competence“ of the Court.

II. Universal Jurisdiction and the Organisation of Jurisdiction

1. Does the national law guarantee to persons suspected or accused of serious crimes subject to universal jurisdiction all the rights that are necessary to assure that their trial is equitable and expeditious?

In regard to the defendant’s rights, it does not make any difference whatsoever under which principle German courts exercise jurisdiction. The Federal Constitutional Court, in a case concerning genocide committed abroad, declared that no special criminal proceedings must be provided for specific crimes (in: Neue Juristische Wocheochondrft 2001, p. 1848). Therefore, a defendant who is being prosecuted on the basis of the universality principle can rely on all the procedural rights provided for in the European Convention on Human Rights and the StPO - especially the right to a fair and speedy trial – without any restrictions.

2. Does it recognize the application of the principle of discretionary prosecution? Is the prosecutor able to exercise discretion in deciding to prosecute these offences, and for which ones?

In general, German public prosecutors have a duty to investigate and prosecute (principle of mandatory prosecution – Legalitytsprinzip) as soon as an initial suspicion is established, Section 152 (2) StPO. However, some exceptions exist regarding the prosecution of extraterritorial crimes. The scope of prosecutorial discretion varies depending on whether universal jurisdiction is exercised under Section 1 VStGB or Section 6 StGB.

To the extent Section 6 StGB extends national jurisdiction over crimes committed abroad, the public prosecutor can exercise his or her wide discretion and refrain from prosecution (Section 153c (1) (1) StPO). The same applies in cases where the defendant has been punished abroad and the sentence to be expected in Germany would not significantly exceed the sentence which has already been enforced abroad, or where the defendant has been acquitted by the foreign court (see below). However, in this case – acquittal of the defendant abroad – the execution of German criminal proceedings might be reasonable when the reason for the acquittal was the foreign court’s lack of jurisdiction. If public charges have already been preferred, the prosecutor can still end the proceedings if “predominant public interests” are not opposed (Section 153 (4) StPO). Generally the prosecutor must decide whether – from the German point of view – a public interest exists in prosecuting the crime in question,25 taking into consideration the specific problems that may arise during the prosecution. If the conduct of proceedings would create a risk of serious detriment to Germany, the crime should not be prosecuted. The prosecutor’s discretionary decision is final and cannot be reviewed by a court.

Section 153c Non-Prosecution of Offenses Committed Abroad.
(1) The public prosecution office may dispense with prosecuting criminal offenses:
1. which have been committed outside the territorial scope of this statute, or which an inciter or accessory to an act committed outside the territorial scope of this statute has committed within the territorial scope thereof;
2. which a foreigner committed in Germany on a foreign ship or aircraft;
3. if a sentence for the offense was already executed against the accused abroad, and the sentence which is to be expected in Germany would be negligible after taking the foreign sentence into account or if the accused has already been acquitted by final judgment abroad in respect of the offense.

For crimes punishable under the VStGB Section 153f shall apply.
(2) The public prosecution office may dispense with prosecuting criminal offences if a sentence for the same offence was already executed abroad and the sentence which is to be expected in Ger-

many would be negligible after taking the foreign sentence into account or if the accused has already been acquitted by a final judgement abroad for the same act.
(3) The public prosecution office may also dispense with prosecuting criminal offenses committed within, but through an act committed outside, the territorial scope of this statute, if the conduct of proceedings would pose the risk of serious detriment to the Federal Republic of Germany or if other predominant public interests present an obstacle to prosecution.
(4) If charges have already been preferred, the public prosecution office may in the cases of subsection (1), numbers 1 and 2, and of subsection (2) withdraw the charges at any stage of the proceedings and terminate the proceedings if the conduct of proceedings would pose the risk of serious detriment to the Federal Republic of Germany, or if other predominant public interests present an obstacle to prosecution.
(5) If criminal offenses of the nature designated under section 74a subsection (1), numbers 2 to 6, and under section 120 subsection (1), numbers 2 to 7, of the Courts Constitution Act are the subject of the proceedings, the Federal Prosecutor General shall have these powers.

With regard to the scope of universal jurisdiction over international crimes committed abroad pursuant to Section 1 VStGB, Section 153f StPO has to be considered in regard to the way in which this jurisdiction is exercised:

Section 153f StPO Non-Prosecution of Offences Under the VStGB
(1) In the cases referred to under Section 153c subsection (1), numbers 1 and 2, the public prosecution office may dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, if the accused is not present in Germany and such presence is not to be anticipated. If in the cases referred to under Section 153c subsection (1), number 1, the accused is a German, this shall however apply only where the offence is being prosecuted before an international court or by a State on whose territory the offence was committed or whose national was harmed by the offence.
(2) In the cases referred to under Section 153c subsection (1), numbers 1 and 2, the public prosecution office may dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, in particular if
1. there is no suspicion of a German having committed such offence,
2. such offence was not committed against a German,
3. no suspect in respect of such offence is residing in Germany and such residence is not to be anticipated and
4. the offence is being prosecuted before an international court or by a State on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offence.
The same shall apply if a foreigner accused of an offence committed abroad is present in Germany but the requirements pursuant to the first sentence, number 2 and 4, have been fulfilled and transfer to an international court or extradition to the prosecution state is permissible and is intended.
(3) If charges have already been preferred in cases under Subsections (1) or (2), the public prosecution office may withdraw the charges at any stage of the proceedings and terminate the proceedings.

Section 153f StPO replaces Section 153c StPO for crimes under the VStGB, i.e. genocide, crimes against humanity and war crimes. As compared to Section 153c StPO the margin of prosecutorial discretion is cut back. The gravity of the crimes covered by the VStGB and the VStGB’s aim of preventing international crimes from going unpunished made this restriction necessary. At the same time, Section 153f StPO establishes guidelines on how the remaining discretion should be exercised.

Section 153f StPO has two aims. The primary objective is to prevent non-punishment of perpetrators of international crimes; on the other hand, however, German investigation authorities shall not be burdened with cases in which it appears to be very unlikely that a criminal trial will ever be completed. In detail: The main objective of Section 153f StPO is to prevent international crimes going unpunished and to put an end to impunity. The widely assumed subsidiary jurisdiction of third states must be taken into account, and is achieved not by cutting back the scope of universal jurisdiction, but through a complex procedural provision regarding the exercise of this jurisdiction. Therefore in certain situations, German prosecution authori-

ties should refrain from using their power of prosecution and yield to foreign or international prosecution authorities (Bundestags-Drucksache 14/8524, p. 82). Nevertheless, in those cases, domestic prosecution remains possible and the results of investigations initiated in Germany could be valuable for proceedings before a foreign or international court. In the explanatory memo for the VStGB, the legislator explicitly declares that “the purpose of the regulation makes it clear that the act of refraining from prosecution cannot be justified under Section 153f StPO if prosecutions abroad are mere sham proceedings, or prosecutions conducted without serious intent to prosecute, for the purpose of shielding the accused from prosecution” (Bundestags-Drucksache 14/8524, p. 83). At the same time, the provision takes note of the risk of overstretched Germany’s investigative resources (“procedural corrective”), which had been feared as a consequence of the “pure” (unconditional) application of the principle of universal jurisdiction under Section 1 VStGB. In particular, German authorities should refrain from initiating criminal proceedings in cases that have no connection to Germany whatsoever and in which it appears to be very unlikely that a criminal trial (in Germany) will ever be completed. In this context, it may also be decisive if the offence in question is already prosecuted before a court of another state or an international court. In this respect, Section 153f StPO establishes a “gradual hierarchy of jurisdictions”\footnote{Bundestags-Drucksache 14/8524, p. 37; Beulke, in: Löwe-Rosenberg, Strafprozessordnung, 2001/2003, § 153f, marg. no. 6. The Federal Attorney General commented on this as follows (Federal Attorney General, in: Juristenzeitung 2005, p. 311): “The state of the commission of the crime and the home state of the perpetrator and the victim and a competent international court are called on first to prosecute. The jurisdiction of third states must be understood as a subsidiary jurisdiction which should prevent non-punishment (impunity) but not otherwise inappropriately interfere with the primarily responsible jurisdiction. Not unless primary prosecution by the foreign state or the international court cannot be secured, for instance when the accused escapes criminal proceedings by leaving the country, is domestic subsidiary jurisdiction triggered. This hierarchy of responsibility results from the particular interest of the home state of the perpetrator or the victim in the prosecution and the general proximity to evidence.”}, the state in which the crime takes place and the home state of the perpetrator or victim (particular interest in the prosecution, proximity of evidence) and a competent international court are called upon first to prosecute the person suspected of a crime under international law. The underlying rationale may be summed up as follows: The jurisdiction of so-called third states (i.e. states exercising universal jurisdiction) must be understood as subsidiary only; third states are called to step in to prevent such crimes as genocide, crimes against humanity and war crimes from going unpunished only but should not otherwise interfere with the primarily responsible jurisdiction (“substitiäre Drittstaaten-Gerichtsbarkeit”: Oberlandesgericht Stuttgart, in: Zeitschrift für Internationale Strafrechtsdogmatik 2005, p. 143). If the offence is being prosecuted by an international or foreign jurisdiction with primacy and the foreign accused is present on German territory, the extradition or transfer of this person to the prosecuting jurisdiction generally has priority over Germany’s subsidiary prosecution interest; however, it is generally accepted that sham proceedings in the primarily responsible jurisdiction cannot rule out Germany’s subsidiary jurisdiction as a third state.\footnote{Bundestags-Drucksache 14/8524, p. 38; Beulke, in: Löwe-Rosenberg, Strafprozessordnung, 2001/2003, § 153f, marg. no. 19.} Remarkably, with this approach German law also recognizes the priority of the ICC. According to the legislative memo, this is not in contravention of the principle of complementarity in Article 17 ICC Statue; this principle should not be understood to encourage the state whose jurisdiction in a specific case is based solely on the principle of universal jurisdiction to claim this jurisdiction before the ICC (Bundestags-Drucksache 14/8524, p. 84).\footnote{See Beulke, in: Löwe-Rosenberg, Strafprozessordnung, 2001/2003, § 153f, marg. no. 6.}
Before this theoretical background, as a rule, investigation and prosecution of crimes of genocide, crimes against humanity, and war crimes are mandatory, even if jurisdiction is based on the universality principle (see Section 152 (2) StPO). Section 153f StPO provides for discretion whether to prosecute genocide, crimes against humanity, and war crimes committed abroad only if:

- a foreigner who is accused of the crime is not present on German territory and is not expected to enter German territory. Unlike presence during transit, the mere theoretical possibility of entry into Germany is insufficient, according to the Federal Attorney General; entry can hardly be expected if the accused has no personal, familial or professional ties to Germany.  

- a German who is accused of the crime is not present on German territory, his entry into Germany is not expected, and if the offence is being prosecuted before an international court or the State on whose territory the offence was committed or whose national was harmed by the offence.

Furthermore, Section 153f (2) StPO contains some guidelines for the prosecutor on how to make use of his discretion. According to these, the prosecutor is encouraged to refrain from using his power to prosecute (“may dispense with prosecuting ... in particular if”) if the following conditions are fulfilled:

- a German is not involved in the crime, either as perpetrator or as victim;

- the offence is being prosecuted by a primarily responsible international or foreign jurisdiction;

- the accused is not present on German territory and is not expected to enter the country; or – in case the accused is present – his transfer or extradition to a primarily responsible international or foreign jurisdiction is permissible and intended.  

It must be noted, however, that even if the conditions of Section 153f StPO are met, and prosecution is therefore discretionary, prosecution and trial remain permissible – and might even be reasonable, for instance – as the legislative memo explicitly states - if a large group of victims is present in Germany.  

The decision to refrain from or to terminate investigations or proceedings according to Section 153f StPO is the exclusive responsibility of the Federal Attorney General. The prosecutor can withdraw the charges at any stage of the proceedings, even if charges have already been preferred. The Federal Attorney General has full discretionary power; generally the decision is not subject to appeal.  

A review of recent practice reveals, that in several cases the Federal Attorney General has refrained from initiating criminal proceedings on the basis of Section 153f StPO. In this context two major – and highly controversial – questions have arisen:

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31 According to the Federal Attorney General and the Oberlandesgericht Stuttgart this might also be the case if the suspect is present on German territory but as a member of foreign military forces based in Germany subject to the exclusive jurisdiction of the sending state (Oberlandesgericht Stuttgart, in: Zeitschrift für Internationale Strafrechtsdogmatik 2005, p. 143, available at http://www.zis-online.de).

32 Bundestags-Drucksache 14/8892, p. 6.

Concerning the requirements of Section 153f StPO, the question arose, what is required to stipulate that “the offence is being prosecuted” and, in this context, what is to be understood by the term “offence” (die Tat) in Section 153f (2) (1) StPO. The Federal Attorney General interpreted the elements of Section 153f StPO with reference to the Rome Statute, especially to the principle of complementarity. By doing so, he introduced a novel definition of “offence”, as yet unknown in German criminal law: in his opinion, “the offence” which is “being prosecuted” refers to the entire complex of criminal acts in general, the “situation” as such, but not to a certain individual or a certain act. Consequently, the prosecutor is of the opinion that an “offence” is being prosecuted by another jurisdiction if investigations have been launched concerning the same complex of criminal acts (e.g. “events in Abu Ghrailb, Iraq”), even if the proceedings are not directed against the persons named concretely in the complaint filed in Germany (e.g. D. Rumsfeld). This interpretation provides several points of criticism: first, the ICC Statute merely regulates the relationship between the ICC, on the one hand, and the state parties, on the other; second, the Rome Statute does not provide for universal jurisdiction; third, Articles 18 and 19 ICC Statute establish a sophisticated and well-balanced mode of (vertical) distribution of authority (including monitoring and review mechanisms) which must also be taken note of if one endeavors (like the Federal Attorney General does) to transfer the complementarity regime of the ICC Statute to (horizontal) conflicts of jurisdiction between various national criminal justice systems.

The second issue that came up relates to the question on which arguments – once there is a margin of discretion under Section 153f StPO – the prosecutor may legitimately base his decision not to prosecute. So far, the Federal Prosecutor regularly discussed whether an investigation in Germany could effectively help to determine substantial facts of an alleged crime in order to prepare and support upcoming trials either abroad or in Germany. According to the prosecutor, only if this question can be answered in the affirmative should domestic investigations be launched. On this basis, the Federal Prosecutor has found on several occasions that German authorities and court were not in a position to significantly contribute to the clarification of the facts of an alleged crimes, and that therefore the initiation of criminal proceedings was not reasonable. In this context, the prosecutor stressed in particular that generally investigations in the state in which the crime was committed were necessary, and that – since German authorities are only entitled to investigate extraterritorially with permission of the state in question – the typical lack of cooperation on part of the state of commission proves as an obstacle to “successful” investigations. Prima facie, this line of argumentation seems convincing. Yet, closer scrutiny reveals some doubts: international crimes are typically state crimes; the state in which the crime is committed is normally involved. It is obvious that those states are not willing to cooperate with a third state investigating these crimes; already for this reason, the argument of the prosecutor is feeble. Otherwise, the entire system of international criminal justice and the enforcement of international criminal law through national jurisdictions would be challenged. Moreover, the fact that the accused is not present on German territory and that the offence is an extraterritorial crime can not be presented to support a decision not to prosecute, as the presence of the accused in Germany and the commission of the crime in Germany always imply a duty for German criminal authorities to prosecute – their absence cannot automatically lead to the ending of investigations.

3. Are all courts of the State able to exercise universal jurisdiction? Does there exist a specific judicial organ to exercise this function?

The competence of the courts *ratione materiae* is determined according to the crime charged and the expected sentence, regardless of the principle on which jurisdiction is based.

However, as regards **Section 1 VStGB**, special rules apply: the competence to prosecute crimes subject to the VStGB is concentrated; exclusive competence lies with the Federal Attorney General and the Higher Regional Court (*Oberlandesgericht*) in whose district the provincial government is situated (Section 120 (1) No. 8 Law on the Constitution of Courts (*Gerichtsverfassungsgesetz* – VGV). Yet, the legislator refused to name one specific Court on grounds of flexibility (experience of the court, presence of the accused or of witnesses).

As regards the competence of courts *ratione materiae* concerning crimes subject to **Section 6 StGB**, there is no concentration of prosecutorial or adjudicative competencies: the competent first instance court is either the Higher Regional Court (*Oberlandesgericht*) (Section 120 (2) No. 3 VGV), the Regional Court (*Landgericht*) (e.g. Sections 74 (1), 74 (2) (1) nos. 17 et seq., 74c (1) (1) No. 5 VGV) or the Local Court (*Amtsgericht*) (Section 24 VGV), depending on the facts of each individual case.

If local venue cannot be established in any domestic court – as is often the case for extraterritorial crimes – the Federal High Court decides which court shall be competent (Section 13a StPO).

4. Is there a judicial organ able to issue an international arrest warrant against the accused for violations subject to universal jurisdiction?
5. What conditions are necessary to fill the order? Does one have to provide reasonable proof of the culpability of the requested subject?

For the issue of international arrest warrants or detention requests for crimes subject to universal jurisdiction, no particularities need be taken into consideration.

If an arrest warrant has been issued by the competent Local Court (Section 112 StPO; requirements: an elevated degree of suspicion against the suspect, ground for arrest (flight, risk of flight, risk of evidence tampering), proportionality) the public prosecutor can issue a formal imprisonment request transmitted either via Interpol (by the Federal Criminal Police Office - *Bundeskriminalamt*, BKA) or through the Schengen Information System (SIS), or by diplomatic means. If requested by the invoked state, certified documents containing proof of the culpability of the suspect shall be included with the outgoing extradition request, No. 92 (1) (a) (bb) RIVAST.

With the entry into force of the (second) German European Arrest Warrant Act on 2 August 2006, the transmission of arrest warrants and imprisonment requests between the European Union States became easier and faster. The existence of an arrest warrant issued according to national procedural law (Section 112 StPO) is still required, but no proof of culpability must be delivered. The mere description of the facts and a legal evaluation suffice (Section 83a IRG; Article 8 European Arrest Warrant Framework Decision).

6. If your country receives an international arrest warrant, will it consider the existence of such as proof of guilt?

In general, when German authorities receive an extradition request or an international arrest warrant, a separate verification of the facts and the evidence does not
take place; as a rule, German authorities shall have confidence that foreign prosecution authorities have investigated the facts and concluded on the defendant’s responsibility adequately.

However, if special circumstances give rise to the assumption that the extradition request is inconsistent, improper and may be arbitrary, the court and the competent authority may review whether there are reasonable grounds to believe that the accused has committed the offence with which he or she is charged, Section 10 (2) IRG. If doubts remain which cannot be immediately cleared up by the requesting state, extradition detention pursuant to Sections 15 (1) or 16 (1) n. 1 IRG shall not be ordered.

**Article 10 IRG Extradition Documents.**

(1) Extradition shall be granted only if, as a result of the commission of the act, an arrest warrant or a document with corresponding legal force or a decision by a competent authority of the requesting state, which is enforceable and orders imprisonment, as well as a representation of the applicable laws, has been submitted. If extradition is requested for the purpose of prosecution of several offences, then, instead of an arrest warrant or a document with corresponding legal force, a document from the competent authorities of the requesting state which shows the charges made against the person sought shall suffice with regard to additional offences.

(2) If special circumstances justify a review as to whether there is reasonable ground to believe that the accused has committed the offence with which he is charged, extradition shall be granted only upon presentation of the facts showing probable cause that the offence has been committed.

The same applies to treaty-based extradition, even if a verification of the proof of guilt is explicitly excluded (e.g. European Convention); but in this case, the abuse of the extradition request must be evident and its assumption based on precise facts.

If a foreign state requests the arrest of a suspect or issues an international arrest warrant via SIS, the German court may order provisional extradition detention prior to the receipt of the official extradition request (Section 16 (1) IRG, Article 16 (1) European Convention) if the following requirements are met:

- request by a competent authority of the requesting state (No. 1); or
- strong suspicion against a foreigner of an offence which may lead to extradition (No. 2)
- grounds for arrest (risk of flight, risk of tampering with evidence (Section 15 (1) IRG)
- proportionality
- extradition shall not appear inadmissible from the outset (Section 15 (2) IRG

**Section 15 IRG Extradition Detention.**

(1) Upon receipt of an extradition request, extradition detention of the person sought may be ordered

1. If there is danger that he may avoid the extradition proceedings or the extradition; or
2. If, on the basis of known facts, there is reason for the strong suspicion that the accused would obstruct the finding of truth in the foreign proceedings or in the extradition proceedings.

(2) Para. 1 shall not apply if it appears from the outset that extradition will not be granted.

**Section 16 IRG Provisional Extradition Detention.**

(1) Under the conditions of Section 15, extradition detention can be ordered prior to receipt of the extradition request, if

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1. a competent authority of the requesting state requests it; or
2. a foreigner, on the basis of certain facts, is under strong suspicion of an offence which may lead to his extradition.

(2) The extradition arrest order shall be cancelled if the accused has been detained from the day of his arrest or under provisional detention for the purpose of extradition for a total of two months and the extradition request with the extradition documents has not been received by the authorities designated in Section 74 or by any other authorities competent to receive the request and the documents. If a non-European state has requested the order of a provisional extradition detention, the period of time shall be three months.

(3) After receipt of the extradition request and the extradition documents, the Higher Regional Court shall make its decision without delay concerning the continuation of the detention.

7. Will it take account of the potential political ramification of the application of this order?

Concerning non-treaty based requests, the competent authority generally has discretion whether to grant the extradition or not. Only if the court has decided that the extradition is inadmissible are the granting authorities bound to this decision, Section 12 IRG. Reasons for refusing extradition may also be based on political arguments. However, the scope of discretion is limited when the extradition request is based on a treaty binding on Germany or on an European arrest warrant (Section 79 (1) IRG); in the latter case, extradition may only be refused if an obstacle pursuant to Section 83b IRG exists.

Section 83b IRG Obstacles to Approval.
(1) Applications for extradition may be refused if:
   a) criminal proceedings are being carried out against the accused in the area covered by this law for the same act that is the basis of the extradition request,
   b) initiation of criminal proceedings for the same act that is the basis of the extradition request was rejected or already initiated proceedings were abandoned,
   c) precedence is to be accorded to the extradition request of a third state,
   d) there is no expectation of a duty to extradite pursuant to the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (ABl. EG Nr. L 190 S. 1), with an assurance provided by one of the requesting states, or another reason that would be comparable to a similar German request.

(2) Applications for extradition of a foreigner who is normally resident in Germany may further be refused:
   a) if the extradition of a German national for the purposes of prosecution is not permissible pursuant to Section 80 (1) or (2) IRG,
   b) if in the case of extradition for the purpose of serving a sentence he, after being informed of the judicial protocol, has not consented and his protected interest in serving the sentence in Germany does prevail; Section 41 (3) and (4) shall apply correspondingly.

8. May universal jurisdiction be exercised in absentia (universal jurisdiction in persona or in absentia)?

Here a distinction must be made between the preliminary proceedings (investigation and prosecution by the public prosecutor), on the one hand, and the main proceedings (trial before a court), on the other.

Preliminary proceedings may also be conducted in absentia; in particular as regards investigation and indictment, the presence of the suspect in Germany is not required for the exercise of universal jurisdiction. In particular, acts of investigation can proceed if the accused is not present on German territory; but the accused must be able to take a stand before the indictment is submitted to the court. Compared to prosecution based on the principle of vicarious administration of justice (Section 7 (2) No. 2 StGB), where the defendant must be found to be in Germany, investigation proceedings based on the principle of universality may be initiated also when the suspect is not present on German territory. One exception may result from international treaties imposing upon Germany a duty to prosecute only when the accused is comprehended in Germany; if German jurisdiction is based on such a treaty (via Section 6 No. 9 StGB), the presence of the suspect on German territory is indeed a prerequisite
of the exercise of jurisdiction. Moreover, the presence of the accused is decisive for the question whether or not the public prosecutor has a duty to prosecute international crimes subject to universal jurisdiction under the VStGB: as a rule, Section 153f (1) StPO provides for prosecutorial discretion when the accused is not present in Germany.

However, the presence of the defendant is required for the main proceedings; German law does not allow for a trial in absentia, Section 230 (2) StPO. Therefore, the conviction of the accused is possible only if he is present; this holds true also in cases where German jurisdiction is based on the principle of universality pursuant to Sections 1 VStGB and 6 StGB.

1. Does your national legislation provide express criteria to allow for resolution in case of conflict of multiple jurisdictions? For example, if two States are competent to prosecute a crime subject to universal jurisdiction?

2. If applicable, do your national courts recognize these criteria? If so, what are the criteria?

There exists no comprehensive set of rules in German criminal law on the resolution of conflicts of jurisdictions. Germany has not yet joined the European Convention on the Transfer of Proceedings in Criminal Matters of the Council of Europe of 15 May 1972 (ETS Nr. 73). However, the following provisions must be taken into consideration:

- Section 51 (3) StGB: a punishment handed down by a foreign court for the same act shall be deducted from any new sentence to the extent it has already been executed (Anrechnungsprinzip).

- Within the scope of his discretion, the public prosecutor can decide to refrain from prosecuting an extraterritorial crime when another state (e.g. state of commission) has already initiated criminal proceedings (Section 153c (1) StPO, see above). Also, some recent international treaties binding on Germany contain special mechanisms and set up a system of coordination and consultation. In the case of conflict of jurisdictions concerning international crimes subject to the VStGB, Section 153f StPO provides for the above-mentioned “graduated system of prioritized jurisdictions”: an international criminal court and a jurisdiction with closer connections to the crime (particularly the state of commission, the home state of the perpetrator or the home state of the victim) shall have primary jurisdiction while German authorities exercising jurisdiction under the principle of universality shall only step in when no primary jurisdiction is able and willing to prosecute.

- Section 153c (2) StPO, as regards the principle of ne bis in idem and the corresponding possibilities of abandonment of proceedings (see below).

- The juxtaposition of an extradition request and a domestic criminal proceeding in the same matter is subject to Section 9 IRG. If domestic criminal proceedings concerning the same act have been carried out in Germany and the court has rendered a judgement or a decision (for details see Section 9 No. 1 IRG, see also Article 8 European Convention), the statute of limitations has elapsed or an amnesty law has been enacted, no extradition shall be granted to the requesting state. The same applies if a judgement or a decision has been rendered by an international court, Section 9a (1) IRG. According to Section 154b StPO, the German prosecutor has discretion to dispense with prose-
cuting an offence if the accused is extradited because of the same or another offence or if he is transferred to an international court.

**Section 9 IRG Concurrent Jurisdiction.**

If the act is also subject to German jurisdiction, extradition shall not be granted, provided
(1) a court or other authority in Germany has rendered a judgement or a decision with corres-
ponding legal force or has declined to open the main trial (Section 204 of the Code of Criminal
Procedure) or has denied a motion to issue a formal indictment (Section 174 of the Code of Crimi-
nal Procedure) or has suspended the proceedings after the satisfaction of conditions and instruc-
tions (Section 153 (a) of the Code of Criminal Procedure) or has, under juvenile criminal law, re-
sinded prosecution or has suspended the case (Sections 45 and 47 of the Juvenile Court Act), or
(2) the statute of limitations for the prosecution or the enforcement has elapsed under German
law or the prosecution or enforcement is barred by a German amnesty law.

**Section 9a IRG Extraditions and Proceedings before International Criminal Courts.**

(1) Extradition of an accused for an act shall not be granted if an international criminal court, es-
established according to a legal act which is binding on the Federal Republic of Germany, hands
down a legally binding judgement or a decision with corresponding legal effect or suspends the
criminal proceedings on the ground that they are non-appealable and prosecution by other courts
is prohibited by the establishing act in this instance. Should the criminal court indicated in sen-
tence 1 conduct criminal proceedings for the act and should a decision not yet have been rendered
pursuant to sentence 1 of the criminal court after receipt of an extradition request, a decision on
the admissibility of the extradition will be deferred. Temporary extradition (Art. 37) is excluded.
(2) If a foreign state and a criminal court in the meaning of sentence 1, paragraph 1 request the
transfer of the accused for criminal prosecution or execution of sentence (concurrent requests)
and if the establishing act of the criminal court or the statutory regulations which bring about its
implementation contain provisions governing the settlement of several requests, the requests shall
be dealt with in accordance with these provisions. If neither the establishing act nor the statutory
regulations which bring about its implementation contain provisions on dealing with concurrent re-
quests but the establishment act grants precedence to the proceedings of the criminal court over
proceedings of a foreign State, then precedence will be given to the request of the criminal court.

**Section 154b StPO Extradition and Expulsion.**

(1) Preferment of public charges may be dispensed with if the accused is extradited to a foreign
government because of the offense.
(2) The same rule shall apply if he is to be extradited to a foreign government because of another
offense and the penalty or the measure of reform and prevention in which the domestic prosecu-
tion might result is negligible in addition to the penalty or measure of reform and prevention which
was imposed on him abroad with binding effect or which he is to expect abroad.
(3) Preferment of public charges may also be dispensed with if the accused is expelled from the
territorial scope of this Federal statute.
(4) If in the cases of subsections (1) to (3) public charges have already been preferred, the court,
upon application by the public prosecution office, shall provisionally terminate the proceedings.
Section 154 subsections (3) to (5) shall apply mutatis mutandis, provided that the time limit in sub-
section (4) amounts to one year.

Among academics, several proposals are being discussed on how to determine the
"best" and most effective jurisdiction in cases of conflict of multiple jurisdictions.39
Two basic models can be distinguished: a more recent approach favours flexible han-
dling of the allocation of jurisdiction on a case-by-case basis.40 The counter model
arranges the various principles of criminal jurisdiction in a hierarchical order and de-

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39 In this context the annotation of the Federal Constitutional Court – developed in the decision on the
European Arrest Warrant (reprinted in: Neue Juristische Wochenschrift 2005, p. 2289) - must be men-
tioned: accordingly, differentiation must be made as concerns crimes of German nationals having a
"significant domestic link" and those having a "significant foreign link". Only regarding the first group
his or her trust in the German legal order must be protected. (see further Ranft, in: Zeitschrift für Wirt-
schaft, Steuer, Strafrecht (wistra) 2005, p. 361, at p. 364). As regards the conflict of multiple jurisdic-
tions the approach of the Federal Constitutional Court leads to the conclusion that the transfer of crimi-
nal proceedings concerning crimes perpetrated on German territory by a German national is out of
question.

40 See, for example, Eicker, in: Strafverteidiger 2005, p. 631; Vander Beken/Vermeulen/Steverlynck/
Thomaes, Finding the best Place for Prosecution, 2002, p. 48 et seq.; VanderBeken/Vermeulen/
Lagodny, in: Neue Zeitschrift für Strafrecht 2002, p. 624, and the resolution of the Fourth Section of
the XVII. International Criminal Congress of the AIDP, in: Revue Internationale de Droit Penal 75
termines which state is authorized to exercise its jurisdiction according to the classification of links which underlie those principles of jurisdiction. It is questionable however whether such a ranking already emerged as a rule under customary international law.\(^{41}\) It can be assumed that in such a case, the primary jurisdiction will always be that of the state of commission. Further, arguments can be brought forth in support of a primacy of a state’s own interest in prosecution, which should prevail over the foreign states’ interests.\(^{42}\)

(A) Universal Jurisdiction and International Criminal Tribunals
1. Is your country a party to a treaty to one of the existing international criminal tribunals?
2. If your country has already ratified the ICC treaty (or is preparing to do so), is it (or will it be) necessary to do this to proceed with a reform of your Constitution? In this case, in what manner?
3. In case your country has not ratified the ICC treaty, what were the difficulties encountered? Legal difficulties (possibly constitutional)? Other difficulties?

Germany signed the ICC Statute on 10 December 1998 and ratified it on 11 December 2000. In order to create the constitutional conditions required and in particular to make sure that Germans can be handed over to the ICC, Article 16 (2) of the German Constitution (\textit{Grundgesetz} – GG) was amended authorizing the parliament to enact a law allowing individuals to be turned over to certain international courts. Article 16 (2) GG now reads as follows:

\textbf{Article 16 GG Citizenship; Extradition.}

... (2) No German may be extradited to a foreign country. A different regulation to cover extradition to a Member State of the European Union or to an international court of law may be laid down by law, provided that constitutional principles are observed.

The German legislature made use of this authorization e.g. in Section 2 of the Law on Cooperation with the ICC (\textit{Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof} – IStGHG); corresponding provisions can be found in the Law on Cooperation with the ICTY (\textit{Gesetz über die Zusammenarbeit mit dem Strafgerichtshof für das ehemalige Jugoslawien} – JStGHG) and the Law on Cooperation with the ICTR (\textit{Gesetz über die Zusammenarbeit mit dem Strafgerichtshof für Ruanda} – RStGHG).

4. Does your legislation, in anticipation of such a situation, contain a permanent rule for conflicts of jurisdiction with an international tribunal? Imagine the following situation: Your country is competent to judge in conformity with the principle of universal jurisdiction, as well as the international criminal tribunal because of the nature of the crime.
5. What are the rules to apply to solve this conflict?
6. If the international criminal tribunal has a position of preference: Are the domestic tribunals required to check, officially, if the international criminal tribunal is competent? Or does the international tribunal itself have to demand this priority? If it is competent, is it able to request in its favour a case already in progress?
7. If the international tribunal occupies an auxiliary position: under what conditions may it request in its favour a case already in progress?

As regards the conflict of domestic jurisdiction with the jurisdiction of an international court, a distinction must be made between the jurisdiction of the ICC and the jurisdiction of the UN ad-hoc tribunals.

The \textbf{ad-hoc tribunals} have absolute primacy over national courts, Article 9 (2) ICTY Statute and Article 8 (2) ICTR Statute. Accordingly, Section 2 (1) JStGHG/RStGHG

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\(^{42}\) See e.g.: \textit{Ambos}, in: Münchener Kommentar zum Strafgesetzbuch, 2003, Vor § 3, marg. no. 72.
state that domestic criminal proceedings that fall within the jurisdiction of the tribunal shall be transferred to it at any stage at the tribunal’s request.

**Section 2 JStGHG / RStGHG**

**Status vis-à-vis criminal proceedings in the Federal Republic of Germany.**

(1) At the Tribunal’s request, criminal proceedings involving offences which fall within its jurisdiction shall be transferred to the Tribunal at any stage. In the event that criminal proceedings which are so transferred have resulted in the imposition of a legally valid sentence, once the convicted party in question, pursuant to Section 3 (1), has been remanded to the custody of the Tribunal, the further enforcement of this sentence shall cease.

(2) Should a request pursuant to paragraph 1, sentence 1 be submitted, no proceedings may be conducted against any person for an offence falling within the jurisdiction of the Tribunal for which they are standing or have stood trial before that Tribunal.

(3) Insofar as the conditions stipulated in paragraph 1, sentence 1 have been satisfied, the decision to transfer proceedings to the Tribunal shall be taken by the competent court. That court shall also submit to the Tribunal the available evidence and the records of the investigations and proceedings conducted up to that point, as well as any judicial decisions that have already been handed down. In the event that a single sentence has been imposed for a series of offences in respect of which only partial grounds obtain for ruling that they should fall within the jurisdiction of the Tribunal, following the transfer of the criminal proceedings to the Tribunal, the remaining sentences shall form a single reduced sentence. Section 456a of the Code of Criminal Procedure shall apply mutatis mutandis.

(4) Subject to the proviso that the final decision shall be taken by the public prosecutor, where the proceedings in question are not yet pending before the court, paragraph 3, sentences 1 and 2 shall apply mutatis mutandis.

(5) Section 154b of the Code of Criminal Procedure shall apply mutatis mutandis.

(6) In those cases specified in paragraph 3, sentence 1, the court shall not rule on the costs of the proceedings incurred prior to their transfer to the Tribunal until such time as the Tribunal has brought the transferred proceedings in question to a legal conclusion. In this connection, the court shall predicate its decision upon the Tribunal’s ruling on the issues of guilt and punishment. Following consultation with the parties involved, a decision shall be effected by a court order. Sentences 1 to 3 shall apply mutatis mutandis in respect of those decisions which are to be taken in accordance with the law on compensation for criminal proceedings.

The decision to transfer the proceedings shall be taken by the public prosecutor (Subparagraph 4); if the proceedings are already pending before the court, the decision shall be taken by the competent court (Subparagraph 3). This procedure is not a violation of the "upward ne bis in idem" principle stated in Article 10 (2) ICTY Statute / Article 9 (2) ICTR Statute: at this stage of the proceedings, the defendant has not yet "been tried" by a national court. The public prosecutor and the concerned national court shall also submit the available evidence and the records of investigation. The German proceedings shall be terminated, Section 206a StPO. *Dusko Tadic*, charged before a German court *inter alia* with aiding and abetting genocide, was transferred to the ICTY the 24 April 1995 on the basis of Section 2 (1) JStGHG.

The German prosecutor or criminal court has no discretion once the transfer of proceedings is requested by the ICTY or the ICTR. If the defendant is the person sought and all the required documents are handed over, the German authorities must proceed according to Section 2 (3) / (4) JStGHG / RStGHG and transfer proceedings to the tribunal. Yet, it is controversial whether the domestic authorities have a duty to review the competence of the tribunals in each individual case – as might be suggested by the legislative memo. The majority of academics answers this question in the negative, arguing that such a duty of review could only be justified in "unimaginable cases of abuse" and would turn the tribunals into "toothless tigers". Accordingly, the decision on their competence lies solely with the tribunals.

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43 ICTY: Prosecutor v. Tadic (IT-94-1-T); see also: *Schomburg/Nemitz*, in: Schomburg/Lagodny/Gleß/Hackner (eds.), Internationale Rechtshilfe in Strafsachen – Kommentar, 2006, Teil VI - ne bis in idem, marg. no. 11.

44 Bundestags-Drucksache 13/57, p. 8.

The German authorities do not officially check the competence of the tribunals if they do not request the transfer of proceedings. However, the prosecutor or the court may bring forward the case to the tribunals in order to trigger a formal request.\textsuperscript{46}

In contrast, a conflict of jurisdiction between a German court and the International Criminal Court is resolved by other means. According to the principle of complementarity, Article 17 ICC Statute, the ICC cannot request the transfer of proceedings as long as they are pending in Germany. Nevertheless, the proceedings can still be transferred as specified in Section 28 ISTGHG:

\textbf{Section 28 ISTGHG Criminal Proceeding in Germany and Request for Surrender.}

(1) If a criminal proceeding based upon a criminal act set out in Article 5 of the Rome Statute takes place domestically and the Court has declared to the Federal Ministry of Justice or another office responsible pursuant to Section 68 (1) that in the event the German proceeding is discontinued it will seek a surrender of the suspect, the public prosecutor may refrain from prosecution when it appears to be in the public interest, based upon extraordinary reasons against domestic criminal prosecution. If the public charges have already been preferred, the court may, upon a corresponding request by the public prosecution office, temporarily discontinue the criminal proceedings at any stage. The decision whether to approach the Court for an explanation within the meaning of the first sentence, is within the competency of the office responsible pursuant to Section 68 (1).

(2) If provisional detention for surrender of the suspect is ordered pursuant to Section 11 (2) and the Court has not requested provisional arrest within the deadline foreseen in Section 11 (3), the proceedings will be resumed. The proceedings will also be resumed when provisional detention for surrender of the suspect has been ordered based upon a request for provisional arrest pursuant to Section 11 (1) (1) and the Court has not requested arrest and surrender within the deadline set forth in Section 11 (1) (2). If the court has temporarily discontinued the proceedings, a court decision is required for resumption. Nothing shall hinder a discontinuance in accordance with para. 1 of a proceeding that had previously been resumed.

(3) The decision to discontinue proceedings and the decision to resume proceedings are non-appealable.

(4) The costs and necessary expenses shall be decided in the final accounting of the proceedings before the Court. Sections 464-473 of the Criminal Procedure Code apply mutatis mutandis.

In a situation of concurrent jurisdiction, the public prosecutor may refrain from prosecuting the offence if the ICC has declared to the Federal Ministry of Justice (\textit{Bundesministerium der Justiz} – BMJ) that, in the event the German proceeding is discontinued, it will seek the surrender of the accused. If the charges have already been preferred, the court may temporarily end the proceedings upon request of the public prosecutor. The decision to discontinue proceedings is non-appealable. The provisional detention of the suspect for surrender pursuant to Section 11 (2) No. 1 ISTGHG may be ordered. If the ICC does not seek surrender within a fixed period of time, the German proceedings are to be continued.

The decision whether to approach the ICC for an explanation for the surrender of the suspect pursuant to Section 28 (1) (3) ISTGHG is within the authority Federal Ministry of Justice, in agreement with the Foreign Ministry and other federal ministries concerned, Sections 28 (1) (3), 68 (1) ISTGHG. In this context, the Federal Ministry of Justice has wide discretion, as does the public prosecutor, who decides if – after the ICC’s explanation has been received – it appears to be in the public interest to discontinue the domestic proceedings. In practice, all these questions are likely to be resolved in advance in informal meetings between the ICC, the Federal Ministry of Justice and the competent prosecution authorities (see Bundestags-Drucksache 14/8527, p. 58).

\textsuperscript{46} Ibíd., marg. no. 7.
Section 11 IstGfH Provisional Detention of Persons to be Surrendered.

(1) When there is a request of the Court for provisional arrest accompanied by the documents set forth in Article 92 (2) of the Rome Statute, provisional detention for surrender shall be ordered. The order of detention for surrender shall be rescinded when the suspect has been detained for a total of 60 days for the purpose of the surrender since the day of capture or provisional arrest without a request by the Court for arrest and surrender, nor presentation of the documents required by the Statute to the office responsible pursuant to Section 68 (1), nor a declaration by the suspect within this deadline of his agreement with streamlined surrender (Section 33).

(2) Prior to receipt of the request for arrest and surrender or a request for provisional arrest, provisional detention for surrender may be ordered when the person has committed an act that would subject him to surrender to the Court and based upon certain criminal acts there is strong suspicion, and

1. danger exists that the suspect will flee prior to the surrender proceedings or implementation of the surrender, or

2. based upon certain criminal acts strong suspicion exists that the suspect will hinder the investigation of the truth in the Court’s proceedings or hinder the surrender proceedings.

Regarding a suspect against whom there is a strong suspicion of genocide (Article 6 of the Rome Statute) or crimes against humanity (Article 7 of the Rome Statute), provisional detention for surrender may also be ordered when certain criminal acts provide a basis that, without arrest of the suspect, the explanation of the acts that the suspect is accused of committing could be endangered. The appropriate measures should be used to ensure that the office responsible pursuant to Section 68 (1) can inform the Court of the order of detention pursuant to sentence 1 or 2.

Section 68 IstGfH Federal Jurisdiction.

(1) The Federal Ministry of Justice shall rule on requests for mutual assistance by the Court and on the submission of requests to the Court for mutual assistance in agreement with the Federal Foreign Office and with other federal ministries whose departments are affected by the mutual assistance. If the authority responsible for providing mutual assistance belongs to a different federal ministry, that ministry takes the place of the Ministry of Justice; the decision shall be made in agreement with the Ministry of Justice and the Federal Foreign Office. The competent federal ministry pursuant to sentences 1 and 2 may transfer the exercise of their authority in individual cases to subordinate federal authorities. The federal government may transfer to a state government (Landesregierung) the exercise of its authority regarding decision on a request of the Court pursuant to Part 5 of this law and a request of the Court for mutual assistance in individual cases. The state governments may transfer the authority transferred pursuant to sentence 4 to another authority competent under state law.

If the extradition request by a foreign state competes with the request for surrender by the ICC, Section 4 IstGfH must be taken into account:

Section 4 IstGfH Requests for Surrender and Requests for Extradition.

(1) If a foreign state requests extradition of a person on the basis of a criminal act over which the Court has jurisdiction, the Court may be informed of the submission of the request. Upon request, the Court will be given a copy of the extradition request and the accompanying documents, when the foreign state does not object to the transmittal and the transmittal does not contradict other international law agreements.

(2) Should the Court request surrender and a foreign state request extradition of the same person, the Court and the state will each be notified of the other request. If the request for surrender and the request for extradition are each based upon the same criminal act, this shall be included in the notification required in the first sentence.

(3) If extradition has not been approved at the time of receipt of the request of the Court for surrender, the decision regarding this will be deferred conditional upon paragraph 5 until a decision regarding approval of the surrender. The decision regarding which request will be given priority will be made in accordance with Article 90 para. 2, 4, and 7 (a) of the Rome Statute.

(4) In cases under Article 90 para. 2-6 of the Rome Statute, after approval of the request for surrender the decision on the approval of extradition shall be deferred until a final decision in the proceedings before the Court regarding the criminal acts upon which the request for surrender was based.

(5) In cases under Article 90 para. 5 of the Rome Statute, if the Court has not decided on permissibility within two months after the notification pursuant to Article 90 para. 1 of the Rome Statute,
a decision may be made regarding approval of the extradition when the other prerequisites are met.

(6) In cases under Article 90 para. 6 and 7 (b) of the Rome Statute, the request of the Court will be given priority to the extent that, when considering all of the criteria in these provisions, the reasons in favor of approving the extradition request are not clearly predominant.

(7) The Court will be notified in all cases of the decision regarding the extradition request.

(B) Universal Jurisdiction and the principle of *ne bis in idem*

1. Is the principle of *ne bis in idem* recognized at the national level?
2. Is the principle of *ne bis in idem* recognized in the transnational sphere? To what degree is it applied to acts committed abroad?
3. Does it constitute an express limitation on the exercise of universal jurisdiction?

The following remarks on the principle of *ne bis in idem* apply regardless of the jurisdictional principle according to which a German or a foreign court or authority exercises its jurisdiction.

The principle of *ne bis in idem* is laid down in Article 103 (3) of the German Constitution (GG), according to which no person may be punished for the same act more than once under the general criminal laws.

*Article 103 GG Hearing in accordance with law; ban on retroactive criminal laws and on multiple punishment.*

... (3) No person may be punished for the same act more than once under the general criminal laws.

Yet, this basic right is directly applicable only with respect to judgements of German courts; in the common view, it does not apply to the relationship between a German court and a foreign court. If the convicted person has been punished abroad for the same act, the foreign punishment shall only be credited towards the new one to the extent it has been executed (Section 51 (3) StGB). Some recent exceptions exist as regards decisions by courts (or by the public prosecutor) of member states of the European Union under Article 54 of the Convention Implementing the Schengen Agreement (CISA) and as regards decisions of international courts. However, a second conviction following a judgement of a court outside of the EU is still possible.

However, the public prosecutor’s office may dispense with prosecuting an offence committed on foreign territory if the defendant has already been acquitted by a final judgement abroad in respect of the same act or if a sentence for the offence was already executed abroad and the sentence which is to be executed in Germany would be negligible after taking the foreign sentence into account, Section 153c (2) StPO. According to the Federal High Court, the public prosecutor is expected to terminate the proceedings pursuant to Section 153c StPO if its conditions are fulfilled and no rule of double jeopardy expressly regulated by law applies.47

In the German laws regarding legal assistance, the transnational principle of *ne bis in idem* is regulated under Section 9 No. 1 IRG. This makes extradition to a requesting state impermissible if there is concurrent German jurisdiction and a German agency or court has already dealt with the case through either a judgment on the merits or another measure (Sections 204, 174, 153a StPO, Sections 45, 47 JGG). The provision is supplemented by Section 9a IRG, which regulates the prohibition on double jeopardy, and thus the presence of an obstacle to extradition if there is a decision by an international criminal tribunal.

According to Section 69 IStGHG – which adopts Article 20 (2) ICC Statute into domestic law – no one shall be brought before a domestic court for a crime which is

47 Federal High Court, in: BGHSt 34, p. 340.
subject to the jurisdiction of the ICC and for which he or she has already been convicted or acquitted by the ICC.

Section 69 ISTGH

German Criminal Proceeding and Earlier Criminal Proceeding before the Court.

(1) No one shall, based upon a crime described in Article 5 of the Rome Statute or a criminal act described in Article 70 para. 1 of the Rome Statute for which he has already been judged guilty or acquitted by the Court, be brought before another court.

(2) If, during a criminal proceeding taking place domestically against a person, it becomes known that there is a final judgment against that person or he has been acquitted by the Court based upon all or a portion of the acts that are the basis of the German proceeding, the proceeding as to the acts as to which the Court has ruled, at the cost of the State, shall be terminated. If the proceedings are pending before a court, a decision of the court is required for the termination.

(3) The ruling of the Court on the questions of guilt and penalty shall be used as a basis for the decision to be made regarding compensation for criminal prosecution measures.

The relationship between the request for surrender by the ICC and earlier criminal proceedings before a national or a foreign court is subject to Section 3 ISTGH:

Section 3 ISTGH Requests for Surrender and Earlier Criminal Proceedings Before the Court or in a Foreign State.

During the surrender proceedings, if the suspect makes a statement that he has already been convicted or acquitted by the Court or a court in another state of the criminal act that is the basis of the surrender request from the Court, the office to which the statement was made by the suspect, notwithstanding Section 68 (3) (3) and (4), shall immediately inform the public prosecution office attached to the Higher Regional Court. The Higher Regional Court shall temporarily stay the surrender proceedings in accordance with Article 89 para. 2 sentence 3 of the Rome Statute, until the Court reaches a decision regarding permissibility. The suspect will not be surrendered when the Court rules that the implementation of a criminal proceeding is not permissible.

As concerns the principle of *ne bis in idem* and the UN ad-hoc tribunals, Article 10 ICTY Statute and Article 9 ICTR Statute must be respected.

4. What are the conditions and extension of the *ne bis in idem* principle?

The principle of *ne bis in idem* under Article 103 (3) GG constitutes not only a subjective constitutional right of the individual which absolutely forbids a defendant from being tried a second time for the same crime, but also develops into a mandatory procedural impediment (prohibition of double jeopardy – Strafklageverbrauch). However, if a second decision is made by a court, thereby violating the *ne bis in idem* principle, this decision is not per se void but can be contested, the reason for this being the complex differentiation concerning the definition of “the same act,” which can best be reviewed on appeal.48

For the interpretation of the *ne bis in idem* principle, the definition of the expression “the same act“ ("idem") in Article 103 (3) GG is of utmost importance. Contrary to the situation in foreign jurisdictions, the prohibition of a second trial for the "same act" is not limited to the same provision of substantive criminal law,49 but encompasses all the historical circumstances during the commission of the crime (prozessualer Tatbegriff).

Concerning the quality of the first trial, there is an absolute prohibition of a second trial after a final acquittal or a final conviction. Also, penalty orders (Strafbefehle)

prohibit the initiation of a second trial once the order has entered into force, if no objections have been lodged in time, Section 410 (3) StPO.

In contrast, judgements determining the end of proceedings due to a procedural impediment by virtue of Section 260 (3) StPO and Section 206a StPO do not bar a second trial, since the court has not evaluated the act as such. The same holds true for the termination of proceedings by the public prosecutor, even when a court consents. One exception to this general rule is the termination of proceedings after concurrently imposing a condition upon the accused, in accordance with Section 153a StPO. In this case, the act can be prosecuted again as a “serious offence” (unlawful acts that are punishable by a minimum of imprisonment for one year or more – Verbrechen, Section 12 StGB) but not as a “less serious crime” (Vergehen). Other proceedings that do not result in a criminal sentence as a final consequence can be initiated independently from criminal proceedings without violating the ne bis in idem principle.\footnote{Meyer-Goßner, Strafprozessordnung, 2006, § 153a, marg. no. 45.}

The European ne bis in idem principle is enshrined in Article 54 CISA, which prohibits the initiation of a second trial for the same offence when final judgment has been imposed upon a person by a court of a contracting party.\footnote{Nolte, in: von Mangoldt/Klein/Starck (eds.), Kommentar zum Grundgesetz, 2005, Art. 103, marg. no. 211.} As in German law, the definition of “the same offence” is used in a broad sense. According to the European Court of Justice, Article 54 of the Convention must be interpreted to mean “the identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected”.\footnote{Schomburg/Lagodny/Gleß/Hackner (eds.), Internationale Rechtshilfe in Strafsachen – Kommentar, 2006, Einl., marg. no. 69.} One other requirement of Article 54 CISA is that the sentence has been served or is currently being served or can no longer be carried out. Because of the many different kinds of proceedings and ways to end proceedings within the member states, the interpretation of the scope of the European ne bis in idem principle is problematic. For these reasons, the ECJ ruled that: “The ne bis in idem principle laid down in Article 54 CISA also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the public prosecutor of a member state discontinues criminal proceedings brought in that State, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor”.\footnote{European Court of Justice (van Esbroeck), Judgement of 9 March 2006 (C-436/04); see also: Schomburg, in: Schomburg/Lagodny/Gleß/Hackner (eds.), Internationale Rechtshilfe in Strafsachen – Kommentar, 2006, Art. 54 SÜ, marg. no. 20.}

5. Do exceptions exist?

Section 362 StPO allows the reopening of proceedings which have already been concluded by a final judgment to the defendant's detriment within narrow confines.\footnote{European Court of Justice (Gözütok und Brügg), Judgement of 11 February 2003 (C-187/01; C-385/01).} This legal institution is called an “extraordinary remedy” to resolve the conflict between substantive justice and the principle of legal certainty, both of which derive from rule of law principles.\footnote{Schmidt-Abmann, in: Maunz/Dürrig (eds.), Grundgesetz Kommentar, 2006, Art. 103, marg. no. 270. Pfeiffer, Karlsruher Kommentar zur Strafprozessordnung und zum Gerichtsverfassungsgesetz, 2003, Einl., marg. no. 172; see also: Federal Constitutional Court, in: Neue Juristische Wochenschrift 1994, p. 510.}
According to Section 362 StPO, proceedings may be reopened to the defendant’s detriment if grave faults occurred during the finding of facts which affected the court’s decision-making, namely:

- if a document produced as genuine, for the benefit of the defendant, at the main hearing was false or forged;
- if a witness or expert, when giving testimony or an opinion for the defendant’s benefit, was guilty of wilful or negligent violation of the duty imposed by the oath, or of wilfully making a false, unsworn statement;
- if a judge or lay judge who participated in drafting the judgment was guilty of a criminal violation of his official duties in relation to the case;
- if the person acquitted made a credible confession, in or outside the court, that he committed the criminal offence.

When the proceedings have been concluded by a penal order, proceedings may also be reopened to the defendant’s detriment if new facts or evidence were produced which, either alone or in conjunction with earlier evidence, tend to substantiate a conviction for a serious criminal offence, Section 373a StPO.

As concerns the European ne bis in idem principle, Germany has declared that it is not bound by Article 54 CISA in the following cases (Article 55 CISA):

- where the acts took place in part on its own territory;
- where the acts to which the foreign judgement relates constitute certain categories of offences enumerated in the declaration, e.g. offences against the state, such as high treason against the federation or against the state, the formation of criminal or terrorist organizations, murder or manslaughter, and crimes subject to the VStGB, if the internal security of Germany has been endangered by the act.

In these cases, a second trial and a second conviction by a German court remain possible.

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IV. Universal Jurisdiction and International Cooperation in Criminal Matters

1. To what degree can you utilize universal jurisdiction to preserve evidence? Is the State obliged to comply with an order to preserve evidence?

As regards international cooperation in criminal matters, it is irrelevant whether the requesting state claims jurisdiction according to the universality principle or according to any other principle of jurisdiction. This holds true for incoming as well as outgoing requests. In general, there is no duty to comply with incoming assistance requests; however, a duty to comply with a request may originate from international treaties binding on Germany.

2. In your country, is it possible to request the extradition of an alleged offender on the basis of the principle of universal jurisdiction?

3. Is it possible in your country to grant (originally: request) the extradition of an alleged offender requested by a third State based on universal jurisdiction?

4. In the two cases, must the double criminality principle be respected?

An outgoing request for extradition can be made by the competent German authorities regardless of the principle on which German jurisdiction is based. Therefore, German authorities can demand extradition of a suspect in a crime subject to Section 1 VStGB or Section 6 StGB for which the principle of universality applies, as long as the general conditions for an outgoing extradition request are met (German jurisdiction, suspicion against the accused, grounds to issue an arrest warrant).

The same applies to incoming extradition requests: it is irrelevant under which principle the requesting state exercises its jurisdiction. In fact, when German authorities receive an extradition request, they can merely assume the jurisdiction of the requesting state without further verification: the request establishes a presumption that the requesting state does not wrongly claim its jurisdiction.59

If two states request extradition – one claiming jurisdiction according to the universality principle, the other according to another jurisdictional principle – German courts first decide on the admissibility of both of the requests. In a second step, the executing authorities decide which extradition request shall be given priority, taking into account the place of commission of the offence, the nationality of the perpetrator and the victim, and the severity of the crime.60

If both a foreign state and an international criminal court request extradition Section 9a (2) IRG refers to the provisions issued to resolve this conflict (Article 90 ICC Statute, Section 4 1StGHG). If neither the establishing act nor the statutory regulations contain provisions on dealing with concurrent requests, but the establishing act grants precedence to the proceedings of the criminal court over proceedings of the foreign state, then priority will be given to the request of the court.

In general, the double criminality principle must be respected, Section 3 (1) IRG. It is necessary – and sufficient – that after analogous conversion of the disclosed facts, the acts would also constitute an offence under German law. "Analogous conversion" means that – in the case of a domestic offence – the place of the commission of the crime is thought to be on German territory and the perpetrator or the victims are German nationals. It is irrelevant under which principle the requesting state claims its jurisdiction. However, there is controversy over whether an offense that is extraterri-

torial for the requesting state must also be punishable as an extraterritorial offence in Germany. The Higher Regional Court Karlsruhe found that, as a rule, German authorities must assume the jurisdiction of the requesting state without further verification. Only in cases of strong doubts and an evident lack of a genuine link between the act and the requesting state’s territory or interests may a review of jurisdiction be carried out.\footnote{Lagodny, in: Schomburg/Lagodny/Gleß/Hackner (eds.), Internationale Rechtshilfe in Strafsachen – Kommentar, 2006, § 3, marg. no. 8; Oberlandesgericht Karlsruhe, in: Justiz 1989, p. 199; and in: Justiz 1999, p. 330.}

If the extradition request is based on a European arrest warrant, no verification of the double criminality is conducted, Section 81 No. 4 IRG. This is justified with the enumeration of crimes for which a European arrest warrant may be issued, all of which are punishable in each of the European Union member states.\footnote{See Hackner, in: Schomburg/Lagodny/Gleß/Hackner (eds.), Internationale Rechtshilfe in Strafsachen – Kommentar, 2006, Vor § 78, marg. no. 7.}

5. Are you able to refuse extradition for particular reasons? What are they: Application of the death penalty in the requesting State; acts of torture; cruel, inhuman, and degrading treatment; violations of international human rights norms (due process, etc....)?

Concerning the inadmissibility of extradition, the following general provisions of the IRG and the European Convention on Extradition are to be taken into account (the relevant regulations of other international agreements which, like the European Convention, take priority over the provisions of the IRG are not included in the following list):

- In general, no \textbf{German national} may be extradited to a foreign country, Article 16 (2) (1) GG, Section 2 IRG. But extradition to an international criminal court and to a member state of the European Union on the basis of a European arrest warrant are permissible when the transfer of the accused back to Germany is ensured, Section 80 IRG.

- In principle, extradition is prohibited if the offence is punishable by the \textbf{death penalty} under the law of the requesting state, Section 8 IRG (Article 11 European Convention). However, extradition may be granted if the requesting state provides assurances that the death penalty will not be imposed or carried out.

- In order to ensure that Germany is not involved in the domestic conflicts of foreign states, extradition shall not be granted for a \textbf{political act} (exception: European arrest warrant), Section 6 (1) IRG. Yet no official definition exists of “political act”. An exception shall be made if the accused is being prosecuted for the commission or attempt of genocide, murder or manslaughter or because of participation in such an act (Section 6 (1) (2) IRG); these exceptions may also apply to crimes against humanity and war crimes. Within its scope of application, the provisions of the European Convention on the Suppression of Terrorism of 1977 (and other treaties binding on Germany) shall be taken into account.

- Extradition is prohibited if there are sound reasons to assume that the accused, in the event of his extradition, would be \textbf{persecuted} or punished because of his \textbf{race}, \textbf{religion}, \textbf{citizenship}, \textbf{association with a certain social group}, or \textbf{political beliefs} (Section 6 (2) IRG).
In addition to Sections 6 (2) and 8 IRG, extradition shall not be granted according to the general rule of Section 73 IRG if it would conflict with the basic principles of the German legal system (or, if the request is based on a European arrest warrant, the principles contained in Article 6 of the Treaty on the European Union respectively). This provision includes: all imminent violations of human rights, such as acts of torture, proceedings violating the principle of rule of law, the threat of inhuman and cruel penalties, or the assumption of severe conditions of imprisonment that violate minimum standards under international law. Further, extradition shall not be granted if a sentence is to be enforced that is based on a final and, for the accused, unexpected judgement after a trial in absentia.

Extradition shall not be granted for an act that consists exclusively of a breach of military discipline, Section 7 IRG, unless the request is based on an European arrest warrant, Section 82 IRG.

Extradition shall not be granted if the act consists exclusively of a fiscal offence, Article 5 European Convention.

Extradition shall not be granted if the act is also subject to German jurisdiction and proceedings are being or have been conducted in Germany and have been terminated in a particular way (ne bis in idem principle, see above), or the statute of limitations for prosecution or enforcement has elapsed under German law, or prosecution is barred by a German amnesty law (Section 9 IRG). In the case of concurrent jurisdiction of the requesting state with an international criminal court, the extradition shall not be granted if the international court has already finished the proceedings, Section 9a IRG. If a decision has not yet been rendered, the decision on admissibility of the extradition will be deferred.

Article 16 GG Citizenship; Extradition.

... (2) No German may be extradited to a foreign country. A different regulation to cover extradition to a Member State of the European Union or to an international court of law may be laid down by law, provided that constitutional principles are observed.

Section 6 IRG Political Offences, Political Prosecution.
(1) Extradition for a political act or for an act connected with such an act shall not be granted. It shall be granted if the accused is being prosecuted or has been sentenced for the commission or an attempted commission of genocide, murder or manslaughter or because of participation in such an act.
(2) Extradition shall not be granted if there are sound reasons for the assumption that the accused, in the event of his extradition, would be persecuted or punished because of his race, religion, citizenship, association with a certain social group or his political beliefs, or that his situation would be rendered more difficult for one of these reasons.

Section 7 IRG Military Offences.
Extradition because of an act which consists exclusively in the breach of military discipline shall not be granted.

Section 8 IRG Death Penalty.
If the act is punishable by death under the law of the requesting state, extradition shall be granted only if the requesting state gives assurances that the death penalty will not be imposed or carried out.

Section 9 IRG Concurrent Jurisdiction.
If the act is also subject to German jurisdiction, extradition shall not be granted, provided (1) a court or other authority in Germany has rendered a judgement or a decision with corresponding legal force or has declined to open the main trial (Section 204 of the Code of Criminal Procedure) or has denied a motion to issue a formal indictment (Section 174 of the Code of Criminal Procedure) or has suspended the proceedings after the satisfaction of conditions and instructions
(Section 153 (a) of the Code of Criminal Procedure) or has, under juvenile criminal law, rescinded prosecution or has suspended the case (Sections 45 and 47 of the Juvenile Court Act), or (2) the statute of limitations for the prosecution or the enforcement has elapsed under German law or the prosecution or enforcement is barred by a German amnesty law.

Section 9a IRG Extratieditions and proceedings before international criminal courts.
(1) Extradition of an accused for an act shall not be granted if an international criminal court, established according to a legal act which is binding on the Federal Republic of Germany, hands down a legally binding judgement or a decision with corresponding legal effect or suspends the criminal proceedings on the ground that they are non-appealable and prosecution by other courts is prohibited by the establishing act in this instance. Should the criminal court indicated in sentence 1 conduct criminal proceedings for the act and should a decision not yet have been rendered pursuant to sentence 1 of the criminal court after receipt of an extradition request, a decision on the admissibility of the extradition will be deferred. Temporary extradition (Art. 37) is excluded. (2) If a foreign state and a criminal court in the meaning of sentence 1, paragraph 1 request the transfer of the accused for criminal prosecution or execution of sentence (concourt requests) and if the establishing act of the criminal court or the statutory regulations which bring about its implementation contain provisions governing the settlement of several requests, the requests shall be dealt with in accordance with these provisions. If neither the establishing act nor the statutory regulations which bring about its implementation contain provisions on dealing with concurrent requests but the establishment act grants precedence to the proceedings of the criminal court over proceedings of a foreign State, then precedence will be given to the request of the criminal court.

Section 73 IRG Limitations on Assistance.
Legal assistance shall not be granted if it would conflict with basic principles of the German legal system. Should the request be based on a European arrest warrant, the provision of legal aid shall not be permitted if the satisfaction of the request contravenes the principles contained in Article 6 of the Treaty on European Union.

6. In refusing extradition, is the State required to prosecute the alleged offender? Is the State required to extradite the alleged offender to a third State that respects international norms in the matter of human rights?

If (non-treaty based) extradition is inadmissible, German prosecution authorities are not required to prosecute the alleged offender. The general possibilities of prosecution and duties to prosecute subject to the StGB and the StPO apply. However, a duty to prosecute may originate from international treaties that contain reciprocal application of the principle *aut dedere, aut iudicare.*

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V. Amnesties, Immunities, Statute of Limitation

V. Limits on the Exercise of Universal Jurisdiction
(A) Amnesties and peace process
1. In your country, is it possible to grant amnesty to those responsible for crimes subject to universal jurisdiction? If applicable, what is the legal rationale? If yes, does this prevent the cooperation with other States applying the principle of universal jurisdiction in criminal matters? And in extradition?
2. Can your country exercise universal jurisdiction over persons responsible for crimes who were given amnesty in accord with their national legislation? If applicable, is the national judicial organ able to evaluate the circumstances surrounding the grant of this amnesty (in particular, in the case of transition of dictatorial States to democratic States)?
3. What is the practice of the State?
4. Do the processes of national reconciliation have a similar effect?

In general, it is possible to prohibit prosecution of certain offences through a German amnesty law, even when German jurisdiction is based on the principle of universality. In fact, Section 9 No. 2 IRG explicitly provides for an extradition impediment if prosecution of the act or enforcement is barred by a German amnesty law. However, among academics the enactment of a general amnesty for international crimes is considered a violation of international law; such a law could not be enforced under Article 25 GG.

Pursuant to Section 1 VStGB and Section 6 StGB, German law is also applicable to the enumerated acts committed abroad, regardless of the law of the place of their commission – even if their prosecution is barred by an amnesty law in this state or committed by persons who were given amnesty in accordance with their national legislation. However, the circumstance that amnesty was granted by a foreign state may be relevant with regard to prosecutorial discretion under Section 153c (1) No. 1, (2) StPO, though this Section does not apply to international crimes subject to German jurisdiction pursuant to Section 1 VStGB.

(B) Immunities of the representatives of other States
1. Does your country expressly recognize the personal immunities of representatives of other States? If yes, what is the rationale? Conventional international law, customary, other? Which representatives of other States are covered by this immunity (Heads of State, Prime Ministers, ministers of foreign affairs, others)? If applicable, do there exist permanent proposals to include express mention in the legislation relating to personal immunities of representatives of foreign States?
2. According to the principle of universal jurisdiction, would immunity prevent the execution of an arrest warrant directed against a representative of another State present on the national territory?
3. If applicable, is it limited to the representative of another State in the exercise of one’s function? Or only if not anymore exercising one’s functions?
4. Is there a certain distinction established between the private act and the official act of representatives of a State? In this case, what are the consequences of this distinction?
5. Is there a certain distinction established between the different crimes ascribed to the representatives of a foreign State? Are they offences representing a serious violation of international law or other crimes?
6. Does there exist in your country a debate on the necessity to exclude from the scope of personal immunities crimes representing a serious violation of international law?

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64 For detail see: Werle, Principles of International Criminal Law, 2005, marg. no. 189.
65 According to the German courts this holds true even when the German criminal law is applicable under the principle of vicarious administration of justice and it is required that „the act is punishable at the place of its commission“. Only substantive criminal law should be decisive to answer this question. The actual possibility to prosecute the crime (amnesty, statute of limitations) is irrelevant, see Federal High Court, in: BGHSt 34, p. 334. According to an academic point of view the possibility to prosecute the crime at the place of its commission must also be taken into account in the context of Section 7 (2) (2) No. 2 StGB – however, procedural impediments can only be respected if they are not in conflict with the international ordre public.
German jurisdiction does not apply to the following persons, Sections 18 – 20 of the German Law on the Constitution of Courts (Gerichtsverfassungsgesetz – GVG):

- Members of **diplomatic missions**, their family members and their private servants, in accordance with the Vienna Convention on Diplomatic Relations (Section 18 GVG).

- Members of **consular posts**, in accordance with the Vienna Convention on Consular Relations (Section 19 GVG).

- **Representatives of foreign states** (e.g. heads of state or government, ministers), their delegation members and private company who are present on German territory following an official invitation on behalf of Germany (Section 20 (1) GVG).

- Members of **foreign military forces** based in Germany where the exclusive jurisdiction of the sending state is provided for under Article 7 of the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces.

- Other persons, to the extent they are exempt from jurisdiction under **customary international law**, international treaties or other statutory provisions, Section 20 (2) GVG. This applies especially to foreign heads of state, even if they are not present in Germany in an official capacity (otherwise Section 20 (1) GVG applies). Further, heads and members of foreign governments acting in an official capacity enjoy immunity, as well as ad-hoc goodwill ambassadors, certain members of international organizations and courts, and military forces of foreign war ships.

**Section 18 GVG**
The members of diplomatic missions established in the territorial area of applicability of this law, their family members and private servants are exempt from German jurisdiction under the conditions of the Vienna Convention on Diplomatic Relations, done at Vienna on 18 April 1961. This applies equally if the sending state is not a contracting party to this Convention. In those cases Article 2 of the Act of 6 August 1964 to the Vienna Convention on Diplomatic Relations done at Vienna on 18 April 1961 shall apply correspondingly.

**Section 19 GVG**
(1) The members of consular posts including honorary consular officers (Wahlkonsularbeamte) established in the territorial area of applicability of this law are exempt under the conditions of the Vienna Convention on Consular Relations, done at Vienna on 24 April 1963 from German jurisdiction. This applies equally if the sending state is not a contracting party to this Convention. In those cases Article 2 of the Act of 26 August 1969 to the Vienna Convention on Consular Relations done at Vienna on 24 April 1963 shall apply correspondingly.

(2) Special international treaties on the immunity of persons named in para. 1 from German jurisdiction are not affected by this provision.

**Section 20 GVG**
(1) German jurisdiction does not extend to representatives of foreign states and their attendance who are present on the territorial area of applicability of this law following an official invitation of the Federal Republic of Germany.

(2) Further, German jurisdiction does not extend to persons not named in para. 1 and Sections 18 and 19 as far as they are exempt from prosecution under general rules of international law, international treaties or other statutory provisions.

**Section 21 GVG**
Sections 18 to 20 do not oppose to granting extradition or transfer or other legal assistance by an international criminal court, established according to a legal act which is binding on the Federal Republic of Germany.
The link between national immunity provisions and the relevant treaty-based immunity regulations is made by Section 20 (2) GVG, which secures consonance with the immunity doctrine under international law. Section 21 GVG explicitly points out that the immunity from prosecution provided for in Sections 18 to 20 GVG does not prevent the person sought from being transferred to an international court, or the granting of other legal assistance to such a court.

Immunity from criminal jurisdiction is a procedural impediment that forbids the initiation of preliminary proceedings and must also be respected in the process of issuing an arrest warrant (Section 112 StPO). Yet under German law, no explicit distinction is drawn between private acts and acts in official capacity.

As regards the immunity of representatives of foreign states from German jurisdiction, certain special characteristics have to be kept in mind when accusing them of violating international criminal law (Sections 6 et seq. VStGB). This may have an effect on the exercise of universal jurisdiction pursuant to Section 1 VStGB. According to some commentators, only heads of state and government, foreign ministers and diplomatic agents can invoke personal immunity for crimes under international law before a national (German) criminal court, and only for the duration of their tenure in office.66

(C) The prescription of the offence as a limit on the exercise of universal jurisdiction
1. In your country, are the penal prosecution and penalty for offences subject to temporal limitations?
2. Does your legislation make a distinction between these different temporal limits and the nature of the seriousness of the offence?
3. What are the temporal limits?
4. Are the offences subject to universal jurisdiction subject to any statute of limitation? In the same manner as international crimes?

In principle, prosecution of crimes is subject to a statute of limitations (Sections 78 – 78c StGB); the period of limitation depends on the gravity of the offence and the maximum penalty provided for its commission.

Section 78 StGB Period of Limitation.
(1) The imposition of punishment and the ordering of measures (Section 11 subsection (1), no. 8) shall be excluded on expiry of the period of the statute of limitations. Section 76a subsection (2), sent.1, no. 1, shall remain unaffected.
(2) Serious criminal offenses under Section 211 (murder) are not subject to a statute of limitations.
(3) To the extent that prosecution is subject to a statute of limitations, the period of limitation shall be:
1. thirty years in the case of acts punishable by imprisonment for life;
2. twenty years in the case of acts punishable by a maximum term of imprisonment of more than ten years;
3. ten years in the case of acts punishable by a maximum term of imprisonment of more than five years but not more than 10 years;
4. five years in the case of acts punishable by a maximum term of imprisonment of more than one year but not more than five years;
5. three years in the case of other acts.
(4) The period shall conform to the punishment threatened by the norm defining the elements of the offense fulfilled by the act, irrespective of aggravating or mitigating circumstances provided for in the provisions of the General Part or for especially serious or less serious cases.

The crime of murder (Section 78 (2) StGB) as well as genocide, crimes against humanity and war crimes (Section 5 VStGB) are not subject to a statute of limitations.

Section 5 VStGB Non-applicability of statute of limitations.

The prosecution of serious criminal offences pursuant to this Act and the execution of sentences imposed on their account shall not be subject to any statute of limitations.

This signifies that the prosecution of crimes subject to universal jurisdiction according to Section 1 VStGB is not subject to a statute of limitations; whereas the prosecution of crimes subject to universal jurisdiction under Section 6 StGB is subject to a statute of limitations according to Section 78 StGB.

5. **Problems of legality: Is one able to change the limits of the prescription after the offence subject to universal jurisdiction was committed?**

According to the legal practice of German courts, prescription is a procedural impediment, and therefore the principle of non-retroactivity of laws does not apply. No exceptions are made for crimes subject to universal jurisdiction.

6. **Is your country able to prosecute an international crime committed in another country if it is prescribed according to national legislation?**

For the application of German criminal law according to Section 1 VStGB and Section 6 StGB, it is irrelevant whether prosecution of the crime is excluded because of a statute of limitations in the state of commission; German law applies regardless of the law of the place of commission of the crime. However, the fact that the crime is prescribed under the foreign legislation may be relevant regarding prosecutorial discretion according to Section 153c (1), (2) StPO, though this Section does not apply to international crimes subject to German jurisdiction pursuant to Section 1 VStGB (for details see above).
VI. Practical Significance, Proposals for Reform, 
and Key Elements of a Model Regulation on Universal Jurisdiction

VI. Final Questions
1. On the practical significance of the principle of universal jurisdiction: Is the practical 
application of the principle of universal jurisdiction a problem currently debated in 
your country? If yes, does the application have a certain importance for the move-
ment of criminals committing serious crimes against international human rights trea-
ties?

All in all, very few criminal proceedings have been conducted in Germany on the basis 
of universal jurisdiction (see above). Yet those few cases attracted a great deal of 
attention among academics and the public. The exercise of universal jurisdiction by 
German courts was commented upon either critically (cases of drug trafficking, see 
Bundesgerichtshof, in: BGHSt 27 and in: BGHSt 34) or in the affirmative (cases of 
genocide committed in the former Yugoslavia, see Bundesgerichtshof, in: BGHSt 45 
and in: BGHSt 46).

The relatively large number of preliminary proceedings based on universal jurisdiction 
(according to former Section 6 No. 1 and Section 6 No. 9 StGB) concerning crimes 
committed in the former Yugoslavia was taken as proof of the positive attitude of 
Germany and its justice towards the enforcement of international criminal law (Werle, 
Principles of International Criminal Law, 2006, p. 82). It is to be noted though, that 
the marginal practical significance of the VStGB, especially the negligible number of 
formal investigations, has not (yet) been subject of a broader academic debate.

2. Reforms on the international level: Which would be, according to you, the essential 
points that should be contained in a future legal model on the principle of universal jur-
isdiction going in the direction of human rights appear necessary?

3. Are there proposals for reform in the future?

A model regulation on universal jurisdiction and its exercise by national prosecution 
authorities and courts should take into account – besides the above mentioned mod-
els of other criminal associations and the resolution of the last AIDP World Congress 
(Fourth Section) – the following three “key issues”:

- Notion, scope and requirements of the exercise universal jurisdiction (see I.)
- Determination of rules for coordination of concurrent jurisdictions (horizontal 
  and vertical) and cooperation in criminal matters (see II.)
- Specification of minimum standards for national courts and authorities exer-
cising universal jurisdiction (see III.)

As a starting point, the following observations can be made:

- It shows that a proper discussion of the principle of universal jurisdiction is 
  hampered by the lack of consensus on the definition and the conceptual pa-
  rameters of “universal jurisdiction”.
- Despite the large amount of academic literature, the foundations and the 
  scope of the exercise of universal jurisdiction are not clear. From the point of 
  view of international law, it is beyond controversy that states have the right 
  to exercise universal jurisdiction. Yet it has been difficult to agree on the scope 
  and requirements of universal jurisdiction. The legal practice of the interna-
tional courts and tribunals has not substantially contributed, thus far, to a 
  specification of the grounds and limits of national jurisdiction in general and of 
  universal jurisdiction in particular; to the extent decisions of international
courts touch upon the issue, they are – as can be seen in the dissenting votes in the ICJ’s Arrest Warrant Case – not always consistent.

- In the academic discussion, the previous affirmative attitude towards universal jurisdiction, stimulated by a growing human rights movement and the rapid development of international criminal law in the 1990s, has turned into to a more reserved position towards unrestricted universal justice. Lately, a more restricted approach has been favoured by a majority of scholars, who advocate cautious exercise of universal jurisdiction.

- The gap between the public’s strong interest in universal jurisdiction and its mere marginal importance in the practice of states is still remarkable. Although many states have taken the ratification and implementation of the ICC Statute as an opportunity to enact new legislation and extend their jurisdiction over international crimes by applying the principle of universality, the impression arises that all this legislation may remain symbolic. The reasons for this include the nature of the crimes subject to the principle of universal jurisdiction, the general difficulties that arise when prosecuting extraterritorial crimes, and the fear of political tensions that may arise when exercising universal jurisdiction.

Against this background, elements of a model regulation on universal jurisdiction, in this author’s view, could be summarized as follows:

I. Notion and Scope

1. The principle of universality embodies a permissive rule of international law. The principle entitles states to prosecute crimes directed against fundamental interests of the international community as a whole, such as world peace and international security, regardless of where by whom or against whom they were committed.

2. The power of states to exercise universal jurisdiction requires a corresponding legal proposition under customary international law. Whereas, as a rule, international agreements do not provide a sufficient basis for the exercise of universal jurisdiction, it is not necessary that the crime which is subject to universal jurisdiction be punishable under customary international law.

3. To date, international law entitles states to exercise universal jurisdiction over genocide, crimes against humanity, and war crimes, as defined in Sections 6, 7, and 8 ICC Statute. As regards the crimes of aggression, international terrorism, international drug trafficking and torture, the development of international law is in a constant state of flux.

II. Co-ordination and cooperation

4. National prosecution of international crimes, such as genocide, crimes against humanity and war crimes, is an essential element of the emerging international system of criminal justice. States are strongly encouraged to exercise universal jurisdiction in order to prevent impunity for crimes against the interests of the international community as a whole. The risk that an increased exercise of universal jurisdictions on part of the states will lead to “judicial chaos” as it is brought forward by some commentators has not materialized; quite the contrary, until now, prosecution of crimes under universal jurisdiction has been a great exception.
5. The exercise of universal jurisdiction by national prosecution authorities and national criminal courts shall be subsidiary in two ways: First, a competent international court should be primarily responsible to avenge attacks on the international legal order; in this author’s view prosecution before national courts, including those of the territorial state, is only the second best option. Second, among concurring national jurisdictions, the state of commission and the home states of the alleged perpetrator and the victim shall have primacy. The exercise of universal jurisdiction should be understood as a standby mechanism which is activated only if no priority jurisdiction is willing and able to sincerely prosecute the crime.

6. In order to further elaborate on the relationship between concurring jurisdictions reference to the complementary regime of the ICC Statute may be helpful; any proposal to apply the ICC Statute’s complementary principle to the (horizontal) relationship between various national jurisdictions should, however, carefully consider whether such a transfer is justifiable and adequate.

III. Procedure

7. National criminal trials conducted on the basis of universal jurisdiction must comply with internationally-recognized minimum standards. In this context, the proposals on how to guarantee fair, impartial and independent proceedings should be considered.

8. The initiation of preliminary proceedings on the basis of universal jurisdiction does not require the presence of the accused on the state’s territory. Yet, a trial should not be conducted in absentia.
Appendix 1: Statutes

Constitution (Grundgesetz, GG)

Article 16 GG Citizenship; Extradition.

... (2) No German may be extradited to a foreign country. A different regulation to cover extradition to a Member State of the European Union or to an international court of law may be laid down by law, provided that constitutional principles are observed.

Article 103 GG Hearing in accordance with law; ban on retroactive criminal laws and on multiple punishment.

... (3) No person may be punished for the same act more than once under the general criminal laws.

Code of Crimes Against International Law (Völkerstrafgesetzbuch, VStGB)\(^{67}\)

Section 1 Scope of application.
This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences\(^{68}\) designated therein even when the offence was committed abroad and bears no relation to Germany.

Section 5 Non-applicability of statute of limitations.
The prosecution of serious criminal offences pursuant to this Act and the execution of sentences imposed on their account shall not be subject to any statute of limitations.

Section 6 Genocide.
(1) Whoever with the intent to destroy, in whole or in part, a national, racial, religious or ethnic group as such

1. kills a member of the group,
2. causes serious bodily or mental harm to a member of the group, especially of the kind referred to in section 226 of the Criminal Code,
3. inflicts on the group conditions of life calculated to bring about its physical destruction in whole or in part,
4. imposes measures intended to prevent births within the group,
5. forcibly transfers a child of the group to another group

shall be punished with imprisonment for life.

(2) In less serious cases referred to under subsection (1), numbers 2 to 5, the punishment shall be imprisonment for not less than five years\(^{69}\).

Section 7 Crimes against humanity.
(1) Whoever, as part of a widespread or systematic attack directed against any civilian population,

1. kills a person,
2. inflicts, with the intent of destroying a population in whole or in part, conditions of life on that population or on parts thereof, being conditions calculated to bring about its physical destruction in whole or in part,
3. traffics in persons, particularly in women or children, or whoever enslaves a person in another way and in doing so arrogates to himself a right of ownership over that person,

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\(^{68}\) In German law the term "serious criminal offence" (Verbrechen) is used to denote criminal offences (Straftaten) that are punishable with not less than one year of imprisonment. Mitigating (and aggravating) circumstances - as set out for instance in Section 8 (5) StGB - are to be disregarded in this respect. As a result, all criminal offences in the VStGB are "serious criminal offences" (Verbrechen) with the sole exception of those in sections 13 and 14. Please note that the terminological differentiation between "criminal offences" (Straftaten) and "serious criminal offences" (Verbrechen) is, for technical reasons, not reflected everywhere in this translation.

\(^{69}\) According to section 38 (2) StGB, sentences with a fixed term are not to exceed a maximum period of fifteen years of imprisonment.
4. deports or forcibly transfers, by expulsion or other coercive acts, a person lawfully present in an area to another State or another area in contravention of a general rule of international law,
5. tortures a person in his or her custody or otherwise under his or her control by causing that person substantial physical or mental harm or suffering where such harm or suffering does not arise only from sanctions that are compatible with international law,
6. sexually coerces, rapes, forces into prostitution or deprives a person of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population,
7. causes a person’s enforced disappearance, with the intention of removing him or her from the protection of the law for a prolonged period of time,
   (a) by abducting that person on behalf of or with the approval of a State or a political organisation, or by otherwise severely depriving such person of his or her physical liberty, followed by a failure immediately to give truthful information, upon inquiry, on that person's fate and whereabouts, or
   (b) by refusing, on behalf of a State or of a political organisation 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 letter (a) above, or by giving false information thereon,
8. causes another person severe physical or mental harm, especially of the kind referred to in section 226 of the Criminal Code,
9. severely deprives, in contravention of a general rule of international law, a person of his or her physical liberty, or
10. persecutes an identifiable group or collectivity by depriving such group or collectivity of fundamental human rights, or by substantially restricting the same, on political, racial, national, ethnic, cultural or religious, gender or other grounds that are recognised as impermissible under the general rules of international law
shall be punished, in the cases referred to under numbers 1 and 2, with imprisonment for life, in the cases referred to under numbers 3 to 7, with imprisonment for not less than five years, and, in the cases referred to under numbers 8 to 10, with imprisonment for not less than three years.

(2) In less serious cases under subsection (1), number 2, the punishment shall be imprisonment for not less than five years, in less serious cases under subsection (1), numbers 3 to 7, imprisonment for not less than two years, and in less serious cases under subsection (1), numbers 8 and 9, imprisonment for not less than one year.

(3) Where the perpetrator causes the death of a person through an offence pursuant to subsection (1), numbers 3 to 10, the punishment shall be imprisonment for life or for not less than ten years in cases under subsection (1), numbers 3 to 7, and imprisonment for not less than five years in cases under subsection (1), numbers 8 to 10.

(4) In less serious cases under subsection (3) the punishment for an offence pursuant to subsection (1), numbers 3 to 7, shall be imprisonment for not less than five years, and for an offence pursuant to subsection (1), numbers 8 to 10, imprisonment for not less than three years.

(5) Whoever commits a crime pursuant to subsection (1) with the intention of maintaining an institutionalised regime of systematic oppression and domination by one racial group over any other shall be punished with imprisonment for not less than five years so far as the offence is not punishable more severely pursuant to subsection (1) or subsection (3). In less serious cases the punishment shall be imprisonment for not less than three years so far as the offence is not punishable more severely pursuant to subsection (2) or subsection (4).

Section 8 War crimes against person.

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character
1. kills a person who is to be protected under international humanitarian law,
2. takes hostage a person who is to be protected under international humanitarian law,
3. treats a person who is to be protected under international humanitarian law cruelly or inhumanly by causing him or her substantial physical or mental harm or suffering, especially by torturing or mutilating that person,
4. sexually coerces, rapes, forces into prostitution or deprives a person who is to be protected under international humanitarian law of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population,
5. conscripts children under the age of fifteen years into the armed forces, or enlists them in the armed forces or in armed groups, or uses them to participate actively in hostilities,
6. deports or forcibly transfers, by expulsion or other coercive acts, a person who is to be protected under international humanitarian law and lawfully present in an area to another State or another area in contravention of a general rule of international law, or
7. imposes on, or executes a substantial sentence, in particular the death penalty or imprisonment, in respect of a person who is to be protected under international humanitarian law, without that person having been sentenced in a fair and regular trial affording the legal guarantees required by international law,
8. exposes a person who is to be protected under international humanitarian law to the risk of death or of serious injury to health
(a) by carrying out experiments on such a person, being a person who has not previously given his or her voluntary and express consent, or where the experiments concerned are neither medically necessary nor carried out in his or her interest,
(b) by taking body tissue or organs from such a person for transplantation purposes so far as it does not constitute removal of blood or skin for therapeutic purposes in conformity with generally recognised medical principles and the person concerned has previously not given his or her voluntary and express consent, or
(c) by using treatment methods that are not medically recognised on such person, without this being necessary from a medical point of view and without the person concerned having previously given his or her voluntary and express consent,
9. treats a person who is to be protected under international humanitarian law in a gravely humiliating or degrading manner shall be punished, in the cases referred to under number 1, with imprisonment for life, in the cases referred to under number 2, with imprisonment for not less than five years, in the cases referred to under numbers 3 to 5, with imprisonment for not less than three years, in the cases referred to under numbers 6 to 8, with imprisonment for not less than two years, and, in the cases referred to under number 9, with imprisonment for not less than one year.
(2) Whoever in connection with an international armed conflict or with an armed conflict not of an international character, wounds a member of the adverse armed forces or a combatant of the adverse party after the latter has surrendered unconditionally or is otherwise placed hors de combat shall be punished with imprisonment for not less than three years.
(3) Whoever in connection with an international armed conflict
1. unlawfully holds as a prisoner or unjustifiably delays the return home of a protected person within the meaning of subsection (6), number 1,
2. transfers, as a member of an Occupying Power, parts of its own civilian population into the occupied territory,
3. compels a protected person within the meaning of subsection (6), number 1, by force or threat of appreciable harm to serve in the forces of a hostile Power or
4. compels a national of the adverse party by force or threat of appreciable harm to take part in the operations of war directed against his or her own country shall be punished with imprisonment for not less than two years.
(4) Where the perpetrator causes the death of the victim through an offence pursuant to subsection (1), numbers 2 to 6, the punishment shall, in the cases referred to under subsection (1), number 2, be imprisonment for life or imprisonment for not less than ten years, in the cases referred to under subsection (1), numbers 3 to 5, imprisonment for not less than five years, and, in the cases referred to under subsection (1), number 6, imprisonment for not less than three years. Where an act referred to under subsection (1), number 8, causes death or serious harm to health, the punishment shall be imprisonment for not less than three years.
(5) In less serious cases referred to under subsection (1), number 2, the punishment shall be imprisonment for not less than two years, in less serious cases referred to under subsection (1), numbers 3 and 4, and under subsection (2) the punishment shall be imprisonment for not less than one year, in less serious cases referred to under subsection (1), number 6, and under subsection (3), number 1, the punishment shall be imprisonment from six months to five years.
(6) Persons who are to be protected under international humanitarian law shall be
1. in an international armed conflict: persons protected for the purposes of the Geneva Conventions and of the Protocol Additional to the Geneva Conventions (Protocol I) (annexed to this Act70), namely the wounded, the sick, the shipwrecked, prisoners of war and civilians;
2. in an armed conflict not of an international character: the wounded, the sick, the shipwrecked as well as persons taking no active part in the hostilities who are in the power of the adverse party;
3. in an international armed conflict and in an armed conflict not of an international character: members of armed forces and combatants of the adverse party, both of whom have laid down their arms or have no other means of defence.

70 The official Annex to Section 8 (6) No. 1 reads as follows:
For the purposes of this Act the term “Geneva Conventions” shall constitute a reference to the following:
- II. GENEVA CONVENTION of 12 August 1949 for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Federal Law Gazette 1954 II, p. 781, at p. 813),
- III. GENEVA CONVENTION of 12 August 1949 relative to the Treatment of Prisoners of War (Federal Law Gazette 1954 II, p. 781, at p. 838) and
For the purposes of this Act Protocol I shall constitute a reference to the following:
Section 9 War crimes against property and other rights.
(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character pillages or, unless this is imperatively demanded by the necessities of the armed conflict, otherwise extensively destroys, appropriates or seizes property of the adverse party contrary to international law, such property being in the power of the perpetrator’s party, shall be punished with imprisonment from one to ten years.
(2) Whoever in connection with an international armed conflict and contrary to international law declares the rights and actions of all, or of a substantial proportion of, the nationals of the hostile party abolished, suspended or inadmissible in a court of law shall be punished with imprisonment from one to ten years.

Section 10 War crimes against humanitarian operations and emblems.
(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character
   1. directs an attack against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under international humanitarian law, or
   2. directs an attack against personnel, buildings, material, medical units and transport, using the distinctive emblems of the Geneva Conventions in conformity with international humanitarian law shall be punished with imprisonment for not less than three years. In less serious cases, particularly where the attack does not take place by military means, the punishment shall be imprisonment for not less than one year.
(2) Whoever in connection with an international armed conflict or with an armed conflict not of an international character makes improper use of the distinctive emblems of the Geneva Conventions, of the flag of truce, of the flag or of the military insignia or of the uniform of the enemy or of the United Nations, thereby causing a person’s death or serious personal injury (Section 226 of the Criminal Code) shall be punished with imprisonment for not less than five years.

Section 11 War crimes consisting in the use of prohibited methods of warfare.
(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character
   1. directs an attack by military means against the civilian population as such or against individual civilians not taking direct part in hostilities,
   2. directs an attack by military means against civilian objects, so long as these objects are protected as such by international humanitarian law, namely buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, or against undefended towns, villages, dwellings or buildings, or against demilitarised zones, or against works and installations containing dangerous forces,
   3. carries out an attack by military means and definitely anticipates that the attack will cause death or injury to civilians or damage to civilian objects on a scale out of proportion to the concrete and direct overall military advantage anticipated,
   4. uses a person who is to be protected under international humanitarian law as a shield to restrain a hostile party from undertaking operations of war against certain targets,
   5. uses starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival or impedes relief supplies in contravention of international humanitarian law,
   6. orders or threatens, as a commander, that no quarter will be given, or
   7. treacherously kills or wounds a member of the hostile armed forces or a combatant of the adverse party shall be punished with imprisonment for not less than three years. In less serious cases under number 2 the punishment shall be imprisonment for not less than one year.
(2) Where the perpetrator causes the death or serious injury of a civilian (section 226 of the Criminal Code) or of a person who is to be protected under international humanitarian law through an offence pursuant to subsection (1), numbers 1 to 6, he shall be punished with imprisonment for not less than five years. Where the perpetrator intentionally causes death, the punishment shall be imprisonment for life or for not less than ten years.
(3) Whoever in connection with an international armed conflict carries out an attack by military means and definitely anticipates that the attack will cause widespread, long-term and severe damage to the natural environment on a scale out of proportion to the concrete and direct overall military advantage anticipated shall be punished with imprisonment for not less than three years.

Section 12 War crimes consisting in employment of prohibited means of warfare.
(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character
   1. employs poison or poisoned weapons,
   2. employs biological or chemical weapons or
   3. employs bullets which expand or flatten easily in the human body, in particular bullets with a hard envelope which does not entirely cover the core or is pierced with incisions shall be punished with imprisonment for not less than three years.
(2) Where the perpetrator causes the death or serious injury (section 226 of the Criminal Code) of a civilian or of a person protected under international humanitarian law through an offence pursuant to subsection (1), he shall be punished with imprisonment for not less than five years. Where the perpetrator intentionally causes death, the punishment shall be imprisonment for life or for not less than ten years.

Criminal Code (Strafgesetzbuch, StGB)

Section 3 Applicability to Domestic Acts.
German criminal law shall apply to acts, which were committed domestically.

Section 4 Applicability to Acts on German Ships and Aircraft.
German criminal law shall apply, regardless of the law of the place where the act was committed, to acts which are committed on a ship or in an aircraft, which is entitled to fly the federal flag or the national insignia of the Federal Republic of Germany.

Section 5 Acts Abroad Against Domestic Legal Interests.
German criminal law shall apply, regardless of the law of the place the act was committed, to the following acts committed abroad:

1. preparation of a war of aggression (Section 80);
2. high treason (Sections 81 to 83);
3. endangering the democratic rule of law:
   (a) in cases under Sections 89 and 90a subsection (1), and Section 90b, if the perpetrator is a German and has his livelihood in the territorial area of applicability of this law; and
   (b) in cases under Sections 90 and 90a subsection (2);
4. treason and endangering external security (Sections 94 to 100a);
5. crimes against the national defense:
   (a) in cases under Sections 109 and 109e to109g; and
   (b) in cases under Sections 109a, 109d and 109h, if the perpetrator is a German and has his livelihood in the territorial area of applicability of this law;
6. abduction and casting political suspicion on another (Sections 234a, 241a), if the act is directed against a person who has his domicile or usual residence in Germany;
6a. child stealing in cases under Section 235 subsection (2), no. 2, if the act is directed against a person who has his domicile or usual residence in Germany;
7. violation of business or trade secrets of a business located within the territorial area of applicability of this law, an enterprise, which has its registered place of business there, or an enterprise with its registered place of business abroad, which is dependent on an enterprise with its registered place of business within the territorial area of applicability of this law and constitutes with it a group;
8. crimes against sexual self-determination:
   (a) in cases under Section 174 subsections (1) and (3), if the perpetrator and the person, against whom the act was committed are Germans at the time of the act and have their livelihoods in Germany; and
   (b) in cases under Sections 176 to 176b and 182, if the perpetrator is a German;
9. termination of pregnancy (Section 218), if the perpetrator at the time of the act is a German and has his livelihood in the territorial area of applicability of this law;
10. false unworn testimony, perjury and false affirmations in lieu of an oath (Sections 153 to 156) in a proceeding pending before a court or other German agency within the territorial area of applicability of this law, which is competent to administer oaths or affirmations in lieu of an oath;
11. crimes against the environment in cases under Sections 324, 326, 330 and 330a, which were committed in the area of Germany’s exclusive economic zone, to the extent that international conventions on the protection of the sea permit their prosecution as crimes;
11a. crimes under Section 328 subsection (2), nos. 3 and 4 subsections (4) and (5), also in conjunction with Section 330, if the perpetrator is a German at the time of the act;
12. acts, which a German public official or a person with special public service obligations commits during his official stay or in connection with his duties;
13. acts committed by a foreigner as a public official or as a person with special public service obligations;
14. acts which someone commits against a public official, a person with special public service obligations, or a soldier in the Federal Armed Forces during the discharge of his duties or in connection with his duties;
14a. bribery of a member of parliament (Section 108e) if the perpetrator is a German at the time of the act or the act was committed in relation to a German;
15. trafficking in organs (section 18 of the Transplantation Law), if the perpetrator is a German at the time of the act.

Section 6 StGB Acts Abroad Against Internationally Protected Legal Interests.
German criminal law shall further apply, regardless of the law of the place of their commission, to the following acts committed abroad:

1. (deleted)
2. serious criminal offences involving nuclear energy, explosives and radiation in cases under Sections 307 and 308 subsections (1) to (4), Section 309 subsection (2) and Section 310;
3. assaults against air and sea traffic (Section 316c);
4. trafficking in human beings for sexual exploitation and for exploitation of workforce, as well as promotion of human trafficking (Sections 232 to 233a);
5. unauthorized distribution of narcotics;
6. dissemination of pornographic writings in cases under Sections 184a and 184b subsections (1) to (3), also in connection with Section 184c sentence 1;
7. counterfeiting of money and securities (Sections 146, 151 and 152), payment cards and blank Eurochecks (Section 152b subsections (1) to (4), as well as their preparation (Sections 149, 151, 152 and 152b subsection (5));
8. subsidy fraud (Section 264);
9. acts which, on the basis of an international agreement binding on the Federal Republic of Germany, shall also be prosecuted if they are committed abroad.

Section 7 Applicability to Acts Abroad in Other Cases.

(1) German criminal law shall apply to acts, which were committed abroad against a German, if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement.

(2) German criminal law shall apply to other acts, which were committed abroad if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement and if the perpetrator:
   1. was a German at the time of the act or became one after the act; or
   2. was a foreigner at the time of the act, was found to be in Germany and, although the Extradition Act would permit extradition for such an act, is not extradited, because a request for extradition is not made, is rejected, or the extradition is not practicable.

Section 9 Place of the Act.

(1) An act is committed at every place the perpetrator acted or, in case of an omission, should have acted, or at which the result, which is an element of the offense, occurs or should occur according to the understanding of the perpetrator.

(2) Incitement or accessoryship is committed not only at the place where the act was committed, but also at every place where the inciter or accessory acted or, in case of an omission, should have acted or where, according to his understanding, the act should have been committed. If the inciter or accessory in an act abroad acted domestically, then German criminal law shall apply to the incitement or accessoryship, even if the act is not punishable according to the law of the place of its commission.

Section 78 Period of Limitation.

(1) The imposition of punishment and the ordering of measures (Section 11 subsection (1), no. 8) shall be excluded on expiry of the period of the statute of limitations. Section 76a subsection (2), sent.1, no. 1, shall remain unaffected.

(2) Serious criminal offenses under Section 211 (murder) are not subject to a statute of limitations.

(3) To the extent that prosecution is subject to a statute of limitations, the period of limitation shall be:
   1. thirty years in the case of acts punishable by imprisonment for life;
   2. twenty years in the case of acts punishable by a maximum term of imprisonment of more than ten years;
   3. ten years in the case of acts punishable by a maximum term of imprisonment of more than five years but not more than 10 years;
   4. five years in the case of acts punishable by a maximum term of imprisonment of more than one year but not more than five years;
   5. three years in the case of other acts.

(4) The period shall conform to the punishment threatened by the norm defining the elements of the offense fulfilled by the act, irrespective of aggravating or mitigating circumstances provided for in the provisions of the General Part or for especially serious or less serious cases.

Section 146 Counterfeiting of Money.

(1) Whoever:
   1. counterfeits money with the intent that it be brought into circulation as genuine or that such bringing into circulation be made possible, or alters money with such intent, so that the appearance of a higher value is evoked;
   2. procures counterfeit money with such intent; or
   3. brings counterfeit money as genuine into circulation, that he counterfeited, altered or procured under the provisions of numbers 1 or 2,
   shall be punished with imprisonment for not less than one year.
(2) If the perpetrator acts professionally or as a member of a gang which has combined for the continued commission of money counterfeiting, then the punishment shall be imprisonment for not less than two years.

(3) In less serious cases under subsection (1), imprisonment from three months to five years should be imposed, in less serious cases under subsection (2), imprisonment from one year to ten years.

Section 149 Preparation of the Counterfeiting of Money and Stamps.

(1) Whoever prepares a counterfeiting of money or stamps by producing, procuring for himself or another, offering for sale, storing or giving to another:

1. plates, frames, type, blocks, negatives, stencils or similar equipment which by its nature is suited to the commission of the act; or
2. paper, which is identical or confusingly similar to the type of paper which is designated for the production of money or official stamps and specially protected against imitation;
3. holograms or other constituents, which serve as protection against counterfeiting, shall be punished with imprisonment for not more than five years or a fine if he prepared the counterfeiting of money, otherwise with imprisonment for not more than two years or a fine.

(2) Whoever voluntarily:

1. renounces the execution of the prepared act and averts a danger caused by him that others continue to prepare the act or execute it, or prevents the completion of the act; and
2. destroys or renders useless the means for counterfeiting, to the extent they still exist and are useful for counterfeiting, or reports their existence to a public authority or surrenders them there, shall not be punished under subsection (1).

(3) If the danger that others continue to prepare or execute the act is averted, or the completion of the act prevented due in no part to the contribution of the perpetrator, then the voluntary and earnest efforts of the perpetrator to attain this goal shall suffice in lieu of the prerequisites of subsection (2), number 1.

Section 151 Securities.

The following securities shall be equivalent to money within the meaning of Sections 146,147,149 and 150 if they are specially protected against imitation by print and type of paper:  
1. bearer and order bonds which are parts of an entire issue, if the payment of a specified sum of money is promised in the bonds;
2. shares of stock;
3. share certificates issued by capital investment companies;
4. interest, dividend and renewal coupons of the type of securities indicated in numbers 1 through 3 as well as certificates of delivery of such securities;
5. traveler’s checks.

Section 152 Money, Stamps and Securities of a Foreign Currency Area.

Sections 146 through 151 shall also be applicable to money, stamps and securities of a foreign currency area.

Section 152b Counterfeiting of payment cards with guarantee and preprint of eurocheques

(1) Whoever acts according to section 152a subsection (1) in reference with a payment card with a guarantee or who preprints an eurocheque will be punished with one year to ten years imprisonment.

(2) If the perpetrator acts within the context of a commercial enterprise or as a member of a gang which has combined for the continued commission of crimes under subsection (1), then the punishment shall be imprisonment for not less than one year.

(3) In less serious cases of subsection (1) the punishment shall be imprisonment from three months to five years, in less serious cases of subsection 2 the punishment shall be imprisonment from one year to ten years.

(4) Payment cards with guarantee for the purpose of subsection (1) are credit cards, euro cheque cards and other cards, which:

1. allow the drawer in the monetary transaction to authorise a guaranteed payment, and
2. are specially protected against imitation through design or coding.

Section 184a Dissemination of pornographic writings showing acts of violence or sexual acts of human beings with animals

Whoever, in relation to pornographic writings (Section 11 subsection (3)), which have as their object acts of violence or sexual acts of human beings with animals:

1. disseminates them;
2. publicly displays, posts, presents or otherwise makes them accessible; or
3. produces, obtains, supplies, stocks, offers, announces, commends, or undertakes to import or export them, in order to use them or copies made from them within the meaning of numbers 1 or 2 or makes such use possible by another,

shall be punished with imprisonment of not more than three years or a fine.

Section 184b Dissemination, purchase and possession of child pornographic writings

(1) Whoever, in relation to pornographic writings (Section 11 subsection (3)), which have as their object the sexual abuse of children (sections 176 to 176b):
1. disseminates them;
2. publicly displays, posts, presents or otherwise makes them accessible; or
3. produces, obtains, supplies, stocks, offers, announces, commends, or undertakes to import or export them, in order to use them or copies made from them within the meaning of numbers 1 or 2 or makes such use possible by another,

shall be punished with imprisonment from three months to five years.

(2) Whoever undertakes to gain possession of pornographic writings for a third person, which have as their object the sexual abuse of children, shall, if the writings reproduce an actual or true-to-life event, be similarly punished.

(3) In cases under subsections (1) or (2) the punishment shall be imprisonment from six month to ten years, if the perpetrator acts within the context of a commercial enterprise or as a member of a gang which has combined for the continued commission of such crimes, and the pornographic writing reproduce an actual or true-to-life event.

Section 184c Dissemination of pornographic presentations by radio, media- or teleservices
1 Whoever disseminates pornographic presentations by radio, media- or teleservices shall be punished under the sections 184 to 184b.

Section 232 Human trafficking for sexual exploitation
(1) 1 Whoever exerts influence on another person, with knowledge of a coercive situation or the helplessness associated with the person's stay in a foreign country to induce the person to take up or continue in prostitution or to induce the person to commit sexual acts, by which he is exploited, on or in front of the perpetrator or a third person, or to allow them to be committed on the person by the perpetrator or a third person shall be punished with six month to ten years imprisonment.

2 Whoever induces a person under twenty-one years of age to take up or continue prostitution or to commit sexual acts named in sentence 1 shall be similarly punished.

(2) An attempt shall be punishable.

(3) The punishment shall be from one year imprisonment to ten years, if
1. the victim is a child (section 176 subsection 1)
2. the perpetrator seriously physically maltreats the victim through the act or places the victim in danger of death through the act or
3. the perpetrator acts within the context of a commercial enterprise or as a member of a gang which has combined for the continued commission of such crimes.

(4) Whoever
1. with force, threat of appreciable harm or trickery induces another person to take up or continue prostitution or to commit sexual acts named in subsection 1 sentence 1 or
2. recruits another person through trickery or abducts another person against the person's will by threat of appreciable harm or trickery to take up or continue prostitution or to commit sexual acts named in subsection 1 sentence

shall also be punished under subsection (3).

(5) In less serious cases of subsection (1) the punishment shall be imprisonment from three months to five years, in less serious cases of subsections (3) and (4) the punishment shall be imprisonment from six months to five years.

Section 233 Human trafficking for exploitation of workforce
(1) 1 Whoever seizes a human being with knowledge of a coercive situation or the helplessness associated with the person's stay in a foreign country in order to place him in slavery, bondage or indentured servitude or to induce the person to take up or continue an employment at the perpetrator or at a third party at conditions which are in blatant disparity to the ones of other employees who perform the same or similar activities, shall be punished with imprisonment from six months to ten years.

2 Whoever places a person under twenty-one years of age in slavery, bondage or indentured servitude or induces the person to take up or continue an employment described in sentence 1 shall be similarly punished.

(2) An attempt shall be punishable.

(3) Section 232 subsection (3) to (5) shall apply accordingly.

Section 233a Promoting human trafficking
(1) Whoever abets human trafficking under sections 232 or 233, by recruiting, advancing, passing on, sheltering or taking in another person, shall be punished with imprisonment from three months to five years.

(2) The imprisonment shall be from six months to ten years, if
1. the victim is a child (section 176 subsection (1)
2. the perpetrator seriously physically maltreats the victim through the act or places the victim in danger of death through the act or
3. the perpetrator acts within the context of a commercial enterprise or as a member of a gang which has combined for the continued commission of such crimes.

(3) An attempt shall be punishable.
Section 264 Subsidy Fraud.
(1) Whoever:
  1. makes incorrect or incomplete statements about facts relevant to a subsidy for himself or another, that are advantageous for himself or the other, to a public authority competent to approve a subsidy or to another agency or person (subsidy giver) which has intervened in the subsidy procedure;
  2. uses an object or cash benefit, the use of which is limited by legal provisions or by the subsidy giver in relation to a subsidy, contrary to the use-limitation;
  3. leaves the subsidy giver, contrary to legal provisions relating to the subsidy grant, in ignorance about facts relevant to the subsidy; or
  4. uses a certificate of subsidy entitlement or about facts relevant to a subsidy which was acquired by reason of incorrect or incomplete statements in subsidy proceeding, shall be punished with imprisonment for not more than five years or a fine.
(2) In especially serious cases the punishment shall be imprisonment from six months to ten years. An especially serious case exists, as a rule, if the perpetrator:
  1. acquires, out of gross selfishness or by using counterfeit or falsified documentation, an unjustified subsidy of great magnitude for himself or another;
  2. abuses his powers or his position as a public official; or
  3. exploits the assistance of a public official who abuses his powers or his position.
(3) Section 263 subsection (5), shall apply accordingly.
(4) Whoever acts recklessly in cases under subsection (1), numbers 1 to 3, shall be punished with imprisonment for not more than three years or a fine.
(5) Whoever voluntarily prevents the granting of a subsidy on the basis of the act, shall not be punished pursuant to subsections (1) and (4). If the subsidy is not granted due in no part to the contribution of the perpetrator, then he will be exempt from punishment if he voluntarily and earnestly makes efforts to prevent the granting of the subsidy.
(6) Collateral to imprisonment of at least one year for a crime under subsections (1) to (3), the court may deprive the person of the capacity to hold public office and the capacity to attain public electoral rights (Section 45 subsection (2)). Objects to which the act relates may be confiscated; Section 74a shall be applicable.
(7) A subsidy within the meaning of this provision shall be:
  1. a benefit from public funds under federal or Land law for businesses or enterprises, which, at least in part: a) is granted without market-related consideration; and b) should aid in stimulating the economy;
  2. a benefit from public funds under the law of the European Communities, which is granted, at least in part, without market-related consideration. A public enterprise shall also be deemed to be a business or enterprise within the meaning of sentence 1, number 1.
(8) Relevant to a subsidy within the meaning of subsection (1) shall be facts:
  1. which are designated as being relevant to a subsidy by law or by the subsidy giver on the basis of a statute; or
  2. upon which the approval, grant, reclaiming, renewal or continuation or a subsidy are statutorily dependent.

Section 307 Causing an Explosion by Nuclear Power.
(1) Whoever undertakes to cause an explosion by the release of nuclear energy and thereby endangers the life or limb of another human being or property of another of significant value, shall be punished with imprisonment for not less than five years.
(2) Whoever causes an explosion by the release of nuclear energy and thereby negligently endangers the life or limb of another human being or property of another of significant value, shall be punished with imprisonment from one year to ten years.
(3) If by the act the perpetrator at least recklessly causes the death of another human being, then the punishment shall be:
  1. in cases under subsection (1), imprisonment for life or for not less than ten years;
  2. in cases under subsection (2), imprisonment for not less than five years.
(4) Whoever acts negligently in cases under subsection (2) and negligently causes the danger, shall be punished with imprisonment for not more than three years or a fine.

Section 308 Causing an Explosion by Use of Explosives.
(1) Whoever causes an explosion other than by the release of nuclear energy, in particular by use of explosives, and thereby endangers the life or limb of another human being or property of another of significant value, shall be punished with imprisonment for not less than one year.
(2) If by the act the perpetrator causes serious health damage to another human being or health damage to a large number of human beings, then punishment of not less than two years shall be imposed.
(3) If by the act the perpetrator at least recklessly causes the death of another human being, then the punishment shall be imprisonment for life or for not less than ten years.
(4) In less serious cases under subsection (1), imprisonment from six months to five years shall be imposed, in less serious cases under subsection (2), imprisonment from one year to ten years.
(5) Whoever negligently causes the danger in cases under subsection (1) shall be punished with imprisonment for not more than five years or a fine.
(6) Whoever acts negligently in cases under subsection (1) and negligently causes the danger, shall be punished with imprisonment for not more than three years or a fine.

Section 309 Misuse of Ionizing Radiation.
(1) Whoever, with the intent of harming the health of another human being, undertakes to expose him to ionizing radiation which is capable of harming his health, shall be punished with imprisonment from one year to ten years.
(2) If the perpetrator undertakes to expose a vast number of human beings to such radiation, then the punishment shall be imprisonment for not less than five years.
(3) If by the act the perpetrator causes serious health damage to another human being in cases under subsection (1) or health damage to a large number of human beings, then imprisonment for not less than two years shall be imposed.
(4) If by the act the perpetrator at least recklessly causes the death of another human being, then the punishment shall be imprisonment for life or for not less than ten years.
(5) In less serious cases under subsection (1), imprisonment from six months to five years shall be imposed, in less serious cases under subsection (3), imprisonment from one year to ten years.
(6) Whoever, with the intent of impairing the usefulness of property of another of significant value, exposes it to ionizing radiation which is capable of impairing the usefulness of the property, shall be punished with imprisonment for not more than five years or a fine. An attempt shall be punishable.

Section 310 Preparation of a Serious Criminal Offense involving an Explosion or Radiation.
(1) Whoever, in preparation of:
   1. a particular undertaking within the meaning of Sections 307 subsection (1), or 309 subsection (2); or
   2. a crime under Section 308 subsection (1), which is to be committed with explosives, produces, procures for himself or another, stores or gives to another nuclear fuel, other radioactive materials, explosives or the equipment required for the execution of the act, shall in cases under number 1 be punished with imprisonment from one year to ten years, in cases under number 2 with imprisonment from six months to five years.
(2) In less serious cases under subsection (1), number 1, the punishment shall be imprisonment from six months to five years.

Section 316c Assaults on Air and Sea Traffic.
(1) Whoever:
   1. applies force to or assaults the freedom of decision of a person or engages in other machinations in order to thereby gain control of, or influence the navigation of:
      a) an aircraft employed in civil air traffic which is in flight; or
      b) a ship employed in civil sea traffic; or
   2. uses firearms or undertakes to cause an explosion or a fire, in order to destroy or damage such an aircraft or ship or the cargo which exists on board thereof,
   shall be punished with imprisonment for not less than five years. An aircraft which has already been boarded by members of the crew or air passengers or the loading of the cargo of which has already begun or which has not yet been debarked regularly by members of the crew or air passengers or the unloading of the cargo of which has not been completed, shall be the equivalent of an aircraft in flight.
(2) In less serious cases the punishment shall be imprisonment from one year to ten years.
(3) If by the act the perpetrator at least recklessly causes the death of another human being, then the punishment shall be imprisonment for life or for not less than ten years.
(4) Whoever, in preparation of a crime under subsection (1), produces, procures for himself or another, stores or give to another firearms, explosives or other materials designed to cause an explosion or a fire, shall be punished with imprisonment from six months to five years.

Code of Criminal Procedure (Strafprozessordnung, StPO)

Section 153c Non-Prosecution of Offenses Committed Abroad.
(1) The public prosecution office may dispense with prosecuting criminal offenses:
   1. which have been committed outside the territorial scope of this statute, or which an inciter or accessory to an act committed outside the territorial scope of this statute has committed within the territorial scope thereof;
   2. which a foreigner committed in Germany on a foreign ship or aircraft;
   3. if a sentence for the offense was already executed against the accused abroad, and the sentence which is to be expected in Germany would be negligible after taking the foreign sentence into account or if the accused has already been acquitted by final judgment abroad in respect of the offense.
For crimes punishable under the VStGB Section 153f shall apply.
(2) The public prosecution office may dispense with prosecuting criminal offences if a sentence for the same offence was already executed abroad and the sentence which is to be expected in Germany would not negligible after taking the foreign sentence into account or if the accused has already been acquitted by a final judgement abroad for the same act.

(3) The public prosecution office may also dispense with prosecuting criminal offenses committed within, but through an act committed outside, the territorial scope of this statute, if the conduct of proceedings would pose the risk of serious detriment to the Federal Republic of Germany or if other predominant public interests present an obstacle to prosecution.

(4) If charges have already been preferred, the public prosecution office may in the cases of subsection (1), numbers 1 and 2, and of subsection (2) withdraw the charges at any stage of the proceedings and terminate the proceedings if the conduct of proceedings would pose the risk of serious detriment to the Federal Republic of Germany, or if other predominant public interests present an obstacle to prosecution.

(5) If criminal offenses of the nature designated under section 74a subsection (1), numbers 2 to 6, and under section 120 subsection (1), numbers 2 to 7, of the Courts Constitution Act are the subject of the proceedings, the Federal Prosecutor General shall have these powers.

Section 153f StPO Non-Prosecution of Offences Under the VSGB
(1) In the cases referred to under Section 153c subsection (1), numbers 1 and 2, the public prosecution office may dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, if the accused is not present in Germany and such presence is not to be anticipated. If in the cases referred to under Section 153c subsection (1), number 1, the accused is a German, this shall however apply where the offence is being prosecuted before an international court or by a State on whose territory the offence was committed or whose national was harmed by the offence.

(2) In the cases referred to under Section 153c subsection (1), numbers 1 and 2, the public prosecution office may dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, in particular if

1. there is no suspicion of a German having committed such offence,
2. such offence was not committed against a German,
3. no suspect in respect of such offence is residing in Germany and such residence is not to be anticipated,
4. the offence is being prosecuted before an international court or by a State on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offence.

The same shall apply if a foreigner accused of an offence committed abroad is present in Germany but the requirements pursuant to the first sentence, number 2 and 4, have been fulfilled and transfer to an international court or extradition to the prosecuting state is permissible and is intended.

(3) If charges have already been preferred in cases under Subsections (1) or (2), the public prosecution office may withdraw the charges at any stage of the proceedings and terminate the proceedings.

Law on International Assistance in Criminal Matters
(Gesetz über die internationale Rechtshilfe in Strafsachen, IRG)

Section 2 Principle.
(1) A foreigner who is being prosecuted or who has been sentenced in a foreign country because of an act punishable there may be extradited to such foreign country at the request of the competent authorities for the purpose of prosecution or execution of a sentence given because of that act or because of the imposition of another penalty.

(2) A foreigner who has been sentenced in a foreign country because of an act punishable there may be extradited to another foreign country, which has taken over enforcement, at the request of the competent authorities of that country, for the purpose of executing the sentence imposed because of the act, or for the imposition of another penalty.

(3) Foreigners pursuant to this Law shall be persons who are not German nationals pursuant to Article 116 (1) of the Constitution.

Section 3 Extradition for the Purpose of Prosecution or Execution.
(1) Extradition shall be granted only if the act contains the elements of a criminal offence under German law or if, after analogous conversion of the facts, the act would under German Law constitute an offence.

(2) Extradition for the purpose of prosecution shall be granted only if the act is punishable under German law by a maximum of at least one year of imprisonment or if, after analogous conversion of the facts, the act would, under German law, be punishable by such a penalty.

(3) Extradition for the purpose of execution shall be granted only if extradition for the purpose of prosecution because of the act would have been allowed and if a penalty involving imprisonment is to be executed. It shall further be granted on condition if it is to be expected that the period of imprisonment to be served, or the sum of the periods of imprisonment still to be served, is at least for month.
Section 6 Political Offences, Political Prosecution.
(1) Extradition for a political act or for an act connected with such an act shall not be granted. It shall be granted if the accused is being prosecuted or has been sentenced for the commission or an attempted commission of genocide, murder or manslaughter or because of participation in such an act.
(2) Extradition shall not be granted if there are sound reasons for the assumption that the accused, in the event of his extradition, would be persecuted or punished because of his race, religion, citizenship, association with a certain social group or his political beliefs, or that his situation would be rendered more difficult for one of these reasons.

Section 7 Military Offences.
Extradition because of an act which consists exclusively in the breach of military discipline shall not be granted.

Section 8 Death Penalty.
If the act is punishable by death under the law of the requesting state, extradition shall be granted only if the requesting state gives assurances that the death penalty will not be imposed or carried out.

Section 9 Concurrent Jurisdiction.
If the act is also subject to German jurisdiction, extradition shall not be granted, provided
(1) a court or other authority in Germany has rendered a judgement or a decision with corresponding legal force or has declined to open the main trial (Section 204 of the Code of Criminal Procedure) or has denied a motion to issue a formal indictment (Section 174 of the Code of Criminal Procedure) or has suspended the proceedings after the satisfaction of conditions and instructions (Section 153 (a) of the Code of Criminal Procedure) or has, under juvenile criminal law, rescinded prosecution or has suspended the case (Sections 45 and 47 of the Juvenile Court Act), or
(2) the statute of limitations for the prosecution or the enforcement has elapsed under German law or the prosecution or enforcement is barred by a German amnesty law.

Section 9a Extraditions and Proceedings before International Criminal Courts.
(1) Extradition of an accused for an act shall not be granted if an international criminal court, established according to a legal act which is binding on the Federal Republic of Germany, hands down a legally binding judgement or a decision with corresponding legal effect or suspends the criminal proceedings on the ground that they are non-appealable and prosecution by other courts is prohibited by the establishing act in this instance. Should the criminal court indicated in sentence 1 conduct criminal proceedings for the act and should a decision not yet have been rendered pursuant to sentence 1 of the criminal court after receipt of an extradition request, a decision on the admissibility of the extradition will be deferred. Temporary extradition (Art. 37) is excluded.
(2) If a foreign state and a criminal court in the meaning of sentence 1, paragraph 1 request the transfer of the accused for criminal prosecution or execution of sentence (concurrent requests) and if the establishing act of the criminal court or the statutory regulations which bring about its implementation contain provisions governing the settlement of several requests, the requests shall be dealt with in accordance with these provisions. If neither the establishing act nor the statutory regulations which bring about its implementation contain provisions on dealing with concurrent requests but the establishment act grants precedence to the proceedings of the criminal court over proceedings of a foreign State, then precedence will be given to the request of the criminal court.

Section 10 Extradition Documents.
(1) Extradition shall be granted only if, as a result of the commission of the act, an arrest warrant or a document with corresponding legal force or a decision by a competent authority of the requesting state, which is enforceable and orders imprisonment, as well as a representation of the applicable laws, has been submitted. If extradition is requested for the purpose of prosecution of several offences, then, instead of an arrest warrant or a document with corresponding legal force, a document from the competent authorities of the requesting state which shows the charges made against the person sought shall suffice with regard to additional offences.
(2) If special circumstances justify a review as to whether there is reasonable ground to believe that the accused has committed the offence with which he is charged, extradition shall be granted only upon presentation of the facts showing probable cause that the offence has been committed.
(3) Extradition for the purpose of executing a sentence or another penalty which has been imposed in a third state shall be granted only if the following documents have been submitted:
   1. The enforceable decision ordering imprisonment and a document from the third state showing its consent to execution by that state which has taken over enforcement.
   2. A document from a competent authority of that state which has taken over enforcement showing that the sentence or other sanctions is enforceable there.
   3. A presentation of the applicable legal provisions.
   4. In the case of (2), a presentation in the sense of this provision.

Section 15 Extradition Detention.
(1) Upon receipt of an extradition request, extradition detention of the person sought may be ordered
1. if there is danger that he may avoid the extradition proceedings or the extradition; or
2. if, on the basis of known facts, there is reason for the strong suspicion that the accused would obstruct the finding of truth in the foreign proceedings or in the extradition proceedings.

(2) Para. 1 shall not apply if it appears from the outset that extradition will not be granted.

**Section 16 Provisional Extradition Detention.**

(1) Under the conditions of Section 15, extradition detention can be ordered prior to receipt of the extradition request, if:

1. a competent authority of the requesting state requests it; or
2. a foreigner, on the basis of certain facts, is under strong suspicion of an offence which may lead to his extradition.

(2) The extradition arrest order shall be cancelled if the accused has been detained from the day of his arrest or under provisional detention for the purpose of extradition for a total of two months and the extradition request with the extradition documents has not been received by the authorities designated in Section 74 or by any other authorities competent to receive the request and the documents. If a non-European state has requested the order of a provisional extradition detention, the period of time shall be three months.

(3) After receipt of the extradition request and the extradition documents, the Higher Regional Court shall make its decision without delay concerning the continuation of the detention.

**Section 83b Obstacles to Approval.**

(1) Applications for extradition may be refused if:

a) criminal proceedings are being carried out against the accused in the area covered by this law for the same act that is the basis of the extradition request,
b) initiation of criminal proceedings for the same act that is the basis of the extradition request was rejected or already initiated proceedings were abandoned,
c) precedence is to be accorded to the extradition request of a third state,
d) there is no expectation of a duty to extradite pursuant to the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (ABl. EG Nr. L 190 S. 1), with an assurance provided by one of the requesting states, or another reason that would be comparable to a similar German request.

(2) Applications for extradition of a foreigner who is normally resident in Germany may further be refused,

a) if the extradition of a German national for the purposes of prosecution is not permissible pursuant to Section 80 (1) or (2) IRG,
b) if in the case of extradition for the purpose of serving a sentence he, after being informed of the judicial protocol, has not consented and his protected interest in serving the sentence in Germany does prevail; Section 41 (3) and (4) shall apply correspondingly.

**Law on the Constitution of Courts (Gerichtsverfassungsgesetz, GVG)**

**Section 18.**
The members of diplomatic missions established in the territorial area of applicability of this law, their family members and private servants are exempt from German jurisdiction under the conditions of the Vienna Convention on Diplomatic Relations, done at Vienna on 18 April 1961. This applies equally if the sending state is not a contracting party to this Convention. In those cases Article 2 of the Act of 6 August 1964 to the Vienna Convention on Diplomatic Relations done at Vienna on 18 April 1961 shall apply correspondingly.

**Section 19.**
(1) The members of consular posts including honorary consular officers (Wahlkonsularbeamte) established in the territorial area of applicability of this law are exempt under the conditions of the Vienna Convention on Consular Relations, done at Vienna on 24 April 1963 from German jurisdiction. This applies equally if the sending state is not a contracting party to this Convention. In those cases Article 2 of the Act of 26 August 1969 to the Vienna Convention on Consular Relations done at Vienna on 24 April 1963 shall apply correspondingly.

(2) Special international treaties on the immunity of persons named in subsection 1 from German jurisdiction are not affected by this provision.

**Section 20.**
(1) German jurisdiction does not extend to representatives of foreign states and their attendance who are present on the territorial area of applicability of this law following an official invitation of the Federal Republic of Germany.

(2) Further, German jurisdiction does not extend to persons not named in subsection 1 and Sections 18 and 19 as far as they are exempt from prosecution under general rules of international law, international treaties or other statutory provisions.
Section 21.
Sections 18 to 20 do not oppose to granting extradition or transfer or other legal assistance by an international criminal court, established according to a legal act which is binding on the Federal Republic of Germany.
Appendix 2: Select Bibliography

Ambos, § 6, Münchener Kommentar zum Strafgesetzbuch (2003).
Keller, Grenzen, Unabhängigkeit und Subsidiarität der Weltrechtspflege, Golddammer’s Archiv 2006, 25.

Appendix 3: Leading Cases

Bundesverfassungsgericht (Federal Constitutional Court), decision of 12 December 2000, Neue Juristische Wochenschrift 2001, 1848.

Bundesgerichtshof (Federal High Court), judgment of 20 October 1976, BGHSt 27, 30.

Bundesgerichtshof (Federal High Court), judgment of 22 January 1986, BGHSt 34, 1.

Bundesgerichtshof (Federal High Court), judgment of 8 April 1987, BGHSt 34, 334.

Bundesgerichtshof (Federal High Court), judgment of 22 April 1999, BGHSt 45, 64.

Bundesgerichtshof (Federal High Court), judgment of 21 February 2001, BGHSt 46, 292.

Oberlandesgericht Stuttgart (Higher Regional Court), decision of 13 September 2005, Neue Zeitung für Strafrecht 2006, 117.

Generalbundesanwalt beim BGH (Federal Attorney General), decision of 10 February 2005 (Rumsfeld et al.), Juristenzeitung 2005, 211.


## Appendix 4: Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>BGH</td>
<td>Bundesgerichtshof (Federal High Court)</td>
</tr>
<tr>
<td>BGHSt</td>
<td>Entscheidungen des BGH in Strafsachen</td>
</tr>
<tr>
<td>BVerG</td>
<td>Bundesverfassungsgericht (Constitutional Court)</td>
</tr>
<tr>
<td>BVerfGE</td>
<td>Entscheidungen des Bundesverfassungsgerichts</td>
</tr>
<tr>
<td>CISA</td>
<td>Convention Implementing the Schengen Agreement (SDÜ)</td>
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<td>European Convention</td>
<td>European Convention on Extradition</td>
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<tr>
<td>GG</td>
<td>Grundgesetz (Constitution)</td>
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<tr>
<td>GVG</td>
<td>Gerichtsverfassungsgesetz (Law on the Constitution of Courts)</td>
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<tr>
<td>ICC Statute</td>
<td>Statute of the International Criminal Court (Rome Statute)</td>
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<tr>
<td>IRG</td>
<td>Gesetz über die Internationale Rechtshilfe in Strafsachen (Law on the International Assistance in Criminal Matters)</td>
</tr>
<tr>
<td>JStGHG</td>
<td>Gesetz über die Zusammenarbeit mit dem Strafgerichtshof für das ehemalige Jugoslawien (Law on Cooperation with the ICTY)</td>
</tr>
<tr>
<td>IStGHG</td>
<td>Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof (Law on Cooperation with the ICTY)</td>
</tr>
<tr>
<td>RStGHG</td>
<td>Gesetz über die Zusammenarbeit mit dem Strafgerichtshof für Ruanda (Law on Cooperation with the ICTR)</td>
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<tr>
<td>StGB</td>
<td>Strafgesetzbuch (German Criminal Code)</td>
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<tr>
<td>StPO</td>
<td>Strafprozessordnung (German Code of Criminal Procedure)</td>
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<tr>
<td>VStGB</td>
<td>Völkerstrafgesetzbuch (German Code of Crimes Against International Law)</td>
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