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Front cover: *Pasquale Trento, with other masons, mounting a sculpture in Florence. Masons have a proud tradition of self-regulation and quality control in Florence. The guild of master stonemasons and wood-carvers –* Arte dei Maestri di Pietra e Legname *– was already listed in 1236 as one of the Intermediate Guilds. Ensuring rigorous quality control through strict supervision of the workshops, the guild not only existed for more than 500 years (until 1770, when several of its functions were assigned to the Florentine chamber of commerce), but it has contributed to the outstanding quality of contemporary masonry in Florence. Photograph: © CILRAP 2017.*

Back cover: *Section of the original lower-floor of the Basilica of Saints Cosmas and Damian in Rome which honours the memory of two brothers and physicians for the poor in Roman Syria. Its mosaics and other stonework influenced the Florentine guild of masons referred to in the frontpage caption, as its craftsmen and sponsors created a culture of excellence through competition and exacting quality control. Photograph: © CILRAP 2018.*

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German Preliminary Examinations of International Crimes

Matthias Neuner*

This chapter discusses how the Office of the German Federal Prosecutor General ('FPG') conducts preliminary examinations[1] into international crimes and what quality control measures, if any, are applied. These issues are discussed in six sections: firstly, how Germany implemented the Statute of the International Criminal Court ('ICC Statute'); secondly, what the objectives of this implementation were; thirdly, which measures are available to a German Prosecutor in a preliminary examination; fourthly, the fate of certain preliminary examinations into international crimes; and fifthly, what quality control measures, if any, are taken during a preliminary examination. Finally, a conclusion is provided.

6.1. Germany's Implementation of the ICC Statute

Germany signed the ICC Statute on 10 December 1998[2] and deposited its instrument of ratification on 10 December 2000.[3] The ICC Statute entered

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1 The German term for preliminary examinations is *Vorermittlungen*. A literal translation would read 'pre-*investigation*'. However, as will be pointed out below in Section 6.3.1., German prosecutor has no coercive means available during this early stage. This justifies calling this phase 'examination' only instead of pre-investigation, because the latter term implies the use of coercive means which are *not* available to a German prosecutor before the formal opening of an investigation. To avoid confusion, this chapter uses the term 'preliminary examination'.

2 Cf. the Law regarding the ICC Statute from 17 July 1998, 4 December 2000, *Bundesgesetzblatt*, 2000, part II, no. 35, p. 1393 ('German law on ICC Statute'). The official declaration of Germany accompanying the ratification was published on 4 April 2003 in the *Bundesgesetzblatt*, 2003, part II, no. 9, pp. 293, 297 and 298 ('German law on ratification').

3 This occurred days after Germany had translated the ICC Statute into German and published it in the official gazette on 7 December 2000 (cf. German law on ICC Statute, p. 1393 and German law on ratification, p. 293).

into force in Germany on 1 July 2002.[4] Before this date, Germany had created the Code of Crimes against International Law ('CCAIL'), a law distinct from the Federal German Criminal Code ('FCC') which contains ordinary criminal offences. Initially, the CCAIL contained war crimes, crimes against humanity and genocide comparable to the offences codified in the ICC Statute.[5] Germany exercises jurisdiction over these offences on the basis of active and passive personality, territoriality and also universal jurisdiction.[6]

Following the adoption of the crime of aggression in Kampala on 11 June 2010,[7] Germany amended its CCAIL to include the crime of aggression as well.[8] This amendment entered into force on 1 January 2017 and provides for German jurisdiction over aggression based on the principles of territoriality and active personality,[9] but not universal jurisdiction.

6.1.1. Competent Court

The competent authorities to deal with offences codified in the CCAIL are according to Section 120(1)(8) of the Courts Constitution Act ('CCA')[10] of the Higher Regional Courts. Ordinary decisions about requests to compel charges are decided by a bench of three judges.[11] The Higher Regional Court acts as the court of first instance for offences pursuant to the CCAIL. Depending on the complexity and difficulty of the cases, trials

4 German law on ratification, p. 293, Section I.

5 Cf. CCAIL, part II, chap. 1, Sections 6–8. The CCAIL was adopted on 26 June 2002 and entered into force on 30 June 2002 (cf. the Law introducing the CCAIL, published 29 June 2002, *Bundesgesetzblatt*, 2002, part I, no. 42, pp. 2254–60, Article 8).

6 Cf. CCAIL, Sections 1 and 2 in connection with FCC, Sections 3–5, Section 6, no. 9 and Section 7.

7 Review Conference of the Rome Statute, Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court, 11 June 2010, RC/Res.6 (http://www.legal-tools.org/doc/0d027b/); Adoption of Amendments on the Crime of Aggression, UN doc. C.N.651.2010.TREATIES-8 (Depositary Notification), 29 November 2010; cf. ICC Statute, Articles 5(1)(d) and 5(2).

8 Cf. Gesetz zur Änderung des Völkerstrafgesetzbuches (Law to change the CCAIL), adopted 22 December 2016, published 28 December 2016, *Bundesgesetzblatt*, part I, no. 65, p. 3150, Article 1. Article 1 introduces a new Section 13 into the CCAIL.

9 *Ibid*., Article 3.

10 In German *Gerichtsverfassungsgesetz*.

11 Cf. Federal Code of Criminal Procedure (hereinafter 'FCCP'), Section 172(2) in connection with CCA, Section 122(1).

may be conducted in front of a bench consisting of either three or five judges.[12]

6.1.2. Federal Prosecutor General

The competent authority in Germany to conduct preliminary examinations, investigations and prosecutions into offences codified in the CCAIL is the FPG's office based in Karlsruhe[13] which is supported by the Federal German police's war crimes unit. The FPG mainly prosecutes offences relating to State security. The FPG has *no* authority to assess the suspicion of a crime under political standards.[14] At least during the first six years after the CCAIL entered into force, there was no department within the FPG's office which exclusively dealt with offences under international law. Rather, other existing units within the FPG's office dealt with such offences. In December 2008, an investigative department[15] dealing with international crimes was set up, comprised of one federal prosecutor, one senior prosecutor and two scientific researchers.[16] Over the years this unit on international crimes grew and has, since March 2017, seven prosecutors, namely four permanent prosecutors and three scientific assistants. The latter rotate and usually stay in this unit for two years before moving to other departments within the FPG's office.

Regarding offences under international law, the FPG has been afforded a stronger position in comparison to his[17] colleagues prosecuting ordinary crimes, in that an explicit *authorization* is provided to the FPG to *dispense* with an investigation if an offence under the CCAIL is believed to have been committed and if *no* concrete link to Germany exists.[18] Fur-

12 Cf. CCA, Section 122(2).

13 Cf. *ibid*., Section 142a.

14 Preliminary note of the German government to questions posed by Parliamentarians, Bundestag, 5 May 2014, Bundestag Drucksache no. 18/1318, p. 2; Thomas Beck, "Das Völkerstrafgesetzbuch in der praktischen Anwendung – ein Kommentar zum Beitrag von Rainer Keller", in Florian Jeßberger and Julia Geneuss (eds.), *Zehn Jahre Völkerstrafgesetzbuch*, Nomos and Stämpfli, 2013, pp. 161 and 163 (hereinafter 'Beck – Völkerstrafgesetzbuch').

15 In German: *Ermittlungsreferat*, cf. response of the German government to questions posed by Parliamentarians, Bundestag, 19 December 2008, Bundestag Drucksache no. 16/11479, p. 6, response to question 17.

16 *Ibid*.

17 The masculine 'he', 'his' etc. hereinafter are used for the sake of convenience.

18 Sub-section 153(f)(1) FCCP empowers the FPG to dispense while sub-section 2 contains a suggestion to the FPG to exercise his discretion to suspend in certain cases. Through the

ther, the decisions of the FPG not to open an investigation or, once opened, to close an investigation are only subject to limited review by the Higher Regional Courts regarding two aspects: (a) did the FPG exercise his discretion at all?[19] And if so, (b) did he exercise his discretion arbitrarily?[20] Further, even once the Higher Regional Courts have confirmed the charges, the FPG can, at any stage of the proceedings in cases involving offences under the CCAIL, dispense the proceedings *without* prior permission of the court. In this regard, Section 153f(3) of the Federal Code of Criminal Procedure ('FCCP') states: "[i]f, in the cases [subject to the CCAIL] public charges have already been preferred, the public prosecution office may, at any stage of the proceedings, withdraw the charges and terminate the proceedings".[21]

This provision increases the powers of the FPG in cases involving the CCAIL. By contrast, in almost[22] all cases involving ordinary crimes, the prosecutor *cannot* simply withdraw the charges without the permission of the court,[23] and is barred from doing so after the trial has commenced.[24]

6.2. Objectives of Implementation and Preliminary Examinations

First, the objectives of the implementation of the ICC Statute in Germany are defined, followed by a discussion of those of preliminary examination.

construction of this section, the legislature, relying on the principle of opportunity, structures the exercise of the FPG's discretion (cf. Björn Gercke, "9th section: Öffentliche Klage", in Björn Gercke, Karl-Peter Julius, Dieter Temming and Mark A. Zöller (eds.), *Strafprozessordnung*, 5th edition, C.F. Müller, 2012, Section 153(f), para. 2).

19 Higher Regional Court Stuttgart, *Center for Constitutional Rights v. Rumsfeld et al.*, decision, 13 September 2005, 5 Ws 109/05 (hereinafter 'Higher Regional Court Stuttgart – Rumsfeld decision'), published German in *Neue Zeitschrift für Strafrecht*, 2006, p. 117, Gründe Section III(2)(b) and in English in *International Legal Materials*, 2006, vol. 45, no. 1, pp. 122 and 125.

20 *Ibid*.

21 Cf. also Higher Regional Court Stuttgart, *Amnesty International & Human Rights Watch v. Almatov et al.*, Decision, 27 March 2008, 5 Ws 1/07 (hereinafter 'Higher Regional Court Stuttgart – Almatov Decision'), sub-section II, para. 2(c).

22 Exceptions are provided for in FCCP Sections 153(c)(4), 153(d)(2), 153(e)(2) and 153(f)(3).

23 Cf. *ibid*. Sections 153 and 153(a)(1); 153(a)(2), 153(b) and 154(2); and 154(b)(4).

24 Cf. *ibid*. Section 294(1) in connection with Section 156.

6.2.1. Implementation

The legislative history behind CCAIL reveals that it was created (as part of the domestic implementation of the ICC Statute), among other objectives, to provide adequate investigations, so that Germany will not become a "safe haven" (*sicherer Rückzugsraum*) for war criminals.[25]

At the same time, the legislature was also aware of the enormous resources required for the prosecution of war crimes, and of Germany's own history involving the Nazi' s systematic commission of crimes and subsequent adjudication of individual perpetrators. It therefore decided that Germany should *not* present itself as a 'world police officer' who balances deficits in criminal prosecutions abroad or who demonstrates to other States how a better or other more efficient prosecution of international crimes works.[26] Germany is aware that its judicial resources are limited and that investigations into war crimes usually require cross-border investigations into complex situations. Hence, the German legislature emphasized the principle of subsidiarity and assists with providing judicial assistance to other States or international tribunals to enable them to conduct trials into crimes against international law.[27]

6.2.2. Preliminary Examination

Whether regarding ordinary crimes or offences under the CCAIL, German law does *not* currently regulate and thus define what the objectives of a preliminary examination are.

6.2.2.1. Primary Inferences from Law

In the absence of explicit provisions on preliminary examinations, the FCCP governs at least the procedural step *following* a preliminary exami-

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[25] Cf. the response of the German government to questions posed by Parliamentarians, Bundestag, 19 December 2008, Bundestag Drucksache no. 16/11479, p. 4, response to question 7, see *supra* note 15; Christian Ritscher, "Die Ermittlungstätigkeit des Generalbundesanwaltes zum Völkerstrafrecht: Herausforderungen und Chancen", in Christoph Safferling and Stefan Kirsch (eds.), *Völkerstrafrechtspolitik*, Springer, 2003, pp. 223 and 225 (hereinafter 'Ritscher – Ermittlungstätigkeit GBA').

[26] *Ibid*., p. 225.

[27] Federal Ministry of Justice Germany, Government Draft Code of Crimes against International Law (English version), 28 December 2001, p. 84 (hereinafter 'government draft – motives CCAIL (English version)'); Bundestag, Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches, 13 March 2002, BT Drs. 14/8524, p. 38 (hereinafter 'Bundestag – motives CCAIL').

nation. Regarding the formal opening of an investigation, Section 152(2) of the FCCP provides that: "the public prosecution office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications". By inference, the objective of any preliminary examination is to explore whether sufficient factual indications exist.

Further guidance on preliminary examinations is provided by a directive which was not adopted by either the federal parliament (Bundestag) or any parliament of the 16 States of Germany. Rather, the Ministers of Justice and Interiors of those States agreed in 1992 on a common directive limited to preliminary examinations against organized crime:

> If, following an assessment of the existing leads, factual indications remain unclear and additional lines of inquiry are available, the law enforcements authorities *may* pursue these. In such cases no legal duty to investigate exist. The objective is simply to clarify whether sufficient factual indications exist.[28]

This common directive on organized crime indicates that the objective of a preliminary examination is to determine whether sufficient *factual indications* of a crime exist. This should be done by assessing given leads, meaning those which are known and/or which have been provided by the person/organization notifying the suspicion of a crime. However, by using the word 'may' and emphasizing that no legal duty to pursue additional lines of inquiry exists at the preliminary examination stage, the directive provides the law enforcement authorities with *discretion*. Its scope is unclear: does such discretion include *whether* to pursue additional lines of inquiry? Or rather, do all additional lines have to be generally pursued, but the Prosecutor has discretion regarding the intensity necessary to clarify whether sufficient factual indications of an organized crime exist?

[28] Gemeinsame Richtlinien der Justizminister/-senatoren und der Innenminister/-senatoren der Länder über die Zusammenarbeit bei der Verfolgung der Organisierten Kriminalität, 8 July 1992, JMBl/92, no. 9, p. 139, as amended through the *Gemeinsamer Runderlass*, 18 April 2000, JMBl/00, no. 5, p. 67, at Section 6.2. (hereinafter 'Common Guideline') (emphasis and translation by this author). ("Bleibt nach Prüfung der vorliegenden Anhaltspunkte unklar, ob ein Anfangsverdacht besteht, und sind Ansätze für weitere Nachforschungen vorhanden, so können die Strafverfolgungsbehörden diesen nachgehen. In solchen Fällen besteht keine gesetzliches Verfolgungspflicht. Ziel ist alleine die Klärung, ob ein Anfangsverdacht besteht.")

Furthermore, this directive was adopted by ministers from German States, but not by the Federal Minister of Justice who appoints and has the power to instruct[29] the FPG, whose prosecutors investigate allegations involving crimes against international law. Thus, it remains unclear whether this directive on organized crime can be applied by analogy to preliminary examinations under international criminal law.

6.2.2.2. Secondary Inferences from Indirectly Applicable Law and Practice

Additional inferences on considerations guiding the FPG during the exercise of his discretion at the preliminary examination stage may be drawn from the options available to the FPG under the FCCP. When the FPG obtains knowledge of a suspicion of a crime under international law, he has the following options as a result of the preliminary examination: (1) he finds no factual indications and closes the preliminary examination, (2) he has already an open investigation against a concrete person and connects the new preliminary examination to it by extending the old investigation, (3) he formally opens a new investigation and subsequently either files an indictment[30] or closes the investigation,[31] or (4) he maintains the information and evidence obtained during the preliminary examination by adding it to an ongoing structural investigation against unknown persons. Since 2002, the FPG has mainly pursued three options: the closing of preliminary examinations or of formally opened investigations or, since 2008, the usage of information provided in criminal complaints in structural investigations. These three options provide information on his mindset when exercising his discretion during preliminary examinations.

6.2.2.2.1. Section 153f(1), FCCP

This provision permits the FPG to dispense with an ongoing investigation if the crime was committed abroad and *no* concrete link to Germany exists because neither the victim nor the perpetrator(s) are German citizens and it is unlikely that the perpetrator will enter Germany in a foreseeable time span.[32] Literally, Section 153f, FCCP only relates to the closing of a for-

[29] Cf. *infra* note 135.

[30] Cf. FCCP, Section 170(1).

[31] Cf. *ibid*., Sections 153(f)(1) and 153(f)(2).

[32] Government draft – motives CCAIL (English version), p. 83; Bundestag – motives CCAIL, p. 89.

mally opened investigation. At least two scholars argue that the provision may apply by analogy to the closing of a preliminary examination (before an investigation has been opened).[33] During the preliminary examination, the FPG focuses on whether it can be established that 'sufficient factual indications' for the commission of a crime under international law exist; but if it is impossible to establish these indications without investing substantial effort and the preliminary examination has otherwise reached a 'dead end', then the FPG must decide how to proceed. To apply the law literally and first formally open an investigation in order to close it, is hardly practicable. In this situation he may also hypothetically consider whether, even if such factual indications of an offence under international law could ever be established, he may nevertheless have the right to close the investigation following a proper exercise of his discretion because the case displays *no* concrete link to Germany and is unlikely to do so in the foreseeable future.

Consequently when the Prosecutor reaches a 'dead end' during a preliminary examination, he may be tempted to divert away from exploring whether sufficient factual indications exist for the actual allegation, but to rather look for other indirectly related considerations,[34] such as whether the alleged perpetrator and victims of the potential crime have no link to Germany, or whether the institution or person launching the complaint only went to Germany to make use of the broad universal jurisdic-

[33] This application is needed, *a fortiori*, because why should the FPG lead a preliminary examination into the opening of a formal investigation only in order to immediately thereafter close this opened investigation pursuant to FCCP Section 153(f)? To avoid this, one may apply FCCP Section 153(f) by analogy to the closing of a preliminary examination (cf. Werner Beulke, in Ewald Löwe and Werner Rosenberg, *Die Strafprozeßordnung und das Gerichtsverfassungsgesetz*, supplement to 26th edition, De Gruyter, 2012, Section 153(f), para. 14 (hereinafter 'Beulke – Strafprozeßordnung'); Denis Basak, "Der Fall Rumsfeld – ein Begräbnis dritter Klasse für das Völkerstrafgesetzbuch?", in *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, 2007, vol. 90 no. 4, pp. 333 and 354 (hereinafter 'Basak – Rumsfeld').

[34] However, the FPG is not permitted to consider reasons relating to foreign politics of Germany in his decision to dispense with a (preliminary) investigation (cf. Dirk Teßmer, in *Münchener Kommentar zur Strafprozeßordnung*, C.H. Beck, 2016, vol. 2, Section 153(f), para. 20 (hereinafter 'Teßmer – MK, Section 153f')). Thomas Beck, former head of the unit on international crimes in the FPG office, states that political considerations do not play a role during the decisions of the FPG (Beck – Völkerstrafgesetzbuch, pp. 161 and 163).

tion provided there, that is, 'forum shopping'.[35] Instead of focusing his attention on factual indications of the crime itself, the FPG would merely examine the reasons structuring the exercise of his discretion pursuant to Section 153f of the FCCP which, if satisfied, permit him to *close* a future investigation. However, when proceeding in this way, the focus of a preliminary examination shifts away from testing the truthfulness of the allegation itself, meaning whether a concrete allegation carries sufficient factual indications that a crime against international law has been committed.

6.2.2.2.2. Include Information into Existing Formal Investigations

Another consideration of the FPG during the preliminary examination stage is that he may use the evidence on which the allegations of a crime under international law was based as part of another ongoing formal investigation against concrete persons or a structural investigation.

First, if a formal investigation against a specific person already exists and a new allegation involving the same suspect is reported, then the FPG may simply *extend* the existing investigation to also include the newly reported crime, given sufficient factual indicia.

Second, recent developments at the FPG indicate that a lot of information and evidence received in relation to allegations is used for structural investigations. These are formally opened investigations against unknown persons.[36] The purpose of these investigations is not to assign individual criminal liability, but to collect information about *overarching organizational structures*[37] which would otherwise be missed if an inves-

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35 Cf. Michael Kurth, "Zum Verfolgungsermessen des Generalbundesanwaltes nach § 153f StPO", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2006, vol. 1, no. 2, pp. 81 and 83 (hereinafter 'Kurth – §153f FCCP').

36 Felix Graulich, *Die Zusammenarbeit von Generalbundesanwalt und Bundeskriminalamt bei dem Vorgehen gegen den internationalen Terrorismus*, Duncker & Humblot, 2013, p. 317 (hereinafter 'Graulich – Zusammenarbeit'); cf. Bundestag, Responses of the Federal Government, 7 November 2012, Bundestag Drucksache 17/11339, p. 3, response to question 7.

37 Matthias Jahn, in Michael Heghmanns and Uwe Scheffler (eds.), *Handbuch zum Strafverfahren*, C.H. Beck, 2008, chap. I, para. 82 (hereinafter 'Jahn – Handbuch Strafverfahren'); Graulich – Zusammenarbeit, pp. 316, 337 and 340; Jörg Ziercke, "Welche Eingriffsbefugnisse benötigt die Polizei?", in *Datenschutz und Datensicherheit*, 1998, vol. 22, no. 6, pp. 319 and 321 (hereinafter 'Ziercke – Eingriffsbefugnisse'); Wolfgang Sielaff, "Am selben Strang ziehen: Die Zusammenarbeit von Polizei und Staatsanwaltschaft bei der Bekämpfung der Organisierten Kriminalität", in *Kriminalistik*, 1989, vol. 43, no. 3, pp. 141 and 142.

tigation is solely concentrated on the person itself. A structural investigation enables law enforcement agencies to explore the complexities of a 'situation' independent of the procedural destiny of a single case which aims at assigning individual criminal responsibility.[38] Thus, the inclusion of the evidentiary material into the structural investigation thus also provides an alternative to closing a preliminary examination or opening a formal investigation under Section 153f(2), FCCP.

6.2.2.3. Conclusion

Due to the lack of codification on the federal level, Germany should clarify the purpose(s) of preliminary examinations into crimes under international law. Inferences suggest that the objective of a preliminary examination is to clarify whether sufficient factual indications exist for the commission of an international crime. Distant indicia[39] combined with reasonable criminalistic experience[40] are sufficient. Germany's Federal Constitutional Court held that the more important the legal value protected by the offence against international law, the smaller the probability is required to infer its violation.[41] However, no reasonable basis exists if an untenable conclusion has been drawn by the FPG or the discretion has been exercised with objective arbitrariness.[42]

At the same time, the legal uncertainty surrounding preliminary examinations in Germany combined with the FPG's discretion provided by Section 153f of the FCCP and the existence of structural investigations indicate that there is a need for quality control of the exercise of discretion by the FPG and for codification of preliminary examinations.

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38 Cf. Bundestag, Responses of the Federal Government, 7 November 2012, Bundestag Drucksache 17/11339, p. 3, response to question 7, see *supra* note 36.

39 Herbert Diemer, "Erhebungen des Generalbundesanwalts zur Klärung des Anfangsverdachtes im Rahmen von ARP-Vorgängen", in *Neue Zeitschrift für Strafrecht*, 2005, p. 666 (hereinafter 'Diemer – ARP Vorgänge').

40 Cf. Common Guideline, Section 6.2.; Edda Weßlau, in Wilhelm Degener *et al*. (eds.), *Systematischer Kommentar zur Strafprozeßordnung*, vol. III, 2012, Section 152, para. 12 (hereinafter 'Weßlau – Systematischer Kommentar').

41 Federal German Constitutional Court, judgement, 14 July 1999, 1 BvR 2226/94, 1 BvR 2420/95, 1 BvR 2437/95, BVerfGE 100, pp. 300, 392, at Section VI.

42 Diemer – ARP Vorgänge, p. 666.

6.3. Measures Available during Preliminary Examinations

6.3.1. Measures Infringing Human Rights

German law requires that any infringement of human rights by a State official such as the prosecutor requires a legal basis as justification.[43] This has consequences for preliminary examinations. Since these are generally not (yet) codified under German law and particularly not on the level of the FPG, the war crimes unit in Karlsruhe has no legal basis to apply measures that infringe human rights during preliminary examinations,[44] such as search and seizure, formal questioning, monitoring of telecommunications, arrest and so on. Such measures are available only *after* the formal opening of an investigation or at least when a well-founded suspicion exists which is comparable to or higher than required for the opening of an investigation.[45] To distinguish a preliminary examination which does not allow for such measures, the FPG logs it under the register letters 'ARP'.[46] By contrast, following the formal opening of an investigation the same case is registered under different register letters 'BJs',[47] which indicates that now human rights infringing measures may be considered, if law permits.

6.3.2. Overview of Means Available during Preliminary Examination

Nevertheless, at least three distinct measures remain available during preliminary examinations, namely analysis of open source data, informal

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43 Cf. Hans Hilger, "Vor(feld)ermittlungen – Datenübermittlungen", in Jürgen Wolter, Wolf-Rüdiger Schenke, Peter Rieß and Mark A. Zöller (eds.), *Datenübermittlungen und Vorermittlungen: Festgabe für Hans Hilger*, C.F. Müller, Heidelberg, 2003, pp. 11 and 13 (hereinafter 'Hilger, Vor(feld)ermittlungen'); Daniel Krause, "Allgemeine Rechtsfragen von Vorprüfungen und AR-Verfahren", in Christian Harmsen and Oliver Jan Jüngst (eds.), *Festschrift für Wolfgang von Meibom*, Carl Heymanns Verlag, 2010, pp. 351 and 359 with further references in fn. 32 (hereinafter 'Krause – Vorprüfungen'); differentiating Jahn - *Handbuch Strafverfahren*, chap. I, paras. 77–79; Matthias Jahn, "Der Verdachtsbegriff im präventiv orientierten Strafprozeß", in Institut für Kriminalwissenschaften und Rechtsphilosophie Frankfurt am Main, *Jenseits des rechtsstaatlichen Strafrechts*, Peter Lang, 2007, pp. 545 and 556.

44 Diemer – ARP Vorgänge, p. 666; Graulich – Zusammenarbeit, p. 313; cf. Claus Roxin and Bernd Schünemann, *Strafverfahrensrecht*, C.H. Beck, 29th edition, Section 39, para. 17.

45 Cf. FCCP, Sections 102, 103, 94, 136, 48, 52–55, 69, 100(a)–100(f) and 112.

46 Graulich – Zusammenarbeit, p. 326; cf. Krause – Vorprüfungen, pp. 351 and 353; Diemer – ARP Vorgänge, p. 666, Section II.

47 *Ibid*., Section III.

questioning of persons, and to request existing data from other State authorities.

6.3.2.1. Open Source Analysis/Monitoring

Since open source data is available to everyone and its publication occurs usually voluntarily, the FPG can also use such information during the course of a preliminary examination if it sheds further light on the allegation under question. For example, since 2007, the FPG has analysed the current press and media coverage and created situation analysis to generate a picture of global conflicts.[48]

Part of open source analysis may include the FPG collecting reports from the United Nations and its subcommittees, or from States and non-governmental organizations ('NGOs'), for example, reports about human rights violations. The decisions by the FPG in *Klein and Wilhelm* (Kunduz/Afghanistan) and on *Bünyamin E.* (drone strike in Pakistan), to be examined in Section 6.4. below, show that the FPG used open source material during the preliminary examinations. In the latter case, the FPG asked NGOs to provide advisory opinions on the question whether an armed conflict existed in a part of Pakistan.[49]

6.3.2.2. Informal/Informative Questioning

To verify the veracity of specific allegations made in a criminal complaint about international crimes and/or potential perpetrators, the FPG may choose to have a police officer conduct informal or informative questioning. However, caution is necessary because conducting such informal questioning may easily occur within a 'grey zone'. At the beginning, since no formal investigation has been opened, the police officer engaging in informative questions has a broad, but otherwise not clearly identified task. The objective of informal questions is to clarify whether there are sufficient factual indicia for an allegation. Questioning may start informally without further advising of the person questioned about his right to remain silent.[50] However, depending on the responses received during the questioning, it may transpire that the person informally questioned is either a possible perpetrator or linked to the alleged perpetrator. Thus, the

48 Beck – Völkerstrafgesetzbuch, pp. 161–62; Ritscher – Ermittlungstätigkeit GBA, p. 226.

49 Cf. *infra* Section 6.4.2.1.

50 Cf. Krause – Vorprüfungen, pp. 351, 357–358 and 360.

need arises to inform the person about the right not to incriminate himself or about a privilege he or she may invoke.[51] If the police officer finally summarizes the results of such informal questioning, the legal question arises whether the information thus obtained can be used in subsequent criminal proceedings and whether the accused may be convicted on the basis of such information. Generally, evidence obtained without formal cautioning of the person concerned may be admissible only when the questioned persons, having been formally advised of his right to remain silent and informed about the allegation repeats the information initially obtained during informal questioning.[52] If the person chooses not to repeat the information initially provided then a judgment convicting the accused should not be based on this information alone.

6.3.2.3. Request Available Data from Other State Authorities

As the FPG is limited during the preliminary examination to produce information and evidence which would *not* infringe human rights, he may rely on existing[53] information and data in other State administrations of Germany to check whether the alleged crime can be further substantiated, justified or dismissed. To do so, the FPG must rely on data exchange.

6.3.2.3.1. Data Transfer Laws

Several laws provide a legal basis for the transfer of data to the FPG during a preliminary examination. For example, Section 474(1) of the FCCP provides that "public prosecution offices […] shall be able to inspect the files if this is necessary for the purposes of administration of justice". Such inspection includes that the FPG inspects during the preliminary examination files of other prosecutor offices if this advances the case.[54]

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51 For example, the spouse or doctor-patient privilege.

52 German Federal Criminal Court, judgment, 17 September 1982, 2 StR 139/82, in *Neue Zeitschrift für Strafrecht*, 1983, p. 86.

53 Hilger criticises this because data existing elsewhere is used for a *different* purpose though factual indications for the commission of a crime do *not yet* exist (Hilger - Vor(feld)ermittlungen, p. 14); cf. also Edda Weßlau, "Vor(feld)ermittlung, Datentransfer und Beweisrecht", in Jürgen Wolter, Wolf-Rüdiger Schenke and Mark A. Zöller (ed.), *Datenübermittlungen und Vorfeldermittlungen: Festgabe für Hans Hilger*, C.F. Müller, Heidelberg, 2003, pp. 57–58.

54 For example, in relating to the allegations launched against Jiang Zemin *et al*. the FPG requested the dossiers from his colleagues in Heidelberg which had interviewed some of the complainants as witnesses (cf. *infra* Section 6.4.1.1.). In the formal investigation

Similarly, Sections 10(2) and 11(4) of the Federal Police Agency Law[55] provide for transfer of personal data, information on red line notices, data about prison sentences and DNA information to the FPG. Section 19(1), nos. 2 and 4 as well as Section 20(1) of the Law on Federal Intelligence Agency Protecting the Constitution[56] provide for data transfer, as does Section 24(3) of the Federal Intelligence Service Law.[57] Also, Section 15(1)(4) of the Foreigner Central Register Law[58] and Section 8(3) of the Asylum Procedure Act[59] provide for data exchange with the FPG.[60]

6.3.2.3.2. Questionnaire for Refugees from Syria

Particularly, Section 8(3) of the German Asylum Procedure Act facilitates sharing of information with the FPG. For example, when several hundred thousand refugees registered themselves as asylum seekers in Germany in 2015, it was understood that among them, there were many victims of humanitarian atrocities, but also some perpetrators. Hence, the German Federal Agency for Migration and Refugees ('FAMR') developed a questionnaire for refugees which could be filled out independently from the asylum procedure.[61] Participation in this questionnaire was voluntary. Refugees were asked whether they had witnessed crimes in Syria and Iraq before leaving towards Germany. Only if a refugee provides relevant information FAMR transfers the information to the FPG.[62]

against unknown persons in Pakistan, the FPG requested the dossier on Emrah E., the brother of the victim (cf. *infra* Section 6.4.2.1.).

55 In German: Bundeskriminalamtsgesetz.

56 In German: Verfassungsschutzgesetz.

57 In German: Bundesnachrichtendienstgesetz.

58 In German: Auslandszentralregistergesetz.

59 In German: Asylverfahrensgesetz.

60 Cf. Bundestag, Responses of the Federal Government, 7 November 2012, Bundestag Drucksache 17/11339, p. 5, response to question 17, see *supra* note 36, referring to Section 8(3) Asylum Procedure Act and 'close cooperation' between the Federal Agency for Migration and Refugees and law enforcement authorities who investigate individual cases.

61 Cf. Human Rights Watch, "Q&A: First Cracks to Impunity in Syria, Iraq", 20 October 2016, Section 10 (available on HRW web site).

62 Cf. Bundestag, Bundestagsdrucksache, 8 April 2016, Bundestag Drucksache 18/8052, pp. 23, 24, response to question 34.

6.3.2.3.3. Data Transfer and Structural Investigations

Such data is monitored, analysed and, if deemed relevant, entered into the pool of information relating to the structural investigations conducted in Germany. For example, by 31 December 2015, the FAMR had submitted 366 questionnaires relating to the so-called Islamic State in Syria ('ISIS') to the Central Agency to Fight War Crimes, a department of the Federal German Police working with the FPG.[63] Until that date, 1,735 questionnaires were sent about Syria to the FPG. By April 2017, 4,000 questionnaires had already been communicated to the FPG.[64]

These figures indicate the importance of data transfer to these structural investigations. The following preliminary picture emerges: until 2009 the FPG's war crimes unit conducted one structural investigation involving allegations of crimes against humanity and war crimes.[65] In 2009, a second structural investigation involving again crimes against humanity and war crimes was opened by the FPG *ex officio*.[66] In 2011 alone, three additional structural investigations were opened followed by one structural investigation each in 2014 and 2015.[67] While it is unclear in which succession 11 structural investigations were opened,[68] what is certain is that Eastern Congo/Rwanda, the Arab Spring, ISIS and Syria (excluding ISIS-controlled territory) have become the objects of these structural investigations.[69]

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63 Bundestag, Bundestagsdrucksache, 8 April 2016, Bundestag Drucksache 18/8052, p. 23, response to question 33, see *ibid*.

64 *Ibid*., p. 23, response to question 34.

65 Bundestag, Bundestagsdrucksache, Response of a State Secretary in the German Federal Ministry of Justice to questions posed by a Parliamentarian from the Green Party, 17 July 2015, Bundestag Drucksache 18/5596, p. 38, response to question 50.

66 *Ibid*.; Bundestag, Response of a State Secretary in the German Federal Ministry of Justice to questions posed by Parliamentarians from the Green Party, 2 September 2016, Bundestag Drucksache 18/9512, p. 11, response to question 14.

67 *Ibid*., pp. 11–12; Bundestag, Bundestagsdrucksache, Response of a State Secretary in the German Federal Ministry of Justice to questions posed by a Parliamentarian from the Green Party, 17 July 2015, Bundestag Drucksache 18/5596, pp. 39–40, response to question 50, see *supra* note 65.

68 Cf. Bundestag, Bundestagsdrucksache, 8 April 2016, Bundestag Drucksache 18/8052, p. 23, response to question 33, see *supra* note 62.

69 Cf. *ibid*., pp. 23–24, response to questions 33 and 34.

6.4. Preliminary Examination in Practice

This section examines the fate of certain preliminary examinations which the FPG's office conducted and about which further information and data is publicly available. All preliminary examinations have been clustered into two scenarios: sub-section 1 introduces those cases which *ended* at the preliminary examination stage without opening of an investigation.[70] Sub-section 2 discusses other cases where the preliminary examination *led to* the formal opening of an investigation which was subsequently closed without laying charges.[71] In Sub-section 3, some common arguments used by the FPG in his decisions not to proceed further with the preliminary examination or investigations are analysed.

6.4.1. Preliminary Examinations without Further Investigations

In each of the four cases introduced here, the FPG decided to stop the preliminary examination without formally opening an investigation. The first related to citizens of the People's Republic of China for alleged mistreatment of members of the Falun Gong. The second pertained to the Chechen Vice President for alleged war crimes in Chechnya. The third was concerned with allegations against the former Uzbek Minister of Interior regarding suspected torture in prisons in Uzbekistan and his and Mr. Inoyatov's possible involvement in a massacre carried out in Andijan with others. The last one related to allegations of mistreatment and torture conducted by American forces in the Abu Ghraib prison in Iraq

6.4.1.1. JIANG Zemin *et al.* (People's Republic of China)

On 21 November 2003, an advocate representing 40 persons from various States, including 31 German citizens and one association, the German Falun Dafa, launched a criminal complaint against the former President JIANG Zemin and 15 other governmental or otherwise senior politicians of the People's Republic of China.[72] The acts were alleged to have oc-

[70] *Infra* Section 6.4.1., the cases relating to Jiang Zemin *et al.* (Peoples Republic of China), Ramzan Kadyrow (Chechen Republic within the Russian Federation), Zakirjan Almatov and Rustam Raulovich Inoyatov *et al*. (Republic of Uzbekistan), as well as Donald Rumsfeld *et al.* (US, allegations involving Abu Ghraib in the Republic of Iraq*).*

[71] *Infra* Section 6.4.2., the cases against unknown (drone strike against German citizen Bünyamin E. in Pakistan) and Colonel Klein *et al.* (aerial attack near Kunduz, Afghanistan).

[72] Cf. FPG, Decision not to open an investigation, 24 June 2005, 3ARP 654/03-2, p. 1 (hereinafter 'FPG - Falun Gong Decision').

curred in China, involving torture, inhumane treatment in work camps and killings which, the complainants alleged, amounted to genocide and crimes against humanity against members of the Falun Gong.[73] These allegations related to a time span before and after the CCAIL entered into force on 1 July 2002.

The FPG conducted a preliminary examination (3 ARP 654/03-2). The FPG requested from the Heidelberg Prosecutor's office the dossier of an investigation which contained, among others, witness statements of five of the persons who had launched the criminal complaint on 21 November 2003.[74] After 19 months, on 24 June 2005, the FPG closed the preliminary examination without formally opening an investigation.

As far as the complaint related to the former President JIANG Zemin, the FPG argued:

> Immunity of the former President of the People's Republic of China, Jiang Zemin, already bars him from criminal prosecution… Neither former Section 220a [FCC], in force until 30 June 2002, nor its succeeding rules in the [CCAIL] contain rules on immunities, unlike [Article 27 of the ICC Statute]. Therefore Sections 18 – 20 [CCA] apply when determining the question whether immunity bars criminal prosecution by German authorities […]. Section 20 (2) [CCA] restricts German jurisdiction if persons enjoy immunity under international law. A well-recognized rule in international law grants immunity from criminal prosecution by other states to present and former heads of government and heads of state when acting during their term in office (Doehring, Voelkerrecht, 1999, § 12 marginal number 672).[75] The International Court of Justice explicitly confirmed this state practice in its judgment of 14 February 2002 in the case Democratic Republic of Congo v Belgium for present and former foreign ministers, reasoning that the function of such offices warrants this, which must not be curtailed by criminal prosecution by other states (judgment No. 51-61, […] www.icj-

[73] Wolfgang Kaleck, "German International Criminal Law in Practice: From Leipzig to Karlsruhe", in Wolfgang Kaleck, Michael Ratner, Tobias Singelnstein and Peter Weiss (eds.), *International Prosecution of Human Rights Crimes*, Springer, 2007, pp. 93, 107 (hereinafter 'Kaleck – German International Criminal Law').

[74] FPG - Falun Gong Decision, Section II(1), pp. 2–3.

[75] That is, Karl Döhring, *Völkerrecht: Ein Lehrbuch*, C.F. Müller, 1999, Section 12, marginal number 672.

> cji.org; see Maierhofer, EuGRZ 2003, 553; Weiss, JZ 2002, 698).[76] The reasoning of the International Court of Justice also applies to heads of government and heads of state, as they fulfill similar functions. The ruling of the International Court of Justice also grants such immunity if these officials are prosecuted for international crimes (judgment No. 56-60)[77] and already bars initiation of any investigatory acts (judgment No. 54).[78] Therefore, Section 20 (2) [CCA] bars German prosecutorial agencies from prosecuting former head of state Jiang Zemin.[79]

In so far as the complaint related to persons *other* than JIANG Zemin, the FPG distinguished whether the allegations related to the time periods before or after the entry into force of the CCAIL on 1 July 2002. Regarding the former, the FPG argued that the allegations made would neither satisfy the elements of genocide pursuant to Section 220a of the FCC in force until 30 June 2002 nor causing grievous bodily harm pursuant to Section 226 of the FCC.[80] Having reviewed the statements of five complainants taken by prosecutors from Heidelberg, the FPG concluded that further investigative leads could not be expected.[81]

Regarding alleged crimes committed after 1 July 2002, the FPG emphasized that the crime scenes were outside Germany, that investigations would therefore exclusively need to be conducted in China, and that none of the alleged perpetrators would be German nationals nor would they stay or are expected to stay in Germany in the foreseeable future.[82]

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[76] That is, International Court of Justice ('ICJ'), *Democratic Republic of Congo v. Kingdom of Belgium*, judgment, 14 February 2002, General List no. 121, paras. 51–61 (hereinafter 'ICJ – Yerodia judgment'); see Christian Maierhöfer, "Das Völkerstrafrecht vor den Haager Richtern: Besprechung des Urteils des IGH vom 14.2.2002, Demokratische Republik Kongo gegen Belgien", in *Europäische Grundrechte Zeitung*, 2003, p. 553; Wolfgang Weiss, "Völkerstrafrecht zwischen Weltprinzip und Immunität", in *JuristenZeitung*, 2002, vol. 57, no. 14, pp. 696, 698. The square brackets are supplied by Amnesty International.

[77] That is, ICJ – Yerodia judgment, paras. 56–60.

[78] That is, *ibid*., para. 54.

[79] FPG, Decision not to open an investigation, 24 June 2005, 3ARP 654/03-2, pp. 1–2, in Amnesty International (trans.), *End impunity through universal jurisdiction (No safe haven series 3)*, 2008, p. 72. Footnotes supplied (not in the translation).

[80] FPG - Falun Gong Decision, Section II(1), pp. 2–3.

[81] *Ibid*., p. 3.

[82] *Ibid*., pp. 3–4.

Regarding the last point, the FPG[83] referred to the jurisprudence of the German Federal Criminal Court which requires a *legitimate link* to Germany in each individual case.[84] The stay of possible victims or of the complainant in Germany would not suffice.[85] Otherwise, a boundless and under international law questionable expansion of prosecutions by German authorities would extend to those cases, where there was hardly any prospect to investigate and adjudicate the act in a domestic German criminal procedure from the start.[86] The FPG argued that criminal prosecution absent a *legitimate link* to Germany would infringe the principle of non-intervention which follows from international law's imperative to observe the sovereignty of other States.[87]

6.4.1.2. Ramzan Kadyrow (Chechen Republic within the Russian Federation)

Between 11 and 15 April 2005, Hannover's annual technology fair opened, with Russia as its partner country.[88] Before the event, informed circles learned that Putin intended to be accompanied during his visit to the fair by, among others, Ramzan Kadyrow, the then Vice President of Chechen Republic.[89] On 8 April 2005, the Secretary General of the Gesellschaft für bedrohte Völker e.V. (the Society for threatened people) filed at the FPG's office a criminal complaint against Ramzan Kadyrow, who was expected to soon enter Germany to travel to Hannover's fair.[90] The allegations related to war crimes pursuant to Section 8 of the CCAIL[91] and included multiple abductions, illegal detentions and/or disappearances of persons in

83 *Ibid*., pp. 4–5.

84 German Federal Criminal Court, judgment, 30 April 1999, 3 StR 215/98, BGHSt 45, 64, p. 66.

85 German Federal Criminal Court, in *Neue Zeitschrift für Strafrecht*, 1999, p. 236; StV 1999, p. 240.

86 *Ibid*. Cf. Claus Kreß, Völkerstrafrecht in Deutschland, in *Neue Zeitschrift für Strafrecht*, 2000, p. 617, at pp. 624–25.

87 FPG - Falun Gong Decision, Section II(3), pp. 4–5.

88 Cf. press release BOXID 33184, 6 April 2005.

89 Uwe Halbach, *Der Kaukasus in neuem Licht: Die EU und Rußland in ihrer schwierigsten Nachbarschaftsregion*, Stiftung Wissenschaft und Politik Studie, November 2005, p. 33.

90 Gesellschaft für bedrohte Völker, criminal complaint, 8 April 2005 (hereinafter 'Criminal complaint against Kadyrow').

91 *Ibid*.

Chechnya in from June 2004 to December 2004.[92] The complainant demanded the opening of an investigation against Kadyrow.[93]

After the Federal Government of Germany insisted to Moscow that Ramzan Kadyrow not travel to Hannover,[94] the speaker of the German government clarified that he would *not* be part of the official Russian delegation.[95] Eventually, on 11 April 2005, President Putin visited the fair together with then chancellor Schröder.[96]

On 28 April 2005, the FPG decided not to open a formal investigation against Ramzan Kadyrow.[97] The AU-EU Expert Report and one scholar claim that the FPG based the decision not to open an investigation on immunity considerations.[98]

6.4.1.3. Almatov, Inoyatov *et al.* (Uzbekistan)

On 13 May 2005, allegations that a massacre occurred in Andijan, Uzbekistan were made. On 23 May 2005, the Council of the European Union "strongly condemn[ed] the reported excessive, disproportionate and indiscriminate use of force by the Uzbek security forces, and call[ed] upon the Uzbek authorities to act with restraint in order to avoid further loss of life".[99] The Council further issued statements on Uzbekistan on 13 June 2005 and 18 July 2005 condemning the disproportionate and excessive use of force by the security forces of Uzbekistan against civilians during the unrest in Andijan.[100] On 3 October 2005, the Council "decided to im-

92 Cf. *ibid*.

93 *Ibid.*

94 Cf. Friedbert Meurer, "Mehr Druck in der Tschetschenien Frage", in *Die Zeit*, 11 April 2005.

95 Cf. *ibid*. and "Strafanzeige gegen tschetschenischen Vize-Regierungschef", in *Der Standard*, 11 April 2005.

96 "Putin, Schroeder tour Russian displays at at Hanover exhibition", in *Sputniknews*, 11 April 2005.

97 The decision is neither published, nor does the website of the FPG contain any press release to Kadyrow (cf. web site of the FPG; Kaleck – German International Criminal Law, p. 107; and Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, 16 April 2009, 8672/1/09 REV 1, para. 24, fn. 121).

98 *Ibid*.

99 Council of the European Union, "UZBEKISTAN - Council conclusions", in *Press Release: 2660th Council meeting*, 23–24 May 2005, C/05/112, p. 11, para. 2.

100 Cf. Council of the European Union, Common Position 2005/792/CFSP of 14 November 2005 concerning restrictive measures against Uzbekistan, *Official Journal of the European Union*, 16 November 2005, L 299, pp. 72–79, paras. 2 and 3.

plement restrictions on admission to the European Union aimed at those individuals directly responsible for the indiscriminate and disproportionate use of force in Andijan".[101] This decision did not specifically name which specific persons from Uzbekistan were subject to restrictions to travel to and within the European Union.

On 14 October 2005, the German Embassy in Moscow issued a visa for Zakirjan Almatov, the then Minister of Interior of Uzbekistan for the purpose that he receive medical treatment in Germany.[102] The visa for Almatov was issued from 6 November 2005 until 12 January 2006.[103]

Sometime in November 2005, Zakirjan Almatov, the former Minister of Interior of Uzbekistan, visited a hospital in Hannover where he received medical treatment. On 14 November 2005, the Council of the European Union issued a common position concerning restrictive measures against Uzbekistan which contained the following passage:

> (6) The Council has also decided to implement restrictions on admission to the European Union aimed at those individuals who are directly responsible for the indiscriminate and disproportionate use of force in Andijan and for the obstruction of an independent inquiry. […]
>
> Article 3
>
> 1. Member States shall take the necessary measures to prevent the entry into, or transit through, their territories of those individuals, listed in Annex II, directly responsible for the indiscriminate and disproportionate use of force in Andijan and the obstruction of an independent inquiry. […][104]

The first person listed in Annex II was Zakirjan Almatov in his capacity as Minister of Interior of Uzbekistan. The last person listed was Rustam Raulovich Inoyatov, who was Chief of the National Security Service of Uzbekistan.

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[101] Council of the European Union, General Affairs and External Relations, "UZBEKISTAN - Council conclusions", in *Press Release: 2679th Council meeting*, 3 October 2005, C/05/242, p. 9, para. 5.

[102] Response of the German government to questions posed by the Liberal Party, Bundestag, 8 June 2006, Bundestag Drucksache 16/1781, p. 2, response to question 1. Cf. also Response of the German government to questions posed by Parliamentarians, Bundestag, 19 December 2008, Bundestag Drucksache 16/11479, p. 1.

[103] *Ibid.*

[104] Council of the European Union, Common Position 2005/792/CFSP of 14 November 2005 concerning restrictive measures against Uzbekistan, see *supra* note 100.

Almatov left Germany sometime in mid-November 2005.[105]

On 5 December 2005, Amnesty International sent to the FPG a fax containing a criminal complaint against Almatov regarding alleged crimes against humanity and requested the arrest of Almatov. On 12 December 2005, a German advocate acting on behalf of Human Rights Watch and eight Uzbek citizens sent to the FPG another fax containing allegations against Almatov, Inoyatov and ten Uzbek citizens regarding allegations of crimes against humanity. A day later, Amnesty International furnished further documents outlining the human rights situation to the FPG. The allegations related to, first, the killings of hundreds of demonstrators in Andijan in mid-May 2005 and separately, allegations of systematic torture in detention centres of Uzbekistan for which Almatov was allegedly responsible.

The FPG conducted a preliminary examination (3 ARP 116/05-2) and closed the preliminary examination after three and a half months on 23 March 2006.[106] He concluded that the crime scenes are located outside Germany, that the crimes neither involve German perpetrators nor German victims and that the requested investigation has no significant prospect of elucidation because requests for assistance to the government of Uzbekistan would be hopeless.[107] Further, the FPG argued that the relevant circumstances were extensively documented by NGOs and the United Nations.[108]

On 23 January 2007, the advocate who had filed the second criminal complaint against Almatov, Inoyatov and others seized the Higher Regional Court in Stuttgart with proceedings to compel public charges pursuant to Section 172(2) of the CCA. He argued that the FPG had exercised his discretion provided for in Section 153f of the FCCP in a wrongful and arbitrary way and that this decision would be subject to judicial review.[109] On 6 March 2007, the FPG requested to dismiss this request arguing that the exercise of discretion under Section 153f of the FCCP would not be contestable by way of proceedings to compel public charg-

[105] FPG, *Amnesty International and Human Rights Watch v. Almatov et al.*, decision, 23 March 2006, 3 ARP 116/05-2, Section A, before sub-section 1 (hereinafter 'FPG – Uzbekistan decision').

[106] *Ibid*., Sections B(1) and B(2).

[107] *Ibid.*, Sections B(2)(a) and B(2)(b).

[108] *Ibid.*, last para. before Section B(3).

[109] Cf. Higher Regional Court Stuttgart – Almatov Decision, Section I, para. 6.

es.[110] Further, the FPG claimed to have noticed the existence of discretion and exercised it pursuant to Section 153f of the FCCP correctly. An entry into Germany of the concerned persons from the Uzbek leadership would not be expected, particularly because of the press coverage the criminal complaint had received in late 2005.[111] The FPG argued against the applicants' proposition that German authorities had in late 2005 organizationally neglected to notify the FPG of Almatov's entry for medical reasons into the country. The FPG clarified that the principle of legality or that of mandatory prosecutions pursuant to Section 152(2) of the FCCP would only be applicable to the prosecutor's offices, but not to consular or diplomatic representations of Germany which had issued the visa for Almatov.[112]

On 27 March 2008, the Higher Regional Court in Stuttgart did not permit opening proceedings to compel public charges against a decision of the FPG pursuant to Section 153f of the FCCP.[113] This inadmissibility followed a conscious decision of the legislature.[114] The Court pointed out that *at the time* of the FPG's decision, none of the persons named in the criminal complaint had been in Germany. Section 153f(1) of the FCCP would explicitly mention a present stay or a stay which is currently to be expected.[115] A past stay would not suffice.[116] Whether reference points for the expectation of a stay exist is part of the assessment leeway of the FPG.[117] In any case, reference points for such an expected stay must be real and concrete.[118] Finally, the Court clarified that the discretion of the FPG would not be fully judicially reviewable because according to legislative intent, the FPG should remain the sole dominant actor, even beyond the formal opening of court proceedings.[119] *A fortiori* the FPG would assume this position in the arena of preliminary examinations.[120] The Court

110 FPG, submission, 6 March 2007, 3 ARP 116/05-2, Section B, sub-section 3(c) in particular.

111 *Ibid*., Section B(2).

112 *Ibid*.

113 Higher Regional Court Stuttgart – Almatov Decision, Section II, para. 2.

114 *Ibid*.

115 *Ibid*., particularly in sub-section II, para. 2(b)(bb).

116 *Ibid.*

117 *Ibid*., particularly in sub-section II, para. 2(b)(cc).

118 *Ibid*.

119 *Ibid.*, sub-section II, para. 2(c).

120 *Ibid.*

therefore concluded that the discretionary decision of the FPG would be only subject to a limited judicial review. Such review would be limited to establishing whether the FPG noticed his discretion and whether he exercised it in an arbitrary way.[121] The court concluded that FPG had noticed his discretion and had not exercised it arbitrarily and, thus, upheld the FPG decision not to formally open an investigation.[122]

The European Union extended the travel restrictions for persons alleged to be involved into the Andijan events, including Almatov and Inoyatov, until 13 October 2008.[123] On that day, the travel restrictions for certain persons from Uzbekistan expired without the Council deciding to renew them.[124] On 27 October 2008, the advocate who had filed the first complaint regarding Almatov, Inoyatov and others informed the FPG that Inoyatov would stay in Germany.[125] Indeed, on 30 October 2008, the German press reported that Rustam Inojatovic was in Germany following an invitation of the German Chancellery.[126] The FPG dismissed the complaint against Inojatov.[127]

6.4.1.4. Donald Henry Rumsfeld *et al.* (Abu Ghraib Prison in Iraq)

On 29 November 2004, the Center for Constitutional Rights in the United States ('US') and four Iraqi citizens launched a criminal complaint against Donald Henry Rumsfeld, the then Secretary of Defence of the United States of America ('US') and against other senior persons in the civilian and military hierarchy of the US. The criminal complaint focused on the

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121 *Ibid.*

122 *Ibid.*

123 Cf. Council of the European Union, Common Position 2007/734/CFSP of 13 November 2007 concerning restrictive measures against Uzbekistan; Official Journal of the European Union, 14 November 2007, L 295, pp. 7–34, Article 3, no. 1 and annex II.

124 Cf. Council of the European Union, General Affairs and External Relations, "UZBEKISTAN - Council conclusions", in *Press Release: 2897th Council meeting*, 13 October 2008, C/08/288, p. 10, para. 4; Council of the European Union, Common Position 2008/843/CFSP of 10 November 2008 amending and extending Common Position 2007/734/CFSP concerning restrictive measures against Uzbekistan, 10 November 2008, Article 2.

125 Response of the German government to questions posed by Parliamentarians, Bundestag, Bundestag Drucksache 16/11479, 19 December 2008, p. 2, response to question 4.

126 Cf. Günter Lachmann, "Usbekischer Stasi-Chef heimlich in Deutschland", in *Die Welt*, 30 October 2008.

127 Wolfgang Kaleck, "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998 – 2008", in *Michigan Journal of International Law*, 2009, vol. 30, no. 3, p. 927, at p. 952.

period between 15 September 2003 and 8 January 2004 and related to 44 acts committed in the Abu Ghraib prison in Iraq, which was at the time under the occupation authority of the US. Further, four Iraqi complainants raised allegations of mistreatment at other locations in Iraq. Overall, the criminal complaint referring to command responsibility of civilian and military superiors advanced allegations of war crimes according to Sections 8, 13 and 14 of the CCAIL, qualifying bodily harm pursuant to Sections 223 and 224 of the FCC and acts of torture under the UN Convention against Torture.[128]

The FPG conducted a preliminary examination (3 ARP 207/04-2). In January 2005, while the preliminary examination was still pending, the US administration announced that Rumsfeld would not attend the annual Munich Security Conference for security reasons.[129] On 10 February 2005, the FPG closed the preliminary examination after two and a half months, without having formally opened an investigation.[130] The FPG argued he had neither to prove whether the allegations advanced by the complainant satisfied the requirement of factual indications necessary for the opening of an investigation, nor whether immunity considerations would be a stumbling block.[131] Rather, in weighing up the various considerations as required by Section 153f of the FCCP, it was determined that, under the principle of subsidiarity, German law enforcement authorities should not be activated. The objective of the CCAIL is to close impunity and prosecution gaps. Closing such gaps would occur in the context of the principle of non-intervention into the internal affairs of States.[132] The FPG argued that the US, as another 'country' pursuant to Section 152f(2)(4) of the FCCP, would be generally conducting investigations into the allegations raised:

[128] United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (adopted), 26 June 1987 (entry into force) (http://www.legal-tools.org/doc/326294/).

[129] For proceedings against Donald Rumsfeld, see "Part C: Cases", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, p. 889.

[130] FPG, *Center for Constitutional Rights et al. v. Donald Rumsfeld et al.*, Decision, 10 February 2005, 3-ARP 207/04-2 (hereinafter 'FPG – First decision *Rumsfeld et al*.'), in German in *JuristenZeitung*, 2005, vol. 60, no. 6, pp. 311 ff. and in English in *International Legal Materials*, 2006, vol. 45, no. 1, p. 119.

[131] *Ibid.*, Section B.

[132] *Ibid.*

> In what order and with what means the state of primary jurisdiction carries out an investigation of the overall series of events must be left to this state according to the principle of subsidiarity. (…) In the case at hand there are no indications that the authorities and courts of the US are refraining, or would refrain, from penal measures as regards the violations described in the complaint.[133]

Two days after the FPG had issued this decision, Donald Rumsfeld delivered a speech at the security conference in Munich.[134]

The government of Germany clarified that the German Federal Ministry of Justice had neither issued any instruction[135] to the FPG on how to deal with this case, "nor was any other influence exerted on him by the Federal government to persuade him not to launch investigations into the occurrences in Abu Ghraib".[136]

On 14 July 2005, the Center for Constitutional Rights contested the FPG's decision of 10 February 2005 to close the preliminary examination against Rumsfeld *et al.* by requesting the Higher Regional Court to compel public charges. On 13 September 2005, the Higher Regional Court in Stuttgart decided not to permit proceedings to compel public charges.[137]

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133 FPG – First decision *Rumsfeld et al*., p. 121 (English), see *supra* note 130.

134 Máximo Langer, "The diplomacy of universal jurisdiction: the political branches and the transnational prosecution of international crimes", in *American Journal of International Law*, 2011, vol. 105, no. 1, pp. 1 and 14; Elaine Sciolini, "'New' Rumsfeld Is Seeking Stronger Ties With Europe", in *New York Times*, 13 February 2005.

135 Supervision by the Federal Ministry of Justice regarding the FPG permits the Ministry to issue general as well as specific instructions on issues of law and fact. Limits of instructions are that they can only be issued if the law provides discretion to the FPG and if such instructions are not guided by illegal or arbitrary considerations (cf. Lutz Meyer-Goßner and Bertram Schmidt, *Strafprozeßordnung*, 60th edition, 2017, Section 146, para. 5). An instruction of the FPG against the law incurs criminality of the instructor (cf. FCC, Sections 258a, 344, 345). In general, the Ministry of Justice issues instructions to the FPG extremely restrictive (cf. Preliminary Remark of the German government, Response of the German government to questions posed by Parliamentarians, Bundestag, Bundestag Drucksache 18/1318, 5 May 2014, p. 3).

136 Federal Government of Germany, Response on 22 August 2006 to the letter of the UN Human Rights Council's Special Rapporteur on the independence of judges and lawyers on 13 July 2006, cf. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy: Addendum: Situations in specific situations and countries, A/HRC/4/25/Add.1, 5 April 2007, para. 156 (hereinafter 'Addendum of Special Rapporteur').

137 Higher Regional Court Stuttgart – Rumsfeld decision, p. 117 (German), p. 122 (English), see *supra* note 19.

Regarding the criminal complaints against four persons who worked in army barracks of the United States located in Germany, the court ruled that they would be subject to the unrestricted and unimpeded access of the United States Forces. Though stationed in Germany, they would be subject to US command and US jurisdiction as their counterparts in the US. Therefore, there would be no need for a complementary jurisdiction of Germany under the principle of universal jurisdiction.[138] As the impunity gap which the principle of universal jurisdiction seeks to avoid would not exist, there would be no need for a supplementary jurisdiction in Germany.[139]

On 14 November 2006, the Center for Constitutional Rights – this time supported by 32 non-governmental organizations, 11 Iraqi citizens and one Saudi Arabian citizen – filed to the FPG *another* criminal complaint against Donald Rumsfeld and at least 13 named US citizens regarding allegations of war crimes and torture committed in 2003 and 2004 in the detentions facilities Abu Ghraib and, since 2002, in the Guantánamo Bay Naval Station in Cuba.[140] The additional criminal complaint was launched because results of investigations in the US would mean that merely members of the *lower* ranks within the US military had so far been held criminally accountable, but not those senior US citizens implicated in this complaint, which related to war crimes according to Sections 8, 13 and 14 of the CCAIL, other offences under the FCC[141] as well as acts of torture and bodily harm under the UN Convention against Torture.[142] The complainant argued that, regarding the events in Abu Ghraib and Guantánamo Bay, no criminal prosecutions against the senior leaders subject to this complaint would take place which would indicate the unwillingness of the US authorities to bring the perpetrators to justice.[143]

The FPG conducted a preliminary examination (3 ARP 156/06-2). On 5 April 2007, the UN Human Rights Council's Special Rapporteur on the independence of judges and lawyers noted with concern that the alleged perpetrators in Abu Ghraib "have still not been prosecuted in the US,

138 *Ibid.*, p. 118, para. 14.

139 *Ibid*.

140 Criminal Complaint, 14 November 2006, 1505/2006 WKA (http://www.legal-tools.org/doc/75572b/) (hereinafter 'Second criminal complaint against Rumsfeld *et al.*').

141 Namely qualifying bodily harm pursuant to FCC, Sections 223 and 224.

142 Second criminal complaint against Rumsfeld *et al*., Sections 2.3.–2.6.

143 *Ibid*., Section 2.6., in particular pp. 56 and 44.

and that on the contrary new legislation has been adopted in that country which practically impedes the prosecution of public officials suspected of being responsible for those acts. In light of this development [the Special Rapporteur] notes that a new complaint has been submitted to the German prosecutor […]. In this context the Special Rapporteur hopes that this complaint will be considered with the required independence, in compliance with applicable international norms and standards".[144]

On 26 April 2007, the FPG closed the five-month long second preliminary examination, again without formally opening an investigation.[145] The FPG argued that the crime scenes (Abu Ghraib, other Iraqi detention centres and Guantánamo) were *not* located in Germany[146] and the persons against whom a criminal complaint had been filed would neither be in Germany nor would their stay be expected in the foreseeable future.[147] Also, no elucidation of the complaint made could be expected by the German authorities because, to the extent that investigations in Iraq and Cuba would be necessary, German authorities would have no executive powers over these locations anyway.[148] Also, the filing of requests for assistance would appear pointless considering the security and legal situation in Iraq.[149] The FPG pointed out that no loss of evidence would occur, particularly regarding the offer of the complainant to make Janis Karpinski, former director of the prison in Abu Ghraib, available for an interview.[150] By formally interviewing Karpinski the FPG would not expect a statements of a wider scope than the one she had provided already to the advocate assisting the complainant. And having the FPG interview her and possibly other witnesses made available by the complainant would not lead to the success of a potential investigation from Germany because of the restricted access to the crime scenes and the limited effect requests for assistance are expected to have. Rather, this would result in

144 Addendum of Special Rapporteur, para. 160.

145 FPG, Cover letter containing memorandum, 5 April 2007, 3 ARP 156/06-2, p. 5, Section B(I) (hereinafter 'FPG – Second Decision *Rumsfeld et al.*').

146 *Ibid*., Section B(I)(1)(a).

147 *Ibid*., Section B(I)(1)(b).

148 *Ibid*., Section B(I)(2)(b).

149 *Ibid.*

150 *Ibid*., p. 11, Section B(II)(2)(b).

mere symbolic investigations[151] which would remain one sided without prospect of further clarification of the allegations. The FPG referred to the legislative intent to avoid binding the limited financial and human resources to the detriment of otherwise successful prosecutions of other cases involving international crimes.[152]

On 30 October 2007, the Center for Constitutional Rights contested the decision of the FPG in Rumsfeld *et al.* by again requesting the Higher Regional Court in Stuttgart to compel public charges. On 21 April 2009, the Court dismissed the request,[153] holding that proceedings to compel charges are consciously not permitted by the legislature if the FPG proceeds, as it did there, pursuant to Section 153f of the FCCP.[154] Further, the FPG had exercised his discretion not to open a formal investigation within the limits of Section 153f of the FCCP.[155] While the Court could validate that the FPG had noticed his discretion and had not exercised it arbitrarily, it held that the judges would *not* be competent to review the FPG's exercise of the discretion pursuant to Sections 153f and 172(2)(3) of the FCCP in further detail.[156] The Court accepted the FPG's submission which relied on information provided by the US Headquarters in Europe according to which none of the persons against whom the allegations were directed were currently present in Germany and that their presence would not be expected in the foreseeable future.[157] The Court held that due to a missing concrete link to Germany, it would not matter whether or not the alleged crimes would be pursued by a third State. It held that the FPG would not undervalue the considerations relating to the principle of universality and to the goal of a seamless worldwide prosecution. In relation to the FPG's findings that (i) it would be difficult to secure cooperation of a State if its senior nationals would be investigated by German authorities and that (ii) the prospect to successfully investigate and prosecute the alleged crimes in Germany was low as the crime scenes in Iraq are located outside Ger-

151 Cf. also Rolf Hannich, "Justice in the Name of All", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2007, vol. 2, no. 13, pp. 507 ff., at p. 513.

152 *Ibid.*

153 Higher Regional Court Stuttgart, *Center for Constitutional Rights v. Rumsfeld et al.*, Decision, 21 April 2009, 5 Ws 21/09, pp. 3 and 6, Section III(1).

154 *Ibid.*, p. 6, Section 3(1)(a).

155 *Ibid.*, Section 3(1)(b).

156 *Ibid.*, p. 9, Section 3(1)(c).

157 *Ibid.*, pp. 7–9, Section 3(1)(b)(bb).

many, the Court found them to be legitimate considerations which would not render arbitrary the decision to suspend the preliminary examination.[158]

6.4.2. Preliminary Examinations Leading to Formal Investigations (And Their Subsequent Closing)

At least two preliminary examinations conducted in Germany led to the formal opening of investigations, which were eventually closed without the filing of charges. These cases related to the killing of a German citizen by a drone strike in the so-called 'tribal areas' in Pakistan and the bombardment of a petrol truck on request by a German army commander of the International Security Assistance Force near Kunduz in Afghanistan.

6.4.2.1. Against Unknown Persons (Drone Strike in Pakistan)

The media reported an alleged drone operation on 4 October 2010 in Mir Ali, Northern Waziristan in the tribal areas of Pakistan which led to the killing of Bünyamin E., a German citizen.[159] To clarify this allegation, the FPG opened a preliminary examination on 11 October 2010. He also requested other State authorities[160] for further information. Reports received indicated that Bünyamin E., a German citizen from Wuppertal, was dead as a result of a military operation. The FPG requested advisory opinions from two think tanks about whether an armed conflict existed in Pakistan in the relevant period. In late May 2011, the Heidelberg Institute for International Conflict Research (Heidelberger Institut für Konfliktforschung) and the German Institute for International and Security Affairs (Stiftung Wissenschaft und Politik) provided advisory opinions. Further, in May and June 2011, the German Foreign Office and Federal Intelligence Service provided their advisory opinions and/or furnished additional information on Pakistan. The FPG analysed open-source information including but not limited to the annual publication of the Stockholm International Peace Research Institute, the Heidelberg Institute's conflict barometer as

[158] *Ibid.*, p. 9, Section 3(1)(c).

[159] See https://www.ecchr.eu/en/international-crimes-and-accountability/drones/pakistan.html, last accessed on 6 March 2018.

[160] Namely the Federal German Police, the Federal Intelligence Service ('*Bundesnachrichtendienst*').

well as the Armed Conflict Database of the International Institute for Strategic Studies in London.[161]

Based on the information collected, the FPG formally opened an investigation against unknown persons on 10 July 2012. The objective was to inquire into whether the death of Bünyamin E. could be considered a war crime under the CCAIL.[162] On 10 August 2012, the FPG requested access to files on the incident in Mir Ali held by the German Bundestag. Its secret protection office submitted the documents on 18 September 2012 to the FPG.[163] To further understand the purpose of the travel of Bünyamin E. to Pakistan, the FPG requested the criminal file relating to his older brother Emrah E. who was on 14 January 2013 accused of membership of foreign terrorist groups pursuant to Section 129b of the FCC.[164] Further, the FPG analysed two additional domestic criminal proceedings for purposes of the investigation into the death of Bünyamin E. and interviewed his brother Emrah and his wife.[165] Following an assessment of the available evidence, the FPG concluded that Bünyamin E. could at the time of his death *not* be considered as a civilian person who would enjoy the protection of international humanitarian law. Rather, his departure to Pakistan was for the purpose of participating in a jihad.[166] The usage of a drone leading to the death of Bünyamin E. was therefore not punishable under the CCAIL.[167] Further, the FPG assessed the criminality of the usage of drones under German criminal law, but denied this because

[161] For the documentation listed in the entire paragraph, see FPG, Decision, 20 June 2013, 3BJs 7/12-4, Section A entitled "Erkenntnisquellen", pp. 1–2 (hereinafter 'FPG Pakistan Decision') (http://www.legal-tools.org/doc/600993/).

[162] Cf. FPG, press release entitled "Keine Anklage wegen eines Drohnenangriffs in Mir Ali / Pakistan am 4. Oktober 2010", 1 July 2013, no. 21/2013 (hereinafter 'FPG – press release Pakistan') (available on its web site).

[163] FPG Pakistan Decision, Section A entitled "Erkenntnisquellen", p. 2.

[164] *Ibid.* The trial against Emrah E. was conducted in front of the Higher Regional Court in Frankfurt (cf. FPG - press release Pakistan). About half a year after the FPG closed the preliminary examination against unknown (drone strike in Pakistan), the Higher Regional Court Frankfurt convicted in a separate proceeding Emrah E. for membership in two foreign terrorist organisations and sentenced him to seven years (first instance judgment, 23 January 2014, 5-2 StE 2/13 - 8- 1/13).

[165] FPG Pakistan Decision, Section A entitled "Erkenntnisquellen", p. 2.

[166] *Ibid*., Section D(II)(3)(b)(bb), p. 24. Particularly, the FPG referred to a video produced after the death where Bünyamin E. was portrayed as "German brother" and "martyr" who would have since a "few months [participated] in jihad". *Ibid*.

[167] *Ibid*., Section D(II), particularly sub-sections (3)–(5), pp. 22–27.

Bünyamin E. could be considered a legitimate military target[168] making his death admissible under international humanitarian law.[169] In conclusion, the FPG suspended the criminal investigation into the death of Bünyamin E. pursuant to Section 170(2) of the FCCP.

6.4.2.2. Colonel Klein *et al.* (Aerial Bombardment near Kunduz/Afghanistan)

Around 2 a.m. on 4 September 2009, a US war plane dropped a 500-pound bomb on two petrol trucks which the Taliban had misappropriated from the Federal German Army (hereinafter 'FGA'). Air support had been requested and approved by Colonel Klein who was assisted by Master Sergeant Wilhelm, both officers in the FGA. As a result of the explosion between 70 to 120 people died, including both Taliban fighters and civilians.

Initially, the prosecutor's office in Dresden was seized with the preliminary examination[170] regarding Klein, but deferred the dossier on 5 November 2009 to the FPG in Karlsruhe. On 27 November 2009, the FPG requested from the Operations Command of the FGA all relevant data and information. The Operations Command submitted their investigation report dated 9 September 2009 with 44 attachments to the FPG. The material included (i) a written statement made by Colonel Klein to his superior on 5 September 2009, (ii) a report from the International Security Assistance Force's fact-finding team on the incident dated 6 September 2009, (iii) a report from an Afghanistan investigation committee of President Karzai, (iv) notes of conversations between this domestic investigation committee and the Provincial Reconstruction Team Kunduz, (v) a list of possible civilian victims of the air strike by the UN Assistance Mission to

[168] Kai Ambos, "Einstellungsverfügung GBA vom 20.6.2013 zum Drohneneinsatz in Mir Ali Pakistan am 4.10.2010 und Tötung des deutschen Staatsngehörigen B.E. - Anmerkungen zur "offenen Version" vom 23.7.2014", in *Neue Zeitschrift für Strafrecht*, 2013, p. 634, at p. 615, Section 3: "If one follows the argumentation of the FPG, then the *mere membership* in a (terrorist) armed group suffices to make a civilian protected by IHL into a legitimate military target. [...] However, criminal liability does not permit (a state's) killing of the person concerned, but only criminal prosecutions" (unofficial translation by the author). Cf. also the additional critic in Section 5.

[169] FPG Pakistan Decision, Section D(III)(3)(b)(bb), p. 35 and Section D(III)(4), p. 36 in connection with Section D(II)(3)(b)(bb), p. 24.

[170] Prosecutor Office Dresden, Prüfvorgang betreffend Oberst Klein wegen der Genehmigung zum Einsatz von Luftfahrtzeugen am 4. September 2009 nahe Kunduz/Afghanistan, 5 November 2009, dossier no. 392 AR 100001/09.

Afghanistan and (vi) a NGO report from 5 November 2009. On 8 December 2009, the FPG requested copies of the investigation committee report of the Defence Committee of the German Bundestag. The Defence Committee sent 164 dossiers to the FPG. They also sent material from the investigation committee of the Defence Committee which contained records of questioning of Klein and Wilhelm.[171]

On 21 December 2009 and 23 February 2010, the FPG sent detailed questionnaires to the Operational Command of the German armed forces.

On 12 March 2010, the FPG formally opened an investigation into the acts of Klein and Wilhelm in relation to the suspicion of a crime under the CCAIL and German criminal law. During the investigation both suspects and other witnesses[172] were formally questioned. On 16 April 2010, some 35 days after the formal opening, the FPG closed the investigation pursuant to Section 170(2) of the FCCP.[173] In his decision, the FPG discussed the possible criminal liability of Colonel Klein pursuant to Section 11(1)(3) of the CCAIL which states:

> War crimes consisting in the use of prohibited means of warfare
>
> (1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character […] 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 […] shall be punished with imprisonment of not less than three years. […]

The FPG argued that the objective elements of the offence were satisfied.[174] However, he denied that the subjective element, namely that the suspect definitely anticipated that the attack would cause death to civilians on a scale out of proportion to the concrete and direct overall military

[171] Regarding all sources listed in the paragraph, cf. FPG, Decision to suspend pursuant to Section 170(2) of the FCCP criminal proceedings against colonel Klein and master sergeant Wilhelm pursuant to offences under the CCAIL and other offences, 16 April 2010, 3 Bjs 6/10-4, Section A, pp. 3–4 (hereinafter 'FPG - Kunduz decision') (http://www.legal-tools.org/doc/24d8bd/).

[172] For example, between 22 to 25 March 2010, a captain and sergeant major, both from the FGA.

[173] FPG - Kunduz decision, p. 1.

[174] *Ibid.*, Section D(II)(3)(a), pp. 45–46.

advantage anticipated, was met in the circumstances.[175] The FPG also denied responsibility of Colonel Klein pursuant to Sections 8(1)(1) and 11(1)(1) of the CCAIL.[176]

Further, the FPG discussed and dismissed the criminal liability of Colonel Klein for ordinary criminal offences, including murder pursuant to Section 211 of the FCC, because the aerial bombardment of the stolen petrol truck was permitted under international humanitarian/criminal law.[177]

On 12 April 2010, Abdul H., who lost two sons as a result of the incident on 4 September 2009 in Kunduz, launched proceedings to compel charges against the decision of the FPG. On 16 February 2011, the Higher Regional Court in Düsseldorf dismissed his request because the applicant failed to deliver a coherent and closed description of the facts. Instead, several submissions made by the requester were insufficiently substantiated and thus did not satisfy the requirements of Section 172(3) of the FCCP.[178] His further claim that his right to be heard would have been violated was also dismissed by the Court.[179]

In furtherance of the last claim, Abdul H. filed a complaint against the decision to the German Federal Constitutional Court. On 19 May 2015, the Federal Constitutional Court dismissed his complaint as inadmissible. The judges held that the German Constitution does not create a right to have third persons prosecuted. However, in special circumstances the right to have third persons effectively prosecuted exists where the right to life is at stake, or in structurally asymmetric relationships where the State carries a duty of care, or when an allegation is made that State officials have committed crimes.[180] The obligation for effective prosecution relates to all law enforcing organs.[181] The Constitutional Court ruled that:

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175 *Ibid.*, Section D(II)(3)(b), pp. 46–50.

176 *Ibid.*, Section D(II)(4), pp. 50–51.

177 *Ibid.*, Section D(III)(3)(b), pp. 59 – 67 and Section D(II)(1)(a), pp. 51–52.

178 Higher Regional Court Düsseldorf, *Omar Khel v. FPG*, Decision on request to compel charges, 16 February 2011, III-5 StS 6/10.

179 Higher Regional Court Düsseldorf, *Omar Khel v. FPG*, Decision on fair hearing, 31 March 2011, III-5 StS 6/10.

180 German Federal Constitutional Court, *Abdul H. v Germany*, Decision, 19 May 2015, 2 BvR 987/11, p. 8, paras. 20–22, Sections III(1)(b)(aa), III(1)(b)(bb) and III(1)(b)(cc) (hereinafter 'Constitutional Court – Kunduz decision').

181 *Ibid*., p. 8, para. 22, Section III(1)(b)(dd).

> This does not mean that the obligation concerned can only be discharged by filing criminal charges. Often it is sufficient if the Prosecution and under its instructions the police, make use of the available human and relevant means and their competence in form of a proportional usage of resources in order to clarify the case and to save the evidence […]. To satisfy the obligation to effectively prosecute requires a detailed and complete documentation of the course of investigation as well as an understandable reasoning of the decision to suspend. This is subject to judicial review (sections 172 ff. FCCP).[182]

The Constitutional Court held that the decisions of the FPG and of the Higher Regional Court in Düsseldorf satisfied these requirements and thus dismissed the complaint as inadmissible.

6.4.3. Common Arguments Advanced in Decisions on Preliminary Examinations

The decisions discussed above reveal that at least in cases involving German citizens, whether as potential victims[183] and/or perpetrators[184] of a possible violation of international humanitarian law, the FPG did not only conduct a preliminary examination, but also formally opened criminal investigations. This step enables the FPG to formally take witness statements and, in the case of Kunduz, suspect interviews, both of which are not permitted at the preliminary examination phase on account of human rights as explained above.[185]

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[182] *Ibid.*, p. 9, para. 24, Section III(1)(b)(ee) (author's translation). ("Dies bedeutet nicht, dass der in Rede stehenden Verpflichtung stets nur durch Erhebung einer Anklage genügt werden kann. Vielfach wird es ausreichend sein, wenn die Staatsanwaltschaft und - nach ihrer Weisung - die Polizei die ihnen zur Verfügung stehenden Mittel personeller und sächlicher Art sowie ihre Befugnisse nach Maßgabe eines angemessenen Ressourceneinsatzes auch tatsächlich nutzen, um den Sachverhalt aufzuklären und Beweismittel zu sichern […]. Die Erfüllung der Verpflichtung zur effektiven Strafverfolgung setzt eine detaillierte und vollständige Dokumentation des Ermittlungsverlaufs ebenso voraus wie eine nachvollziehbare Begründung der Einstellungsentscheidungen. Sie unterliegt der gerichtlichen Kontrolle (§§ 172 ff. StPO).")

[183] Bünyamin E. in against unknown (drone strike in Pakistan).

[184] Colonel Klein and master sergeant Wilhelm in the case involving the aerial bombardment near Kunduz in Afghanistan.

[185] Cf. *supra* Section 6.3.1.

This sub-section discusses four common arguments the FPG advanced in decisions on preliminary examinations, namely immunity of persons against whom a criminal complaint had been made, no specific link of the alleged perpetrators to Germany, symbolic investigations or preventive judicial assistance and subsidiarity of the German investigation in relation to investigations by other States.

6.4.3.1. No Specific Link of the Alleged Perpetrator to Germany

All decisions of the FPG discussed here contain elaborations on the existence (or absence) of a link between the alleged perpetrator and Germany. The reason the FPG considers this element is that Section 153f of the FCCP makes explicit reference to it:

> The public prosecution office may dispense with prosecuting a criminal offence for which there is criminal liability pursuant to […] the CCAIL […] if the accused is not resident in Germany and *is not expected* to so reside.[186]

First, the legislature has clarified that for a link to Germany to exist, it is sufficient that the alleged offender "is deemed to be present in the country if he or she is in Germany, even temporarily. Presence as part of a transit is sufficient".[187] It is not necessary that the entry into Germany be voluntary.[188]

Secondly, a prior stay of the person against whom the criminal complaint has been made is not sufficient. What is required is that the person be present at the time the FPG conducts the preliminary examination or makes his decision (to open an investigation or to close the preliminary examination). The contrary view, that a prior stay in Germany could create such a link,[189] overlooks that the reason for requiring a specific link

[186] Emphasis supplied.

[187] Government draft – motives CCAIL (English version), p. 83; Bundestag – motives CCAIL, p. 38.

[188] For example, it suffices that entry into Germany occurs as a result of an emergency landing (Gercke, 2012, Section 153(f), para. 4, see *supra* note 18).

[189] Salvatore Zappalà, "The German Prosecutor's Decision not to Prosecute a former Uzbek Minister: Missed Opportunity or Prosecutorial Wisdom?", in *Journal for International Criminal Justice*, 2006, vol. 4, no. 3, pp. 606–607: "Almatov was present in Germany in autumn 2005, meeting the requirement of presence in the state exercising jurisdiction" (hereinafter 'Zappalà – FPG's Decision Uzbekistan').

to Germany is to have the person concerned arrested.[190] In this regard, the FPG's first decision involving the allegations against Almatov was correct because by the time the FPG became aware of the allegations, the then Uzbek Minister of Interior had already left the country.[191] Hence an arrest by German authorities was no longer possible.

Thirdly, the use of the phrase "is not expected" in the section raises the question of who procedurally carries the burden of substantiating this link, or the absence thereof. Basak argues that it is the FPG who bears the burden of demonstrating that the alleged offender is not expected to enter into Germany or that his or her return thereto would be far-fetched.[192] After all, it will be the FPG who intends to rely on the existence or absence of such a link in his decisions to close a preliminary examination or an investigation pursuant or analogous to Section 153f of the FCCP. However, at least on one occasion the FPG argued that preliminary examinations about current or future travel plans of suspects living abroad would not be potentially successful.[193] This reasoning left it open who carries the burden of proving the absence of a link to Germany. To assess the existence of a specific link of an alleged offender to Germany requires facts. In their absence all that remains is a mere prognosis decision based on assertions. And any prognosis can only be based on what is known at a given moment; whether information then available provides a factual basis to expect an entry of the person concerned into Germany.[194] In this regard, the FPG may consider whether the person concerned has family or

[190] "The accused must only remain in Germany long enough for him or her to be arrested" (cf. government draft – motives CCAIL (English version), p. 83; Bundestag – motives CCAIL, p. 38).

[191] Kreß suggests that the communication between the Federal government and the authorities relating to foreigners and refugees on the one hand side and the FPG on the other hand side should be improved. He suggests an obligation for the authorities involved to check the aspect of international crimes and, if suspicious exists to inform the FPG, should be similar to the Netherlands, be created. See Claus Kreß, "Nationale Umsetzung des Völkerstrafgesetzbuches", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2007, vol. 2, no. 13, p. 523 (hereinafter 'Kreß – Nationale Umsetzung').

[192] Basak – Rumsfeld, p. 356; cf. Beulke – Strafprozeßordnung, Section 153(f), para. 16.

[193] FPG – Second Decision *Rumsfeld et al.*, Section B(I)(1)(b)(bb), p. 9.

[194] Cf. Teßmer – MK, Section 153f, para. 8.

relatives in Germany and/or business contacts providing the necessity for (re-)entering into the country.[195]

The decision to close the preliminary examination regarding Inoyatov, the Uzbek Chief of the National Security Service, shows the potential margin of error in a prognosis decision. In 2006, when the FPG closed the preliminary examination, it was neither reasonably foreseeable when the European Union would lift the travel ban against Inoyatov nor if he would still continue to occupy his official post which would provide him a reason to travel to Germany in the future to liaise with his intelligence services counterparts there. Based on the 2006 assessment against Inoyatov, it was understandable that the FPG closed the preliminary examination as it was not alleged that he had entered German territory. However, the consequence was that in late 2008, when the travel ban was lifted, there was no pending criminal proceedings against Inoyatov so he could enter Germany unimpeded. The decision to invite Inoyatov was beyond the competence (and possibly done without prior knowledge) of the FPG, similar to the temporary stay of the then Uzbek Minister of Interior Almatov, in whose favour the German embassy in Moscow issued a visa autumn 2005. So Almatov and Inoyatov were in Germany *without* the FPG asking them questions regarding the allegations raised in the criminal complaint. Kreß suggests improving the flow of information between the State administration and the FPG in order to ensure that the latter learns in advance about a suspects anticipated stay in Germany (and not *after* the fact, meaning after he has left the country).[196] The consequences of the FPG identifying a missing link to Germany are described by Thomas Beck, the former head of the unit on international crimes in the FPG:

> What we [in the FPG's office] are not doing: open an investigation in purely foreign cases without specific link to Germany. And this not only because we do not have the capacity for it. We are of the firm conviction that we would overstrain ourselves and this would be detrimental to the holistic system of international criminal law (see Belgium, see

[195] Beulke – Strafprozeßordnung, Section 153(f), para. 16; Tobias Singelnstein and Peer Stolle, "Völkerstrafrecht und Legalitätsprinzip", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2006, vol. 1, no. 3, pp. 118 and 121.

[196] Kreß - Nationale Umsetzung, p. 523. In this regard, Beck points out that at best a formal initiation of an investigation together with a suspect interview could be expected. The outcome of a suspect interview would be, in his view, "foreseeable" (cf. Beck - Völkerstrafgesetzbuch, p. 162).

> Spain). Investigations which are a mere facade, without any prospect of evidentiary results, do not correspond to the way in which Germany conducts criminal prosecutions.[197]

Similarly, the FPG elaborated in the second decision not to open proceedings against Rumsfeld *et al.* that the purpose of the specific link requirement in Section 153f is to avoid fruitless investigation activity by Germany because the suspect is abroad.[198] However, this notion has the potential to set aside the guidance of the legislature who expressly stated that "the investigation and prosecution duty is not limited to crimes which have a German connection; even if there is *no* connection to Germany, the results of investigation initiated in Germany could be valuable for proceedings before a foreign or international criminal court".[199]

6.4.3.2. Preventive Judicial Assistance

When the German legislature decided in favour of the possibility of preventive judicial assistance by German authorities regarding allegations of international crimes, it also explicitly clarified that even if another State has preferential jurisdiction, German prosecutors may still act:

> If, on the other hand, a foreign state or an international criminal court is already investigating the matter, but there is a link in terms of offence, suspect or victim to Germany, the German authorities should avail of the investigation opportunities resulting from the German connection, for reasons of worldwide solidarity alone, even *without* specific requests for legal aid, in order to support the trial abroad as well as possible and to be prepared for the case for possible take over by Germany at a later time.[200]

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[197] Beck – Völkerstrafgesetzbuch, p. 162 (author's translation). ("Was wir nicht tun: Die Aufnahme von Ermittungen bei reinen Auslandstaten ohne Anknüpfungspunkt nach Deutschland. Und das keineswegs nur weil gar nicht die Kapzitäten dazu haben. Wir sind der festen Überzeugung, dass wir uns damit überheben würden und das wäre schädlich für das Gesamtsystem des Völkerstrafrechts (siehe Belgien, siehe Spanien). Ermittlungsverfahren, die nur Fassade sind, ohne jegliche Aussicht auf Beweisergebnisse entsprechen nicht der Art und Weise wie in Deutschland Strafverfolgung betrieben wird".)

[198] FPG – Second Decision *Rumsfeld et al.*, Section B(I)(1)(b)(bb), p. 9. Beck – Völkerstrafgesetzbuch, p. 162.

[199] Government draft – motives CCAIL (English version), p. 82; Bundestag – motives CCAIL, p. 37; Weßlau – Systematischer Kommentar, Section 153(f), para. 1.

[200] Government draft – motives CCAIL (English version), p. 84; Bundestag – motives CCAIL, p. 38. Agreeing: Teßmer – MK, Section 153f, para. 20.

It is sufficient that the perpetrator, a victim or the act have a link to Germany.[201]

In this regard, the FPG's notion is narrower than the legislature's guidance. The FPG points out that a 'fruitless investigation' is to be avoided. While these concerns are real, they still do not live up to the legislative intent. Rather, the FPG repeatedly announced that it suffices that the UN or NGOs have documented or otherwise taken statements of victims and that therefore there would be no need for the FPG to take official statements.[202] This view is neither consistent with the spirit of the legislature which had emphasized solidarity considerations, nor with the realities of criminal litigation, whether before national or international judges. While certain documentations from the UN may carry significant weight in court proceedings, they may often not reach the courtroom due to confidentiality reasons. If the UN or regional organizations lift confidentiality then their reports may be redacted making the content of their public reports generic. Fact-finding reports from the UN or regional organizations, like NGO reports, often contain useful information. This may be used as *lead* information in an investigation, but generally not as evidence of individual guilt to issue an arrest warrant[203] and/or to obtain a conviction in courtroom proceedings. This is because NGO staff are often not properly trained in (forensic) evidence handling procedures, and are not legally bound to abide by any criminal procedural code which affords the interviewed persons the right to remain silent. Therefore, informative accounts recorded by NGOs and observers from regional or international organizations in their reports carry, in the absence of a formal advising of witnesses and suspects of their right to remain silent, limited weight in courtrooms.[204]

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[201] Government draft – motives CCAIL (English version), p. 84; Bundestag – motives CCAIL, p. 38.

[202] Cf. FPG – Second Decision *Rumsfeld et al*., Section B(II)(2)(b), p. 11; FPG – Uzbekistan decision, last paragraph before Section B(3).

[203] Beck – Völkerstrafgesetzbuch, p. 162; cf. Martin Böse, "Das Völkerstrafgesetzbuch und der Gedanke der "antizipierten Rechtshilfe"", in Florian Jeßberger and Julia Geneuss (eds.), *Zehn Jahre Völkerstrafgesetzbuch*, Nomos and Stämpfli, 2013, pp. 167, 175 (hereinafter 'Böse – antizipierte Rechtshilfe').

[204] Cf. Kreß – Nationale Umsetzung, p. 521; Rainer Keller, "Das Völkerstrafgesetzbuch in der praktischen Anwendung: Eine kritische Bestandsaufnahme", in Florian Jeßberger and Julia Geneuss (eds.), *Zehn Jahre Völkerstrafgesetzbuch*, Nomos and Stämpfli, 2013, pp. 141, 144 (hereinafter 'Keller – CCAIL'); Wolfgang Kaleck, "Strafverfolgung nach dem Völker-

Still, the FPG mentions in his decision to close preliminary examination or an investigation his refusal to take formal statements of witnesses offered by complainants arguing that everything is already 'well documented'. This attitude was criticized,[205] particularly since victims of international crimes are potentially more vulnerable and formally taking their statement may be crucial before they die.

The former head of the war crimes department of the FPG suggests that preventive judicial assistance may be considered if it occurs for a future criminal prosecution by German authorities.[206] Again, this notion is narrower than the guidance provided by the legislature. The explicit intent of the legislature was that Germany may also provide preventive judicial assistance for proceedings before a *foreign* criminal court, if the primary jurisdiction is, for political reasons, unwilling to exercise its jurisdiction over the crime, or if important witnesses are present in Germany.[207] This begs the question: what are the minimum requirements to commence with preventive judicial assistance? Would the fact that another State or an international court has already commenced criminal proceedings into a (specific) case for which evidence is available in Germany suffice?[208] Or is it also required that the evidence, if obtained, can be legally transmitted to the other jurisdiction concerned, meaning that its transmission is not blocked by Section 73 of the Act on International Cooperation in Criminal Matters?[209] Or should preventive judicial assistance at least be carried out without any other jurisdiction being seized of the case if a "unique investigative opportunity"[210] arises in Germany?

strafgesetzbuch: Ein kurzer Blick in die Zukunft – ein kurzer Kommentar zum Beitrag von Martin Böse", in Florian Jeßberger and Julia Geneuss (eds.), *Zehn Jahre Völkerstrafgesetzbuch*, Nomos and Stämpfli, 2013, pp. 177, 181.

205 Kreß – Nationale Umsetzung, pp. 515 and 519; Keller – CCAIL, p. 144.

206 Cf. Beck – Völkerstrafgesetzbuch, p. 162.

207 Government draft – motives CCAIL (English version), pp. 83–84; Bundestag – motives CCAIL, p. 38.

208 Cf. Böse – antizipierte Rechtshilfe, p. 173.

209 Section 73 Limitations on Assistance (Ordre Public) states: "Legal assistance and transmission of data without request shall not be granted if this would conflict with basic principles of the German legal system".

210 Cf. with ICC Statute, arts. 56 and 18(6).

6.4.3.3. Subsidiarity

The FPG based several decisions not to open investigations on subsidiarity considerations. Particularly, the criminal complaints against Rumsfeld *et al.* did not result in formal opening of criminal proceedings because the US would be primarily responsible and had already opened an investigation.

The motives behind Section 153f of the FCCP, in relation to Germany's universal jurisdiction, provide that: "the jurisdiction of third party states (which exists under international law) must be understood as a subsidiary jurisdiction which should prevent impunity, but not otherwise inappropriately interfere with the primarily responsible jurisdiction. The state in which the crime was committed and the home state of the perpetrator or victim deserve priority due to their particular interest in the prosecution and due to the general proximity to evidence".[211]

The investigative activities of the US authorities in the Abu Ghraib case were relevant as the alleged perpetrators of the criminal complaints were US citizens. One cannot find fault with the reference of the FPG observations that it depends on the US law enforcement authorities conduct their investigation.[212]

However, it is more doubtful whether the US authorities were indeed pursuing persons belonging to senior and highest level of civilian and military leadership responsible for the allegations in Abu Ghraib and other detention facilities in Iraq. Rather, they merely subjected persons at the lowest level of the military hierarchy to criminal proceedings.[213] The US authorities investigated *some* acts of the lowest subordinates, but certainly not those acts of superiors which the criminal complaint brought to the attention of the FPG.[214]

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[211] Government draft – motives CCAIL (English version), p. 82; Bundestag – motives CCAIL, p. 37.

[212] FPG – First decision *Rumsfeld et al.*, p. 121 (English), see *supra* note 130.

[213] Katherine Gallagher, "Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture", in *Journal for International Criminal Justice*, 2009, vol. 7, no. 5, pp. 1087 ff.; Bettina Weißer, "Das Prinzip der Weltrechtspflege in Theorie und Praxis", in *Goldtammer's Archiv für Strafrecht*, 2012, vol. 159, no. 7, pp. 416 and 425.

[214] Cf. Gallagher, 2009, pp. 1087, 1098–99, Section D, see *supra* note 213; Kurth – §153f FCCP, p. 85.

Teßmer argues that the FPG should only close a case if he *positively* found another authority who is pursuing the investigation:

> [the FPG's] suspension is only then suitable, if the act 1. is persecuted elsewhere and 2. this 'elsewhere' may have primacy. Whether this is so, is to be assessed according to the priority of competences, for which the specific link to Germany is decisive. The stronger this link is, the more likely the act has to be persecuted in Germany. If that is the case then a suspension is possible only if the FPG finds somebody with the same or with a higher competence, who wants to conduct the procedure constitutionally and who has declared this will with binding effect. Only if it is guaranteed that an investigation is conducted elsewhere, then the procedure in Germany may be terminated.[215]

In the case of *Rumsfeld et al*., the FPG closed the preliminary examination without having received any assurance from the US that they would investigate the highest echelons of military and civilian leadership. However, to require such an assurance is unrealistic: what means would the FPG have to obtain such an assurance? The only way to react to such allegations and omitted insurances from the primary responsible State is to formally secure relevant evidence which is available in Germany and preserve it for future proceedings, whether in Germany, the US, or elsewhere.

What is also questionable is the consideration which the FPG advanced in two decisions to refrain from investigation due to the principle of non-intervention into the internal affairs of States.[216] The fact that the FPG advances this consideration contradicts the expressly declared decision of the legislature who explicitly stated that a trial based on the prin-

[215] "Eine Einstellung [kommt] nur dann in Betracht, wenn die Tat 1. 'woanders' verfolgt wird und 2. dieses 'woanders' den Vorrang haben darf. Ob dies so ist, bemisst sich nach der 'gestuften Zuständigkeitspriorität', wofür entscheidend der Inlandsbezug der Tat ist. Je stärker dieser ausfällt, desto eher muss die Tat in Deutschland verfolgt werden. Ist das der Fall, kann eine Einstellung nur noch in Betracht kommen, wenn der Generalbundesanwalt 'jemanden' mit gleicher oder höherer Zuständigkeitspriorität gefunden hat gefunden hat, der das Verfahren tatsächlich und rechtsstaatlich führen will und dieses 'Wollen' verbindlich erklärt hat. Erst wenn sichergestellt ist, dass das Verfahren woanders stattfindet, kann das Verfahren in Deutschland eingestellt werden" (Teßmer – MK, Section 153f, para. 20 (author's translation)).

[216] Cf. FPG – First decision *Rumsfeld et al*., Section B, p. 119 (English), see *supra* note 130; FPG - Falun Gong Decision, Section II(3), pp. 4–5.

ciple of universality regarding war crimes, crimes against humanity and genocide "committed abroad, even by foreign citizens, is *not* at variance with the principle of non-intervention".[217]

Further, the European Court of Human Rights acknowledged in *Jorgić v. Germany* an interpretation of a German court which "found that the public international law principle of universal jurisdiction, which was codified in Article 6 no. 1 of the [German] Criminal Code, established their jurisdiction while complying with the public international law duty of non-intervention".[218] The Court concluded that "the German courts' interpretation of the applicable provisions and rules of public international law, in the light of which the provisions of the Criminal Code had to be construed, was not arbitrary. They therefore had reasonable grounds for establishing their jurisdiction to try the applicant on charges of genocide".[219]

In conclusion, the narrow notion advanced by the FPG on the principle of non-intervention is neither consistent with the motives of the German legislature, nor required as the European Court of Human Rights ruled that the German judiciaries approach to international crimes is compliant with the principle of non-intervention.

6.4.3.4. Immunity

The FPG twice highlighted immunity considerations in relation to a former president[220] and a current deputy president.[221] In the first decision not to open an investigation against Rumsfeld, the FPG said in *obiter* that he did not have to consider whether, as current Secretary of Defence,[222] immunity considerations would form a stumbling block, because other con-

[217] Government draft – motives CCAIL (English version), p. 29 (emphasis added); Bundestag – motives CCAIL, p. 14 (emphasis added).

[218] European Court of Humanr Rights, *Jorgić v. Germany*, Judgment, 12 July 2007, application no. 74613/01, para. 67.

[219] *Ibid.*, para. 70.

[220] Former Chinese President Jiang Zemin.

[221] At the time of the FPG's decision Ramzan Kadyrow was deputy President of Chechen Republic.

[222] Donald Henry Rumsfeld was at the time of FPG's decision on the first criminal complaint Secretary of Defence of the US, but no longer so at the time the FPG issued his decision on the second complaint.

siderations[223] would already suffice to close the preliminary examination. At the time of the second decision, when Rumsfeld was no longer the Secretary of Defence of the US, the FPG omitted any reference to immunity considerations.[224] Similarly, the FPG declined to engage in considerations of immunity in 2006 when deciding not to open an investigation into allegations surrounding Uzbek citizens.[225] By that time Almatov had resigned and, thus, was no longer the Minister of Interior.

The FPG's approach regarding presidents[226] of other States is in line with the decision of the International Court of Justice in the *Yerodia* case which grants a head of State, a head of government and the foreign minister immunity *ratione personae* for private and official acts, even in cases of crimes against humanity and war crimes.[227] Further, the FPG's approach is also consistent with the Cologne Higher Regional Court's decision which acknowledged immunity from criminal prosecution in Germany in favour of Saddam Hussein, the then sitting President of Iraq.[228]

The FPG's approach regarding immunity is questionable in at least two aspects. It was unnecessary to mention immunity of a Minister of Defence in the FPG's first decision in relation to Donald Rumsfeld because national courts tend to recognize immunity of the so-called troika,[229] consisting of the heads of States and government as well as the minister of foreign affairs. A minister of defence[230] or a minister of interior are not part of that troika. Granting immunity *ratione personae* is unnec-

223 For example, subsidiarity of the German investigation, the fact that the crimes were committed abroad and not by or against German citizens and the lacking prospect that German authorities could clarify the allegations as part of their investigation.

224 Positively noted by Kreß – Nationale Umsetzung, pp. 515 and 520.

225 Cf. Zappalà – FPG's Decision Uzbekistan, pp. 602, 613–16, Section 5.

226 Namely, regarding Jiang Zemin and Ramzan Kadyrow.

227 ICJ – Yerodia judgment, paras. 53–60.

228 Cologne Higher Regional Court, *Saddam Hussein*, Decision, 16 May 2000, 2 Zs 1330/90, para. 9.

229 International Law Commission ('ILC'), Fifth report on immunity of State officials from foreign criminal jurisdiction, 14 June 2016, A/CN.4/701, para. 237 (http://www.legal-tools.org/doc/ec3997/) (hereinafter 'ILC – Fifth Report Immunities').

230 Steffen Wirth, "Immunity for Core Crimes? The ICJ's judgment in the Congo vs. Belgium case", in *European Journal of International Law*, 2002, vol. 13, no. 4, pp. 877 and 879; Basak – Rumsfeld, p. 351; Schoreit favors a broader scope claiming CCA, Sections 18–20 would exempt Heads of States and governments, Ministers and their entourage from jurisdiction of German courts (in Rolf Hannich *et al.* (eds.), *Karlsruher Kommentar zur Strafprozeßordnung*, C.H. Beck, Munich, 2013, 7th edition, Section 153(f), para. 3).

essary as ministers of defence or interior do not exercise the primary function of representing their States. Thus, to discuss considerations of immunity *ratione personae* for a minister of interior or secretary of defence is unnecessary. Therefore, regarding Rumsfeld, the FPG could have simply omitted any reference to immunity, or at least clarified his position that in his view a sitting minister of defence has (or does not have) immunity.[231] However, by choosing to mention immunity in connection with the phrase "stumbling block"[232] without offering further views, the FPG has created an ambiguity.

Further, the FPG's approach regarding *former* sitting presidents' immunity from prosecution regarding grave international crimes is also questionable.[233] In 2013, the International Law Commission provisionally adopted Article 4(1) which states that "Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office".[234]

Finally, the FPG's notion of immunity regarding international crimes should acknowledge that Section 20(2) of the CCA exempts persons from German jurisdiction only "pursuant to the general rules of international law". Currently, international law regarding immunity for international crimes is developing, particularly after the *Pinochet* decision of the House of Lords.[235] It is debatable whether former heads of States

[231] Cf. Kurth – §153f FCCP, p. 86, text accompanying fn. 60; Zappalà – FPG's Decision Uzbekistan, p. 613.

[232] FPG – First decision *Rumsfeld et al*., see *supra* note 130, Section B.

[233] Critical: Kreß – Nationale Umsetzung, p. 519; fn. 36 referring to Claus Kreß, "Der Internationale Gerichtshof im Spannungsfeld zwischen Völkerstrafrecht und Immunitätsschutz", in *Goltdammer's Archiv für Strafrecht*, 2003, vol. 150, no. 1, pp. 25–43; Zappalà – FPG's Decision Uzbekistan, p. 615; Helmut Kreicker states that sitting heads of state and government and ministers of foreign affairs enjoy complete immunity in Germany from criminal accountability, with no exception for crimes against international law. However, once they cease this function, they enjoy no special international legal exemption from criminal accountability – even for acts committed in their official capacity during their time in office. Without restriction the international legal community can hold them accountable(Helmut Kreicker, in Albin Eser and Helmut Kreicker (eds.), *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, vol. I, Max-Planck-Institut, Freiburg, 2003, pp. 350 ff.).

[234] ILC – Fifth Report Immunities, annex I, p. 96. Cf. Andreas Fischer-Lescano, "Weltrecht als Prinzip", in *Kritische Justiz*, 2005, vol. 38, no. 1, pp. 72 and 81.

[235] House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Appelants), ex part Pinochet (Respondent); Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellants), ex parte Pinochet (Respondent)*, Judgment, 24 March 1999, 2 All E.R.97.

are granted immunity *ratione materiae*, meaning only for official acts.[236] The International Law Commission discussed during its sixty-ninth session in 2017 the following proposed Article 7 regarding an exclusion of immunity *ratione materiae* for State officials:

> Crimes in respect of which immunity does not apply
>
> 1. Immunity shall not apply in relation to the following crimes: (i) Genocide, crimes against humanity, war crimes, torture and enforced disappearances […];[237]

The Commission provisionally adopted this proposal with 21 votes in favour, eight votes against and one abstention and referred it to its drafting committee.[238] In any event, for the German application of immunity regarding crimes against international law it would be useful if the issue is clarified either by the FPG, or a competent German court.

6.5. Quality Control of Preliminary Examinations

One means of quality control is to provide transparent decisions. In the case of *Abdul H v. Germany*, the German Federal Constitutional Court required the FPG to provide a detailed and complete documentation of the course of his investigation as well as understandable reasoning for the decision to suspend under Section 153f of the FCCP.[239] All accessible[240] FPG decisions reviewed and discussed in this contribution are several pages long, provide details about the consideration advanced by the FPG when exercising discretion and otherwise satisfy the requirements set by the constitutional court.

In addition, the FPG maintains a website on which he publishes press releases summarizing the current progress of cases dealt with by the office, which include cases on international criminal law.[241] However, few

[236] Basak – Rumsfeld, p. 351.

[237] ILC – Fifth Report Immunities, Annex III, p. 99.

[238] Report of the International Law Commission Sixty-ninth session (1 May-2 June and 3 July-4 August 2017), UN Doc. A/72/10, 4 August 2017, Chap. VII, paras. 72–77, 84–86, 94–101 (http://www.legal-tools.org/doc/7d6be0/); cf. ILC – Fifth Report Immunities, para. 239 mentioning that some ILC members found this proposal 'unconvincing' while others saw it as 'balanced and unambiguous'.

[239] Cf. *supra* Section 6.4.2.2.

[240] The FPG's decision of the FPG on Kadyrow (Chechen Republic within the Russian Federation) was not accessible to this author.

[241] Available at its web site.

press releases covered decisions on closing preliminary examinations or investigations relating to cases involving the CCAIL, including some of those discussed. Rather, the website mainly contained press releases relating to cases attracting media attention.[242]

Although the FPG endeavours to release so-called 'open versions' (preserving the confidentiality of certain sensitive information) of final decisions relating to crimes against international law, apart from one exception,[243] the open versions of these decisions are not posted on the website of the FPG, but are available only because they were posted by the criminal complainants, academic institutions or NGOs after they gained access to this information. These persons or institutions published these decisions on websites maintained by them or otherwise on openly accessible websites maintained by third persons. As a result, the decisions of the FPG are scattered on various websites on the Internet and the documents posted, though they usually carry indicia of authenticity such as the header of the FPG and stamps of the receiving person or institution, otherwise lack official authentication.

Hence, to date, the decisions of the FPG are *not* made available to the public in a centralized manner, for example, on the FPG's website. Certainly, concerns of confidentiality and sensitivity of information during the preliminary examination-stage may militate against such public sharing of information, but the ICC demonstrates that it is possible to maintain a website where each situation subject to a preliminary examination has a special area and where relevant documents can, if necessary with redactions, be published.[244]

In exceptional circumstances, the FPG published some 'light tower' decisions on the CCAIL in academic journals in German and English.[245] FPG staff occasionally published in academic journals and books information about the work of the war crimes department. As a result, many scholars have discussed the decisions of the FPG, reviewed his arguments

[242] While the website contains certain press releases relating to *Rumsfeld et al.* and *Klein and Wilhelm (Kunduz/Afghanistan)* other cases are not mentioned at all: for example, the preliminary examination of Aslan Kadyrow.

[243] Cf. *supra* note 171.

[244] Cf., for example, ICC, "Guinea" (available on the Court's web site).

[245] For example, the cases relating to *Rumsfeld et al*. and *Colonel Klein et al.* (aerial bombardment near Kunduz/Afghanistan).

thereby providing further guidance on the validity of certain lines of thoughts advanced by the FPG.

Currently, the FPG has neither published a policy paper on how preliminary examinations are conducted, nor annual reports outlining which situations are monitored and allowing interested organizations to inform themselves about the annual progress, if any, of the preliminary examinations conducted by the FPG. This would allow interested organizations to furnish additional material to the FPG for further consideration and analysis.

Due to the strong legal position of the FPG and his broad discretion, a judicial review by German courts of his discretionary decisions is unlikely to succeed. Thus, the dominant position of the FPG lacks adequate *external* checks and balances. Academics have proposed two options: either increase the scope of judicial review of the discretionary decisions of the FPG,[246] or create a requirement of judicial approval[247] if the FPG intends to stop a preliminary examination or an investigation.[248] The first option requires that someone triggers the judicial review by initiating the procedure to compel charges. This depends on a victim or criminal complainant who is willing to pursue the FPG in proceedings under Section 172 of the FCCP. The disadvantage of this procedure is that the victim may not have adequate legal advice regarding the procedure to compel charges. This scenario is avoided by option two, which would involve an automatic approval of the FPG by the judiciary, usually following a process of consultation and review.

The decision of the German legislature to create the principle of universality and to balance this with the broad discretion of the FPG has led to the situation where the question of impunity, a matter of substantive criminal law, has been transferred into the realm of the procedural. Hence the principal decision whether Germany exercises its competence over

[246] Cf. Kai Ambos, in *Münchener Kommentar zum Strafgesetzbuch*, vol. 8: Nebenstrafrecht III, Völkerstrafgesetzbuch, Section 1, paras. 32, 33; Singelnstein and Stolle, 2006, p. 122, see *supra* note 195; Kreicker, 2003, p. 438, see *supra* note 233.

[247] Cf. the analogous situation in FCCP, Sections 153(a) and 153(b) and ICC Statute, Article 53(3) lit/b.

[248] Kreß – Nationale Umsetzung, p. 523; Nils Geißler and Frank Selbmann, "Fünf Jahre VStGB - Eine kritische Bilanz", in *Humanitäres Völkerrecht*, 2007, vol. 20, no. 3, pp. 160 and 165. Cf. Kai Ambos, "International core crimes, universal jurisdiction, and § 153f of the FCCP", in *Criminal Law Forum*, 2007, vol. 18, no. 1, pp. 43 and 58, Section IV.

international crimes rests on the shoulders of the FPG. In this regard, Weßlau observed an "executive control of the prosecution activities in the sensitive area of international conflicts".[249]

Since German law currently provides only limited opportunities for judicial review, issues of quality control of preliminary examinations in Germany have to be mainly addressed by the FPG in form of *self-imposed* quality control measures.

6.6. Conclusion

German law does not explicitly govern preliminary examinations. In practice, the FPG conducts preliminary examinations, though for some situations so-called structural investigations have been formally opened. Regarding international crimes, the legislature provides the FPG with a structured discretion to suspend an investigation and even a trial until the judgment is issued. By inference, the FPG also has discretion to suspend a preliminary examination. The discretion to suspend an investigation and, by analogy, a preliminary examination is *not* subject to a procedure to compel charges due to a conscious omission by the German legislature. Thus, judicial review of the FPG's exercise of discretion is limited to two points: whether the FPG has noticed his discretion at all and whether he exercised his discretion in an arbitrary way.

The FPG exercises his discretion within the boundaries provided by the German legislature. Mere symbolic investigations are to be avoided and investigations into crime scenes abroad require the co-operation of domestic authorities which will be difficult to secure when requests for assistance target the citizens of the country from whom such assistance is sought (unless a regime change has changed political considerations).

In his decisions, the FPG advances at least two considerations which reflect conservative notions that neither reflect the guidance of the German legislature nor developments in international law. Decisions of the FPG should avoid considering that conducting preliminary examinations or investigation into international crimes would be at odds with the principle of 'non-intervention' into the internal affairs of States. The FPG should review its reluctance to engage in preventive judicial assistance.

The FPG's position regarding immunity is at present only partially clear. It is clear that the FPG respects the immunity of present and former

[249] Weßlau – Systematischer Kommentar, Section 153(f), para. 3.

presidents. Regarding former presidents, the FPG's approach disregards developments in international law that *no longer* grant such immunity. Further, in his first decision on Rumsfeld *et al.*, the FPG did not need to mention immunity of a sitting secretary of defence.

The practice shows that the litmus test for the FPG is whether a specific link to Germany exists.[250] All suspended preliminary examinations discussed here displayed no specific link to Germany in two aspects: the crime scenes were abroad and neither the perpetrator nor the victims were German citizens.

This practice of suspensions is largely in line with the law and has therefore become systematic. Due to the broad discretion afforded to the FPG, there are few reasons why the FPG should adjust this approach. However, enhanced quality control would make the exercise of this practice more transparent. Such enhanced quality control will promote discussion and awareness and lead to gradual improvements in preliminary examinations. This may eventually give rise to impetus for reform. Scholars suggest extending the scope of judicial review or introducing the requirement for judicial approval of decisions to suspend an investigation and, by analogy, a preliminary examination. This would add an independent element to the decision-making process and balance the position of the FPG by involving a judge. Doing so would require will of the legislature. The reform of the FCCP is a pending project of the Federal Ministry of Justice. This reform would provide the opportunity to define and codify preliminary examinations.

[250] Cf. *supra* notes 200 and 201.

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Quality Control in Preliminary Examination: Volume 1

Morten Bergsmo and Carsten Stahn (editors)

This is the first of two volumes entitled *Quality Control in Preliminary Examination*. They form part of a wider research project led by the Centre for International Law Research and Policy (CILRAP) on how we ensure the highest quality and cost-efficiency during the more fact-intensive phases of work on core international crimes. The 2013 volume *Quality Control in Fact-Finding* considers fact-finding outside the criminal justice system. An upcoming volume concerns quality control in criminal investigations. The present volume deals with 'preliminary examination', the phase when criminal justice seeks to determine whether there is a reasonable basis to proceed to full criminal investigation. The book does not specifically recommend that prosecutorial discretion in this phase should be further regulated, but that its exercise should be more vigilantly assessed. It promotes an awareness and culture of quality control, including freedom and motivation to challenge the quality of work.

Volumes 1 and 2 are organized in five parts. The present volume covers 'The Practice of Preliminary Examination: Realities and Constraints' and 'Case Studies or Situation Analysis', with chapters by the editors, Andrew T. Cayley, Runar Torgersen, Franklin D. Rosenblatt, Abraham Joseph, Matthias Neuner, Matilde E. Gawronski, Amitis Khojasteh, Marina Aksenova, Christian M. De Vos, Benson Chinedu Olugbuo, Iryna Marchuk, Thomas Obel Hansen, Rachel Kerr, Sharon Weill, Nino Tsereteli and Ali Emrah Bozbayindir, in that order, and with forewords by LIU Daqun and Martin Sørby.

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