

Universal Jurisdiction Cases in Germany: A Closer Look at the Poster Child of International Criminal Justice

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Abstract

Germany has become a poster child for universal jurisdiction cases. German domestic courts made international headlines for dealing with state-sponsored torture in Syria as well as slavery and genocide committed by the so-called Islamic State. In February 2021, in the first trial worldwide concerned with atrocities committed by the Assad regime, the Koblenz Higher Regional Court sentenced Eyad A. to four and a half years in prison for aiding and abetting crimes against humanity. In January 2022, the court sentenced his co-defendant, Anwar R., as an accomplice to crimes against humanity to life in prison. With these landmark judgments, Germany is at the forefront of a broader turn towards the more robust domestic enforcement of International Criminal Law (ICL) through universal jurisdiction trials. In this paper, we examine the two judgments and the trial preceding them. We ask whether Germany lives up to its poster child image and where the proceedings failed the expectations. Beyond questions concerning the domestic legal order, we discuss the trial's implications for ICL more broadly and draw lessons from it for future universal jurisdiction trials.

I. INTRODUCTION

On January 13, 2022, the world's first criminal trial for

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state-sponsored torture in Syria ended in the German city of Koblenz. Its Higher Regional Court sentenced a former Syrian intelligence officer, Anwar R., to life imprisonment for committing crimes against humanity as an accomplice.¹ The verdict against his original co-defendant, Eyad A., for aiding and abetting crimes against humanity was already handed down by the same court in February 2021.² This trial marks the first time Syrian officials have had to stand trial for crimes committed after the brutal crackdown on the Arab Spring protests in 2011. Not least because of this trial, Germany has become a poster child for the prosecution of international crimes at the domestic level and is at the forefront of a recent broader turn towards the more robust domestic enforcement of International Criminal Law (ICL) on the basis of universal jurisdiction.³

In this paper, we examine the two judgments of the Koblenz Court and the trial preceding them. We suggest that the trial can best be evaluated when distinguishing between two dimensions universal jurisdiction cases tend to embrace: an “ordinary” criminal law dimension and a transitional justice dimension. As to the first, we argue that German authorities have successfully shown their readiness to deal with an international criminal law case at the domestic level and that they have proven outstanding preparedness in dealing with such a case. The court managed to conduct most of the trial well and in accordance with the highest standards of the rule of law, despite its complexity. In contrast, our assessment concerning the trial’s second dimension is rather frustrating. We argue that the trial presented a series of failures when viewed from a transitional justice angle, especially in light of comprehensive truth-seeking and outreach. The selectivity of the charges, as well as the court’s refusal to translate the trial for the public into Arabic and to allow audio recordings caused irreparable and unnecessary damage not only to the Syrian population involved

1. *Life imprisonment due to crimes committed against humanity and murder - sentencing of a suspected member of the Syrian secret service*, OBERLANDESGERICHT KOBLENZ [Higher Regional Court of Koblenz] (Jan. 17, 2022), <https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/life-imprisonment-due-to-crimes-committed-against-humanity-and-murder-sentencing-of-a-suspected-me/>.

2. Ben Hubbard, *German Court Convicts Former Syrian Official of Crimes Against Humanity*, N.Y. TIMES (Feb. 24, 2021), <https://www.nytimes.com/2021/02/24/world/middleeast/germany-court-syria-war-crimes.html>.

3. Máximo Langer & Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction*, 30 EUR. J. INT'L L. 779, 787 (2019).

– be it in Germany or elsewhere – but also to future research and education. As a result, we argue, the trial fell short of what it could have achieved. In light of our reasoning’s contrasting results, we ask whether Germany lives up to its poster child image in the prosecution of international crimes. We discuss the trial’s implications for ICL more broadly and the lessons Germany and other jurisdictions can draw from it.

II. WHY GERMANY?

Ideally, crimes should be prosecuted where they occurred. Domestic legal systems are often best prepared to understand local customs, use the same language of those involved, and are more accessible for victims. As to Syria, however, it is unlikely that severe crimes committed in the context of the armed conflict will be investigated and prosecuted at the domestic level any time soon. The mechanism that first comes to mind in such situations where states are unwilling or unable to bring perpetrators to justice, is the International Criminal Court (ICC), established in 2002 by the Rome Statute.⁴ However, Syria is not a member of the ICC. Russia and China consistently blocked attempts at the UN-level to either refer the Syrian situation to the ICC pursuant to Art. 13(b) Rome Statute or to establish an ad hoc tribunal (as has been done for Rwanda or the former Yugoslavia in the 1990s).⁵ With no other legal venues available, third states’ national jurisdictions are currently the only option in the Syrian context to bring (war) criminals to justice.

It is here that the principle of universal jurisdiction comes into play. As last resort, it rests on the idea that certain crimes — genocide, crimes against humanity, and war crimes — are so serious that offenders can (and should) be tried in any jurisdiction in the world, despite the fact that criminal

4. Rome Statute of the International Criminal Court art. 10, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute], available at: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

5. Already in 2011, a large group of states drafted a resolution to refer the situation in Syria to the ICC and presented this draft before the UN Security Council in 2014. U.N.S.C. Draft Res., U.N. Doc. S/2014/348 (May 22, 2014). It was however vetoed by China and Russia. ALEXANDRE SKANDER GALAND, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects, and Limits*, in LEIDEN STUDIES ON THE FRONTIERS OF INTERNATIONAL LAW 5, 106 (Carsten Stahn et al. eds., Brill/ Nijhoff: 2019).

jurisdiction is generally limited to domestic affairs. The principle has existed for centuries and underpinned, for instance, the legal justification for the Nuremberg Trials, which prosecuted Nazi war criminals following World War II in Germany, as well as Israel's trial against Adolf Eichmann in 1961.⁶ Since the early 2000s, with the adoption of the Rome Statute, many states have started to incorporate universal jurisdiction in their national legislation – amongst them Germany.⁷

In 2002, Germany incorporated the Rome Statute into its domestic law by enacting the Code of Crimes against International Law (CCAIL).⁸ Section 1 CCAIL lays down that German courts may prosecute international core crimes even if the act was committed abroad and neither the victim nor the perpetrator are German citizens.⁹ While this version of “pure” universal jurisdiction is remarkably far-reaching in nature, the German legislator was careful enough to ensure that German authorities would not be flooded with investigations and prosecutions under the CCAIL by setting procedural boundaries.¹⁰ A procedural rule on prosecutorial discretion allows German prosecutors to refrain from investigating international core crimes if the suspect is not in Germany and his/her presence is not to be expected.¹¹ In principle, this rule is appropriate and necessary in view of the numerous armed conflicts and situations of mass violence worldwide. However, it also opens the door for arbitrary decisions. In 2007, for example,

6. Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT'L L.J. 358, 365–68 (2012).

7. U.N. Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction*, ¶ 59, U.N. Doc. A/75/151 (July 9, 2020).

8. Völkerstrafgesetzbuch [VStGB] [Code of Crimes against International Law] [CCAIL], June 26, 2022, BGBl 1 at 2254 (Ger.), <http://www.gesetze-im-internet.de/vstgb/VStGB.pdf> [hereinafter CCAIL].

9. CCAIL, *supra* note 8, at § 1. For a detailed analysis of the CCAIL in English, see OPEN SOC'Y JUST. INITIATIVE, *Universal Jurisdiction Law and Practice in Germany*, Briefing Paper, TRIAL INT'L (Mar. 2019) <https://www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-germany>.

10. See DEUTSCHER BUNDESTAG [GERMAN FEDERAL PARLIAMENT], ENTWURF EINES GESETZES ZUR EINFÜHRUNG DES VÖLKERSTRAFGESETZBUCHES [DRAFT LAW INTRODUCING THE CODE OF CRIMES AGAINST INTERNATIONAL LAW] 12, 14 (Mar. 13, 2002), <https://dserver.bundestag.de/btd/14/085/1408524.pdf>.

11. Strafprozessordnung [STPO] [Code of Criminal Procedure], § 153(f), para. 2, https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (Ger.); see also OPEN SOC'Y JUST. INITIATIVE, *supra* note 8, at 17–18 (discussing when German prosecutors have discretion to prosecute crime).

German prosecutors declined to commence an investigation against former US Defense Secretary Donald Rumsfeld and others for international crimes associated with the treatment of prisoners at Abu Ghraib in Iraq and Guantánamo Bay in Cuba.¹² This decision has received criticism for being politically motivated and a means to shield the German government from transatlantic disturbances.¹³

The body competent to lead criminal investigations concerning crimes under the CCAIL is the Federal Public Prosecutor General (*Generalbundesanwalt*, GBA).¹⁴ The Federal Criminal Police Office (*Bundeskriminalamt*) has been equipped with a specialized unit tasked with investigating international crimes under the guidance of the GBA in 2003 (*Zentralstelle für die Bekämpfung von Kriegsverbrechen*).¹⁵ This unit has become a leading war crimes unit for the investigation of international crimes at the domestic level in Europe.¹⁶

Even before an identified suspect is alleged to have committed crimes under the CCAIL, the Federal Public Prosecutor General can open so-called structural or background investigations (*Strukturermittlungsverfahren*).¹⁷ Currently, the Office of the GBA conducts such structural investigations for various conflict regions around the world. A particular focus lies on Syria. Already in 2011, the Office of the GBA initiated a structural investigation collecting information and evidence

12. Tom Gede, *Universal Jurisdiction: The German Case against Donald Rumsfeld*, 8 ENGAGE 41, 41 (2007).

13. See generally *The Rumsfeld Torture Cases*, ECCHR, <https://www.ecchr.eu/en/case/rumsfeld-torture-cases/> (last visited Mar. 6, 2022); Andreas Fischer-Lescano, *Torture in Abu Ghraib: The Complaint against Donald Rumsfeld under the German Code of Crimes against International Law*, 6 GER. L. J. 689, 724 (2005) (arguing that the decision not to investigate the alleged acts of torture was a serious mistake).

14. Gerichtsverfassungsgesetz [GVG] [Courts Constitution Act], May 9, 1975, BGBL I at 1077, §§ 142(a), 120, http://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html#p0722 (Ger.).

15. Bundeskriminalamt, *Central Unit for the Fight Against War Crimes and Further Offences Pursuant to the Code of Crimes Against International Law (ZBKV)*, BKA, https://www.bka.de/EN/OurTasks/Remit/CentralAgency/ZBKV/zbkv_node.html (last visited Mar. 6, 2022).

16. Benjamin Duerr, *International Crimes: Spotlight on Germany's War Crimes Unit*, JUST. INFO (Jan. 2019) <https://www.justiceinfo.net/en/39936-international-crimes-spotlight-on-germany-s-war-crimes-unit.html>.

17. Christian Ritscher, AKTUELLE ENTWICKLUNGEN IN DER STRAFVERFOLGUNG DES GENERALBUNDESANWALTS AUF DEM GEBIET DES VÖLKERSTRAFRECHTS 601 (2019), https://zis-online.com/dat/artikel/2019_12_1334.pdf.

arising from the uprising.¹⁸ Ever since, the Office has been conducting structural investigations into crimes directed against possible perpetrators on all sides of the conflict – namely the Syrian government, the so-called Islamic State, and other groups.¹⁹ The focus, however, lies on crimes allegedly committed by members of the Syrian regime.²⁰ This is also due to the fact that in early 2016, the Office of the GBA gained access to the so-called “Caesar-Files”, consisting of approx. 28,000 photographs a military photograph smuggled out of Syria.²¹ They document more than 6,000 corpses that bear marks of torture.²² Signs placed on them for administrative purposes associate them with a particular branch of the Syrian military or secret services.²³ Given the crucial information these photographs convey, they form an integral part of the GBA’s investigation strategy.²⁴

The information and evidence collected in the context of structural investigations may ultimately lead to person-specific investigations and eventually to trials in Germany. So far, person-specific investigations targeting members of the Assad regime have resulted in an arrest warrant against Jamil H. (former Head of Syria’s Air Force Intelligence Directorate) in 2018,²⁵ a conviction of Eyad A. in 2021 and Anwar R. in 2022 (see in detail below at III.), as well as the confirmation of charges and opening of the trial against Alaa M. (a Syrian doctor alleged to have committed crimes against humanity in two military hospitals) in 2022.²⁶

18. *Id.* at 543.

19. DER GENERALBUNDESANWALT BEIM BUNDESGERICHTSHOF [The Federal Public Prosecutor General], *Our Role: International Criminal Law*, retrieved from: <https://www.generalbundesanwalt.de/EN/Our-role/International-Criminal-Law/Voelkerstrafrecht-node.html> (last visited Jan. 20, 2022).

20. Ritscher, *supra* note 17.

21. DER GENERALBUNDESANWALT BEIM BUNDESGERICHTSHOF, *supra* note 19.

22. *Id.*

23. *If the Dead Could Speak: Mass Deaths and Torture in Syria’s Detention Facilities*, HUM. RTS. WATCH (Dec. 16, 2015), <https://www.hrw.org/report/2015/12/16/if-dead-could-speak/mass-deaths-and-torture-syrias-detention-facilities>.

24. Ritscher, *supra* note 17, at 544.

25. Bundesgerichtshof [Federal Court of Justice], Investigating Judge, Arrest Warrant of 6 June 2018, 4 BGs 106/18, 3 BJs 18/18-4. *See also Jamil Hassan*, TRIAL INT’L (Mar. 22, 2019), <https://trialinternational.org/latest-post/jamil-hassan/>.

26. Molly Quell, *Syrian Doctor Goes on Trial in Germany for Crimes Against Humanity*, COURTHOUSE NEWS SERV. (Jan. 19, 2022),

The fact that German authorities have obtained the “Caesar-Files” as part of their international criminal investigations is just one example indicating that they are not alone in their investigative efforts. In fact, they have been cooperating with many different governmental and non-governmental actors across Germany, Europe, and beyond. At the international level, the Office of the GBA has set up a joint investigation team for some Syrian cases with its French counterpart in Paris.²⁷ In addition, German authorities also cooperate with a number of supranational actors, in particular: the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in Syria (IIIM),²⁸ the UN Independent International Commission of Inquiry on Syria (UN CoI),²⁹ and the private investigation organization Commission for International Justice and Accountability (CIJA), that specializes in retrieving documents from Syria which can be used as evidence in (domestic) courts.³⁰ Last, but definitely not least, civil society actors have taken an important role in providing information relevant to international criminal investigations concerning Syria. As we will see in detail below, the information shared in this large network of actors has proven to be indispensable in order to unify and bundle cross-border investigations and to enhance universal jurisdiction cases in general and the Al-Khatib trial in particular.³¹

<https://www.courthousenews.com/syrian-doctor-goes-on-trial-in-germany-for-crimes-against-humanity/>.

27. Ritscher, *supra* note 17, at 543.

28. See MANDATE, INTERNATIONAL, IMPARTIAL, AND INDEPENDENT MECHANISM, <https://iiim.un.org/> (last visited Jan. 20, 2022).

29. See INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC, U.N. HUMAN RIGHTS COUNCIL, *About the Commission of Inquiry*, <https://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/AboutCoI.aspx> (last visited Jan. 20, 2022).

30. See COMMISSION FOR INT'L JUST. & ACCOUNTABILITY, <https://cijaonline.org/> (last visited Jan. 20, 2022).

31. Ritscher, *supra* note 17; Caroline Fehl, *The Partial Return of Universal Jurisdiction: Syrian Torturers on Trial in Germany*, GLOBALPOLICY, (May 12, 2020), <https://www.globalpolicyjournal.com/blog/12/05/2020/partial-return-universal-jurisdiction-syrian-torturers-trial-germany>.

III. THE AL-KHATIB TRIAL

A. THE TRIAL

These experienced and strong investigative structures were crucial to enable the Al-Khatib trial and bring it to a successful end. The two defendants, Eyad A. and Anwar R., arrived in Germany in 2018 and 2015 respectively.³² While still in Syria, they both worked for the Syrian General Intelligence Service; Anwar R. in a leading role until 2012, when he deserted, Eyad A. at a lower level until 2018.³³ The fact that they attracted the attention of German authorities was a combination of luck, the defendants' unwitting collaboration and the structured cooperation between the relevant authorities.

In the believe that they had no repercussions to fear, both defendants were open about their past in Syria's secret service. Anwar R. opened up to German police authorities when he sought their protection from Syrian agents, which he thought followed him in Berlin.³⁴ He further incriminated himself as a witness in another case.³⁵ Eyad A. told authorities about his own involvement in secret service operations in his asylum hearing.³⁶

32. *Justice or Forgiveness?: The Case of Anwar Raslan*, SYRIA JUST. & ACCOUNTABILITY CTR. (Feb. 27, 2019), <https://syriaaccountability.org/updates/2019/02/27/justice-or-forgiveness-the-case-of-anwar-raslan/>; *Inside the Raslan Trial: Al-Gharib Verdict in Detail*, SYRIA JUST. & ACCOUNTABILITY CTR. (Mar. 2021), <https://syriaaccountability.org/library/inside-the-raslan-trial-the-al-gharib-verdict-in-detail/>.

33. *Scratching the Surface: One Year into the Koblenz Trial*, 7, SYRIA JUST. & ACCOUNTABILITY CTR. (Apr. 2021), https://syriaaccountability.org/wp-content/uploads/Koblenz-Interim-Report_English_PUB-1.pdf.

34. Hannah El-Hitami, *They Felt Too Safe: How Two Syrian Agents Ended up on Trial in Germany*, JUST. INFO (May 4, 2020), <https://www.justiceinfo.net/en/44207-they-felt-too-safe-how-two-syrian-agents-ended-up-on-trial-in-germany.html>.

35. Graham-Harrison, *'My Goal is Justice for all Syrians': One Man's Journey from Jail to Witness for the Prosecution*, GUARDIAN (Dec. 12, 2020), <https://www.theguardian.com/world/2020/dec/12/my-goal-is-justice-for-all-syrians-one-mans-journey-from-jail-to-witness-for-the-prosecution>; see also *Witness or Suspect? The Trial of Anwar Raslan and Eyad Al Gharib*, SYRIA JUST. & ACCOUNTABILITY CTR. (July 30, 2020), <https://syriaaccountability.org/updates/2020/07/30/witness-or-suspect-the-trial-of-anwar-raslan-and-eyad-al-gharib/>.

36. Christoph Reuter & Hannah El-Hitami, *Case in Germany Raises Questions About how to Try Assad's Atrocities*, DER SPIEGEL (Jan. 12, 2022), <https://www.spiegel.de/international/world/witness-defendant-deserter-case-in-germany-raises-questions-about-how-to-try-assad-s-atrocities-a-43d2817e-d85b-4378-b158-0c5001c345eb>.

As part of their structural cooperation with federal investigators, the Federal Office for Migration and Refugees routinely asks asylum-seekers whether they have been a “witness to, victim of or perpetrator of genocide, war crimes or crimes against humanity” and forwards any relevant information to the Office of the GBA.³⁷ Eyad A.’s affirmative answer to that question prompted investigations into his involvement in these crimes.³⁸ When investigators questioned him as a witness in Anwar R.’s case, he provided more detail.³⁹ The Federal Court rendered large parts of that later statement inadmissible in the case against Eyad A., because investigators did not adequately inform him of his rights as an accused once there were sufficient reasons to suspect his involvement in the investigated crimes.⁴⁰ However, the Koblenz Court faced no such obstacle when admitting his statement to the asylum authority as evidence. That authority is under no such obligation as it does not investigate criminal cases. Hence, that statement became a key piece of evidence, without which his conviction would not have been likely.⁴¹

Once formally under investigation, the defendants ceased to cooperate. None of them spoke at the trial. Anwar R. only had his defense team read out two statements, one at the beginning, one at the end of the trial.⁴² Then, the abovementioned institutional cooperation was crucial to gather the necessary

37. *Id.*

38. *Id.*

39. Roger Lu Phillips, *A Drop in the Ocean: A Preliminary Assessment of the Koblenz Trial on Syrian Torture*, JUST SEC. (Apr. 22, 2021), <https://www.justsecurity.org/75849/a-drop-in-the-ocean-a-preliminary-assessment-of-the-koblenz-trial-on-syrian-torture/>.

40. BUNDESGERICHTSHOF [BGH] [Federal Court of Justice], June 6, 2019, StB 14/19 (Ger.), <https://openjur.de/u/2175656.html>; see also *Scratching the Surface: One Year into the Koblenz Trial*, *supra* note 33, at 15.

41. *Scratching the Surface: One Year into the Koblenz Trial*, *supra* note 33, at 14; see Roger Lu Phillips, *A Drop in the Ocean: A Preliminary Assessment of the Koblenz Trial on Syrian Torture*, JUST SEC. (Apr. 22, 2021), <https://www.justsecurity.org/75849/a-drop-in-the-ocean-a-preliminary-assessment-of-the-koblenz-trial-on-syrian-torture/>; see also *Trial Updates: First Trial Worldwide on Torture in Syria*, EUROPEAN CTR. FOR CONST. & HUM. RTS. (ECCHR), <https://www.echr.eu/en/case/trial-updates-first-trial-worldwide-on-torture-in-syria/> (last visited Jan. 28, 2022).

42. Hannah El-Hitami, *Syria: The Man in Raslan’s Shadows – Was he Just Following Orders?*, JUST. INFO (June 19, 2020), <https://www.justiceinfo.net/en/44638-syria-the-man-in-raslan-s-shadow-was-he-just-following-orders.html>; see also Hannah El-Hitami, *Defence: “Raslan did Whatever he Could to Help”*, JUST. INFO (Jan. 10, 2022), <https://www.justiceinfo.net/en/86236-defence-raslan-did-whatever-he-could-to-help.html>.

evidence. Civil society organizations in Germany connected investigators with witnesses and provided further information.⁴³ Investigation authorities of other European states enabled the German prosecutors to gather testimony from the dispersed Syrian diaspora.⁴⁴ Reports and dossiers from the UN CoI, IIM and CIJA gave background information that informed the investigation and trial.⁴⁵ CIJA provided further documents that would later become crucial, including written orders that linked the crimes committed to the highest levels of the Syrian government.⁴⁶

After months of these complex investigations spanning several countries, both defendants ended up at the Higher Regional Court in Koblenz, in whose district Eyad A. resided when authorities detained him.⁴⁷ The court opened trial on April 23, 2020.⁴⁸ The heart of the trial was the testimony of around 80 witnesses, amongst them many survivors and several former intelligence service employees.⁴⁹ A pathologist presented his analysis of the infamous “Caesar-photos”, proving that the corpses shown had been tortured, that the torture followed a pattern, and that the marks matched the torture methods

43. Emma Graham-Harrison, *My goal Is Justice for All Syrians’: One Man’s Journey from Jail to Witness for the Prosecution*, GUARDIAN (Dec. 12, 2020, 7:00 A.M.), <https://www.theguardian.com/world/2020/dec/12/my-goal-is-justice-for-all-syrians-one-mans-journey-from-jail-to-witness-for-the-prosecution>; Espen Stokke & Eric Wiebelhaus-Brahm, *Syrian Diaspora Mobilization for Prospective Transitional Justice in the Absence of Transition*, 21 J. HUM. RTS. (forthcoming 2022) (manuscript at 1), <https://www.tandfonline.com/doi/epub/10.1080/14754835.2021.2007365?needAccess=true>).

44. ECCHR, *supra* note 41, at Day 2.

45. Chantal Meloni & Maria Crippa, *State-Run Torture in Syria*, CRIM. JUST. NETWORK (May 7, 2020), <https://www.criminaljusticenetwork.eu/en/post/state-run-torture-in-syria-the-first-trial-worldwide-on-international-crimes-by-the-assad-regime-opens-before-german-courts>; *Koblenz Court Issues Verdict in the Case of Anwar Raslan*, COMM’N. FOR INT’L JUST. & ACCOUNTABILITY (Jan. 13, 2022), <https://cijaonline.org/news/koblenz-syria-verdict-anwar-raslan>; ECCHR, *supra* note 41, at Day 28.

46. ECCHR, *supra* note 41, at Day 43 and 44; Higher Regional Court Koblenz, Urteil vom 24. Feb. 2021 – 1 StE 3/21 (on file with the authors), at 97 f.

47. *Scratching the Surface: One Year into the Koblenz Trial*, *supra* note 33, at 7.

48. Lena Bjurström, *“For the First Time, Torture Committed by the Assad Regime Will Be Discussed in a Court”*, JUST. INFO (Apr. 23, 2020), <https://www.justiceinfo.net/en/44167-first-time-torture-assad-regime-discussed-in-court.html>.

49. ECCHR, *supra* note 41, at Day 22 and 23.

witnesses had described.⁵⁰ The head of CIJA testified to their methods and findings.⁵¹ The court introduced reports by the United Nations and questioned German police officers on how they used the findings of CIJA and several human rights organizations in their work.⁵² After 57 days, the court decided to separate Eyad A.'s case, reaching a verdict only a week later on February 24, 2021.⁵³ Anwar R.'s trial continued for another 50 trial days, concluding with day 110 on January 13, 2022.⁵⁴

B. THE JUDGMENT

The Koblenz Court determined that Eyad A. and Anwar R. worked for Branch 251 of the Syrian General Intelligence Service.⁵⁵ Eyad A. worked for subbranch 40 of that Branch under the command of a cousin of Syria's President Bashar Al-Assad, Hafez Makhlof.⁵⁶ That unit was tasked *inter alia* with arresting persons at demonstrations and transferring them to the Al-Khatib detention facility.⁵⁷ The judges held, that by participating in these actions, Eyad A. aided and abetted crimes against humanity of torture and deprivation of liberty.⁵⁸

50. *Id.* at Day 41 and 42; Hannah El-Hitami, *Syrian Torture Trial: The "Caesar" Files in Court for the First Time*, JUST. INFO (Nov. 12, 2020), <https://www.justiceinfo.net/en/45964-syrian-torture-trial-caesar-files-court-first-time.html>.

51. ECCHR, *supra* note 41, at Day 43 and 44.

52. ECCHR, *supra* note 41, at Day 28.

53. OBERLANDESGERICHT KOBLENZ, *Urteil gegen einen mutmaßlichen Mitarbeiter des syrischen Geheimdienstes wegen Beihilfe zu einem Verbrechen gegen die Menschlichkeit* (Feb. 24, 2021) <https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/urteil-gegen-einen-mutmasslichen-mitarbeiter-des-syrischen-geheimdienstes-wegen-beihilfe-zu-einem-ver/> (last visited Jan. 28, 2022); ECCHR, *supra* note 41, at Day 60.

54. OBERLANDESGERICHT KOBLENZ, *supra* note 1; *Inside the Raslan Trial #58: The Raslan Verdict in Detail*, SYRIA JUST. & ACCOUNTABILITY CTR. (Feb. 18, 2022), <https://syriaaccountability.org/updates/2022/01/27/inside-the-raslan-trial-the-raslan-verdict-in-detail/>.

55. *Inside the Raslan Trial #58: The Raslan Verdict in Detail*, *supra* note 54; *Scratching the Surface: One Year into the Koblenz Trial*, *supra* note 33, at 11, 16.

56. *Scratching the Surface: One Year into the Koblenz Trial*, *supra* note 33 at 11, 16.

57. *Inside the Raslan Trial #58: The Raslan Verdict in Detail*, *supra* note 54.

58. *Inside the Raslan Trial: Al-Gharib Verdict in Detail*, *supra* note 31; OBERLANDESGERICHT KOBLENZ [Higher Regional Court of Koblenz], Feb. 24, 2021, 1 StE 9/19, juris (Ger.) <https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/urteil-gegen-einen-mutmasslichen-mitar>

Concretely, they convicted him because he helped arrest at least 30 persons and transported them to the Al-Khatib detention center after the dispersal of a protest in the city of Douma.⁵⁹ He witnessed how those persons were already mistreated during the transport and knew and recklessly accepted what awaited them in the Al-Khatib detention center.⁶⁰

Anwar R. headed the interrogation unit of Branch 251, which was connected directly to the Al-Khatib prison.⁶¹ As so often when investigating persons in leading roles, the court could not prove that he himself tortured persons. But in keeping with the requirements for complicity under the German Criminal Code,⁶² it held that he and the persons immediately involved in the torturing acted pursuant to a plan they agreed upon and to whose implementation they all contributed decisively.⁶³ The court also held that Anwar R. fulfilled the *mens rea* requirement of complicity.⁶⁴ He knew of all relevant circumstances and at least recklessly accepted them. He had significant personal interest in the crimes, as they furthered his career. Had the regime fallen, he would have lost his position. Hence, he not only wanted to aid in the commission of the crimes, but also wanted to commit them as an accomplice.⁶⁵ For these reasons, the court found that Anwar R. committed, together with others, the crimes against humanity of killing, torture, serious unlawful detention, rape and sexual assault, as well as the national offenses of murder, causing grievous bodily harm, especially grievous rape and sexual assault, false imprisonment

beiter-des-syrischen-geheimdienstes-wegen-beihilfe-zu-einem-ver/.

59. *Inside the Raslan Trial: Al-Gharib Verdict in Detail*, *supra* note 31; OBERLANDESGERICHT KOBLENZ [Higher Regional Court of Koblenz], Feb. 24, 2021, 1 StE 9/19, juris (Ger.) <https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/urteil-gegen-einen-mutmasslichen-mitarbeiter-des-syrischen-geheimdienstes-wegen-beihilfe-zu-einem-ver/>.

60. *Inside the Raslan Trial: Al-Gharib Verdict in Detail*, *supra* note 31; OBERLANDESGERICHT KOBLENZ [Higher Regional Court of Koblenz], Feb. 24, 2021, 1 StE 9/19, juris (Ger.) <https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/urteil-gegen-einen-mutmasslichen-mitarbeiter-des-syrischen-geheimdienstes-wegen-beihilfe-zu-einem-ver/>.

61. See *Inside the Raslan Trial #58: The Raslan Verdict in Detail*, *supra* note 54.

62. See Strafgesetzbuch [StGB] [Penal Code], § 25 II, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0162 (Ger.).

63. See *Inside the Raslan Trial #58: The Raslan Verdict in Detail*, *supra* note 54.

64. See *id.*

65. *Id.* at 16.

lasting one week, the taking of hostages, and sexual abuse.⁶⁶

The significance of the judgment lies not so much in these determinations, however. The central role Anwar R. occupied within the intelligence service and the context element of crimes against humanity—requiring a systematic or widespread attack against the civilian population—allowed the Koblenz Court to make determinations that can attain relevance well beyond the case at hand.

Concerning the context element, the Court determined that the Assad regime conducted a widespread and systematic attack against the opposition since at least the end of April 2011. Its main drivers were the Syrian military forces, paramilitary forces, and the intelligence services. The court established a chain of command extending from the ground directly to the Central Crisis Management Cell (CCMC).⁶⁷ This entity comprised of several high-ranking Syrian officials was directly subordinate to Bashar Al-Assad.⁶⁸ With these determinations, the Court laid the groundwork for further cases concerning crimes against humanity committed by members of the Syrian military, paramilitary forces, and intelligence services since the end of April 2011.⁶⁹ It also showed that such crimes can be traced back through the chain of command up to the highest levels of the Syrian government, potentially including Bashar Al-Assad himself. With that, charges against these individuals on the basis of command responsibility seem possible, although it was of course not the Court's job to verify individual criminal guilt of members of the CCMC or Al-Assad beyond a reasonable doubt.

Regarding the Al-Khatib prison itself, the prosecution was

66. OBERLANDESGERICHT KOBLENZ, *supra* note 1; *see also Inside the Raslan Trial #58: The Raslan Verdict in Detail*, *supra* note 54, at 1–2.

67. The press release of the Higher Regional Court of Koblenz uses the name “Central Crisis Management Office” instead of “Central Crisis Management Cell”. With that it differs from the judgment against Eyad A. and the oral reasoning by Judge Kerber of the judgment against Anwar R. Therefore, we use the term “Central Crisis Management Cell”.

68. OBERLANDESGERICHT KOBLENZ, *supra* note 1; OBERLANDESGERICHT KOBLENZ, *supra* note 51; OBERLANDESGERICHT KOBLENZ [Higher Regional Court Koblenz], Urteil vom 24. Februar 2021 – 1 StE 3/21, at 98.

69. *See, e.g., German Authorities Issue Arrest Warrant Against Jamil Hassan, Head of the Syrian Air Force Intelligence*, ECCHR, <https://www.ecchr.eu/en/case/german-authorities-issue-arrest-warrant-against-jamil-hassan-head-of-the-syrian-air-force-intelligence/> (last visited July 1, 2022). The Air Force Intelligence Directorate is a crucial secret service and Jamil Hassan was a member of the CCMC. OBERLANDESGERICHT KOBLENZ, *supra* note 68. Hence, the determinations regarding the context element could become directly relevant to that case.

able to establish the inhuman conditions and brutal interrogation methods beyond a reasonable doubt.⁷⁰ To name but a few examples, prisoners were detained in severely overcrowded cells with scarce food, no fresh air, and without daylight.⁷¹ They had to endure the constant screaming of their fellow inmates during interrogations.⁷² These interrogations included electroshocks, severe beatings, sexualized violence and other torture methods.⁷³ At least 27 inmates died as a result.⁷⁴

The Court denied both defendants' reliance on the superior orders defense.⁷⁵ Such a defense is not codified expressly in the German Criminal Code but falls under the general defense of necessity as justification.⁷⁶ The defendants argued that fears about their and their family's safety kept them in place.⁷⁷ The Court denied that argument on two grounds. First, it held that in light of the gravity of the crimes committed, it could have reasonably been expected from the defendants to take personal risks to evade the commission of the crimes.⁷⁸ Second, it determined that both defendants could have deserted earlier than they did.⁷⁹ It also pointed out that Eyad A. seemingly did not devise a strategy to avoid detaining and transferring protesters.⁸⁰

From an international law perspective, it is of utmost importance that the Court found that the defendants could not rely on functional immunity even though they acted within their official capacity.⁸¹ With that, the judges underlined the general

70. OBERLANDESGERICHT KOBLENZ, *supra* note 1; OBERLANDESGERICHT KOBLENZ, *supra* 51.

71. OBERLANDESGERICHT KOBLENZ, *supra* note 1; OBERLANDESGERICHT KOBLENZ, *supra* 51.

72. OBERLANDESGERICHT KOBLENZ, *supra* note 1; OBERLANDESGERICHT KOBLENZ, *supra* 51.

73. OBERLANDESGERICHT KOBLENZ, *supra* note 1; OBERLANDESGERICHT KOBLENZ, *supra* 51.

74. OBERLANDESGERICHT KOBLENZ, *supra* note 1.

75. OBERLANDESGERICHT KOBLENZ, *supra* note 1; OBERLANDESGERICHT KOBLENZ, *supra* 51.

76. Strafgesetzbuch [StGB] [PENAL CODE], § 34, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (Ger.).

77. OBERLANDESGERICHT KOBLENZ, *supra* note 1; OBERLANDESGERICHT KOBLENZ, *supra* 51.

78. OBERLANDESGERICHT KOBLENZ, *supra* note 1; OBERLANDESGERICHT KOBLENZ, *supra* 51.

79. OBERLANDESGERICHT KOBLENZ, *supra* note 1; OBERLANDESGERICHT KOBLENZ, *supra* 51.

80. OBERLANDESGERICHT KOBLENZ, *supra* note 51.

81. OBERLANDESGERICHT KOBLENZ, *supra* note 68, at 190. The mere fact

position of the German judiciary, following a precedent established by the German Federal Court in 2021.⁸² The Koblenz Court unequivocally rebuked any attempts to undermine the customary exception to functional immunity for international crimes. Given that that exception came under fire recently during the proceedings at the International Law Commission on the topic,⁸³ the Koblenz judgment is an important instance of state practice in the defense of the legal status quo, the change of which would make most universal jurisdiction trials impossible.⁸⁴

IV. LESSONS

The Al-Khatib trial was more than just a criminal trial. If it were otherwise, international media and scholarship would not have hailed it as historic and a milestone. It was the first trial dealing with crimes the Syrian government committed as part of its oppression of the opposition since 2011.⁸⁵ With that, as we show below, the trial attained a political and historical significance beyond the question of individual responsibility and guilt. This does not make the Al-Khatib trial unique. Many universal jurisdiction trials have a political and historical dimension in addition to the “ordinary” criminal justice

that the court sentenced them shows that it relied on an exception to functional immunity, as Section 20(2) of the German Courts Constitution Act would have otherwise prevented the court from exercising jurisdiction. See *Gerichtsverfassungsgesetz [GVG] [Courts Constitution Act]*, May 9, 1975, BGBL I at 1077, § 20(2) (Ger.).

82. See Claus Kreß, *On Functional Immunity of Foreign Officials and Crimes Under International Law: The Jan. 28, 2021 Judgment of Germany’s Federal Court of Justice*, JUST SEC. (Mar. 31, 2021), <https://www.justsecurity.org/75596/on-functional-immunity-of-foreign-officials-and-crimes-under-international-law/>; BUNDESGERICHTSHOF [BGH] [Federal Court of Justice] Jan. 28, 2021, 3 StR 564/19, https://www.justsecurity.org/wp-content/uploads/2021/03/german-federal-court-of-justice-functional-immunity-war-crimes-cases-2021-3_str_564-19a.pdf.

83. See generally Dire Tladi, *The International Law Commission’s Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?*, 32 LEIDEN J. INT’L L. 169, 184 (2019) (discussing criticism of the Draft Article and whether there is any state practice in support of the ILC’s position).

84. For an overview of the debate and the current status quo, see Claus Kreß, *Article 98*, in *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* (Kai Ambos ed., 4th ed. 2022).

85. Brigitte Herremans & Tine Destrooper, *Stirring the Justice Imagination: Countering the Invisibilization and Erasure of Syrian Victims’ Justice Narratives*, 15 INT’L J. TRANSITIONAL JUST. 1, 10 (2021).

dimension inherent to criminal trials.⁸⁶ To a degree, international crimes even presuppose the first dimension, as they require that the individual criminal act under scrutiny be embedded in a larger context of more systemic injustice. This does not make the interaction between the two dimensions conflict-free. On the contrary, they work according to very different and often conflicting logics.

The second dimension can be termed the transitional justice dimension of universal jurisdiction trials. Under that dimension, they serve “to come to terms with a legacy of large-scale abuses.”⁸⁷ Several parties of the Al-Khatib trial and Syrian civil society subscribed to that fact.⁸⁸ Likewise, the former German ministers for justice and foreign affairs hinted at it by affirming the historic and symbolic significance of the trial.⁸⁹ Members of the team of the GBA highlighted the contribution of criminal trials generally to peace and stability.⁹⁰ Lastly, a transitional justice dimension is also recognized for proceedings before

86. The use of universal jurisdiction in the context of transitional justice showcases that dimension. For further information, see Juan E. Méndez, *National Reconciliation, Transnational Justice, and the International Criminal Court*, 15 ETHICS & INT'L AFF. 25, 32 (2001); Jessica Doumit, *Accountability in a Time of War: Universal Jurisdiction and the Strive for Justice in Syria*, 52 GEO. J. INT'L L. 263, 283 (2020).

87. U.N. Secretary General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, at 2 (Mar. 2010), https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf.

88. Joint Plaintiff Nouran Alghamian said that the verdict “will affect the future not only of Syria, but also society as a whole.” ECCHR, *supra* note 41, at Day 105 (statement of Noura Alghamian on Day 105 of the al-Khatib trial). Joint Plaintiff Ruham Hawash noted that “[T]his verdict must be an urgent call to the German government and all governments around the world to take real action to save those still held in the regime’s dungeons and in its big prison called ‘Assad’s Syria.’” *Id.* (statement of Ruham Hawash on Day 105 of the al-Khatib trial); see also Anwar al-Bunni, *Breaking New Ground: Transitional Justice in Syria*, SYRIAN CTR. FOR LEGAL STUDIES & RESEARCH (Nov. 24, 2020), <https://sl-center.org/language/en/archives/1580>. The representative of two joint plaintiffs, Patrick Kroker, highlighted the truth-seeking dimension of the trial. *In Germany, Syrians Take Their Torturers to Court*, ARAB NEWS (Apr. 20, 2020), <https://www.arabnews.com/node/1662221/middle-east> (“This is not about revenge, it is about exposing the truth.”).

89. Jonas von Schreijäg, *Folterprozess: Wie ein Gericht Berichterstattung Erschwert*, NORDDEUTSCHER RUNDFUNK (Nov. 18, 2020), <https://www.ndr.de/fernsehen/sendungen/zapp/Folterprozess-Wie-ein-Gericht-Berichterstattung-erschwert,folterprozess108.html>; Heiko Maas (@ HeikoMaas), TWITTER (Feb. 24, 2021, 7:08 AM), <https://twitter.com/heikomaas/status/1364562951697498114>.

90. Peter Frank & Holger Scheidner-Glockzin, *Terrorismus und Völkerstrafaten im Bewaffneten Konflikt*, 38 NEUE ZEITSCHRIFT FÜR STRAFRECHT (NSStZ) 1, 7 (2017).

international criminal tribunals.⁹¹

Of course, the two dimensions are not neatly separated. Many aspects of criminal trials play into both of them. Still, when allowing for a bit of over-simplification, the Al-Khatib trial fared relatively well as a regular criminal trial but failed on the transitional justice dimension.

A. A SUCCESSFUL CRIMINAL TRIAL

The Al-Khatib trial has shown that German investigators and prosecutors are able to conduct sophisticated investigations and deal with complex evidence of international crimes; the GBA's structural investigations have proven to work well. This success is particularly owed to Germany's extensive universal jurisdiction laws, experienced investigative structures, international cooperation, and support from both German and Syrian civil society. The Koblenz Court must be commended for handling a trial of such enormous proportions with the rigor necessary to provide a trial of the highest standards. Without diminishing these accomplishments, it should still be mentioned that the Al-Khatib trial profited significantly from the defendants' self-incrimination. After all, this rather random factor was indispensable for the success of the trial.⁹² Taking all of that together, the Al-Khatib trial has proven to be a fair trial that has surely contributed to bolstering future universal jurisdiction cases.⁹³

The only stronger point of critique in the context of the criminal justice dimension is the issue of witness protection. The court displayed little ability to protect survivors, both from external threats and the psychological distress that resulted from reliving their sometimes-traumatic experiences in court.

Several survivors reported that they were intimidated, often through social media. Many received threats concerning their safety or the safety of their families still residing in Syria or in

91. See James Gallen, *The International Criminal Court: In the Interests of Transitional Justice*, in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 313–14 (Lawther et al. eds., 2017); U.N. Secretary General, *supra* note 87, at 8.

92. See *Scratching the Surface: One Year into the Koblenz Trial*, *supra* note 33, at 14 (concerning Eyad al-Gharib's self-incriminating statements).

93. See Hannah El-Hitami, *Anwar Raslan's Conviction: "The Beginning of a Wider Struggle"*, JUST. INFO (Jan. 20, 2022), <https://www.justiceinfo.net/en/86775-anwar-raslan-conviction-beginning-wider-struggle.html>.

other countries outside Germany.⁹⁴ Given its lack of jurisdiction over foreign territory, the Court had few means at its disposal to protect them. It allowed some witnesses to testify anonymously, especially former employees of Syrian secret services.⁹⁵ In practice, this meant that their names appeared neither in court files nor during the proceedings. They appeared in disguise in the courtroom, albeit without their voices being distorted. As an exemption to witnesses' obligation to testify, they could refuse to answer any question that could have exposed their identity.⁹⁶ There would have been few other measures at the disposal of the Court. German courts can, for example, remove spectators from the courtroom when especially vulnerable witnesses testify.⁹⁷

Yet, as such measures limit the rights of the accused and interfere with fundamental principles of criminal procedure, such as its publicity, they increase the risk of a successful appeal. Also, they reduce the evidentiary value of the testimony. For example, it was often impossible to have such witnesses put on record how they knew the details about the intelligence services' work and structure, as that would have risked their exposure.⁹⁸ Understandably, the Court only used these measures sparingly. Most witnesses had to testify out in the open. Some changed their testimony vis-à-vis the one they had previously given to investigators. This obvious result of intimidation made their testimony worthless.⁹⁹

While the Court thus had limited possibilities to protect witnesses, the way it handled the issue showcases a more structural shortcoming of the German legal system. Judges take

94. Hannah El-Hitami, *Syrian Torture Trial in Germany: Insiders Without Protection*, JUST. INFO (July 27, 2020), <https://www.justiceinfo.net/en/44982-syrian-torture-trial-in-germany-insiders-without-protection.html>; *Inside the Raslan Trial #58: The Raslan Verdict in Detail*, *supra* note 54, at 2.

95. El-Hitami, *supra* note 94.

96. *Id.*

97. GVG, *supra* note 81, § 171(b).

98. The Court reserved days 22 and 23 of the Al-Khatib trial for the examination of a special witness, whose identity was kept secret. ECCHR, *supra* note 41 ("Neither the judges nor the parties to the trial knew his name. Disguised with a wig and a fake beard, he did not enter the courtroom via the witness waiting room as usual. Instead, he was led through the door normally only used by the accused. The witness' whereabouts during breaks was kept secret. In response to questions that might have revealed his identity, his lawyer answered, 'We will not disclose that information.' All this was necessary because, according to his lawyer, disclosing the witness' identity would severely endanger his family.').

99. El-Hitami, *supra* note 94.

decisions about witness protection on a case-by-case basis. In contrast to the ICC,¹⁰⁰ for example, there is no professional risk assessment for each witness embedded in the process.¹⁰¹ German courts neither have the means nor the personnel for such procedures. The result was what an observer described as a “clumsy” approach to witness protection.¹⁰² At times, the Court seemed to learn about threats against witnesses in real time during their testimony.¹⁰³ Names of protected witnesses were leaked to the press.¹⁰⁴ Under these circumstances, the Court was lucky that most witnesses did not succumb to the risks. The success of the trial is thus also owed to their bravery.

While comprehensive witness protection was beyond the ability of the Court, the parties to the proceedings could have done more to protect witnesses’ psychological well-being. As was foreseeable, reliving their trauma was hard for many persons who testified. More than once, the Court had to interrupt proceedings to give witnesses a break and to allow them to recompose themselves.¹⁰⁵ Regardless, neither the Court nor other parties provided psychological support. Of course,

100. For an overview of protective measures at the ICC, see Rome Statute art. 68; Silvana Arbia, *The International Criminal Court: Witness and Victim Protection and Support, Legal Aid and Family Visits*, 36 COMMONWEALTH L. BULL. 519, 522 (2010); see generally Markus Eikel, *Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice*, 23 CRIM. L. F. 97 (2012) (detailing the legal framework of witness protection at the ICC and the established practices in the field). Of course, witness protection at the ICC is far from perfect. It had its own disastrous failings, see e.g., *International Criminal Court, Full Statement of the Prosecutor, Fatou Bensouda, on External Expert Review and Lessons Drawn From the Kenya Situation*, ICC (Nov. 26, 2019), <https://www.icc-cpi.int/itemsDocuments/261119-otp-statement-kenya-eng.pdf>. Still, its systematic approach including a professional risk assessment is far more advanced than what German courts are currently doing.

101. Measures are left at the courts’ discretion. For an overview over the measures and approaches to witness protection see Sarah Finin, FIDH, ECCHR & REDRESS, *Breaking Down Barriers – Access to Justice in Europe for Victims of International Crimes* 72 (Sept. 2020).

102. Phillips, *supra* note 39.

103. Phillips, *supra* note 39.

104. Mais Masadeh, *One Court at a Time: Challenges of Universal Jurisdiction and Enhancing International Justice*, VÖLKERRECHTSBLOG (Jan. 24, 2022), <https://voelkerrechtsblog.org/one-court-at-a-time-challenges-of-universal-jurisdiction-and-enhancing-international-justice/>; *Inside the Raslan Trial #58: The Raslan Verdict in Detail*, *supra* note 54; see also Phillips, *supra* note 39.

105. *Trial Updates: First Trial Worldwide on Torture in Syria*, *supra* note 41.

institutions and individuals that offer such support exist.¹⁰⁶ They could have been involved in the proceedings either on a voluntary basis or pursuant to the German Code of Criminal Procedure. The Code allows courts to appoint psychological assistance for witnesses who survived grave crimes.¹⁰⁷ Strikingly, the enumeration of grave crimes allowing the appointment of psychological assistance does not comprise international core crimes.¹⁰⁸ This is an incomprehensible omission on part of the German legislator. The Court could have worked around that, since the defendants were also charged with crimes in accordance with the national German Criminal Code for which psychological assistance would have been available.¹⁰⁹ Thus, the lack of concern for witnesses' psychological well-being was partially the responsibility of the Court. But it also laid bare an incomprehensible gap in the German legal framework and showcased the need to approach witness protection in both a physical and psychological sense systematically instead of leaving it to the ad hoc decision of a court not trained in these respects.

Despite these severe problems in protecting witnesses, the trial was overall a great success when viewed as a criminal trial. It was conducted to the highest standards and produced well-reasoned, legally sophisticated judgments. Both the investigation authorities and the Court must be commended for that significant achievement. When viewed from a transitional justice dimension, however, the picture differs starkly.

B. FAILURES FROM A TRANSITIONAL JUSTICE PERSPECTIVE

Under the transitional justice dimension of universal jurisdiction trials, it is of utmost importance to establish a comprehensive truth and make it available to the society affected – be it the diaspora or within the state concerned.¹¹⁰ Of

106. See, e.g., WEISSER RING, <https://weisser-ring.de/english> (last visited Mar. 16, 2022). Weisser Ring is the largest German organization to that effect. See also ONLINE DATENBANK FÜR BETROFFENE VON STRAFTATEN, odabs.org/en/index.html (last visited Mar. 16, 2022) for a database of similar organizations.

107. Code of Criminal Procedure, *supra* note 11, § 406g.

108. *Id.* § 406g(3).

109. OBERLANDESGERICHT KOBLENZ, *supra* note 1.

110. RUTI G. TEITEL, TRANSITIONAL JUSTICE 69 (2000); Huhle, *Transitional Justice*, in ELGAR ENCYCLOPEDIA OF HUMAN RIGHTS ¶ 13f (Binder et al. eds., Online Edition 2022). In transitional justice processes, this task is mostly left

course, universal jurisdiction trials are far from an ideal tool when viewed from a transitional justice perspective. Their remoteness from the society concerned limits the effects they can have. This remoteness is not only geographical, but often also concerns cultural and language barriers. It is compounded by the fact that not the society concerned drives the process – although members can be heavily involved – but a foreign justice system.¹¹¹ Lastly, criminal trials can only establish a limited version of the truth about systemic injustices, as they must view it through an individualistic lens, focusing on the person(s) at trial.¹¹²

Universal jurisdiction trials compound that shortcoming, as the selection of defendants is often limited. In national cases, prosecutors can select defendants in a way that allows them to establish a comprehensive truth of the injustice at trial. For example, prosecutors in the German Auschwitz trial in the 1960s, especially the famous Attorney General of the Province of Hesse, Fritz Bauer, selected defendants from most hierarchy levels of the concentration camp in order to capture its entire functioning.¹¹³ In universal jurisdiction cases, however, prosecutors have no access to suspects in the State concerned. They have to charge those who left the country. Like Anwar R. and Eyad A., these tend to be people who turned their back on the regime and deserted.¹¹⁴ Like Eyad A., they often are of lower rank.¹¹⁵ These limitations clearly influence which fragments of truth universal jurisdiction trials can establish after all. What is more, they also perpetuate neo-colonial structures in

to truth commissions. On the importance of truth-finding specifically through commissions see PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS 19–26 (2nd ed. 2011); OHCHR, Rule of Law Tools for Post-Conflict States: Truth Commissions, at 1, U.N. Doc. HR/PUB/06/1 (2006).

111. Mark A. Drumbl, *Juridical and Jurisdictional Disconnects*, 12 FINNISH Y.B. INT'L L. 119, 135 (2001); CHANDRA LEKHA SRIRAM, GLOBALIZING JUSTICE FOR MASS ATROCITIES: A REVOLUTION IN ACCOUNTABILITY 53 (2005).

112. Huhle, *supra* note 110, at ¶ 21.

113. See Ronen Steinke, *A Means to an End: How Fritz Bauer Used the Courtroom for a Reckoning with the German Past*, VÖLKERRECHTSBLOG (Dec. 13, 2021), <https://voelkerrechtsblog.org/a-means-to-an-end-how-fritz-bauer-used-the-courtroom-for-a-reckoning-with-the-german-past/>; DEVIN O. PENDAS, THE FRANKFURT AUSCHWITZ TRIAL, 1963-1965: GENOCIDE, HISTORY, AND THE LIMITS OF THE LAW 46 (2006); see also Rebecca Elizabeth Wittmann, *The Wheels of Justice Turn Slowly: The Pretrial Investigations of the Frankfurt Auschwitz Trial 1963-1965*, 35(3) CENT. EUR. HIST. 345, 361–62 (2002).

114. See *Scratching the Surface: One Year into the Koblenz Trial*, *supra* note 33.

115. *Id.* at 15.

international law and narratives about conflict. Once again, courts of the Global North act as “saviors” that rescue victims from “savages”, both from the Global South.¹¹⁶ The role of the Global North as a facilitator, profiteer and party of conflict rarely forms part of the narrative of universal jurisdiction cases.¹¹⁷ Nevertheless, as set out above, universal jurisdiction trials are, at the moment, all there is on offer to deal with the systematic injustice the Assad regime committed. Thus, the shortcomings concerning the transitional justice dimension should not lead to ignorance of that dimension. On the contrary, authorities should increase efforts to live up to it as well as possible within the necessarily inadequate framework of universal jurisdiction trials.

In the Al-Khatib trial, the main shortcomings related to the transitional justice dimension concerned the establishment of a comprehensive truth and the access of stakeholders to that truth. The former was limited by the selection of charges. The latter was obstructed by the failure to provide translation and audio recordings.

1. Selective Charging

The prosecutor’s selective choice of charges hampered a comprehensive investigation and prosecution of the crimes committed. The indictment initially did not prosecute sexual assault and rape as crimes against humanity (pursuant to section 7 (1) No. 6 CCAIL), but as domestic crimes (pursuant to section 177 of the German criminal code in an older version that was in place at the time of the commission of the crimes).¹¹⁸

116. Cf. Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201 (2001) (arguing that the main authors of the human rights discourse, including, among others, Western states, have constructed a narrative that pits savages on one side and victims and saviors on the other).

117. Thamil Ananthavinayagan, *A Tale of German Global Criminal Justice: A TWAIL Perspective on the Syrian Torture Trial*, JUST SEC. (June 30, 2020), <https://www.justsecurity.org/70986/a-tale-of-german-global-criminal-justice-a-twail-perspective-on-the-syrian-torture-trial/>; see Drumbl, *supra* note 111, at 132. Further, for a notable exception that confirms the rule see Madeline Young, *Lafarge’s Case Cemented: Holding Corporations Liable for Crimes Against Humanity*, 36 EMORY INT’L L. REV. RECENT DEV. 1 (2021).

118. DER GENERALBUNDESANWALT BEIM BUNDESGERICHTSHOF [Federal Public Prosecutor General], *Anklage Gegen Zwei Mutmaßliche Mitarbeiter des Syrischen Geheimdienstes Wegen der Begehung von Verbrechen Gegen die Menschlichkeit U.A. Erhoben* [Indictment Filed Against Two Alleged Syrian

Thus, the General Federal Prosecutor's Office classified these acts as detached and isolated from the systematic attack against the Syrian civil society – contrary to international findings.¹¹⁹ As a result, crimes of sexualized violence were the only category of crimes that were characterized in the indictment as isolated criminal acts not qualifying as an international crime.¹²⁰ It was only at the request of the joint plaintiffs that the court authorized sexualized violence to be examined as a crime under international law by means of a legal reference (pursuant to Section 265 (1) of the German Code of Criminal Procedure).¹²¹

It is to be welcomed that the Court has ultimately corrected the initial mischaracterization of these charges. Yet, it is important to stress that the lack of properly understanding, investigating, and prosecuting sexualized and gender-based violence does not seem to be accidental. In fact, in light of other international criminal cases pending before German courts, it is possible to identify a pattern showing a lack of attention with regard to these particular crimes. This seemingly systemic grievance did not only become apparent in the Koblenz trial, but also in the arrest warrant issued against Jamil H.¹²² In addition, it became apparent in another universal jurisdiction case before the Higher Regional Court Frankfurt am Main concerning genocide committed by former ISIS-fighter Taha Al J. against the Yazidis in Iraq.¹²³ In all of these cases, acts of sexualized

Intelligence Agents for Committing Crimes Against Humanity], (Oct. 29, 2019), <https://www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/DE/2019/Pressemitteilung-vom-29-10-2019.html> (Ger.).

119. See, e.g., U.N. Hum. Rts. Council, "I lost my dignity": Sexual and Gender-based Violence in the Syrian Arab Republic, Conference room paper of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/37/CRP.3 (Mar. 8, 2018).

120. Silke Studzinsky & Alexandra Lily Kather, *Will Universal Jurisdiction Advance Accountability for Sexualized and Gender-Based Crimes? A View from Within on Progress and Challenges in Germany*, 22 GERMAN L.J. 894, 910 (2021).

121. *Al-Khatib Trial in Koblenz: Sexual Violence now Indicted as Crimes Against Humanity*, ECCHR (Mar. 17, 2021), <https://www.ecchr.eu/en/press-release/syrien-prozess-in-koblenz/>.

122. Susann Aboueldahab, *Sexualisierte Kriegsgewalt vor deutschen Gerichten [Conflict-related Sexualized Violence before German Courts]*, LEGAL TRIB. ONLINE (June 19, 2020), <https://www.lto.de/recht/justiz/j/gba-bundesanwalt-syrien-haftbefehl-geheimdienst-sexualisierte-kriegsgewalt-voelkerstrafrecht/>.

123. Alexandra Lily Kather & Alexander Schwarz, *First Yazidi Genocide Trial Commences in Germany*, JUST SEC. (Apr. 23, 2020), <https://www.justsecurity.org/69833/first-yazidi-genocide-trial-commences-in-germany/>; Hannah El-Hitami, *The Yazidi Trial in Germany: How to Prove*

and/or gender-based violence were either mischaracterized, charged as domestic instead of international crimes or entirely excluded from the charges.¹²⁴

Despite the fact that sexualized violence differs from gender-based violence in that the former refers to crimes with a sexual component (such as rape or sexual slavery) while the latter describes crimes which are inflicted on persons because of their gender (such as forced marriage or slavery of women and girls), both categories share the misfortune of being frequently overlooked by the international criminal justice system – be it at the international or at the domestic level.¹²⁵ As with any other international crime, it is indispensable to investigate and prosecute them from the very beginning as what they are in order to fully recognize the harm caused and the context in which they were committed. For universal jurisdiction cases in Germany, this warrants first and foremost the proper application of the CCAIL.¹²⁶ In light of the failures of the German General Federal Prosecutor's Office concerning sexualized and gender-based violence in the past, it is worth noting that the Office has already acknowledged their lack of experience with the investigation of these crimes.¹²⁷ It remains to be seen what the consequence of this will be in future universal jurisdiction cases.

Genocide in a Single Case?, JUST. INFO (Oct. 29, 2020), <https://www.justiceinfo.net/en/45808-yazidi-trial-germany-prove-genocide-single-case.html>.

124. *Scratching the Surface: One Year into the Koblenz Trial*, *supra* note 33, at 9; Hannah El-Hitami, *Syrian and Yazidi Trials: Why Victims' Lawyers Want Sexual Violence Considered*, JUST. INFO (Feb. 5, 2021), <https://www.justiceinfo.net/en/73307-syrian-and-yazidi-trials-sexual-violence.html>; Victims Rights, Interview: Alexandra Lily Kather, VICTIMS RTS. INT'L J., <https://www.victimsrightsinternationaljournal.org/post/interview-alexandra-lily-kather> (last visited Mar. 18, 2022).

125. See, e.g., ROSEMARY GREY, PROSECUTING SEXUAL AND GENDER-BASED CRIMES AT THE INTERNATIONAL CRIMINAL COURT: PRACTICE, PROGRESS AND POTENTIAL 1–3 (2019); Michelle Jarvis, *Overview: The Challenge of Accountability for Conflict-Related Sexual Violence Crimes*, in PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY 5–6 (Baron Serge Brammertz & Michelle Jarvis eds., 2016).

126. Studzinsky & Kather, *supra* note 120, at 910–11; Tanja Altunjan & Leonie Steinl, *Zum Schutz der sexuellen und reproduktiven Selbstbestimmung – Aktuelle Entwicklungen und Reformbedarf im Völkerstrafgesetzbuch*, 12 RECHTSWISSENSCHAFT 335, 354 (2021).

127. Alexander Heinze, *Attacked, Applauded, Threatened, Universalized. Or: A Wednesday at the International Criminal Court*, in THE PAST, PRESENT AND FUTURE OF THE INTERNATIONAL CRIMINAL COURT 39, 89 (Alexander Heinze & Viviane E. Dittrich eds., 2021).

Unlike the Koblenz Court's decision to update the charges concerning sexualized violence, it rejected another motion filed by the joint plaintiffs in the Al-Khatib trial to include the crime of enforced disappearance in the proceedings (pursuant to Section 7(1) No. 7 a) of the CCAIL).¹²⁸ The motion was mainly based on witness testimonies in the proceedings, evidence provided by the IIM, and reports elaborated by the UN CoI.¹²⁹ According to these documents and the witness statements, the Syrian intelligence services employed, among others, enforced disappearances of (perceived) opponents to punish civil society and suppress dissent.¹³⁰ The prosecution, and eventually the Court, denied that enforced disappearances within the meaning of section 7 (1) No. 7 a) of the CCAIL occurred.¹³¹ Both argued that there was no evidence that anyone officially inquired about the fate of disappeared persons, that Anwar R. knew about such inquiries or that he knowingly gave false information about the whereabouts of such persons.¹³² The prosecution further argued that the detentions in the Al-Khatib prison did not pursue the goal of removing people from the protection of the law but served primarily to gather information.¹³³

Evidence might have sustained assumptions to the contrary.¹³⁴ More importantly, with that argumentation, long-

128. *Executive Summary: Enforced Disappearances in the al-Khatib Trial*, ECCHR (July 22, 2021), https://www.ecchr.eu/fileadmin/Juristische_Dokumente/20210721_Executive_Summary_Enforced_Disappearances_al_Khatib.pdf; see also *Inside the Raslan Trial #58: The Raslan Verdict in Detail*, *supra* note 54; Cf. Lina Schmitz-Buhl, *Missing Perspectives. Understanding the Accountability Gap for Enforced Disappearances in the Al-Khatib Trial and Beyond*, VÖLKERRECHTSBLOG: INT'L L. & INT'L LEGAL THOUGHT (Aug. 30, 2021), <https://voelkerrechtsblog.org/de/missing-perspectives/> (criticizing the restrictive interpretation of the criminal provision on enforced disappearances and how prosecutors and judges missed the opportunity to obtain corroborative evidence especially from female witnesses).

129. *Executive Summary: Enforced Disappearances in the al-Khatib Trial*, *supra* note 128.

130. *Id.*

131. See ECCHR, *supra* note 41, at Day 84; *Inside the Raslan Trial #58: The Raslan Verdict in Detail*, *supra* note 54.

132. ECCHR, *supra* note 41, at Day 84; *Inside the Raslan Trial #58: The Raslan Verdict in Detail*, *supra* note 54.

133. ECCHR, *supra* note 41, at Day 84.

134. See Lina Schmitz-Buhl, *Enforced Disappearances in Syria and the Al Khatib Trial in Germany: Qualifying the Alleged Acts as Enforced Disappearance as a Distinct Crime Against Humanity is Imperative*, VÖLKERRECHTSBLOG: INT'L L. & INT'L LEGAL THOUGHT (Jan. 27, 2021), <https://voelkerrechtsblog.org/de/enforced-disappearances-in-syria-and-the-al-khatib-trial-in-germany/> (highlighting The Syrian State's policy to give no,

expressed fears about the inadequacy of section 7 (1) No. 7 CCAIL materialized.¹³⁵ The requirement that someone makes an official inquiry about the fate of a disappeared person rewards particularly brutal regimes under which people do not dare to inquire or simply know that an inquiry does nothing but endanger them.¹³⁶ The high subjective threshold that the perpetrator knows about such inquiries misunderstands that enforced disappearances are often sustained by a system, rather than by individuals: a perpetrator often does not gain knowledge of inquiries as a result of the normal division of labor in government agencies. Lastly, the CCAIL's requirement that the perpetrator intends to remove his or her victims from the protection of the law deviates unnecessarily from international law: Article 2 of the Convention on Enforced Disappearances views this removal as a consequence of enforced disappearance, not an element of intent.¹³⁷ It should not be decisive, whether the perpetrator pursues the goal to remove victims from the protection of the law or achieves that effect while pursuing any other goal. The grave danger and egregious consequences of the crime of enforced disappearances materialize either way. In sum, these unnecessarily strict requirements severely limit the effectiveness of the provision.¹³⁸ It is to be hoped that the German legislator will change that provision in light of how it failed in the Koblenz trial. That there was a need to investigate enforced disappearances was impressively conveyed by the closing statement of joint plaintiff Hussein Ghreer.¹³⁹ But of course his recount of the consequences of this brutal crime was no substitute for a genuine examination of the related facts by

insufficient or false information about detainees' fate and whereabouts, and the need for Courts to take into account the difficulties of requesting information from the states about disappeared individuals under war circumstances).

135. ECCHR, *Alternative Report to the Additional Information Submitted by the Federal Republic of Germany on 3 July 2020 Under Article 29, Paragraph 4 of the convention for the Protection of All Persons from Enforced Disappearance*, CED/C/DEU/AI/1 (July 12, 2021), https://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/DEU/INT_CED_NGO_DEU_45253_E.pdf.

136. *Id.* at 3; Lina Schmitz-Buhl, *Missing Perspectives: Understanding the Accountability Gap for Enforced Disappearances in the Al-Khatib Trial and Beyond*, VÖLKERRECHTSBLOG (Aug. 30, 2021), <https://voelkerrechtsblog.org/de/missing-perspectives/>.

137. ECCHR, *Alternative Report*, *supra* note 135, at 3.

138. *Id.* at 3.

139. *Trial Updates: Al-Khatib trial, Day 105*, ECCHR (Dec. 8, 2021), <https://www.ecchr.eu/en/case/trial-updates-first-trial-worldwide-on-torture-in-syria/>.

the Court.¹⁴⁰

2. Translation

The German Courts Constitution Act states in Section 184 that “The language of the court shall be German.”¹⁴¹ In and of itself that is not a surprising statement in relation to the German court system. But the persistence with which the Koblenz Court clung to that Section even when strong legitimate interests existed to access information in Arabic was almost impressive.

Naturally, the trial drew strong attention from Syrian civil society and media, which were not always able to follow the proceedings in German.¹⁴² The Court did little to accommodate their interests. All information on the trial, including the hearing dates and most other press releases, e.g. on Covid-restrictions were exclusively in German.¹⁴³ Most importantly, the trial was not translated for non-German-speaking spectators, even though the accused and joint plaintiffs received Arabic translation.¹⁴⁴ Spectators had no work-around. Whispered translation from a private translator was rendered impossible by the safety-distance spectators had to keep due to the Covid-pandemic. Electronic devices that could have facilitated private translation were not allowed in the public gallery.¹⁴⁵

The Court could have provided relief. German procedural law does not prohibit translation for the public, as long as the language actually spoken in court remains German.¹⁴⁶ It would have taken nothing more than an extension cable for

140. Lina Schmitz-Buhl, *supra* note 134.

141. Gerichtsverfassungsgesetz [GVG] [Courts Constitution Act], May 9, 1975, BGBl I at 1077, § 184 (Ger.).

142. Dünkelsbühler et al., *Universal Jurisdiction Without Universal Outreach?*, VÖLKERRECHTSBLOG (Jan. 13, 2021) <https://voelkerrechtsblog.org/universal-jurisdiction-without-universal-outreach/>.

143. Charlotte Bailey, *Syrian War Crimes on Trial in Germany: Will Justice be Lost in Translation?*, NEW HUMANITARIAN (Oct. 21, 2021), <https://www.thenewhumanitarian.org/2021/10/21/syrian-war-crimes-trial-germany-will-justice-be-lost-translation>.

144. *Scratching the Surface: One Year into the Koblenz Trial*, *supra* note 33, at 20.

145. *Id.*

146. This is demonstrated by the fact that the verdicts for both Eyad A. and Anwar R. were translated via loudspeaker, see below.

headphones to extend the existing translation into the public gallery.¹⁴⁷ Nevertheless, the Court struck down any request for public translation. Apart from denying its responsibility for providing translation, the Court cited concerns about the additional resources necessary for providing translation to the public, a potential discrimination of journalists that speak neither German nor Arabic, and the risk that persons would secretly record the proceedings, which in turn could influence witnesses.¹⁴⁸ A group of Syrian journalists complained to the Federal Constitutional Court citing a violation *inter alia* of their right to freedom of the press and information. The constitutional judges, in a surprise even for close observers, granted them an injunction, ordering the Koblenz Court to grant them access to translation.¹⁴⁹ The hope of journalists was short-lived, however. The Koblenz Court interpreted the injunction as narrowly as possible. From the outset, the injunction did not encompass the observing NGOs.¹⁵⁰ It also granted translation only to already accredited journalists. The deadline for accreditation had long passed. Given that no translation was available, non-German speaking journalists had little incentive to accredit themselves at the time. Despite all of this, the Court provided no subsequent accreditation and continued to deny Syrian journalists present in the gallery access to the headphones a mere meter away from the public gallery.¹⁵¹

The Court only made two exceptions from its stubborn stance: The pronouncement of the judgments against Anwar R. and Eyad A. were both translated via loudspeaker into Arabic. A Syrian activist present in the courtroom confirmed that that made a huge difference to her.¹⁵² Although important, the

147. *Scratching the Surface: One Year into the Koblenz Trial*, *supra* note 33, at 20.

148. BUNDESVERFASSUNGSGERICHT [BVERFG] [Federal Constitutional Court] Aug. 18, 2020, 1 Beschluss der 2. Kammer des Ersten Senats vom [BVerfGE] (Ger.).

149. *Id.*

150. *Scratching the Surface: One Year into the Koblenz Trial*, *supra* note 33, at 20.

151. ECCHR, *supra* note 41, at Day 24; *Federal Constitutional Court on Torture Trial in Koblenz: Syrian Public Has Access to Simultaneous Translation*, ECCHR (Aug. 19, 2020), <https://www.ecchr.eu/pressemitteilung/bundesverfassungsgericht-zu-folter-prozess-in-koblenz-syrische-oeffentlichkeit-erhaelt-zugang-zu-simultanuebersetzung/>.

152. *Inside the Raslan Trial #58: The Raslan Verdict in Detail*, *supra* note 54. The press release on the judgment against Anwar R. was even translated into Arabic, *Pressemitteilung zum Urteil gegen einen mutmaßlichen Mitarbeiter*

Court's previous constant refusal to provide translation makes these two exceptions bittersweet. They showed that the Court could have allowed it the entire time, without facing decisive legal or technical obstacles. Receiving translation of the pronouncements at the mercy of the court hardly makes up for the possibility to follow the trial.

3. Recordings

Just as the Court failed to provide broader access to information during the trial, it obstructed any possibility to access it after the facts. Already astounding to international observers, German Court proceedings are not recorded. Judges draw their conclusions from their memory and notes – inaccessible to other trial parties or higher courts.¹⁵³ A court protocol only contains a minimum amount of information. In most criminal courts, including the Higher Regional Courts, it only contains the appearance and dismissal of a witness. It does not say a word about the crucial part in between these two events.¹⁵⁴ The Court could have changed that. In light of the trial against the right-wing terrorist group “National-Socialist Underground” (*Nationalsozialistischer Untergrund*, NSU), which made international headlines,¹⁵⁵ the German legislator introduced the possibility to record trials of historical significance for the Federal Republic of Germany for archival purposes.¹⁵⁶ National and international law scholars, academic

des syrischen Geheimdienstes in arabischer Sprache, OBERLANDESGERICHT KOBLENZ [Higher Regional Court of Koblenz] (Jan. 17, 2022), <https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/pressemitteilun-g-zum-urteil-gegen-einen-mutmasslichen-mitarbeiter-des-syrischen-geheimdienstes-in-ara/>.

153. See Strafprozessordnung [StPO] [Code of Criminal Procedure], §§ 272, 273, ¶ 2, https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (Ger.); see Press Release, Federal Ministry of Justice, Abschlussbericht zur Dokumentation der strafgerichtlichen Hauptverhandlung [Final report on the Documentation of Criminal Proceedings] (July 1, 2021), https://www.bmj.de/SharedDocs/Artikel/DE/2021/0701_Dokumentation_Hauptverhandlung.html.

154. See Strafprozessordnung [StPO] [Code of Criminal Procedure], § 272, ¶ 2, https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (Ger.); *Scratching the Surface: One Year into the Koblenz Trial*, *supra* note 33, at 19–22.

155. Melissa Eddy, *Trial Begins for a Neo-Nazi Suspect in Germany*, N.Y. TIMES (May 6, 2013), <https://www.nytimes.com/2013/05/07/world/europe/trial-of-neo-nazi-beate-zschape-in-germany.html>.

156. Gerichtsverfassungsgesetz [GVG] [Courts Constitution Act], June 25,

institutions, human rights organizations, and others made multiple submissions to the Court, asking it to make use of that possibility. The Court declined, questioning the historic significance of the trial for Germany and again claiming that audio recordings could influence and intimidate survivors.¹⁵⁷ In the meantime, in a parallel criminal trial, the Higher Regional Court Naumburg showed that another way would have been possible. It was the first to make use of the new law and recorded the entire trial concerning a right-wing terrorist attack on a Synagogue in the city of Halle that shocked German society in 2019.¹⁵⁸

The fact alone that this US-American journal on international law publishes an analysis of the trial shows that the Court's determination on its historic (in)significance was, to put it mildly, questionable. The second limb of the Court's reasoning concerning a possible influence and intimidation of survivors rests on equally shaky premises. German law provides strong safeguards against such effects. The recordings could not have been used in any court proceeding, neither in Koblenz nor in following trials. They would have been archived and remained under seal for 30 years or 10 years after the recorded person's death, whichever would have come first.¹⁵⁹ Before these time limits would have passed, the records could have been made available for academic purposes only after balancing the academic interests with the interests of the recorded persons.¹⁶⁰ Also, the recordings could have been anonymized when handed

2021, BGBl I at 2099, § 169, ¶ 2 (Ger.).

157. See *Motion on Audio Recording of the Al Khatib Trial – English Executive Summary*, ECCHR (July 1, 2021), <https://timep.org/wp-content/uploads/2021/06/Court-Motion-Executive-Summary.pdf>; Phillips, *supra* note 39; *Scratching the Surface: One Year into the Koblenz Trial*, *supra* note 33, at 21.

158. Christopher Safferling, *Für Wissenschaft und Geschichte [For Science and History]*, NJW EDITORIAL (Aug. 7, 2020), <https://rsw.beck.de/aktuell/daily/magazin/detail/fuer-wissenschaft-und-geschichte>; see Melissa Eddy, *German White Supremacist is Sentenced to Life for Synagogue Attack*, N.Y. TIMES (Dec. 21, 2020), <https://www.nytimes.com/2020/12/21/world/europe/germany-synagogue-attack.html>.

159. Bundesarchivgesetz [BArchG] [Federal Archives Act], Dec. 4, 2018, BUNDESGESETZBLATT [BGBl] at 2257, § 11, ¶¶ 1–2 (Ger.); Landesarchivgesetz [LArchG], Feb. 2, 2020, GVBI at 42, § 11, para. 3 (Ger.).

160. Bundesarchivgesetz [BArchG] [Federal Archives Act], Dec. 4, 2018, BUNDESGESETZBLATT [BGBl] at 2257, § 12, ¶ 4 (Ger.); Landesarchivgesetz [LArchG], Feb. 2, 2020, GVBI at 42, § 3, ¶ 4 (Ger.).

out for academic purposes.¹⁶¹ Even if the Court determined during the trial that recordings did influence single witnesses despite these strong safeguards, the law would have allowed it to suspend recording at any time during the proceedings.¹⁶² In light of these strong safeguards, it is striking that the Court did not find it necessary to support its claim of witness intimidation and influence with any evidence. Unfortunately, the decision to deny recordings is not subject to appeal.¹⁶³

The failure of the Court to adequately translate and record the trial, together with the inadequacy of documentation in the German criminal law system, resulted in a dearth of documentation and did not do justice to this historic trial. Press only reported on the most significant developments.¹⁶⁴ While several organizations observed the trial, only a few had observers in the public gallery every single trial day, allowing them to publish summaries of each hearing.¹⁶⁵ To this day, recordings of e.g. the Nuremberg, Eichmann, or Auschwitz trials are publicly accessible and of great significance for scholarly inquiry and education. This makes it all the more frustrating that the Koblenz Court denied the world a similar source on the Syrian conflict.

V. CONCLUSION

The Al-Khatib trial is in and of itself historic. It marks the first time Syrian officials had to stand trial for international

161. Bundesarchivgesetz [BArchG] [Federal Archives Act], Dec. 4, 2018, BUNDESGESETZBLATT [BGBl] at 2257, § 12, ¶ 4 (Ger.).

162. Gerichtsverfassungsgesetz [GVG] [Courts Constitution Act], June 25, 2021, BGBl I at 2099, § 169, ¶ 2 (Ger.).

163. Gerichtsverfassungsgesetz [GVG] [Courts Constitution Act], June 25, 2021, BGBl I at 2099, § 169, para. 4 (Ger.).

164. The New York Times, for example, reported mainly on the opening of the trial and the verdicts. See Ben Hubbard, *Germany Takes Rare Step in Putting Syrian Officers on Trial in Torture Case*, N.Y. TIMES (Apr. 23, 2020), <https://www.nytimes.com/2020/04/23/world/middleeast/syria-germany-war-crimes-trial.html>; Ben Hubbard, *German Court Convicts Former Syrian Official of Crimes Against Humanity*, N.Y. TIMES (Feb. 24, 2021), <https://www.nytimes.com/2021/02/24/world/middleeast/germany-court-syria-war-crimes.html>; Ben Hubbard, *Former Syrian Colonel Guilty in War Crimes Trial in Germany*, N.Y. TIMES (Jan. 13, 2022), <https://www.nytimes.com/live/2022/01/13/world/syria-war-crimes-germany-verdict>.

165. *Trial Updates: Torture in Syria*, ECCHR, <https://www.ecchr.eu/en/case/trial-updates-first-trial-worldwide-on-torture-in-syria/>; *Trial Monitoring*, SYRIA JUST. & ACCOUNTABILITY CTR., <https://syriaaccountability.org/trial-monitoring/> (last visited Jan. 28, 2022).

crimes they committed after President Bashar Al-Assad started to brutally crack down on the protests of the Arab Spring in 2011. The Court's determinations, especially concerning the context and the structures within which the two defendants committed their crimes, can set a precedent for future cases, potentially all the way up through the Syrian chain of command. Beyond the Syrian context, the Al-Khatib trial holds many lessons on how to conduct effective universal jurisdiction proceedings.

As to its "ordinary" criminal law dimension, the trial was an outstanding success that was made possible by the rigorous work of investigators, civil society, and international organizations, as well as the bravery of witnesses. Competent judges managed to conduct a trial of gigantic proportions to the highest standards of the rule of law. Despite the partially avoidable deficits in witness protection, all involved actors must be commended for this achievement.

The trial showcased the benefits of strong specialized investigatory structures for international crimes and consolidated cooperation across broad networks. While the start of the investigations into Eyad A. and Anwar R. was owed mostly to their unwitting openness about their potential involvement in crimes, the success of the following investigations rested on an experienced and well-prepared investigative apparatus. According to standard protocol, the asylum authority noticed the Office of the GBA of Eyad A.'s testimony. Prosecutors there could connect the information they received about Eyad A. and at that point also Anwar R. to their findings from the long-running structural investigation into the Syrian context. The IIIM, CoI, and human rights organizations contributed background information and missing puzzle pieces. Predominantly CIJA contributed documents crucial to the understanding of the situation, the relevant structures of Syrian authorities and Anwar R.'s role therein. Civil society organizations such as the German European Center for Constitutional and Human Rights (ECCHR) and individuals such as Syrian human rights lawyer Anwar al-Bunni connected potential witnesses with prosecutors. Other national investigation authorities enabled the gathering of testimonies from the Syrian diaspora across Europe. The result was a dense network of evidence collected across several countries, by multiple actors, and over a considerable period of time that eventually led to a conviction for crimes that are anything but easy to prove.

Luckily, the authorities could also rely on the bravery of

witnesses to come forward and testify out in the open. They did so despite the fact that many received threats directed at them and their families. In part, this will always be a weak spot of trials outside the state concerned, be they domestic or international, because the authorities tasked with prosecuting and adjudicating crimes lack the power to protect persons who are still in that state. However, the risk can be reduced by a systematic approach to witness protection in the hands of specialized agencies. Leaving it to judges not trained in that area and without the resources to conduct thorough risk assessments does not do justice to the importance of witnesses and the precarious situation they are willing to put themselves in. This is all the more true when it comes not to the physical, but the psychological well-being of witnesses. Testifying to crimes of such gravity is often (re)traumatizing. When relying on individuals to relive their trauma in order to conduct a successful trial, the judiciary owes them the best mental healthcare available. In the first place, this is the task of the legislator. It must provide the possibility and resources to assign psycho-social support to witnesses of international crimes. Thereafter, courts must use these resources.

In stark contrast to the accomplishments in the criminal justice dimension, the Al-Khatib trial presented a series of failures when viewed from a transitional justice angle. In particular, the Court displayed an astounding and frustrating ignorance of that dimension of the trial. The result was an unnecessarily limited truth and outreach. The selectivity of the charges, which the Court only remedied partially, impeded comprehensive truth-seeking. The Court's refusal to translate the trial for the public and produce audio recordings hindered stakeholders from processing and disseminating the contents of the trial. It caused irreparable damage to the possibility of using original material for future research and education. This resulted fundamentally from the fact that the Court had no incentive to consider the transitional justice dimension of the trial. Any deviation from standard criminal procedure can present an opening for a successful appeal – the worst possible outcome from a criminal law perspective. Again, it is up to the legislature to change that framework. Instead of leaving decisions concerning outreach, translation, and recording to the full and unchecked discretion of the judges, the legislature can give stakeholders with a special interest a right to receive translation. It can make recordings of historical trials mandatory. And it can provide the resources for effective

outreach. A cultural change in criminal courts will still be necessary to give judges a sense for the importance of these measures and intrinsic motivation to implement them effectively. Making these decisions appealable by, for example, joint plaintiffs, who often have a better feeling for this dimension of such trials, can be a first step in that direction.

Universal jurisdiction trials will always be a deficient measure to deal with systemic injustice. As a criminal trial, they will continue facing problems with protecting witnesses and putting on trial those truly responsible for international crimes. The truth they establish will always be particular, individualized, and impaired by blind spots. They will always face enormous challenges to reach the society and diaspora affected by the crimes across geographical, cultural, and linguistic boundaries. That makes them a tool of last resort. But unfortunately, the highly imperfect world in which international crimes take place all too often leaves nothing but that last resort. For that reason, it is of the utmost importance that states are prepared to prosecute international crimes that would otherwise remain unpunished once the opportunity arises.

The Al-Khatib trial has shown what preparedness can look like and what its absence can mean for those affected by the crimes. Jurisdictions around the world should pay close attention to the lessons the trial can teach. In Germany, the next opportunity already looms. The trial of Alaa M., a Syrian doctor alleged to have committed crimes against humanity by torturing detainees in the military hospitals of Homs and Damascus and killing one of the detainees, began in November 2021 in the city of Frankfurt.¹⁶⁶

166. Bel Trew, *Syrian Doctor Goes on Trial in Germany for Crimes Against Humanity*, INDEPENDENT (Jan. 19, 2022), <https://www.independent.co.uk/news/world/middle-east/syrian-doctor-torture-trial-germany-b1996366.html>; OBERLANDESGERICHT FRANKFURT AM MAIN [Higher Regional Court Frankfurt am Main], *Eröffnung des Hauptverfahrens wegen Verbrechen gegen die Menschlichkeit* [Opening of the Main Trial for Crimes Against Humanity] (Nov. 10, 2021), <https://ordentliche-gerichtsbarkeit.hessen.de/pressemitteilungen/menschlichkeit>.