



## **Statement on the German Federal Prosecutor's decision not to open investigations in the Kilani case (Gaza airstrike 2014)**

*May 2022*

In August 2021, the German Federal Prosecutor announced that he will not open an investigation into the airstrike on 21 July 2014 by Israeli Defense Forces in the Kilani case. According to the Prosecutor, the evidence needed to conclusively determine whether a war crime had been committed was not obtainable. The decision came after seven years of legal and evidentiary submissions by PCHR and ECCHR on behalf of the Kilani family in order to push for independent and impartial investigations. After accessing parts of the case file in April 2022, PCHR and ECCHR are issuing this statement.

In December 2014, PCHR and ECCHR filed a criminal complaint together with the son of the Kilani family, Ramsis, who lost his father and five stepbrothers and stepsisters in the airstrike. Both organizations submitted additional information, evidence and analysis during subsequent years on nine separate occasions to the Federal Prosecutor. The case was discussed at a [public event](#) in Berlin in 2018 and is also known more widely through the documentary film [Not just your picture](#) by filmmakers Anne Paq and Dror Dayan.

On 21 July 2014, during the Israeli military operation, an airstrike on the Al-Salam tower in Gaza city by the Israeli Defense Forces killed eleven members of the Kilani and Derbas families. Among the dead were Ibrahim and Taghreed Kilani and their five children. Ibrahim Kilani and the five children were German nationals. According to the Israeli Army, the target of the air strike had been a member of the Palestinian Islamic Jihad, who was also found dead in the building. For more information, visit ECCHR's [case page](#).

## **The use of double standards**

The German Federal Prosecutor's decision stands as emblematic of the [double standards](#) applied in cases against powerful actors. The approach taken by the Prosecutor did not follow standard procedures and lines of argumentation, especially with regard to the German citizenship of some of the victims.

### ***a. Strong link to Germany***

In cases that concern German citizens as victims of a crime abroad, it is standard procedure and a legal obligation under German law and practice to open formal investigations and to seek interstate cooperation not only through diplomatic, but also legal channels. The main reason for this is because citizenship necessitates a strong connection to Germany, in contrast to cases investigated on the basis of the principle of universal jurisdiction, in which a crime was committed abroad and neither the alleged perpetrator nor the victim is German. In the present situation, the Prosecutor failed to swiftly open an investigation, despite the severity of the alleged crime involving the death of eleven civilians (among them six German citizens), a strong link to Germany through the citizenship of the victims, and close ties to German family members living in North Rhine-Westphalia. Moreover, the Prosecutor decided to close the case without opening any investigations whatsoever and also stated that this was indeed an exception, as he would usually have proceeded with opening a formal investigation. Section 153f § 2 of the German Code of Criminal Procedure (Strafprozessordnung – StPO) does indeed provide the option for the Prosecutor to close cases under universal jurisdiction, however, only under the precondition that *no* German citizen is a victim of the alleged international crime. Here, the situation is exactly the opposite: German citizens were victims of an international crime abroad, which entails that the Prosecutor is obligated to open an investigation.

### ***b. Invoking domestic proceedings and remedies***

Contrary to the legal obligation to prosecute that stems from the principle of compulsory prosecution in cases where German nationals are involved in a crime (Legalitätsprinzip), the Prosecutor invoked an exception and thus applied double standards with respect to German victims in Gaza and their relatives in Germany vis à vis other situations. The reasons brought forward by the Prosecutor for this exception do not justify the decision to not even open formal

investigations. He argued that there was an Israeli investigation by the Military Advocate General into the incident with the conclusion that no further investigative steps would need to be taken, as there was no "reasonable suspicion of criminal misconduct." PCHR challenged this decision before the Israeli Attorney General, however without success. In the case before the German Federal Prosecutor, PCHR and ECCHR upheld that the Military Advocate General is not independent, inter alia, according to the report by the United Nations High Commissioner for Human Rights entitled "Ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory including East Jerusalem," UN Doc. A/HRC/37/41, 19 March 2018, §§ 11-14. The Federal Prosecutor ignored the arguments and material submitted by PCHR and ECCHR on this matter, and instead declared that he could not interfere in domestic affairs, especially after a domestic decision had been reached and in a case where all domestic remedies had not yet been exhausted. PCHR, indeed, did not fully exhaust local remedies after the decision in the Attorney General's review process by seizing the High Court of Justice with the matter. The Israeli High Court of Justice applies a very high and strict standard of review and even when referring cases back to the (non-independent) Military Advocate General, the latter would still have a wide margin of discretion when issuing a new decision. The failures, lack of independence, and predictable outcomes were argued in an ECCHR expert opinion submitted in 2018 to the Federal Prosecutor.

In many other cases, the Federal Prosecutor did not require any legal steps to be taken domestically – let alone the exhaustion of all local remedies – by victims or their relatives in their respective jurisdictions, e.g. in Syria, Iraq, The Gambia or Sri Lanka, before proceeding with an investigation, and rightly so. International criminal justice does not require the exhaustion of domestic remedies before pursuing the case before foreign courts, especially considering that it is often very unrealistic for victims and their families to seize domestic courts with cases against the domestic armed forces or secret services.

***c. Invoking functional immunity for crimes under the regular Code of Crimes although conjoined with an alleged international crime***

The Prosecutor is in line with the Federal Court of Justice's decision of 28 January 2021 (BGH, 28. January 2021 - 3 StR 564/19) not to apply functional immunity for war crimes. It is, however, legally untenable that the Prosecutor argued that functional immunity would per se hinder the prosecution of the crime of murder (Section 211 of the German Criminal Code) regardless of whether or not that potential murder was committed in the same act as a potential

war crime. This is contrary to the Federal Court of Justice's case law. In several cases, the Federal Court of Justice acknowledged that German courts could exercise universal jurisdiction also with regard to crimes incorporated in the German Criminal Code that were committed in one and the same act as the international crime. With regard to functional immunity, the Federal Court of Justice decided in its recent January 2021 decision at § 11 that there can be no functional immunity if a crime under the regular Code of Crimes occurs conjointly with the commission of an international crime under the Code of Crimes against International Law. Therefore, it was not justifiable for the Prosecutor to abstractly exclude the prosecution of a murder at a point where he had not yet confirmed the lack of sufficient evidence regarding a war crime.

### **Missed opportunity**

The Federal Prosecutor missed an important opportunity to extend international criminal justice in an equal manner to victims of crimes by a powerful actor. The application of double standards with respect to the link to Germany through the citizenship of victims and relatives, as well as in reference to domestic procedures, undermines the otherwise very positive trends and actions of the Federal Prosecutor in prosecuting international crimes in Germany. Regardless of the potential outcome of a criminal investigation, the procedure has to be inclusive and non-discriminatory, guaranteeing the rights of victims and their relatives. Unfortunately, in this case, it was not, and thus constituted a missed opportunity for applying international criminal justice in all cases and situations equally to all, which would have strengthened the legitimacy of the Prosecutor's work on international crimes in general.

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