

## **Sexual violence by members of the Russian armed forces: A renewed call to the German authorities to investigate**

### **Q&A on the legal background**

This document gives an overview of the German Federal Public Prosecutor's decision not to investigate a case involving the torture and rape of a civilian and the arbitrary killing of her husband by Russian forces in Ukraine. The Prosecutor's decision follows a criminal complaint submitted by the European Center for Constitutional and Human Rights (ECCHR) and Ukrainian Legal Advisory Group (ULAG) in support of a Ukrainian survivor based in Germany. For more detailed information about the initial complaint, please see our previous [Q&As](#) and [case page](#).

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#### **1. What is the case about?**

Grave crimes against civilians and conflict-related sexual violence in particular have been documented in large parts of Ukraine that have come under Russian attack. To put a crack in the wall of impunity and to support a survivor of such crimes in her quest for justice, ECCHR, together with ULAG, filed a criminal complaint against four members of the Russian armed forces with the German Federal Public Prosecutor in June 2023. The complaint concerns the rape and torture of the survivor and the killing of her husband in a village in the Kyiv region in March 2022 by two Russian soldiers and the failure of their commanders to prevent their subordinates from committing these crimes. Despite the case being under investigation already in Ukraine and one of the direct suspects standing trial in absentia, there are significant accountability gaps: The Ukrainian legal system does not provide for the prosecution of crimes against humanity and there are thus far no known efforts to hold the commanders of the direct perpetrators to account. The complaint therefore asks the German authorities to step in and fill these gaps by investigating the case alongside Ukrainian authorities. Germany can take action on the basis of the principle of universal jurisdiction.

## **2. How did the German Federal Public Prosecutor react to our criminal complaint?**

The Federal Prosecutor's Office decided to add the information provided in the complaint to the structural investigation of the situation in Ukraine, but otherwise refused to initiate person-specific proceedings against the named suspects. This decision was based on Section 153f of the German Code of Criminal Procedure, which provides prosecutorial authorities with discretion not to investigate extraterritorial crimes in cases where the suspects are neither present on German territory nor expected to enter Germany in the foreseeable future. In exercising this discretion, the Prosecutor argued that investigations by Germany could not provide any added value because Ukraine was already investigating the case with one of the direct perpetrators standing trial in absentia. Concerning the commanding officers, the Prosecutor did not see any initial indicia of responsibility but rather considered the crimes by their subordinates to constitute unforeseeable incidents. Regarding the evidentiary basis of the case, the Prosecutor pointed to the alleged difficulty of further clarifying the facts without submitting a request for mutual legal assistance to Ukraine, which, according to him, speaks in favour of Ukraine exclusively investigating the case. Finally, the fact that crimes against humanity cannot be prosecuted under Ukrainian law was not considered to create a gap in accountability.

## **3. How do we assess the Prosecutor's decision and why is it worthy of criticism?**

While the absence of suspects in Germany cannot be disputed, we do not agree with the Prosecutor's reasoning. Unfortunately, the German Code of Criminal Procedure does not provide for a legal remedy to formally challenge the decision not to investigate, but we have nonetheless submitted a counterstatement to again urge the opening of an investigation.

These are our main considerations:

### **3.a. Germany should investigate the case to increase the likelihood of arrests and trials of the perpetrators**

There is **added value** in Germany investigating the case, even with respect to the alleged direct perpetrators already under investigation in Ukraine. Recent decisions by courts in [Finland](#) and [France](#) have shown that extradition requests by Ukraine might not always be implemented due to rule of law concerns. It is therefore important that third states investigate international crimes committed in Ukraine with the aim of issuing their own arrest warrants for the suspects to

increase the likelihood that they will get arrested and tried. This also holds true for investigations of the higher-ranking perpetrators.

### **3.b. The attack must be prosecuted not only as a war crime but also as a crime against humanity**

The inability to prosecute **crimes against humanity** in Ukraine leads to an accountability gap which is not adequately filled by prosecuting the extreme violence against the survivor and her family simply as war crimes under Section 438 of the Ukrainian Criminal Code. Crimes against humanity differ significantly from war crimes in that they require a systematic or widespread attack directed against a civilian population. War crimes, by contrast, are grave breaches of the laws of war and can in theory occur as isolated incidents within an armed conflict. True accountability, which is premised on establishing the full extent of the injustice committed, therefore demands a probe into crimes against humanity whenever there are factual indications of their commission. This condition is met here, given the number and patterns of crimes against civilians reported in the Kyiv region shortly after the beginning of the full-scale invasion – besides sexual violence also summary executions, torture, arbitrary detentions, and deportations. Additional research conducted by the Ukrainian Archive for our counterstatement has brought to light even more open-source information concerning attacks on civilians during the Russian presence in the survivor’s village which further substantiates this finding. Because the German Code of Crimes against International Law has incorporated crimes against humanity, the attack could and should be investigated as such to close the existing accountability gap.

### **3.c. The higher-ranking perpetrators must be held to account**

The refusal to investigate the superiors of the direct perpetrators under the principle of **command responsibility** shows a flawed understanding of the applicable legal standard and the systematic nature of violence against civilians in the Kyiv region in March 2022. The Prosecutor’s argument that responsibility can be ruled out because the direct perpetrators acted while they may not have been supervised is unsound. While it is correct that command responsibility hinges on the foreseeability of the underlying crimes for the commanders<sup>1</sup>, it is sufficient

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<sup>1</sup> The German Code of Crimes Against International Law subjects only one form of command responsibility to the principle of universal jurisdiction, concerning cases in which the superior knew that his or her subordinates would commit a crime under international law and nevertheless failed to prevent its commission. Cases of negligence in which the superior should have foreseen that his or her subordinates would commit such a crime are not covered. Also not covered is the failure of a superior to report subordinates to a competent authority for criminal prosecution after such a crime has become known.

that they anticipated the concrete possibility of their subordinates committing an offense of a certain type – in the present case the killing, torture and rape of civilians. Precise knowledge of the details of the impending crime, by contrast, is not required. Given reliable reports about a significant number of civilians deliberately killed or tortured, and several other incidents of sexual violence in the Kyiv region likely linked to the unit who attacked the survivor, there are solid factual indications that its commanders anticipated the type of crimes committed against the survivor and her family. Accordingly, investigations in Germany could add value by potentially holding these higher-ranking perpetrators to account, who have -- as far as is publicly known -- not been subject of the investigations in Ukraine.

#### **4. Where do we situate the Prosecutor's decision in the broader accountability landscape of universal jurisdiction efforts regarding Russia's war of aggression?**

Russia's full-scale invasion of Ukraine has been met with firm declarations of intent to prosecute international crimes under the principle of universal jurisdiction by several Western states. Almost two years later, however, the reality looks rather sobering. With ongoing investigations largely happening behind closed doors, comparatively little is known about the actual results of these accountability efforts. A couple of states, such as France, Germany and the US, have initiated investigations regarding crimes committed against their own citizens by Russian forces. But beyond this, states seem to be focussing mostly on securing testimonies from Ukrainian refugees now living in that state's territory rather than on systematically building cases, including comprehensive investigations, leading to arrest warrants for those who perpetrated the crimes.

The Federal Prosecutor's decision here reflects this seeming hesitancy to take a more proactive role in the investigation of crimes committed in Ukraine. Instead of attempting to further clarify the facts, e.g. through open-source investigations, the Prosecutor pointed to the proceedings already underway in Ukraine. This line of reasoning, however, runs counter to the Prosecutor's self-proclaimed goal of closing accountability gaps and actively supporting Ukraine in this endeavour. Almost all incidents of crimes are already being investigated by Ukraine in one way or another – but oftentimes with clear legal and factual limitations. What therefore needs to be kept in mind, is that the mere existence of an investigation in Ukraine does not automatically imply that every legally relevant aspect of the case is sufficiently addressed, just like in the present case. Real progress can only be made when third states start to seek evidence collected by Ukraine to use it as a basis for their own investigations. Broad mutual legal assistance treaties are

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needed to facilitate this exchange. And most importantly, of course, the responsibility does not lie with third states alone. Ultimately, Ukraine must give clear signals as to what form of support is needed and to what extent it is willing to cooperate with other states on cases of international crimes.

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**Last updated: February 2024**

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