DEVELOPMENTS

Torture in Abu Ghraib: The Complaint against Donald Rumsfeld under the German Code of Crimes against International Law

By Andreas Fischer-Lescano[*]

A. Introduction

The thesis that, after September 11, 2001, there were categorical differences between Europe and the U.S. in their approaches to the dangers of terrorism, rests essentially on the claim that "Old Europe's" constitutional pacifism has failed. In this view, the global *pax americana* has a Hobbesian commitment to military power, and this is said to be the form adequate to realize the universal concept of peace. In principle, this is not an especially original notion. Robert Kagan,[1] who nevertheless helped it gain a certain prominence, is merely the intellectual beneficiary of a series of classical theorists of *realpolitik* who agreed that conflicts could, "at the end of the day," only be settled politically and not legally. Ironically, the prophets of this thesis were confessed Old Europeans. Carl Schmitt as well as Hans Morgenthau laid

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[1] Robert Kagan, *Power and Weakness*, 113 (June and July) POLICY REVIEW 5 (2002) *at* http://www.policyreview.org/JUN02/kagan.html; *see also* the *German Law Journal's* special issue "The New Transatlantic Tension and the Kagan Phenomenon" at 4:9 GERMAN L. J. 863 (2003), especially Sonja Buckel & Jens Wissel, *Welcome to the Desert of Real Imagination*, 4:9 GERMAN L. J. 971 (2003) *at* http://www.germanlawjournal.com/article.php?id=310.

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the cornerstone of these forms of cosmography,[2] insisting that, on a global level, it is not law that rules but the free interplay of state-forces.[3]

This tradition, the political system of nation-states that is taken as the main point of reference for what is driving "Europe" and "America" apart (whatever these simplified notions may mean), provides little help in describing a recent legal case in which the German judiciary has been embroiled. The complaint filed by the German attorney Wolfgang Kaleck with the Federal Prosecutor Kay Nehm in Karlsruhe, in the name of four Iraqi citizens and an American NGO (the Center for Constitutional Rights (CCR)) raises accusations of torture committed in the now infamous Abu Ghraib prison in Iraq by members of the allied forces.[4] Without regard to *realpolitik*, the case represents an initiative that is to be taken seriously from a legal point of view. As proof of this claim, in the meanwhile the Republican Lawyers Association, the International Federation of Human Rights, and the NGO Lawyers Against the War have associated themselves with the effort.[5] The case demonstrates that a *realpolitik* outlook that works with the monolithic explanatory concepts of "Europe" and "America" is obsolete. Here is a lawyer-led American NGO filing a complaint in Germany, with the support of a network of German attorneys, making an appeal to universal legal norms which are recognized by the U.S., Iraq and Germany through the ratification of international treaties, norms which are said to have been violated by U.S. citizens, with Iraqi citizens as the victims. This is not a question of *pax americana* v. *pax europea*. Rather it involves fundamental differences between two global discourse systems: the reality of global law v. *realpolitik*. In their collision in this case nothing less is at stake than the question of whether the fundamental constitutional idea of a legal construction and

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[2] CARL SCHMITT, DER BEGRIFF DES POLITISCHEN (1932), 2nd ed. of the text, reprint in 7th ed., Berlin (1932); Hans Morgenthau, *Positivism, Functionalism, and International Law*, 34:2 AM. J. OF INT'L L., 260 (1940); for a critique of that approach and of interdisciplinary projects like 'The New Generation of Interdisciplinary Scholarship', which reproduces the 'Weimar argument', Martti Koskenniemi, Carl Schmitt, *Hans Morgenthau, and the Image of Law in International Relations*, *in*: THE ROLE OF LAW IN INTERNATIONAL POLITICS 17 (Michael Byers ed., 2000).

[3] Hans Morgenthau stated that in international relations "a competitive contest for power will determine the victorious social forces, and the change of the existing legal order will be decided, not through a legal procedure [...] but through a conflagration of conflicting social forces which challenge the legal order as a whole" (Morgenthau, *supra* note 2, at 275).

[4] Wolfgang Kaleck, *Complaint Against the US Secretary of Defense Donald Rumsfeld et al.*; the English translation of the 180-page complaint is *available at*

http://www.ccr-ny.org/v2/legal/september_11th/docs/German_COMPLAINT_English_Version.pdf.

[5] Information on the International Federation for Human Rights is *at* www.fidh.org; for Lawyers Against the War, visit www.lawyersagainstthewar.org; for the Republikanische Anwältinnen- und Anwälteverein: http://www.rav.de.

limitation of power can be asserted or whether global law will be pushed back by the totalizing demands of the international political system to perpetuate a global state of exception.

B. CCR v. Bush, Rumsfeld et al.

The contours of this international alternative do not only run between America and Europe. In the battle between differing readings of the law, political actors and social actors look for fora and procedures in which to strive for a confirmation of their respective perspectives. How little this basic conflict is specific to international law and how much it really crosses through the nation-state system as a whole, becomes clear if one looks at the complaint's background. The CCR had already made a name for itself prior to its efforts to bring a complaint in the courts of the Federal Republic by bringing the case of *Rasul v. Bush*[6] before the U.S. Supreme Court. As early as February 2002 the NGO had filed a claim that the right to the judicial appeal process, confirmed by the Geneva Conventions and general human-rights accords, should no longer be denied the detainees at the military base at Guantánamo. After the negative decisions of the lower courts, the U.S. Supreme Court decided on June 28, 2004 that the detainees are entitled to access to U.S. courts. In the case of *Hamdi v. Rumsfeld*, decided together with *Rasul v. Bush*, Justice Sandra Day O'Connor made clear what was at stake in the cases: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United Nations Constitutions envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[7]

After its legal successes in the U.S., CCR sought to try its luck in the German courts. Unlike in the U.S. cases, in Germany the case is not concerned with accusations relative to detainment conditions in Guantánamo but principally with the occurrences in the Abu Ghraib prison, in which the occupying powers have at times held

[6] Rasul v. Bush, 124 S. Ct. 2686 (2004).

[7] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2650 (2004), citations omitted; *see also* the decision of the House of Lords of December 16, 2004, in which the judges declared the British Anti-Terror Law to be incompatible with internationally recognized human rights and observed in regard to the judiciary's role: „It is also of course true [...] that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself" (Lord Bingham of Cornhill, [2004] UKHL 56, A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), no. 42).

up to 4,000 detainees.[8] The accusations regarding systematic torture and cruel and inhuman treatment in U.S. prison camps has already been investigated by a series of institutions. Major General Antonio Taguba's report,[9] prepared on order of Lieutenant-General Ricardo Sanchez, the general in command, is one of these. There is also the military's official investigative report (Fay – Jones) of August 9, 2004,[10] the Schlesinger Report,[11] a report of the International Red Cross,[12] and the report of the High Commissioner of the United Nations for Human Rights.[13] Three recently published books collect an impressive range of these sources and other primary materials and package them with commentary and media coverage, providing comprehensive, accessible and damning surveys of the events at Abu Grahib.[14] Moreover, human rights organizations like Amnesty International and Human Rights Watch have presented their own assessments of the situation.[15] All of these investigative efforts are interested in the shockingly brutal and humiliating mistreatment of detainees in Abu Ghraib by U.S. guards and interrogators. The story of the abuse reached the world's public in April 2004 with the release of a number of photos documenting the actions.[16]

The fact that the interrogation and intimidation techniques documented in these pictures contradict fundamental legal norms of world society hardly needs to be seriously discussed.[17] What is arguable, however, is whether the deeds designated

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[8] *See* CBS News, 28 May 2004, *available at* http://www.cbsnews.com/stories/2004/05/29/iraq/main620298.shtml

[9] *Available at* http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html

[10] *Available at* http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/26_08_04_fayreport.pdf

[11] *Available at* http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf

[12] *Available at* http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf

[13] UN Human Rights Report, *The present Situation of Human Rights in Iraq*, 9 June 2004, E/CN.4/2005/4, *available at* http://www.unhchr.ch/html/hchr/docs/iraq1.doc

[14] *See* THE ABU GHRAIB INVESTIGATIONS. THE OFFICIAL INDEPENDENT PANEL AND PENTAGON REPORTS ON THE SHOCKING PRISONER ABUSE IN IRAQ (Steven Strasser ed., 2004); MARK DANNER, TORTURE AND TRUTH. AMERICA, ABU GHRAIB, AND THE WAR ON TERROR (2004); THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen Greenberg & Joshua Dratel eds., 2005).

[15] The relevant reports and memoranda are also documented in Greenberg & Dratel , *supra* note 14, at 383 and also *available at* http://web.amnesty.org, www.aclu.org and www.hrw.org.

[16] Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, 30 April, 2004, 42; *see also* SEMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2004).

[17] For an overview, *see* Paola Gaeta, *May Necessity be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?*, 2 J. OF INT'L CRIM. JUSTICE 785 (2004); Ralf Poscher, *Die Würde des Menschen ist*

as malfeasance by the U.S. military can, as the authors of the complaint maintain, be characterized as torture and other serious infractions of humanitarian law and whether the practices were more than the work of a handful of sadistic individual perpetrators. The complaint claims that the scandalous practices under the U.S. military are widespread and in use in Afghanistan as well as Guantánamo and Iraq and in known and unknown detention centers in other countries.[18] It alleges that functionaries of the U.S. administration have not only directly or indirectly accommodated the proliferation of these atrocities, but have helped cause them through incorrect and false legal information given by civil and military jurists in the service of the administration.[19]

C. Jurisdiction of the German Judiciary

These are the accusations for which CCR, and others associated with the complaint, have sought review from German authorities. One may ask, however, why the circumstances of these crimes, which were clearly not committed by Germans, nor against Germans, nor on German territory, nor even from German territory, should be investigated in Germany. We should first answer that question by resorting to the words of Immanuel Kant, who declaimed: "the infraction of the law was felt in *one* place on earth by *all*."[20] If military and intelligence personnel, in the course of military intervention, resort to torture to force democratization, they disavow the very democratic-constitutional core values they claim to be promoting, most significantly the principle of legal protection of individuals from degrading treatment by state authority.

It is juridically crucial that the *Völkerstrafgesetzbuch* (German Code of Crimes against International Law – CCAIL)[21] has been in force in Germany since June 30,

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unantastbar, JURISTENZEITUNG 756 (2004), and Antonio Cassese, *Are International Human Rights Treaties and Customary Rules on Torture binding upon US Troops in Iraq?*, 2 2 J. OF INT'L CRIM. JUSTICE 872 (2004); *see also* Office of Legal Counsel, U.S. Department of Justice, Memorandum for James Comey, Deputy Attorney General, Legal Standards Applicable Under 18 U.S. §§ 2340-2340A, 30 December 2004, in which the US-Administration distances itself from former memos, www.usdoj.gov; on this *see*: Jeffrey Smith & Dan Eggen, *Justice Expands 'Torture' Definition*, WASHINGTON POST, 31 December 2004.

[18] KALECK, *supra* note 4, at 8.

[19] *Id*. at 88.

[20] IMMANUEL KANT, *Schrift zum ewigen Frieden* (1795), in: *idem*, WERKAUSGABE, vol. 11, 191 (Wilhelm Weischedel ed., 8th ed. 1991), *at* 216.

[21] An English translation of the CCAIL and the explanation of the German government introducing the CCAIL can be found at the homepage of the Max Planck Institute for Foreign and International Criminal Law, *at* www.iuscrim.mpg.de/forsch/legaltext/VStGBengl.pdf. See *The German International Criminal Code (VCtGB)*, *in* 2003 ANNUAL OF GERMAN & EUROPEAN LAW 667 (Russell A. Miller and Peer C. Zum-

2002.[22] This law incorporates the pertinent rules of international criminal law, which are in effect according to international customary law, as well as the rules of criminal jurisdiction[23] and of the obligatory punishments in cases of grave breaches of the international law of armed conflict. It affirms, in § 1, the *Weltrechtsprinzip*,[24] i.e. the principle of German universal jurisdiction in the case of crimes listed in the CCAIL.[25] With this law the Federal Republic responded to the development of international criminal law. This area of law cannot be reduced to the Rome Statute of the International Criminal Court (ICC).[26] The Rome Statute, already ratified by the Federal Republic with its law of July 17, 1998,[27] places the sentencing of certain penal offenses in the jurisdiction of the International Criminal Court, with its seat in The Hague. There are, however, important restrictions to the ICC's jurisdiction which concern, for example, the crime of war of aggression, which has until now not been defined within the framework of the statute, but which is in effect in international customary law.[28] It should also be noted that only such crimes are referred to the jurisdiction of the International Criminal Court which can be linked to a member state of the Rome Statute either as regards territory or in respect to the nationality of the perpetrator (active principle of personality).[29] The International

bansen eds., 2005); Christoph J.M. Safferling, *Germany's Adoption of an International Criminal Code*, *in* 2003 ANNUAL OF GERMAN & EUROPEAN LAW 365 (Russell A. Miller and Peer C. Zumbansen eds., 2005).

[22] BGBl I 2002, 2254.

[23] On the principle of universal jurisdiction, recognized in international customary law, *see* the contributions in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONA LAW (Stephen Macedo, ed., 2004) and LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (2003); Anthony Sammons *The 'Under-Theorization' of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts*, 21 BERKLEY J. OF INT'L L. 111 (2003); STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 151 (2nd ed., 2001).

[24] This is the technical term for "universal jurisdiction" in German law; literarily translated: "principle of global law".

[25] *See* GERHARD WERLE VOLKERSTRAFRECHT 39 (2003).

[26] Rome Statute Of The International Criminal Court UN Doc. 2187 U.N.T.S. 90, entered into force 1 July 2002.

[27] IStGH-Statutgesetz [Law Regarding the Statute of the ICC] – IStGHG, BGBl. 2000 II, 1393.

[28] On the efforts of operationaizing the norm: Roger Clark, *Rethinking Aggression as a Crime*, LJIL 15, 859 (2002); *see also* BENJAMIN FERENCZ, DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE (1975); General Assembly Res. 3314 (XXIX), 29 Resolution number, U.N. GAOR, session number, Supp. No. 31, at 24, U.N. Doc. A/9631 (1975).

[29] See Art. 12 ICC-Statute (Preconditions to the exercise of jurisdiction):

Criminal Court would appear to lack jurisdiction over the allegations of abuse at Abu Ghraib because the alleged perpetrators (Americans) are nationals of a member state and because the deeds were committed on the territory of a state that is not a party (Iraq).[30] Because of this objective and personal limitation on the ICC's jurisdiction, Judges Higgins, Kooijmans and Buergenthal have stressed that nation-state courts hearing cases by way of universal jurisdiction constitute an important complement to the International Criminal Court.[31]

Compared with the German Criminal Code and the International Criminal Court Statute Law, the CCAIL is an independent regulatory corpus. It contains a part with general provisions and a special part in which the norms for genocide, crimes against humanity and war crimes are laid out. For all crimes the CCAIL provides for the application of universal jurisdiction. In this respect, § 1 CCAIL determines that the law applies to all designated criminal acts against international law, even if the act occurred abroad and shows no link to internal affairs.[32] On the basis of this

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> (1) A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
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> (2) In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> > (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
> >
> > (b) The State of which the person accused of the crime is a national.
>
> (3) If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

[30] On the U.S.-resistance towards the ICC *see* Monroe Leigh, *The United States and the Statute of Rome,* AM. J. OF INT'L L. 95, 124 (2001).

[31] Joint sep. opinion, Judges Higgins, Kooijmans and Buergenthal, I.C.J., Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), I.C.J. Rep. 2002, pp. 121. und I.L.M. 41 (2002), pp. 536, *available at* http://www.icj-cij.org; as the ICC has no jurisdiction via the 'universal jurisdiction principle' this estimation is not simply a repetition of the principle of 'complementarity' mentioned in art. 17 ICC-Statute. The latter governs the admissibility of ICC-proceedings, in cases the ICC has jurisdiction via territoriality or active personality principles of jurisdiction, on the systematic see Markus Benzing, *The complementarity regime of the International Criminal Court*, 7 MAX PLANK YEARBOOK OF UNITED NATIONS LAW 591 (2004).

[32] § 1 CCAIL reads: "This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany."

principle, it is always incumbent on the Prosecutor General to prosecute all crimes against international law stipulated in the CCAIL, as far as they were committed after the CCAIL's entry into force, i.e. after June 30, 2002. In a session of the German Parliament, the (then) Federal Minister of Justice Däubler-Gmelin said, on the occasion of the adoption of the CCAIL in April 2002:

> "We also all know that the prosecution of crimes against international law before German courts remains important. The complementarity principle of the Rome Statute stipulates that the International Criminal Court's jurisdiction only holds if states do not wish, or are not in a position, criminally to prosecute one of the core crimes included in the Statute. This means that the states in the treaty retain their responsibility for international criminal jurisdiction, as far as they can. As a constitutional state, we can do this and we wish to. With our CCAIL we are creating an improved legal foundation for the prosecution of crimes against international law […] Another word on the principle of universal jurisdiction. Even perpetrators, who are neither German themselves nor commit their crimes against humanity in Germany or against Germans, can be made responsible here. This makes sense simply in order to underline the global significance of the proscription and prosecution of the most serious crimes."[33]

The complaints in the Abu Ghraib case, thus, correctly point to the fact that German jurisdiction is universal in cases falling under the CCAIL. The point of contact for German jurisdiction is simply the horrendous nature of the deeds. A specific link to Germany beyond this, such as the nationality of the victims or perpetrators, the territory of the acts or the presence of the accused in Germany[34] is not required.[35]

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[33] Protocols of the German Bundestag, 14/233 25/4/2002, 23270.

[34] On the norm of § 153f Code of Criminal Procedure *see* below.

[35] Gerhard Werle & Florian Jeßberger, *Völkerstrafgesetzbuch*, 7 JURISTENZEITUNG 725 (2002); *See* Cristina Hoss & Russell Miller, *German Federal Constitutional Court and Bosnian War Crimes: Liberalizing Germany's Genocide Jurisprudence*, *in* 44 GERMAN YEARBOOK OF INT'L L. 576 (2001).

D. Torture as a War Crime

The accusations made against the U.S. military in the complaint assert that systematic torture took place in the detention institution at Abu Ghraib and that the persons who were to be protected according to humanitarian international law were treated cruelly and inhumanely. The relevant elements of the crimes are incorporated into German law in § 8 Paragraph 1 CCAIL.[36] They are to be punished with a minimum of a three-year term of imprisonment. In the (general) German Criminal Code a separate definition for "torture" does not exist and one must always have recourse to elements of related crimes like duress (without being able juridically to articulate the specific illegality of torture) for prosecutions for torture under Germany's (general) criminal code.[37] The special criminal law for the realm of crimes against international law, however, explicitly formulates a penalization of torture. Its internationally accepted definition is contained in Art. 1 of the 1984 U.N. Convention against torture and other cruel, inhuman or degrading treatment or punishment.[38] Article 130 of the Geneva Convention on the Treatment of Prisoners of War[39] (Germany, Iraq and the U.S. have ratified this accord) must be read in the

[36] § 8 para 1 CCAIL: "Whoever in connection with an international armed conflict or with an armed conflict not of an international character […] 3. treats a person who is to be protected under international humanitarian law cruelly or inhumanly by causing him or her substantial physical or mental harm or suffering, especially by torturing or mutilating that person."

[37] The committee formed according to the International Anti-Torture Convention has continually criticized precisely this failing of German law (*see* most recently A/53/44, no. 185, *available at* http://www.unhchr.ch/tbs/doc.nsf). This is also pertinent to the so-called Daschner case, i.e. in respect to the accusations of torture against the former Vice President of the Frankfurt Police Headquarters, since in this case the indictment and sentence were only related to duress. In general, the Committee has criticized German law as follows: "The Committee is concerned that there are certain openly formulated legal determinations according to which, however, it is permissible under certain circumstances severely to restrict the legally guaranteed rights of persons who are in police custody on their way to being tried [...] Even invoking the "principle of proportionality" can, in the absence of any binding decisions of German courts, lead to arbitrary restrictions of these guaranteed rights" (A/53/44, no. 189). *See also* the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (BGBl. 1989 II p. 946) and the criticism of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), that visited Germany in December 2000 (2/8/2001, CPT/Inf (2003) 20; Answer of the German government of 14 June 2002 (CPT/Inf (2003) 21), both *available at* http://www.cpt.coe.int/documents/deu/2003-21-inf-eng.htm. The reports of the preceding visits of the CPT in the Federal Republic and the answers of the Federal government are published under the following reference numbers: CPT/Inf (93) 13; CPT/Inf (93) 14; CPT/Inf (97) 9 and CPT/Inf (99) 10).

[38] Convention against torture and other cruel, inhuman or degrading treatment or punishment, 10.12.1984 (BGBl. 1990 II p. 246; 1465 UNTS 85).

[39] Geneva Conventions of 12 August 1949 on the Treatment of Prisoners of War (BGBl. 1954 II 781; 75 UNTS 135, 150).

light of this norm, which classifies torture as a "grave breach" of the Geneva Conventions. From this follows the duty stipulated in Art. 129. para. 2 of this treaty, which address the investigation and prosecution of persons who are accused of having ordered the commission or having committed under orders, one or another of these serious infractions:

> "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."[40]

In specifying the obligations of humanitarian international law, both the Yugoslavia and the Rwanda tribunals have referred to the definition of torture of Art. 1 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment,[41] according to which an act fulfills the elements of "torture" when severe pain or suffering, whether physical or mental, is intentionally inflicted on a person

> "for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public

[40] Art. 129. para. 2 Geneva Convention on the Treatment of Prisoners of War (*see supra* note 39).

[41] ICTY, Furundzija, December 12, 1998, no. 159, I.L.M. 38 (1999), pp. 317 et seq.; ICTR, Akayesu, 2 September 1998, no. 593, I.L.M. 37 (1998), pp. 1399 et seq.; *see* Michael Bothe, *War Crimes*, *in*: THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, vol. 1, 379 (A. Cassese, P. Gaeta & J.R.W.D. Jones eds., 2002), Gerhard Werle VOLKERSTRAFRECHT 338 (2003), *and also* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: International Criminal Law: U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison*, 98 AM. J. OF INT'L L. (2004), and The Association of the Bar of the City of New York, *Human Rights Standards Applicable to the United States' Interrogation of Detainees*, 59 THE RECORD OF THE ASSOCIATION OF THE BAR OF NEW YORK 271 (2004).

> official or other person acting in an official capacity."[42]

The complaints assert that the four Iraqi detainees were beaten and sexually abused, that they were deprived of sleep and food, and that by means of hoods they were subjected to sensory deprivation. It is alleged that these actions were taken in order to intimidate the detainees and obtain intelligence information from them. In addition, they allege that the prisoners were exposed to extreme temperatures and loud music as well as required to stand in uncomfortable positions and that dogs were ordered to attack them and mock murders carried out. Another serious accusation is that medical personnel actively cooperated in the mistreatment. Thus the interrogators were said to have used medical diagnoses in order to be able to put the prisoners under more effective pressure. The complaint alleges that the number of prisoners who had psychological problems, mainly due to long isolated detentions, is great. Similar procedures in the detention center in Guantánamo were designated by the generally very cautious International Committee of the Red Cross as "torture." In a report leaked to the *New York Times*, which was given to the White House and other U.S. authorities in July 2004, the Committee charged that the methods were deployed in an increasingly "more refined and repressive" way.[43] The Committee reported finding a system in Guantánamo that was intended to break the will of the prisoners and make them psychologically dependent on the interrogators by means of "humiliating acts, solitary confinement, temperature extremes, use of forced positions."[44] The International Committee of the Red Cross concluded:

> "The construction of such a system, whose stated purpose is the production of intelligence, cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture". [45]

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[42] Art. 1 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment.

[43] Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, THE NEW YORK TIMES, 30 November 2004, at 1.

[44] *Id*.

[45] *Id*.

E. The Responsibility of Superiors

If these assertions are true, the direct participants in the deeds have been involved in crimes meeting the definition of torture. It is more difficult to demonstrate responsibility in the upward chain of command. But it is precisely this interest that is taken up by the complaint, which is not directed against the soldiers at the lower end of the military hierarchy, against whom in some cases there are already trials before U.S. military courts.[46] Instead, the complaint asserts accusations against persons who act as political decision-makers and superiors of those stationed in Abu Ghraib, making the argument that it is the leadership that should be held responsible for a general command situation which made torture possible in the first place. The list of the accused reads like a "Who's Who" of the intelligence and military apparatus of the U.S.: the Secretary of Defense of the United States of America, Donald Rumsfeld; the former Director of the Central Intelligence Agency, George Tenet; Lieutenant General Ricardo S. Sanchez, Commander General of the Fifth Corps (stationed in Heidelberg); Major General Walter Wojdakowski, Fifth Corps (Heidelberg); Brigadier General Janis Karpinski, at present suspended commander of the 800th Military Police Brigade; Lieutenant Colonel Jerry L. Philabaum, former commander of the 320th Military Police Bataillon of the 800th Military Police Brigade; Colonel Thomas Pappas, commander of the 205th Military Intelligence Brigade (Wiesbaden); Lieutenant Colonel Stephen L. Jordan, 205th Military Intelligence Brigade (Wiesbaden); Major General Geoffrey Miller; Under Secretary of Defense for Intelligence Stephen Cambone. The claimants do not assert that these people participated directly in torture, but argue instead that their responsibility extends to the proliferation of torture practices, which were not only directly or indirectly ordered by these U.S. functionaries, but which were also brought about in part because of incorrect and false legal information from civil and military jurists in the service of the government. Concretely, the complaint is based on a multitude of documents, which demonstrate the military leadership's direct responsibility for torture practices in Abu Ghraib. "In part we have direct instructions for the employment of methods in Abu Ghraib, which are forbidden by the Geneva Conventions," Kaleck said in a press conference on December 1, 2004. The use of sexual humiliation, he said, has indeed only expressly been declassified in the prison island of Gunatánamo, but also governed the practice in Abu Ghraib. The complaint points to a series of memoranda and directives in which those in positions of leadership (1) claimed that the Geneva Conventions are in part inapplicable; or (2) have so misinterpreted them that, for example, they only recognize the existence of tor-

[46] Beginning with the trial of Charles Graner, reservist of the 372nd Military Police Company in January 2005, who was convicted of inflicting serious bodily harm, conspiracy, prisoner mistreatment, sexual assault and other crimes (*see Frankfurter Rundschau*, 16 January 2005).

ture when the pain inflicted in interrogations lead to death, to organ failure or to the permanent damage of important bodily functions.[47]

The German CCAIL has broken down the provision in Art. 28 of the International Criminal Court Statute into a total of three prohibitions[48] and lays down alongside the general guarantor obligation (§ 4 CCAIL)[49] an intelligence and control obligation[50] for superiors. The latter must deploy all means to prevent excesses of force on the part of their subordinates. The concept of "superior" is not strictly tied to military hierarchies but instead takes the concrete relations of instructions and commands into account in each case. "Superior" can thus also indicate civilians, since in the final analysis actual leadership and control possibilities are what will count. Leadership personnel have to take effective measures for the prevention of war crimes by their subordinates,[51] an obligation that is complemented by oversight, investigative and reporting obligations. The complaint argues in great detail, over nearly 50 pages, that those responsible in the case of Abu Ghraib massively failed in their oversight and control obligations (which alone would establish culpability). However, the complaint goes further and accuses U.S. functionaries of actively participating in intensifying the form of interrogation techniques in Guantánamo and Abu Ghraib such that the techniques ultimately employed no longer square with the ban on torture. This accusation is also supported by a number of memoranda and reports. The passage of the complaint that concerns Secretary Rumsfeld explains this as follows:

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[47] KALECK, *supra* note 4, at 8.

[48] *See* Werle & Jeßberger, *supra* note 35, at 725.

[49] § 4 CCAIL reads: "(1) A military commander or civilian superior who omits to prevent his or her subordinate from committing an offence pursuant to this Act shall be punished in the same way as a perpetrator of the offence committed by that subordinate. […] (2) Any person effectively giving orders or exercising command and control in a unit shall be deemed equivalent to a military commander. Any person effectively exercising command and control in a civil organization or in an enterprise shall be deemed equivalent to a civilian superior."

[50] § 13 para 1 CCAIL: "A military commander who intentionally or negligently omits properly to supervise a subordinate under his or her command or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Act, where the imminent commission of such an offence was discernible to the commander and he or she could have prevented it." *See also* § 14 para 1 CCAIL: "A military commander or a civilian superior who omits immediately to draw the attention f the agency responsible for the investigation or prosecution of any offence pursuant to this Act, to such an offence committed by a subordinate, shall be punished with imprisonment for not more than five years." On the systematic *see e.g.* KAI AMBOS, DER ALLGEMEINE TEIL DES VOKLERSTRAFRECHTS 2002.

[51] § 4 CCAIL.

> "The accused Rumsfeld reacted on December 2, 2002 with the decision to permit 16 further techniques, among them hooding, stripping, deployment of dogs and so-called mild, non-injurious contact […] At the end of the memorandum on the permitting of certain techniques there is a manuscript note by Rumsfeld that refers to letting prisoners stay in tense positions for up to four hours. There he writes 'I stand for 8-10 hours a day. Why is standing limited to four hours?' […] On April 16, 2003 the accused Rumsfeld agreed to a list of ca. 20 interrogation techniques, which were, and still are, permitted for use in Guantánamo. They allow staff of the Department of Defense, among others, to reverse the prisoners' normal sleeping habits and to expose them to heat, cold and 'mild assaults' (including loud music and glaring light) […] Personal interventions by Rumsfeld not only led to the use of patently criminal methods in interrogations of certain persons. He is also responsible for a system of cover-up of detentions. The accused Rumsfeld ordered military personnel in November 2003 in Iraq not to enter a prisoner in the list of inmates, in order to prevent the International Committee of the Red Cross from observing his treatment, which is a breach of international law. Moreover, according to reports, prisoners were kept in at least a dozen facilities that work in secret and are hidden from inspection by the Red Cross."[52]

If these accusations prove true in judicial proceedings, the accused would in fact be war criminals. The project of regime change in so-called rogue states would be burdened by a structural analogy of domination techniques between democracies and terrorists, which would have in common the fact that they are ready to carry out

[52] The documents cited can be found in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 181 (Karen Greenberg & Joshua Dratel eds., 2005); *see also* the report by Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: International Criminal Law: U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison*, 98 AM. J. OF INT'L L. 591 (2004), and The Association of the Bar of the City of New York, *Human Rights Standards Applicable to the United States' Interrogation of Detainees*, 59 THE RECORD OF THE ASSOCIATION OF THE BAR OF NEW YORK 271 (2004); *see also* the recent Memorandum of the Office of Legal Counsel, U.S. Department of Justice, Memorandum for James Comey, Deputy Attorney General, *supra* note 17.

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their respective claims of universality without regard to the human dignity of those affected.[53]

F. No Obstacles to Legal Proceedings

But maybe immunity has to be granted to the accused so that they cannot be prosecuted in Germany?

In the question of immunity from German jurisdiction[54] one must differentiate between investigative procedures and court procedures and the individual accused persons, for whom different complexes of norms are pertinent. None of the accused enjoy immunity from a state-prosecutorial investigative procedure preliminary to a possible court trial. The immunity guaranteed by international law does not go so far as to prevent a sifting through, and securing of, the evidence for, and an investigation of, the criminal accusations by the Office of Public Prosecutor. Nor is there anything in the NATO Status of Forces Agreement that speaks against investigating the suspects stationed in the Federal Republic. But the pertinence of immunity is disputable if an actual indictment were issued or an arrest warrant signed. In these cases, it has to be asked, if the rule granting immunity to heads of state is also applicable to officiating ministers. The I.C.J. has held that foreign ministers are *rationae personae* immune from jurisdiction of third states, as long as the actions of which they are accused are taken in the exercise of their official capacity.[55] At the end of

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[53] *See* the general thesis of GIORGIO AGAMBEN, THE STATE OF EXCEPTON (HOMO SACER II.I) (2004).

[54] The relevant rules are those of international public law, to be applied via § 20 Para. 2 of the *Gerichtsverfassungsgesetz* (The Organization of the Courts Act (cited GVG) is translated as the Judicature Act and the Constitution of the Courts Act.) in conjunction with Art. 25 of the *Grundgesetz* (GG - Basic Law).

[55] I.C.J., Arrest Warrant (Dem. Rep. Congo v. Belg., 14 February 2002, see *supra* note 31), para 61 reads: "Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances. First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law. Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity. Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity. Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may

their tenure, however, the immunity from judicial procedures is suspended, and the accusations of breaches of human rights, which occurred during the tenure as a minister, must be prosecuted. The limitations contained in the rules on immunity result especially from the jurisdiction of the International Court of Justice and the decisions of national courts (e.g. in the Pinochet case through the English House of Lords).[56] In these instances the courts dealt with standards of international law, such as are expressed in the Vienna Convention on Diplomatic Relations of April 18, 1961,[57] the Vienna Convention on Consular Relations of April 24, 1963[58] and in the U.N. Convention on Special Missions of December 8, 1969.[59] In particular, in the arrest-warrant case between Belgium and the Congo,[60] in which the International Court of Justice had to decide on an arrest warrant issued for the (then) sitting Foreign Minister of the Congo, we can see that international law arrived at a tiered doctrine of immunity in weighing the right of individual protection (investigation and punishment of human-rights crimes, *aut dedere aut iudicare*)[61] and the right of protection of the function of diplomatic activity.[62] This doctrine attempts to interlock both rights so that neither diplomatic immunity nor the protection of human rights must fundamentally suffer.[63] An actual legal proceeding now pending at the International Court, involving France and the Congo, regards the question of how this solution applies to investigative proceedings.[64] The International Court has not

attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

[56] As a whole, if one includes the decision of the Divisional Court, there were four decisions in the Pinochet affair: (1) Divisional Court Decision: Augusto Pinochet Ugarte, [1999], I.L.M. 68 et seq. (Q.B. Div'l Ct. 1998); (2) Pinochet 1: R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, 3 W.L.R. 1456 (H.L. 1998); nullified by: (3) Pinochet 2: R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (no.2), 2 W.L.R. 272 (H.L. 1999) und (4) Pinochet 3: R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, 2 W.L.R. 827 (H.L. 1999).

[57] Vienna Convention on Diplomatic Relations of April 18, 1961, 500 UNTS 95.

[58] Vienna Convention on Consular Relations of April 24, 1963, 596 UNTS 262.

[59] UN Convention on Special Missions, Annex to UNGA Resolution 2530 (XXIV) of 8 December 1969

[60] ICJ, Arrest Warrant (Dem. Rep. Congo v. Belg., 14 February, 2002, *see supra* note 31).

[61] M. CHERIF BASSIOUNI & EDWARD WISE, AUT DEDERE AUT JUDICARE: THE DDUTY TO EEXTRADITE OR PROSECUTE IN INTERNATIONAL LAW (1995).

[62] ICJ, Arrest Warrant (Dem. Rep. Congo v. Belg., February 14, 2002, *see supra* note 31); Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. OF INT'L L. 407 (2004).

[63] Thus already Michael Bothe, *Die strafrechtliche Immunität fremder Staatsorgane*, 31 HEIDELBERG J. OF INT'L LAW 246 (1971).

[64] Certain Criminal Proceedings in France (Republic of the Congo v. France), Order of 17 June 2003, I.C.J. *available at* www.icj-cij.org.

yet conclusively decided the case, even though it has dismissed the Congo's request for provisional measures,[65] which involves a French investigative procedure against a Congolese minister. Since criminal investigations do not hinder diplomatic activity, immunity of officials in this context is not likely to be accepted by the Court.[66]

In rough outline then, the conditions for jurisdictional immunity appear as follows.[67] During tenure as the head of state, a person enjoys immunity from the jurisdiction of other states.[68] This also holds for members of diplomatic special missions. This (personal) immunity does not extend so far that breaches of human rights committed during an official's tenure can never be prosecuted. In fact, no state official enjoys immunity in the case of grave human rights infractions, since human rights infractions do not belong to the exercise of public functions.[69] Nevertheless, owing to protection for the freedom of diplomatic activity within international law, judicial prosecutions of human rights crimes are suspended as long as the official in question is still in office. In international law, one can argue over the extent of this special personal immunity. Originally it only held for heads of state.[70] However, in the practice of international law there is a tendency to broaden this immunity to individual ministers.[71] This immunity provision stands in contradiction to the norms of humanitarian international law that lay down an obligation to investigate in the case of war crimes.[72] These norms urge the parties of the Geneva Conven-

[65] *Id.*

[66] Similarly the argumentation in the framework of the weighing of rights by the International Criminal Court, Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v. France), Decision of 17 June 2003; the French investigative procedure has in the meanwhile been discontinued, see Chambre d'instruction de la Cour d'appel de Paris, November 22, 2004.

[67] Instructive summary by Akande, *supra* note 62.

[68] An exception is made for the International Criminal Court, Art. 27 (2) Rome Statute.

[69] Antonio Cassese, *When may Senior State Officials be tried for International Crimes? Some Comments on the Congo v. Belgium Case*, EJIL 853 (2002).

[70] See the criticism of Judge van den Wyngaert: "In the present case, there is no settled practice *(usus)* about the postulated "full" immunity of Foreign Ministers to which the International Court of Justice refers in paragraph 54 of its present Judgment. There may be limited State practice about immunities for current or former Heads of State in national courts, but there is no such practice about Foreign Ministers. On the contrary, the practice rather seems to be that there are hardly any examples of Foreign Ministers being granted immunity in foreign jurisdictions." (I.C.J., Arrest Warrant (Dem. Rep. Congo v. Belg., 14 February 2002, *see supra* note 31, diss. Opinion van den Wyngaert, para 13).

[71] *Id.*

[72] See Art. 129 of the Third Geneva Convention. On this obligation *see* Christian Tomuschat, *The duty to prosecute international crimes committed by individuals*, *in* FESTSCHRIFT HELMUT STEINBERGER: TRADITION UND WELTOFFENHEIT DES RECHT 315 (Hans-Joachim Cremer et al. (eds.), 2002).

tions to prosecute grave breaches and to bring the accused persons, regardless of their nationality, before its own courts. The Geneva Conventions, in this regard, do not provide an exception for ministers. There are good reasons to conceive of them as *lex specialis* to the general rules of immunity,[73] and to reclaim for this complex of norms what the ILC already noted in its report on the Draft Code of Crimes against the Peace and Security of Mankind: "The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility".[74] The assumption that Donald Rumsfeld might be granted immunity in German courts is therefore based on a very doubtful line of argument. In any case, a temporary jurisdictional immunity for serving ministers does not preclude the prosecutor's obligation to enter into a formal investigation procedure, as no immunity from investigations is granted by international law.

As to the others, as long as they are stationed in the Federal Republic, the legal situation is specifically that by international treaty the NATO Status of Forces Agreement guarantees exemption from German jurisdiction.

International assurance of immunity or exemption from jurisdiction for allied troops is enjoying a general boom these days. After the U.S. distanced itself from striving against international resistance, for guarantees of immunity for its soldiers in international missions under Art. 16 of the Rome Statute,[75] it has concentrated its efforts on the conclusion of bilateral immunity, i.e. exemption agreements.[76] For the

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[73] Therefore the criticism of Adam Day, *Crimes Against Humanity as a Nexus of Individual and State Responsibility: Why the ICJ Got Belgium v. Congo Wrong*, 22 BERKELEY J. INT'L L. 489 (2004) concerning the I.C.J. decision in the arrest warrant case (Dem. Rep. Congo v. Belg., 14 February, 2002, *see supra* note 31, especially para 59 of the decision) is justified.

[74] Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, U.N. GAOR, 51st Sess., Supp. No. 10, at 41, U.N. Doc. A/51/10 (1996).

[75] Art. 16 permits specific Security Council Resolutions for the grant of immunity in limited cases. On this legally doubtful strategy of securing immunity *see* Carsten Stahn, *The Ambiguities of Security Council Resolution 1422 (2002)*, 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 85 (2003), and Marc Weller, *Undoing the global constitution: UN Security Council action on the International Criminal Court,* 78 INTERNATIONAL AFFAIRS 693 (2002).

[76] Even the German administration, its noble assertions notwithstanding, has had recourse to this regulatory approach and has reached exemption or immunity agreements, for example, in the military-technical convention with the Afghan interim government and in the troop stationing accord between Germany and Uzbekhistan of 12 Febryary 2002. The military-technical accord of 4 January 2002 negotiated between the ISAF and the Afghan interm government regulates in its Annex A (Arrangements

statute of the International Criminal Court there is the pertinent legal context from Art. 98 of the Rome Statute, according to which the Court may not direct transfer requests to states if the latter would be contrary to agreements of international law in transferring a suspect. Both in the jurisdictional domain of the International Criminal Court and in that of national courts, it depends on an exact determination of the content of each of the assurances of international immunity, and above all, on an examination of whether such norms possibly infringe on other international-law norms. As regards the demarcation of jurisdictions of the U.S. and the Federal Republic, such as follow from the NATO Status of Forces Agreement of June 19, 1951 and from the Supplemental Agreement of August 3, 1959 and its revision in the Agreement of March 18, 1993,[77] four aspects are relevant. First, these agreements have the aim of regulating jurisdictional boundaries, which result from the stationing of foreign troops on the territory of the host state. The NATO Statute is thereby only applicable if the criminal accusations refer to crimes committed on the territory of the host state. This does not obtain in the present case, since it involves accusations that arise in the context of the occurrences in Abu Ghraib. Even each of the individual accusations in respect to the breach of oversight, guarantor, and control obligations were for offenses not occurring in Germany. Second, another technique for compatibilizing the possibly colliding norms can be drawn from the decision of the ICTY in the *Furundzija* case, in which the tribunal stated:

> "The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authoris-

Regarding the Status of the International Security Assistance Force), para. 4 questions of immunity: „The ISAF and supporting personnel, including associated liaison personnel, will be immune from personal arrest or detention. The ISAF and supporting personnel, including associated liaison personnel, mistakenly arrested or detained will be immediately handed over to ISAF authorities. The Interim Administration agree that ISAF and supporting personnel, including associated liaison personnel, may not be surrendered to, or otherwise transferred to the custody of, an international tribunal or any other entity or State without the express consent of the contributing nation" (the MTA can be found *at* <www.operations.mod.uk/isafmta.pdf> and in: Harvey Langholtz, Boris Kondoch & Alan Wells, International Peacekeeping, The Yearbook of International Peace Operations 8 (2004), documentation on CD-ROM)). Nevertheless, the Federal government does not see that these clauses compromise its cooperation with the ICC. It assumes "that contracting states have, with the ratification of the Statute, already given their approval to a possible transfer to the ICC" (answer of the Federal administration to a parliamentary inquiry, August 1, 2002, BT-Drs. 14/9841, p. 2).

[77] See NATO Status of Forces Agreement (SOFA), BGBl. 1961 II 1190; SOFA Zusatzvereinbarung, BGBl. 1961 II 1218; Revised SOFA Supplemental Agreement, BGBl. 1994 II 2594, 2598; see further the trooop statute "Partnership for Peace" of NATO of 19 June 1995 (BGBl. 1998 II p. 1340); see also Art. 8 Para. 1 of the EU troop statute of November 4, 2003 (13028/03, JUR 375, PESC 548).

> ing torture. It would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition."[78]

Applying the legal reasoning of the ICTY, the *ius cogens* principle codified in Art. 53 of the Vienna Convention of the Law of Treaties[79] prohibits any legal act, that might disavow the *aut dedere aut iudicare* rule in respect of deeds of torture. Third, it is also important, concerning the right of troop stationing, to grasp the distinction made in international customary law in respect to immunity exceptions. The jurisdiction of the host state is only ruled out if the act in question occurred by commission or omission on the part of a NATO soldier in his or her official capacity. As in cases of diplomatic immunity, participation in torture is not, and is never to be, regarded as an official activity in the sense of immunity law. An international exemption from the jurisdiction of the host state is therefore just as much excluded as is the application of the immunity principles of international customary law. In other words, even if torture is carried out on the occasion of the exercise of a public function, immunity and exemption from the jurisdiction of the host state does not hold. Finally, even if all this were not so, the accusations in question here would have to be treated as punishable acts "resulting from commission or omission in the exercise of duty," according to Art. VII (3) (a) (ii) of the NATO Status of Forces Agreement, and it only follows that between the dispatching state (U.S.A.) and the host state (F.R.G.) there is a competing jurisdiction with a jurisdictional privilege for the U.S.A.[80] If, as here, the dispatching state makes no use of its privilege, no substantive hindrances to proceedings derived from the NATO Status of Forces Agreement

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[78] ICTY, Furundzija, I.L.M. 38, 349, para 155 (1999).

[79] BGBl.1985 II, 926; 1155 UNTS 331.

[80] Details in RAINER BIRKE, STRAFVERFOLGUNG NACH DEM NATO-TRUPPENSTATUT: GRUNDLAGEN UND PRAXIS EINES "INTERNATIONAL-ARBEITSTEILIGEN" SREAFVERFAHRENS 77 (2004); *see also* Dieter Fleck, *Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements?*, 1 J. OF INT'L CRIMINAL JUSTICE 651 (2003).

stand in the way of the jurisdiction of the host state. In sum, immunity, i.e. an acceptance of exemption from procedure, is withdrawn for the accused stationed in Germany.

G. Constraints on Discretion

If German jurisdiction exists for the complaint under the principles of international law, that is, responsibility of the persons named in the complaint is not unfounded, and there is no immunity from an investigative procedure, how might the complaint nonetheless fail?

To begin with, it could fail because the Chief Federal Prosecutor refused, exactly one day before the Security Conference in Munich, to initiate an investigative procedure.[81] Among the frequent trial injunction techniques in German criminal law is the shutting off of a plethora of investigations via the Prosecutor's refusal to introduce an investigative procedure. Such a refusal to open an investigative procedure is a Kafkaesque business that recalls the gatekeeper parable: A man from the country stands before the gates of the law, desires entry but is refused admission; at the end, the gate is closed without his even having caught sight of the law.[82] The law was only there to make him wait in vain. Still, this strategy has stood the test of time in the case of troublemakers and of prominent people. It is, however, merely informal and is not provided for in the Code of Criminal Procedure. The troublemakers can be dispatched in this way without inordinate expenditure of paper and time. Prominent people can thus be shielded from a stigmatization resulting from an investigative procedure. The paradox is that the investigations preceding the formal investigative proceedings are, in these cases, identical with which is signified by the introduction of a formal investigative procedure in the case of common criminals, i.e. one examines whether a criminally relevant suspicion exists.[83]

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[81] Federal Prosecutor, decision of 10 February 2005, file-no 3 ARB 207/04-2, on file with the author; the decision is partly documented *at* http://www.generalbundesanwalt.de/news/index.php?Artikel=163&Thema=6&Start=0

[82] Franz Kafka, *Vor dem Gesetz*, *in* DER PROZESS (1915).

[83] Section 160 (Investigation Proceedings) of the Criminal Procedure Code reads:

> (1) As soon as the public prosecution office obtains knowledge of a suspected criminal offense either through a criminal information or by other means it shall investigate the facts to decide whether public charges are to be preferred.
>
> (2) The public prosecution office shall ascertain not only incriminating but also exonerating circumstances, and shall ensure that such evidence is taken the loss of which is to be feared.

This is precisely the artful dodger that the Chief Federal Prosecutor made when he refused to undertake an investigation on the complaint in the Abu Ghraib matter.[84] He did not look into the initial suspicion in respect to the accused and decided, primarily on the bases of subsidiarity,[85] not to investigate. This decision, however, is subject to the control of the court (here: the Higher Regional Court, *Oberlandesgericht*, Karlsruhe) . In so far as they are victims of the alleged crime, the complainants have the legal right in Federal Courts to appeal the State Prosecutor's decision to end the procedure before it begins. [86]

> (3) The investigations of the public prosecution office should extend also to the circumstances which are important for the determination of the legal consequences. For this purpose it may avail itself of the service of the court assistance agency.

[84] *See* e.g. Ursula Knapp, *In erster Linie sind Heimatstaaten zuständig*, FRANKFURTER RUNDSCHAU, 11 February 2005.

[85] On this principle *see* section 153f Criminal Procedure Code. On ground of this subsidiarity principle also the Spanish Tribunal Supremo recently rejected a case against former Peruvian President Alberto Fujimori, *See* STS, 20 May 2003 (Sentencia No. 712/2003), *available at* <http://www.derechos.org/nizkor/peru/doc/tsperu.html>.

[86] Section 172 (Proceeding to Compel Public Charges) of the Criminal Procedure Code reads:

> (1) If the applicant is at the same time the aggrieved party, he shall be entitled to lodge a complaint against the notification made pursuant to Section 171 to the official superior of the public prosecution office within two weeks after receipt of such notification. On the filing of the complaint with the public prosecution office the time limit shall be deemed to have been observed. The time limit shall not run if no information has been given pursuant to Section 171, second sentence.
>
> (2) The applicant may, within one month of receipt of notification, apply for a court decision in respect of the dismissal of the complaint by the superior official of the public prosecution office. He shall be informed of this right and of the form provided for such application; the time limit shall not run if no information has been given. The application shall not be admissible when the subject of the proceedings is solely a criminal offense which may be prosecuted by the aggrieved party by way of a private prosecution, or if the public prosecution office dispensed with preferring public charges in accordance with Section 153 subsection (1), Section 153a subsection (1), first and sixth sentences, or Section 153b subsection (1); the same shall apply in cases under Sections 153 c to 154 subsection (1), as well as under Sections 154b and 154c.
>
> (3) The application for a court decision shall indicate the facts which are intended to substantiate preferment of public charges as well as the evidence. The application must be signed by an attorney-at-law; legal aid shall be governed by the same provisions as in civil litigation. The application shall be submitted to the court competent for the decision.
>
> (4) The Higher Regional Court shall be competent to decide on the application. Section 120 of the Courts Constitution Act shall apply *mutatis mutandis*.

In this judicial procedure the complainants will have to force the Federal Prosecutor's Office to admit an investigative procedure, because the legislature has structured and restricted the otherwise existing discretion of the State Prosecutor's Office in the case of acts committed abroad. Section 153f of the Strafprozessordnung (StPO – Code of Criminal Procedure), newly introduced in the legislative process associated with the enactment of the CCAIL, provides for an investigative and prosecutorial obligation for cases in which the accused is residing within the Federal Republic or in which such a sojourn is expected.[87] In this connection, it suffices that the stay occurs in the context of a transit journey. Former Iraq-commander Sanchez's unit is stationed in Heidelberg. The offices of the accused Wodjakowski and Pappas are also in Germany. For this reason alone, in light of the obligation to prosecute imposed by § 153f Code of Criminal Procedure, the deeds in the complaint would have to be prosecuted. The prosecution does not thereby have to be restricted to those present in Germany, which is clear from *argumentum e contrario* in the legal conception articulated in § 153f II No. 3 of the Code of Criminal Procedure, which allows for the discontinuing of investigations if "no suspect is residing

[87] § 153f Criminal Procedure Code reads:

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

in Germany and such a sojourn is also not to be expected." From the very wording of the law it is clear that the presence of only one of the participants in a complex of acts suffices to establish the obligation to prosecute. In this it is also irrelevant if the accused is intermittently moved to a site of action outside federal territory. Waiting out the issue of investigations would be against the law, as it would violate the state prosecutorial obligation to investigate. This attempt to allow the process to be stalled would also be futile for the very reason that so many U.S. units have been and continue to be stationed in Germany. The Chief Federal Prosecutor is obliged to extend the investigations to all possible suspects, whether or not they are named in the complaint. In the present case, a further delimitation of discretion results from the Third Geneva Convention, which also stipulates an obligation to prosecute.[88]

Superficially considered,[89] one might think, and the Federal Prosecutor maintained in his February 10, 2005 decision exactly this position,[90] that the discontinuation justification of subsidiarity mentioned in § 153f para. 2 No. 4 Code of Criminal Procedure applies. Accordingly, proceedings in the Federal Republic could be dropped if, among other things, the act is already being prosecuted by the fora of the state of which the alleged perpetrator or victim is a national. The fact that the United States is governed by the rule of law does not, however, mean that in a concrete instance an effective prosecution of the crimes of Abu Ghraib will take place in the United States.[91] Despite the frequently stated intention of thoroughly investigating the accusations, until now only eight low-ranking soldiers have been indicted, and among them only a handful have yet been convicted and sentenced, in regard to the occurrences at Abu Ghraib. At present, no proceedings can be expected before either U.S. courts or Iraqi courts against the superiors accused, in the complaint, for

[88] Art. 129 Para. 2. Geneva Convention on the Treatment of Prisoners of War (*see supra* note 39); this Convention has been ratified by the Federal Republic and the U.S.

[89] As, for example, in Jan Hessbruegge, *An Attempt to Have Secretary Rumsfeld and Others Indicted for War Crimes under the German Völkerstrafgesetzbuch*, ASIL INSIGHT 12/2004, *at* www.asil.org/insights.htm (2004), who is piquantly described in ASIL's biographical note as an advisor to former Minister of Defense Rudolf Scharping.

[90] Federal Prosecutor, *supra* note 81.

[91] For the complementarity principle of the ICC, see Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MILITARY L. REV. 20, 54 (2001): "The ICC prosecutor and court must make a subjective assessment whether the sovereign state is "genuinely unwilling" or "genuinely unable" to take action on the case. This new standard also allows the supranational institution to review, and potentially reverse, the disposition of the case following prior judicial or investigative action in the domestic system."

the offenses of breach of guarantor, investigation and control duties.[92] Indeed, one of the motives for the complaint in the Federal Republic is that there should also be investigations of military superiors and that the German investigations provide an occasion for initiating proceedings in the U.S., for which the evidence collected in the Federal Republic can then also be used. In view of the still not introduced court proceedings in the U.S. against the accused, there is no room for an exercise of discretion not to prosecute on the part of the Chief Federal Prosecutor, which also follows from the materials used in the Introduction of § 153f Code of Criminal Procedure. According to the latter, a case in which a concrete criminal accusation is not prosecuted by a foreign or international jurisdiction should be subjected to the legality principle and not to the opportunity principle:[93]

> "If the act shows no domestic link, and if no prior jurisdiction has begun investigations, the legality principle, in connection with the principle of universal jurisdiction, then demands that German prosecutorial authorities make assiduous efforts at the investigations that are possible for them in order to prepare a subsequent prosecution (whether in Germany or abroad)."[94]

Whether or not the *local remedies* in the U.S. have been activated is a purely factual question. In the present case regarding the accused and the criminal accusations directed at them the answer must be negative. Whether these accusations are the

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[92] *See* Scott Horton: "In addition to UCMJ, the other principal bodies of criminal law under which war crimes may be charged are the War Crimes Act of 1996, 18 U.S.C. sec. 2441, and the Anti-Torture Act of 1996, 18 U.S.C. sec. 2340. Enforcement of these acts is committed to the Department of Justice and particularly to the Attorney General and the various United States Attorneys. […] Accordingly, senior lawyers at DOJ, acting with the knowledge and support of the Attorney General, were complicit in the scheme to introduce torture and other abusive practices into authorized regimes of treatment for detainees in GWOT. It is therefore clear that DOJ will not act on its responsibility to initiate criminal investigations or undertake prosecutions of the conspirators and implementers of this scheme" (Scott Horton, Expert Report, 1/29/2005, para 25 and 28, *available at* http://www.ccr-ny.org/v2/legal/september_11th/docs/ScottHortonGermany013105.pdf and www.rav.de).

[93] The "principle of legality" is laid down in § 152 para 2 Code of Criminal Procedure: "Except as otherwise provided by law, the public prosecution office shall be obliged to take action in the case of all criminal offenses which may be prosecuted, provided there are sufficient factual indications." Whereas the principle of legality obliges to prosecute, the principle of "opportunity" gives discretion to the Prosecutor's office, *see* THEODOR KLEINKNECHT & LUTZ MEYER-GOßNER, STRAFPROZESSRDNUNG § 152 para 2 (47th ed. 2004).

[94] BT Drucks. 14/8524, p. 38

object of separate investigative reports,[95] whether these questions have incidentally been addressed in the course of trials against the direct participants, whether the courts in these trials have come to a judgment based on the defense strategy of invoking the command situation in part used by the defendants, all this is legally irrelevant.[96] The possibility of dropping the case according to No. 4 of § 153f para. 2 Code of Criminal Procedure is only given if the act, i.e. here the accusations of responsibility of superiors, is in fact being criminally prosecuted. This is only the case if the accused themselves are confronted with proceedings before the legal remedies, e.g. courts. A similar formulation of this obligation is in Art. 129 para. 2 of the

[95] On the techniques of influencing the results of these official reports, see Scott Horton: "In May 2004, I had occasion to interview several soldiers stationed at various locations in the German Länder of Hessen and Baden-Württemberg, who were attached to military intelligence units under the U.S. Army's V Corps, and who were previously stationed at, or who visited, Abu Ghraib. I conducted my interview for purposes of understanding how MG Fay was proceeding with his investigation. The accounts I received were all consistent and were highly revealing of MG Fay's intent. MG Fay held group meetings with soldiers in the presence of their group commanding officers. At these meetings, he reminded them that any soldier who had observed the abuse of detainees at Abu Ghraib and other sites and who had failed to report it contemporaneously was guilty of an infraction and could be brought up on charges. He stated that any non-commissioned officer who observed the abuse of detainees at Abu Ghraib and other sites and who failed to intervene or stop it was guilty of an infraction and could be brought up on charges. He then asked if anyone had observed any incidents they wished to discuss with him. The result of such a process is entirely predictable. MG Fay worked hard to limit the number of accounts of abuse in order to sustain a preconceived theory that the abuse at Abu Ghraib was the result of a handful of "rotten apples" rather than systematic instructions rendered through the chain of command. The soldiers with whom I spoke all felt that anyone providing evidence of abuse would be the target of certain retaliation in the form of (i) criminal charges; (ii) hazing and harassment or (iii) potential exposure and "friendly fire" death on the field of battle in Iraq. One specifically inquired about the possibility of securing political asylum in Germany, and I arranged for this soldier to obtain U.S. and German legal counsel on that issue. Soldiers who raised issues about detainee abuse in Iraq were subject to ridicule and threat; one notorious case involved a soldier who, after registering a report of severe abuse, was ordered to be found "mentally deranged," was strapped to a gurney and was flown out of Iraq Through interviews I conducted of military personnel who interacted with MG Fay, I was also able to document and establish cases of abuse and mistreatment which were duly reported to MG Fay and which he failed to note or take account of in any way in the report he ultimately issued. I passed some of this information to staff members of the Armed Forces Committee of the United States Senate for use when MG Fay appeared to testify before the Committee" (Horton, *supra* note 92, para 12 et seq.).

[96] *See also* Schoreit, *in* KARLSRUHER KOMMENTAR ZUR STRAFPROZESSORDNUNG 921 (5th ed., Gerd Pfeiffer ed., 2003): "Also in cases to which § 153f para. 2 would be applicable, there can be grounds for complaints, not excluding domestic prosecution (see BR-Drucks. 29/02 pp. 87, 88), e.g., if there is concern that a prosecution in the state of the act's occurrence will be hampered and when important witnesses are present in Germany; a mock trial occurring elsewhere does not suffice. Even in cases that exhibit no tie to Germany, in which however no prior jurisdiction has begun investigations, the German authorities should, following the principle of universal jurisdiction, undertake investigations in preparation for subsequent criminal prosecution. If a connection to Germany regarding act, suspect or victim is present, and another jurisdiction is investigating the matter, the German authorities should, without seeking further legal assistance, support foreign proceedings to the best of their ability and be prepared for a possible later taking over of the proceedings."

Third Geneva Convention, which demands that the parties to the treaty bring the perpetrators "before their own courts."[97] Whatever the reason may be why no judicial proceedings have been initiated in the U.S. against the accused, whether the U.S. is generally speaking governed by the rule of law, whether the General Prosecutor regards the reticence of the American judiciary as appropriate, understandable or even politically necessary. All of this plays no role, for the only decisive factor is that no judicial proceedings have been initiated in the U.S. against the accused for the occurrences in Abu Ghraib and the related concrete charges of superior responsibility.

The Federal Prosecutor's decision to apply the subsidiarity principle is, therefore, improper. First, military reports are not the functional equivalent of legal remedies. Second, § 153f Code of Criminal Procedure foresees the legality principle, e.g. obliges the Federal Prosecutor to investigate if there is no Court proceeding in the US. Third, the Prosecutor's office has no discretion in the issue, as the legislator has installed a legally framed subsidiarity principle, which reflects the obligation to prosecute arising from art. 129 of the Third Geneva Convention and is thus much more rigorous than the principle of complementarity addressed in the ICC-Statute.

The judicial line of argument the Chief Prosecuting Attorney used in order to dismiss the proceedings is overshadowed by the intent to protect the federal government from further transatlantic disturbances.[98] On the basis of the obligation of the Chief Prosecutor's Office to investigate, it is precisely this kind of matter that is, in fact, to be accorded no sort of legal significance. Nevertheless, it shaped the procedural decisions in the present case. It is an oft-deplored problem that Prosecutors in the Federal Republic enjoy little political independence due to the way "public service law" (*Dienstrecht*)[99] has been structured.[100] In particular, the Chief Federal Prosecutor must function as a "political official" in fulfilling the tasks of that office; he is expected to be in continuous agreement with the fundamental political objectives of the Federal government that are relevant to him or her. Significantly, the

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[97] On this obligation *see* Christian Tomuschat, *The duty to prosecute international crimes committed by individuals*, *in* FESTSCHRIFT HELMUT STEINBERGER: TRADITION UND WELTOFFENHEIT DES RECHTS 315 (Hans-Joachim Cremer et al. eds., 2002).

[98] *See e.g.*, the news report in: DIE WELT, 11 Februry 2005.

[99] I.e. functional equivalent, in public sector, of labor law in private sector.

[100] *See also* the criticism in Anne van Aaken, Eli Salzberger & Stefan Voigt, *The Prosecution of Public Figures and the Separation of Powers: Confusion within the Executive Branch*, 15 CONST. POL. ECON. 261 (2004), *at* www.bepress.com/gwp/default/vol2003/iss1/art11.

Chief Federal Prosecutor is under the supervision of the Federal Minister of Justice.[101]

Due to the affiliation of the German Prosecutor's Offices to the executive,[102] it is no accident that – *nullo actore nullus iudex* – the German judiciary has been very reluctant to become involved in criminal cases with a transnational dimension. Thus, the *Pinochet* case did not receive its definitive procedural impulse from the German judiciary, although, even before the introduction of the CCAIL the possibility for it would have existed. Instead it was the Spanish examining magistrate Baltasar Garzón who was responsible not only for the arrest warrant issued in Fall 1998 for the Chilean ex-dictator, but also for recently initiated criminal proceedings, for example against Adolfo Scilingo, responsible for Argentine "death flights,"[103] and the arrest in Mexico, and subsequent extradition of, Ricardo Miguel Cavallo, a former member of the so-called 3.3.2. task-force that was responsible for numerous cases of disappearances in Argentina.[104] In contrast to Spain, where Baltasar Garzón could deal with the investigations against the explicit will of José Aznar's government, in Germany the possibility of political influence on the investigations is always a given.

Confronted with the recent decision of the federal prosecutor not to investigate the Abu Ghraib complex, a final possibility is open to the complainants, at least to the four Iraqis detained in Abu Ghraib: to pursue their rights through an "indictment enforcement procedure" (*Klageerzwingungsverfahren*), e.g. a judicial review procedure of the Prosecutor's decision initiated by the injured themselves. The indictment enforcement procedure regulated by § 172 of the Code of Criminal Procedure can, judicially, force the lodging of an indictment by the Chief Prosecutor's Office. The procedure is, to be sure, precluded if the Chief Prosecutor's Office can disregard the prosecution based on the opportunity principle.[105] However, this preclu-

[101] The position of political official follows from § 36 para. 1 no. 5 Bundesbeamtengesetz in conjunction with § 31 Beamtenrechtsrahmengesetz. The supervision provision for the Chief Prosecutors Office is in § 147 no. 1 Gerichtsverfassungsgesetz.

[102] Despite its organizational integration in the judiciary, the Constitutional Court has consistently assigned the Prosecutor's Office to the executive (*see* BVerfG, NEUE JURISTISCHE WOCHENSCHRIFT 815 (2002)).

[103] On this case *see* Martine Silber, *L'ex-tortionnaire argentin Scilingo devant la justice espagnole* , LE MONDE 14/1/2005 and Richard J. Wilson, *Argentine Military Officers Face Trial in Spanish Courts*, ASIL INSIGHT 12/2003, *at*: www.asil.org/insights.htm.

[104] References in ANDREAS FISCHER-LESCANO, GLOBALVERFASSUNG: DIE GELTUNGSBEGRUNDUNG DER MENSCHENRECHTE (2005).

[105] §§ 153 to 154c German Code of Criminal Procedure.

sion does not obtain if the Chief Prosecutor's Office drops the procedure by overstepping its authority, i.e. if it makes use of a discretion that is not at all granted to it.[106] This is the present situation, as the prosecutor denied investigations, applying a reading of the subsidiary principle that is not viable. Due to the existing domestic link, the presence of suspects in the Federal Republic and the non-existent prosecution of the complex of allegations against superiors in the U.S., there is no room for opportunity considerations by the Chief Prosecutor's Office. The legality principle must be applied and the erroneous presumption of the opportunity principle by the Chief Prosecutor's Office will have to be judicially corrected.

In respect of the Federal Prosecutor's decision not to investigate, the victims thus do not only have the option to file a new complaint against Rumsfeld in several months, arguing, that there is no effective treatment of the Abu Ghraib complex in U.S. courts. They also have the legally guaranteed possibility to file the case with the German courts, which in this case will lead to a mandated legal review of the Prosecutors doubtful decision. In this legal procedure serious questions of immunity and of the *aut dedere aut judicare* principle and their incorporation in German law will be raised.[107] At this point, the Federal Constitutional Court may also come into play as Art. 100 para 2 of the German Basic Law provides that an ordinary court before which the proceedings are being held must refer the matter to the Federal Constitutional Court for decision if the ordinary court concludes that "doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court."[108]

H. The Principle of Universal Jurisdiction Under Political Pressure

In the event that the complaints resort to the legal remedies provided for in the Code of Criminal Procedure, it is probable that the Federal Constitutional Court will have the opportunity to shape the future meaning and application of the *aut dedere aut judicare* principle. The Federal Prosecutors *polit-servile* refusal to investigate the Abu Ghraib complex, thus could lead to a Constitutional Court decision that effectuates the German obligations to prosecute war crimes and ends the Prosecutor's passivity in this respect. Since the coming into force of the CCAIL in

[106] *See* OLG HAMM, MONATSSCHRIFT FÜR DEUTSCHES RECHT 460 (1993).

[107] On basic rights of the victims that could be violated in case of a negative decision in the indictment enforcement procedure, see Bundesverfassungsgericht, BVerfG, 2 BvR 2104/01, decision of March 28, 2002, *at* http://www.bverfg.de/. Such a violation could lead to a constitutional compliant at the Federal Constitutional Court.

[108] Art. 100 II German Basic Law.

July 2002, none of the 26 lodged complaints have led to court proceedings. The Chief Prosecutor's Office in no case saw an occasion for the introduction of a formal investigative procedure.[109] And no one seriously believed in the Chief Prosecutor willingness to conduct investigations against the U.S. military in the case of Abu Ghraib.

And yet the project of the CCAIL and the principle of universal jurisdiction began with so much promise. German politicians of all stripes praised it for being a global model.[110] The errors that the Belgians had made with the introduction and application of the principle of universal jurisdiction were apparently avoided since more care was given to restrictions in international law in respect to the temporary immunity of officiating heads of state and foreign ministers than Belgium had provided. The German CCAIL regulates not only the application of the subsidiarity principle but also reflects carefully the framework of immunity norms. This means, that even where the legality principle is to be adopted and the German Federal Prosecutor is obliged to investigate a case, international customary law on immunity is incorporated in German law and prohibits arrest warrents or criminal court proceedings, in cases when there is no exception from immunity.[111] Belgium had a much more inflexible provision. After the arrest warrant against the officiating Congolese foreign minister,[112] more were threatened, among others Colin Powell, George W. Bush, and Ariel Sharon. The diplomatic entanglements sparked by this went so far that the U.S. administration finally announced it would evacuate NATO Headquarters from Brussels, since it was no longer possible to travel there safely.[113]

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[109] According to information from the Press Office of the Chief Prosecutor (13 December 2004) the Chief Prosecutor has "looked at the circumstances of the charged acts in the framework of review procedures. For various criminal-procedural reasons [...] there was in no case occasion for the introduction of a formal investigative procedure."

[110] Generally on universal jurisdiction see the contributions of LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUMICIPAL LEGAL PERSPECTIVES (2003); Anthony Sammons *The 'Under-Theorization' of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts*, 21 BERKELEY J. OF INT'L L. 111 (2003); STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGNTS ATROCITIES IN INTERNATIONAL LAW : BEYOND THE NUREMBERG LEGACY 151 (2nd ed., 2001); BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 105 (2003); Christian Maierhöfer, *Weltrechtsprinzip und Immunität: das Völkerstrafrecht vor den Haager Richtern*, 30 EUROPAISCHE GRUNDRECHTE-ZEITSCHRIFT 545 (2003).

[111] *See* the discussion *supra* lit. F.

[112] Which initiated the procedure at the I.C.J. mentioned in notes 31 and 62

[113] *See e.g*, the statement of Donald Rumsfeld: "Finally, I discussed the U.S. concern about the lawsuit that's recently been filed in a Belgian court against General Tom Franks and against Colonel Brian McCoy alleging that they were responsible for war crimes in Iraq, as well as suits that have been filed here in Belgium against former President Bush – George Herbert Walker Bush as opposed to George W. Bush – General Norman Schwarzkopf, Vice President Cheney and Secretary Powell. The suits are ab-

Finally, in the summer of 2003 Belgium gave-in to U.S. political pressure and changed the relevant law such that acts can only be prosecuted according to the principle of international law if the victim has lived at least three years in Belgium.[114] This decision provoked obituaries from universal jurisdiction skeptics who have sought to discredit civil-society and academic efforts for a strengthening of the principle.[115] While Amnesty International, Human Rights Watch and the epistemic community of international lawyers have taken a clear position for the principle of universal jurisdiction in the Princeton Principles on Universal Jurisdiction,[116] the phalanx of opponents of the principle is led by Henry Kissinger, who himself is endangered by numerous investigative procedures (in Chile, France, Spain, etc.),

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surd. Indeed, I would submit that there is no general in history who has gone to greater lengths than General Franks and his superb team to avoid civilian casualties. I am told that the suit against General Franks was effectively invited by a Belgian law that claims to gives Belgian courts powers to try the citizens of any nation for war crimes. The United States rejects the presumed authority of Belgian courts to try General Franks, Colonel McCoy, Vice President Cheney, Secretary Powell and General Schwarzkopf, as well as former President Bush. I will leave it to the lawyers to debate the legalities. I am not a lawyer. But the point is this. By passing this law, Belgium has turned its legal system into a platform for divisive, politicized lawsuits against her NATO Allies. Now, it's obviously not for outsiders, non-Belgians, to tell the Belgian government what laws it should pass. And what it should not pass. With respect to Belgium's sovereignty, we respect it. Even though Belgium appears not to respect the sovereignty of other countries. But Belgium needs to realize that there are consequences to its actions. This law calls into serious question whether NATO can continue to hold meetings in Belgium and whether senior U.S. officials, military and civilian, will be able to continue to visit international organizations in Belgium. I would submit that that could be the case for other NATO Allies, as well. If the civilian and military leaders of member states can not come to Belgium without fear of harassment by Belgian courts entertaining spurious charges by politicized prosecutors, then it calls into question Belgium's attitude about its responsibilities as a host nation for NATO and Allied forces." (*News Transcript: Secretary of Defense Rumsfeld at NATO Headquarters,* DEFENSELINK (June 12, 2003), *available at* http://www.defenselink.mil/transcripts/2003/tr20030612-secdef0271.html)

[114] *See* Loi relative aux violations graves du droit humanitaire, 5 August 2003, M.B., Aug. 7, 2003; *available at*http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Transnational_criminal_justice/ International_Criminal_Court/Documents/ConsultICC(2003)11F.pdf; on this Luc Reydams, *Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law*, 1 J. OF INT'L CRIM. JUST. 679 (2003).

[115] *See* the summary in Steven Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. OF INT'L L. 888 (2003); *cf. also* Michael Kirby, *Universal Jurisdiction and Judicial Reluctance: A New Forteen Points*, *in* UNIVERSAL JURISDICTION: NATONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 240 (Stephen Macedo ed., 2004).

[116] The Princeton Principles on Universal Jurisdiction – Joint Declaration of the Princeton University's Program in Law and Public Affairs, Woodrow Wilson School of Public and International Affairs et al. on Universal Jurisdiction, *available at* http://www.law.uc.edu/morgan/newsdir/univjuris.html; see further: Human Rights Watch - Documentation of text on transitional justice: http://www.hrw.org/doc/?t=justice; Amnesty International - Memorandum "Universal Jurisdiction - the duty of states to enact and enforce legislation" (AI Index 53/002/2001), *at* http://web.amnesty.org/pages/uj-memorandum-eng;

among others for the so-called *operación condor*.[117] In an angry article in *Foreign Affairs*, which some commentators think Kissinger wrote in view of the impending restriction of his freedom to travel,[118] he stated:

> "The advocates of universal jurisdiction argue that the state is the basic cause of war and cannot be trusted to deliver justice. If law replaced politics, peace and justice would prevail. But even a cursory examination of history shows that there is no evidence to support such a theory. The role of the statesman is to choose the best option when seeking to advance peace and justice, realizing that there is frequently a tension between the two and that any reconciliation is likely to be partial. The choice, however, is not simply between universal and national jurisdictions."[119]

In fact, in his dramatic presentation Kissinger does outline the problem. What is at stake in the principle of universal jurisdiction is not merely a technical juridical question of the boundaries of jurisdictions; it is the fundamental organizing principle of the constitutional idea. Will international law, driven by the development of international criminal law and by the founding of numerous special regimes ranging from the WTO, through the United Nations to human-rights pacts,[120] succeed in reacting to its increasing politicization by generating a movement capable of guaranteeing legal autonomy?[121] Can global law be more than an apologetic accessory

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[117] ANDREAS FISCHER-LESCANO, GLOBALVERFASSUNG. DIE GELTUNGSBEGRÜNDUNG DER MENSCHENRECHTE (2005).

[118] *See e.g.,* Jonathan Powers: "After Pinochet and Milosevic does Kissinger see the writing on the wall for himself? Could some lone magistrate somewhere – another Baltasar Garzon – set the ball rolling towards him? Could he be picked up while attending some academic conference in France, or giving political advice on behalf of Kissinger Associates to the government of Taiwan or to multinational companies in Malaysia or taking a holiday in India?" (Jonathan Powers, *Henry Kissinger Has Become a Very Nervous Person*, *at* www.globalpolicy.org).

[119] Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFFAIRS 86 (4/2001); for an opposing view *see e.g.* the reply to Kissinger by the Chair of Human Rights Watch, Kenneth Roth, *The Case for Universal Jurisdiction*, 80 FORREIGN AFFAIRS 150 (5/2001) and Amnesty International - Memorandum "Universal Jurisdiction - the duty of states to enact and enforce legislation" (AI Index 53/002/2001), *at* http://web.amnesty.org/pages/uj-memorandum-eng.

[120] On this *see* Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. OF INT'L L. 999 (2004).

[121] On this necessity *see*, Jacques Derrida, *Force of Law. The "Mystical Foundation of Authority"*, *in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3, 28 (Drucilla Cornell, Michel Rosenfeld & David

of *realpolitik*? These questions are open, and the complaint regarding the occurrences in Abu Ghraib is a part of the world social struggle for the rule of law on a global scale. The lines of conflict in this struggle do not run between Europe and the U.S. And, ironically, it is precisely the U.S. courts, from the German point of view as regards the decisions in the forced-labor cases, that have in numerous proceedings adjudicated infractions of international law's core human-rights content.[122] It is precisely these rules that threaten to strike back at powerful realpoliticians. Postnational fronts, therefore, do not exist geographically but functionally, between politics and law. *Hamdi v. Bush*, *CCR v. Rumsfeld*, *Käsemann v. The Argentine military junta*, *Belgium v. the Congo* – all of these are only ciphers for different expressions of a worldwide social conflict of constitutional proportions. Are there legal norms in global society which limit the political system and protect the most elementary human rights? Before which courts can these fundamental laws be asserted, such that they become more than symbolic texts that are taken into account on holidays and apologetically when there is a wish to legitimize force?

If we are serious about constitutionalizing international relations,[123] if we want to see the rule of law not as an abortive episode in human history which perished

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Carlson, eds., 1992; on Derrida's legal philosophy see the *German Law Journal's* special issue "A Dedication to Jacques Derrida" at 6:1 GERMAN L. J. 1-199 (2005).

[122] A summary of these processes should start with Filártiga v. Peña-Irala, 630 F.2d 876 (2nd Cir. 1980); *see* the inventory in Beth Stephens, *Translating Filártiga: a comparative and international law analysis of domestic remedies for international human rights violations*, 27 YALE J. OF INT'L L. 1 (2002); Markus Rau, *Das Ende der Weltrechtspflege? Zur Abschaffung des belgischen Gesetzes über die universelle Verfolgung völkerrechtlicher Verbrechen*, 16 HUMANITARES VOLKERRECHT INFORMATIONSSCHRIFTEN, 212 (2003); concerning the legal actions arising from forced-labor cases, the establishment of the Foundation for Memory, Responsibility and the Future and the German-U.S. governmental agreement, *see* Andreas Fischer-Lescano, *Bericht über die völkerrechtliche Praxis der Bundesrepublik Deutschland in den Jahren 2000 bis 2002*, 64 HEIDELBERG J. OF INT'L L. 195, 210 (2004); Libby Adler & Peer Zumbansen, *The Forgetfulness of Nobless: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, *in* ZWANGSARBRIT IM DRITTEN REICH: ERINNERUNG UND VERANTWORTUNG 333 (Peer Zumbansen ed., 2002); on the discussion on restitution in Germany see ULRICH ADAMHEIT, JETZT WIRD DIE DEUTSCHE WIRTSCHAFT VON IHRER GESCHICHTE EINGEHOLT: DIE DISKUSSION UM DIE ENTSCHADIGUNG EHMALIGER ZWANGSARBEITER AM ENFE DES 20. JARHUNDERTS 72 and 213 (2004).

[123] On global constitutionalism *see* Jurgen Habermas, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?*, *in* IBIDEM, DER GESPALTENE WESTEN: KLEINERE POLITISCHE SCHRIFTEN X 113 (2004); Jochen Abr. Frowein, *Konstitutionalisierung des Völkerrechts*, 39 BERICHTE DER DEUTSCHEN GESELLSCHAFTFUR VOLKERRECHT 427 (2000); Fischer-Lescano, *Redefining Sovereignty via International Constitutional Moments?*, *in* REDEFINING SOVEREIGNTY: THE USE OF FORCE AFTER THE END OF THE COLD WAR. NEW OPTIONS, LAWFUL AND LEGITIMATE? (Michael Bothe, Mary Ellen O'Connell & Natalino Ronzitti eds., (2005), forthcoming, available as ConWEB Paper 1/2005 at http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudies/FileStore/ConWEBFiles/Filetoupload,13000,en.pdf; *see also* Lothar Brock, *Frieden durch Recht. Zur Verteidigung einer Idee gegen ‚die harten Tatsachen' der internationalen Politik*, 3 HSFK-STANDPUNKTE 1 (2004), *at* www.hsfk.de.

with nation-states, then we will have to be prepared for a sharpening of the conflicts between law and politics. We must come to terms with the fact that the law cannot always guarantee the observance of legal norms. If, however, we allow the law to decide legality and illegality in concrete questions, we can expect it to structure that which we can expect of each other under global law in the future and to make available to us its symbolic apparatus, so that we can react to disappointed expectations. This would include penal mechanisms, but also civil-law damage claims. Precisely the latter have, until now, been only insufficiently acknowledged for transnational cases in Germany.[124] Redressing this is urgently necessary. One need not be an abolitionist[125] in order to see that it is precisely the penal sanction apparatus that has constantly caused the legal system to flinch from initiating judicial proceedings – e.g. against members of the federal government for German participation in various military interventions from Kosovo to Iraq[126] – or to conclude these proceedings with a decision on legality and illegality.

Instead of hastily retreating before political pressure in the case of Abu Ghraib, the German parliament should codify the possibilities of implementing the principle of universal jurisdiction for civil-rights disputes as well. Instead of restricting the legal possibilities of access for the victims of serious human-rights crimes, expanded possibilities for plaints are needed. In these proceedings, one need not always use as a threat the strongest weapons of democratic constitutional states, i.e. penal sanctions, but make room, as a minimal goal, for opening a legal avenue of communication for the victims.[127] What is most important is that in democratic constitutional

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[124] *See* the instructive analysis by Axel Halfmeier, *Menschenrechte und Internationales Privatrecht im Kontext der Globalisierung*, 68 RABELS ZEITSCHRIFT FUR AUSLANDISCHES UND IINTERNATIONALESPRIVATRECHT 653 (2004); Burkhard Heß, *Kriegsentschädigung aus kollisionsrechtlicher Sicht*, 40 BERICHTE DER DEUTSCHEN GESELLSCHAFT FUR VOLKERRECHT 107 (2003); on what is possible in terms of international law, *see* the so-called van Boven Report (1993) and the Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, U.N. Doc. E/CN.4/Sub.2/1996/17.

[125] Even if there are good reasons for this position, *see* KLAUS LÜDERSSEN, ABSCHAFFEN DES STRAFENS? 2 (1995).

[126] *See e.g.*, the decision of the Chief Prosecutor of 21 March 2003, which ended the proceedings regarding the complaints in respect to the Iraq War, i.e. the accusation (due to rights granted to use German air space and the German AWACS deployments in Turkey) of a war of aggression punishable according to § 80 Criminal Code: Generalbundesanwalt [Chief Federal Prosecutor], Kein Anfangsverdacht wegen Vorbereitung eines Angriffskrieges (§ 80 StGB) [No Initial Suspicion of Preparation of a War of Aggression (§ 80 Criminal Code), available at: http://www.uni-kassel.de/fb10/frieden/regionen/Irak/klagen.html; on this Klaus Kress, *The German Chief Federal Prosecutor's decision not to investigate the alleged crime of preparing aggression against Iraq*, 1 J. OF INT'L CRIMINAL JUSTICE 245 (2004).

[127] Regarding the decentralized processes of precedent establishment in the realm of civil law, Axel Halfmeier correctly states: „The future of judicial decisions in private law under conditions of globaliza-

states, procedures have been instituted in which legal assignments of responsibility and the drawing of lines between legality and illegality can occur.[128] The alternative would not be an alternative: Abandoning the structural achievements of the rule of law and leaving to politics alone the decision on war and peace and the form of war, such as realpoliticians like Henry Kissinger advocate, would only lead to the further domination of conflicts by fundamentalism and to much more drastic means of conflict repression.

I. Conclusion

Hans Kelsen once said that "each conflict that is described as a conflict of interests, power or politics [...] can be decided as a legal dispute."[129] Indeed that which distinguishes totalitarian from constitutional states is their differing readiness to install an independent legal system, give conflicts to the judiciary to decide and protect each procedure from political influence. Last but not least this normative desire is expressed in numerous U.N. documents.[130] This is also the core of modern constitutionalism, as it was presented in legal form for the first time in the decision of the U.S. Supreme Court in the case of *Marbury v. Madison* in 1803[131] when the Court claimed its independent right of examination of the acts of parliament and of the executive.

The accusations of torture also can and must be judicially decided. In German law this follows necessarily from the norms of the CCAIL and from the restriction of the Chief Prosecuting Attorney's discretion. If one wants to prevent this case from be-

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tion does not lie in a centralized system of world courts but in a decentralized patchwork of decisions of national civil courts on transnational issues. Out of these decentralized decisions a transnational civil law regarding human-rights violations is currently developing" (Axel Halfmeier, *Menschenrechte und Internationales Privatrecht im Kontext der Globalisierung*, 68 RABELS ZEITSCHRIFT FUR AUSLANDISCHES UND IINTERNATIONALESPRIVATRECHT 653, 685 (2004)).

[128] *See* the stocktaking of Peer Zumbansen, *Globalization and the Law: Deciphering the Message of Transnational Human Rights Litigation*, 5 GERMAN L.J. 1499 (2004).

[129] Hans Kelsen, *Wer soll der Hüter der Verfassung sein?* (1931), *in* DIE WIENER RECHTSTHEORETISCHE SCHULE: AUSGEWAHLTE SCHRIFTEN VON HANS KELSEM, ADOLF JULIUS MERKL UND ALFRED VERDROSS 1873, 1883 (Hans Klecatsky et al. eds., 1968).

[130] *See* the endorsement of the concluding statement of the 7th U.N. Congress on Prevention of Crimes Through the U.N. General Assembly (GA Resolutions 40/32 vom November 29, 1985 and 40/146 of 13 December 1985), the Basic Principles on the Independence of the Judiciary, UN Doc. GA/40/146 and GA/41/149; *also*: Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1, no. 14 (1994).

[131] 1 CRANCH 137 (1803).

ing submitted to judicial proceedings the law must be changed through a parliamentary process. In the meanwhile, the German legislature has decided that it wishes to see the charged crimes judicially investigated and prosecuted. It has thus incorporated the operative norms of international customary law into German law and created an example of the principle *ubi ius, ibi remedium*. It is therefore scandalous that, despite these parliamentary requirements and despite the penalization obligation stipulated in the Geneva Conventions, the Chief Prosecuting Attorney was not to introduce an investigative procedure. This decision will have to be corrected by the German courts. These should be aware of the far-reaching consequences of the procedure and, it is to be hoped that those who are responsible to decide on the legal remedies that are going to be taken against the Chief Prosecuting Attorney's decision not to open an investigation procedure will internalize the words of the Federal Justice Minister: "It is not enough to agree on the text of an international treaty; one must also give it life. Precisely in the area of international law one has to take care that the provisions that the community of nations has given themselves is put into practice. Germany has therefore not only supported the establishment of the International Criminal Court from the start with great commitment. Through the introduction of its CCAIL it has also created the international conditions to enable an appropriate penal prosecution of the most serious human-rights crimes regardless of whether they were committed in Germany."[132]

[132] Minister of Justice Zypries – Symposium: Strafverfolgung von Völkerrechtsverbrechen [Criminal Prosecution of Human-Rights Crimes], 27 June 2003, *at* http://www.bmj.bund.de/enid/fa.html.