

The German criminal charges against Donald Rumsfeld – the long road to implement international criminal justice at the domestic level

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1 Introduction

On 29 November 2004, the United States-based Center for Constitutional Rights¹ and four Iraqi individuals² lay a charge³ with the German federal prosecutor⁴ at the German federal court for criminal matters⁵ against the (then) United States secretary of defence and ten other individuals of the United States military and security apparatus with the allegation that they were responsible for the prisoner abuses in the United States-run Iraqi prison in Abu Ghraib, which took place in 2003 and 2004.⁶

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¹ For more information on the Centre for Constitutional Rights (CCR) and its present projects, see <http://www.ccr-ny.org> (03-08-2007).

² The number of plaintiffs on whose behalf the first criminal charge was filed was later extended to 18.

³ This article discusses the two criminal complaints against the former United States secretary of state Donald Rumsfeld and others in Germany. The German criminal charge “*Strafanzeige gegen Donald Rumsfeld*” of Nov 2004, its dismissal in Feb 2005, the appeal in March 2005 and subsequent dismissal and the recent, second criminal charge of Dec 2006 are referred to as the *Rumsfeld* case. The (English) docket of the case can be retrieved from the Center of Constitutional Rights (CCR) homepage at <http://www.ccr-ny.org/v2/home.asp> (30-07-2007).

⁴ The German federal prosecutor “Der Generalbundesanwalt am Bundesgerichtshof” is the highest German prosecuting authority and can be compared with the national director of public prosecutions. Cf <http://www.gba.bund.de> (30-07-2007) for more information.

⁵ The “Bundesgerichtshof” (BGH) is situated in Karlsruhe and is the highest judicial body for criminal and civil matters in Germany; see §§ 130 (1), 123 of the “Gerichtsverfassungsgesetz” (GVG), the German Judicial Act. Its findings are final with the exception of cases where a breach of the German constitution or other international human and civil rights is claimed. In these cases the decision of the German federal constitutional court (*Bundesverfassungsgericht*) and/or the respective international judicial organs as *eg* the European court of human rights in Strasbourg may be sought.

⁶ The confidential *Article 15-6 Investigation of the 800th military Police Brigade*, the so-called “Taguba” report, which investigated torture and other war crimes allegedly committed by United States military personnel assigned to guard duty in detention facilities, found that United States army soldiers had committed “egregious acts and grave breaches of international law”. The report can be retrieved at <http://news.findlaw.com/cnn/docs/iraq/tagubarpt.html>. For more information on the United States military’s use of coercive methods, see the Amnesty International press release “United States: pattern of brutality and cruelty – war crimes at Abu Ghraib” AI Index: AMR 51/077/2004 (Public) News Service no 118 of 7-05-2004 <http://www.amnesty.org> (22-07-2007) and Human Rights Watch “GIs against torture” of 13-03-2005 <http://hrw.org/english/docs/2005/03/14/afghan10320.htm> (30-05-2007). The reverberations of these incidents were experienced for a long time: see *eg* *CNN.com* “More images of abuse at Abu Ghraib—Australian TV airs new photos, videos from 2003 scandal”, retrievable at <http://edition.cnn.com/2006/WORLD/meast/02/15/abughraib.photos> (15-02-2006). The United States closed the facility as a direct consequence of the negative publicity and handed it over to the Iraqi authorities, see *Die Welt*, 11-04-2006, 5.

The criminal charge utilized the newly introduced German Code of Crimes against International Law of 2002⁷, which grants German penal courts, at least in theory, universal jurisdiction over perpetrators of war crimes and other grave breaches of international criminal law.⁸

The German federal prosecutor dismissed the criminal charge with a decision on 10 February 2005⁹ and found that the criminal prosecution of the accused by Germany would lead to an infringement of the international principles of subsidiarity and non-intervention in the affairs of foreign states (comity) due to the fact that the requirements for a supplementary German criminal prosecution were not fulfilled.¹⁰ Consequently, he ended all criminal investigations.

Counsel for the plaintiffs lodged an appeal against this dismissal with a petition for a court decision on 10 March 2005. This petition was also unsuccessful and eventually dismissed as inadmissible by the higher regional court of Baden-Württemberg in Stuttgart.¹¹ Another criminal charge¹² was filed against the former secretary of defence Rumsfeld (who resigned on 8 November 2006) and 13 other individuals on behalf of 44 individuals and organizations on 14 November 2006. This new criminal charge alleged the commission of war crimes and acts of torture by the United States in its detention facilities in Abu Ghraib and Guantanamo Bay, Cuba. The accused in this case were not only state and military officers, as was the case in the first complaint, but also former government lawyers for their culpability for the actions of their government.

The German federal prosecutor dismissed this criminal charge, citing similar considerations as in his February 2005 decision, namely Germany's obligation to respect principles of state comity and the complementarity of domestic criminal jurisdiction. The *Rumsfeld* case serves as another example of the so far unsuccessful judicial implementation of the German Code of Crimes against International Law¹³ of 2002. It furthermore demonstrates how *Realpolitik*¹⁴ can affect the judiciary (and politics) of an otherwise sovereign state in respect of the exercise of international criminal justice. This latest futile attempt to establish individual criminal accountability of state officials (former and still serving) raises additional legal questions which will be discussed in this article.

⁷ The German Code of Crimes against International Law is the German "Völkerstrafgesetzbuch" (*VStGB*) of 30-06-2002, published in *BGBI I* 2254; see 2003 *International Legal Materials* 995 for an English version with commentary. For an electronic version of the German version, see the homepage of the Max-Planck Gesellschaft <http://www.mpg.de> (20-06-2007).

⁸ See s 1 of the German code of crimes against international law, which confers universal jurisdiction to German criminal courts under the principle of "Weltrechtsprinzip", regardless of the location of the crime or the nationality of the perpetrator.

⁹ Decision of the federal attorney general of 10-02-2005, to cease further criminal investigations – <http://www.ccr-ny.org/v2/home.asp> (03-08-2007). *Cf* the official statement press release 10-02-2005 <http://www.generalbundesanwalt.de/de/voelker.php> (30-10-2007).

¹⁰ Decision (n 9), 2, thus referring to the complementary nature of any German criminal prosecution of international crimes.

¹¹ The *Oberlandesgericht* is comparable to the high court in South Africa.

¹² Press release of 27-04-2007 "Kein Ermittlungsverfahren wegen der angezeigten Vorfälle in Abu Ghraib/Irak und Guantanamo/ Kuba" <http://www.generalbundesanwalt.de/prnt/showpress.php?newsid=273> (20-06-2007).

¹³ So far, there have been 28 unsuccessfully lodged charges with the attorney general. This information was received from the press information office – presse@generalbundesanwalt.de.

¹⁴ Referring to a situation where the diplomatic, political and strategic interests of one state affect its freedom to deal with its inter- and intra-state affairs.

2 *The facts of the criminal charges*

2.1 The first charge of 2004

The criminal charge of the eighteen plaintiffs accused United States secretary of defence, Donald Rumsfeld, and ten other high-ranking representatives of the United States military and security apparatus of complicity in war crimes and acts of torture, committed in the notorious United States military prison of Abu Ghraib, Iraq, by subordinates in 2002 and 2003. These crimes were committed by military personnel of the United States' 800th military police brigade and the 205th military intelligence brigade and probably by other members of the various civil United States intelligence branches. The alleged crimes took place in Abu Ghraib between September 15, 2003 and January 8, 2004. The plaintiffs claimed that they had been subjected to various acts of torture and physical maltreatment, sexual humiliation and even rape, sleep and food deprivation.

Criminal responsibility of the accused as the military and civil superiors of the military personnel committing the actual crimes was based on sections 4, 8 13 and 14 of the Code of Crimes against International Law – namely the omission to supervise subordinates as stipulated in section 13 of the code, the omission to report a crime committed by a subordinate as stipulated in section 14 of the code and directly from their position as military and civil superiors under section 4 of the code.¹⁵

One of the explicit objectives of the criminal charge was to end the impunity of military and civil superiors of the soldiers and actual perpetrators.¹⁶

2.2 The second charge of 2006

The second criminal charge of December 2006, amended in March 2007, was filed again against the (now resigned) secretary of state, Rumsfeld, and thirteen other high-ranking military and state officials on behalf of 44 individuals and (non-governmental) organizations.¹⁷ It partly repeats the allegations of the first criminal charge in respect of the events in connection with the Abu Ghraib detention facility, Iraq, but differs from the original complaint by extending the criminal responsibility of the accused to acts of alleged torture committed in the Guantanamo Bay detention facility in Cuba. Another significant difference of this criminal charge is the fact that it includes senior United States governmental lawyers for their role in advising the present United States administration on the legal guidelines on the treatment of detainees in United States detention facilities.¹⁸ The complaint regarded these actions as acts of aiding and abetting the crime of torture.

¹⁵ Decision (n 9) 2.

¹⁶ Seven low-ranking army reservists were charged with the abuses at Abu Ghraib. The official Pentagon claim is that the crimes committed at Abu Ghraib were aberrations of individual soldiers, see *eg Human Rights Watch* "US: Abu Ghraib trials only 'a first step' – those who ordered or condoned abuses must also be prosecuted" <http://hrw.org/english/docs/2005/01/05/usint9945.htm> (6-01-2005).

¹⁷ The text of this charge can be retrieved from the decision (n 9).

¹⁸ International criminal adjudication does not provide for many cases in which legal advisors were successfully convicted for their complicity in the commission of international crimes. See the *Alostötter* case (*aka Justice* case) before the United States military tribunal sitting at Nuremberg, judgment of 4-12-1947, cited in Lauterpacht *Annual Digest and Reports of Public International Law Cases: Year 1947* (1951) 278-289 for an example for the prosecution of members of the German judiciary.

It was alleged that these actions constituted crimes under the above-cited sections of the Code of Crimes against International Law and, in addition, under sections 211, 223, 239, 6.9 of the German penal code in connection with the provisions of the United Nations Torture Convention and article 129 of the Geneva Convention on the Treatment of Prisoners of War (Geneva Convention III).

3 *A brief excursus on the criminality of torture under international law*¹⁹

Acts of torture or other cruel, inhuman or degrading treatment or punishment are regarded today as a true *jus cogens* norm of international (criminal) law. The international crime of torture became globally criminalized under the United Nations Torture Convention of 1984.²⁰ Prior to that, certain acts of inhumane treatment had already developed customary law status under international law.²¹

The protection from torture through the Torture Convention has become a true means of human rights protection. Article 1 explicitly establishes the connection of torture to the existence of official acts (or omissions) of a state, thus qualifying the offence as an exemplary “state” crime.²² The (international) crime of torture has therefore become an independent crime whose scope exceeds the sole criminalizing of certain “inhumane acts” as otherwise listed in connection with war crimes and crimes against humanity.²³

Interesting in this context is the fact that torture was not incorporated into the Rome statute of the international criminal court in The Hague as a fifth of the so-called “core crimes” of international criminal law.²⁴ Considering the nature of the criminalizing of torture as a safeguard against (domestic) state torture in the first place, one can assume that the fear of possible interference in the internal affairs of a state led to its exclusion from the Rome statute.

The Torture Convention has already been used for the purpose of prosecuting gross human rights perpetrators. In *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International intervening) (No 3)*²⁵ Pinochet as a former head of state was found to be responsible for his alleged role in the commission of serious international crimes (such as torture) under the provisions

¹⁹ Cf. Bachmann *Liability for Gross Human Rights Violations: From Criminal to Civil Remedies* (2006 thesis UJ), part B for more information on the international crime of torture and its adjudication before domestic and international courts.

²⁰ International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, 1465 UNTS 113-114.

²¹ Ratner and Abrams *Accountability for Human Rights Atrocities in International Law – Beyond the Nuremberg Legacy* (2001) 117. This qualification can be further based on the observation that the crime of torture with its two elements, namely that of torture *strictu sensu* and other acts qualifying as inhumane and cruel, has found its way into every major instrument of international criminal law as an inherent element of other international crimes.

²² “any act [...] inflicted by or at the instigation [...] of a public official or other person acting in an official capacity [...], a 1 of the Torture Convention.”

²³ Cf. a 6(b) and (c) of the charter of the international military tribunal of 1946 (IMT), a 2(a) and 5(f) of the statute of the international criminal tribunal for Yugoslavia (ICTY), a 3(f) and 4(a) of the statute of the international court for Rwanda (ICTR), a 2 and 3 of the statute of the special court for Sierra Leone (SCSL) and lastly, a 7 s 1(f) and 8 s 2(a)(ii) of the statute of the international criminal court.

²⁴ The term “core crimes” refers to serious international crimes and human rights violations such as the crimes of genocide, crimes against humanity, war crimes, the crime of aggression, torture and (state-sponsored) terrorism, cf. e.g. Murphy “Civil liability for the commission of international crimes as an alternative to criminal prosecution” in 1999 *Harvard Human Rights Journal* 6. Such crimes impose as *jus cogens* violations on states an *erga omnes* duty of *aut dedere aut judicare*.

²⁵ 1999 2 All ER 97 (HL).

of the Torture Convention and the British Criminal Justice Act of 1988. Subsequent extradition proceedings came to an end, however, when Pinochet was eventually found to be unfit to stand trial because of his poor health. The home secretary decided on 2 March 2000 that Pinochet was to be sent back to Chile.

Today torture has become, as Kaufmann J stated in his groundbreaking decision in *Filartiga v Pena-Irala*,²⁶ prohibited by the “law of nations” and its perpetrators regarded, “like the pirate and slave trader before him, as the enemy of all mankind or *hostis generis*”.²⁷

4 *The use of coercive methods by the intelligence community*

Counterintelligence organizations worldwide use coercive methods to interrogate “resistant” sources on a daily basis. The war on terror has seen an increased use of coercive interrogation methods by Western counterintelligence²⁸ since 11 September.²⁹ The infamous aberrations of some United States servicemen and women, which became known to the broader public in the Abu Ghraib scandal, might hide the fact that the use of such coercive methods is deemed to be essential for gaining the necessary (intelligence) knowledge of the organization and the *modus operandi* of the terror organization Al Qaeda. Major terror plots in Europe were foiled because of the use of such methods.

Counterintelligence interrogation consists of a psychological approach (which is not unlike the interrogative approach in a domestic criminal interrogation) and a more physical, coercive approach.³⁰ The former manipulates the suspect psychologically in order to achieve the interrogative objective, while the latter approach coerces the suspect to respond with a feeling of debility, dependency and dread.³¹ The approaches used by the various branches of the intelligence community may differ in intensity and approach: the choice of approach is hereby determined by the interrogator, his “rules of engagement” and the urgency of the particular situation. In the so-called “ticking bomb” scenario,³² where the suspect might carry vital

²⁶ 630 F2d 876 (2d Cir 1980). The case concerned civil liability for gross human rights violations such as torture. Cf for a more detailed outlook on civil liability, Bachmann “Human rights litigation against corporations” 2007 *TSAR* 292-308.

²⁷ See the *Filartiga* case (n 26) 890.

²⁸ See Mackey and Miller *The Interrogator's War – Inside the Secret War against Al Qaeda* (2004) for an insightful description of the United States military's counterintelligence interrogation of enemy combatants in the Afghan combat theatre.

²⁹ The term refers to the infamous attacks on the World Trade Centre and the Pentagon by Arab terrorists of the Al-Qaeda network, which took place on 11-09-2001, in which some 3000 people lost their lives.

³⁰ The United States central intelligence agency's (CIA) confidential *KUBARK* manual differentiates between so-called coercive and non-coercive counterintelligence approaches see eg “Die Folterungen von Abu Ghraib folgten einem Handbuch des CIA” <http://www.uni-kassel.de/fb5/frieden/themen/Menschenrechte/folter-mccoy.html> (10-06-2006) and McCoy “Torture at Abu Ghraib followed CIA's manual” *Boston Globe* 14-052004 [http:// globalresearch .ca/arts/MCC406A.html](http://globalresearch.ca/arts/MCC406A.html) (30-06-2007).

³¹ Coercive methods used by the intelligence organs start with “softer” methods such as sleep deprivation, psychological threats (including the use of dogs), stress positions such as standing or kneeling for certain periods of time and increase in intensity to actual acts of physical abuse qualifying as physical torture.

³² This term refers to life or death scenarios where the suspect might probably carry vital information needed to stop an impending bomb threat. The use of “moderate physical pressure” in ticking-bomb situations was authorized in Israel in 1987 by the Landau commission. See Human Rights Watch, “The twisted logic of torture” <http://hrw.org/wr2k5/darfurandabughraib/6.htm> (30-06-2007).

information on an impending terrorist bomb plot, resorting to coercion as an interrogative approach is more likely.³³

Distinguishing which technique qualifies as “coercive”, but is still permissible under the secret rules of engagement of the counterintelligence interrogator, and which technique already constitutes an act of (psychological and/ or physical) torture is difficult and probably only academic in nature. An alternative, more pragmatic approach would regard all interrogative means and actions using coercion as a violation of article 1 of the Torture Convention of 1984 with the possibility of a later justification in cases of the above-mentioned “ticking bomb” scenarios.³⁴

5 *The German Code of Crimes against International Law of 2002*

In order to understand the legal context of the criminal charge within the German legal framework and its jurisprudence it is important to reflect on the way Germany prosecuted international crimes prior to and after the introduction of the Code of Crimes against International Law.³⁵

5.1 The prosecution of international crimes before German criminal courts

In June 2002 Germany introduced the Code of Crimes against International Law,³⁶ which establishes universal jurisdiction of German criminal courts for the punishment of serious crimes under international law.

5.2 Criminal prosecutions of serious international crimes in Germany before the introduction of the Code of Crimes against International Law

Before the introduction of the new code, the prosecution of international crimes before German courts faced various legal difficulties in respect of subject matter jurisdiction and applicability of law. This notwithstanding, in 2001 German courts successfully tried Bosnian Serbs for crimes of genocide and war crimes committed during the Yugoslav conflict of 1991 to 1995.³⁷ Criminal jurisdiction was established either under section 6(1) of the German penal code³⁸ for the crime of genocide or, alternatively, under section 6(9) of the German penal code for war crimes as offences prosecutable on the basis of a binding treaty. Consequently, German courts in the latter case applied the Geneva Convention relating to the Protection of Civilian Persons in Time of War (Geneva Convention IV) and the Protocol Additional to

³³ Coercion might, however, lead to inaccurate or false information by the suspect who will even fabricate information in order to avoid further torture, see Mackey and Miller (n 28) 31-32.

³⁴ Such a differentiation would be unlawful under the law of criminal procedure of most democratic states. *Cf* the *fruit of a poisonous tree* doctrine of the United States criminal procedure. The present complaint of Markus Gäfgen against Germany before the European court of human rights concerns a recent case of the use of psychological torture by German law enforcement officers in connection with such a life or death scenario – application no 22978/05, decision of 10-04-2007.

³⁵ *Cf* Bachmann (n 19) part B ch 2.

³⁶ (n 7).

³⁷ See Ambos and Wirth “Genocide and war crimes in the former Yugoslavia before German criminal courts” 2001 *Bochumer Schriften zur Friedenssicherung und zum Humanitären Völkerrecht* 771 for a discussion of these six judgments.

³⁸ *Strafgesetzbuch*, the German domestic penal code.

the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I).³⁹

One of the thresholds with respect to the exercise of German criminal jurisdiction had always been the requirement of establishing the so-called “legitimising link” between the offence and Germany in order to prevent a violation of the principle of sovereign equality in international law.⁴⁰ The existence requirement was confirmed by the German federal supreme court⁴¹ in respect of the crime of genocide but left open with respect to war crimes.⁴²

An additional restriction for the prosecution of international crimes lies in the scope of the applicable law. While the crime of genocide was prosecutable under section 220a of the German Penal Code, crimes against humanity and war crimes were not codified in the German Penal Code and as a consequence had to be prosecuted as ordinary crimes of murder and manslaughter under sections 211 and 212 of the German Penal Code.⁴³

5.3 Criminal prosecution of international crimes under the new Code of Crimes against International Law

Such difficulties for an effective criminal prosecution of international crimes, however, should belong to the past after the introduction of the new code. Criminal jurisdiction of German courts under German general criminal law and the special provisions of the new code can be established for the prosecution of serious international crimes without requiring any further link to Germany.⁴⁴ The Code of Crimes against International Law criminalizes genocide and crimes against humanity as serious violations of human rights law⁴⁵ and war crimes as violations of humanitarian law.⁴⁶ Of particular importance in the context of the criminal complaint is the criminality of the omission to report a crime by persons who are under an explicit duty to act.⁴⁷

6 *The criminal proceedings*

6.1 The German federal prosecutor’s decision to dismiss the first criminal charge

The German federal prosecutor dismissed the criminal charge on the grounds (a) that the prosecution of the accused crimes before a German criminal court would

³⁹ Ambos and Wirth (n 37) 777 on the applicability of “humanitarian law” on the crimes of genocide and/or war crimes.

⁴⁰ Such a link exists *eg* in the presence of the accused person in Germany.

⁴¹ *Bundesgerichtshof* (n 5).

⁴² *BGH* decision of 13-02-1994 in *Tadic* BGs 100/94 reported in 1994 *Neue Juristische Woche* 232 for the crime of genocide and *BGH* judgment of 30-03-1999 in *Jorgic* 3 StR 215/98 in *BGHSt* 45,65 for war crimes. For a further discussion of the link requirement, see Ambos and Wirth (n 37) 778-783.

⁴³ This has to be seen against the background that while Germany had ratified the four Geneva conventions with the two additional protocols, the application of the criminal sanctions of the grave breaches system could not take place because of an absence of the necessary domestic implementing legislation. Subsequent implementation was also hindered by the non-retroactivity limitation as stipulated by a 103(2) of the German constitution (*GG*).

⁴⁴ See the German code (n 7) s 1 which reads “serious criminal offences [...] even when the offence was committed abroad and bears no relation to Germany”.

⁴⁵ s 6 and 7.

⁴⁶ s 8-12, covering the whole range of humanitarian law including the provisions of the Geneva Conventions I-IV and the two Additional Protocols I and II.

⁴⁷ s 14(1) imposes on military and civilian commanders the duty to “draw the attention” of the respective disciplinary organs to offences committed by their subordinates.

have been unlawful because the United States of America had primary jurisdiction over the accused and (b) the prerequisites of a German (subsidiary) prosecution under section 153(f) of the code of criminal procedure⁴⁸ were not fulfilled in that case.

The discussion and evaluation of the question, whether a so-called initial suspicion (*Anfangsverdacht*)⁴⁹ for the existence of a crime existed, consequently did not fall under the scope of the German federal prosecutor's criminal investigation. Because of the invoking of this procedural limitation, further deliberations on the existence and applicability of possible bars to a criminal prosecution in Germany (such as immunity) were not necessary.

This decision limits the universality of German criminal proceedings for international crimes under the new Code of Crimes against International Law to cases whose prosecution would apparently not violate the principles of subsidiarity and non-intervention in the affairs of foreign states. German criminal legislation takes these principles into account under section 153(f) of the Code of Criminal Procedure, which allows the prosecution of international crimes only in a subsidiary context, comparable to the complementary jurisdiction of the international criminal court at The Hague under article 17 of the statute of the international criminal court.⁵⁰

The German federal prosecutor stated further that the primary forum for the prosecution of international crimes remained the forum of the state whose citizens have either committed the crime or were the victims of the crime (thus referring to the active and passive personality principles as two of the principles⁵¹ of international law conferring criminal jurisdiction on domestic courts and accounting for the particular interest of the home state of the perpetrator, respectively victim, to prosecute the crime). Otherwise the criminal jurisdiction of international criminal courts such as the international criminal tribunal for the former Yugoslavia⁵² or the new international criminal court in The Hague would have automatic primacy in such cases. Therefore, German criminal courts could only exercise their jurisdiction over United States citizens in order to close a possible "impunity gap" for the above-mentioned core crimes of international law, thus following the principle of jurisdictional complementarity in the context of universal jurisdiction.

The German federal prosecutor found that the United States criminal jurisdiction was the primary and only jurisdiction for the prosecution of the alleged crimes and stated that⁵³

⁴⁸ The *Strafprozeßordnung (StPO)* is the German code of criminal procedure.

⁴⁹ The so-called *Anfangsverdacht* is a prerequisite for any German criminal prosecution and can be translated as the existence of an initial criminal suspicion as an indicator for the existence of a crime. This is a requirement for any criminal investigation – see s 153(2) *StPO*.

⁵⁰ See preamble and a 17 of the statute of the international criminal court: The efficiency of the international criminal court to prosecute crimes under these limitations may resemble an eventual "Lackmus test" of its later efficiency and eventual credibility.

⁵¹ These principles are the territoriality principle, the nationality principle, the passive nationality principle, the protective principle, and finally the universality principle. See *eg* "The Harvard research draft convention on jurisdiction with respect to crime" 1935 *American Journal of International Law* 443; Shaw *International Law* (2003) 597; Cassese *International Criminal Law* (2003) 16 *et seq*; Ratner and Abrams (n 21) 161.

⁵² The international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 was established by security council resolution 827 of 25-05-1993.

⁵³ See Decision (n 9) 4.

- (1) the United States of America as the state whose citizens were accused of the crimes in question had primary criminal jurisdiction over the alleged crimes at all times due to the active personality principle;
- (2) the alleged crimes did not take place in Germany as the *locus crimini*;⁵⁴
- (3) German citizens were neither perpetrators nor victims of the alleged crimes. The attorney-general as the competent prosecuting agency was authorized to withdraw charges in such a case according to section 153(c)(1) and section 153(f)(2)(1) and (2) of the German *Strafprozeßordnung* on the grounds that the requirements neither of the active nor passive personality principle were met;
- (4) the fact that military disciplinary action (court martials) was being taken against some of the accused served as evidence that “there are no indications that the authorities and courts of the United States of America are refraining, or would refrain, from penal measures”, albeit to adjudicate the alleged crimes itself. Therefore, there was no need for establishing the complementary jurisdiction of Germany.⁵⁵

Counsel of the plaintiffs appealed the decision to dismiss the criminal charge with a petition for a court hearing on 10 March 2005. This petition was lodged at first with the higher regional court of Karlsruhe, which was found not to be competent to hear the case due to the fact that the higher regional court of Stuttgart had both factual and regional jurisdiction over the petition of the claimants.⁵⁶

6.2 The decision of the higher regional court of Stuttgart to dismiss the plaintiff’s petition for a court decision

On 14 July 2005, counsel for the plaintiffs lodged a petition with the higher regional court of Stuttgart with the objective of obtaining a court order which would force the German federal prosecutor to resume the prosecution of the case, a procedure that is known as “indictment enforcement procedure”.⁵⁷

The petitioners challenged the dismissal of their complaint by the German federal prosecutor on the grounds that he had misinterpreted the prerequisites for the dismissal of investigation procedures or criminal charge matters under section 153(f) of the Code of Criminal Procedure and that the case resembled an example where the German federal prosecutor would have had no discretion not to initiate criminal investigations. They claimed that the German federal prosecutor’s dismissal therefore constituted a violation of the legality principle of German criminal procedural law.⁵⁸

⁵⁴ as stipulated under s 9 of the German penal code.

⁵⁵ See s 153(f)(2)(4) *StPO*.

⁵⁶ The regional jurisdiction of the higher regional court of Stuttgart derives from the fact that at least some of the named accused are residing within its district – see s 120(1)(8) *GVG*.

⁵⁷ This procedure is called *Klageerzwingungsverfahren* and resembles a criminal review procedure before a criminal court with the objective to review the prior dismissal of a criminal case. This procedure has to be initiated by the defendants themselves; see s 172 *GVG*.

⁵⁸ The so-called legality principle subjects the initiation of criminal proceedings to the prerequisites of s 153(ff) *StPO* and serves as a safeguard of the legality of criminal justice within the broader context of the rule of law.

The petitioners also requested the referral of certain legal aspects of the decision to the German federal constitutional court⁵⁹ under article 100(1) of the German constitution of 1949⁶⁰ to review the constitutionality of the decision.

This petition was unsuccessful and the higher regional court dismissed it as inadmissible on 13 September 2005.⁶¹ The court confirmed the findings of the German federal prosecutor in his dismissal of 14 July 2005. The German federal prosecutor's decision not to proceed with the criminal proceedings was lawful under section 153(f) of the Code of Criminal Procedure due to the fact that the exercise of the German federal prosecutor's discretion to dismiss the case or not was lawful and no misinterpretation of the legal prerequisites on his side was apparent.⁶²

The court further dismissed the request for a referral to the constitutional court under article 100(1) of the German constitution on the grounds that section 153(f) of the Code of Criminal Procedure itself was constitutional and furthermore that there were no indications of any violation of international law by the decision of the German federal prosecutor.⁶³

6.3 The German federal prosecutor's decision to dismiss the second criminal complaint

The new charge of 14 November 2006 accounts for the resignation of Rumsfeld as secretary of defence on 8 November 2006, thus removing the bar of jurisdictional immunity for the former state minister. It also includes in the group of defendants governmental lawyers who allegedly aided and abetted the United States government in the commission of international crimes such as torture.⁶⁴

The German federal prosecutor dismissed the updated criminal charge as well and followed the considerations made in his decision of February 2005 stressing Germany's obligation to respect the principles of state comity and the complementarity of domestic criminal jurisdiction.⁶⁵ This decision confirmed his earlier view that the United States of America had the sole and primary duty to adjudicate – and remedy – any allegations of torture committed by its forces and/or citizens. The German federal prosecutor found no reason to assume that Germany had a legal duty or even right to exercise its criminal jurisdiction.⁶⁶

The decision did not comment on the removal of Rumsfeld's procedural immunity after his resignation or on the criminality of the alleged acts of aiding and abetting (state) torture by his legal advisors through their legal advice.

⁵⁹ The *Bundesverfassungsgericht*, the German federal constitutional court, situated in Karlsruhe is the German counterpart to the South African constitutional court.

⁶⁰ The *Grundgesetz* (GG) allows the German federal constitutional court to review the constitutionality of acts of the judiciary in its a 100 I GG.

⁶¹ See decision of the *OLG* Stuttgart of 13-09-2005 http://www.rav.de/download/OLG_Stuttgart_BU/30922005.pdf (30-06-2007).

⁶² 5 and 9.

⁶³ 10.

⁶⁴ Cf the summary of the American society of international law (ASIL) "ASIL insight German criminal complaint against Donald Rumsfeld and others" <http://www.asil.org/insights/2006/12/insights061214.html> (20-06-2007).

⁶⁵ Press release (n 12).

⁶⁶ (n 12) 4.

7 Conclusion

At a first glance, the *Rumsfeld* case seems to demonstrate to what extent *Realpolitik* may affect the quest for justice. The latter was hereby heavily affected by political and diplomatic questions and considerations by the United States secretary of state's threat to abstain from participating in the global security conference in Munich, Germany, in November 2005 because the criminal proceedings were still in progress.⁶⁷ Conveniently and in order to avoid any diplomatic annoyance, the case was dismissed precisely one day before the commencement of this event.

The *Rumsfeld* case did not establish the necessary "Grundsatzentscheidung"⁶⁸ on the applicability of the Code of Crimes against International Law for future cases. The federal prosecutor missed the opportunity to add some jurisprudence to the otherwise hardly developed case law on the commission of international crimes through the means of legal aiding and abetting.⁶⁹

It only resembled an example where German penal procedural law led to the eventual dismissal on the grounds of the principle of the subsidiarity of the criminal prosecution of international crimes before German criminal courts.

The outcome of the *Rumsfeld* case explicitly acknowledged the fact that the present United States administration does not cover up incidents of criminal misconduct of its military personnel but prosecutes such crimes in a satisfying (at least for the German prosecution) fashion. Recent examples from the ongoing anti-terror "Operation Iraqi Freedom" document illustrate the determination of the United States military leadership to stamp out any misconduct which would undermine and jeopardize the overall war effort of the allies (which is to counter the present threat of global Islamist extremism).⁷⁰ The most recent development in that regard is George Bush's presidential decree of 20 July 2007 which considerably limits the possibilities of coercion and other "stressful" interrogation techniques.⁷¹

The *Rumsfeld* case could have provided the opportunity to test the practical value of the Code of Crimes against International Law and its judicial application for the prosecution of international crimes at the domestic German level. To miss such a chance is unfortunate, considering the fact that the prosecution of international crimes before domestic courts has faced some stagnation since the outcomes in the *Pinochet*⁷² and *Yerodia*⁷³ cases (as the more prominent examples of domestic adjudi-

⁶⁷ This annual event of global security actors in Munich would have been negatively affected by such a decision by Rumsfeld.

⁶⁸ judicial precedent.

⁶⁹ See the *Altstötter* case (*aka Justice* case) before the United States military tribunal sitting at Nuremberg 4-12-1947 (n 18).

⁷⁰ See *CNN com* "6 Marines charged with assaulting Iraqi civilians – three face murder, kidnapping charges in separate case" 3-08-2006 <http://edition.cnn.com/2006/LAW/08/03/hamdaniya/index.html> (10-05-2007) for an overview of alleged United States war crimes in Iraq.

⁷¹ See "Executive order: interpretation of the Geneva Conventions common article 3 as applied to a program of detention and interrogation operated by the central intelligence agency" <http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html> (30-07-2007).

⁷² See the *Pinochet* case – (n 25). The court held that there was no immunity for Pinochet as a former non-incumbent head of state for the alleged crimes of torture and that therefore the extradition process could be resumed.

⁷³ In *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* 14-02-2002, General List, no 121 <http://icj-cij.org> (30-06-2007) the international court of justice found in essence that the issuing of the arrest warrant "constituted violations of a legal obligation" of Belgium towards the Democratic Republic of the Congo under international law and that "Belgium failed to respect the (full) immunity from criminal jurisdiction [...] that Yerodia enjoyed as an incumbent foreign Minister" *ibid* par 78(1) and (2).

cations of international crimes and their domestic and international reverberations). It will be interesting to see how the concept of international justice for serious international crimes develops in future and what its implementation will look like.

SAMEVATTING

DIE KRIMINELE AANKLAG TEEN DONALD RUMSFELD – DIE VERVOLGING VOOR DUITSE HOWE VAN VERANTWOORDELIKES VIR DIE BEWEERDE MISHANDELING VAN GEVANGENES DEUR DIE VSA

Die hantering van die *Rumsfeld*-saak en die weiering deur Duitsland om die beskuldigdes te vervolg, is belangrik omdat dit demonstreer dat die uitoefening van universele jurisdiksie oor internasionale misdade deur nasionale howe in 'n bepaalde staat beperk word deur die internasionaal erkende beginsels van subsidiariteit en die nie-inmenging in die belange en sake van ander state. Die struikelblokke wat hierdie twee beginsels meebring moet dus eers oorkom word alvorens sodanige strafregtelike vervolging suksesvol voor 'n vreemde gereg gevoer kan word. Dit laat die vraag onbeantwoord tot watter mate diplomatieke oorwegings en *Realpolitik* 'n rol speel in die uitkoms van sodanige sake. Die verloop van die tersake proses laat die indruk dat sodanige mooi klinkende internasionale beleidsdokumente nie sonder meer 'n waarborg bevat dat 'n vermeende oortreder van die daarin vervatte internasionale norme daadwerklik tot rekenskap gebring sal word voor iedere vreemde gereg nie.