



GERMANY

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UNIVERSAL JURISDICTION

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CONTENTS

1. INTRODUCTION	9
2. THE LEGAL FRAMEWORK	11
2.1. CONSTITUTIONAL PROVISIONS	11
2.2. CRIMINAL PROCEDURE – THE ROLE OF THE PROSECUTOR	14
2.3. COMPETENCE OF COURTS OVER CRIMINAL CASES.....	15
2.4. OTHER ASPECTS OF THE LEGAL FRAMEWORK	16
3. EXTRATERRITORIAL CRIMINAL JURISDICTION OTHER THAN UNIVERSAL JURISDICTION	17
3.1 ACTIVE PERSONALITY JURISDICTION	18
3.2 PASSIVE PERSONALITY JURISDICTION.....	19
3.3 PROTECTIVE JURISDICTION	20
4. LEGISLATION PROVIDING FOR UNIVERSAL CRIMINAL JURISDICTION.....	22
4.1. ORDINARY CRIMES.....	25
4.2. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN	26
4.2.1. ACTS ABROAD AGAINST INTERNATIONALLY PROTECTED LEGAL INTERESTS	27
4.2.2. CRIMES IDENTIFIED IN TREATIES TO WHICH GERMANY IS A PARTY.....	28
4.3. CRIMES UNDER INTERNATIONAL LAW.....	36
4.3.1. WAR CRIMES	36
4.3.2. CRIMES AGAINST HUMANITY	37
4.3.3. GENOCIDE	38
4.3.4 TORTURE.....	38
4.3.5. EXTRAJUDICIAL EXECUTIONS.....	39

4.3.6. ENFORCED DISAPPEARANCES	39
4.3.7. THE CRIME OF AGGRESSION	40
5. CIVIL JURISDICTION OVER TORTS.....	41
5.1. LEGISLATION PROVIDING FOR UNIVERSAL JURISDICTION OVER TORTS IN CIVIL CASES.....	43
5.2. LEGISLATION PROVIDING FOR RAISING CIVIL CLAIMS IN CRIMINAL CASES INITIATED BY A PROSECUTOR OR INVESTIGATING JUDGE.....	44
5.3. PRIVATE PROSECUTIONS BY VICTIMS OR OTHERS ACTING ON THEIR BEHALF, ACTIONS CIVILES OR ACTIO POPULARIS.....	46
5.4. RESTRICTIONS ON PRIVATE PROSECUTIONS AND CIVIL CLAIMS PROCEDURES.....	47
6. OBSTACLES TO THE EXERCISE OF CRIMINAL OR CIVIL JURISDICTION	48
6.1. FLAWED OR MISSING DEFINITIONS OF CRIMES UNDER INTERNATIONAL LAW, PRINCIPLES OF CRIMINAL RESPONSIBILITY OR DEFENCES.....	48
6.2. PRESENCE REQUIREMENTS IN ORDER TO OPEN AN INVESTIGATION OR REQUEST EXTRADITION	55
6.2.1 SECTION 153 LIT. F OF THE CODE OF CRIMINAL PROCEDURE	55
6.2.2 SUSPECT IS A FOREIGN CITIZEN, PRESENT IN GERMANY OR HIS OR HER PRESENCE IS ANTICIPATED	56
6.2.3. SUSPECT IS A FOREIGN CITIZEN, NEITHER PRESENT NOR ANTICIPATED TO BE PRESENT IN GERMANY.....	57
6.2.4. SUSPECT IS A GERMAN CITIZEN	57
6.2.5 INVESTIGATIONS HAVE BEEN OPENED BY AN INTERNATIONAL OR FOREIGN JURISDICTION	57
6.2.6 ANTICIPATED LEGAL ASSISTANCE (<i>ANTIZIPIERTE RECHTSHILFE</i>).....	61
6.2.7. THE FAILURE TO ESTABLISH AND COMPLY WITH CRITERIA FOR EXERCISING DISCRETION	62
6.2.8. JUDICIAL CONTROL OF PUBLIC PROSECUTION PROCEEDINGS.....	65
6.3. STATUTES OF LIMITATION APPLICABLE TO CRIMES UNDER INTERNATIONAL LAW	66

6.4. DOUBLE CRIMINALITY	69
6.5. IMMUNITIES	70
6.6. BARS ON RETROACTIVE APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL LAW OR OTHER TEMPORAL RESTRICTIONS.....	72
6.7. NE BIS IN IDEM	73
6.8. POLITICAL CONTROL OVER DECISIONS TO INVESTIGATE AND PROSECUTE	75
6.9. RESTRICTIONS ON THE RIGHTS OF VICTIMS AND THEIR FAMILIES.....	75
6.10. AMNESTIES.....	75
7. EXTRADITION AND MUTUAL LEGAL ASSISTANCE	76
7.1 EXTRADITION	78
7.1.1. INAPPROPRIATE LIMITS ON MAKING EXTRADITION REQUESTS	79
7.1.1.1. POLITICAL CONTROL OVER THE <i>MAKING</i> OF EXTRADITION REQUESTS	79
7.1.1.2. PRESENCE	80
7.1.2. INAPPROPRIATE BARS TO GRANTING EXTRADITION REQUESTS	80
7.1.2.1. POLITICAL CONTROL OVER THE GRANTING OF EXTRADITION REQUESTS	80
7.1.2.2. NATIONALITY.....	80
7.1.2.3. DUAL CRIMINALITY AND TERRITORIAL JURISDICTION	80
7.1.2.4. POLITICAL OFFENCE	81
7.1.2.5. MILITARY OFFENCE	81
7.1.2.6. NE BIS IN IDEM.....	82
7.1.2.7. NON-RETROACTIVITY	82
7.1.2.8. STATUTES OF LIMITATION	82
7.1.2.9. AMNESTIES, PARDONS AND SIMILAR MEASURES OF IMPUNITY	82
7.1.3. SAFEGUARDS.....	82

7.1.3.1. FAIR TRIAL	83
7.1.3.2. TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT	84
7.1.3.3. DEATH PENALTY	84
7.1.3.4. HUMANITARIAN CONCERNS	84
7.1.3.5. SPECIALITY	85
7.2. MUTUAL LEGAL ASSISTANCE	85
7.2.1 UNAVAILABLE OR INADEQUATE PROCEDURES	85
7.2.2 INAPPROPRIATE BARS TO MUTUAL LEGAL ASSISTANCE.....	85
7.2.3. SAFEGUARDS	85
8 SPECIAL POLICE OR PROSECUTOR UNIT	87
9 JURISPRUDENCE	90
9.1 OVERVIEW	90
9.2. PROSECUTION OF ORDINARY CRIMES	90
9.3.1. NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW IN GERMANY PRIOR TO THE ENACTMENT OF THE CCIL	91
9.3.1. CASES RELATED TO THE ARMED CONFLICT IN THE FORMER YUGOSLAVIA	91
9.3.1.1. DUŠKO TADIĆ CASE.....	91
9.2.1.2. NOVISLAV DJAJIĆ CASE	93
9.3.1.3 NIKOLA JORGIĆ CASE.....	93
9.3.14. MAKSIM SOKOLOVIĆ CASE	97
9.3.1.5. KJURADJ KUSLJIĆ CASE.....	98
9.3.2. CASES RELATED TO THE ARGENTINE ARMED FORCES.....	98
9.3.2.1 CASES CONCERNING DESCENDANTS OF JEWS OF GERMAN ORIGIN	98

9.3.2.2. CASES OF ELISABETH KÄSEMANN AND KLAUS ZIESCHANK.....	100
9.3.3. CASE AGAINST AUGUSTO PINOCHET	100
9.4. CASES RELATED TO THE ALLEGED VIOLATIONS OF THE CCIL	101
9.4.1. PRELIMINARY INVESTIGATION IN IGNACE MURWANASHYAKA CASE.....	102
9.4.2. COMPLAINTS WHICH HAVE BEEN DISMISSED WITHOUT FORMAL INVESTIGATION PROCEEDINGS	102
9.4.2.1. JIANG ZEMIN	102
9.4.2.2. RAMZAN KADYROW.....	103
9.4.2.3. DONALD RUMSFELD I	103
9.4.2.4. DONALD RUMSFELD II	104
9.4.2.5. ZAKIR ALMATOV	104
RECOMMENDATIONS FOR REFORM OF LAW AND PRACTICE.....	106
SUBSTANTIVE LAW:	106
JURISDICTION:	106
PROCEDURE RELATED TO VICTIMS:.....	107
REMOVAL OF LEGAL, PRACTICAL AND POLITICAL OBSTACLES:.....	107
SELECTED BIBLIOGRAPHY CONCERNING EXTRATERRITORIAL JURISDICTION AND RELATED ISSUES.....	111
PUBLICATIONS IN GERMAN.....	111
GERMAN LEGAL SYSTEM IN GENERAL:.....	111
CRIMINAL CODE/CODE OF CRIMES AGAINST INTERNATIONAL LAW:.....	111
CRIMINAL PROCEDURE CODE:.....	112
INTERNATIONAL CRIMINAL COURT:	112
UNIVERSAL JURISDICTION:.....	113
PUBLICATIONS IN ENGLISH AND IN FRENCH.....	114

CRIMINAL CODE/CODE OF CRIMES AGAINST INTERNATIONAL LAW:	114
INTERNATIONAL CRIMINAL COURT:.....	114
UNIVERSAL JURISDICTION:	114

1. INTRODUCTION¹

Germany, which has a civil law system, has authorized its courts to exercise universal criminal jurisdiction over ordinary crimes in its Criminal Code (*Strafgesetzbuch, Criminal Code*)² since 1975 and over genocide since 1954.³ In addition, since 30 June 2002, it has authorized its courts under the new Code of Crimes against International Law (CCIL, *Völkerstrafgesetzbuch*)⁴ to exercise universal jurisdiction over genocide, crimes against humanity and war crimes. However, war crimes, crimes against humanity, torture, extrajudicial executions and enforced disappearances committed before July 2002 are not defined as crimes under German law.

Although a judicially created requirement that there be a link between the crime and Germany before its courts could exercise universal jurisdiction was eliminated in 2002 by amendment of the Code of Criminal Procedure (*Strafprozessordnung*)⁵ with respect to all crimes in both codes, that amendment permitted the Federal Prosecutor to exercise his or her discretion not to investigate or prosecute foreign suspects for crimes committed abroad. Despite a general principle of legality obliging the Federal Prosecutor to investigate and

¹ This report was drafted by members of Amnesty International Germany's working group on International Justice (Nina Althoff, Denise Bentele, Leonie von Braun, Friedrich Frank, Anna von Gall, Nils Geissler, Carolin Herzig, Constanze Schimmel, Christine Schuon and Frank Selbmann) in close consultation with the International Justice Project in the International Secretariat of Amnesty International. Amnesty International wishes to thank the following persons for their helpful and thoughtful comments on drafts of this paper: Dr. Florian Jessberger, Wolfgang Kaleck, Prof. Dr. Hans Vest and Prof. Dr. Andreas Zimmermann. Every effort was made to ensure that all the information in this paper was accurate as of 1 October 2008. However, for an authoritative interpretation of German law, counsel authorized to practice in Germany should be consulted. Amnesty International welcomes any comments or corrections, which should be sent to ijp@amnesty.org.

² An English translation of the German Criminal Code as promulgated on November 13th, 1998 is available at: <http://www.iuscomp.org/gla/statutes/StGB.htm>.

³ These provisions have their antecedent in a proposal made more than 80 years ago. Project of Penal Code for Germany of 1927, Sec. 7 (cited in Harvard Research in International Law, 29 Am. J. Int'l L. Supp. 435, 575 (1935)).

⁴ An English translation of the CCIL is available at: <http://www.wihl.nl/finals/Germany/DE.L-IM.Draft%20of%20an%20act%20to%20introduce%20the%20CCAICL.pdf>; BGBl. 2002 I, 2254; see also Gerhard Werle/Florian Jessberger, Das Völkerstrafgesetzbuch, in: Juristenzeitung (JZ) 2002, 725, 730; for an overview of the history of international criminal law in Germany see: Claus Kreß, Versailles – Nürnberg – Den Haag: Deutschland und das Völkerstrafrecht, in: Juristenzeitung (JZ) 2006, 981 et seq.

⁵ An English translation of the German Code of Criminal Procedure (as of [dateXXX]) is available at: <http://www.iuscomp.org/gla/statutes/StPO.htm>.

prosecute all cases where there is evidence of a crime and authoritative commentary indicating that this statutory provision concerning discretion should be applied sparingly, the Federal Prosecutor has since 2002 failed to investigate more than two of at least 62 complaints, none of which led to a prosecution⁶ even when the suspect was in Germany at the time of the complaint (see Section 9.4.1 below). Therefore, despite the strong provisions permitting German courts to exercise universal jurisdiction over a broad range of crimes, Germany today has effectively become a safe haven from prosecution for foreigners responsible for crimes under international law committed abroad against other foreigners. There were a number of landmark judgments before 2002 concerning genocide and confirming that states could exercise universal jurisdiction over this crime despite the absence of a provision in the 1948 Convention for the Prevention and Punishment of the Crime of Genocide authorizing states parties to do so. However, there have been no judgments under the CCIL.

Although victims have only limited rights to initiate a criminal prosecution in Germany, German law permits victims to file civil complaints in criminal proceedings, including those based on universal jurisdiction, but for the reasons indicated, under current prosecution policy, there is little or no chance for victims to achieve their goals with such a complaint. In addition, the possibilities of receiving reparations are extremely limited under German law.

There are a number of serious obstacles to extradition of persons suspected of crimes under international law that contribute to Germany being a safe haven for persons responsible for certain crimes when they cannot be prosecuted in Germany, such as requirements of double criminality.

There is a small special police unit to investigate crimes under international law, but there is no similar special unit of prosecutors to prosecute such crimes. Since July 2002, however, the Federal Prosecutor has all but ceased prosecuting crimes under international law.

This paper makes extensive recommendations for reform of law and practice so that Germany can fulfil all of its obligations under international law to investigate and prosecute crimes under international law, to extradite them to another state able and willing to do so in a fair trial without the death penalty or a risk of torture or other cruel, inhuman or degrading treatment or punishment or to surrender them to the International Criminal Court.

⁶ Nils Geißler/Frank Selbmann, 5 Jahre Völkerstrafgesetzbuch – Eine kritische Bilanz, *Humanitäres Völkerrecht – Informationsschriften*, Issue 20 (2007), 160, 161.

2. THE LEGAL FRAMEWORK

This section gives an overview of the relevant constitutional provisions concerning international law and jurisdiction and the substantive and procedural scope of the CCIL, Criminal Code and Code of Criminal Procedure. It also provides cross-references to other parts of this paper where some of these aspects are discussed in more detail.

2.1. CONSTITUTIONAL PROVISIONS

Article 25 of the German Constitution (*Grundgesetz*) provides that customary international law has priority over legislation: "The general rules of international law shall be an integral part of federal law. They shall override laws and directly establish rights and obligations for the inhabitants of the federal territory."⁷ German legal commentaries indicate, however, that the principle of legality in Article 103 (2) of the Constitution must be interpreted as prohibiting a national court from trying a person for a crime under international law unless the conduct is also a crime under the law of suspect's state at the time it occurred.⁸ These commentaries object to qualifying most crimes against humanity and other crimes under customary international law as a general rule of international law in the sense of Article 25 of the German Constitution that would allow the direct application of the offence.⁹ Thus, to the extent that the conduct is prohibited only as an ordinary crime, such as murder, rather than as a crime under international law, it will be subject to the limitations applicable to ordinary crimes under national law, which in most cases is wholly inappropriate to crimes of such gravity.

This strictly formalized interpretation of the Constitution is not mandated by international law, but understandable in the light of German legal history. International law permits – and in some cases requires – states to exercise criminal jurisdiction over international crimes

⁷ The German Constitution of the Federal Republic of Germany, May 23, 1949, as amended to June 1993, together with the text of the 40th amendment of December 20, 1993 (Official English translation in Gisbert H. Flanz, Germany, in: Albert P. Blaustein/Gisbert H. Flanz (eds.), *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. August 1994) (Release 94-6).

⁸ Robert Roth & Yvan Jeanneret, *supra*, n.307, 3-4 (citing Thomas Fischer, *Strafgesetzbuch und Nebengesetze* (Munich 55th ed. 2007) Section 6 para.9; Heinrich Jescheck/Thomas Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* (Berlin 5th ed. 1996) 164; Christiane Nill-Theobald, "Defences" *bei Kriegsverbrechen am Beispiel Deutschlands und der USA (Freiburg im B. 1998)* [37ss. BVerfG] in: *Neue Zeitschrift für Strafrecht* (NStZ) 2001, 240]).

⁹ Theodor Maunz/Günter Dürig, *Grundgesetz Kommentar, Bd. 4, Article 103 II, para. 251* for more details; Hans-Heinrich Jeschek in: Rudolf Bernhard (Ed.), *Encyclopedia of International Law*, Instalment 4, 1982, 294 (296); Albin Eser in: Adolf Schönke/Horst Schröder, *Strafgesetzbuch* (Munich 27th ed. 2006), appendix to Section 1, para. 22.

even if these crimes were not regulated under national law at the time they were committed.¹⁰ The strict interpretation is motivated by a desire to guarantee legal certainty.¹¹ In this context it is interesting to note the reservation of Germany to Article 7 (2) of the 1950 European Convention for Protection of Human Rights and Fundamental Freedom (European Convention on Human Rights),¹² which expressly includes crimes, that were criminal according to the general principles of law recognised by civilised nations, and do not require necessarily written law. The reservation, made 1954 and imposing limitation of binding reads: “Article 7 Section 2 applies only within the limits of Article 103 Section 2 of the German Constitution”.¹³

In marked contrast, on 17 December 1973, Germany ratified the 1966 International Covenant on Civil and Political Rights (ICCPR), Article 15 (2) of which is worded in almost exactly the same way as Article 7 (2) of the European Convention on Human Rights, without making any reservation to this paragraph. Moreover, in 1996 the Federal Constitutional Court formulated in a highly debated decision the concept of a strict interpretation of the principle of legality and retroactivity, rejecting the argument, that the reservation to Article 7 (2) of the European Convention on Human Rights was not consistent with the intention of Parliament.¹⁴ In exceptional cases, the Court decided, the strict protection of certainty Article 103 (2) of the German Constitution has to yield. The decision of the court was based on the so-called principle of substantive justice (*Gebot der materiellen Gerechtigkeit*).

The CCIL implements the provisions of the Rome Statute of the International Criminal Court (Rome Statute). It puts German criminal law largely in line with the requirements of the Rome Statute and other international law as far as genocide, crimes against humanity and war crimes are concerned (see Section 4.3 below). However, it does not include other crimes under international law, such as aggression, torture and enforced disappearances when they do not amount to crimes against humanity or torture. The CCIL contains a part with general

¹⁰ See ICCPR, art. 15 (2); Universal Declaration of Human Rights, art. 11 (2).

¹¹ BVerfGE 25,269,287.

¹² Article 7 (No punishment without law) reads as follows:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

¹³ BGBl. 1954 II, 14.

¹⁴ BVerfGE 95,96, 132ff; BVerfGE 21.01.2000, BvQ 60/99. The decision of the BVerfG concerned a DDR-Case questioning the non-application of Rechtfertigungsgrund for executions on the German wall and referred to “extremely exceptional cases“ involving former Nazi cases.

provisions (Sections 1 to 5) and a substantive part in which the definitions of genocide, crimes against humanity and war crimes are set out (Sections 6 to 14). One of the key provisions is Section 1 which provides for universal jurisdiction over genocide, crimes against humanity and war crimes. No particular legitimising link (see discussion of this now rejected requirement below in section 9.3.1) is required with regard to these crimes. Section 1 of the CCIL embodies the principle of universal jurisdiction in its purest form (see Sections 4.3.1 to 4.3.3 below). However, regarding crimes committed abroad 153 lit. f of the Code of Criminal Procedure under certain conditions gives the Federal Prosecutor considerable discretion not to open an investigation with regard to crimes committed abroad (see Section 6.2 below).¹⁵

The German Parliament decided to enact a separate law rather than to add a new chapter in the ordinary German Criminal Code due to the subject's particular importance and its effect on international legal policy (*völkerrechtspolitische Wirkung*).¹⁶ In particular, the objectives of the CCIL¹⁷ are to cover the specific area of crimes under international law and to promote legal clarity and practical application with standards in a single body of rules. It also aims to ensure that Germany will always be in a position to fulfil its obligations under the principle of complementarity of the Rome Statute. In order to strengthen international criminal justice at large, the creation of the CCIL intends to contribute to the advancement and extension of international humanitarian law. At the same time, the CCIL has the objective to close some of the gaps between German criminal law and international criminal law, which includes genocide and crimes against humanity, as well as international humanitarian law.

Before the CCIL entered into force, genocide and grave breaches of the Geneva Conventions and Protocol I could be prosecuted only under certain conditions. According to Section 6 No. 1 and No. 9 of the German Criminal Code,¹⁸ it was possible to prosecute those crimes according to the principle of universal jurisdiction. Crimes against humanity were not included. Since the CCIL is only applicable to crimes under international law committed after it entered into force, genocide and grave breaches of the Geneva Conventions that were committed before 30 June 2002, as well as other crimes under international law, such as torture and enforced disappearances, regardless when they were committed, still have to be prosecuted under the previous provisions.

¹⁵ See 2.4.B. Presence requirements in order to open an investigation or request extradition.

¹⁶ Gerhard Werle/Florian Jessberger, *Das Völkerstrafgesetzbuch*, in: *Juristenzeitung (JZ)* 2002, 725, 730.

¹⁷ Explanatory Memorandum of the Code of Crimes against International Law, BT. Drs. 14/8524, 12 (available at: <http://dip.bundestag.de/parfors/parfors.htm>); see also Kai Ambos, *Internationales Strafrecht*, 2006, 226 to 226; for more details regarding the objectives see: Albin Eser/Helmut Gropengießer/Helmut Kreiker, *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, 2003, 61-70.

¹⁸ Prior to the entry into force of the CCIL, German Courts already had universal jurisdiction to punish genocide according to Section 6 No. 1 of the Criminal Code and grave breaches of the Geneva Conventions and torture according to Section 6 No. 9 of the Criminal Code. The issue is outlined in Steffen Wirth, *International Criminal Law in Germany – Case Law and Legislation*, at <http://www.mpicc.de/shared/data/pdf/ottawa.pdf>. According to a view in legal literature, Section 6 No. 9 of the Criminal Code applies also to torture.

2.2. CRIMINAL PROCEDURE – THE ROLE OF THE PROSECUTOR¹⁹

Pursuant to Section 142 lit. a in conjunction with Section 120 subs. 1 No. 8 of the German Judiciary Act (*Gerichtsverfassungsgesetz*), the competence for criminal prosecutions of crimes under the CCIL rests with the German Federal Prosecutor (*Generalbundesanwalt*).²⁰ The problematic structure and organisation of the German Federal Prosecution Office as far as investigations and prosecutions of crimes under the CCIL are concerned will be addressed later in detail.²¹ The German Federal Prosecutor is also responsible for criminal prosecutions of crimes committed before the CCIL entered into force as well as crimes committed since July 2002 that can only be prosecuted under the Criminal Code.

A brief note on the distinction between the opportunity and legality principles

The opportunity principle of Section 153 lit. c subs. 1 No.1 of the German Criminal Code applies to all foreign acts that fall under either the Criminal Code or the CCIL. According to the principle of opportunity or expediency (*Opportunitätsprinzip*), the decision to bring a charge against someone is part of the discretionary power of the *prosecution* in order to avoid over burdening the judiciary. Normally, the opportunity principle applies only to certain minor crimes and requires the prosecutor to obtain permission of the court to invoke it.²² This principle is an exception to the general principle of legality or compulsory prosecution (*Legalitätsprinzip*) according to which the prosecution has in general to indict someone for every crime. One commentary has explained:

“This principle seeks to ensure that the law is impartially upheld and prosecutions are put into effect to do this. All participants in the criminal process are subject equally to the law and no arbitrary decisions should be reached either in the case or in the decision to prosecute.”²³

However, as explained below in Section 6.2, Article 153 lit. f and c of the German Code of Criminal Procedure, which have given the Federal Prosecutor considerable discretion in practice not to prosecute some of the worst possible crimes imaginable in the world, is an exception to the general rule of German law that limits the opportunity principle to minor acts.

¹⁹ For more details see: Albin Eser/Helmut Gropengießer/Helmut Kreiker, *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, 2003, 417-420.

²⁰ The legal situation regarding crimes committed prior to 30 June 2002 has been described above in this section, see 1. Introduction, para. 3.

²¹ See Section 8 below.

²² Nigel Foster/Satish Sule, *German Legal System and Laws*, Oxford University Press, 3rd ed. 2002, 342.

²³ *Ibid.*, 341-342.

2.3. COMPETENCE OF COURTS OVER CRIMINAL CASES

The jurisdictional scheme of courts over criminal cases is complex and divided between regional and Federal courts.

Trial level.

The first instance jurisdiction over crimes under the CCIL rests with the Higher Regional Courts (*Oberlandesgerichte*), Section 120 subs. 1 No. 8 of the Judiciary Act. Although the court of first instance is the only court competent to try crimes committed under the CCIL, the judges can also consider other crimes committed in conjunction with the crime under international law (*Tateinheit*, Section 52 of the German Criminal Code). With regard to crimes committed before the CCIL entered into force in July 2002, the first instance jurisdiction rests either with the Higher Regional Courts, in case of the prosecution of genocide, or with the District Courts (*Landgerichte*), in case of other crimes, such as murder.²⁴

The determination of the competent court follows the regular provisions concerning the crimes and expected penalty pursuant to Sections 74, 74a, 120, 124 GVG. Thus, jurisdiction for most cases would rest with the District Courts and appeals are heard by the Higher Regional Court. A second appeal (Revision) is possible on certain legal and procedural grounds to the Federal Court of Justice (*Bundesgerichtshof*, BGH) (sometimes translated as Federal Supreme Court). The Federal Prosecutor (*Generalbundesanwalt*) is authorised after Section 142a GVG in conjunction with Sec 120 (1) and (2) GVG to take up cases under certain circumstances (*besondere Bedeutung*). In such a case the Higher Regional Court would have jurisdiction.

Appeals

Sections 7 et seq. of the German Code of Criminal Procedure²⁵ determine which Higher Regional Court is competent (*örtliche Zuständigkeit*). Appeals from these courts are within the competence of the Federal Court of Justice, according to Section 135 subs. 1 of the Judiciary Act. Under certain circumstances a further challenge on constitutional grounds at the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) is possible. Appeals from the District Courts are heard by the highest courts in the *Länder* and then go to the Federal Court of Justice.

Members of the armed forces

The same allocation of trials and appeals applies to criminal cases involving members of the Armed Forces which are assigned to the criminal jurisdiction of the ordinary courts. So far, no military criminal courts for the Armed Forces have been established in Germany, though,

²⁴ Section 74 of the Judiciary Act. See also the former version of Section 120 subs. 1 No. 8 of the Judiciary Act.

Article 96 subs. 2 of the German Constitution authorizes the Federation to establish such courts which may exercise criminal jurisdiction over members of the Armed Forces serving abroad or on board warships.²⁶

2.4. OTHER ASPECTS OF THE LEGAL FRAMEWORK

General principles such as *ne bis in idem* (see Sections 6.7 and 7.1.2.6 below) and the prohibition of retroactive criminal law (see Sections 6.6 and 7.1.2.7 below) are included in the Constitution, as well as immunity for certain state officials (see Section 6.6 below). The CCIL and the Criminal Code are silent on the question of the denial of immunity for perpetrators of crimes under international law (see Section 6.5 below). Questions of extradition are dealt with in the International Legal Assistance in Criminal Matters Act (*Internationales Rechtshilfegesetz*, IRG) (see Section 7 below). For civil claims German law provides several tools: legally restricted charges by private parties (*Privatklage*), claims of civil law damages in the criminal procedure (*Adhäsionsverfahren*), the right of victims to participate in trials (*Nebenklage*) and the Act on Securing Victims Claims (*Opferanspruchsgesetz*) (see Section 5 below).

²⁶ Aside from the described situations such courts could only exercise jurisdiction during a state of defense (Article 96 (2) of the German Constitution, see also Section 3 (1) of the Code of Crimes for the Federal Armed Forces, *Wehrstrafgesetz*).

3. EXTRATERRITORIAL CRIMINAL JURISDICTION OTHER THAN UNIVERSAL JURISDICTION

Extraterritorial offences are justiciable if one of the following principles is applicable:

- active personality
- passive personality
- protective

The first three forms of extraterritorial jurisdiction and the crimes that can be prosecuted under each form are discussed below in this section and the fourth, universal jurisdiction, and the crimes subject to this form of jurisdiction are discussed in the following section.

There are numerous provisions in the Criminal Code giving German courts extraterritorial jurisdiction over particular crimes, including ordinary crimes under national law, crimes under national law of international concern (mostly in treaties) and crimes under international law (sometimes also defined in treaties). Some of these provisions clearly give courts jurisdiction under more than one form of jurisdiction, but other provisions are less clear and the applicable form of extraterritorial jurisdiction often is debated among German scholars. Rather than simply discuss the provisions in the order that they are placed in the Criminal Code, the following discussion groups the provisions under each applicable form of extraterritorial jurisdiction. When, however, the provision could be justified under more than one form of jurisdiction or the form is subject to controversy, the provision is discussed under each form and the possibility that other forms apply is noted. The definitions of the forms of jurisdiction are those used in each of the 192 Amnesty International country papers in the No Safe Haven Series. Since there is no unanimity among governments or scholars, Amnesty International adopted definitions which seemed to make the most sense and to be clear and consistent with each other. For example, the characterization of some of the provisions discussed in this section as involving protective jurisdiction may not always be consistent with the definitions used in the German criminal law. However, a number of German legal doctrines related to extraterritorial jurisdiction are noted.

3.1 ACTIVE PERSONALITY JURISDICTION

Active personality jurisdiction is based on the nationality – not residence – of the suspect or defendant at the time of the crime or tort – not on the basis of the nationality of the suspect or defendant afterwards.²⁷ As explained below, there are two basic sets of provisions in the Criminal Code based on active personality. Any provisions where there might be overlap with other forms of jurisdiction or a controversy on this point are noted.

First, Section 7 subs.2 No.1 of the Criminal Code (active personality) covers criminal conduct that can be punished in foreign countries as an offence (criminal act) (dual criminality) and can apply to a German perpetrator. This is also applicable to attempt, participation or attempted participation in committing such an offence or a crime. Section 7 subs. 2 No. 1 reads:

“Section 7 - Applicability to Acts Abroad in Other Cases²⁸

. . .

(2) German criminal law shall apply to other acts, which were committed abroad if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement and if the perpetrator:

1. was a German at the time of the act or became one after the act.”

Therefore, German criminal law can apply in cases, where the act is not punishable at the place of its commission. Additionally, it applies in some cases considered in Section 5 in connection with the protective jurisdiction.

Second, there are a number of provisions based on active personality in Section 5 of the Criminal Code. This section provides for active personality over the following crimes:

- No. 3 a) covers endangering the democratic rule of law, Section 89, 90a subs. 1 of the Criminal Code, if the perpetrator is a German and has his livelihood in the territorial areas of applicability of this law.
- No. 5 a) covers crimes against the national defence, Section 109a, 109d and 109h of the Criminal Code, if the perpetrator is a German and has his livelihood in the territorial areas of applicability of this law.
- No. 8 covers crimes against sexual self-determination: Section 174 subs. 1 and 3 of the

²⁷ This is the approach taken in the International Bar Association Legal Practice Division, Report of the Task Force on Extraterritorial Jurisdiction (forthcoming October 2008), p. 144 (“The active personality principle, also known as the active nationality principle, permits a state to prosecute its nationals for crimes committed anywhere in the world, if, at the time of the offense, they were such nationals.”).

²⁸ The other cases are those listed in Sections 5 and 6 of the Criminal Code.

Criminal Code, if the perpetrator and the victim (person against whom the act is committed) is German; Section 176 to 176b and 182 of the Criminal Code, if the perpetrator is German. This provision involves both active and passive personality jurisdiction.

- No. 9 covers the crime of termination of pregnancy, defined in Section 218 of the Criminal Code, when the perpetrator is German and to have his livelihood within the territorial applicability of this law.
- No.11a covers offences against the environment, Section 328 subs. 2 No. 3 – 5 of the Criminal Code, also in conjunction with Section 330 of the Criminal Code, (*Fördern, Verleiten oder Verursachen einer nuklearen Explosion*), if the perpetrator is a German in time of the act.
- No. 12 covers acts committed by a German public official or a person with a special public service obligation during his official stay or in connection with his duties (*Amtsdelikte eines Deutschen*).
- No. 14a covers bribery of a member of parliament, as defined in Section 108e of the German Criminal Code if the perpetrator is a German at the time of the act or the act was committed in relation to a German. This provision would involve protective jurisdiction if the perpetrator were foreign, but active personality if the perpetrator were German.
- No. 15 establishes jurisdiction for trafficking in human organs, as defined in Section 18 of the Transplant Law (*Transplantationsgesetz*) if the perpetrator is a German at the time of the act (*Organhandel*).

3.2 PASSIVE PERSONALITY JURISDICTION

Passive personality jurisdiction is jurisdiction based on the nationality of the victim at the time of the crime or the tort.²⁹ Under German law the passive personality principle is considered a special kind of protective principle.³⁰ Section 7 subs.1 of the Criminal Code (passive personality) covers the same crimes as Section 7 subs.2, provided that here the perpetrator (offender) is German, but some of the provisions can only fit the definition of universal jurisdiction, such as those requiring that the perpetrator have acquired German nationality after the crime (see Section 4 below). The opportunity principle of Section 153 lit. c subs.1 No.1 of the Code of Criminal Procedure also applies.

The provisions in Section 5 of the German Criminal Code based on passive personality are listed below, noting any overlap with other forms of jurisdiction or any controversy about this question:

²⁹ IBA Report, p. 146 (“The victim must have been a national of the foreign state, State A, at the time of the crime.”).

³⁰ Thomas Fischer, *Strafgesetzbuch und Nebengesetze* (Munich 55th ed. 2007), appendix to Sections 3-7.

- No. 6 criminalizes the abduction (Section 234 a of the Criminal Code) and casting political suspicion on another person (Section 241a of the Criminal Code) if the act is directed against a person who has his usual residence in Germany. When the resident was a foreigner at the time of the crime, this provision involves universal jurisdiction.
- No. 6a provides jurisdiction in cases where children are abducted from their parents or by one of their parents (Section 235 Abs. 2 Nr. 2). Jurisdiction is available in case where the crime is directed against a person resident or usually resident outside Germany.
- No. 7 covers the violation of business or trade secrets of a business located within the territorial area of application of German criminal law or an enterprise, which has its registered place of business or an enterprise with a registered place of business abroad, which is dependent on an enterprise with its registered place of business within the territorial area of this law and is part of its organisation.
- No. 8, as noted above in Section 3.2, covers crimes against sexual self-determination, defined in Section 174 subs. 1 and 3 of the Criminal Code, if the perpetrator and the person against whom the act is committed is German, and Section 176 to 176b and 182 of the Criminal Code, if the perpetrator is German. This provision involves both active and passive personality jurisdiction.
- No. 14 covers acts committed against an public official, a person with a special public service obligations or a soldier in the Federal Armed Forces during the discharge of his or her duties or in connection with such duties (*Delikte gegen Amtsträger*).

3.3 PROTECTIVE JURISDICTION

Protective jurisdiction is based on conduct abroad directed against the forum state's own specific national interest, such as counterfeiting, treason and sedition.³¹ Section 5 of the Criminal Code covers foreign acts against German objects of an action regardless of the law applicable at the scene of crime and regardless of whether the act or crime is punishable according to this law. This section includes a list of 15 different offenses (crimes), such as state security offenses (Nos. 1-5), protection of the German national economy (No. 7) and of the judicial system (No. 8). The opportunity principle applies according to Section 153 lit. c subs. 1 No.1. of the Criminal Code. These provisions and any overlap or disputes regarding their jurisdiction are discussed below. Some of the provisions cover more than one jurisdictional principle.

- No.1-5 contain offences against the state. Including the following:
 - Preparation of a war of aggression, Section 80 of the Criminal Code (*Vorbereitung eines Angriffskrieges*);

³¹ For a somewhat more restrictive definition, see IBA Task Force Report, p. 149 (“[T]he ‘protective principle’, . . . recognizes a state’s power to assert jurisdiction over a limited range of crimes committed by foreigners outside its territory, where the crime prejudices the state’s vital interests”).

- High treason, Sections 81-83 of the Criminal Code: (*Hochverrat*),
 - Endangering the democratic rule of law, Section 89, 90a subs. 1 of the Criminal Code, if the perpetrator is a German and has his livelihood in the territorial areas of applicability of this law, and Sections 90 and 90a subs. 2 of the Criminal Code (*Gefährdung des demokratischen Rechtsstaates*);
 - Treason and endangering external security, Sections 94-100a of the Criminal Code (*Landesverrat und Gefährdung der äußeren Sicherheit*);
 - Crimes against the national defense, 109a-h Criminal Code (*Straftaten gegen die Landesverteidigung*), in cases 109a, d, h it is required that the perpetrator is a German and has his livelihood in the territorial area of this law.
- No.10 of Section 5 provides for jurisdiction over false unsworn testimony, perjury and false affirmation in lieu of an oath, defined in Section 153 to 156 Criminal Code (*Falsche uneidliche Aussage, Meineid, Falsche Versicherung an Eides statt*), in a proceeding that is pending before a court or other German agency within territorial areas of applicability of this law, which is competent to administer oaths or affirmations in lieu of oath.
- No. 14a concerns bribery of a member of parliament, as prohibited in Section 108e of the German Criminal Code if the perpetrator is a German at the time of the act or the act was committed in relation to a German. This provision would involve protective jurisdiction if the perpetrator were foreign, but active personality if the perpetrator were German.

In addition to these provisions in Section 5 of the Criminal Code, there are two provisions in Section 6 Nos. 7 and 8 of the Criminal Code based on protective jurisdiction:

No. 7 provides for jurisdiction over counterfeiting of money and securities, Sections 146, 149 to 152 of the Criminal Code, and counterfeiting of payment cards and blank Eurochecks, Section 152b subs. 1 - 4 of the Criminal Code, as well as their preparation 152b subs. 5 (*Geld- und Wertpapierfälschung; Zahlungskarten und Eurocheckfälschung; Vorbereitung*). Under German legal doctrine, jurisdiction for these crimes is based on the treaty principle (see Section 4.2 below) and state protection (*Vertragsprinzip und Staatschutzprinzip*).

No. 8 provides for jurisdiction over economic subsidy fraud, Section 264 of the Criminal Code (*Subventionsbetrug*). The provision protects German subsidies and subsidies of the European Community. Jurisdiction for over such extraterritorial crimes is based both on state protection and on protection of the European Community.

4. LEGISLATION PROVIDING FOR UNIVERSAL CRIMINAL JURISDICTION

There are two separate legal bases for universal jurisdiction over crimes, depending on whether the crimes are defined in the CCIL or in the Criminal Code and other law. First, Section 1 of the CCIL provides for such jurisdiction over three core crimes under international law (genocide, crimes against humanity and war crimes) committed since 30 June 2002. Second, Sections 6 and 7 of the Criminal Code provide for universal jurisdiction over certain other crimes as listed below. Universal jurisdiction is the ability of the police or investigating judge of any state to investigate and prosecutors to prosecute persons for crimes committed outside the state's territory which are not linked to that state by the nationality of the suspect or of the victim at the time of the crime or by harm to the state's own national interests. The state exercises such jurisdiction even if national law imposes a variety of conditions or requirements of links to that state. Those conditions or requirements do not create new forms of jurisdiction; they are simply restrictions on the scope of the universal jurisdiction being exercised.

Universal jurisdiction, Section 1 of the CCIL

The CCIL provides for universal jurisdiction over genocide, crimes against humanity and war crimes. Section 1 of the CCIL provides:

“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 there exists no relation to Germany.”

This section enables the Federal Prosecutor to investigate and prosecute regardless of the nationality of the victims or perpetrators, the territory of the crime or the presence of the accused.³² No particular legitimising link is required. According to some German legal scholars, to the extent that a juridical link is necessary, it is provided by the seriousness of the crime. Crimes under international law are directed against the most vital interests of the international community, in particular, world peace and international security. Therefore, the lawmakers departed from the view of the Federal Court of Justice, which for several years required a judicially created link according to which it was necessary that there is a link between Germany and the crime. One example is where the suspect had been living in

³² Gerhard Werle, *Principles of International Criminal Law*, The Hague 2005, Part One, G, V, para. 238 et seq., 80 et seq., 88.

Germany for a long time.³³ This judicially created link was justified in part by an outdated view of the scope of the principle of non-intervention into the affairs of a sovereign state. Even though this jurisprudence is now obsolete with respect to the CCIL, it should be noted that the aforementioned Section 153 lit. f of the Code of Criminal Procedure - which will be addressed later in detail in Section 6.2 – gives the Federal Prosecutor considerable discretion to refuse to prosecute crimes under international law committed abroad under the CCIL.

Sections 6 and 7 of the Criminal Code

Section 1 of the CCIL does not apply to misdemeanours (*Vergehen*) – crimes punishable by less than one year of imprisonment. Serious criminal offences (*Verbrechen*) are crimes, which are punishable with at least one year of imprisonment (Section 12 of the Criminal Code). According to the clear wording of Section 1 and the explanatory notes to the CCIL, the Parliament wanted to exclude minor offences from the application of Section 1 of the CCIL.³⁴ Instead, the general provisions on extraterritorial jurisdiction of the German Criminal Code (Sections 4 to 7 and 9) are applicable to misdemeanours. Whether or not the adoption of the CCIL leads to a revision of the previous jurisprudence regarding Section 6 Nos. 1 and 9 of the Criminal Code - according to which a genuine link was required - is still a debated question among some scholars.³⁵ The Federal Court of Justice indicated that an additional genuine link is no longer required in cases relating to Section 6 No. 9 of the Criminal Code, thus reversing previous jurisprudence.³⁶ This decision thus means that in that court's view, the judicially created link does not apply to any case under the Criminal Code, before or after the enactment of the CCIL. Even though the decision of the Federal Court of Justice is not *per se* binding on all other courts, it is the normal practice to follow its lead. The judges held that the exercise of universal jurisdiction does not violate the principle of non-intervention, on the ground that Germany fulfils its international obligations while exercising jurisdiction over crimes under international law. German legal commentaries approve this interpretation³⁷.

In summary, Section 6 of the Criminal Code, which codifies universal jurisdiction in general, has been modified with the creation of the CCIL to exclude the serious crimes, which are now introduced by the CCIL. Section 7 of the Criminal Code is independent of Sections 4 to 6 of

³³ BGH St 45,64; BGH NSTz 1994, 232; BGH NSTz 1999, 236ff.; BGH StV 1999, 240; recently more reluctant BGH NSTz 2002, 2728; see also Steffen Wirth, *International Criminal Law in Germany – Case Law and Legislation*, p. 5 et seq.; Ewald Löwe/Werner Rosenberg, *Großkommentar zur StPO, Band 8*, Berlin 25th ed. 2005, appendix to Section 153 lit. f, para. 2.

³⁴ BT Drs. 14/8524, 14.

³⁵ See Ewald Löwe/Werner Rosenberg, *Großkommentar zur StPO, Band 8*, Berlin 25th ed. 2005, appendix to Section 153f, para.2; Andreas Zimmermann, *Auf dem Weg zu einem deutschen Völkerstrafgesetzbuch- Entstehung, völkerrechtlicher Rahmen und wesentliche Inhalte*, in: *Zeitschrift für Rechtspolitik (ZRP)* 2002, 97, 100.

³⁶ BGHSt 46,292, 307.

³⁷ See Gerhard Werle/Florian Jessberger in: *Leipziger Kommentar: Strafgesetzbuch*, Berlin 12th.ed. 2006, Section 6, para.143.

the Criminal Code. According to German legal doctrine, Section 7 para. 2 No. 2 does not codify a jurisdictional rule, but clarifies, in which cases representative criminal justice is possible by the German judicial authorities (*stellvertretende Strafrechtspflege*). This section applies when a foreigner at the time of the act is found to be in Germany and, although the Extradition Act would permit extradition for such an act, is not extradited, because a request for extradition is not made, is rejected, or the extradition is not practicable. Thus, it is clear that, regardless how the jurisdictional basis of Section 7 is characterized in German legal doctrine, the section is based on universal jurisdiction since the court would be exercising jurisdiction over foreigners for crimes committed against foreigners not involving any harm to German national interests. This provision is not based on a specific nature of the crime committed (such as crimes of certain gravity).

Section 2 of the CCIL and the relationship between CCIL and other legislation

Sections 6 to 14 of the CCIL contain the substantive law and define the crimes which can be prosecuted according to the CCIL, Sections 1 to 5 of the CCIL contain the general provisions. In this regard, Germany decided to incorporate the basic principles of criminal responsibility under international law into the existing doctrinal framework of German criminal law. In general, ordinary criminal law, in particular, the general part of the Criminal Code and the unwritten principles regarding individual criminal responsibility, shall apply to the CCIL. Section 2 CCIL reads:

“The general criminal law shall apply to offences pursuant to this Act so far as this Act does not make special provisions in Sections 1 and 3 to 5.”

Accordingly, the CCIL excludes the corresponding principles of general criminal law only with respect to Section 1 CCIL providing for universal jurisdiction, Section 3 concerning offences committed pursuant to superior orders, Section 4 regarding the responsibility of military commanders and other superiors and Section 5 containing the principle of non-applicability of statutes of limitations.³⁸ While the majority of the existing principles were regarded as being in line with the provisions of the Rome Statute, these sections adjust the existing German criminal law to fundamental notions of international law largely codified in the Rome Statute (As described below in Section 6.1, some of the principles of criminal responsibility and defences in the Rome Statute are not fully consistent with international law or appropriate.).³⁹ However, the majority of the general provisions of the German Criminal Code as well as the unwritten principles, for example, the requirements of intent or negligence, relevance of mistakes of fact and law and possible defences, remain applicable to the crimes under the CCIL.⁴⁰

³⁸ The particular provisions are addressed in detail in Section 6.1 below.

³⁹ Gerhard Werle, *Principles of International Criminal Law*, The Hague 2005, Part One, 85; see also the English translation of the German legislator's Explanatory Memorandum of the CCIL, 29, 30 (provided by the Federal Ministry of Justice, but no longer available from their website), available at: <http://www.wihl.nl/finals/Germany/DE.L-IM.Draft%20of%20an%20act%20to%20introduce%20the%20CCAICL.pdf>.

⁴⁰ Albin Eser/Helmut Gropengießer/Helmut Kreiker, *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, 2003, p. 73; Gerhard Werle, *Konturen eines deutschen Völkerstrafrechts. Zum*

4.1. ORDINARY CRIMES

Ordinary crimes subject to universal jurisdiction fall into three groups: (1) ordinary crimes under the CCIL; (2) ordinary crimes covered by Section 5 of the Criminal Code; and (3) ordinary crimes covered by Section 7 of the Criminal Code.

Ordinary crimes under the CCIL

Besides the three core crimes of genocide, crimes against humanity and war crimes, it can be argued that the CCIL includes two “ordinary crimes” - the violation of the duty of supervision (Section 13) and the omission to report a crime (Section 14) – as ancillary to the core crimes. These two crimes (discussed below in Section 6.1) are subject to universal jurisdiction under the CCIL.

Ordinary crimes covered by Section 5 of the Criminal Code

Ordinary crimes subject to German jurisdiction regardless of the law of the place where the act was committed are found in particular in the category: acts abroad against domestic legal interest according to Section 5 No. 1 - 15 of the Criminal Code.⁴¹ The jurisdictional bases of the crimes listed in this category differ and some provisions are subject to more than one form of extraterritorial jurisdiction. Given the focus of this paper – and Section 4.1 in particular - on universal jurisdiction, this section discusses only those ordinary crimes which are subject to universal jurisdiction, although the kinds of ordinary crimes that are subject to other forms of extraterritorial jurisdiction are noted briefly above in Section 3.

- Nos. 3a, 5b and 14 (See Section 3 above).
- No. 6 provides for jurisdiction over the abduction and casting political suspicion on another, if the act is directed against a person who has his usual residence in Germany (Section 234a, 241a of the Criminal Code - *Verschleppung und politische Verdächtigung*). Some legal commentaries disagree with categorizing this provision as based on universal jurisdiction even when the victim is a foreigner.

Arbeitsentwurf eines Völkerstrafgesetzbuches, in: *Juristenzeitung (JZ)* 2001, 889; Gerhard Werle/Florian Jessberger, *Das Völkerstrafgesetzbuch*, in: *Juristenzeitung (JZ)* 2002, 728.

Pursuant to Section 2 of the CCIL, not only the sections of the general part of the German Criminal Code, but also the relevant criminal provisions of other German codes, such as the German Civil Code (*Bürgerliches Gesetzbuch*) or the German Juvenile Courts Act (*Jugendgerichtsgesetz*), are applicable. An example for correlation between CCIL and German Criminal Code can be found in the *Rumsfeld* case at Denis Basak, *Abu Ghreib, das Pentagon und die deutsche Justiz. Die Zuständigkeit der deutschen Strafverfolgungsbehörden für Kriegsverbrechen im Irak nach Inkrafttreten des VStGB* in: *Humanitäres Völkerrecht Informationsschriften* 2005, 85 et seq.

⁴¹ See Official Translation of the German Criminal Code/StGB <http://www.iuscomp.org/gla/statutes/StGB.htm#6> or Bilingual Version of the General Part, Prof. Markus Dubber: <http://wings.buffalo.edu/law/bclc/StGBframe.htm>.

- No. 6a covers kidnapping of children in cases under Section 235 subs. 2 no. 2, if the act is directed against a person resident in Germany.
- No. 13 covers acts committed by a foreigner as a public official or a person with a special public service obligation (*Amtsdelikte ausländischer Amtsträger*).

Ordinary crimes covered by Section 7 of the Criminal Code

Section 7 (Applicability to Acts Abroad in Other Cases) provides that German criminal law applies to ordinary crimes committed abroad if the acts were criminal where they took place (dual criminality) or the place where they took place was not subject to criminal law enforcement in two circumstances, when either: (1) the person responsible was a foreigner at the time of the act, but subsequently acquired German nationality or (2) the person responsible was a foreigner at the time of the act, and was later found in Germany and, although the Extradition Act would permit extradition for such an act, is not extradited. More specifically, Section 7 (2) provides:

“(2) German criminal law shall apply to other acts, which were committed abroad if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement and if the perpetrator:

1. . . . became [a German] after the act; or
2. was a foreigner at the time of the act, was found to be in Germany and, although the Extradition Act would permit extradition for such an act, is not extradited, because a request for extradition is not made, is rejected, or the extradition is not practicable.”

Although some German scholars consider that jurisdiction exercised pursuant to Section 7 (2) (1) and (2) should be characterized as representational jurisdiction (*stellvertretende Strafrechtspflege*), such jurisdiction is simply one form of universal jurisdiction since the court will be exercising jurisdiction over a foreigner for a crime committed against another foreigner not involving a specific harm to Germany.

4.2. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN

Next to the provisions considering universal jurisdiction in the CCIL, German courts can exercise universal jurisdiction over numerous crimes of international concern in one of two ways. First, certain “Acts Abroad against Internationally Protected Legal Interests” listed in Section 6 Nos. 2 – 8 of the Criminal Code are subject to universal jurisdiction. Second, pursuant to Section 6 No. 9 of the Criminal Code, German courts can exercise universal jurisdiction over crimes identified in treaties providing for or requiring universal jurisdiction. As noted above, German legal doctrine justifies the exercise of such jurisdiction in its own special ways, but, regardless of such national doctrine, the important point is that the provisions discussed below permit German courts to exercise jurisdiction over crimes committed abroad by foreigners against foreigners when the special interests of Germany are not harmed. Section 7 (2) No. 2 does not apply to the specific crimes covered by Section 6 of the Criminal Code. As noted above in Section 4.1, Section 7 (2) No. 2 of the Criminal Code provides for universal jurisdiction in certain circumstances, although German legal doctrine treats it as a separate form of extraterritorial jurisdiction – representational jurisdiction.

4.2.1. ACTS ABROAD AGAINST INTERNATIONALLY PROTECTED LEGAL INTERESTS

The first method of exercising universal jurisdiction over crimes under national law of international concern is found in Section 6 Nos. 2 - 6 of the Criminal Code, listing acts abroad against internationally protected legal interests).⁴² Nothing in the wording of these provisions limits its scope to German perpetrators or German victims and there is no requirement of any harm to Germany's own special national interests.

The offences listed in Section 6 Nos. 2 to 6 fall within the German legal principle of (international) treaties (treaty principle) (*Vertragsprinzip*).⁴³ That means that jurisdiction is also based on international treaties and limited by their content. Some German courts and scholars are of the view that since Section 6 of the Criminal Code includes offences not listed in international agreements it is, to that extent, inconsistent with international law and needs to be restricted (*völkerrechtskonforme Reduktion*) in the individual case if there is no other justifying link such as active personality.⁴⁴ However, as demonstrated by state practice in over 50 countries, as well as the provisions in the German Criminal Code discussed above in Section 4.1, states may exercise universal jurisdiction over ordinary crimes under national law even if those crimes are not listed in any treaty.⁴⁵

The relevant provisions of Section 6 of the Criminal Code are discussed below in detail (see also Section 4.2.2 below):

- No. 2: Serious criminal offences Involving nuclear energy, explosives and radiation in cases under Section 307. 308 subs. 1 – 4, 309 subs. 2 and 310 of the Criminal Code (*Kernenergie-, Sprengstoff-, Strahlenverbrechen*). This regulation assures that Germany is able to meet its international obligations. With regard to international agreements like the International Convention for the Suppression of Terrorist Bombing (1997) or the Comprehensive Nuclear Test Ban Treaty (1996), under German legal doctrine, jurisdiction is consistent with the treaty principle (*Vertragsprinzip*). Should this fail to be the case, German jurisdiction is restricted by international law and the German Constitution (*völkerrechts- und verfassungsgemäße Reduktion*) meaning that recourse must be taken to other supplementary principles of jurisdiction.⁴⁶

⁴² Section 6 No. 1 of the Criminal Code, which authorized universal jurisdiction over genocide under Section 220a of the Criminal Code has been repealed. Under German legal doctrine, the international justification for extraterritorial jurisdiction in cases of Section 6 No. 7 and No. 8 is based on the principle of state protection (*Staatsschutz*) and discussed above under Section 3.3.

⁴³ Gerhard Werle/Florian Jessberger in: *Leipziger Kommentar: Strafgesetzbuch*, Berlin 12th.ed. 2006, appendix to Section 3, para.250 and Section 6, para.15.

⁴⁴ The Federal Court of Justice has interpreted the scope of Section 6 no.1, 5, 9; see also the commentary by Gerhard Werle/Florian Jessberger in: *Leipziger Kommentar: Strafgesetzbuch*, Berlin 12th.ed. 2006, section 6, para.25ff.

⁴⁵ Amnesty International, *Universal jurisdiction: The duty of states to enact and implement jurisdiction - Introduction*, AI Index: IOR 53/002.2001, September 2001, 1.

⁴⁶ This means that the jurisdictional principles under international public law are upheld by German

- No. 3: Assaults against air and sea traffic have been transformed in Section 316c of the Criminal Code (*Angriffe auf den Luft- und Seeverkehr*). The provision provides for universal jurisdiction in more cases than required under international treaties. According to Werle and Jessberger it is only consistent with international law to legitimize jurisdiction in cases concerning Article 101 United Nations Convention on the Law of the Sea (cases of piracy) on the ground of universal jurisdiction. In their view, in all other cases the scope of Section 6 No. 3 needs to be restricted to be consistent with international law and Article 25 of the German Constitution and jurisdiction based on additional principles.
- No. 4: Trafficking in human beings for sexual exploitation and trafficking in human beings for slavery, servitude, forced or compulsory labour included in German jurisdiction (*Menschenhandel zu Zweck sexueller Ausbeutung, Menschenhandel zum Zweck der Ausbeutung von Arbeitskraft*), are prohibited in Sections 232 to 233a of the Criminal Code. No. 4 provides for universal jurisdiction in cases of trafficking in human beings, but not as a crime against humanity, as in Section 7 para 1 no. 3 of the CCIL. Thus, it provides broader jurisdiction than found in the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. Under German legal doctrine – but not international law – this provision needs to be restricted (*völkerrechts- und verfassungsgemäße Reduktion*).
- No. 5: Unauthorized distribution of narcotics (*unbefugter Vertrieb von Betäubungsmitteln*). According to the Federal Court of Justice, jurisdiction cannot be based on universal jurisdiction. Instead, the court held that it requires a genuine link (detention on German territory)⁴⁷ in cases that cannot be justified with international treaties (*völkerrechts- und verfassungsgemäße Reduktion*). As discussed above, this national legal doctrine is not consistent with international law.
- No. 6: Dissemination of pornographic writings in cases under Section 184a, 184b subs. 1 – 3, also in conjunction with Sec. 184c sentence 1 Criminal Code (*Verbreitung pornographischer Schriften*). The provision has to be read in context with the Framework decision on combating the sexual exploitation of children and child pornography (22.12.2003). The text of No. 6 opens a wide relevant sphere of application, which, under German legal doctrine, but not international law, calls for a reduction corresponding to international and constitutional law.

4.2.2. CRIMES IDENTIFIED IN TREATIES TO WHICH GERMANY IS A PARTY

The second way German courts can exercise universal jurisdiction over crimes under national law of international concern is found in Section 6 No. 9 of the Criminal Code, which provides for prosecution of crimes of international concern identified in treaties ratified by Germany. It reads:

“Acts which, on the basis of an international agreement binding on the Federal Republic of Germany, shall also be prosecuted if they are committed abroad”.

courts, as these apply directly through Art. 25 of the Constitution.

⁴⁷ BGHSt 34,334,338.

Thus, Section 6 of the Criminal Code provides that crimes committed abroad can be prosecuted if these crimes are incorporated in international treaties ratified by Germany and provide for universal jurisdiction.⁴⁸ However, under German law, Germany does not have to criminalize or punish every act or activity prohibited by an international agreement. According to national law, for there to be a duty to prosecute international crimes the treaty rules must be binding (*verbindlich*)⁴⁹ and the criminalization must be compulsory according to the treaty's intention (*völkervertragliche Verfolgungspflicht*), for example, when the treaty contains an *aut dedere aut iudicare* provision. In this sense, the provision assists the German judiciary to take action even if a treaty prohibition has not yet been introduced into national law. However, this is only the case if the treaty provides for universal jurisdiction because otherwise there is the danger of jurisdictional conflicts. For example, should Germany ratify the International Convention for the Protection of All Persons from Enforced Disappearance, but fail to incorporate the new criminal provision into its national law, then Section 6 No. 9 would enable the German judiciary to apply the Convention, since it provides for universal jurisdiction.

A brief note on treaties involving crimes under international law

Binding treaties on Germany in the sense that they express a general prohibition or criminalization or include an *aut dedere aut iudicare*-provision involving crimes under international law include the following:

- The Anti-Slavery Convention;⁵⁰
- The Geneva Conventions Relating to the Protection of Victims of Armed Conflicts of 1949 and the First Additional Protocol to the 1949 Geneva Conventions Relating to the Protection of Victims of International Armed Conflict; and.
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture).

These treaties are discussed below in Section 4.3 dealing with crimes under international law. Although the Rome Statute contains general prohibitions, it was decided to implement it through the CCIL.

⁴⁸ Albin Eser in: Adolf Schönke/Horst Schröder, *Strafgesetzbuch* (Munich 27th ed. 2006) Section 6, para.10,11; Kai Ambos in: *Münchener Kommentar StGB Band I (Section 1-51)* (Munich 2003), Section 6, para.19 to 31.

⁴⁹ Pursuant to Article 59 subs. 2 of the German Constitution, a signed international treaty becomes binding (i.e. is ratified) with the approval of an implementing bill (*Zustimmungsgesetz*) and its public announcement in the *Bundesgesetzblatt* (BGBl.).

⁵⁰ Adopted on September 25th, 1926; Amending Protocol December 7th, 1953 (Article 2 Convention, Article1 Amendment Protocol).

Crimes under national law of international concern listed in treaties

The following discussion reviews international treaties involving general prohibitions or containing *aut dedere aut judicare* provisions regarding crimes under national law of international concern (treaties involving crimes under international law are discussed in Section 4.3 below.). As discussed above, jurisdiction can be established under Section 6 No. 9 of the Criminal Code, but in some cases also other Subsections or Numbers of Section 6 may apply. This has been indicated in each treaty subsection below. The crimes are discussed roughly in order of when they became generally recognized as subject to universal jurisdiction, as in the case of piracy, or became the subject of an international treaty.

Piracy

Piracy has been recognized under international law as subject to universal jurisdiction for several centuries. Germany has been a party to the 1958 Convention on the High Seas, which codified this rule, since 1962.⁵¹ It has been a party to the United Nations Convention on the Law of the Sea since 1994. Both treaties provide for universal jurisdiction over piracy.⁵² Germany has not defined piracy as a crime. Since piracy is a crime which can be committed only on the high seas or outside the territorial jurisdiction of any state, courts can exercise universal jurisdiction over piracy. Germany can exercise universal jurisdiction over acts of piracy pursuant to Section 6 No. 9 of the Criminal Code. According to Werle and Jessberger, universal jurisdiction over piracy can also be based on Section 6 No. 3 of the Criminal Code.⁵³

Counterfeiting

Germany has been a party to the 1929 International Convention for the Suppression of Counterfeiting since 1933.⁵⁴ This treaty requires states parties to make counterfeiting of foreign currency and attempts to do so ordinary crimes (Art. 3), to make such crimes subject to extradition (Art. 10) and, if the state party recognizes a general rule of extraterritorial jurisdiction, to prosecute persons suspected of counterfeiting of foreign currency abroad if extradition has been requested and rejected for a reason not connected with the crime (Art. 9). Germany has defined some conduct as counterfeiting in its Criminal Code.⁵⁵ Germany

⁵¹ Convention on the High Seas (http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf), 29 April 1958 (entered into force 29 Sept. 1962), Arts. 19 (authorizing seizure of pirate ships or aircraft on the high seas), 15 (defining piracy).

⁵² UN Convention on the Law of the Sea (http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 10 Dec. 1982 (entered into force 16 Nov. 1994), Arts. 101 (Definition of piracy), 105 (Seizure of a pirate ship or aircraft).

⁵³ Gerhard Werle/Florian Jessberger in: *Leipziger Kommentar: Strafgesetzbuch*, Berlin 12th.ed. 2006 Section 6 para 13, 55.

⁵⁴ See <http://untreaty.un.org/english/bible/englishinternetbible/partii/treaty-14-a.asp>.

⁵⁵ See Sections 146 et seq.

can exercise universal jurisdiction over counterfeiting of foreign currency abroad pursuant to Section 6 No. 9 of the Criminal Code.

Violence against passengers or crew on board a foreign aircraft abroad

Germany has been a party to the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) since 16 March 1970.⁵⁶ This treaty authorizes states parties to take measures to ensure persons suspected of violence against passengers or crew on board a foreign aircraft abroad can be extradited or prosecuted (Art. 13 (2)) and to extradite persons suspected of responsibility for such acts or to institute criminal proceedings against them in their own courts (Art. 15 (1)). Germany has defined acts of violence against passengers or crew on board an aircraft as a crime under Section 316 c Criminal Code. Germany can exercise universal jurisdiction over violence against passengers or crew on board a foreign aircraft abroad pursuant to Section 6 No. 3 and 9 of the Criminal Code.

Hijacking of aircraft

Germany has been a party to the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) since 16 December 1970.⁵⁷ This treaty requires states parties to define seizures of aircraft as crimes under national law (Art. 2), to establish jurisdiction over persons suspected of such seizures who are present in its territory if they are not extradited (Art. 4 (2)), to take measures to ensure presence for prosecution or extradition (Art. 6 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 7). Germany has defined hijacking an aircraft as a specific crime under Section 316 c of the Criminal Code. Germany can exercise universal jurisdiction over hijacking a foreign aircraft abroad pursuant to Section 6 No. 3 and 9 of the Criminal Code.

Certain attacks on aviation

Germany has been a party to the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention) since 3 February 1978. This treaty requires states parties to define certain attacks on aviation as crimes under national law (Art. 3), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 5 (2)), to take measures to ensure presence for prosecution or extradition (Art. 6 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 7). Germany defined attacks on aviation as a crime under Section 316 c of the Criminal Code. Germany can exercise universal jurisdiction over certain attacks on aviation abroad pursuant to Section 6 No. 3 and 9 of the Criminal Code.

⁵⁶ Convention on Offences and Certain Other Acts Committed on Board Aircraft (<http://untreaty.un.org/English/Terrorism/Conv1.pdf>), Tokyo, 14 Sept. 1963 (entered into force 4 Dec. 1969).

⁵⁷ Convention for the Suppression of Unlawful Seizure of Aircraft (http://untreaty.un.org/unts/1_60000/24/40/00047980.pdf), The Hague, 15 Dec. 1970 (entered into force 14 Oct. 1973).

Attacks on internationally protected persons, including diplomats

Germany has been a party to the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents since 25 January 1977.⁵⁸ This treaty requires states parties to define attacks on internationally protected persons, including diplomats, as crimes under national law (Art. 2), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 3 (2)), to take measures to ensure presence for prosecution or extradition (Art. 6 (1)) and to submit the cases to the competent authorities if they are not extradited (Art. 7). Germany has defined attacks on internationally protected persons as a crime under Sections 102 and 103 of the Criminal Code. Germany can exercise universal jurisdiction over attacks on internationally protected persons, including diplomats, abroad pursuant to Section 6 No. 9 of the Criminal Code.

Hostage taking

Germany has been a party to the 1979 International Convention against the Taking of Hostages since 15 December 1980.⁵⁹ This treaty requires states parties to define attacks on internationally protected persons, including diplomats, as crimes under national law (Art. 2), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 5(2)), to take measures to ensure presence for prosecution or extradition (Art. 6 (1)) and to submit the cases to the competent authorities if they are not extradited (Art. 8). Germany has penalized hostage taking as a crime under Section 102 of the Criminal Code. Germany can exercise universal jurisdiction over hostage taking abroad pursuant to Section 6 No. 9 of the Criminal Code.

Attacks on ships and navigation at sea

Germany is a party to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.⁶⁰ This treaty requires states parties to define attacks on ships and navigation at sea as crimes under national law (Art. 5), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 6 (4)), to take measures to ensure presence for prosecution or extradition (Art. 7 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 10). Germany has defined attacks on ships and navigation at sea as crimes under national law under Section 316 c of the Criminal Code. Germany can exercise universal jurisdiction over attacks on ships and navigation at sea pursuant to Section 6 No.3 and 9 of the Criminal Code.

⁵⁸ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents (<http://untreaty.un.org/English/Terrorism/Conv4.pdf>), 14 Dec. 1973 (entered into force 20 Feb. 1977).

⁵⁹ International Convention against the Taking of Hostages (<http://untreaty.un.org/English/Terrorism/Conv5.pdf>), 17 Dec. 1979 (entered into force 3 June 1983).

⁶⁰ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988 (<http://untreaty/un.org/English/Terrorism.asp>).

Theft of nuclear materials

Germany has been a party to the 1979 Convention on the Physical Protection of Nuclear Material since 6 October 1991.⁶¹ This treaty requires states parties to define theft of nuclear material and certain other acts as crimes under national law (Art. 7), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 8 (2)), to take measures to ensure presence for prosecution or extradition (Art. 9) and to submit the cases to the competent authorities if they are not extradited (Art. 10). Germany has defined theft of nuclear material and other acts prohibited in this treaty as crimes in the Criminal Code in Sections 307, 308 and 309. Germany can exercise universal jurisdiction over theft of nuclear material abroad pursuant to Section 6 No. 2 and 9 of the Criminal Code.

Narcotics trafficking - Single Convention

Germany has been a party to the 1961 Single Convention on Narcotics Drugs, as amended by the Protocol amending the Single Convention on Narcotic Drugs since 20 February 1975.⁶² This treaty requires states parties to define certain conduct concerning narcotic drugs as crimes under national law (Art. 36 (1)) and, if a person suspected of conduct is present in its territory and not extradited to prosecute the suspect (Art. 36 (2) (a) (iv)). Germany has drug offences, but it does not appear to have expressly defined any of the conduct prohibited by the 1961 Single Convention as crimes in the Criminal Code. Germany can exercise universal jurisdiction over certain conduct abroad involving narcotics crimes pursuant to Section 6 No. 5 of the Criminal Code.

Narcotics trafficking - Psychotropic Substances Convention

Germany has been a party to the 1971 Convention on Psychotropic Substances since 2 December 1977. Germany has drug offences, but it does not appear to have expressly defined any of the conduct prohibited by the 1971 treaty as crimes.⁶³ Germany can exercise universal jurisdiction over certain conduct abroad involving psychotropic substances pursuant to Section 6 No. 5 of the Criminal Code.

Use, financing and training of mercenaries

Germany signed the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries on 20 December 1990, but it has not yet ratified it.⁶⁴ This treaty requires states parties to define the use, financing or training of mercenaries as crimes

⁶¹ Convention on the Physical Protection of Nuclear Material, Vienna, 26 Oct. 1979 (<http://untreaty/un.org/English/Terrorism/Conv6.pdf>).

⁶² 1961 Single Convention on Narcotics Drugs, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 25 Mar. 1972 (entry into force 25 Aug. 1975).

⁶³ Convention on Psychotropic Substances, 21 Feb. 1971.

⁶⁴ U.N. G.A. Res. 44/34, 4 Dec. 1989.

under national law (Art. 5 (3)), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 9 (2)), to take measures to ensure presence for prosecution or extradition (Art. 10 (1)) and to submit the cases to the competent authorities if they are not extradited (Art. 12). Germany has not defined the use, financing or training of mercenaries as crimes under national law. It has not authorized its courts to exercise universal jurisdiction over such conduct.

Attacks on UN and associated personnel

Germany has been a party to the 1994 Convention on the Safety of United Nations and Associated Personnel since 22 April 1977⁶⁵ and it is a party to its 2005 Protocol. The Convention requires states parties to define attacks on UN and associated personnel as crimes under national law (Art. 9 (2)), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 10 (4)), to take measures to ensure presence for prosecution or extradition (Art. 13 (1)) and to submit the cases to the competent authorities if they are not extradited (Art. 14). The Protocol expands the scope of protection found in the Convention and incorporates the same enforcement obligations.⁶⁶ Germany has not defined the attacks on UN and associated personnel as crimes. Germany can exercise universal jurisdiction over attacks on peace keepers abroad pursuant to Section 6 No. 9 of the Criminal Code.

Terrorist bombing

Germany has been a party to the 1997 International Convention for the Suppression of Terrorist Bombings since 23 April 2003.⁶⁷ This treaty requires states parties to define terrorist bombing as a crime under national law (Arts. 4 and 5), to establish jurisdiction over persons suspected of such bombings who are present in its territory if they are not extradited (Art. 6 (4)), to take measures to ensure presence for prosecution or extradition (Art. 7) and to submit the cases to the competent authorities if they are not extradited (Art. 8). It has not specifically defined terrorist bombing as a crime under national law. However, a number of provisions penalized acts of terrorist bombings, such as Sections 129 *et seq.* and Sections 308 and 316 of the Criminal Code. Germany can exercise universal jurisdiction over terrorist bombing abroad pursuant to Section 6 No. 2, 3 and 9 of the Criminal Code.

Financing of terrorism

Germany is a party to the 1999 International Convention for the Suppression of Financing of Terrorism.⁶⁸ This treaty requires states parties to define financing of terrorist activities as a

⁶⁵ Convention on the Safety of United Nations and Associated Personnel, U.N. G.A. Res. 49/59, 9 Dec. 1994 (<http://www.un.org/law/cod/safety.htm>).

⁶⁶ U.N. G.A. Res. 60/42, 8 Dec. 2005.

⁶⁷ See <http://untreaty.un.org/English/Terrorism/Conv12.pdf>.

⁶⁸ *Ibid.*

crime under national law (Arts. 4 and 5), to establish jurisdiction over persons suspected of such financing who are present in its territory if they are not extradited (Art. 7 (4)), to take measures to ensure presence for prosecution or extradition (Art. 9 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 10 (1)). Germany has not defined financing of terrorist activities as a specific crime. However, the German Criminal Code includes two provisions which address many kinds of terrorist activities, Sections 129 and 129 a. Germany can exercise universal jurisdiction over financing of terrorist activities abroad pursuant to Section 6 No. 9 of the Criminal Code.

Transnational crime - Transnational organized crime

Germany has been a party to the 2000 UN Convention against Transnational Organized Crime since 14 June 2006⁶⁹ This treaty requires states parties to define certain transnational crimes which involve criminals acting in organized groups as a crime under national law (Arts. 5, 6, 8 and 23), authorizes them to establish jurisdiction over persons suspected of such crimes who are present in its territory if they are not extradited (Art. 15 (4)) and authorizes them to take measures to ensure presence for prosecution or extradition (Art. 16 (9)). Germany has defined several kinds of transnational organized crimes listed in this treaty as crimes under national law. Germany can exercise universal jurisdiction over certain transnational crimes abroad, which involve criminals acting in organized groups pursuant to Section 6 No. 9 of the Criminal Code.

Transnational crime - Trafficking of human beings

Germany has been a party to the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime since 14 June 2006.⁷⁰ This treaty, which incorporates all of the jurisdictional requirements of the UN Convention against Transnational Organized Crime (Art. 1(2)), requires states parties to define trafficking in human beings as a crime under national law (Art. 5). Germany has defined trafficking in human beings, including children, as a crime under national law in Sections 232, 233, 233 a, and 233 b of the Criminal Code. These provisions include trafficking for sexual or other forms of exploitation. In addition, it has provided its courts with universal jurisdiction over trafficking under Section 6 Nr. 4 of the Criminal Code, which refers to the relevant sections of the Criminal Code.

Transnational crime - Firearms

Germany has signed, but not ratified the 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime on 3 September 2002.⁷¹ This treaty, which incorporates all of the jurisdictional requirements of the UN

⁶⁹ U.N. G.A. Res. 55/25, 15 Nov. 2000 (http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf).

⁷⁰ *Ibid.*, Annex II.

⁷¹ U.N. G.A. Res. 55/255, 8 June 2001, see <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty16.asp>.

Convention against Transnational Organized Crime (Art. 1(2)), requires states parties to define certain firearms offences as crimes under national law (Art. 5).

Nuclear terrorism

Germany has not signed or ratified the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.⁷² This treaty requires states parties to define acts of nuclear terrorism as a crime under national law (Arts. 5 and 6), to establish jurisdiction over persons suspected of such nuclear terrorism who are present in its territory if they are not extradited (Art. 9 (4)), to take measures to ensure presence for prosecution or extradition (Art. 10 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 11 (1)). Germany has not specifically defined such crimes as crimes under national law. It has not specifically authorized its courts to exercise universal jurisdiction over nuclear terrorist activities. However, the criminal behaviour covered by the Convention fits some of the provisions relating to nuclear aggression. Thus, if Germany were to ratify the Convention, Section 6 No. 2 might apply in some cases relating to nuclear arson and the abuse of ionic radiation (Section 308 and 309 of the Criminal Code).

4.3. CRIMES UNDER INTERNATIONAL LAW

German courts are authorized to exercise universal jurisdiction over persons suspected of committing genocide, crimes against humanity and war crimes under the CCIL after 1 July 2002. They may exercise universal jurisdiction over persons suspected of committing some of these crimes under international law before 1 July 2002 and other crimes under international law regardless when they were committed under the Criminal Code. The substantive part of the CCIL defines war crimes, crimes against humanity and genocide. Unlike the Rome Statute, which provides for a wide range of punishments, Sections 6 to 12 contain a more restricted statutory range of sentences for each crime. In addition, courts may exercise universal jurisdiction over certain other crimes under international law.

4.3.1. WAR CRIMES

Germany can exercise universal jurisdiction under the CCIL over most war crimes committed in international and non-international armed conflict since July 2002. It can exercise universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I committed before July 2002 with respect to conduct that is a crime in the Criminal Code, but not with respect to other war crimes committed before that date.

War crimes under the CCIL since July 2002

The list of war crimes in the CCIL is subdivided into the following five sections: Section 8 contains war crimes against persons and Sections 9 and 10 concern war crimes against property and other rights, as well as war crimes against humanitarian operations and emblems. War crimes consisting of the use of prohibited methods of warfare are included in Section 11 and Section 12 concerns war crimes prohibiting certain means of warfare. However, the list of war crimes does not cover all violations recognized under international

⁷² See <http://untreaty.un.org/English/Terrorism.asp>.

humanitarian law. In addition to the war crimes in the Rome Statute, the CCIL implements other international humanitarian law obligations, in particular, grave breaches of Additional Protocol I.⁷³ Thus, the Code largely corresponds to current customary international law. Nevertheless, it has to be emphasized that the list of war crimes in the CCIL only covers those violations of international humanitarian law which are punishable under existing customary international criminal law.⁷⁴

In the majority of cases, the CCIL – in accordance with customary international law – does not distinguish between international and non-international conflict. Only where customary international law does not treat crimes committed as part of an international or non-international conflict in the same manner is a distinction made within individual provisions.⁷⁵

War crimes under the Criminal Code

As confirmed in the *Sokolović* and *Kusljic* cases, German courts can exercise universal jurisdiction over grave breaches of the Geneva Conventions when that conduct also constitutes a crime under the Criminal Code (see Section 9 below). They cannot exercise such jurisdiction over other war crimes committed before July 2002 except to the extent such conduct is an ordinary crime.

4.3.2. CRIMES AGAINST HUMANITY

Section 7 of the CCIL defines crimes against humanity in accordance with the Rome Statute. However a number of distinctions were made based on how German law interprets the principle of legality. Thus, the scope of the definitions in this Section is in parts more restrictive than those of the Rome Statute.⁷⁶ However, Germany has not defined crimes against humanity committed before 2002 as crimes under national law.

Apartheid.

Germany is not a party to the 1973 Convention for the Prevention and Punishment of the

⁷³ The CCIL also prohibits grave breaches of Protocol I and, therefore, does not only incorporate the offences contained in Article 8 (2) of the Rome Statute Rome Statute.

⁷⁴ “However, not all acts of war prohibited by international humanitarian law result in criminal liability under the Code of Crimes against International Law, as not all conducts punishable under international law are also punishable under international customary law. The CCIL merely implements existing international customary criminal law in German law, but does not attempt to restrict the further development of international humanitarian law.” (Ministry of Justice and Working Group of Experts: Draft of an Act to Introduce the Code of Crimes against International Law, 52 seq., online available at <http://www.bmj.bund.de/files/-/408/Englische_Fassung.pdf>).

⁷⁵ See Gerhard Werle, *Principles of International Criminal Law*, The Hague 2005, 85 para.259.

⁷⁶ Gerhard Werle, *Ibid.*, 85, para.255; see also the Explanatory Memorandum of the Code of Crimes against International Law, BT Drs. 14/8524, 42 (available at: <http://dip.bundestag.de/parfors/parfors.htm>).

Crime of *Apartheid*.⁷⁷ That treaty requires states parties to take legislative or other measures necessary to suppress the crime of *apartheid* as practiced in Southern Africa (Art. IV (a)), obligates them to adopt legislative and judicial measures to bring to justice “in accordance with their jurisdiction” those responsible for this crime whether or not such persons are residents or nationals of the state party or another state or are stateless (Art. IV (b)) and permits the courts of any state party which acquires jurisdiction over a person suspected of this crime to try that person (Art. V). Germany has not expressly defined apartheid as a crime, but it has defined much of the conduct amounting to *apartheid* as a crime. It has effectively provided its courts with universal jurisdiction over this crime under international law.

4.3.3. GENOCIDE

The crime of genocide was incorporated in Section 6 of the CCIL. It reproduces Section 220 lit. a Criminal Code without any substantive changes. Section 6 is based on the definition in Article II of the Convention on the Prevention and Punishment of Genocide of 1948 and thus corresponds with Article 6 of the Rome Statute. The most significant change was that the requirements for genocide can also be fulfilled if the act is only directed against one person who is a member of a group in accordance with the internationally accepted interpretation of the crime.⁷⁸ However, the CCIL does not expressly include all ancillary acts of genocide listed in Article III of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide.

As mentioned above, German courts can exercise universal jurisdiction over genocide committed before 2002. This can be based on Section 6 in connection with Section 220 lit a. of the Criminal Code, which is consistent with the prohibition of retroactive criminal law under German law.

4.3.4 TORTURE

Germany has been a party to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment since 1 October 1990.⁷⁹ This treaty requires states parties to define acts of torture as a crime under national law (Art. 4), to establish jurisdiction over persons suspected of committing acts of torture who are present in its territory if they are not extradited (Art. 5 (2)), to take measures to ensure presence for prosecution or extradition (Art. 6 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 7 (1)).

Section 7 subs. 1 No. 7 of the CCIL defines torture committed as part of a widespread or systematic attack on a civilian population after July 2002 as crime against humanity; Section 8 subs. 1, No. 3 of the CCIL defines torture committed in an armed conflict as a war

⁷⁷ Convention for the Prevention and Punishment of the Crime of *Apartheid*, U.N. G.A. Res. 3068, 30 Nov. 1973 (entered into force 18 July 1976), see <http://www.unhcr.ch/html/menu3/b/11.htm>.

⁷⁸ Gerhard Werle, *Ibid.*, 85, para.254; see also the Explanatory Memorandum of the Code of Crimes against International Law, BT Drs. 14/8524, p. 41 (available at: <http://dip.bundestag.de/parfors/parfors.htm>).

⁷⁹ See <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp>.

crime. Acts of torture can, therefore, only be punished as such under the CCIL if they were committed in an armed conflict or as part of a systematic or widespread attack against the civilian population.

The Criminal Code does not contain a separate definition of torture in other circumstances.⁸⁰ Some conduct amounting to torture can be punished as duress (Section 240), bodily harm inflicted in the course of or in connection with official duties (Section 340) and extraction of testimony by duress (Section 343). However, not all conduct amounting to torture necessarily is covered by these provisions. It is a combination of provisions, which penalize torture. However, the Convention can be applied directly utilizing Section 6 No. 9 of the Criminal Code.

4.3.5. EXTRAJUDICIAL EXECUTIONS

Extrajudicial executions “are unlawful and deliberate killings, carried out by order of a government or with its complicity or acquiescence”.⁸¹ The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions make clear that states must not only bring to justice persons responsible for such killings in territory under their jurisdiction, but also wherever the killers are located.⁸² Extrajudicial executions are not expressly defined as crimes in the Criminal Code. However, they could be prosecuted based on universal jurisdiction as other crimes. Murder in the context of a crime against humanity is punishable according to Section 7 subs. 1, No. 1 of the CCIL. Wilful killing in international and non-international armed conflicts as a war crime is punishable according to Section 8 subs. 1, No. 1 CCIL. Other acts of intentional killings are punishable as murder according to Section 211 of the Criminal Code and manslaughter according to Section 212 of the Criminal Code. Courts could exercise universal jurisdiction over such other acts in the circumstances covered by Section 7 (2) (1) and (2) of the Criminal Code.

4.3.6. ENFORCED DISAPPEARANCES

Germany has signed the 2006 International Convention for the Protection of All Persons from Enforced Disappearance; ratification is expected for late 2008. This treaty requires states parties to define enforced disappearance as a crime under national law (Arts. 3, 4 and 6), to establish jurisdiction over persons suspected of enforced disappearance who are present in

⁸⁰ Third period report of states due in 1999 – Germany, U.N. Doc. CAT/C/49/Add.4, 8 July 2003, para. 17.

⁸¹ Amnesty International, “Disappearances” and Political Killings – Human Rights Crisis of the 1990s: A Manual for Action, AI Index: ACT 33/01/94, February 1994, 86.

⁸² Principle 18 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions states:

“Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.”

its territory if they are not extradited (Art. 9 (2)), to take measures to ensure presence for prosecution or extradition (Art. 10 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 11 (1)).⁸³

According to Section 7 subs. 1 No. 7 of the CCIL enforced disappearance has been criminalized in the context of crimes against humanity and, as such, subject to universal jurisdiction. Enforced disappearance as laid down in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance has not yet been included into national criminal law as a crime in other circumstances. Other criminal norms such as the deprivation of liberty (Section 239 of the Criminal Code) and the crime of kidnapping (Section 234 and Section 234a of the Criminal Code) do not fully reflect Article 2 of the Convention as none of the national criminal norms sufficiently reflect that enforced disappearances are committed with a specific intent and the state's involvement. Therefore, a legal gap exists for individual cases of enforced disappearance, which do not amount into a crime against humanity.

4.3.7. THE CRIME OF AGGRESSION

Germany has defined the preparation of a war of aggression as a crime under Section 80 Germany has defined the preparation of a war of aggression as a crime under Section 80 (Preparation of a War of Aggression) of the Criminal Code (*Vorbereitung eines Angriffskrieges*). That section states:

“Whoever prepares a war of aggression (Article 26 subsection (1), of the Basic Law) in which the Federal Republic of Germany is supposed to participate and thereby creates a danger of war for the Federal Republic of Germany, shall be punished with imprisonment for life or for not less than ten years”

In addition, Section 80a (Incitement to a War of Aggression) prohibits incitement to commit this crime. The crime under international law of planning, preparing or waging aggressive war has been recognized as a crime under international law since Nuremberg in 1946 and is expressly listed as a crime in the Rome Statute over which the International Criminal Court will have jurisdiction when a definition and conditions under which the Court can exercise its jurisdiction over this crime have been agreed. German courts can exercise universal jurisdiction over the preparation of a war of aggression as defined in Section 80 pursuant to Section 5 of the Criminal Code.⁸⁴ They can exercise such jurisdiction over incitement to a war of aggression as defined in Section 80a pursuant to Section 7 of the Criminal Code.

⁸³ The Convention has defined enforced disappearance in Article 2 as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”.

⁸⁴ Whoever publicly incites to a war of aggression (Section 80) in a meeting or through the dissemination of writings (Section 11 subsection (3)) in the territorial area of application of this law shall be punished with imprisonment from three months to five years.

5. CIVIL JURISDICTION OVER TORTS

Although there is no legislation providing for universal civil jurisdiction in civil proceedings, there are a number of provisions described below in this section which permit victims to participate in criminal proceedings based on universal jurisdiction to seek civil reparations. Private prosecutions are possible only for minor offences.

A preliminary note on the right of victims to reparations

International law and standards recognize that victims and their families have the right to recover reparations, including restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition, for crimes under international law, whether during peace or armed conflict. This right has been confirmed in provisions of a number of international instruments adopted over the past two decades since the Convention against Torture was adopted in 1984. These instruments do not restrict this right geographically or abrogate it by state or official immunities. They include the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,⁸⁵ the 1998 Rome Statute of the International Criminal Court⁸⁶ and two instruments adopted in April 2005 by the Commission on Human Rights, the first of which was adopted subsequently in December of that year by the UN General Assembly, the UN Basic Principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and international humanitarian law (*Van Boven-Bassiouni-Principles*)⁸⁷ and the UN Updated set of principles for the protection and promotion of human rights through action to combat impunity (*Joinet-Orentlicher -Principles*).⁸⁸ Both instruments, which were designed to reflect international law obligations, have been cited by Pre-Trial Chamber I of the International Criminal Court in its determination that the harm suffered by victims of crimes under international law includes emotional suffering and economic loss.⁸⁹ Most recently, the UN

⁸⁵ GA Res. 40/34, 29 Nov 1985.

⁸⁶ Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference on the Establishment of an International Criminal Court, Rome UN Doc A/CONF.183/9*, 17 July 1998, as corrected by the *process-verbaux* UN Doc C.N.577.1998.TREATIES-8, 10 November 1998, and UN Doc C.N.604.1999.TREATIES-18, 12 July 1999, Art. 75. Its reach is potentially universal as the Security Council can refer a situation involving crimes in any state to the Prosecutor.

⁸⁷ UN Comm'n Hum. Rts Res. E/CN.4/2005/35, 13 April 2005; GA Res. A/RES/60/147, 16 Dec 2005.

⁸⁸ UN Comm'n Hum Rts Res. E/CN.4/2005/81, 15 April 2005.

⁸⁹ *Situation of the Democratic Republic of the Congo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Case No. ICC-01/04, Pre-Trial Chamber I, 17 January 2006, para.115.

Human Rights Council adopted by consensus the International Convention for the Protection of All Persons from Enforced Disappearances with a very broad definition of the right to reparations and referred it to the UN General Assembly for adoption at its 61st session in 2006.⁹⁰ This right is inherent in the right to a remedy, as guaranteed in Article 2 of the International Covenant on Civil and Political Rights (ICCPR), adopted four decades ago in 1966.⁹¹ Indeed, the international community recognized the rights of victims to civil recovery directly against foreign states for war crimes a century ago in Article 3 of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.⁹² Germany, which proposed including Article 3, stated:

"if . . . individuals injured by breach of the Regulations, could not ask for compensation from the Government, and instead they had to turn against the officer or soldier responsible, they would, in the majority of cases be denied their right to obtain compensation";⁹³

Situation in Germany

In Germany the discussion regarding victims' rights to reparations has been controversial both in legal and in political terms. After the end of World War II the German state engaged in several accords to award victims of the Holocaust with reparations. In the so called Luxemburg Accords of 1952 Germany submitted to awarding reparations vis-à-vis Israel and the Jewish Claims Conference. Additional financial support is awarded today through the Claims Conference, but Germany has declined to open a new round of official restitution negotiations.⁹⁴ Concerning the rehabilitation of victims who suffered under state repression in the German Democratic Republic a special law was passed in 1992, which enables moral and financial compensation.⁹⁵

This state-to-state or national reparations policy must be viewed separately from the legal

⁹⁰ UN Human Rights Council Res. A/HRC/1/L.2), 29 June 2006, Art. 24.

⁹¹ See Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (no suggestion that the right to a remedy under the ICCPR is geographically restricted).

⁹² 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, reprinted in Adam Roberts/Richard Guelff, *Documents on the Laws of War* 67 (Oxford: Oxford University Press 3rd ed. 2000); Hisakazu Fujita/Isomi Suzuki/Kantato Nagano, *War and the Rights of Individuals, Renaissance of Individual Compensation*, Nippon Hyoron-sha Co. Ltd. Publishers (1999), expert opinions by Frits Kalshoven 31; Eric David 49; Christopher Greenwood 59. .

⁹³ Hisakazu Fujita, Isomi Suzuki and Kantaro Nagano, *War and the Rights of Individuals, Renaissance of Individual Compensation*, Nippon Hyoron-sha Co. Ltd. Publishers (1999), expert Opinion by David, Eric, p.51.

⁹⁴ See for further information <http://www.sueddeutsche.de/deutschland/artikel/687/144362/>.

⁹⁵ See *Gesetz zur Rehabilitierung und Entschädigung von Opfern rechtsstaatswidriger Strafverfolgungsmaßnahmen im Beitrittsgebiet* (StrREhG) v. 29. October 1992 (BGBl. I 1992, 1814.

discussion in international public law whether victims of serious human rights violations are able to claim restitution directly from the state whose civil servants or other institutions may be involved or have committed such crimes.⁹⁶ One case stands out in German legal debate in particular: the case of the Bridge of *Varvarin*. This case concerned a bridge in Serbia, which was bombed by NATO troops during the Kosovo siege in 1999. The victims and some relatives of the Serbian village bombed brought the case before Germany's courts as it was held that the planes were directed by or flown with information submitted by Germany's military. The main question the courts dealt with was whether the individual applicants had any legal standing to claim compensation against the German Federal Government. The legal framework of government liability is regulated by Art. 34 of the Constitution in conjunction with Section 839 of the Civil Code. In 2006 the Federal Court of Justice ruled that individuals are incapable of claiming compensation under this framework as they lack standing as subjects of international law.⁹⁷ The court held, erroneously, and contrary to the position of Germany when the Hague Convention IV was being drafted (see above), that reparations may only be claimed between states regarding violations of the laws of war. This decision has been highly criticized for upholding outdated international public law principles without taking into account the recent developments mentioned above. The Higher Regional Court had decided the case differently. Even if it did not award compensation in the particular case due to its merits, it held that the applicants generally had the right to claim compensation under Section 839 of the Civil Code.⁹⁸

The situation may be different, however, if in a criminal trial the accused is held responsible and sentenced. Those accepted as victims in the criminal proceedings are able to sue the convicted perpetrator for compensation. The rules presented in the German legal system are also applicable to universal jurisdiction cases as they apply in general (see Section 5.1. below).

5.1. LEGISLATION PROVIDING FOR UNIVERSAL JURISDICTION OVER TORTS IN CIVIL CASES

There is no specific legislation permitting victims to obtain reparations in civil proceedings based on universal jurisdiction. An Act such as the *Alien Tort Claims Act* in the United States does not exist under German law.

The general legal framework on torts applies in all cases. If a German civil servant committed a crime or a violation of rights resulting in damages, but who acted in accordance with his official duty, Art. 34 of the Constitution in conjunction with Section 839 of the Civil Code provides the legal framework for restitution. The individual civil servant may still be responsible, but under German law, the state is held responsible for his actions. If the perpetrator was not acting in connection with state functions or institutions the general

⁹⁶ See for example N. Quenivet, *The Varvarin-Case: The Legal Standing of Individuals as Subjects of International Humanitarian Law*, *Journal of Military Ethics* 2 (2004), 181.

⁹⁷ See BGHE v. 02.11.2006 (III ZR 190/05).

⁹⁸ See OLG Köln, *Neue Juristische Wochenschrift* (NJW) 2005, 2860.

norms concerning torts apply, which are regulated in Sections 832 to 865 of the Civil Code. Then, the state is not held responsible.

The jurisdiction of German civil courts is regulated in two laws, the Civil Criminal Procedure Act (*Zivilprozessordnung*, ZPO) and the Law on the Constitution of the Courts (*Gerichtsverfassungsgesetz*, GVG). The jurisdiction of German civil courts is dependent on the norms governing regional jurisdiction in Sections 12 to 35 of the Civil Procedure Code (ZPO). For torts, Section 32 ZPO provides that the competent court is the court at the place where the harmful act was committed. However, the general provisions regarding residency of the applicant apply as well.⁹⁹

Questions regarding jurisdiction state immunity are regulated in Sections 18 to 21 GVG. Here, the norms provide for the application of the rules of international public law concerning state immunity including the application of the relevant conventions on diplomatic and consular immunity. In the *Varvarin*-Case the courts held that Section 20 did not prevent German courts on adjudicating the case since no other state was being sued by the applicants.

5.2. LEGISLATION PROVIDING FOR RAISING CIVIL CLAIMS IN CRIMINAL CASES INITIATED BY A PROSECUTOR OR INVESTIGATING JUDGE

In German criminal procedure, the victims of crimes have several possible ways to participate in criminal proceedings initiated by a public prosecutor against suspected perpetrators or to use other procedures supplementary to criminal proceedings in order to obtain civil reparations. Each mechanism can be utilized in universal jurisdiction cases, especially involving crimes in the CCIL. In each method, the underlying criminal proceedings could be based on universal jurisdiction, provided the case is adjudicated by a German criminal court. In this regard, the German criminal procedure entails typical features of a civil law procedure, as the victims can be involved more easily than in a party-driven adversarial criminal procedure.

Participation as an equal party

First, victims may generally participate as an equal party to the criminal proceedings. The term “victim” is not defined by law. The person must be directly affected by the crime, however.¹⁰⁰ The position of the victim is also not dependent on the participation in the proceedings in form of the *Nebenklage* (accessory prosecution).¹⁰¹ The law seeks to empower victims to participate in proceedings and to stay informed as much as they want.

The Criminal Procedure Code provides victims with several rights outside the *accessory*

⁹⁹ Section 12 and 13 ZPO.

¹⁰⁰ See Lutz Meyer-Goßner, *Strafprozessordnung* (Munich 51st ed. 2008), appendix to Section 406 d, para.2.

¹⁰¹ See below.

prosecution-procedure, which will be outlined below. Sections 406 d to 406 h of the Code state the following rights:

- The right to access the dossiers of the court through legal representatives;¹⁰²
- The right to legal representation during proceedings;¹⁰³
- If the victim is being questioned, the legal representative may be present;¹⁰⁴
- If the victim is heard as witness, a person whom he trusts may be present, unless the investigation is endangered;¹⁰⁵
- In case the victim is accepted as *Nebenkläger* (accessory prosecution), he may be present during the main proceedings even if these are not public;¹⁰⁶ and

The Court is obligated to inform the victim of these rights and to assist in organizing additional help from victims organisations.¹⁰⁷

Adhaesionsverfahren (Claiming civil law damages in the criminal proceedings)

The second method, *Adhaesionsverfahren*, enables the victim of a crime to claim civil law damages arising out of the crime in connection with the criminal proceedings, which would normally have to be brought separately to the attention of a civil court.¹⁰⁸ This may prove to be advantageous for the victim to successfully claim the damages and allows for judicial efficiency. In comparison to civil courts, the criminal courts are obliged to establish the facts of the case using their own resources. This takes the burden from the victim of having to prove the facts establishing the claim of damages.¹⁰⁹ This procedure applies to all criminal cases and would thus also apply to cases of serious human rights abuse.

¹⁰² Such as consulting the dossier according to Section 406e (1) Code of Criminal Procedure if the victim can show a legitimate interest.

¹⁰³ Section 406f (1) Code of Criminal Procedure.

¹⁰⁴ Section 406 f (2) Code of Criminal Procedure.

¹⁰⁵ Section 406 f (3) Code of Criminal Procedure.

¹⁰⁶ Section 406g Code of Criminal Procedure.

¹⁰⁷ Section 406h Code of Criminal Procedure.

¹⁰⁸ Section 403 Code of Criminal Procedure.

¹⁰⁹ Werner Beulke, *Strafprozessrecht*, Heidelberg 9th edn. 2006, 350, no. 599.

Nebenklage (Joining in the prosecution of a public prosecutor)

For certain crimes,¹¹⁰ the victim can align with the public prosecutor for the prosecution of these crimes. This requires initiation of the proceedings by the prosecution, to which the joining in of the victim of the crimes is accessory.¹¹¹ Joining in the prosecution vests the victim with further rights in the proceedings. In such a case, the victim can question the accused, witnesses and expert witnesses and can request or propose further evidence.¹¹² The victim can also appeal court decisions except for those relating to the sentence. This broader participation of the victim in the proceedings accommodates personal satisfaction and restitution interests.¹¹³

Other procedures supplementary to criminal proceedings for victims of crimes to obtain reparations

Victims of violent crime can obtain some reparation according to the Law on Victims' Reparation¹¹⁴ for physical or economic damages caused by the crime.¹¹⁵ The Law on Securing Victim's Claims¹¹⁶ implements a lien of the victim on the profits gained by the perpetrator who sells his story of the crime to the media.

5.3. PRIVATE PROSECUTIONS BY VICTIMS OR OTHERS ACTING ON THEIR BEHALF, ACTIONS CIVILES OR ACTIO POPULARIS

It is possible for a victim to initiate the prosecution of certain minor crimes (so-called *Privatklage*).¹¹⁷ However, this opportunity does not exist with respect to serious crimes. Germany has no procedure providing for a *partie civile*. Here, the prosecutor is obliged to take a case forward if there is reason to believe a crime was committed (legality principle). Victims can, however, bring a case to the attention of the prosecution by submitting complaints (*Strafanzeige*). In cases where the prosecution declines to open an investigation, this decision can be challenged before court according to Section

¹¹⁰ Such as sexual assault, libel, bodily harm *etc.*, see Section 395 (1) Code of Criminal Procedure.

¹¹¹ Werner Beulke, *Ibid.*, 346, no. 593.

¹¹² For these and further rights see Section 397 (1) Code of Criminal Procedure.

¹¹³ Werner Beulke, *Ibid.*, 347, no. 593, 596.

¹¹⁴ *Opferentschaedigungsgesetz*, BGBl. I 1985, 1.

¹¹⁵ According to Section 7 of the Law on Victims' Reparation, legal disputes regarding these claims are assigned to the social jurisdiction or in certain exceptional cases (regarding war victims' relief services, *Leistungen der Kriegsoferfürsorge*) to the administrative jurisdiction.

¹¹⁶ *Opferanspruchssicherungsgesetz*, BGBl. I 1998, 905.

¹¹⁷ Such as libel or unlawful trespassing *etc.*, see Section 374 (1) Code of Criminal Procedure.

172 of the Criminal Procedure Code.¹¹⁸

5.4. RESTRICTIONS ON PRIVATE PROSECUTIONS AND CIVIL CLAIMS PROCEDURES

As the discussion above indicates, there are a number of significant restrictions on private prosecutions and civil claims procedures. First, as a general rule, victims and their families can only obtain damages as reparations in criminal proceedings based on universal jurisdiction, rather than the full range of reparations to which they are entitled under international law and standards. Second, in contrast to many other countries, victims and their families cannot initiate private prosecutions concerning crimes under international law. In the light of the unwillingness of the Federal Prosecutor to prosecute crimes under international law based on universal jurisdiction (See Section 9 below), this inability is a serious weakness in German law.

¹¹⁸ See the Section on case law for more information on this issue.

6. OBSTACLES TO THE EXERCISE OF CRIMINAL OR CIVIL JURISDICTION

As discussed below, there are numerous obstacles to exercising criminal and civil jurisdiction based on universal jurisdiction in criminal and civil cases.

6.1. FLAWED OR MISSING DEFINITIONS OF CRIMES UNDER INTERNATIONAL LAW, PRINCIPLES OF CRIMINAL RESPONSIBILITY OR DEFENCES

Definitions of crimes

As indicated above, the definitions of genocide, crimes against humanity and war crimes are largely consistent with international law. However, they are only applicable when such crimes have been committed before July 2002. War crimes, apart from grave breaches of the Geneva Conventions and of Protocol I, and crimes against humanity committed before that date cannot be prosecuted on the basis of universal jurisdiction. Grave breaches can be prosecuted, but only to the extent that the conduct also is an ordinary crime under German law, such as murder, which could leave significant impunity gaps. In addition, it is not possible to prosecute anyone on the basis of universal jurisdiction for crimes against humanity committed before July 2002 or for torture, extrajudicial executions or enforced disappearances not amounting to crimes against humanity regardless of the date they were committed, although a limited amount of such conduct probably could still be able to be prosecuted as ordinary crimes. The case is different for genocide as this was already penalized in the German Criminal Code before 2002 (Section 220 a Criminal Code) and included in Section 6 of the Criminal Code.

Principles of criminal responsibility

As explained below, principles of criminal responsibility, both under the CCIL and the Criminal Code, continue to be defined in the Criminal Code, apart from the principle of superior and command responsibility. The provisions defining superior responsibility for crimes under international law are largely in accordance with the customary international law principle of superior responsibility with regard to such crimes as set forth in Articles 86 and 87 of Protocol I to the Geneva Conventions and Article 6 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind.¹¹⁹ However, like Article 28 of the Rome Statute,

¹¹⁹ The two-level principle of superior responsibility in Article 28 of the Rome Statute, with a less strict standard for superiors than for commanders, was included as a result of a political compromise designed to encourage certain states to ratify the Rome Statute. It falls short of the customary and conventional international law principle and is applicable only in trials before the International Criminal Court.

they regrettably adopted a two-level standard which is weaker for superiors than commanders.

Principles of criminal responsibility applicable in all cases

The provisions of the General Part of the Criminal Code are applicable to all prosecutions under the CCIL for crimes committed since July 2002, except with regard to superior and command responsibility, and to all prosecutions under the Criminal Code. These provisions are Section 25 para. 1 and 2, 26 para. 2 (*Täterschaft und Teilnahme*).

There are considerable differences in structure and terminology in these provisions from those of Article 25 of the Rome Statute concerning individual criminal responsibility and it is not entirely clear to what extent persons might be acquitted under these provisions, but convicted under the Rome Statute or visa versa. For regular forms of participation (*Tatbeteiligung*) – parallel to Article 25 Rome Statute - Section 2 of the CCIL provides that responsibility is determined under the General Part of the Criminal Code. While Section 25 para. 1 of the Criminal Code provides for direct perpetration (*unmittelbare Täterschaft*) and the commitment of a crime through another person (*mittelbare Täterschaft*), Section 25 para. 2 Criminal Code includes perpetration jointly with another (*Mittäterschaft*), Section 26 provides for instigation (*Anstiftung*) and Section 27 for aiding and abetting (*Beihilfe*). German Criminal Law differentiates strictly between perpetration (*Täterschaft*) and complicity (*Teilnahme*) with consequences for the imposition of punishment. Acts regarding Article 25 of the Rome Statute like ‘order’ and ‘solicit’ are not expressly mentioned, but, according to jurisprudence, they are included in the criminal responsibility provisions of the Criminal Code. For example, the Federal Court of Justice has developed a concept of criminal responsibility in the sense that the person who commits a crime through another person who commits the crime in full awareness of his own responsibility as is often found in command structures can be held responsible under Section 25 para. 2 subs. 2 of the Criminal Code (*mittelbare Täterschaft kraft Organisationsherrschaft*).¹²⁰ Because there still is no jurisprudence under Section 25 of the Rome Statute, it is not clear how German courts will interpret these provisions and to what extent they will take into account jurisprudence of the International Criminal Court regarding criminal responsibility. It cannot be excluded that there is an inconsistency between Section 27 Criminal Code and Article 25 para. 3 d Rome Statute (‘in any other way contributes’). At this point, in certain circumstances the Rome Statute could have a wider reach than the German concept of aiding and abetting. Nonetheless, there any gap may be minimized to the extent that certain acts are criminalised by other provisions of the Criminal Code (e.g. money laundering).¹²¹

¹²⁰ *Täterschaft kraft Organisationsherrschaft* as direct responsibility (*Täterschaft*) was and is highly debated in German Law. Other commentaries consider this form of participation as instigation/complicity (*Teilnahme*) others as individual perpetration *sui generis*. However, the German Federal Court opines since 1994 that this legal concept is a subcategory of Section 25 (1) S. 2 Criminal Code (BGH St 40,218ff).

¹²¹ Consequently, statutes of limitation apply.

Superior and command responsibility

The concept of superior and command responsibility in international law is spelled out in Articles 86 and 87 of Protocol I and Article 6 of the Draft Code of Crimes. Article 28 of the Rome Statute, which applies only to trials in the International Criminal Court, largely reflects customary international law, apart from the two-level standard which is weaker for superiors than for commanders. The CCIL separates the principles in Article 28 of the Rome Statute into three different norms, each providing a specific mode of liability, which are found in three different sections of the CCIL: (1) Under Section 4 of the CCIL, military commanders and civilian superiors can be held accountable as principals in cases where they failed to prevent his or her subordinate from committing an offence according to the CCIL (*unechtes Unterlassungsdelikt*); (2) Under Section 13, a military commander or a civilian superior can be held accountable who intentionally or negligently fails to control his subordinates properly in cases where they could have prevented the crime (*echtes Unterlassungsdelikt*); and (3) Section 14 states that superiors who do not submit the case of a completed crime immediately to the competent organs are also held accountable.

The CCIL varies somewhat from Article 28 of the Rome Statute. However, it comprises the same group of perpetrators, such as military commanders and civilian superiors, and appears to criminalize the same acts and negligence as Article 28 of the Rome Statute. Even if different terms are used, the CCIL, for example, reads “discernible” and the Rome Statute “knew or should have known”, the extent of the conduct covered appears to be essentially the same. It is particularly to be welcomed that the CCIL does not have a weaker standard for civilian superiors than for military commanders. There may be one serious lack of criminalization: cases of negligent omission to report a crime are not included in Section 14 CCIL. In addition, even though the criminal responsibility of a commander or a superior is greater than that of the subordinates and the degree of harm magnified, penalties are comparatively lenient for certain aspects of command and superior responsibility. The three provisions are:

- Section 13 subs. 1 CCIL: A military commander who intentionally or negligently fails 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.
- Section 13 subs. 2 CCIL: A civilian superior who intentionally or negligently omits properly to supervise a subordinate under his or her authority 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 superior without more and he or she could have prevented it.
- Section 14 CCIL: A military commander or a civilian superior who omits immediately to draw the attention of 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.

Any person effectively giving orders or exercising command and control is held to the same

degree of criminal responsibility as a military commander. Similarly, any person effectively exercising command and control in a civil organisation or in an enterprise is held to the same degree of criminal responsibility as a civilian superior. (Section 13 subs. 3, Section 14 subs. 2, Section 4 subs. 2 CCIL). The penalty for the mode of liability in Section 4 is as severe as for the direct perpetration of a crime. Section 13 provides for a term of imprisonment of up to five years for intentionally neglecting the duty to control and up to three years for a negligent dereliction of this duty. Section 14 also provides a penalty of up to three years' imprisonment.¹²²

Defences

Defences, justifications, excuses and other grounds for excluding criminal responsibility are spelled out in the Criminal Code. It is to be welcomed that the Criminal Code, unlike the Rome Statute, does not provide that superior orders are a defence to war crimes.

Defences – superior orders

There is no defence of superior orders in German law. Although Article 33 of the Rome Statute, in derogation of customary international law, which prohibits superior orders as a defence to crimes under international law, but permitting them as a ground for mitigation of punishment,¹²³ contains a limited defence of superior orders for war crimes, this defence applies only in trials before the International Criminal Court. In German law the CCIL provides that superior orders are no defence in cases involving crimes under international law.

Defences – ignorance and mistake of law

The defence of the ignorance or mistake of law is spelled out in Section 17 of the Criminal Code. The defence of mistake of fact is formulated in Section 16 of the Criminal Code. Taking into account the wording of the Rome Statute the qualifications of these defences seem to be roughly the same, although the jurisprudence of the ICC may develop differently

¹²² Otto Triffterer, *Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 of the Rome Statute?*, in: Leiden J.Int'l L. 2002, 187

¹²³ This defence has been contrary to international law since Nuremberg, although it may properly be taken into account in mitigation of punishment. see Amnesty International, *The international criminal court: Making the Right Choices – Part I: Defining the crimes and permissible defences*, AI Index: IOR 40/01/1997, 1 January 1997, Sect. VI.E.2. This defence has been excluded in numerous international instruments for more than half a century, including the Charter of the International Military Tribunal, annexed to the London Agreement (Nuremberg Charter), 8 Aug. 1945, art. 8; Allied Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity (Allied Control Council Law No. 10), 20 Dec. 1945, art.4, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 Jan. 1946.; ICTY Statute, art. 7 (4); ICTR Statute, art. 6 (4); Draft Code of Crimes against the Peace and Security of Mankind, art. 5; UNTAET Regulation 2000/15 (establishing the Special Panels for Serious Crimes, Dili, East Timor), 6 June 2000, sect. 21; Statute of the Special Court for Sierra Leone (Sierra Leone Statute), art. 6 (4); Cambodian Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 Oct. 2004 (NS/RKM/1004/006), art. 29.

in future. Thus, the defence of ignorance of the law in national law seems to have roughly the same scope as the defence of mistake of law in Article 32 (2) of the Rome Statute. The defence of mistake of fact in national law also seems to be approximately the same as the defence of mistake of fact in Article 32 (1) of the Rome Statute. Amnesty International explained its view on the scope of these defences in a paper published in 1997.¹²⁴

Defences – insanity and mental deficiencies

The defences based on insanity and mental deficiencies are set out in Sections 20 and 21 of the Criminal Code. Children are not responsible for their actions in the criminal sense until they reach the age of 14 (Section 19 of the Criminal Code). According to Section 20 (Lack of Capacity to be Adjudged Guilty due to Emotional Disorders) a person is not criminally responsible if he has a mental disorder or a cognitive or fundamental social defect, which renders that person unable to understand his wrongdoing.¹²⁵ This provision includes disorders resulting from drug or alcohol abuse, all kinds of severe mental sicknesses and deficiencies. Section 21 (Diminished Capacity to be Adjudged Guilty) regulates the situation in which mental disorders or sicknesses exist, which are not of such severe gravity as to exclude criminal liability. The person is generally held responsible for his actions but may receive a lesser sentence than usual (mitigating circumstances).¹²⁶

The defence of insanity as spelled out in national law seems to be approximately the same as the ground for excluding criminal responsibility because of a mental disease or defect in Article 31 (1) (a) of the Rome Statute. However, German case law has developed guidelines for a number of mental disorders, especially drug and alcohol abuse. There is no jurisprudence in the International Criminal Court so far on the scope of these defences.

Defences – intoxication

As stated above, Sections 20 and 21 relate to intoxication as a mental disorder as well. However, in contrast to Article 31 (1) (b) of the Rome Statute, there is no express defence of involuntary intoxication.¹²⁷ Section 21 provides that the factors in Section 20, when they

¹²⁴ *Ibid.*, Sect. VI.E.6.

¹²⁵ Criminal Code, art. 20 (“Whoever upon commission of the act is incapable of appreciating the wrongfulness of the act or acting in accordance with such appreciation due to a pathological emotional disorder, profound consciousness disorder, mental defect or any other serious emotional abnormality, acts without guilt.”).

¹²⁶ *Ibid.*, art. 21 (“If the capacity of the perpetrator to appreciate the wrongfulness of the act or to act in accordance with such appreciation is substantially diminished upon commission of the act due to one of the reasons indicated in Section 20, then the punishment may be mitigated pursuant to Section 49 subsection (1).”).

¹²⁷ Article 31 (1) of the Rome Statute states that

“[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

result in diminished capacity may be considered as a mitigating circumstance rather than a defence.

Defences – Compulsion, duress and necessity

The defences of compulsion, duress and necessity in national law are regulated in Sections 34 and 35 of the Criminal Code (*Notstand*). In addition, there is extensive case law concerning situations of duress, which specify these norms. From their wording these provisions of the Criminal Code seem to be approximately the same as the ground of duress in Article 31 (1) (d) for excluding responsibility. However, the scope of Article 31 (1) (d) has yet to be interpreted by the International Criminal Court. As Amnesty International has argued, compulsion, duress and necessity should not be defences to crimes under international law, but simply grounds for mitigation of punishment.¹²⁸ However, in a regrettable political compromise, Article 31 (1) (d) of the Rome Statute permits, in strictly limited circumstances and only in trials before the International Criminal Court, defences of duress in response to threats from another person and necessity (called “duress”) in response to threats from circumstances beyond a person’s control.¹²⁹

Defences – Defence of person or property

As Amnesty International has explained, self-defence and defence of others can be defences to crimes under international law in certain limited circumstances, but only when the

. . .

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court[.]”

¹²⁸ Amnesty International, *Making the right choices*, *supra*, n. XXX, Sect. VI.E.3 and 4.

¹²⁹ Article 31 (1) (d) of the Rome Statute provides that

“[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

. . .

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.”

response is reasonable and proportionate and, when deadly force is used, only when retreat is not possible.¹³⁰ Unfortunately, in another political compromise, the Rome Statute provides very broad defences of self, others and property.¹³¹

Self-defence and defence of property are regulated in Section 32 and 33 (self-defence) and Sections 34 and 35 of the Criminal Code (*Rechtfertigender und entschuldigender Notstand*). State institutions may also rely on these norms in extreme situations (*staatliches Notstandsrecht*) as defences.¹³² In addition, the Civil Code provides some norms, which deal with the protection of property.

In the context of the use of torture in extreme situations, the defence of self-defence formed part of a new discussion. Some have contended that torture could be utilized in extreme situations (such as the protection of human life) in order to help potential victims of a crime, for example, against terrorist suspects or kidnappers. However, the vast majority of commentators and the courts in Germany disagree with a weakening of the absolute prohibition of torture and have declined to allow the defence of necessity or self-defence in such cases.¹³³

The defence of defence of person or property in national law seems to be approximately the same as the ground of defence of person or property in Article 31 (1) (c) of the Rome Statute.¹³⁴

¹³⁰ Amnesty International, *Making the right choices*, *supra*, n. XXX, Sect. VI.E.5.

¹³¹ Article 31 (1) (c) of the Rome Statute provides that

“[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

. . .

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph[.]”

¹³² See BGH 27, 260 and Thomas Fischer, *Strafgesetzbuch und Nebengesetze* (Munich 55th ed. 2007) Section 32, para.318.

¹³³ See Thomas Fischer, *Strafgesetzbuch und Nebengesetze* (Munich 55th ed. 2007) Section 32, para. 294 *et seq.*.

¹³⁴ *Ibid.*

6.2. PRESENCE REQUIREMENTS IN ORDER TO OPEN AN INVESTIGATION OR REQUEST EXTRADITION

There are no statutory provisions expressly requiring the presence of a suspect in Germany to initiate an investigation of a crime. A previous judicially created requirement of a link to Germany – often presence – between the suspect and Germany has probably been completely extinguished. However, as explained below, a new provision of the Code of Criminal Procedure (Section 153 lit. f and c) adopted in 2002 at the same time as the CCIL and apparently applicable both to cases arising under the CCIL and the Criminal Code, reintroduces presence or anticipated presence of a suspect as a factor in determining whether the Federal Prosecutor can investigate or prosecute a case involving a crime committed abroad. Section 153 lit. f and c of the Code of Criminal Procedure, contrary to the intent of the drafters, has been used by the Federal Prosecutor to end as a practical matter almost every prosecution in Germany of crimes committed abroad.¹³⁵

6.2.1 SECTION 153 LIT. F OF THE CODE OF CRIMINAL PROCEDURE

Even though the CCIL enables prosecution of genocide, crimes against humanity and war crimes based on universal jurisdiction, the duty to prosecute is limited by procedural law. As noted above in Section 2.2, in contrast to the general applicable statutory principle of mandatory prosecution (*Legalitätsprinzip*) – one of the core principles of German procedural law – Section 153 lit. f, in conjunction with Section 153 lit. c of the Code of Criminal Procedure, incorporates the principle of opportunity (*Opportunitätsprinzip*) and provides for discretion to investigate and to prosecute an international crime under universal jurisdiction. Although crimes under the CCIL committed on German territory always have to be investigated (pursuant to Sections 152 subs. 2, 170 subs. 1 of the Code of Criminal Procedure), the German Federal Prosecutor may dispense with prosecution in certain cases which have been committed outside German territory, according to Section 153 lit. f of the Code of Criminal Procedure.

Section 153 lit. f of the Code of Criminal Procedure reads as follows:

“(subs. 1) In cases referred to under Section 153c subs. 1 numbers 1 and 2, the prosecutor may dispense the prosecution of 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 expected. In cases referred to under Section 153c subs. 1, number 1, the accused is German national, this shall apply only where the offence is being prosecuted by an international court or by a state where the offence was committed or whose national was harmed by the offence.

“(subs. 2) In cases referred to under Section 153c subs. 1, numbers 1, the prosecutor can in particular dispense to prosecute an offence punishable to Sections 6 to 14 of the CCIL, if

¹³⁵ Kai Ambos, *International Core Crimes, Universal Jurisdiction and § 153f of the German Criminal Procedure Code: A Commentary on the Decisions of the Federal Prosecutor General and the Stuttgart Higher Regional Court in the Abu Ghraib/Rumsfeld Case*, in: *Criminal Law Forum* 2007, 43 et seq.

1. there is no suspicion against a German citizen,
2. the offence was not committed against a German,
3. no suspected person is present in Germany and such presence is not to be expected and
4. the offence is being prosecuted by an international criminal court or by a state on whose territory the offence was committed, whose national is suspected to have committed the crime or whose national was harmed by the offence.

The same applies if a foreigner suspected 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 criminal court or extradition to the prosecuting state is admissible and intended.

(subs. 3) In the cases referred to under paragraph 1 or 3 public charges have already been filed, the prosecutor may withdraw the charges at any stage of the proceedings and terminate the proceedings.”

Section 153 lit. c subs. 1 No. 1 and 2 of the Code of Criminal Procedure reads:

“(subs. 1) The public prosecution office may dispense with prosecuting criminal offenses:

1. which have been committed outside the territorial scope of this statute, or which an inciter or accessory to an act committed outside the territorial scope of this statute has committed within the territorial scope thereof;
2. which a foreigner committed in Germany on a foreign ship or aircraft.”

Four situations need to be distinguished:

- (1) when the suspect is a foreign citizen and is present in Germany or such presence is to be anticipated (see Section 6.2.2 below);
- (2) when the suspect is a foreign citizen, neither present nor anticipated to be present in Germany (see Section 6.2.3 below);
- (3) when the suspect is a German citizen (see Section 6.2.4 below) and
- (4) when an international or foreign jurisdiction has already opened investigations (see Section 6.2.5 below).

6.2.2 SUSPECT IS A FOREIGN CITIZEN, PRESENT IN GERMANY OR HIS OR HER PRESENCE IS ANTICIPATED

In cases in which a foreign suspect is present in Germany or in which such presence is

anticipated, investigations are mandatory, even if the crime was committed abroad, according to Section 153 lit. f subs. 1 clause 1 *e contrario* of the Code of Criminal Procedure.¹³⁶ In this regard, the concept of residence is defined broadly and irrespective of whether such presence or anticipated presence is voluntary or not.¹³⁷ It suffices that the presence or anticipated presence is only temporary, for example, the suspect simply enters Germany as part of a transit on a trip to another country. Then, the principle of mandatory prosecution applies. Therefore, either the suspect's presence or anticipated presence makes prosecution obligatory, provided that no other jurisdiction is carrying out a genuine investigation of the crime. The latter will be described below.

6.2.3. SUSPECT IS A FOREIGN CITIZEN, NEITHER PRESENT NOR ANTICIPATED TO BE PRESENT IN GERMANY

In cases in which a foreign suspect is not present in Germany and such presence is not likely in the future, pursuant to Section 153 lit. f subs. 1 clause 1 of the Code of Criminal Procedure, investigations and prosecution are discretionary and the Federal Prosecutor is able to decline to prosecute the case. However, it has to be emphasized again that once the presence of the foreign suspect in Germany is to be anticipated, even if only for a short sojourn, investigations are mandatory as described above.

6.2.4. SUSPECT IS A GERMAN CITIZEN

In cases where the suspect is a German citizen, the Federal Prosecutor is obliged to initiate investigations, regardless of his or her presence or anticipated presence in Germany, pursuant to Section 153 subs. 1 clause 2 *e contrario* of the Code of Criminal Procedure.¹³⁸ This may only be different when the German citizen is neither present in Germany nor anticipated to be present and another jurisdiction is carrying out a genuine investigation of the crime, which will be described in the following.

6.2.5 INVESTIGATIONS HAVE BEEN OPENED BY AN INTERNATIONAL OR FOREIGN JURISDICTION

If an international court or another state has already opened judicial investigations, there are two exceptions to the general rule of mandatory investigations.

First, when a foreign suspect is present or anticipated to be present in Germany, no German victim is involved, and the transfer of the suspect to the international or foreign court is possible and intended, investigations become discretionary pursuant to Section 153 lit. f subs. 2 clause 2 and clause 1 of the Code of Criminal Procedure.¹³⁹ Each of the *criteria* have

¹³⁶ For the *argumentum e contrario* discretion, see Kai Ambos, in: Criminal Law Forum 2007, 43, 47; Albin Eser/Helmut Gropengießer/Helmut Kreicker, *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, 2003, 263.

¹³⁷ See the English translation of the German legislator's Explanatory Memorandum of the CCIL, 83 (provided by the Federal Ministry of Justice, but no longer available from their website) available at: <http://www.wihl.nl/finals/Germany/DE.L-IM.Draft%20of%20an%20act%20to%20introduce%20the%20CCAICL.pdf>.

¹³⁸ See Kai Ambos, in: Criminal Law Forum 2007, 43, 47; Albin Eser/Helmut Gropengießer/Helmut Kreicker, *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, 2003, 264.

¹³⁹ When the foreign suspect is neither present nor anticipated to be present, investigations are discretionary, in any event, pursuant to Section 153 lit. f subs.1 clause 1 of the Code of Criminal

to be satisfied, otherwise investigations remain mandatory.

Second, when the suspect is a German citizen and he or she is neither present in Germany nor is his or her presence anticipated, the Federal Prosecutor has discretion to decline to prosecute, according to Section 153 lit. f subs. 1 clause 2 of the Code of Criminal Procedure.

According to some commentators, in each of these two situations, provided that the prosecution in the other state is genuine, the law grants priority to the state of the victim's nationality because of the victim's special interest in prosecution, and to the state where the crime was committed because of its close proximity, in most cases, to the evidence.¹⁴⁰ This approach, if adopted by German courts, would pose a number of problems. First, the other state must be able and willing genuinely to prosecute. Second, the burden should be on the other state, which had previously taken no action, to demonstrate that the investigation is genuine.

Procedure (see also Albin Eser/Helmut Gropengießer/Helmut Kreicker, *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, 2003, 265; Kai Ambos, in: *Criminal Law Forum* 2007, 43, 48). Section 153 lit. f subs. 2 clause 1 of the Code of Criminal Procedure is insofar misleading. This provision merely states, the German Federal Prosecutor may *particularly* dispense the prosecution when the listed criteria in No.1 to No.4 are fulfilled.

¹⁴⁰ See Lutz Meyer-Goßner, *Strafprozessordnung* (Munich 51st ed. 2008), Section 153f, para. 9; Ewald Löwe/Werner Rosenberg, *Großkommentar zur StPO, Band 8* (Berlin 25th ed. 2005), appendix to Section 153f, para.2 appendix to Section 153f, para.19; Albin Eser/Helmut Gropengießer/Helmut Kreicker, *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, 2003, 264.

According to the Code of Criminal Procedure, investigations and prosecution are ...	Crimes under the CCIL committed on German territory	Crimes under the CCIL committed abroad	
			In case investigations have been initiated by an international or foreign jurisdiction
Foreign suspect is present in Germany or such presence is anticipated, regardless of whether the presence or anticipated presence is only temporary, e.g. as part of a transit, and regardless of whether the presence or anticipated presence is voluntary or not	... mandatory (Sections 152 subs. 2, 170 subs. 1).	... mandatory (Section 153 lit. f subs. 1 clause 1 <i>e contrario</i>).	... discretionary only if no German victim is involved and the transfer of the suspect to the international or foreign court is permissible and intended (Section 153 lit. f subs. 2 clause 2) – otherwise always mandatory (<i>e contrario</i>).
Foreign suspect is neither present in Germany nor is such presence anticipated	... mandatory (Sections 152 subs. 2, 170 subs. 1).	... discretionary (Section 153 lit. f subs. 1 clause 1).	... discretionary (Section 153 lit. f subs. 1 clause 1).
German suspect is present in Germany or such presence is anticipated	... mandatory (Sections 152 subs. 2, 170 subs. 1).	... mandatory (Section 153 lit. f subs. 1 clause 2 <i>e contrario</i>).	... mandatory (Section 153 lit. f subs. 1 clause 2 and 1 <i>e contrario</i>).
German suspect is neither present in Germany nor is such presence anticipated	... mandatory (Sections 152 subs. 2, 170 subs. 1).	... mandatory (Section 153 lit. f subs. 1 clause 2 <i>e contrario</i>).	... discretionary (Section 153 lit. f subs. 1 clause 2, clause 1).

Section 153 lit. f of the Code of Criminal Procedure was particularly introduced as a supposed “safeguard” against the overburdening of the courts¹⁴¹ and, therefore, is referred to as a ‘procedural safeguard’.¹⁴² Since such cases have so far never overburdened the courts or prosecution authorities, either in Germany or in another country, this justification has no merit. The intent of the drafters when adopting the CCIL was to empower the German judiciary to contribute actively to ending impunity of international criminals. In view of the gravity of the crimes against world peace and international security, the scope of Section 153 lit. f of the Code of Criminal Procedure is too wide and susceptible to misuse.

Indeed, so far, the Federal Prosecution Office has applied this discretionary norm extensively and has declined to open investigations in almost every single case brought to its attention. Despite over 60 complaints into grave crimes under international law¹⁴³ - some of which were prepared with great care and skill - investigations under the CCIL have only been initiated in two cases.¹⁴⁴ In most cases the Federal Prosecution Office cited Section 153 lit. f of the Code of Criminal Procedure as a justification.¹⁴⁵ The Office has acted in marked contrast to its very active investigation and prosecution policy under Section 6 of the Criminal Code concerning crimes committed in the former Yugoslavia before the CCIL was enacted.¹⁴⁶

Even though Germany has provided for extensive universal jurisdiction in Section 1 of the CCIL, as well as in various provisions of the Criminal Code, these provisions have been undermined, if not largely negated, by the manner in which the Federal Prosecutor has interpreted and applied Section 153 lit. f of the Code of Criminal Procedure. The manner to apply Section 153 lit. f of the Code of Criminal Procedure as a bar to investigations in almost

¹⁴¹ See the English translation of the German legislator’s Explanatory Memorandum of the CCIL, p. 82 (provided by the Federal Ministry of Justice, but no longer available from their website) available at: <http://www.wihl.nl/finals/Germany/DE.-IM.Draft%20of%20an%20act%20to%20introduce%20the%20CCAICL.pdf>; see also Kai Ambos, in: *Criminal Law Forum* 2007, p. 43, 46 et seq..

¹⁴² Florian Jessberger, *Universality, Complementarity, and the Duty to Prosecute*, in: Wolfgang Kaleck/Michael Ratner et al. (eds.), *International Prosecution of Human Right Crimes* (New York 2007), 213, 216.

¹⁴³ 62 cases have been brought up according to the answers of the Federal government to the requests of the parliamentarians *Toncar* (FDP), BT-Drs. 16/2692 of 22 September 2006 and *Wieland* and others (Bündnis90/Die Grünen), BT-Drs. 16/4267 of 5. February 2007. For more details, see 3.2. Cases related to alleged violations of the CCIL.

¹⁴⁴ For more details regarding these cases, see Section 9.4.1 below on preliminary investigations..

¹⁴⁵ In other cases, the decisions have been based on legal grounds such as the claimed immunity of the possible suspects (Kai Ambos, in: *Criminal Law Forum* 2007, 43 et seq. For more details on the dismissed complaints and the stated reasons therefore, see Section 9.4.2. Complaints, which have been dismissed without formal investigation proceeding.

¹⁴⁶ With regard to crimes committed in the former Yugoslavia, it has been asserted that the differences in the investigation practice are because many perpetrators as well as witnesses were resident or remained for a longer period in Germany. For more details see Section 9.3 (National Prosecution of crimes under international law in Germany Prior to the Enactment of the CCIL).

all cases is contrary to the intent of the drafters of both codes and, in effect, has made the universal jurisdiction provision a nullity. The mere fact that there is discretion not to prosecute does not mean that the German Federal Prosecutor could or should not prosecute. It remains possible to investigate the relevant case in Germany, particularly, for example, when important witnesses are located in Germany.¹⁴⁷

6.2.6 ANTICIPATED LEGAL ASSISTANCE (*ANTIZIPIERTE RECHTSHILFE*)

In this context, experts have been discussing the possibility of ‘anticipated legal assistance’ (*antizipierte Rechtshilfe*). Anticipated legal assistance means the execution of certain acts of investigation with regard to possible criminal proceedings in the future, regardless where the crime is being or will be prosecuted, whether in Germany or abroad. In this regard, the German government in its Explanatory Memorandum on the CCIL states that if the offence has no connection to Germany, the principle of mandatory prosecution in conjunction with the principle of universal jurisdiction requires that the German prosecution authorities make every effort to prepare for later prosecution (whether in Germany or abroad).¹⁴⁸ Furthermore, according to the legislator’s Explanatory Memorandum, when a foreign state or an international criminal court is already investigating the matter, but there is a link in terms of offence, suspect or victim to Germany, the German authorities should avail themselves of the investigation opportunities resulting from the German connections for reasons of worldwide solidarity alone, even without specific requests for legal aid, in order to support and further the trial abroad and to be prepared for possible take over of the relevant case by Germany at a later time.¹⁴⁹ The superior aim of preventing impunity could even lead to a reduction of the discretionary power in favor of proceedings in order to support investigations, whether in Germany or abroad.¹⁵⁰

At an expert hearing before the German Parliament’s Committee on Human Rights and Humanitarian Aid (*Ausschuss für Menschenrechte und humanitäre Hilfe des Deutschen Bundestags*) on the CCIL in October 2007, the majority of experts argued for proactive investigations (*Ermittlungen auf Vorrat*) and referred to the universal jurisdiction cases against Hissene Habré, the former President of Chad, in Senegal, and Augusto Pinochet, the former President of Chile, in Spain, as precedents.¹⁵¹ In the past, successful cases, whether

¹⁴⁷ Florian Jessberger, *Universality, Complementarity, and the Duty to Prosecute*, in: Wolfgang Kaleck/Michael Ratner et al. (eds.), *International Prosecution of Human Right Crimes* (New York 2007), 213, 216 et seq.; see also Kai Ambos, in: *Criminal Law Forum* 2007, 43 et seq..

¹⁴⁸ English translation of the Explanatory Memorandum of the CCIL, p. 84..

¹⁴⁹ *Ibid.*

¹⁵⁰ With regard to crimes committed abroad with no domestic link, see Kai Ambos, in: *Criminal Law Forum* 2007, 43, 49.

¹⁵¹ See the written statements of Kai Ambos (http://www.bundestag.de/ausschuesse/a17/anhoerungen/voelkerstrafgerichtshof/Stellungnahme_Ambos.pdf) and Wolfgang Kaleck (http://www.bundestag.de/ausschuesse/a17/anhoerungen/voelkerstrafgerichtshof/Stellungnahme_Kaleck.pdf) and Claus Kreß (http://www.bundestag.de/ausschuesse/a17/anhoerungen/voelkerstrafgerichtshof/Stellungnahme_Kress.pdf). See also the verbatim record of the expert hearing, available at:

prosecuted by national or international jurisdiction, have been achieved due to the transnational collaboration of several authorities and actors. Despite the above cited remark in the Explanatory Memorandum of the CCIL stating that anticipated legal assistance should be provided even without specific requests for legal aid, some have claimed that a specific request for legal aid should be required.¹⁵² However, the “anticipated legal assistance” is seen as one possible way to apply universal jurisdiction, and the experts predominantly agreed that such application of such jurisdiction regarding the “anticipated legal assistance” is highly desirable.¹⁵³

6.2.7. THE FAILURE TO ESTABLISH AND COMPLY WITH CRITERIA FOR EXERCISING DISCRETION

Section 153f provides the Federal Prosecutor with discretion not to prosecute in certain narrowly defined circumstances discussed above, but it establishes no criteria how that discretion to prosecute or not to prosecute should be exercised. The failure to establish and follow comprehensive and systematic criteria for the exercise of discretion means that such exercises of unguided discretion are an abuse of discretion and will lead to injustice. It is essential for the Federal Prosecutor to establish legitimate criteria in transparent consultation with civil society and to follow them that are consistent with the intent of the drafters to investigate and prosecute a broad range of crimes committed by foreigners against foreigners abroad where there is no link to Germany and which are consistent with the general principle of legality, not opportunity, of prosecution.

One criterion which could be legitimately included is the likelihood of a successful prosecution. Criteria that would not be legitimate include giving priority to a criminal investigation or prosecution in another national court, unless the state where that court is located can demonstrate that the proceedings would be fair and not a sham and not involve the death penalty. The burden to make that showing should be on the foreign state and the accused, not the prosecutor or the victim to demonstrate that the foreign proceeding would be faulty. The general principle should be that the first state to exercise universal jurisdiction should have priority, since this state will have demonstrated a commitment to investigate. Indeed, the primary justification for the exercise of universal jurisdiction is that the territorial state and the state of the suspect’s nationality, if that is different, have failed to fulfil their obligations under international law to investigate and, if there is sufficient admissible evidence, to prosecute. Indeed, in almost every single case where a state has

<http://www.bundestag.de/ausschuesse/a17/anhoerungen/voelkerstrafgerichtshof/prot.pdf>.

¹⁵² While one expert contended at this hearing that such a specific request will be highly improbable because of the political implications of such a request for countries undergoing regime changes (see the written statement of Claus Kress, p. 3, available at: http://www.bundestag.de/ausschuesse/a17/anhoerungen/voelkerstrafgerichtshof/stellungnahme_kress.pdf), another expert disagreed with this contention by stating that such a request can also be made by a third state (see the written statement of Ambos, p. 2, available at: http://www.bundestag.de/ausschuesse/a17/anhoerungen/voelkerstrafgerichtshof/stellungnahme_ambos.pdf).

¹⁵³ See the written statement of Hans-Peter Kaul, p. 2, available at: http://www.bundestag.de/ausschuesse/a17/anhoerungen/voelkerstrafgerichtshof/stellungnahme_kaul.pdf. See also the verbatim record of the expert hearing, available at: <http://www.bundestag.de/ausschuesse/a17/anhoerungen/voelkerstrafgerichtshof/prot.pdf>.

exercised universal jurisdiction it is because the territorial state and the suspect's state have not merely failed to investigate and prosecute genuinely, but also they have failed to do anything at all and then fail to seek the suspect's extradition.¹⁵⁴

The Federal Prosecutor is in charge of the investigation and prosecution of crimes under the CCIL and the Criminal Code. If the suspect is present or likely to be present in Germany the prosecution is obligated to investigate and to prosecute. If this is not the case, Section 153 lit. f of the German Code of Criminal Procedure allows for the exercise of discretion. Without a territorial link there is the possibility to decline to open an investigation (*Kann-Vorschrift*). These requirements for exercising discretion are meant to balance the intention of the Parliament in implementing the Rome Statute with the efficiency of criminal prosecutions.

Furthermore, Section 153 lit. f, subs. 2 is considered to be an "In-Particular-Provision", which means that it describes two situations, in which the Federal Prosecutor may decline to initiate an investigation, but leaves room for the development of further criteria. The presence requirement is interpreted by this provision in that the theoretical possibility of the presence of a suspect in Germany or the European Union is not sufficient. In addition, the criterion of whether a successful investigation is likely plays a key role in the considerations of the prosecutor in order to avoid wasting resources (*Vermeidung der Überlastung durch unzweckmäßige Ermittlungsarbeit*).¹⁵⁵ This criterion is derived from the legislative statement connected to the Section 153 f. As a result, the Federal Prosecution may dismiss a claim even if no other country is actively investigating the crimes. The possibility that the collection of evidence may also be a part of the Prosecutor's mandate has not occurred in the opinion of the Office yet (*Beweisverlust mangels umfassender Aufklärungsmöglichkeiten hinnehmbar*). It is not acceptable that the Federal Prosecutor simply notes, for example, that safeguarding of evidence would be possible only in Uzbekistan and Uzbekistan would refuse legal assistance. Some measures, such as taking testimony would be possible.

According to Section 153 lit. f subs. 2, No. 4, the prosecutor should, as a rule, give precedence to prosecutions in international courts or national courts in the territorial state, the suspect's state or the victim's state (*Gestufte Zuständigkeit*). The first problem with this approach is that there should be no automatic precedence to foreign court prosecutions. A careful assessment is needed in each case to determine whether those foreign prosecutions are being undertaken in good faith, effectively and fairly. The second problem is, that the Federal Prosecutor – without any basis in the statute or its drafting history - refers not to a certain individual or a certain act, but to the entire complex of (allegedly) criminal acts (*Gesamtkomplex*) in general¹⁵⁶, claiming that the criteria is based on a concept of "offence",

¹⁵⁴ For example, when Spain sought the extradition of the former President of Chile, Augusto Pinochet, Chile objected, but it did not abrogate the amnesties protecting him or seek his extradition.

¹⁵⁵ BT-Drs. 14/8524, S. 37; Dismissal in the Almatov-Case March, 30th, 2006, Az.3 ARP 116/05-2, para 11 and Press Release in the *Rumsfeld* case II, General Attorney vom 27.04.2007

¹⁵⁶ Florian Jessberger, *Universality, Complementarity, and the Duty to Prosecute*, in: Wolfgang Kaleck/Michael Ratner et al. (eds.), *International Prosecution of Human Right Crimes* (New York 2007), 213, 219 et seq..

a concept unknown in the German Criminal Procedure. Instead, under German law it is necessary to prosecute particular persons for particular acts. By justifying this “offence” concept by citing Article 14 of the Rome Statute, under which a state party refer “a situation” to the ICC, the Federal Prosecutor mistakes the particular stage of the proceedings (the independent triggering procedure and not the “concrete” procedure)¹⁵⁷ with the consequence that Germany’s concurrent jurisdiction as a third state would be blocked in regard to any act and any individual allegedly criminally involved in the situation.¹⁵⁸ For example, under the Federal Prosecutor’s approach, Germany could not prosecute a single case arising in a situation on the scale of the killings in Rwanda in 1994 if a Rwandan court were prosecuting one person for one murder.

The Federal Prosecutor claims to apply a Statute-oriented interpretation of 153 lit. f subs. 2 of the Code of Criminal Procedure that complies with Article 17 of the Rome Statute, which establishes the principle of complementarity.¹⁵⁹ According to this interpretation, criminal jurisdiction on the basis of universal jurisdiction is only permissible as a backup mechanism in cases where the primary jurisdiction is unable or unwilling to prosecute the crimes.

Two more exceptions apply: The proceedings were initiated for the purpose of shielding the person concerned from criminal responsibility (*Scheinprozess*) or without the intent of bringing the person concerned to justice (*ohne Verfolgungswillen*). The reference to Article 17 Rome Statute raises the fundamental question whether this standard examination of Article 17-19 Rome Statute is applicable at all in national proceedings. It is not applicable to such proceedings since the complementarity principle is limited to the unique situation involving decisions by the International Criminal Court to assert its concurrent jurisdiction when states – which have the primary duty to investigate and prosecute crimes under international law – fail to do so. This would not only imply that the substantial decision would have to be taken by this national organ of prosecution but also that the territorial/suspect or victim State would have to prove that it carries out criminal proceedings itself and that these are in accordance with Article 17 of the Rome Statute.¹⁶⁰

Another criterion the prosecutor considers in two decision to open the case is whether or not state immunity creates a bar for investigations and prosecutions by referring to the judgment in the *Democratic Republic of the Congo v. Belgium (Arrest Warrant or Yerodia)* case in International Court of Justice (ICJ).¹⁶¹ This generalized reference to the ICJ judgment is not

¹⁵⁷ Kai Ambos, in: Criminal Law Forum 2007, 43–58

DOI 10.1007/s10609-007-9026-9, 52.

¹⁵⁸ Jessberger, *Ibid.*, 218.

¹⁵⁹ General Attorney, GBA February 10th, 2005, Az 3 ARP 207/04-2 = Juristenzeitung (JZ) 2005, 311.

¹⁶⁰ Kai Ambos, Criminal Law Forum 2007, 43–58

DOI 10.1007/s10609-007-9026-9, S. 43ff., 53.

¹⁶¹ International Court of Justice, Arrest Warrant Case (*DR Congo v. Belgium*), Judgement (14 February

convincing at all. Even if the judgments of the ICJ were binding for German courts in an certain extent, the Arrest Warrant Case involved another legal situation.¹⁶² The judgment did not involve genocide and its conclusions regarding immunities have been widely criticized by international legal scholars. As Amnesty International has noted, every international instrument adopted involving crimes under international law has excluded immunities for such crimes.¹⁶³ In addition, the Federal Prosecutor ignores the judgment of the House of Lords in the Pinochet case¹⁶⁴ and subsequent decisions of the Special Court for Sierra Leone for the Taylor case,¹⁶⁵ as well as Article 27 of the Rome Statute.

The overriding idea behind the criteria for exercising prosecutorial discretion seems to relate to an outdated view of the principle of non-intervention into the affairs of another state. However, the Federal Prosecutor is not correct in claiming that the application of universal jurisdiction in cases of crimes of the CCIL breaches the *domaine réservé* principle. The prosecution sees Section 153 lit. f as a corrective to supposed abusive use of universal jurisdiction. Moreover, the prosecution wants to prevent "forum shopping" by victims of human rights violations. This pejorative label is often used by those seeking to prevent victims from searching for justice abroad when they are denied it at home.

6.2.8. JUDICIAL CONTROL OF PUBLIC PROSECUTION PROCEEDINGS

Section 172 of the German Code of Criminal Procedure provides for a judicial control mechanism (*Klageerzwingungsverfahren*) to compel the prosecution to take action in a case if a complaint was dropped.¹⁶⁶ However, Section 172 does not normally apply to those cases where an investigation or prosecution was not opened on the grounds of opportunity. These cases are regulated in Sections 153 – 154 of the Criminal Procedure Code. Since the procedural restriction on the scope of Section 1 CCIL by Section 153 f Criminal Procedure Code has also been included in this list of norms allowing for the application of prosecutorial discretion, the procedural control mechanism of Section 172 does not apply in its current wording.¹⁶⁷ In the *Rumsfeld* case, the Higher Regional Court in Stuttgart has held that an

2002), ILM 41 (2002), 536, para. 54 *et seq.*, 58, see also International Court of Justice, <www.icj-cij.org>.

¹⁶² Judgments of the ICJ are binding, but only on the parties to the particular case. Statute of the International Court of Justice, art. 59 ('The decision of the Court has no binding force except between the parties and in respect of that particular case.').

¹⁶³ Amnesty International, *Universal jurisdiction: Belgian court has jurisdiction in Sharon case to investigate 1982 Sabra and Chatila killings*, AI Index: IOR 53/001/2002, 1 May 2002.

¹⁶⁴ Pinochet III vom 24.03.1999, Regina v. Bow Street Metropolitan Stipendary Magistrate and Others , ex parte Pinochet.

¹⁶⁵ Special Court of Sierra Leone, The Prosecutor Against Charles Ghankay Taylor, Decision on Immunity for Jurisdiction, SCSL-2003-01-I, 31.04.2004, Abs.43ff..

¹⁶⁶ Tobias Singelstein/Peter Stolle, *Völkerstrafrecht und Legalitätsprinzip – Klageerzwingungsverfahren bei Opportunitätseinstellung und Auslegung des § 153f StPO*, in: Zeitschrift für internationale Strafrechtsdogmatik (ZIS) 3/2006, 118 *et seq.*

¹⁶⁷ Kai Ambos, *Völkerrechtliche Kernverbrechen, Weltrechtsprinzip und § 153f StPO – Zugleich*

appeal against the first dismissal of the complaint under Section 172 was inadmissible.¹⁶⁸ It held that judicial control can only be exercised with regard to the exercise of prosecutorial discretion when the prosecutor exercised discretion, but the legal requirements for discretion did not exist, that is, that there was no margin of discretion and the prosecutor was under a duty to prosecute.¹⁶⁹ The courts may thus verify whether the Prosecutor exercised discretion and that the discretionary decision was not arbitrary. This approach, however, overlooks the issue of discretionary decisions taken without any criteria for their exercise, which by their very nature are arbitrary.

This unsatisfactory situation was taken up in the hearing before the German Parliament's Committee on Human Rights and Humanitarian Aid in October 2007. Experts testified that in the light of the current practice of the Federal Prosecution Office a judicial control instrument should be included. This instrument could either be introduced by a reform of Section 172 or by an inclusion of a new mechanism in the CCIL.

6.3. STATUTES OF LIMITATION APPLICABLE TO CRIMES UNDER INTERNATIONAL LAW

Statutes of limitation do not apply to genocide, crimes against humanity and war crimes committed after July 2002. They do apply, however, to all other ordinary crimes committed in conjunction with these serious crimes (such as assault for example) and to civil claims based on these and the serious crimes.

Statutes of limitations applicable to crimes

Germany is not yet a party to the 1968 Convention on Statutory Limitations for War Crimes and Crimes against Humanity. Statutes of limitation for crimes under international law, including genocide, crimes against humanity and war crimes, are contrary to customary international law.¹⁷⁰ Under the CCIL, statutes of limitation do not apply to genocide, crimes

Anmerkung zu GBA, JZ 2005, 311 und OLG Stuttgart, NSTz 2006, 117, in: Neue Zeitschrift für Strafrecht (NSTz) 2006, 437 et seq.

¹⁶⁸ OLG Stuttgart, 13. September 2005, Az.: 5 Ws 109/05 (= Neue Zeitschrift für Strafrecht (NSTz) 2006, 117).

¹⁶⁹ See Kai Ambos, *Criminal Law Forum* 2007, 43-57

¹⁷⁰ See, for example, Ruth Kok, *Statutory Limitations in International Criminal Law* (London: Blackwell 2008; Amnesty International, *The Prohibition of Statutory Limitations for Crimes under International Law* (forthcoming 2008). The Committee against Torture has made clear that statutes of limitation do not apply to torture. In its most recent conclusion on this point in June 2008 the Committee against Torture noted with concern that since acts of torture could only be prosecuted under other provisions of the Swedish Penal Code, they were subject to the statute of limitations, which

“may prevent investigation, prosecution and punishment of these grave crimes, in particular when the punishable act has been committed abroad. Taking into account the grave nature of acts of torture, the Committee is of the view that acts of torture cannot be subject to any statute of limitations. (arts. 1, 4 and 12)[.]”

against humanity or war crimes committed after 30 June 2002, but they do apply to prosecutions of such crimes committed before that date and to other crimes and to extradition requests.

Section 5 of the CCIL provides that the prosecution of serious criminal offences pursuant to the CCIL and the execution of sentences imposed on their account shall not be subject to any statute of limitations.

However, the statute of limitations still applies to three classes of crimes. First, genocide, crimes against humanity and war crimes committed before 30 June 2002, the date the CCIL came into force, are also subject to the limitation periods of the regular Criminal Code. In these cases, the statute of limitations is inapplicable only to murder (Section 211 of the Criminal Code) and genocide (former Section 220 lit. a) of the Criminal Code) according to Section 78 subs. 2 of the Criminal Code.¹⁷¹ Genocide committed before 2002 can still be prosecuted under the former Section 220 lit. a of the Criminal Code but not under the newly introduced Section 6 CCIL. Jurisdiction was established under the former Section 6 No. 1 of the Criminal Code. Second, a statute of limitation applies to torture not amounting to a crime against humanity or a war crime (Section 78 para. 3 of the Criminal Code).

Third, statutes of limitation apply to offences categorized as misdemeanours (*Vergehen*) regulated in Sections 13 and 14. In addition, as noted above, Section 13 and 14 of the CCIL

Concluding observations of the Committee against Torture – Sweden, U.N. Doc. CAT/C/SWE/CO/5, 4 June 2008, para. 10. Therefore, the Committee recommended that Sweden

should review its rules and provisions on the statute of limitations and bring them fully in line with its obligations under the Convention so that acts of torture, attempts to commit torture, and acts by any person which constitute complicity or participation in torture, can be investigated, prosecuted and punished without time limitations.

Ibid.

¹⁷¹ Section 78 subs. 3 of the German Criminal Code reads as follows:

“To the extent that prosecution is subject to a statute of limitations, the period of limitation shall be:

(No. 1) thirty years in the case of acts punishable by imprisonment for life;

(No. 2) twenty years in the case of acts punishable by a maximum term of imprisonment of more than ten years;

(No. 3) ten years in the case of acts punishable by a maximum term of imprisonment of more than five years but not more than ten years;

(No. 4) five years in the case of acts punishable by a maximum term of imprisonment of more than one year but not more than five years;

(No. 5) three years in the case of other acts.”

criminalize breaches of different duties by commanders and superiors. While Section 13 provides for the liability for intentional or negligent violation of the duty of supervision, Section 14 provides for liability of intentionally or knowingly failing to report a crime. In these cases, the statute limitation of Section 78 subs. 3 of the Criminal Code applies:

- According to No. 3 the period of limitation is ten years in the case of acts punishable by a maximum term of imprisonment of more than five years, but not more than ten years (No. 3);
- five years in the case of acts punishable by a maximum term of imprisonment of more than one year, but not more than five years (No. 4); or
- three years in the case of other acts (No. 5).¹⁷²

According to Section 78 subs. 3 of the Criminal Code, the period of limitation for bodily harm inflicted in the course of or in connection with official duties (Section 340), which is the relevant crime for many acts of torture not amounting to a crime against humanity, is five years.

Statutes of limitation applicable to torts

Germany has three statutes of limitations applicable to torts. These are listed in the Civil Code:

- German Civil Code Sections 195, 199 I BGB: Three years from the time the injured party and the wrongdoer are made aware of the damage;
- German Civil Code Section 199 II BGB provide for a thirty year limitation period for damage caused to life, physical integrity, health and freedom;

¹⁷² Section 78 subs. 3 of the German Criminal Code reads as follows:

“To the extent that prosecution is subject to a statute of limitations, the period of limitation shall be:

(No. 1) thirty years in the case of acts punishable by imprisonment for life;

(No. 2) twenty years in the case of acts punishable by a maximum term of imprisonment of more than ten years;

(No. 3) ten years in the case of acts punishable by a maximum term of imprisonment of more than five years but not more than ten years;

(No. 4) five years in the case of acts punishable by a maximum term of imprisonment of more than one year but not more than five years;

(No. 5) three years in the case of other acts.”

- German Civil Code Section 199 III BGB provide for a ten year limitation period for property damage.

6.4. DOUBLE CRIMINALITY

Double criminality (sometimes called dual criminality) does not apply under the CCIL to genocide, crimes against humanity or war crimes committed after 30 June 2002 or to prosecutions of other crimes based on universal jurisdiction pursuant to Sections 5 and 6 of the Criminal Code. However, it applies to prosecutions based on passive personality, universal jurisdiction pursuant to Section 7 (2) of the Criminal Code and in extradition cases (See Section 7.1.2.3. below).

Double criminality under German law means that there is evidence of an “identical penal rule” in two different legal systems. Despite the name, the criterion of identity is not interpreted rigidly. The corresponding rule must prohibit a comparable conduct and establish as legal consequence a threat of punishment. However, it is not sufficient for the conduct to be a mere regulatory offence (*Ordnungswidrigkeit*) or a violation of a regulation with a character completely different from German criminal law (*völlig anderes Gepräge*).

Whatever the merits may be for requiring double criminality with respect to conduct that only amounts to an ordinary crime, it has no merit when the conduct amounts to a crime under international law, even if the requesting state is seeking extradition to prosecute the person for an ordinary crime when its legislation does not characterize the conduct as a crime under international law. All states have a shared obligation to investigate and prosecute conduct that amounts to crimes under international law, either by doing so in their own courts or by extraditing the suspect to another state or surrendering that person to an international criminal court, and they cannot escape this obligation by refusing to extradite on the basis of double criminality.

Double criminality under German law is relevant in three situations:

- passive personality jurisdiction under Section 7 (2) (1) of the Criminal Code;
- (2) pursuant to Section 7 (2), universal jurisdiction over persons who acquire German citizenship after the crime and over foreigners arrested in Germany for acts punishable in the territorial state, if the suspect is not extradited; and
- (3) extradition cases (See Section 7.1.2.3 below).

Passive personality

Section 7 (Application to Acts abroad in other cases) of the Criminal Code provides:

“German Criminal law shall apply to acts which were committed abroad against a German if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement.

Universal jurisdiction

Section 7 (2) of the Criminal Code also requires dual criminality to exist when it is used to exercise universal jurisdiction over persons who were foreigners at the time of the crime, but subsequently acquired German citizenship, and over foreigners arrested in Germany for acts punishable in the territorial state, if the suspects are not extradited:

“(2) The German criminal law is likewise applicable to crimes committed abroad if such conduct is punishable by the law of the place where it occurred, or if no criminal law enforcement existed at the place where the crime was committed, and if the perpetrator:

1. . . . acquired German citizenship thereafter, or
2. was a foreigner at the time of the crime, was apprehended within Germany and, although the extradition statute would permit extradition for the type of offense involved, was not extradited either because a request for extradition was never made, or was refused, or because extradition is not feasible.”

6.5. IMMUNITIES

While the CCIL and the Criminal Code are silent on this question, German law otherwise provides for immunities under international law and constitutional law.

Article 46 subs. 1 German Constitution provides immunity for the members of the German parliament and Article 60 subs. 4 grants immunity to the German President. However, these immunities will in all likelihood not be involved when German courts prosecute foreigners for crimes on the basis of universal jurisdiction.¹⁷³

Sections 18 - 20 of the German Judiciary Act (*Gerichtsverfassungsgesetz*) grant immunity to diplomatic missions, staff of embassies and consulates, and state representatives on official invitation in Germany. German officials cited these sections as the ground for refusing to open an investigation of a senior Rwandan official visiting Germany on an official mission who was alleged to have committed crimes under international law in Rwanda in 1994. Section 20 subs. 2 of the Judiciary Act generally declares rules of international law and international covenants on immunity applicable. Immunity of diplomatic missions and consulates is determined by the Vienna Conventions on Diplomatic and Consular Relations, to which Germany is a party. These immunities apply with ratification of this Convention by Germany according to Art 59 subs. 2 of the Constitution. Customary international law and general principles of international law are directly applicable in Germany under Article 25 of the Constitution.¹⁷⁴

¹⁷³ Claus Kreß, *Internationaler Strafgerichtshof*, in: Heinrich Grützner/Paul Pötz (Eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, vol. III, 428; Jörg Meißner, *Das Gesetz zur Ausführung des Römischen Statuts*, Neue Justiz (NJ) 7 (2002), 347, 348.

¹⁷⁴ For more details see Albin Eser/Helmut Gropengießer/Helmut Kreicker, *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, 2003, 350 *et seq.*

It is a highly debated question in Germany, however, to what extent heads of states and members of government are exempt from jurisdiction according to international customary law. The International Court of Justice concluded, without a proper review of international instruments and state practice that heads of state, heads of government and foreign ministers have immunity for all official acts even after they leave office in its controversial decision in the *Arrest Warrant Case*.¹⁷⁵ International legal scholars, by contrast, have concluded that such officials are not exempt from jurisdiction in cases where they are involved in committing crimes under international law, even if these are committed as official acts, as is regularly the case.¹⁷⁶ Amnesty International likewise believes that the judgment in the *Arrest Warrant* case is based on incorrect notions of law. Therefore, Amnesty International has urged that this ruling should be reversed and hopes that this will be done in the future, as immunity should not be granted in the case of the worst possible crimes ever to be committed. As explicated elsewhere,¹⁷⁷ Amnesty International has explained in detail that there is no convincing basis in customary international law to accord immunity of state officials while in office when committing genocide, crimes against humanity and war crimes. It has further noted that the International Court of Justice's reasoning in the *Arrest Warrant* case failed to cite any state practice or *opinio iuris* in this respect.

The Federal Prosecutor did not mention the issue of immunity in the decisions terminating the proceedings in the cases against Donald Rumsfeld and Zakir Almatov under Section 153 f of the Code of Criminal Procedure (See Sections 9.4.2.3 to 9.4.2.5 below).¹⁷⁸ However, in its decision not to open an investigation against the former president of China, Jiang Zemin, the Federal Prosecutor referred in great detail to the ruling of the International Court of Justice in the *Arrest Warrant* case (See Section 9.4.2.1 below).¹⁷⁹ Instead, he based the termination of proceedings against the former head of state of China entirely on this seriously

¹⁷⁵International Court of Justice, *Arrest Warrant Case (DR Congo v. Belgium)*, Judgement (14 February 2002), ILM 41 (2002), 536, para. 54 *et seq.*, 58, see also International Court of Justice, <www.icj-cij.org> (last visited 02/07/07); for comments on this decision see Weiß, *Völkerstrafrecht zwischen Weltprinzip und Immunität*, in: Juristenzeitung (JZ) 57 (2002), 696, 697 *et seq.*; Albin Eser/Helmut Gropengießer/Helmut Kreicker, *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, 2003, 356 *et seq.*; Claus Kreß, *Der Internationale Gerichtshof im Spannungsfeld von Völkerstrafrecht und Immunitätsschutz*, in: Goldammer's Archiv für Strafrecht (GA) 2003, 25 *et seq.*

¹⁷⁶ Albin Eser/Helmut Gropengießer/Helmut Kreicker, *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, 2003, 358, 431 *et seq.*; Antonio Cassese, *Affadavit on The Immunities of Foreign State Officials Suspected of International Crimes*.

¹⁷⁷ UNIVERSAL JURISDICTION: Belgian prosecutors can investigate crimes under international law committed abroad, AI Index: IOR 53/001/2003 (http://www.amnesty.org/en/alfresco_asset/a50d5cdf-a508-11dc-a92d-271514ed133d/ior530012003en.html) (last visited 12 June 2008), p. 10.

¹⁷⁸ For the position of the German Federal Attorney General in the *Almatov* case see Juristenzeitung (JZ) 60 (2005), 311, see also below 3.2.

¹⁷⁹ Decision of the Federal Prosecutor terminating the proceedings in the *Jiang Zemin* case is available at: <http://www.diefirma.net/download.php?8651010ea2af5be8f76722e7f35c79de&hashID=44b8c6eba6a3530e554210fa10d99b3a>> (last visited on 12/06/08).

flawed judgment and reasoned in the first bullet point of his justification as follows:

“Immunity of the former President of the People's Republic of China, Jiang Zemin, already bars him from criminal prosecution. . . Neither former Section 220a Criminal Code, in force until 30 June 2002, nor its succeeding rules in the International Crimes Code contain rules on immunities, unlike the Rome Statute of the International Criminal Code (BGBl. 2000 II 139, Article 27). Therefore Sections 18 – 20 Judiciary Act apply when determining the question whether immunity bars criminal prosecution by German authorities (for International Crimes Code see BT-Drs. 14/8524, p. 17; Kress, GA 2003, p. 41). Section 20 (2) Judiciary Act restricts German jurisdiction if persons enjoy immunity under international law. A well recognized rule in international law grants immunity from criminal prosecution by other states to present and former heads of government and heads of state when acting during their term in office (Doehring, Voelkerrecht, 1999, § 12 marginal number 672). The International Court of Justice explicitly confirmed this state practice in its judgment of 14 February 2002 in the case Democratic Republic of Congo v Belgium for present and former foreign ministers, reasoning that the function of such offices warrants this, which must not be curtailed by criminal prosecution by other states (judgment No. 51-61, [...] www.icj-cji.org; see Maierhofer, EuGRZ 2003, 553; Weiss, JZ 2002, 698). The reasoning of the International Court of Justice also applies to heads of government and heads of state, as they fulfil similar functions. The ruling of the International Court of Justice also grants such immunity if these officials are prosecuted for international crimes (judgment No. 56-60) and already bars initiation of any investigatory acts (judgment No. 54). Therefore, Section 20 (2) Judiciary Act bars German prosecutorial agencies from prosecuting former head of state Jiang Zemin.”¹⁸⁰

Legal scholars have strongly criticized this decision.¹⁸¹

6.6. BARS ON RETROACTIVE APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL LAW OR OTHER TEMPORAL RESTRICTIONS

States have recognized for at least six decades that the prohibition of retroactive criminal laws does not apply to national criminal legislation enacted after that conduct became recognized as criminal under international law.¹⁸² German legal doctrine, shaped largely by Germany's unhappy legal history, however, opposes such legislation, which has resulted in serious gaps in Germany's ability to act effectively with regard to genocide, crimes against

¹⁸⁰ Amnesty International translation.

¹⁸¹ Claus Kreß articulated his criticism in the public hearing of the German Parliament's Committee for Human Rights and Humanitarian Aid on 24 October 2007.

¹⁸² Article 11 (2) of the Universal Declaration of Human Rights states:

“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

humanity and certain war crimes committed before July 2002, as well as with regard to other crimes under international law, regardless of the date when they were committed.

The German constitutional principle of *nullum crimen sine lege*, as contained in Article 103 subs. 2 of the German Basic Law and Section 1 of the Criminal Code, determines that a person can only be convicted of a criminal act if the elements of the crime were laid down in law before the act was committed. Thus, the prosecution of crimes under the International Crimes Code which were committed before the International Crimes Code entered into force and of other crimes under international law which were committed before they were codified in German national law was barred, even though the crimes were recognised under international law and thus were actually applicable in Germany according to Article 25 of the Constitution. Likewise the *nullum crimen sine lege* principle under German law, bars retroactive application of the International Crimes Code and of other German national legislation implementing crimes under international law to crimes committed before the date the International Crimes Code or the respective German national law entered into force i.¹⁸³

Germany interprets the prohibition of retroactive criminal legislation more restrictively than international law does,¹⁸⁴ and in this regard Germany's ability to investigate and prosecute conduct that was criminal under international law before German legislation defined that conduct as criminal under national law is undermined. The principle of *nullum crimen sine lege* as understood in German law protects such values of utmost importance as legal certainty, which should allow the accused to be informed about the nature of his acts as potentially criminal. The importance of this purpose of the *nullum crimen sine lege* principle in the German understanding is reflected in the fact that it is a principle guaranteed in the German Constitution. Under German legal doctrine, in order to protect the accused in criminal proceedings, balancing the German interpretation of the *nullum crimen sine lege* principle against other considerations should not be taken lightly, even if precludes an efficient prosecution of crimes under international law.

6.7. NE BIS IN IDEM

The prohibition of *ne bis in idem* under international law applies only in a single jurisdiction.¹⁸⁵ Under German law, the principle of *ne bis in idem* does not prevent a court

¹⁸³ A. Eser, H. Gropengießer, H. Kreicker (Eds.), *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, 390 *et seq.*

¹⁸⁴ In addition to Article 11 (2) of the Universal Declaration of Human Rights, cited earlier, Article 15 of the ICCPR (Article 7 of the European Convention on Human Rights is similar) reads as follows:

1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. [...]

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

¹⁸⁵ The Human Rights Committee has concluded that Article 14 (7) of the ICCPR “does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more States. The Committee observes

from prosecuting a person who has been acquitted or convicted in a foreign court, except where the foreign criminal proceedings took place in a state party to the Implementation Convention for the Schengen Treaty of the European Union (*Schengener Durchführungsübereinkommen, SDÜ*). However, the principle will bar extradition (see Section 7.1.2.6) and any foreign sentence is considered a mitigating circumstance by German courts.

The CCIL does not expressly include the principle of *ne bis in idem*. Therefore, no impediment to criminal proceedings exists against double jeopardy. Neither the Criminal Code nor the German Code of Criminal Procedure contains a provision concerning double jeopardy. However, the principle of *ne bis in idem* is codified in Article 103 subs. 3 German Constitution and thus overrides all ordinary law. The constitutional provision states: “No person shall be tried twice for the same criminal offence”. If a person has been tried by a German criminal court, this principle prevents a retrial in Germany. Article 103 subs. 3 has three legal consequences: First, the prohibition of double conviction; second, the prohibition of double prosecution, and third, the prohibition of re-prosecution after an acquittal.¹⁸⁶

This bar has to be considered by the prosecution and the court *ex officio*. It requires a non-reviewable court decision. Article 103 subs. 3 is directed exclusively at German court decisions. Accordingly, final acquittals have the same effect as convictions.¹⁸⁷ By contrast, decisions to terminate criminal proceedings only have a restricted blocking effect, as such decisions according to the discretionary provisions such as Sections 153 subs. 2 and 153 lit. a, subs. 2 Code of Criminal Procedure may involve negative consequences for the accused, they cannot be compared to a sentence. The impediment to the proceedings applies only for the same conduct that underlies a criminal offence. Article 103 subs. 3 applies to everyone - also foreigners - irrespective of whether they reside in Germany or not.

that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State.” *A.P. v. Italy*, No. 204/1986, 2 November 1987, 2 Selected Decisions of the Human Rights Committee under the Optional Protocol 67, UN Doc. CCPR/C/OP/2, UN Sales No. E.89.XIV.1. This was also recognized during the drafting of Article 14 (7) of the ICCPR. See Marc J. Bossuyt, *Guide to the “Travaux préparatoires” of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff Publishers 1987), pp. 316-318. The Trial Chamber in the *Tadić* case reached the same conclusion:

“The principle of *non-bis-in-idem*, appears in some form as part of the international legal code of many nations. Whether characterized as *non-bis-in-idem*, double jeopardy or *autrefois acquit*, *autrefois convict*, this principle normally protects a person from being tried twice or punished twice for the same acts. This principle has gained a certain international status since it is articulated in Article 14 (7) of the International Covenant on Civil and Political Rights as a standard of fair trial, but it is generally applied so as to cover only double prosecution in the same State.”

¹⁸⁶ Schultze-Fielitz in: Horst Dreier (ed.), *Grundgesetzkommentar Band III*, Article 83-146, para.12.

¹⁸⁷ BVerfGE 12, 62 (66); 75,1, 15; Schultze-Fielitz in: Horst Dreier (ed.), *Grundgesetzkommentar Band III*, Article 83-146, para.28; different opinion BGH St 21, 186, 187.

In addition to Article 103 subs. 3, Article 45 of the SDÜ declares the principle of *ne bis in idem* applicable within the state parties of the convention. A person who has been tried for the same act before by a court of a state party is protected by this trial from prosecution and conviction in the court of another party to the SDÜ.¹⁸⁸ The exact terms can be gathered from the Agreement between the member states of the European Communities over the prohibition of double jeopardy (25.05.1987).

6.8. POLITICAL CONTROL OVER DECISIONS TO INVESTIGATE AND PROSECUTE

Section 147 of the German Judiciary Act (*Gerichtsverfassungsgesetz*, GVG) states that the Federal Prosecutor is guided and controlled by the Federal Minister of Justice.

Notwithstanding the repeated statements by the Office of the Federal Prosecutor that no directives exist, with respect to the application of the CCIL¹⁸⁹ this institutional framework makes it impossible to exclude a certain degree of political control of the decisions of the Federal Prosecutor.

6.9. RESTRICTIONS ON THE RIGHTS OF VICTIMS AND THEIR FAMILIES

See Section 5 above concerning civil claims.

6.10. AMNESTIES

Amnesties and similar measures of impunity for crimes under international law are prohibited under international law.¹⁹⁰ There is no provision in German law giving effect to amnesties issued by a foreign state for crimes under international law and no German court has held that they are a bar to the exercise of universal jurisdiction over such crimes.

¹⁸⁸ Sachs (Ed.), *Grundgesetzkommentar* (4th ed.), Article 103, para.23; EuGH Urteil vom 28.09.2006 – C 467/04 (Gasparini et al); see Wolfgang Schomburg, *Die Europäisierung des Verbots doppelter Strafverfolgung – ein Zwischenbericht*, in: *Neue Juristische Wochenschrift (NJW)* 2000, 1833; BGH in *Neue Zeitschrift für Strafrecht (NStZ)* 1999, 250 = *Neue Juristische Wochenschrift (NJW)* 1999, 1270 (Belgische Transactie).

¹⁸⁹ Rolf Hannich, member of the Office of the Federal Prosecutor in the public hearing of the German Parliament's Committee for Human Rights and Humanitarian Aid on 24 October 2007.

¹⁹⁰ See, for example, Amnesty International, *Sierra Leone: Special Court for Sierra Leone: denial of right to appeal and prohibition of amnesties for crimes under international law*, AI Index: AFR/012/2003, 31 October 2003.

7. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

General legal framework.

The following legal provisions and principles apply in Germany with regard to mutual legal assistance and extradition. Notwithstanding further legislation they also apply to all cases concerning crimes under the CCIL.

According to Art. 16 subs. 2 of the Constitution, no German can be extradited to another country. The possibility of abuse of this principle – i.e. avoiding prosecution - is limited by the application of extraterritorial jurisdiction, so that crimes committed by Germans on foreign territory do not go unpunished just because a German citizen has returned home. However, the responsibility then lies with the German courts. This principle has been modified by law under Art. 16 subs. 2 in two cases: A German citizen can be extradited to a member state of the European Union (EU)¹⁹¹ and surrendered to international courts. In this sense, Germany upholds its obligations as a member of the United Nations especially regarding international crimes and cooperation with international institutions. As an EU member, Germany has increased its cooperation in judicial and police matters by ratifying the Amsterdam and Nizza treaties. This cooperation works within the so called “Third Pillar” for judicial cooperation.¹⁹² Thus, the strict prohibition of extraditing German nationals to other countries has been modified in significant areas.

Section 32 subs. 1 of the German Constitution states: ‘Relations with foreign states shall be conducted by the Federation’. Therefore, the final authority to decide over mutual legal assistance or extradition lies with the Federal Government and not the courts. For extradition and mutual legal assistance matters this has been codified in Section 74 subs. 1 of the *Gesetz über die internationale Rechtshilfe in Strafsachen, IRG*, which states that the Federal Minister of Justice in cooperation with the Ministry of Foreign Affairs and any other Ministry, which has an interest in taking part, decides on extradition requests posed by other states as well as requests by Germany to other states. However, this authority can also be delegated to the *Länder* (states) as provided for by section 74 subs. 2 of the IRG. Further competence is assigned to the Federal Police Department (*Bundekriminalamt, BKA*) concerning the transfer of data, search warrants and identity searches (Section 74 subs. 3 IRG). In general, the

¹⁹¹ However, in light of the recent Constitutional Court decision on the European Extradition Law this possibility is pending further legislative activity, see below.

¹⁹² See Art. 31 subs. 1 EU Treaty.

Federal Government issues extradition requests via diplomatic channels according to the bilateral agreements with other states. The IRG only regulates the general principles of the horizontal inter-state cooperation regime under German law and fills the gaps left in extradition treaties.¹⁹³ In addition the IRG is complemented by the laws developing on EU-level, which are subsequently binding on German authorities.¹⁹⁴

Section 74 (a) of the IRG provides that the ordinary framework set out for foreign countries requesting for assistance or requesting extradition is also the model international criminal tribunals will follow unless there are differing specific regulations.¹⁹⁵ Each state has its own statutory regulation determining the competent authorities for the respective decisions. The IRG only provides for the proceedings where there is no specific treaty regulation. If such a treaty regime exists, the IRG provisions only have subsidiary meaning. There are also directives, which regulate the modalities of judicial cooperation with other states in criminal matters in more detail (RiVAST). However, these guidelines are only directives for the administration itself.

The eighth part of the IRG (Sections 78 IRG ff.) regulates the cooperation among Member States of the European Union. This part was modified in 2004 in accordance with the Law on the European Arrest Warrant (*Europäisches Haftbefehlsgesetz*).¹⁹⁶ However, the first attempt of transformation into German law failed after the Federal Constitutional Court declared the law to be unconstitutional.¹⁹⁷ The Court held that the law violated Art. 2 in conjunction with Art. 20 (3), Art. 16 (2), and Art. 19 (4) of the Constitution. Two points were especially important: First, the law violated Art. 16 (2) of the Constitution as it failed to meet the

¹⁹³ Examples of vertical cooperation regimes concern cooperation with the ICTR, ICTY and the ICC. When the ICTY was founded Germany introduced §§ 68 and 74a IRG, which enable the cooperation between Germany and an international organisation in criminal assistance matters. When the Rome Statute was ratified these provisions were modified again and complemented by § 9 a IRG, which entails the prohibition of double jeopardy and regulates the relationship between parallel extradition requests. However, Germany has regulated the more sensitive areas concerning the actual surrender in separate laws to ensure the highest possible standards.

¹⁹⁴ These are mostly multilateral treaties developed by the Council of Europe, which uphold the European Convention on Human Rights, see also the European Treaty Series at <http://www.conventions.coe.int>. Treaties concerning specific criminal areas are also developed at EU-Level, especially concerning corruption, money laundering and other forms of organised, trans-European crime, for an overview <http://www.europa.eu>.

¹⁹⁵ With regard to cooperation with the ICC, a specific law has been passed (*Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof, IStGHG*). *Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof*, included as Article 1 in the *Gesetz zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofes* (Rome Statute Implementation Act), of 21 June 2002, in force 1 July 2002, BGBl. 2002 I, p. 2144.

¹⁹⁶ See Gesetz vom 21. Juli 2004 zur Umsetzung des Rahmenbeschlusses über den Europäischen Haftbefehl und die Übergabeverfahren zwischen den Mitgliedsstaaten (BGB. 2004 I, S. 1748).

¹⁹⁷ BVerfGE v. 18.07.2005 (2 BVR 2236/04), for commentary see Wolfgang Schomburg et al. (eds.), *Internationale Rechtshilfe in Strafsachen, Kommentar zum Gesetz über die internationale Rechtshilfe in Strafsachen (IRG)*, (Munich 4th edn.), Section 78, no. 13.

requirements under which a German citizen is allowed to be extradited. Secondly, the Court criticized the fact that no judicial remedy was provided against such a decision. Art. 16 of the Constitution allows deviation from the principle only if judicial guarantees are provided which uphold the rule of law. The Parliament reacted to the criticism of the Constitutional Court and changed the legislation adopting the European Arrest Warrant accordingly. The new law was passed on 25. July 2006.¹⁹⁸

Concerning the German legal framework, one additional systematic point is of importance: In German legal practice mutual legal assistance is first and foremost a question of diplomatic relations (*Pflege der auswärtigen Beziehungen*) with competence awarded to the Federal Government, which enjoy a high degree of discretion in deciding whether to issue an extradition request or not. However, it is recognised that it is a two-pronged system, which also involves the judiciary which typically issues arrest warrants and seeks extradition.¹⁹⁹ This system poses the problem that in cases where the German judiciary has voiced the need for judicial assistance it is left to the discretion of the Federal Government to act upon these requests, which may lead to an infringement of the independence of the courts and the legality principle. For instance, in the case of Khaled El-Masri, a German citizen, the prosecution in Munich had obtained arrest warrants for the CIA agents suspected of kidnapping him. The Minister of Justice then refused to issue a formal request as the United States had signalled not to extradite their citizens to Germany.²⁰⁰ The possibility of judicial review of this decision is a highly debated question.²⁰¹

There is a complex network of EU treaties and framework decisions governing extradition and mutual legal assistance, which is beyond the scope of this paper.²⁰²

7.1 EXTRADITION

There are a number of obstacles to making German extradition requests and requests for mutual legal assistance, as well as obstacles to granting such requests made by other states.

¹⁹⁸ See http://www.eurowarrant.net/documents/cms_eaw_id1456_1_Europ%E4isches%20Haftbefehlsgesetz%202006.pdf.

¹⁹⁹ Wolfgang Schomburg et. al., *Ibid.*, Section 74, no. 2.

²⁰⁰ For an overview of this case see <http://www.ecchr.eu>.

²⁰¹ *Ibid.*

²⁰² There are four instruments of particular importance: (1) EU Extradition Convention of 27 September 1995; (2) Council Framework Decision on 13 June 2002 on the European Arrest Warrant and the Surrender of Procedures between Member States; (3) Convention on Mutual Assistance in Criminal Matters between the Member States of the EU of 29 May 2000; and (4) Council Framework Decision on the Execution in the European Union of Orders Freezing Property and Evidence. See all German and English versions in Wolfgang Schomburg et al. (eds.), *Internationale Rechtshilfe in Strafsachen, Kommentar zum Gesetz über die internationale Rechtshilfe in Strafsachen (IRG)*, (Munich 4th edn.), Part III.

7.1.1. INAPPROPRIATE LIMITS ON MAKING EXTRADITION REQUESTS

There do not appear to be any inappropriate statutory limits on making extradition requests. However, it is left to the discretion of the Federal Government, which is competent according to Section 74 of the IRG to make such request, rather than to an independent prosecutor, subject to judicial review.

7.1.1.1. POLITICAL CONTROL OVER THE *MAKING* OF EXTRADITION REQUESTS

Extradition requests are subject to review by a political official and limited judicial review.

Extradition requests

Despite the delegation of authority in Section 74 Subd. 2 most of the statutory regulations of the *Länder* provide that the Federal Prosecutor decides upon requests for extradition. However, before the request for an extradition is approved, a Higher Regional Court will scrutinize the admissibility of this request (12 of the IRG). If the request is found to be admissible it is for the Federal Government to decide whether it approves the extradition or not. If a court has found a request for legal assistance to be not admissible, the request cannot be issued by the authorities.

Assisting foreign states in criminal matters is also limited by the requirement that such assistance be consistent with *ordre public*, that is, it is necessary that the request does not contradict fundamental principles of the German legal system, such as the right to life and freedom from torture.²⁰³ Furthermore, the deciding authority is bound by Germany's obligations under public international law. There are various treaties regulating those obligations specifically with regard to extradition and legal assistance.

Judicial scrutiny and discretion

When deciding about requests for legal assistance or extradition the competent authorities may exercise broad discretion (Art. 32 of the Constitution, Section 74 of the IRG). Judicial review is especially problematic because its consideration as to the purpose of a decision is closely tied to the question of foreign relations.²⁰⁴ Therefore, judicial scrutiny can only examine whether the decision itself is based on an excess of discretion or misuse of discretion, cf. s 23 EGGVG.²⁰⁵ It is possible to make a legal challenge against the decision of the government to the administrative courts (*Verwaltungsgericht*). Such challenges are not likely to succeed because the Federal Government has broad discretion.²⁰⁶ This system of competence allows the government to take diplomatic questions into account when mutual

²⁰³ See at 7.1.3 for further details.

²⁰⁴ Peter Gummer in *Zöller Zivilprozessordnung* (Munich 26th ed. 2006), Section 23 EGGVG para.15; OLG Düsseldorf, JMBI NW 2007, 67.

²⁰⁵ Peter Gummer in *Zöller Zivilprozessordnung* (Munich 26th ed. 2006), Section 23 EGGVG para.15; OLG Düsseldorf, JMBI NW 2007, 67.

²⁰⁶ See for ex. the decisions by regional courts in Berlin VG Berlin, 27.09.07, Rn. 14 and OVG Berlin 26.03.2001.

legal assistance matters arise. Of course, this may also have an impact on universal jurisdiction cases in the future.

7.1.1.2. PRESENCE

There is no requirement that a suspect has ever have resided or been present in Germany in order to seek that suspect's extradition. For the use of presence or expected presence as a factor in determining whether to investigate or to prosecute a case, see Section 6.2 above..

7.1.2. INAPPROPRIATE BARS TO GRANTING EXTRADITION REQUESTS

There are several serious obstacles to granting extradition requests which are not appropriate when crimes under international law are involved, including broad discretion of political officials to refuse such requests, the prohibition of the extradition of nationals and broad and ill-defined political offence exception,. The general principles and restrictions outlined above apply. Extradition to another state, with which no extradition treaty has been convened, can only be exercised when certain conditions are met provided by the IRG and the Constitution. In addition to the conditions discussed below: (1) The other state likewise must be ready for legal cooperation i.e. under the principle of reciprocity (Section 5 of the IRG); and (2) no other obstacles must exist hindering extradition such as safeguards discussed below.²⁰⁷

7.1.2.1. POLITICAL CONTROL OVER THE GRANTING OF EXTRADITION REQUESTS

It is left to the discretion of the Federal Government under Section 74 subs. 1 IRG in conjunction with the Constitution to decide whether it is in the interest of a state to accept or issue a request for extradition. This opens the door to political and diplomatic influence in legal questions and may infringe on the decision of the courts to proceed with a case even though the suspect is out of reach. As stated briefly above the possibility to take legal action against the decision not to extradite or not to issue an extradition request is possible and may be submitted to the competent administrative court. This is the *Verwaltungsgericht* in Berlin in cases in which the Federal Government declines to issue a request.

7.1.2.2. NATIONALITY

Under Art. 16 subs. 2 of the German Constitution German nationals may not be extradited to a foreign country. The German legal framework deviates from this principle only with regard to the cooperation agreements with international courts such as the ICC and within EU law.²⁰⁸

7.1.2.3. DUAL CRIMINALITY AND TERRITORIAL JURISDICTION

Double criminality under German law applies to extradition as well as to prosecution in certain circumstances (See Section 6.4 above). This principle is historically connected to the principle of reciprocity ("*do ut des*").²⁰⁹ According to Section 3 (1) of the IRG the offence named in the extradition request of the requesting country needs to be a punishable act

²⁰⁷ For details see Wolfgang Schomburg et al. (eds.), *Internationale Rechtshilfe in Strafsachen, Kommentar zum Gesetz über die internationale Rechtshilfe in Strafsachen (IRG)*, (Munich 4th edn.), 14, 15, no. 75.

²⁰⁸ See Introduction at 7.

²⁰⁹ Wolfgang Schomburg et. al. (eds.), *Ibid.*, Introduction, no. 63.

under German law. There is no requirement that a German court could exercise jurisdiction, only that the act itself must be punishable. The extradition is permissible if the conduct is unlawful under German criminal law and fulfils the requirements of a criminal provision of the requesting state. The same rule applies to extradition to carry out a sentence.

Double criminality is common in extradition treaties with respect to ordinary crimes and some authorities go so far as to say that this requirement is part of customary international law. However, the principle is in decline especially with regard to developments at the EU level, and it should have no place in extradition decisions involving crimes under international law.

7.1.2.4. POLITICAL OFFENCE

Section 6 IRG states that extradition is not permissible concerning political crimes or crimes connected to political crimes. An exception is made with regard to genocide, murder and manslaughter. The objective of this norm is to protect the German state against political and diplomatic conflicts which may arise on account of individual crimes. The lawmaker has not defined the nature of “political crimes” and has thus enabled wide discretion for the courts in this area. In general, whether a crime is “political” is to be determined according to German law and not according to the law of the requesting state. Thus, the fact that the requesting state deems a crime to be of political nature is irrelevant.²¹⁰

The question whether other crimes except those listed in Section 6 are exempted from the political crime-exception is unclear. From its wording the provision seems to list only these three crimes. However, in practice it seems that the wording is extended to include all kinds of crimes of a severe nature including acts of terrorism.²¹¹ There is a danger, however, that this provision may be used to deny extradition in universal jurisdiction cases as crimes against humanity and war crimes are not listed and no reference to the CCIL is made. The definition of political crimes is complemented by multi- and bilateral treaties.²¹² In this context, the European Union is active in intensifying the cooperation among member states regarding the extradition of terrorist suspects to the state in which the crimes were committed.²¹³ Thus, the political crime doctrine is gradually subsiding in this area.

7.1.2.5. MILITARY OFFENCE

Section 7 IRG states that extradition is impermissible if the crime committed only concerns the violation of military duties. An offence is military if it pertains to acts not criminalized in the Criminal Code but only specific military activity such as desertion (*Fahnenfluch*) or refusal to obey orders (*Befehlsverweigerung*). These are regulated in the Military Criminal Code (*Wehrstrafgesetzbuch*). Offences against the Law of the Social Service

²¹⁰ Wolfgang Schomburg et. al. (eds.), *Ibid.*, Section 6, no. 22.

²¹¹ Wolfgang Schomburg et. al. (eds.), *Ibid.*, Section 6, no. 23.

²¹² Such provisions exist in the extradition treaty with the USA for example, see Auslieferungsvertrag zwischen der Bundesrepublik Deutschland und den Vereinigten Staaten von Amerika, 20. Juni 1978, Section 4.

²¹³ Wolfgang Schomburg et. al. (eds.), *Ibid.*, Part III.

(*Zivildienstgesetz*), which can be a substitute for the mandatory military service of young men, are also included. However, the law of the state requesting extradition is also to be taken into account.²¹⁴

7.1.2.6. NE BIS IN IDEM

Article 9 No. 1 of the IRG provides that *ne bis in idem* constitutes a bar to extradition.²¹⁵ In addition, the Schengen Treaty provides regulations Germany adheres to.²¹⁶ Section 9 IRG provides that extradition is not permissible under a very broad concept of *ne bis in idem* if:

a court or authority issued a decision with regard to the particular crime, declined to open the proceedings (Section 204 of the Criminal Procedure Code), declined to prosecute (Section 174 Criminal Procedure Code), terminated proceedings (Sections 153 a Criminal Procedure Code) or applied the laws of Juvenile Criminal Procedure to terminate proceedings.

7.1.2.7. NON-RETROACTIVITY

This principle is to be kept in mind when determining, which laws should or can be applied to the extradited person on arrival in Germany. The principle of non-retroactivity applies to the extradition process in the sense that the relevant point in time is qualified as the date of the transfer act (*Übergabeakt*).²¹⁷ Other courts apply the date of the issuance of the extradition request and see a collision with the principle of non-retroactivity if the actual act of transfer is deemed the relevant date for the application of the criminal laws.

According to Art. 1 and 2 subs. 1 and 2 of the Constitution, which also uphold the principle of retroactivity in German law, the person whose extradition is requested may not be extradited if there is reason to believe the principle will be violated.

7.1.2.8. STATUTES OF LIMITATION

According to Section 9 subs. 2 of the IRG extradition is barred if the crime is subject to a statute of limitation and the period of limitation has elapsed.

7.1.2.9. AMNESTIES, PARDONS AND SIMILAR MEASURES OF IMPUNITY

There are no provisions concerning amnesties, pardons or similar measures to be found within the German legal framework for extradition.

7.1.3. SAFEGUARDS

German law provides for numerous safeguards for the rights of persons facing extradition. Safeguards to protect the German state are outside the scope of this paper. In addition, in the area of terrorism some safeguards cease to apply.

²¹⁴ Wolfgang Schomburg et. al. (eds.), *Ibid.*, Section 7, no. 6.

²¹⁵ See Wolfgang Schomburg et. al. (eds.), *Ibid.*, Section 9, no. 7 et. seq.

²¹⁶ Art. 54 and 62 of the Schengen Agreement.

²¹⁷ Wolfgang Schomburg et. al. (eds.), *Ibid.*, Section 3, no. 21.

There are several safeguards in German law that prevent extradition if this would subject the person to violations of human rights, such as torture (see Section 7.1.3.2 below) or the death penalty (see Section 7.1.3.3 below). Section 6 provides that extradition is prohibited if there are grounds to believe that the person will be discriminated against or persecuted due to the ground of religious views, race, nationality, social group or political views in the country requesting extradition. Section 6 thus introduces these fundamental guarantees into the IRG, which are stipulated in Art. 16 a (1) of the German Constitution for asylum seekers (*individualrechtliches absolutes Auslieferungsverbot*). Political persecution must be avoided. These safeguards have to be considered in each case by the authorities and courts involved. In accordance with Section 74 IRG, this can also be the Federal Government if one of the *Länder* is not responsible.

These guarantees have been further defined by the Federal Constitutional Court. The term of the politically persecuted person is to be applied broadly to ensure as much safety as possible.²¹⁸ German courts are required to ensure that the minimum human rights standards under international public law, which are binding on German authorities through Art. 25 of the Constitution are upheld. This article also requires that the minimum guarantees of a fair trial are respected in the country requesting extradition.²¹⁹

A person subject to an extradition request challenge the extradition pursuant to Sections 21 to 42 of the IRG.

7.1.3.1. FAIR TRIAL

No one can be extradited if there is a fear of violation of the fundamental guarantees inherent in the right to fair trial. This principle is not regulated expressly in the IRG. However, it was upheld by the Federal Constitutional Court and is derived from Section 6 of the IRG.²²⁰ The Court also held that it is the duty of the judicial authorities to determine whether these guarantees can be met by the requesting state. These guarantees are those listed in Art. 6 of the European Convention on Human Rights.

In addition, Section 73 of the IRG provides that legal assistance including the transfer of personal data is impermissible if fundamental norms of the German legal order are at risk being violated. This norm integrates all guarantees of the rule of law including those enshrined in the European Convention on Human Rights into the legal framework of judicial assistance. In this sense Section 73 of the IRG is applicable to all forms of judicial cooperation by the German state.²²¹ However, if an extradition treaty exists between Germany and another state, the right to verify whether fair trial guarantees are upheld has been denied. The Court has declared that a duty to verify these guarantees exists only in cases where an extradition treaty is absent and the common principles of international and national

²¹⁸ BVerfGE 9, 174, 180.

²¹⁹ Wolfgang Schomburg et. al. (eds.), *Ibid.*, Section 6, no. 38.

²²⁰ BVerfGE 63, 332.

²²¹ Wolfgang Schomburg et. al. (eds.), *Ibid.*, Section 73, no. 4.

extradition law apply.²²² Thus, the Federal Constitutional Court takes the position that German constitutional provisions and guarantees pertaining to the rule of law must give way if the relations between the states have been regulated by treaty (*Exportverbot deutscher Grundrechte*). The reason is to leave as much freedom as possible for Germany to act within the international legal assistance regime. As Section 73 of the IRG provides for the case law of the European Court of Human Rights to apply within the framework of judicial assistance in Germany and this case law is based on a treaty ratified by Germany the position of the Federal Court has been criticized.²²³

7.1.3.2. TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Section 73 of the IRG, in conjunction with the case law of the European Court of Human Rights, prohibit extradition where there is a risk of torture (see above). Through the ratification of the Convention against Torture, the absolute prohibition of torture has become part of Germany's legal system. The Constitutional Court has held that the prohibition against torture is part of *ius cogens*.²²⁴ If there are doubts whether a state will be able to uphold the guarantees under the Convention against Torture, then the person may not be extradited.

7.1.3.3. DEATH PENALTY

Section 8 of the IRG states that when the crime is punishable by death in the requesting state, extradition may only be permitted if that state guarantees not to impose the death penalty in the specific case. Art. 101, as well as Art. 2, of the Constitution incorporate this basic principle and restrict all forms of mutual legal assistance procedures in cases where the death penalty may be issued.

Section 8 only refers to the legal framework not regulated by treaty. Thus, there is a debate whether the prohibition applies to cases regulated by treaty.²²⁵ In practice, the death penalty is seen as a reason not to extradite a person.

The exception in Section 8 is not only a formal criteria but means that extradition can only be permitted in cases where there is no reasonable doubt that the death penalty will be applied. The competent authority is responsibly for overseeing this guarantee.

7.1.3.4. HUMANITARIAN CONCERNS

Germany guarantees refugees asylum on humanitarian grounds. Art. 33 of the Geneva Convention relating to the Protection of Refugees and Art. 3 of the Human Rights Convention convey protection against extradition if there are grounds to believe that the person would suffer bodily and mental harm upon his return. The possibility of torture is one of the main

²²² See decision concerning an extradition to Vietnam involving the duty to verify that the guarantees would be respected, BVerfG v. 22.11.2005 (2 BvR 1090/05).

²²³ Criticism on this point see Wolfgang Schomburg et. al. (eds.), *Ibid.*, Section 73, no. 14.

²²⁴ BVerfG, NJW 1994, 2883.

²²⁵ See Wolfgang Schomburg et. al. (eds.), *Ibid.*, Section 8, no. 10

phenomena underlying current judicial practice in this regard.²²⁶ Both provisions apply in Germany. However, the safeguards in Germany's asylum laws and the principles outlined above do not apply in political cases. This concerns terrorism in particular (*Terrorismusvorbehalt*).²²⁷

7.1.3.5. SPECIALITY

In addition, the rule of speciality provides for a certain amount of safety as it prevents the requesting state from trying a person extradited to it for a crime not listed in the extradition request without the permission of Germany, the requested state.²²⁸ Section 11 of the IRG regulates this principle for extradition matters.

7.2. MUTUAL LEGAL ASSISTANCE

Mutual legal assistance other than extradition matters is regulated in Part 4 and 5 of the IRG. Part 4 deals with assistance by mutual assistance concerning foreign judicial decisions (*Rechtshilfe durch Urteilsvollstreckung*) Part 5 contains all other forms of legal assistance.

7.2.1 UNAVAILABLE OR INADEQUATE PROCEDURES

Most of the traditional principles relating to extradition specified above are not included in the section relating to all other forms of legal assistance.²²⁹ However, the principle of reciprocity or double criminality applies to the surrender of objects (Section 66 IRG) as such measures may result in use of force vis-à-vis the affected persons. The principle of speciality relates to the transfer of data in particular.

7.2.2 INAPPROPRIATE BARS TO MUTUAL LEGAL ASSISTANCE

The same bars exist concerning mutual legal assistance as outlined above in extradition cases.

7.2.3. SAFEGUARDS

Some of the safeguards also provided in extradition cases are included in the other forms of legal assistance. Section 59 subs. 3 IRG opens the door to the application of all forms of protection granted under international human rights and German constitutional law.

This protection relates to cases where the death penalty may be issued, the protection of German citizens, in cases where there is fear of political persecution or any other form of unconstitutional behaviour by foreign authorities.²³⁰ However, there is an extensive amount of case law relating to all kinds of judicial guarantees. Thus, the fact that these guarantees are not explicitly regulated in the relevant chapter of the IRG make it difficult to determine in

²²⁶ Wolfgang Schomburg et. al. (eds.), *Ibid.*, Section 6, no. 46.

²²⁷ BVerwG NVwZ 1999, 1346 ff.

²²⁸ For details see Wolfgang Schomburg et. al. (eds.), *Ibid.*, Section 14, marginal number 74.

²²⁹ See Wolfgang Schomburg et. al. (eds.), *Ibid.*, Section 59, no. 16 et. seq.

²³⁰ *Ibid.*

which cases German courts may decline to assist foreign authorities.

In cases where the competent court declines to grant the assistance, it must refer the case to the Appeals Court (mostly *Oberlandesgericht*) for review.²³¹

Another important form of safeguard is, however, the possibility for the person affected to make a legal challenge.

²³¹ Section 61 IRG.

8 SPECIAL POLICE OR PROSECUTOR UNIT

There is a special police unit dealing with crimes under international law, but it is subject to the control of the Federal Prosecutor. There is, however, no special independent prosecution unit dealing with such crimes.

A Central Federal Agency to combat war crimes (*Zentralstelle für die Bekämpfung von Kriegsverbrechen, ZBKV*) was established at the Federal Criminal Police Office (*Bundeskriminalamt, BKA*) to deal with the cases concerning the former Yugoslavia and cooperation with the ICTY. The term “war crimes” in the name of this agency is a misnomer as the unit is responsible for investigating all crimes under international law, including crimes under the CCIL. Today, the size of the unit has been considerably reduced with only a handful of experienced police officers assigned to it. They are involved in cases relating to the genocide committed in Rwanda in 1994 and crimes concerning the former Yugoslavia.

As stated above (See Section 2), the competence for criminal investigations and prosecutions of crimes under the CCIL and the Criminal Code rests with the German Federal Prosecutor. According to Section 152 GVG the Police Services in the *Länder* work under the auspices of the prosecution services (*Hilfsbeamte der Staatsanwaltschaft*). However, the Federal Prosecutor mostly works in conjunction with the Federal Police Office (*Bundeskriminalamt*), which is responsible for crimes of federal importance transcending the *Länder*. The primary responsibility for the police in Germany rests with the federal states, however.

An exception to this allocation of responsibility is that the Federal Prosecutor has primary responsibility for the investigation of crimes under international law. After the coming into force of the CCIL, no additional staff appropriations or non-monetary resources have been allocated to the Federal Prosecution Office. Only three staff members are engaged part-time in the investigation and prosecution of crimes under the CCIL. In view of the large number of foreigners in Germany suspected of committing crimes under international law abroad against other foreigners, the large number of complaints that have been made, the general complexity of the cases and the repeated exercise of discretion by the Federal Prosecutor not to prosecute anyone for such crimes, this situation is astonishing. This, however, does not seem to resonate with the Federal Prosecution Office. In his statement before the German Parliament, Federal Prosecutor Hannich said, that his Office was not in need of additional funds.²³²

²³² See the Protocol of the Special Hearing before the German Parliament, at <http://www.bundestag.de/ausschuesse/a17/anhoerungen/voelkerstrafgerichtshof/index.html>.

Therefore, human rights organisations and legal experts have pushed for the establishment of a special investigation police or prosecution unit or a joint police-prosecution unit modelled on the units working in Canada, Sweden, Norway and in other European countries.²³³ Pending establishment of such a unit, a first step to improve the effectiveness of the investigation and prosecution of crimes under international law would be to increase significantly the staff of the Central Federal Agency and of the Federal Prosecution Office responsible for cases under the CCIL and the Criminal Code. At the expert hearing before the German Parliament's Committee on Human Rights and Humanitarian Aid (*Ausschuss für Menschenrechte und humanitäre Hilfe des Deutschen Bundestags*) on 24 October 2007, this suggestion was considered useful by parliamentarians.²³⁴ The majority of experts at this hearing argued for an increase of resources of the Federal Prosecution Office.²³⁵ A motion of the faction The Greens (*Bündnis 90/Die Grünen*) of 14 November 2007 then called on the Federal Government to establish a special unit for investigations of crimes under the CCIL similar to the NOVO war crimes unit, which forms part of the Dutch national crime squad and is integrated into the *Landelijk Parket* (Prosecution Services) where 32 experts are entrusted with investigations, and which is closely linked to a small team of six prosecutors in the Prosecution Services.²³⁶ According to the proposal by The Greens, the communication between the Federal Government and the Federal Prosecution Office pertaining to investigations and possible prosecutions should also be improved particularly between diplomatic representatives abroad (*Auslandsvertretungen*) and the border police authorities (*Grenzschutzbehörden*).²³⁷

This point was also addressed by the legal experts at the hearing.²³⁸ Based on the good cooperation between the immigration authorities, the ministries, the police forces and the prosecution office in the Netherlands several perpetrators of crimes under international law

²³³ Such special units exist in a number of other countries, including Canada, Denmark, Finland, Netherlands, Norway and Sweden. In addition, the French Minister of Justice has announced that France intends to establish such a unit.

²³⁴ The verbatim record of the expert hearing is available at: <http://www.bundestag.de/ausschuesse/a17/anhoerungen/voelkerstrafgerichtshof/prot.pdf>.

²³⁵ See the written statements of Kai Ambos, Wolfgang Kaleck and Géraldine Mattioli, available at: <http://www.bundestag.de/ausschuesse/a17/anhoerungen/voelkerstrafgerichtshof/>. See also the verbatim record of the expert hearing, page 10, available at: <http://www.bundestag.de/ausschuesse/a17/anhoerungen/voelkerstrafgerichtshof/prot.pdf>.

²³⁶ The motion (Drucksache 16/7137) is available at: <http://dip.bundestag.de/btd/16/071/1607137.pdf>.

Regarding the police and prosecution units in the Netherlands, see also the report of Human Rights Watch, *Universal Jurisdiction in Europe – The State of the Art*, June 2006, page 71 et seq., available at: <http://www.globalpolicy.org/intljustice/universal/2006/0606univjuris.pdf>.

²³⁷ See also the written statement of Kai Ambos, page 5: http://www.bundestag.de/ausschuesse/a17/anhoerungen/voelkerstrafgerichtshof/Stellungnahme_Ambos.pdf.

²³⁸ The verbatim record of the expert hearing is available at: <http://www.bundestag.de/ausschuesse/a17/anhoerungen/voelkerstrafgerichtshof/prot.pdf>

have been brought to justice on the basis of universal jurisdiction. The successes achieved are particularly due to the legal policy programme of the Netherlands entitled *No safe haven for war criminals* which has been incorporated in policy, legal practice and prosecution procedures in order to enforce the principle of universal jurisdiction.²³⁹ As this programme has proved to be very effective, Amnesty International has been urging the German Federal Government to consider the implementation of a similar programme in Germany, adapted to the specific needs of the German legal system (See Recommendations below).

²³⁹ See Human Rights Watch, *Universal Jurisdiction in Europe – The State of the Art*, June 2006, page 71 et seq., available at: <http://www.globalpolicy.org/intljustice/universal/2006/0606univjuris.pdf>.

9 JURISPRUDENCE

The effectiveness of investigation and prosecution of crimes under international law committed abroad is mixed. From 1997-2001 German courts issued several landmark decisions involving universal jurisdiction over such crimes.

9.1 OVERVIEW

The most important aspects of jurisprudence were developed in the *Jorgić* case, discussed below. First, German courts played a leading role on the international stage in the interpretation of genocide and the scope of jurisdiction permissible under international law. Second, courts tried persons for ordinary crimes, such as murder, based on universal jurisdiction provided by treaty – the Geneva Conventions of 1949 – over grave breaches, since grave breaches, as such, were not crimes under German law at the time. Third, the question whether there must exist a legitimizing link in order to exercise universal jurisdiction was highly debated. Although the judicially created requirement of a legitimizing link demanded by German courts in cases involving ordinary crimes was inconsistent with international law when applied to crimes under international law, it is important to emphasize that courts held that there is a duty to exercise jurisdiction if the link was established. It is also important to note that courts finally eliminated this link, at least for crimes under international law. After the enactment of the CCIL, the Federal Prosecutor's interpretations of the CCIL have essentially ended this creative era of German jurisprudence by the repeated and controversial refusals to initiate investigations or prosecutions under the new law.

9.2. PROSECUTION OF ORDINARY CRIMES

Germany is one of the states that have prosecuted persons for ordinary crimes committed abroad where the conduct did not also constitute a crime under international law as well.²⁴⁰ In a 1976 case, *Prosecutor v. Dost*, a Dutch national was convicted by a German court for selling drugs in the Netherlands.²⁴¹ This decision is significant not merely for that reason, but also because it appears to have led the courts to create a requirement not found in the statute that there must be an undefined “legitimizing link” between the suspect and Germany. Little thought was given to the entirely different nature of crimes under international law, which are crimes against the entire international community, not just against the victim and the state where the crime occurred. Although there was some

²⁴⁰ Austria also prosecuted a person for an ordinary crime under national law (fraud) committed by a Yugoslav national in Yugoslavia that did not involve conduct amounting to a crime under international law or a crime of international concern listed in a treaty. *Prosecutor v. Milan T.*, Oberste Gerichtshof, 29 May 1958, reprinted in *Oberste Gerichtshof, Serie Strafsachen*, XXIX, No. 32 (edited version in English published in 28 Int'l L. R. 341 (1963))

²⁴¹ *Prosecutor v. Dost*, *Bundesgerichtshof*, 20 October 1976, 74 Int'l L. Rep. 166.

academic criticism concerning the exercise of jurisdiction, it is also significant that the Netherlands did not protest and did not ask for extradition.²⁴² There also is another early case in which a Turkish citizen was reportedly convicted by a German court for drug dealing in Belgium.²⁴³

9.3.1. NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW IN GERMANY PRIOR TO THE ENACTMENT OF THE CCIL

The Criminal Code prior 30 June 2002 (and still applicable to crimes other than genocide, crimes against humanity and war crimes) has been described above.²⁴⁴ Two situations were investigated prior to the enactment of the CCIL: the period of the Argentinean military dictatorship from 1976-1983 and the international armed conflicts in the former Yugoslavia from 1991-1995. In addition, Germany started surrender proceedings to the ICTR against the former Rwandan Minister of Planning Augustin Ndirakobuca, who allegedly participated in the Rwandan genocide.²⁴⁵

9.3.1. CASES RELATED TO THE ARMED CONFLICT IN THE FORMER YUGOSLAVIA

The Federal Prosecutor initiated investigations in 128 cases against 167 persons concerning the armed conflict in the former Yugoslavia. In up to 100 cases the investigations were terminated due to a lack of evidence.²⁴⁶ Four cases led to a final judgment. In another case the suspect was transferred to the ICTY. The remainder of the cases are in the process of ongoing investigations.

9.3.1.1. DUŠKO TADIĆ CASE

Following the arrest of the Bosnian Serb Duško Tadić by the German authorities on 13 February 1994 in Munich, a German investigating judge of the Federal High Court decided to open proceedings against Tadić.²⁴⁷ He was charged with aiding and abetting genocide in concurrence with the ordinary crimes of murder and inflicting grievous bodily harm. The German Federal High Court held that the universality principle for genocide in Section 6 No. 1 of the Criminal Code was applicable. However, following an outdated view of the principle

²⁴² Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* 147-148 (2003).

²⁴³ A. Krikke, *De zaak-Dost: De rechtsmacht van de Bondsrepubliek bij d bestrijding van verdovende middelen*, *Recht en Kritiek* 1976, 249, 250 (cited in Reydam, *supra* note 124, 147 n. 36).

²⁴⁴ See above Sections 2 and 6.

²⁴⁵ Ndirakobuca has been arrested on 17 September 2007 in Frankfurt am Main. As of writing he was not transferred to the ICTR detention unit in Arusha.

²⁴⁶ German Federal Prosecutor, *Straftaten nach dem Völkerstrafgesetzbuch (Crimes under the Code of Crimes against International Law)*, <<http://www.generalbundesanwalt.de/de/voelker.php>> (last visited 12 March 2008).

²⁴⁷ Federal Supreme Court, 13 February 1994, BGH NSTZ 14 (1994), 232. For a note on this decision see Dietrich Oehler, *Verfolgung von Völkermord im Ausland*, in: *Neue Zeitschrift für Strafrecht (NSTZ)* 1994, 485.

of non-intervention, the Court reiterated the judicially created requirement that there is a legitimizing link before a German court could exercise universal jurisdiction over a person suspected of genocide.²⁴⁸ The Court held that such a link could be found in the presence of Tadić in Germany for several months.²⁴⁹ This reasoning of the Federal Supreme Court has been severely criticized by legal scholars since prosecution of crimes under international law is an accepted exception to the principle of non-interference.²⁵⁰

After finding that the principle of non-interference did not apply because of the legitimizing link, the court explained that it could not only could exercise universal jurisdiction, but that it was obliged to do so for two reasons:

“The crime of aiding and abetting to genocide coincides in casu with other serious offences which Germany is obliged to repress on the basis of international conventions. This circumstance has indirect legal effect also for the content of § 220a StGB at any rate with regard to the application of the universality principle.”

Furthermore, the prosecution of murders in Bosnia-Herzegovina by national courts fits in with numerous political, military and humanitarian measures of the international community, including Germany, aimed at countering the expansion and dominance policies in the former Yugoslavia, in particular in Bosnia-Herzegovina, and at protecting the civilian Muslim population from persecution, decimation and deportation. In those circumstances, there can be no question of an unlawful interference in the affairs of Bosnia-Herzegovina or of the present Republic of Yugoslavia. On the contrary, it would be inconceivable that Germany, in spite of the allegations and the provisions of § 6(1), would leave in peace a person who is

²⁴⁸ The court explained:

“German penal law applies by virtue of § 6 (1) to genocide committed abroad independently from the law of the territorial State (so-called universality principle). Prerequisites, however, are that international law does not forbid this and that there is a legitimate link (*ein legitimierender Anknüpfungspunkt*) in the concrete case; only then is the application of German penal law to extraterritorial conduct by foreigners justified. Absent such a link the forum State violates the non-interference principle which requires States to respect the sovereignty of other States. . . .”

²⁴⁹ Tadić was later convicted by the ICTY for war crimes and crimes against humanity for his participation in murder and maltreatment of Bosnian Muslims and Croats in Prijedor municipality in Bosnia and was sentenced to 25 years' imprisonment, ICTY Trial Chamber Sentencing Judgment 11 November 1999, IT-94-1-Tbis-R117, ICTY Appeals Chamber Judgment, 15 July 1999, IT-94-1-A; ICTY Trial Chamber Judgment, 7 May 1997, IT-94-1-T. The sentence was reduced to twenty years imprisonment on appeal on 26 January 2000, ICTY Appeals Chamber Judgment, IT-94-1-A and IT-94-1-Abis.

²⁵⁰ Kai Ambos, *Aktuelle Probleme der deutschen Verfolgung von „Kriegsverbrechen“ in Bosnien-Herzegowina*, in: *Neue Zeitschrift für Strafrecht* (NStZ) 1999, 226, 227; id. *Anmerkung*, in: *Neue Zeitschrift für Strafrecht* (NStZ) 1999, 404 et. seq.; id. *Immer mehr Fragen im internationalen Strafrecht*, in: *Neue Zeitschrift für Strafrecht* (NStZ) 2001, 628, 630; Claus Kreß, *Völkerstrafrecht in Deutschland*, in: *Neue Zeitschrift für Strafrecht* (NStZ) 2000, 617, 624; Frank Selbmann, *Der Tatbestand des Genozids im Völkerstrafrecht*, 111 et seq.; Gerhard Werle, *Anmerkung*, in: *Juristenzeitung* (JZ) 1999, 1181 et seq.

suspected of having committed the worst possible crimes in the conflict in Bosnia-Herzegovina and who has come voluntarily to Germany.”²⁵¹

9.2.1.2. NOVISLAV DJAJIĆ CASE

On 23 May 1997, the Bavarian Higher Regional Court found Novislav Djajic guilty of 14 cases of aiding murder and one case of attempted murder according to Section 211, subsection 27 of the Criminal Code. He was sentenced to five years' imprisonment.²⁵² The court held that it had jurisdiction according to Section 6 No. 9 of the Criminal Code. According to the court jurisdiction for the ordinary crime of murder derives from the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. Article 147 obliges state parties to prosecute “wilful killing”, inhuman treatment”, and “unlawful confinement of a protected person” committed in international armed conflicts. The duty to prosecute grave breaches of the Fourth Geneva Conventions according to their Articles 146, 147 exists for every state party, not only the state where the crimes have been committed. In addition, the court stated that it was applying the representation principle – a form of universal jurisdiction - codified in Section 7 subparagraph 2 No. 2 of the Criminal Code.

9.3.1.3 NIKOLA JORGIĆ CASE

On 26 September 1997, the Higher Regional Court of Düsseldorf (*Oberlandesgericht Düsseldorf*) convicted the Bosnian Serb Nikola Jorgić of 11 counts of genocide according to Section 220 a subs, Nos. 1 and 3 of the Criminal Code in connection with murder according to Section 211 of the Criminal Code, physical injury according to Section 223a of the Criminal Code (in the version then applicable) and unlawful deprivation of liberty according to Section 139, subsection 1 and 2 of the Criminal Code. The court sentenced Jorgić to life imprisonment.²⁵³ It concluded that German jurisdiction for genocide can be based on Section 6 No. 1 of the Criminal Code. The court concurred with the Federal Supreme Court in the *Tadić* case that it is necessary to establish a legitimizing link. This link was seen in the long-term presence of the accused in Germany.²⁵⁴ The court held further that it had jurisdiction over the ordinary crimes of murder according to section 211 of the Criminal Code, physical injury according to Section 223 of the Criminal Code and unlawful deprivation of liberty according to Section 139 of the Criminal Code. Like the Higher Regional Court of Bavaria the court relied on Section 6 No. 9 of the Criminal Code and concluded that this section applies to the Fourth Geneva Convention. The court concluded that all state parties have the obligation to punish grave breaches committed by other state parties in international armed conflicts even if the acts were not committed on the territory of the state who initiate the criminal proceedings.²⁵⁵

²⁵¹ *Prosecutor v. Tadić*, Judgment, Federal Supreme Court, 13 February 1994 [*BGH-Ermittlungsrichter, Beschluß vom 13. Februar 1994, 1 BGs 100/94*] (abstract of this case in English obtainable from <http://www.icrc.org/ihl-nat/ihl-nat>). The English translation is based on the translation in Reydams, *supra*, n. 66. A note on this decision by Dietrich Oehler is in *Neue Zeitschrift für Strafrecht* (NSTZ) 1994, 485

²⁵² Higher Regional Court of Bavaria, Judgment, 23 May 1997, NJW 1998, 392. For further reading see Kai Ambos, *Neue Zeitschrift für Strafrecht* (NSTZ) 1998, 138; Christoph Safferling, *Am. J. Int'l L.* 92 (1998), 528, and Frank Selbmann, *Der Tatbestand des Genozid im Völkerstrafrecht*, 115.

²⁵³ Higher Regional Court at Düsseldorf, Judgment, File No. IV 26/96 2 StE 8/96 (not published).

²⁵⁴ *Jorgić* Judgment, p. 153.

²⁵⁵ *Ibid.*, p. 156 *et seq.*

The conviction and sentence were confirmed on appeal by the Federal Court of Justice²⁵⁶. The court said that several acts committed in one criminal context constitute only one act of genocide. The Federal Supreme Court upheld the findings regarding the necessity for a legitimizing link in order to exercise universal jurisdiction. In the light of doubts that have been expressed by some scholars about whether states parties to the Genocide Convention can exercise universal jurisdiction over genocide, its explanation of why a national court could exercise universal jurisdiction over genocide deserves to be set out at length:

"The conviction of the accused by a German court on the basis of the universality principle is not forbidden under international law.

Such a prohibition cannot be derived from Article VI of the Genocide Convention. To be sure, the Convention does not incorporate the universality principle - whereas the draft did - but this is because a few countries were opposed to any international jurisdiction given the political character of the protected right. However, this did not lead to the inclusion of a prohibition. The view that the provisions [of Article VI] are not exhaustive is not only based on the drafting history; the opinion that genocide can only be punished by a court of the territorial State or by an international tribunal is irreconcilable with the obligation imposed by Article I on all States to repress the international crime of genocide. Since genocide is most of the time condoned, if not committed, by the authorities, effective repression by the territorial State cannot be expected. An international tribunal envisaged by the Genocide Convention did not exist until the creation of the ICTY in 1993, the ICTR in 1994, and the ICC by the not yet entered into force ICC Statute. The ICTY can at this moment dispose of maximum ten cases per year. Therefore, the repression of the many crimes committed in execution of the policy of 'ethnic cleansing' urges itself upon national courts.

This construction of the Genocide Convention is also supported by Article 9(1) of the ICTY Statute which, independently of Article VI of the Convention, provides for concurrent jurisdiction of national courts over genocide. The Prosecutor of the ICTY, who together with the Trial Chambers has authority to interpret the Statute, understands under 'national courts' not only courts of the territorial State but courts of all other States. This follows from the fact that the Prosecutor of the ICTY in this and other cases declined to take over the proceedings and applauded the prosecution by German authorities. If the international community of States was of the opinion that the provisions of Article VI of the Genocide Convention were exhaustive, it would have made this clear in Article 9 of the Statute by limiting concurrency of jurisdiction to the courts of Bosnia and Herzegovina, or better to the courts of the States of the former Yugoslavia. Further, the International Court of Justice in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime Genocide (Bosnia and Herzegovina v. Yugoslavia) has held that Convention's right and obligations apply *erga omnes* and that the conventional obligation to prevent and repress genocide has no territorial limits.

²⁵⁶ Federal Court of Justice, Judgment, 30 April 1999, BGH NStZ 19 (1999), 396 *et seq.* For a comment on the case see Kai Ambos, *Anmerkung*, in: *Neue Zeitschrift für Strafrecht* (NStZ) 1999, 404.

From the absence of the universality principle in the Genocide Convention follows only that State parties are not obliged to adopt this principle and prosecute a foreigner for acts of genocide committed abroad. When it comes to the repression of genocide, a crime under customary and conventional international law, no international norm prohibits State parties to do more than the conventional minimum."²⁵⁷

Furthermore, the Court held that in cases of genocide German courts have an accessory competence to punish murder and manslaughter. In addition, the court applied the representation principle – a form of universal jurisdiction - codified in Section 7 subparagraph 2 No. 2 of the Criminal Code. When discussing jurisdiction, unlike the Higher Court of Düsseldorf, the Federal Supreme Court did not rely on Section 6 No. 9 of the Criminal Code.

The judgment was upheld in 2001 by the Federal Constitutional Court, which rejected a constitutional challenge contending that customary international law and Article VI of the Genocide Convention prohibited the exercise of universal jurisdiction over genocide. First, the court held that a customary international law prohibition on the exercise of universal jurisdiction would be contrary to the obligations of Germany under Article I of the Genocide Convention, a derogation that would be impermissible since the prohibition of genocide is part of *jus cogens*. Second, it reaffirmed the Federal Supreme Court's conclusion that Article VI did not prohibit states parties from exercising universal jurisdiction over genocide:

“The universality principle applies to certain acts that endanger the legal interests of the international community of States. It differs from the representation principle codified in § 7 (2) (2) StGB in that it does not require double criminality and non-extradition (para. 37). Whether the Genocide Convention contains a provision on universal jurisdiction has to be examined through interpretation. International conventions are to be interpreted from their text in accordance with their object and purpose with due regard to general international law. The lower courts' interpretation of § 6 (1) StGB in conjunction with Article VI of the Genocide Convention regarding the scope application of German law is at any rate neither manifestly untenable, nor impossible to maintain under no imaginable circumstances and hence arbitrary (para. 38). According to a textual interpretation the lower courts have constitutionally correctly determined that Article VI of the Genocide Convention in any event does not contain a prohibition on German criminal jurisdiction. On the other hand, the Convention does clearly not regulate the question of jurisdiction exclusively, because, for example, the active or passive universality principle are not mentioned. The courts have thereupon interpreted Article I of the Genocide Convention according to its object and purpose that the Convention intended effective punishment; consequently, the fact that there is no mention of the universality principle only means that the contracting Parties are not obliged to prosecute, although they are competent on the basis of this principle. It does not invite objections to prefer in some cases a 'systematic-teleological' interpretation above a textual interpretation of treaties. This

²⁵⁷ *Public Prosecutor v. Jorgić*, Judgment, Federal Supreme Court, 30 April 1999 [*Bundesgerichtshof, Urteil vom 30. April 1999* - 3 StR 215/98]. The English translation is based on the translation in Reydams, *supra*, n 124. A comment on the case by Kai Ambos is in *Neue Zeitschrift für Strafrecht (NSZ)* 1999, 404.

applies in particular in the field of criminal jurisdiction over extraterritorial conduct on the basis of international conventions, because they are often vague on the issue of jurisdiction. Genocide, the most grave violation of human rights, is the classical example of the universality principle, whose function precisely is to close all loopholes in the prosecution of crimes against the fundamental legal interests of the community of States (para. 38). Yet, the drafting history of the Genocide Convention indicates that was deliberately not included. Article VII of the initial draft contained the universality principle. In the draft of the Ad Hoc Committee, however, the universality principle was abandoned in favor of the territoriality principle. Sovereignty concerns and considerations of accession influenced that decision. There are, however, no constitutional objections against the decision of the lower courts not to attribute decisive importance to the drafting history. The preparatory work of a treaty is, according to Article 32 of the Vienna Convention of the Law of Treaties, only a 'supplementary means of interpretation', to which recourse may only be had when the interpretation of according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. None of these alternatives is present in this case. The interpretation according to Article 31 clearly leads the courts the conclusion that Convention allows prosecution on the basis of the universality principle. This result is not manifestly absurd or unreasonable (para. 41)."²⁵⁸

The Constitutional Court left open the question whether a link to Germany was required in universal jurisdiction case.

On 12 July 2007 the European Court of Human Rights dismissed Jorgić's complaint against the German court decisions.²⁵⁹ The European Court of Human Rights ruled:

"68. In determining whether the domestic courts' interpretation of the applicable rules and provisions of public international law on jurisdiction was reasonable, the Court is in particular required to examine their interpretation of Article VI of the Genocide Convention. It observes, as was also noted by the domestic courts [...], that the Contracting Parties to the Genocide Convention, despite proposals in earlier drafts to that effect, had not agreed to codify the principle of universal jurisdiction over genocide for the domestic courts of all Contracting States in that Article [...]. However, pursuant to Article I of the Genocide Convention, the Contracting Parties were under an *erga omnes* obligation to prevent and punish genocide, the prohibition of which forms part of the *jus cogens*. In view of this, the national courts' reasoning that the purpose of the Genocide Convention, as expressed notably in that Article, did not exclude jurisdiction for the punishment of genocide by States whose laws establish extraterritoriality in this respect must be considered as reasonable (and indeed convincing). Having thus reached a reasonable and unequivocal interpretation of Article VI of the Genocide Convention in accordance with the aim of that Convention,

²⁵⁸ *Jorgić* case, Judgment, Constitutional Court, 12 December 2000 (as summarized in Reydam, *supra*, n. 124). para. 16. [*Bundesverfassungsgericht* (BVerfG), 2 BvR 1290/99 vom 12.12.2000, Absatz No. (1-49) (obtainable from <http://www.bverfg.de>)].

²⁵⁹ E.Ct.H.R., *Jorgić v. Germany*, Judgment, 12 July 2007, Appl. No. 74613/01.

there was no need, in interpreting the said Convention, to have recourse to the preparatory documents, which play only a subsidiary role in the interpretation of public international law (see Articles 31 § 1 and 32 of the Vienna Convention on the Law of Treaties of 23 May 1969).

69. The Court observes in this connection that the German courts' interpretation of Article VI of the Genocide Convention in the light of Article I of that Convention and their establishment of jurisdiction to try the applicant on charges of genocide is widely confirmed by the statutory provisions and case-law of numerous other Contracting States to the Convention (for the Protection of Human Rights) and by the Statute and case-law of the ICTY. It notes, in particular, that the Spanish *Audiencia Nacional* has interpreted Article VI of the Genocide Convention in exactly the same way as the German courts [...]. Furthermore, Article 9 § 1 of the ICTY Statute confirms the German courts' view, providing for concurrent jurisdiction of the ICTY and national courts, without any restriction to domestic courts of particular countries. Indeed, the principle of universal jurisdiction for genocide has been expressly acknowledged by the ICTY [...] and numerous Convention States authorize the prosecution of genocide in accordance with that principle, or at least where, as in the applicant's case, additional conditions – such as those required under the representation principle – are met. . .”

9.3.14. MAKSIM SOKOLOVIĆ CASE

On 29 November 1999, the Higher Regional Court at Düsseldorf convicted the accused for inflicting physical injuries on Muslim civilians in five cases and unlawfully detaining Muslim civilians in 56 cases. It also held that this conduct qualified as aiding genocide. Sokolović was sentenced to nine years' imprisonment.²⁶⁰ The Higher Regional Court concluded that there was a legitimizing link because the accused had been a resident of Germany for twenty years and received a pension from the German government.

On 21 February 2001 the Federal Court of Justice confirmed the judgment.²⁶¹ The court held that German courts had jurisdiction for genocide under Section 6 No. 1 of the Criminal Code and for the crime of deprivation of liberty in Section 6 No. 9 of the Criminal Code. According to the findings of the Court, the duty to prosecute unlawful detention derives from the Fourth Geneva Convention of 1949. German courts have the obligation to prosecute such crimes, if an international armed conflict occurs and the relevant crimes constitute a grave breach in the meaning of Article 147 of the Fourth Geneva Convention. In its judgment the Federal Court of Justice held tentatively that it might not be necessary to require a legitimizing link if jurisdiction is based on Section 6 No. 9 of the Criminal Code.²⁶²

²⁶⁰ Higher Regional Court of Düsseldorf, Judgment, 29 November 1999, File No. IV 9/97 2 StE 6/97 (not published). For further reading, see Frank Selbmann, *Der Tatbestand des Genozid im Völkerstrafrecht*, 117 et. seq.

²⁶¹ Federal Supreme Court, Judgment, 21 February 2001, BGH in: *Neue juristische Wochenschrift (NJW)* 2001, 2728.

²⁶² BGH in: *Neue Juristische Wochenschrift (NJW)* 2001, 2728, 2731 et. seq.

9.3.1.5. KJURADJ KUSLIJĆ CASE

On 15 December 1999, the Bavarian Higher Regional Court convicted Kjuradj Kusljić, the former police commander of Vrbnica, which is situated 40 kilometers south of Banja Luka in Bosnia and Herzegovina. The court found Kusljić guilty of genocide and six cases of murder and sentenced him to life imprisonment. Before the conflict in the former Yugoslavia broke out, Kusljić resided in Germany. On 21 February 2001, the Federal Supreme Court confirmed the sentence, but convicted Kusljić for aiding in genocide.²⁶³ According to the Federal Court of Justice, the Bavarian Higher Regional Court could not conclude from the factual findings that Kusljić acted with the special intent to commit genocide. Since the intent was not proved the findings only allowed a conviction of aiding in genocide.²⁶⁴ Based on the findings of the Sokolović judgment, the Court concluded that it had jurisdiction over the six cases of murder under Section 6 No. 9 of the Criminal Code since these crimes constitute grave breaches in the meaning of Article 146 and 147 of the Fourth Geneva Convention.²⁶⁵

9.3.2. CASES RELATED TO THE ARGENTINE ARMED FORCES

Victims and their relatives backed by support by human rights organisations lodged complaints in Germany in relation to the crimes committed during the period of the Argentine military government (1976 – 1983). Between 1998 and 2004, 39 such complaints were submitted accusing 89 Argentine military leaders and one manager of Daimler-Chrysler AG of being involved in enforced disappearances of dissidents.²⁶⁶ In this regard, several decisions have been passed regarding the jurisdiction of the German courts.

The Federal Court of Justice confirmed the jurisdiction of the State Court of Nuremberg-Fürth with regard to some complaints under Section 13 a subs. 1 Code of Criminal Procedure and Section 7 subs. 1 Criminal Code.²⁶⁷ The latter section incorporates passive personality jurisdiction, that is, when victims were German. Hence, for most of the complaints in question Germany's jurisdiction was established under this principle and not under universal jurisdiction, even though that section also provides for universal jurisdiction.

9.3.2.1 CASES CONCERNING DESCENDANTS OF JEWS OF GERMAN ORIGIN

With regards to the cases concerning descendants of Jews of German origin who had fled to Argentina to escape the Nazi regime and were murdered by Argentine security forces, the German prosecution decided to abandon prosecution with reference to sect. 153 c German

²⁶³ Federal Court of Justice, Judgment, 21 February 2001, BGH NJW 2001, 2732. For further reading see Frank Selbmann, *Der Tatbestand des Genozid im Völkerstrafrecht*, 119 et. seq.

²⁶⁴ BGH in: *Neue Juristische Wochenschrift (NJW)* 2001, 2732, 2733.

²⁶⁵ BGH in: *Neue Juristische Wochenschrift (NJW)* 2001, 2732, 2734.

²⁶⁶ For this and the following see Wolfgang Kaleck, *German International Criminal Law in Practice: From Leipzig to Karlsruhe*, in Wolfgang Kaleck/Michael Ratner et al. (eds.), *International Prosecution of Human Rights Crimes* (Berlin 2007), 93, 100.

²⁶⁷ This decision is unpublished.

Criminal Procedural Code (expediency principle *Opportunitätsprinzip*).²⁶⁸ This decision was mainly based on two claims: First of all, it was contended that the German authorities lacked jurisdiction because the victims were not German nationals at the relevant time, and, thus, the jurisdiction with regards to the passive personality principle was not applicable. No reference to universal jurisdiction was made. The second contention was that since the investigations had not established probable cause as to the existence of murder in the reported cases, only other provisions of the Criminal Code would have been applicable. However, these provisions are subject to statutes of limitations which prevented the further prosecution of these crimes.²⁶⁹ A legal action enforcement proceeding (*Klageerzwingungsverfahren*)²⁷⁰ has been brought against this decision after a complaint remained unsuccessful. The decision in this action is still pending.²⁷¹

The decision to close the investigations by the Prosecutor's Office in Nuremberg-Fürth has been criticised as "*profoundly cynical*" by legal scholars.²⁷² According to these experts, the first argument is based on a too formal understanding of sect. 7 of the Criminal Code. The descendants of Jews of German origin had already been deprived of their German nationality by Nazi laws after their flight. It is entirely accepted throughout the whole German legal post-war community (and was also affirmed by the Federal Constitutional Court of Germany) that these laws of revocation do not have any legal validity since they are considered as "blatantly unjust".²⁷³ However, in order not to impose the German nationality after the war on the Jews of German origin (and to avoid a re-victimisation), the German Constitution left it to the former nationals to activate their nationality again (Article 116 al.2 of the German Constitution). In the cases discussed here, the victims had not (yet) made such declarations to re-activate the German nationality, the administrative processes to prepare the physical handing over of the nationality documents had not been completed or, solely, the handing over failed because the victims had already been arrested. Thus, in a formal understanding, the victims had not been German nationals. However, this interpretation in fact reinforced the injustice which formerly had been done to the Jews of German origin, and, therefore, runs completely counter the spirit and purpose of Article 116 al. 2 of the German Constitution.²⁷⁴

²⁶⁸ Decision of the Prosecutor's Office of Nuremberg-Fürth, 8th July 2004, file reference 407/Js41063/98).

²⁶⁹ *Ibid.*, p. 11ff.

²⁷⁰ Under Section 172 of the Criminal Procedure Code, victims can bring an action against the prosecution to Court in cases where the prosecution refused to open an investigation. See Section 5.

²⁷¹ Newsletter December 2006 of the "Coalition against Impunity" (online: <http://www.menschenrechte.org/Koalition/rundbrief/rundbrief15-2006.pdf>)

²⁷² Denis Basak, *Die dritte Entrechtung*, in: *Zeitschrift für internationale Strafrechtsdogmatik (ZIS)* 2007, 381.

²⁷³ BVerfGE 23, 98ff., 105ff.; 54, 53, 67f.

²⁷⁴ Denis Basak, *Ibid.*, 382.

There has also been severe criticism of the second ground for declining to prosecute: The failure to establish probable cause as to murder is mainly based on the absence of evidence, *i.e.*, the missing bodies. Considering the normal 'procedures' of Argentinean (para-) military units towards 'subversive individuals' (disposal of bodies by burning or throwing them out of flying helicopters into the high sea), this reasoning has no merit. There have been almost no cases of any of the persons who were "disappeared" in Argentina "reappearing" since the first year after the restoration of democracy in 1983.²⁷⁵

9.3.2.2. CASES OF ELISABETH KÄSEMANN AND KLAUS ZIESCHANK

The investigations in two other cases led to the issuance of arrest warrants by the District Court in Nuremberg with regard to five Argentine military leaders, including former State President and junta commander Jorge Videla and Emilio Massera on 28 November 2003.²⁷⁶ The suspects allegedly have murdered the German student, Elisabeth Käsemann, by way of indirect perpetration using their organisational authority with the intention of covering up other crimes, which were committed against her, such as unlawful deprivation of liberty and causing bodily harm. A diplomatic and judicial tug-of-war followed: First, the extradition request was denied by the Argentine government.²⁷⁷ This decision was successfully appealed by the German government in Argentina and the case transferred to the original court for new decision. Unfortunately, based on the revocation of the amnesty laws in Argentina, the court found that these crimes should now be tried in Argentina in the course of a mass trial for crimes committed by the 1st army corps. As of May 2007, there had not even been an interrogation of Videla in this regard although the Argentine prosecutorial service has actually started their investigations.²⁷⁸ The Supreme Court of Argentina has denied Germany's extradition request for Videla on 2 July 2008.²⁷⁹

9.3.3. CASE AGAINST AUGUSTO PINOCHET

There was also a brief investigation by Germany into the allegations against Augusto Pinochet, the former President of Chile, following complaints by victims, who alleged that they had suffered torture during the Chilean military government.²⁸⁰ After the Federal

²⁷⁵ *Ibid.*, p. 383f.

²⁷⁶ 57 Gs 13320-13322/03; for this and the following see Wolfgang Kaleck, *German International Criminal Law in Practice: From Leipzig to Karlsruhe*, in Wolfgang Kaleck/Michael Ratner et al. (eds.), *International Prosecution of Human Rights Crimes* (Berlin 2007), 100, 101.

²⁷⁷ Wolfgang Kaleck, *German International Criminal Law in Practice: From Leipzig to Karlsruhe*, in Wolfgang Kaleck/Michael Ratner et al. (eds.), *International Prosecution of Human Rights Crimes* (Berlin 2007), 103.

²⁷⁸ Newsletter May 2007 of the "Coalition against Impunity" (online: <http://www.menschenrechte.org/Koalition/rundbrief/rundbrief16-2007.pdf>)

²⁷⁹ See for further information ECCHR, at <http://www.ecchr.eu/cases/articles/argentina.html>.

²⁸⁰ For this and the following see Wolfgang Kaleck, *German International Criminal Law in Practice: From Leipzig to Karlsruhe*, in Wolfgang Kaleck/Michael Ratner et al. (eds.), *International Prosecution of Human Rights Crimes* (Berlin 2007), 102.

Supreme Court of Justice of Germany transferred the case to the Higher Regional Court at Düsseldorf under Section 13a of the Code of Criminal Procedure,²⁸¹ the German prosecution decided to transfer the case to the Chilean authorities, after Pinochet's transfer to Chile.

9.4. CASES RELATED TO THE ALLEGED VIOLATIONS OF THE CCIL

In marked contrast to the vigorous investigation and prosecution of universal and passive personality jurisdiction cases by the Federal Prosecutor under the Criminal Code prior to the enactment of the CCIL in 2002, since that date the Federal Prosecutor has taken almost no action to investigate or prosecute universal jurisdiction cases under the CCIL or, indeed, the Criminal Code, regardless whether the suspect was in Germany or abroad. Neither the previous Federal Prosecutor Kai Nehm nor the current Prosecutor Monika Harms have been actively pursuing cases under the new CCIL. (The strong activities during the Balkan conflicts can be attributed to international pressure and national interests.) In some cases, the decision has been made for lack of evidence. In others, the Federal Prosecutor has refused to investigate for such reasons as:

- the alleged immunity of current or former officials based on flawed reasoning;
- there was no evidence that the state of the suspects' nationality was not able and willing to investigate the crimes (improperly placing the burden on the prosecutor to demonstrate otherwise);
- the crimes were being investigated by the state of the suspects' nationality, even though the suspects were not the subject of that investigation;
- the suspect's presence was not anticipated in Germany; and
- the suspect had fled Germany after the complaint was made.

From 30 June 2002 to 5 February 2007, 62 complaints under the CCIL were lodged. According to the Federal Ministry of Justice, in 19 cases the complaints were related to the war in Iraq (including alleged acts of torture in Abu Ghraib and Guantanamo), in 16 cases they involved the conflict in the Middle East, ten cases involved the alleged persecution of Falun Gong practitioners in China and an undisclosed number of cases relating to human rights abuses in Africa, the Caucasus and other regions.²⁸² In two cases the Federal Prosecutor opened a preliminary investigation, but neither investigation led to a prosecution. One of these cases was based on universal jurisdiction. The other case was related to alleged acts on

²⁸¹ Decision, Federal Supreme Court, 18 November 1998 (Bundesgerichtshof, Beschluss vom 18. November 1998), 2 ARs 47/98, 2 Ars 474/98, printed in *H. Albrecht, K. Ambos (Eds.), Der Fall Pinochet(s), Auslieferung wegen staatsverstärkter Kriminalität?*, p. 100. For a press briefing of the Federal Supreme Court on this decision see *ibid.* p. 100-102.

²⁸² See the answers of the Federal government to the request of the parliamentarians Florian Toncar (FDP), BT-Drs. 16/2692 of 22 September 2006 and Wolfgang Wieland and others (*Bündnis90/Die Grünen*), BT-Drs. 16/4267 of 5. February 2007.

the territory of Germany. Not all of the complaints and decisions have been made public.²⁸³

9.4.1. PRELIMINARY INVESTIGATION IN IGNACE MURWANASHYAKA CASE

In April 2006 the Federal Prosecution Office opened (on its own initiative) a preliminary investigation against Ignace Murwanashyaka.²⁸⁴ Murwanashyaka was the leader of a Hutu militia Democratic Forces for the Liberation of Rwanda and is allegedly responsible for violations of humanitarian law in Eastern Congo. He was arrested in Germany for violations of immigration laws and released shortly after. The case was dismissed because the Federal Prosecutor did not find enough evidence of Murwanashyaka's involvement in crimes under international law.²⁸⁵ The decision was not made public and its reasoning can thus not be discussed. However, the case shows that it would be preferable for the Federal Prosecutor, as police and prosecutors do in other countries, to seek cooperation with human rights organisations that could assist in providing information.

9.4.2. COMPLAINTS WHICH HAVE BEEN DISMISSED WITHOUT FORMAL INVESTIGATION PROCEEDINGS

A number of well-documented complaints have been dismissed, often on the inappropriate ground that current or former officials had immunity from prosecution for crimes under international law.

9.4.2.1. JIANG ZEMIN

The first case under the CCIL, which was made public, is the complaint against the former President of China Jiang Zemin and other members of the Chinese government relating to the alleged persecution of Falun Gong practitioners as a crime against humanity.²⁸⁶ The complaint was lodged in November 2003. On 24 June 2005, the Federal Prosecutor announced the decision not to open an investigation.²⁸⁷ In the case of Jiang Zemin the Federal Prosecutor General took the view that Jiang Zemin as a former head of state enjoys immunity. In this decision the Office not only departed from the House of Lords judgment in the *Pinochet* case, but also from the decisions of German courts in the *Jorge Videla* case. In its reasoning the Federal Prosecutor misapplied the *Arrest Warrant* judgment of the ICJ without analysing the decision properly.²⁸⁸ Regarding the other persons named in the

²⁸³ A detailed overview is given in Nils Geißler/Frank Selbmann, *5 Jahre Völkerstrafgesetzbuch – Eine kritische Bilanz, Humanitäres Völkerrecht - Informationsschriften* Issue 20 (2007), 160.

²⁸⁴ See R. Müller, *Nehm ermittelt gegen Hutu-Führer*, FAZ, 27 April 2006, 6.

²⁸⁵ See C. Ritscher, *Praxis der Strafverfolgung von Völkerstraftaten in Deutschland*, presentation held at the conference The ICC at Work, 21 and 22 September 2007 in Berlin.

²⁸⁶ For a detailed overview see Wolfgang Kaleck, *German International Criminal Law in Practice: From Leipzig to Karlsruhe*, in Wolfgang Kaleck/Michael Ratner et al. (eds.), *International Prosecution of Human Rights Crimes*, (Berlin 2007), 106 et. seq. and Nils Geißler/Frank Selbmann, *5 Jahre Völkerstrafgesetzbuch – Eine kritische Bilanz, Humanitäres Völkerrecht - Informationsschriften* Issue 20 (2007), 160

²⁸⁷ Decision of the Federal Prosecutor of 24 June 2005; File No. 3 ARP 654/03-2; <http://www.diefirma.net/>.

²⁸⁸ Critically Nils Geißler/Frank Selbmann, *5 Jahre Völkerstrafgesetzbuch – Eine kritische Bilanz*,

complaint the decision is based on Section 153 f subs. 1 of the Criminal Procedure Code. According to the Federal Prosecutor, the suspected persons were not present in Germany and their presence could not be anticipated in future.

9.4.2.2. RAMZAN KADYROW

In a similarly flawed decision, the Federal Prosecutor granted immunity to the then acting Vice-President of Chechnya, Ramzan Kadyrow.²⁸⁹ The Federal Prosecutor again misapplied the *Arrest Warrant Case* of the ICJ and held without detailed reasoning that Kadyrow enjoyed immunity. He did not take into account that the ICJ judgment applies only to serving foreign ministers, heads of government and presidents of states. The fact that Kadyrow was only a vice-president of a local entity was overlooked.

9.4.2.3. DONALD RUMSFELD I

The first complaint against the former Defence Secretary Rumsfeld and other high-ranking members of the US-Military and the Secret Service was made by the Center for Constitutional Rights to the Federal Prosecutor on 30 April 2004. The complaint concerned incidents in the Abu Ghraib prison in 2003 and 2004. US Defence Secretary Donald Rumsfeld was expected to attend the Munich Security Conference on 13 February 2005. Two days before the expected arrival the Federal Prosecutor announced the decision that he would not be opening an investigation.²⁹⁰ The decision was based on Section 153 f subs. 2 No. 4 of the Criminal Code of Procedure. The Federal Prosecutor interpreted Section 153 f of in the light of Article 17 of the Rome Statute and held that universal jurisdiction can be only exercised when the primary jurisdiction (Iraq or USA) is unable or unwilling to investigate. The Federal Prosecutor claimed that there was no indication that US courts had refused to take action.²⁹¹ The complainants appealed the decision. The Higher Regional Court of Stuttgart found the request inadmissible.²⁹² The court asserted that since the prosecutor made use of his

Humanitäres Völkerrecht - Informationsschriften Issue 20 (2007), 160, 163 et seq. and Claus Kreß, *Nationale Umsetzung des Völkerstrafgesetzbuches, Öffentliche Anhörung im Ausschuss für Menschenrechte und humanitäre Hilfe des Deutschen Bundestages*, 24.10.2007, **BT Ausschuss-Drucksache** 16(17)0073.

²⁸⁹ Decision of the Federal Attorney General, 28 April 2005, File No. 3 ARP 35/05-2 (not published).

²⁹⁰ Decision of the Federal Attorney General, 10 February 2005, File No. 3 ARP 207/04-2, published in *Juristenzeitung* (JZ) 2005, p. 311. The English translation is available at http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=1xiADJ00Qx&Content=472.

²⁹¹ The decision was criticised in the legal literature, see among others Kai Ambos, *International Core Crimes, Universal Jurisdiction and § 153f of the German Criminal Procedure Code: A Commentary on the Decisions of the Federal Prosecutor General and the Stuttgart Regional Court in the Abu Ghraib/Rumsfeld Case*, *Criminal Law Forum* 2007, 43-58 and A. Fischer-Lescano, *Torture in Abu Ghraib. The Compliant against Donald Rumsfeld under the German Code against Crimes under International Law (Völkerstrafgesetzbuch)*, 6 *German Law Journal* No. 3 (1 March 2005), www.germanlawjournal.com.

²⁹² OLG Stuttgart, in: *Neue Zeitschrift für Strafrecht (NSZ)* 2006, 117 An English translation of the decision can be found under: http://www.ccr-ny.org/v2/legal/september_11th/docs/German_HigherRegionalCourt_decison.pdf.

discretion and had not exceeded its boundaries the complaint was inadmissible. Since the complainants raised concerns that the Federal Prosecutor's decision was politically motivated, they drew the refusal to investigate to the attention of the UN Special Rapporteur for the Independence of Judges and Lawyers.

9.4.2.4. DONALD RUMSFELD II

The Center for Constitutional Rights and other human rights groups lodged a second complaint against former Secretary of Defence Donald Rumsfeld and others on 14 November 2006. The Federal Prosecutor dismissed this second complaint on 27 April 2007, based on Section 153 lit. f.²⁹³ Regarding the acts committed between 15 September 2003 and 1 January 2004, the Federal Prosecutor referred to the first decision. Furthermore, the Prosecutor gave the following reasons for the decision:

- The acts were not committed on German territory.
- There was no evidence that orders, which are inconsistent with the Geneva Conventions, were given by persons based in German territory.
- The suspects were not present in Germany and such presence could not be anticipated.
- None of the suspects had occupational, familiar or personal ties to Germany. The theoretical possibility that a suspect enters German territory in future is not a sufficient basis to open an investigation.
- The Prosecutor understood Section 153 f as a tool to avoid superfluous investigations.
- It would be necessary to conduct investigations either in the United States or in Iraq. Since German authorities cannot investigate abroad it would be necessary to obtain for legal assistance, which would hardly be possible.

The Federal Prosecutor dismissed a motion to reconsider the decision. The applicants filed a legal action enforcement proceeding against the decision to the Higher Regional Court of Frankfurt. As of 1 October 2008 the Court had not issued a decision.

9.4.2.5. ZAKIR ALMATOV

At an undisclosed date the Uzbek Minister of Interior, Zakir Almatov, entered Germany for medical treatment. Almatov is allegedly responsible for the killing of 200 to 700 people in Andijan in May 2005 and systematic torture in Uzbekistan. On 5 December 2005, the German section of Amnesty International called on the Federal Prosecutor to open an investigation. On 12 December 2005 Human Rights Watch lodged a separate complaint against Almatov and eleven other leading members of the Uzbek security forces. After learning of these complaints Almatov left Germany under unclear circumstances.

²⁹³ Federal Prosecutor, Press Release, No. 9/2007, 27 April 2007.

The Federal Prosecutor announced on 30 March 2006 that he would not open an investigation, since Almatov was not present in Germany and such a presence could not be anticipated.²⁹⁴ The decision was based on Section 153 f subs. 2. Its reasoning is particularly disappointing since the prosecution stated that it was unable to prove whether or not there were systematic acts of torture in Uzbekistan. The findings were based solely on official statements by the Uzbek government declaring that no such acts were occurring. The Federal Prosecutor concluded, without requesting legal assistance, that applications for legal assistance would fail. Furthermore, the prosecutor stated that the killings had been well documented by human rights organisations and UN agencies making investigations unnecessary. The prosecution did not consider the option of hearing victims and expert witnesses who were either present in the German territory or willing to testify before German consulates. A motion to reconsider the decision has been dismissed.²⁹⁵ Therefore, Human Rights Watch filed a complaint against the decision to the Higher Regional Court of Stuttgart. Since the alleged crimes were not committed in Germany the Federal Supreme Court now has to determine which court is locally competent to decide (Section 13 a of the Code of Criminal Procedure). As of today, the court has not issued a decision.

²⁹⁴ Decision of the German Federal Prosecutor, 30 March 2006, File No. 3 ARP 116/05-2, see also German Federal Prosecutor, Press Release No. 9/2006 of 30 March 2006 .

²⁹⁵ Federal Prosecutor, Decision of 16 October 2006, Case No. 3 ARP 116/05-2 (not published).

RECOMMENDATIONS FOR REFORM OF LAW AND PRACTICE

SUBSTANTIVE LAW:

Germany should ratify, without any limiting reservations, all treaties requiring states to extradite or prosecute crimes under international law, including:

Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity;.

and

International Convention for the Protection of All Persons from Enforced Disappearance

Define crimes under international law as crimes under national law, where this has not yet been done, including:

crimes against humanity committed before 1 July 2002;

war crimes in both international and non-international armed conflict committed before 1 July 2002;

torture not amounting to a crime against humanity or a war crime, consistently with the definition in Article 1 of the Convention against Torture;

extrajudicial executions; and

enforced disappearances not amounting to a crime against humanity,

in accordance with the strictest standards of international law.

Define defences in accordance with the strictest standards of international law and, in particular, exclude as permissible defences duress and necessity, but permit them to be taken into account in mitigation of punishment.

JURISDICTION:

Provide that courts have universal criminal jurisdiction over conduct amounting to crimes under international law, where this does not yet exist.

Provide that courts have universal civil jurisdiction over conduct amounting to crimes under

international law (see recommendations below concerning victims).

Repeal or amend Section 153 of the Code of Criminal Procedure to re-establish the legality principle for all crimes under international law. In this connection, amend the law to provide that Germany has an *aut dedere aut judicare* obligation to extradite persons in territory subject to its jurisdiction suspected of crimes under international law or submit allegations to the prosecution authorities for the purpose of prosecution.

Amend legislation to provide that the first state to exercise jurisdiction, whether universal or territorial, to investigate or prosecute a person has priority over other states with regard to the crimes unless a second state can demonstrate that it is more able and willing to do so in a prompt and fair trial without the death penalty or other serious human rights violations.

PROCEDURE RELATED TO VICTIMS:

Ensure that victims and their families are able to institute criminal proceedings based on universal jurisdiction over crimes under international law, not just minor crimes, through private prosecutions, *actions civiles*, *actio popularis* or similar procedures.

Ensure that victims and their families are able to file civil claims for all five forms of reparations (restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition) in civil and in criminal proceedings based on universal jurisdiction over crimes under international law.

Ensure that victims and their families are fully informed of their rights and of developments in all judicial proceedings based on universal jurisdiction concerning crimes under international law.

REMOVAL OF LEGAL, PRACTICAL AND POLITICAL OBSTACLES:

Legal -

Provide that any claimed state or official immunities will not be recognized with regard to crimes under international law.

Provide that statutes of limitation do not apply to conduct amounting to crimes under international law no matter when they were committed. Abolish statutes of limitations that apply to prosecutions for crimes under international law or civil claims for human rights violations no matter when they were committed.

Provide that the principle of *ne bis in idem* does not apply to proceedings in a foreign state concerning crimes under international law so that German courts can exercise jurisdiction over persons suspected of such crimes, when they have been acquitted in sham foreign proceedings or convicted only of ordinary crimes.

Political –

Ensure that the criteria for deciding whether to investigate or prosecute crimes under international law are developed in a transparent manner in close consultation with civil

society, made public, are neutral and exclude all political considerations.

Ensure that decisions to investigate or prosecute are taken by independent prosecutors in accordance with such neutral criteria, subject to appropriate review by courts, but not by political officials.

Ensure that decisions whether to seek extradition or mutual legal assistance or to extradite persons suspected of crimes under international law and to provide mutual legal assistance are made in accordance with neutral criteria and exclude all inappropriate criteria, such as the prohibition of the extradition of nationals.

Ensure that the final decision regarding extradition or mutual legal assistance is taken by an independent prosecutor, subject to judicial review, and not by a political official.

Practical –

Improving investigation and prosecution in Germany –

Strengthen the current special unit of police, the Central Federal Agency to combat war crimes, which is located in the Federal Criminal Police Office, or create a new one, and ensure that it works closely in a task force or combined unit with the Federal Prosecutor and, where necessary, prosecutors in the *Länder*. The police unit and the prosecutors with responsibility for investigating and prosecuting crimes under international law committed abroad, should consult with members of units with similar responsibilities in other countries, such as Canada, Denmark, Norway and Sweden, to learn from their experience.

Ensure that such a unit or task force:

- has sufficient financial resources, which should be comparable to the resources devoted to other serious crimes, such as "terrorism", organized crime, trafficking in persons, drug trafficking, cyber crimes and money laundering

- has sufficient material resources

- has sufficient, experienced, trained personnel

Ensure that the mandate and methods of work include the following:

- providing effective training on a regular basis of all staff in all relevant subjects, including international criminal law, human rights and international humanitarian law

- taking the initiative to conduct investigations without waiting for complaints

- taking the initiative to use anticipated legal assistance, in particular, by sharing resources and working jointly with other states to open investigations, issue arrest warrants and seek extradition of persons suspected of crimes under international law

Establish special screening procedures or special questioning techniques in the relevant

procedures adopted by the administrative bodies in the *Länder* responsible for immigration to screen foreigners seeking to enter Germany, including immigrants, visa applicants and asylum seekers:

to determine whether they are suspected of crimes under international law

to cooperate fully with police and prosecuting authorities in a manner that fully respects the rights of all persons to a fair trial

Establish an effective training unit to ensure that all judges, prosecutors, defence lawyers and others in the criminal and civil justice systems are effectively trained in relevant subjects.

Establish an effective victim and witness protection and support unit, based on the experience of such units in international criminal courts and national legal systems able to protect and support victims and witnesses involved in proceedings in the state, in foreign states and in international criminal courts, including through relocation.

Improvements in cooperation with investigations and prosecutions in other states

Eliminate any obstacles to requests from foreign states for mutual legal assistance in investigating and prosecuting crimes under international law, provided that the procedures are fully consistent with international law and standards concerning the right to a fair trial and that cooperation is not provided when there is a risk that it could lead to the imposition of the death penalty, torture or other cruel, inhuman or degrading treatment or punishment or an unfair trial.

Ensure that other requests for mutual legal assistance by foreign states can be transmitted directly to the police, prosecutor or investigating judge directly, without going through cumbersome diplomatic channels, but ensure that such requests are not complied with when there is a risk that it could lead to the imposition of the death penalty, torture or other cruel, inhuman or degrading treatment or punishment or unfair trial.

Improve procedures in the forum state for conducting investigations abroad, including through the use of joint international investigation teams, with all the necessary areas of expertise.

Eliminate in law and practice any unnecessary procedural obstacles for foreign states seeking to gather information in territory subject to the forum state's jurisdiction concerning crimes under international law.

Eliminate in law and practice any unnecessary procedural obstacles that would delay or prevent the introduction of admissible evidence from abroad. Exclude any evidence that cannot be demonstrated as having been obtained without the use of torture or other cruel,

Cooperate with Interpol in the maintenance of the database on crimes under international law.

Take steps, in cooperation with other states, to draft, adopt and ratify promptly a new multilateral treaty under Council of Europe auspices providing for extradition of persons suspected of crimes under international law and mutual legal assistance with regard to such crimes, excluding inappropriate grounds for refusal and including bars on extradition and mutual legal assistance where there is a risk of the death penalty, torture or other ill-treatment, unfair trial or other serious human rights violations.

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