

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

From the entry into force of the German Code of Crimes against International Law (*Völkerstrafgesetzbuch*, hereinafter CCAIL), up until September 2006, there had been 57 petitions filed for alleged crimes codified in this law.<sup>1</sup> Most of the petitions relate to the conflict in the Middle East, as well as the war in Iraq and its aftermath. These petitions target members of the United States, German and Israeli Governments, as well as members of Governments and Heads of States of various African and Asian States. So far, the initiation of the proceedings in 49 cases has been abstained in accordance with §§ 152 subs. 2, 153f subs. 1 and 2 of the Criminal Procedure Code (*Strafprozessordnung*, hereinafter CPC).<sup>2</sup> These decisions have been

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\* Professor of Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the University of Göttingen, Germany; Head, Dept. of Foreign and International Criminal Law; Judge State Court (*Landgericht*) Göttingen. The paper was originally published in German in 26 *NEUE ZEITSCHRIFT FÜR STRAFRECHT* (NSTZ) 2006 (issue 8), at 434. The English version was prepared at the request of the Finnish colleagues of the University of Helsinki for a book in honour of Prof. Raimo Lahti; thus, it is warmly dedicated to him. I am grateful to Ousman Njikam (Cameroon/Germany), doctoral candidate at the University of Göttingen and research assistant at the Dept. of Foreign and International Criminal Law, to Dr. Helena Raulus, University of Helsinki and to Dr. Shane Darcy (University of Ulster), for assistance in preparing the English version of the paper. I am indebted to Guido Belger, research assistant, for editorial help.

<sup>1</sup> E-mail of 5 September 2006 by Bundesanwalt Lanz, Office of the Federal Prosecutor General, to the author.

<sup>2</sup> Provisions without explicit reference belong to the CPC.

either based on legal grounds (*inter alia*, immunity of the possible suspects, the non-applicability of the CCAIL at the time the alleged act was committed) or, as the case may be, on the lack of any prospects of success (§ 153f subs. 1 clause [hereinafter cl.] 1 CPC). A formal investigation was only initiated in one case against a Rwandan citizen living in Germany as an asylum seeker for crimes committed on Congolese territory.<sup>3</sup>

Among all the petitions filed, the petition against the (former) United States Secretary of State for Defence *et al.*, arising from the maltreatment of Iraqi prisoners in the Abu Ghraib prison complex, drew special attention.<sup>4</sup> The Federal Prosecutor General (*Generalbundesanwalt*, “GBA”) dismissed the complaint in his decision of 10 February 2005.<sup>5</sup> The Stuttgart Higher Regional Court (*Oberlandesgericht*, “OLG”) declared the motion for a court decision as inadmissible on the 13 September 2005.<sup>6</sup> This was the first High Court decision on the application of the complicated regulation of § 153f CPC and, implicitly, also on the principle of universal jurisdiction contained in § 1 CCAIL. Yet, both the decision from the Federal Prosecutor General as well as that from the Higher Regional Court deserve criticism. First, it is questionable whether the decisions fully comply with the legal purpose of § 1 CCAIL, § 153 f CPC and what is

<sup>3</sup> Concretely he is accused as being a political leader of the FDLR (Democratic Liberation Forces of Rwanda), a Rwandan rebel militia operating in North-Kivu and South-Kivu in eastern Democratic Republic of Congo (“DRC”), and of being responsible for the atrocities committed by this militia on the civilian population. It is so far, however, impossible to justly attribute the crimes committed in eastern Congo to this militia for the simple fact that the concerned region is under the control of many rebel armed groups and these groups either co-exist or fight among each other.

<sup>4</sup> See Basak, *Abu Ghreib, das Pentagon und die deutsche Justiz*, 15 *Humanitäres Völkerrecht-Informationsschriften (HUV-I)* [2005], 85 *et seq.* for the factual and legal background; and REPUBLIKANISCHER ANWALTSVEREIN/ HOLTFORT-Stiftung (eds.), *STRAFANZEIGE./RUMSFELD u.a.*, 26 *et seq.* (2005), for the suit.

<sup>5</sup> Cf. Press Statement of 10 February 2005, reprinted in 60 *JURISTENZEITUNG (JZ)* [2005], 311.

<sup>6</sup> 26 *NSTZ* (2006), 117. Already on 2 May 2005 the plaintiff’s complaint (*Gegenvorstellung*) of 10 March 2005 was rejected by the Federal Prosecutor General. The initial petition for a court decision filed at the Higher Regional Court Karlsruhe was dismissed due to lack of jurisdiction, since the State Government of Baden-Württemberg has its seat in Stuttgart and thus the Higher Regional Court in Stuttgart has jurisdiction over the matter (§ 172 IV CPC in connection with § 120 I Nr. 8 *Gerichtsverfassungsgesetz* –“GVG”).

the interaction of both regulations (thereto I.). Furthermore, the concrete examination of § 153f CPC raises numerous questions (II.). Finally, the inadmissibility to compel the initiation of proceedings and hence the inability to legally control and review decisions not to proceed is very unsatisfactory; legal reforms must therefore be considered (III.).

## I. THE PURPOSE AND INTERACTION OF § 1 CCAIL AND § 153F CPC

According to § 1 CCAIL, the jurisdiction of German Courts rests – independent of the place of commission and other statutory links for the exercise of jurisdiction<sup>7</sup> – on the genuine or “true” principle of universal jurisdiction, i.e. universal jurisdiction in a broad sense.<sup>8</sup> In fact, the regulation revokes the traditional jurisprudence of the Federal Supreme Court (*Bundesgerichtshof*, “BGH”) which always demanded a domestic link<sup>9</sup> using the explicit wording “bears no relation to Germany”.<sup>10</sup> This unlimited universal jurisdiction does not constitute a violation of the principle of non-intervention, for §§ 6-12 CCAIL deal with core crimes in International Law, whose prosecution lies in the interest of humanity<sup>11</sup> and thus cannot be

<sup>7</sup> For the international law links legitimising the application of the national *ius puniendi* see AMBOS, INTERNATIONALES STRAFRECHT, § 3 marginal note (hereinafter mn.) 2 *et seq.* (2006).

<sup>8</sup> Contrary to the qualified principle of universal jurisdiction, in the absolute form the competence is not attached to certain conditions (e.g. residence ). Cf. AMBOS, *supra* note 7, § 3 mn. 95.

<sup>9</sup> See BGH, 14 NSTZ (1994) 232, 233; BGH 19 NSTZ (1999), 236; 19 STRAF-VERTEIDIGER (STV) [1999], 240; BGHSt 45, 64 (65 *et seq.*, 68 *et seq.*), though clearly for war crimes (69). Cf. also for case-law AMBOS, in MÜNCHNER KOMMENTAR (hereinafter “MÜKO”) STGB, § 6 mn. 1, 4 *et seq.* (W. Joecks et al. eds., vol 1, 2003)

<sup>10</sup> Cf. the motives in LÜDER/VORMBAUM, MATERIALIEN ZUM VSTGB 26, (2003), (“Referentenentwurf” according to BR-Drucks. 29/02). Cf. also Werle, *Konturen eines deutschen Völkerstrafrechts*, 56 JZ (2001), 885, 890; Werle/ Jeßberger, *Das Völkerstrafgesetzbuch*, 57 JZ (2002), 724, 729; Zimmermann, *Bestrafung völkerrrechtlicher Verbrechen durch deutsche Gerichte nach In-Kraft-Treten des Völkerstrafgesetzbuchs*, 55 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) [2002], 3068, 3069; Abg. Pick, in Lüder/ Vormbaum, *op. cit.* p. 80; Zypries, *Strafverfolgung von Völkerrechtsverbrechen: Eine Herausforderung für die deutsche Justiz*, in DER ISTGH FÜNF JAHRE NACH ROM, 11, 14 (Theissen/ Nagler eds., 2004).

<sup>11</sup> See motives in Lüder/Vormbaum, *supra* note 10, p. 26.

regarded as a domestic issue of the States where the crime was committed.<sup>12</sup> This was the rationale of the position of the German delegation at the Rome Diplomatic Conference arguing in favour of the inclusion of the principle of universal jurisdiction in the International Criminal Court (hereinafter ICC) Statute.<sup>13</sup> It is therefore unfounded when the OLG Stuttgart sees a legally “doubtful extension” of jurisdiction in reference to the principle of universal jurisdiction.<sup>14</sup> From a *legal* perspective this extension, in fact, gives no cause for concern; yet it generates *political* concerns and these were exactly the ones that the legislator wanted to confront by the procedural restriction of the substantially unrestricted principle of universal jurisdiction through § 153f CPC.

§ 1 CCAIL fits the German criminal prosecution of international crimes within an “international criminal justice system”, which – to avoid impunity for serious human rights violations – relies primarily on the territorial/suspect/victim States; second, on the ICC and if applicable other international criminal courts;<sup>15</sup> and third, on third States on the basis of universal jurisdiction.<sup>16</sup> This system entails a conditional subsidiarity of the universal jurisdiction principle which § 153f CPC secures by directing the Prosecutor’s discretion. The overall aim of the provision is to counteract an alleged overload of

<sup>12</sup> For more on reasons see AMBOS, *supra* note 7, § 3 mn. 94; Ambos, in: MüKo-VStGB, § 1 mn. 4 (forthcoming).

<sup>13</sup> The author was a member of the German delegation. In the end, the German position did not prevail: Article 12 ICC Statute rather provides for the principles of territoriality and active personality (for more on this see AMBOS, *supra* note 7, § 8 mn. 7 *et seq.*).

<sup>14</sup> 26 NSTZ (2006), 119 left column.

<sup>15</sup> Cf. AMBOS, *supra* note 7, § 6 mn. 58 *et seq.*

<sup>16</sup> *Ibid.*, § 3 mn. 21. Also Keller, Grenzen, *Unabhängigkeit und Subsidiarität der Weltrechtspflege*, 153 GOLTDAMMERS ARCHIV (GA) [2006], 25, 34 *et seq.*, 37; Kurth, Zum Strafverfolgungsermessen des Generalbundesanwaltes nach § 153f StPO, Zeitschrift für internationale Strafrechtsdogmatik (ZIS; www.zis-online.com), [2006], 81, 84; for a “flexible” principle of universal jurisdiction, see also, Vest, *Zum Universalitätsprinzip bei Völkerrechtsverbrechen*, 123 SCHWEIZERISCHE ZEITSCHRIFT FÜR STRATRECHT, (ZSTR) [2005], 313, 331 *et seq.*; for primacy of third States over the ICC see Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004, 2005, para. 616: “(...) the ICC should defer to national courts other than those of Sudan which genuinely undertake proceedings on the basis of universal jurisdiction.” Concurring Mireille Delmas-Marty, *Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC*, 4 J. INTL CRIM. JUSTICE (2006), 6.

the judiciary<sup>17</sup> through so-called “forum-shopping” with regard to international crimes<sup>18</sup> and to limit criminal proceedings to “reasonable cases”.<sup>19</sup> The conflicting procedural principles of legality (mandatory prosecution) and opportunity (discretion) are adjusted in accordance with the particularities of (international) crimes committed abroad as opposed to the rules for ordinary crimes committed abroad according to § 153c subs. 1 CPC (cf. § 153c subs. 1 clause 2 CPC)<sup>20</sup>. § 153f CPC refers to *all* crimes of the CCAIL (§§ 6–14), although only the crimes (*Verbrechen*) of §§ 6–12 fall under the principle of universal jurisdiction while for the misdemeanours (*Vergehen*) of §§ 13 and 14, the general criminal law (§§ 3 *et seq.* StGB) remains applicable. Insofar as this is the case, one could have left it with the application of the general rules in § 153c CPC.<sup>21</sup> To put it more simply, the discretion as a result of the opportunity principle is structured in two directions (always taking care of the superior goal of preventing impunity<sup>22</sup>): In case of *crimes committed abroad with a domestic link* – i.e. when the accused<sup>23</sup> is present in Germany (§ 153f subs. 1 cl. 1 CPC) and/or when he/she is a German (§ 153f subs. 1 cl. 2 CPC) – it follows from the cited rules a *contrario* that an obligation to prosecute *exists in principle*; there could only then be a decision not to

<sup>17</sup> See motives in: LÜDER/VORMBAUM, *supra* note 10, p. 60; Werle, *Konturen eines deutschen Völkerstrafrechts*, 56 JZ (2001), 885, 890. For similar efforts in Great Britain where prosecution of persons is limited to those who after the commission of a crime reside in Great Britain, O’Keefe, *Universal Jurisdiction*, 2 J. INTL CRIM. JUSTICE (2004), 757 *et seq.*; for the discussion in Switzerland Vest, *supra* note 16, 314 *et seq.*

<sup>18</sup> To this danger of an arbitrary expansionist choice of place of jurisdiction see Kurth, *supra* note 16, 83.

<sup>19</sup> Zypries, *supra* note 10, p. 14.

<sup>20</sup> See motives in: LÜDER/VORMBAUM, *supra* note 10, p. 59 *et seq.*; Kreß, *Völkerstrafrecht in Deutschland* 20 NSTZ (2000), 617, 625; Jeßberger, *Das Völkerstrafgesetzbuch: Herausforderung und Verpflichtung für die deutsche Justiz*, in: Theissen/ Nagler *supra* note 10, 48; Beulke, in LÖWE-ROSENBERG vol. 3 (LR) § 153f mn. 9 [P. Rieß ed., 25<sup>th</sup> ed. 2004].

<sup>21</sup> Also cf. Weßlau, in SYSTEMATISCHER KOMMENTAR ZUR STRAFPROZESSORDNUNG (SK) § 153f mn. 5, [H.-J. Rudolphi et al. eds., 2003],

<sup>22</sup> See motives in: LÜDER/VORMBAUM, *supra* note 10, p. 60; also see Schoreit, in KARLSRUHER KOMMENTAR, STRAFPROZESSORDNUNG (KK) § 153f mn. 2 [G. Pfeiffer ed., 2003]; Beulke, *supra* note 20, § 153f mn. 4.

<sup>23</sup> The rule wrongly refers to the accused instead of suspect (cf. Beulke, *supra* note 20, § 153f mn. 14; Weigend, *Das Völkerstrafgesetzbuch-nationale Kodifikation internationalen Rechts*, in: GEDÄCHTNISSCHRIFT FÜR THEO VÖGLER, 197, 209 with fn 49 (O. Triffterer ed. 2004).

prosecute a German national when the offence is being prosecuted before an international court or by the territorial or victim State (§ 153f subs. 1 cl. 2 CPC), since in this case the overall goal (to avoid impunity) could also be achieved.<sup>24</sup> If, however, there is *no domestic link* whatsoever – when a German is neither involved as victim nor as perpetrator (§ 153f subs. 2 nos. 1, 2 CPC), and no suspect of such offence is residing in Germany, and such residence is not to be anticipated (§ 153f subs. 2 no. 3 CPC) – the prosecution may in particular (*insbesondere*) be dispensed of, if – avoidance of impunity! – an international court or the territorial/suspect/victim State prosecutes the offence. The same applies – as an exception to the duty to prosecute crimes according to § 153f subs. 1 cl. 1 CPC *a contrario* – where the foreigner accused of an offence committed abroad is residing in Germany, but there are no German victims to deplore (§ 153f subs. 2 cl. 2 in conjunction with cl. 1 no. 2 CPC) and his transfer to an international court or, as the case may be, his extradition to the prosecuting State (§ 153f subs. 2 cl. 2 in conjunction with clause. 1 no. 4 CPC) is permissible and is intended (§ 153f subs. 2 cl. 2 CPC).<sup>25</sup> Besides, it ensues from § 153f subs. 1 cl. 1 in conjunction with 153c subs. 1 no. 1 and 2 CPC that in case of “*purely foreign offences*” – with no anticipated residence of the accused – the Federal Prosecutor General could dispense with prosecuting even when there is no other jurisdiction willing to prosecute (but see below).<sup>26</sup>

The rule thus adopts a “jurisdictional hierarchy by stages” (“*gestufte Zuständigkeitspriorität*”)<sup>27</sup> according to which foreign courts with a close link to the act and, as the case may be, the ICC, to a large extent be given primacy for the cases dealt with in § 153f subs.

<sup>24</sup> § 28 (in conjunction with § 68) Internationaler Strafgerichtshof Gesetz (“IST-GHG”, German cooperation law with the ICC, BGBl. I 2002, p. 2144) supports this since there is basically a holding back from prosecuting a German national when there is an (declared) ICC surrender request (cf. Beulke, *supra* note 20, § 153f mn 24; Weßlau, *supra* note 21, § 153f mn. 8). This rule is further evidence of the friendliness of the German legislator towards the ICC given that already the mere *declaration of intent* of the filing of a surrender request would be enough without any concrete proof that an investigation is really being carried out. For more on the ISTGHG cf. Ambos, *Die Implementierung des ISTGH-Status in Deutschland*, in BEDEUTUNG DER STRAFRECHTSDOGMATIK IN GESCHICHTE UND GEGENWART - MANFRED MAIWALD ZU EHREN, (Loos/Jehle eds., forthcoming); for an English translation, see [http://jura.uni-goettingen.de/k.ambos/Forschung/laufende\\_Projekte\\_Translation.html](http://jura.uni-goettingen.de/k.ambos/Forschung/laufende_Projekte_Translation.html).

<sup>25</sup> Cf. the motives in: LÜDER/VORMBAUM, *supra* note 10, p. 60 *et seq.*

<sup>26</sup> Cf. motives in: LÜDER/VORMBAUM, *supra* note 10, p. 61; Weigend, *supra* note 23, p. 209; Schoreit, *supra* note 22, § 153f mn. 3.

<sup>27</sup> See motives in: LÜDER/VORMBAUM, *supra* note 10, p. 61; Weigend, *supra* note 23, p. 209.

2 CPC. While the wording “may” (instead of “ought to”),<sup>28</sup> inserted by the Legal Committee (*Rechtsausschuss*) of the *Bundestag*, expresses, on the one hand, that there should be “normally”<sup>29</sup> and, as the case may be, “regularly”<sup>30</sup> a refrain in prosecuting the mentioned cases. The substitution of “ought to” which expresses a binding discretionary power with “may” makes it, on the other hand, clear that a partial withdrawal of the Material Universal jurisdiction principle is neither intended nor is it excluded that the prosecutor could - despite the existence of nos. 1–4 of subs. 2 of § 153f – make use of its competence to prosecute.<sup>31</sup> Also, the above mentioned extensive discretionary powers in the case of “*purely foreign acts*” is not to be understood as a withdrawal from the principle of universal jurisdiction, but it is rather guided by the purely practical consideration that in such cases criminal proceedings in Germany would not be very promising.<sup>32</sup> The costs generated by unnecessary investigations ought to be avoided and only cases with realistic chances of success ought to be prosecuted.<sup>33</sup> The superior aim of preventing impunity could, however, even in the case of “*purely foreign acts*”, lead to a reduction of the discretionary power in favour of the initiation of proceedings in order to support investigation in another country or by the ICC.<sup>34</sup> The reduction of the discretion also follows from the *wide understanding of residence within German territory* for it suffices any (voluntary or involuntary) contact with German territory (e.g. temporary stay, transfer) which would permit detention.<sup>35</sup>

<sup>28</sup> For the old wording see the expert draft in: BUNDESMINISTERIUM DER JUSTIZ, ARBEITSENTWURF EINES GESETZES ZUR EINFÜHRUNG DES VSTGB p. 14, (2001) and the official government draft (*Referentenentwurf*) in: LÜDER/VORMBAUM, *supra* note 10, p. 20.

<sup>29</sup> Weigend, *supra* note 23, p. 209.

<sup>30</sup> Schoreit, *supra* note 22, § 153f mn. 7.

<sup>31</sup> Cf. Report of Legal Committee of the *Bundestag* in: LÜDER/VORMBAUM, *supra* note 10, p. 88; Beulke, *supra* note 20, § 153f mn. 32.

<sup>32</sup> See motives in: LÜDER/VORMBAUM, *supra* note 10, p. 61; also see Beulke, *supra* note § 153f mn. 5; Singelstein/ Stolle, *Völkerstrafrecht und Legalitätsprinzip*, ZIS (2006), 120.

<sup>33</sup> Cf. also Schoreit, *supra* note 22, § 153f mn. 3.

<sup>34</sup> On “provisional investigations” or “investigatory help” (also in connection with § 153f subs. 2 CPC) see motives in: LÜDER/VORMBAUM, *supra* note 10, p. 61; Weigend, *supra* note 23, p. 209; Schoreit, *supra* note 22, § 153f mn. 9; Beulke, *supra* note 20, § 153f mn. 42; Weßlau, *supra* note 21, § 153f mn. 11.

<sup>35</sup> See motives in: BUNDESMINISTERIUM DER JUSTIZ, *supra* note 10, p. 86; LÜDER/VORMBAUM, *supra* note 10, p. 61; also see Beulke, *supra* note 20, § 153f mn. 15; Weßlau, *supra* note 21, § 153f mn. 9.



## II. A CONCRETE EXAMINATION OF § 153F CPC IN THE ABU GHRAIB PROCEEDINGS

Against the background of the underlying rationale of § 1 CCAIL and § 153f CPC, the analysis of § 153f CPC by the Federal Prosecutor General and the OLG Stuttgart is not completely convincing. First, as correctly acknowledged by the Federal Prosecutor General and the OLG Stuttgart, there should be a distinction between those suspects who, in principle, do not reside on German territory (a so-called “foreign” group of persons), e.g. the United States Defence Secretary Rumsfeld; and those, e.g. as members of the US army dispatched to Germany, who do so (a “domestic” group of persons). The *foreign* group of persons in principle falls under § 153f subs. 1 cl. 1 and the *domestic* group of persons under § 153f subs. 2 cl. 2 CPC. Thus, in principle, there could be in the first case a decision to dispense with prosecuting because it refers to pure foreign offences; in the second case prosecution can be dispensed of if the conditions in § 153f subs. 2, cl. 1 nos. 2 and 4 have been fulfilled and a transfer to the ICC (or another international criminal court) or the extradition to the prosecuting State is permissible and intended. Should there in the case of § 153f subs. 1, cl. 1 be any – even if only temporal – anticipated residence on federal territory, then § 153f subs. 2, cl. 2 would apply, for in this case it no longer deals with a pure foreign offence but with a foreign offence having a – though minor but adequate – domestic link. The fact that such an anticipated residence in the case at hand was to occur (the participation of the US Defence Secretary at the Munich security conference in February 2005), and as the case may be also will occur in the future (Rumsfeld’s participation once more in the conference on security in February 2006 and also in the following years)<sup>36</sup> was also recognised by the OLG Stuttgart,<sup>37</sup> and therefore the foreign group of persons (§ 153f subs. 1, p.1) and the domestic one (§ 153f subs. 2, p. 2) were treated equally.<sup>38</sup> With regard to the latter there is, first, no prosecution or impunity gap since,

<sup>36</sup> Obviously, with Rumsfeld’s dismissal at the beginning of November 2006 the situation has changed.

<sup>37</sup> 26 NSTZ (2006), 118 right column mn. 16: “etwaigen zeitlich begrenzten Aufenthalt” (“eventual temporarily limited stay”); different at mn. 12 (“Aufenthalt ... nicht zu erwarten” = “such presence ... not to be anticipated”); this latter remark may have caused the unfounded criticism of Singelstein/ Stolle, *supra* note 32, 121 left column, that the OLG Stuttgart established that a residence on German territory was not to be anticipated.

<sup>38</sup> 26 NSTZ (2006), 118 right column mm. 13 *et seq.* (16).



as members of the United States army, they fall under the jurisdiction of the United States; second, the conditions of § 153f subs. 2 cl. 2 are fulfilled since the sending and home State (the United States) had at any time the possibility to bring its personnel back home so that an extradition is superfluous. This applies to the foreign group of persons respectively (§ 153f subs. 2, cl. 2 applies here as a result of the anticipated residence) when, in addition, taking into account that the whole complex is under investigation in the United States.

Apart from the application of § 153f subs. 2 cl. 2 in the case of the foreign group of persons, all these conclusions deserve criticism. It is, for example, quite daring to infer from the existence of jurisdiction (over the sending State about its soldiers) a lack of an impunity gap since with this inference one intermingles different levels and one could as well defend the almost absurd assumption that the territorial State's jurisdiction over offences committed on its territory excludes the possibility of impunity for these same offences (the reality shows that the contrary is true). Be that as it may, the crucial issue is, if general information about proceedings being carried out in the United States, as perceived by the Prosecutor General,<sup>39</sup> meets the explicit legal requirement of the competent State carrying out criminal proceedings within the meaning of § 153f subs. 2, cl. 1 no. 4 and takes sufficiently into account the overall aim of the avoidance of impunity. Can one really say that the acts committed in Abu Ghraib are being prosecuted within the meaning of § 153f subs. 2, cl. 1 no. 4 when the State on whose territory the offence was committed (Iraq) leaves the prosecution of the offences to the State, whose nationals are suspected of its commission (the United States) and the latter court-martials only the lower ranking soldiers who merely received orders (James Graner and Lynndie England), while the mid-ranking offenders and those at the top of the chain of command (the White House and the Pentagon)<sup>40</sup> are not touched.<sup>41</sup>

<sup>39</sup> Cf. OLG Stuttgart, 26 NSTZ (2006), 118 right column; GBA, 60 JZ (2005), 312.

<sup>40</sup> For more on the executioners, organisers and leaders cf. VEST, GENOZID DURCH ORGANISIERTE MACHTAPPARATE, p. 29–30, 240 *et seq.*, 302 (2002).

<sup>41</sup> Initially the only top ranking military officers who have been convicted were Gen. Karpinski who was demoted (The Washington Post, 12 May 2005) and issued a formal letter of reprimand and Col. Pappas who also received a reprimand and was ordered to repay \$8,000 in wages as a result of his failure to adequately train and supervise Abu Ghraib prison guards (cf. <http://news.bbc.co.uk>; Hersch, Guardian Weekly 27 May - 2 June 2005, 15; also cf. Basak, *supra* note 4, 91). On 28 April 2006 the former head of the interrogation center in Abu Ghraib, Lt. Col. Steven L. Jordan, became the highest ranking officer to be charged in connection with the abuse of detainees at the prison; he was indicted on 12 counts (N.Y. Times, 29 April 2006; El Pais, 29 April 2006, 10).

Does the general information that the competent State has initiated criminal proceedings suffice, or does it justify an anticipated trust being given to this State that a serious and concrete investigation is or will be carried out? In such a situation is it not possible and admissible, at least, to carry out auxiliary investigations in the sense mentioned above?

When the “act” according to § 153f subs. 2, cl. 1, no. 4 has to be “prosecuted” by the competent State, the general information that a few persons who merely executed orders in such a pattern of criminality are being prosecuted does not suffice; it is rather necessary to prosecute particular persons for particular acts.<sup>42</sup> The contrary opinion of the Federal Prosecutor General and the OLG Stuttgart cannot be based upon the notion of “situation” in Articles 13 and 14 of the ICC Statute.<sup>43</sup> This notion refers to a particular stage of the proceedings before the ICC, i.e. the initiation or triggering of the jurisdiction of the ICC (so-called *triggering procedure*) which is foreign to national legislations and proceedings. This procedural stage has an independent character and is to be distinguished from the actual (pre)-preliminary investigation according to Articles 15 and 53 of the ICC Statute (which is comparable with national legislations).<sup>44</sup> By the initiation of proceedings, a “situation” becomes a concrete *case* (cf. e.g. Article 15 (4) and Article 53 (1) (b) of the ICC Statute) and the *suspicion* will – by the issue of an arrest warrant or the summoning of the suspect – be individualised. A national criminal proceeding finds itself *a limine* at the investigatory stage in terms of Articles 15 and 53 of the ICC Statute and that is the reason that the direction of the investigations (against certain suspects) could be taken into consideration. Equally, Article 17 of the ICC Statute as quoted by the Federal Prosecutor General does not base itself on a general situation but rather on a concrete “case” which follows from the reference to the “person concerned” in Article 17 (1) (c) of the

<sup>42</sup> In this sense also see Keller, *supra* note 16, 35 *et seq.*, Kurth, *supra* note 16, 85; Singelstein/Stolle *supra* note 32, 121 *et seq.*; Delmas-Marty, *supra* note 16, 5.

<sup>43</sup> Also see Keller, *supra* note 16, 36; Delmas-Marty, *supra* note 16, 5.

<sup>44</sup> See OLÁSULO, CORTE PENAL INTERNACIONAL. DÓNDE INVESTIGAR?, p. 101 *et seq.*, 391 *et seq.* (2003); *idem*, *The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor*, 5 INTL CRIM. L. REV. (2005), 122, 123 *et seq.* Generally on the structure of (pre-)trial proceedings see AMBOS, *supra* note 7, § 8 mn. 20 *et seq.*

ICC Statute.<sup>45</sup> It is, last but not least, also worth pointing out that the failure to prosecute particular high ranking suspects could be perceived as an *unwillingness* to carry out investigation or prosecution in the terms of Article 17 of the ICC Statute if the aim of prosecuting the low ranking suspects is to protect the organisation and/or the high ranking suspects (Article 17 (2) (a) of the ICC Statute).

The Federal Prosecutor General's reference to Article 17 of the ICC Statute further raises the fundamental question whether the *standard of examination* as contained in Articles 17 to 19 of the ICC Statute is applicable at all in national proceedings and, thus, can be invoked by a national prosecuting authority at all. 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 ICC Statute. This burden of demonstrating the seriousness of the national proceedings exists *vis-à-vis* the ICC (Articles 18 and 19 of the ICC Statute); thus, although one may speak of the *formal* complementary role of the ICC *vis-à-vis* national criminal justice systems, at the same time one must, as a result of the ICC's decision-making authority, acknowledge a sort of *substantive* primacy of the ICC *vis-à-vis* national criminal justice systems.<sup>46</sup> As a consequence, the Federal Prosecutor General's assertion that "a third State cannot control the legal practice of foreign States according to its own standards" is unfounded as far as it is based on Act 17 to 19 ICC Statute. First of all, exactly the opposite ensues from these Articles as explained above. Furthermore the principle of non-intervention, as alleged by the Federal Prosecutor General, does not arise *in casu* for, as already mentioned, it does not apply with regard to the CCAIL core crimes.

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<sup>45</sup> Also see Singelstein/Stolle *supra* note 32, 122 left column. Also cf. ICC, Pre-Trial Chamber I, Situation en République Démocratique du Congo, Décisions sur les demandes de participation à la procédure de VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5 et VPRS-6, ICC-01/04, 17.1.2006, para. 65: "...des incidents spécifiques au cours desquels un ou plusieurs crimes de la compétence de la cour semblent avoir été commis par un ou plusieurs suspects identifiés..."; confirmed in Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 10.2.2006, para. 21, 31: "specific incidents during which one or more crimes within the jurisdiction of the court seem to have been committed by one or more identified suspects", <www.icc-cpi.int/cases/current\_situations/DRC.html>.

<sup>46</sup> Cf. Olásolo, *supra* note 44, p. 196, 227 *et seq.* ("primacia material"); *idem*, 5 INTL CRIM. L. REV. (2005), 137.

Thus, in the result the recourse to the ICC Statute rather vitiates the position of the Federal Prosecutor General.

After all, the core issue is whether one can apply Articles 17 to 19 of the ICC Statute which were tailored to fit the *vertical* relationship between the ICC and States parties to *horizontal* inter-state conflicts on jurisdiction, i.e., whether *in concreto* the ICC standards could be applied to § 153f CPC. In this respect the sovereign equality of States must give room for cautiousness if the legal system of the prosecuting State complies, according to general standards, with the rule of law.<sup>47</sup> Indeed, one must not easily interpret § 1 CCIL in connection with § 153f CPC as giving the German judicial authorities the right to decide on the appropriateness and efficiency of concrete criminal proceeding being carried out by the competent (prosecuting-) State if serious criminal proceedings are being carried out by this State and *its judicial system operates in conformity with the rule of law*. Still, one cannot relieve the national (German) authorities from verifying these two conditions, i.e. to first inform oneself in every single case about the prosecuting State's legal system and the concrete investigation being carried out, and then evaluate this information. These quite concrete requirements arise in turn from the notion of an "act"<sup>48</sup> as laid down in § 153f which brings us back to the starting point of our argument.<sup>49</sup>

### III. JUDICIAL REVIEW OF THE FEDERAL PROSECUTOR GENERAL'S DECISION ACCORDING TO § 153F CPC?

In the light of the foregoing analysis there is cause for concern when according to the OLG Stuttgart the central issue of a serious investigation or prosecution in the competent (territorial) State is not open to judicial review because of its "discretionary" nature (*eigentliche Ermessensentscheidung*),<sup>50</sup> since this entails the risk that the application of the principle of universal jurisdiction is, *de facto*, being disavowed by an

<sup>47</sup> In this sense see GBA, 60 JZ (2005), 312: "Mit welchen Mitteln und zu welchem Zeitpunkt gegen weitere mögliche Tatverdächtige ... ermittelt wird, muss dabei den Justizbehörden der Vereinigten Staaten von Amerika überlassen bleiben." ("It must be left unto the legal authorities of the USA to decide with which means and at what point of time investigations on potential suspects be carried out...").

<sup>48</sup> See explicitly Singelnstein/Stolle *supra* note 32, 122.

<sup>49</sup> See text at *supra* note 42.

<sup>50</sup> 26 NSTZ (2006), 199 left column.

executive exercise of this discretion.<sup>51</sup> In this respect, the general reference to the inadmissibility to examine dismissal decisions taken by the Office of the Public Prosecutor based on the opportunity principle (§ 153 *et seq.* CPC, *argumentum ex* § 172 subs. 2 cl. 3)<sup>52</sup> is not convincing. This argument already deserves criticism with regard to the “traditional” reasons for dismissing a case stated in § 153 *et seq.*,<sup>53</sup> but it is even less justifiable in the case of § 153f nor should the alleged inadmissibility of a judicial review be understood as the legislator’s conscious decision.<sup>54</sup> As a matter of fact, the legislator adopted § 153f as a result of the concerns expressed by the Federal Prosecutor General concerning the principle of universal jurisdiction in § 1 CCIL.<sup>55</sup> Due to time constraints – the German legislation on the implementation of the ICC Statute was to come into force not later than the ICC Statute did (1 July 2002) – the legislator did not spend any thought on possible legal remedies and, in particular, it did not take into account that § 153f falls under the provisions listed in § 172 subs. 2, cl. 3 last part (“§§ 153 c bis 154 Abs. 1”).<sup>56</sup> It is also due to the speed of the legislation process that § 153f does not require judicial consent for the dismissal decision and that, therefore, judicial control can only occur afterwards. Indeed, this goes against the system of dismissal provided for in §§ 153 *et seq.* since judicial consent is, in principle, required (§§ 153 I 1, 153a I 1, 153b, 153e CPC);<sup>57</sup> this requirement is

<sup>51</sup> Weßlau, *supra* note 21, § 153f mn. 3.

<sup>52</sup> Cf. only Graalman-Scheerer, in LR, *supra* note 20, § 172, mn. 21, 26 with further references.

<sup>53</sup> For general demands for the control of the legality of discretionary decisions cf. § 174a Alternative Draft Investigation (*Alternativentwurf-Ermittlungsverfahren*) with further references; see also. HORSTMANN, ZUR PRÄZISIERUNG UND KONTROLLE VON OPPORTUNITÄTSEINSTELLUNGEN 308 (2002); for a limited compulsory procedure ERB, LEGALITÄT UND OPPORTUNITÄT 230 *et seq.* (1999), and SATZGER, CHANCEN UND RISIKEN EINER REFORM DES STRAFRECHTLICHEN ERMITTLUNGSVERFAHRENS, GUTACHTEN C ZUM 65. DEUTSCHEN JURISTENTAG C 78, (2004); as to § 153f. One must take into account, however, that the argument of procedural economy shifts, given the gravity of the offences, in favour of the interests of victims.

<sup>54</sup> OLG Stuttgart, 26 NSTZ (2006), 118 left column: “bewusste gesetzgeberische Entscheidung”

<sup>55</sup> The author was a member of the working group appointed by the German Federal Ministry of Justice to draft the CCAIL and § 153f CPC.

<sup>56</sup> The OLG Stuttgart, 26 NSTZ (2006), 118 left column invokes this to support its position.

<sup>57</sup> On the importance of judicial consent in this context see already Schroeder, *Zur Rechtskraft staatsanwaltschaftlicher Einstellungsverfügungen*, 16 NSTZ (1996), 319; also ERB, *supra* note 54, p. 228 *et seq.*, who, however, correctly points out the low efficiency of the control by judicial consent (*ibid.*, 224 *et seq.*).

only waived (§§ 153 I 2, 153a I 7, 153c and d CPC) when acts of less gravity are concerned, be it minor misdemeanours (§§ 153 I 2, 153a I 7) or any other offences committed abroad (§ 153c), or when there are overwhelming political interests opposing a criminal prosecution (§ 153c III, IV, § 153d). None of these grounds applies to § 153f, neither is it concerned with lesser offences (but rather the most important international core crimes) nor should divergent political interests play a role.<sup>58</sup> The only relevant question is whether – with regard to the overall aim of preventing impunity – the criminal prosecution could be carried out otherwise (i.e., by another State or the ICC). It is also worth noting that even under the current law a complaint to compel the criminal investigation or prosecution (*Klage-/Ermittlungserzwingungsverfahren*) against a dismissal on the basis of §§ 153f *et seq.* is admissible with the claim that the legal requirements for discretion did not exist, i.e., that there was no margin of discretion and thus the duty to prosecute continued to exist.<sup>59</sup> According to the case law of the higher courts a claim for judicial review is admissible when an initial suspicion, on legal grounds, was rejected and therefore an investigation on the facts of the case has been omitted.<sup>60</sup> Thus, a complaint in order to secure the principle of legality could be used even in the case of §§ 153 *et seq.*,

<sup>58</sup> On these demands see *Weigend*, *supra* note 23, p. 209; Kreicker, in *NATIONALE STRAFVERFOLGUNG VÖLKERRECHTLICHER VERBRECHEN. LANDESBERICHT DEUTSCHLAND*, vol. 1, 434 (Eser/Gropengiesser/ Kreicker eds., 2003); rather critically Kurth, *supra* note 16, 86.

<sup>59</sup> Rieß, in *LR*, § 172 mn. 26 (vol 2, 1986); Graalman-Scheerer, in *LR*, § 172 mn. 22, 26; Wohlers, in *SK* § 172 mn. 38; Plöd, in *KOMMENTAR ZUR STRAFPROZESSORDNUNG* § 172 mn. 15 (H. Müller et al. eds. 2006); *Krehl*, in *HEIDELBERGER KOMMENTAR ZUR STRAFPROZESSORDNUNG* § 172 mn. 7 (M. Lemke et al. eds. 2001); See also Schmid, *supra* note 22, § 172 mn. 41 *et seq.*; MEYER-GOßNER, *STRAFPROZESSORDNUNG* § 172 mn. 3 *et seq.* (2006); for an inquiry into the legal elements of the dismissal rules through interpretation Singelstein/Stolle, *supra* note 32, 118; diss. HORSTMANN, *supra* note 53, p. 239 *et seq.*

<sup>60</sup> OLG Karlsruhe, decision from 10 January 2005, 1 Ws 152/04; OLG Karlsruhe, decision from 16.12.2002 = 52 *DIE JUSTIZ* (2003), 270, 271; with reference to OLG Zweibrücken, 1 *NSTZ* (1981), 193; OLG Bremen, *OLGSt StPO* § 175 no. 1, OLG Koblenz, 15 *NSTZ* (1995), 50 *et seq.*; OLG Braunschweig, *ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT (WISTRA)* [1993], 31 *et seq.*; KG 10 *NSTZ* (1990), 355 *et seq.*; OLG Celle, decision from 26.04.2002, 2 Ws 94/02; also recently OLG Köln, 8 *Neue ZEITSCHRIFT FÜR STRAFRECHT, RECHTSPRECHUNGS-REPORT (NSTZ-RR)* [2003], 212; OLG Hamm, 22 *STV* (2002), 128, 129 *et seq.*



for it does not make a difference if investigations were already carried out (§ 170 CPC) and a right of review has arisen (§ 172 CPC), or if they were omitted from the very beginning.<sup>61</sup> These contemplations apply *a fortiori* to § 153f for this rule provides for a double exception to the universal jurisdiction principle and the principle of legality for offences which entail – beyond the national duty to prosecute<sup>62</sup> – an *international duty to prosecute and punish*.<sup>63</sup> This means that § 153f constitutes a distinctive feature in the system of §§ 153 *et seq.* and this distinctive feature implies that the requirements contained in subs. 1 and 2 must be subjected to a strict legal control. In a way, one can argue that a judicial control of the Prosecutor's dismissal decision corresponds to the control of the ICC Prosecutor's non-investigation decision by the Pre-Trial Chamber under Article 53 (1) (c), (3) (b) of the ICC Statute. The need for judicial control is particularly evident with regard to the requirement that the offence is being (actually) prosecuted by an international criminal court or State (§ 153f subs. 1 cl. 2, subs. 2 cl. 2 no. 4), since this requirement serves to prevent impunity as the overall aim of the substantive universal jurisdiction principle provided for by § 1 CCAIL.<sup>64</sup> In fact, this requirement does not – contrary to the position taken by the OLG Stuttgart – constitute a discretionary element but a strict legal one as part of the normative structure of § 153f subs. 2. In any case, the OLG Stuttgart itself first refers to possible investigations being carried out in the United States within the framework of its examination of the legal elements of § 153f CPC, but a few paragraphs later wants to interpret § 153f subs. 2, cl. 1 no. 4 as being a (purely) discretionary rule.<sup>65</sup>

<sup>61</sup> OLG Karlsruhe, decision from 10 January 2005, 1 Ws 152/04, 5; OLG Karlsruhe, 52 DIE JUSTIZ (2003), 270, 271.

<sup>62</sup> See generally on the procedure to compel criminal proceedings ("Klageerzwingungsverfahren") Wohlers, *supra* note 59, § 172 mn. 2 with further references on the case law; Schmid, *supra* note 59, § 172 mn. 1; Plödt, *supra* note 59, § 172 mn. 1; BEULKE, STRAFPROZESSRECHT mn. 344 (8th ed. 2005).

<sup>63</sup> Ambos, *Völkerrechtliche Bestrafungspflichten bei schweren Menschenrechtsverletzungen*, 37 ARCHIV DES VÖLKERRECHTS (AVR) [1999], 319 *et seq.*

<sup>64</sup> In the result also Singelnstein/Stolle, *supra* note 32, 119 *et seq.* who, in addition, also considers as reviewable the requirements of the accused being present in Germany (§ 153f subs. 1, cl. 1) and the admissible and intended extradition (§ 153f subs. 2, cl. 2).

<sup>65</sup> 26 NSTZ (2006), 118 right column *versus* 119 left column



#### IV. CONCLUSION

In conclusion, all this means that the principle of legality in § 153f as supported by an international duty to prosecute needs to be secured through the possibility of judicial review. This may be done either using analogous proceedings to the proceeding to compel public charges according to § 172 or through the additional requirement of a (high) court consent for a dismissal decision under § 153f (which needs to be inserted by way of legal reform of § 153f). Last but not least, from a victims' perspective, it is worth pointing out that a decision taken in accordance with § 153f has no effect of *res iudicata* and, thus - with the existence of new facts – the already dismissed motion could be filed again. This explains that the Rumsfeld *et al.* case has again been filed on 14 November 2006.<sup>66</sup>

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<sup>66</sup> The media coverage was extensive but mostly not very accurate, see for example Times, 16 November 2006, <<http://www.time.com/time/nation/article/0,8599,1560224,00.html>> where it is stated that “Federal prosecutors ... are subject to the wishes of the government ... “ and therefore the case will not proceed. While the latter may, indeed, be the case the Office of the Federal Prosecutor would certainly strongly reject the former statement since it implies a direct interference of the Federal Government in the work of the GBA; indeed, in the first Rumsfeld case the former Prosecutor General, Kay Nehm, had rejected such allegations. While it is correct that the Federal Prosecutor General is appointed by the government she is not its lackey and less so the Federal Prosecutors who are professional lawyers and as such recruited mostly from the state judiciaries.