PROSECUTING GUANTÁNAMO IN EUROPE: CAN AND SHALL THE MASTERMINDS OF THE "TORTURE MEMOS" BE HELD CRIMINALLY RESPONSIBLE ON THE BASIS OF UNIVERSAL JURISDICTION?

Kai Ambos[*]

Investigating the secrets surrounding Guantánamo Bay and other U.S. prisons overseas and prosecuting those responsible for serious human rights violations—especially the so-called "harsh interrogation techniques" alluded to in the "torture memos" of the former George W. Bush administration—is currently en vogue in Europe. This paper will show, however, that the chances that such prosecutions will formally commence are rather low. The paper analyzes the jurisdictional and related procedural requirements of such prosecutions in three representative European countries (Belgium, Germany, and Spain). These countries have been selected because they possess different legal regimes for prosecuting extraterritorial offences, which in turn present different legal issues. While Germany has perhaps the broadest universal jurisdiction regime in Europe on paper, Belgium and Spain have been particularly proactive in prosecuting international crimes, despite a recent legislative and policy rollback de facto derogating universal jurisdiction. Taken together, the law and practice in these countries stand for the general trend of a more cautious and restrictive approach with regard to the extraterritorial prosecution of international crimes, replacing universal jurisdiction proper with a subsidiary or cooperative surrogate. This gives reason, in the conclusion of this paper, to reassess the strategy for dealing with international core crimes, turning from a less criminal law or prosecution based to a more comprehensive approach.

[*] Professor of Criminal Law, Criminal Procedure, Comparative Law, and International Criminal Law at the Georg-August Universität, Göttingen; Judge at the District Court (*Landgericht*) Göttingen. [kambos@gwdg.de]—I thank my student assistant Stefanie Kern for research assistance in the preparation of this paper regarding Belgian materials and my LL.M. and doctoral student Jose Fernando Botero regarding Spanish materials; I thank my student assistant Annika Poschadel for assistance in the formatting of the paper. I also thank the following colleagues for useful comments: Dr. Cedrid Ryngaert, Utrecht, Netherlands; Prof. Dr. Lorena Bachmaier, Prof. Dr. Alicia Gil Gil, Prof. Dr. Javier Chinchón and Manuel Ollé Sesé, all Madrid, Spain; Wolfgang Kaleck, Berlin, Germany. Last but not least I also thank the editors of this Journal for their thorough and thoughtful revision.

I. INTRODUCTION

In the infamous "torture memos," i.e., the memoranda concerning the treatment of the so-called "enemy combatants" held at Guantánamo Bay and other U.S. prisons overseas, senior officials of the former Bush Administration argued that "harsh interrogation techniques" were consistent with international law, in particular international humanitarian law. These interrogation techniques included waterboarding, pushing detainees against a wall, facial slaps, cramped confinement, stress positions, and sleep and food deprivation.[1] It was further argued that if an act was committed outside the territory of a State, the human rights law treaties and conventions to which that State was a party would not be binding extraterritorially, and therefore would not be applicable.[2] As to the torture prohibition under international law, it was argued that Article 1 of the Convention Against Torture defines torture as "severe pain" and thus shows that any lesser pain could not be considered torture. Treatment amounting to torture must induce excruciating, agonizing pain equaling serious injuries;[3] the infliction of non-lethal pain is excluded.[4] The treatment of detainees at Guantánamo Bay, which consisted of up to twenty hours of intense interrogations on most days over a period of nearly two months, would thus not amount to inhuman treatment.[5]

The memos were drafted by senior officials of the Bush Administration. The so-called "Bush Six" were Alberto Gonzales, former Attorney General; Professor John Yoo and Jay Bybee, both from the Office of Legal Counsel of the Justice Department (OLC); Douglas Feith, former Undersecretary of Defense for Policy; William Haynes II, former general counsel for the Department of Defense; and David Addington, former Vice President Richard "Dick" Cheney's Chief of Staff.[6] But the memos were also

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1 *Obama Publishes 'Torture' Memos*, BBC.COM, Apr. 16, 2009, http://news.bbc.co.uk/2/hi/americas/8003023.stm (last visited Nov. 13, 2009).

2 *See* Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Att'ys Gen., to William J. Haynes, II, Gen. Counsel, U.S. Dep't of Def. (Dec. 28, 2001), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 29, 36–37 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter TORTURE PAPERS].

3 Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President (Aug.1, 2002), *in* TORTURE PAPERS, *supra* note 2, at 172.

4 *See id.*

5 Kathleen T. Rhem, *Alleged Guantanamo Abuse Did Not Rise to Level of 'Inhumane'*, AM. FORCES PRESS SERVICE, July 13, 2005, http://www.defenselink.mil/news/newsarticle.aspx?id=16651 (last visited Nov. 13, 2009).

6 *See* Scott Horton, *The Bush Six to be Indicted*, DAILY BEAST, Apr. 13, 2009, http://www.thedailybeast.com/blogs-and-stories/2009-04-13/the-bush-six-to-be-indicted/ (last visited Nov. 13, 2009).

backed by the White House. As soon as February 7, 2002, President Bush signed an order stating, "I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world . . . ."[7] This presidential order further declared that none of the captured Taliban or al-Qaeda detainees qualified for P.O.W. status according to the Geneva Conventions.[8] Thus, not surprisingly, it has been argued that the U.S. administration entered legal no man's land and set up its own rules.[9]

On April 16, 2009, the Obama Administration released four secret memos, produced by the OLC, which authorized interrogators to use the interrogation methods mentioned above.[10] The release of these further memoranda once again led to a call for an independent investigation of the Bush Administration's conduct.[11] On August 24, 2009, Attorney General Eric Holder appointed federal prosecutor John Durham to look into abuse allegations revealed by an internal CIA inspector general's report[12] according to which, inter alia, interrogators once threatened to kill a 9/11 suspect's children and forced another suspect to watch his mother be sexually assaulted.[13] This appointment led to further discussions about the pros and cons of investigating the alleged abuses.[14]

This paper examines if criminal prosecutions of the masterminds of the torture memos in Europe are legally and politically possible, focusing on the jurisdictional and related procedural requirements in three representative countries (Belgium, Germany, and Spain). Clearly, this is a limited ap-

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[7] Presidential Memorandum on Humane Treatment of al Qaeda and Taliban Detainees 1 (Feb. 7, 2002), *available at* http://www.dod.mil/pubs/foi/detainees/dia_previous_releases/fourth_release/DIAfourth_release.pdf (last visited Nov. 13, 2009).

[8] *Id.* at 2.

[9] *See* PHILIPPE SANDS, TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES 18 (2008) (asserting the Bush administration made Guantánamo Bay a "legal black hole").

[10] These memos are available at the American Civil Liberties Union website: http://www.aclu.org/safefree/general/olc_memos.html (last visited Nov. 13, 2009).

[11] *See* Center for Constitutional Rights, Impeach Torture Architect Jay Bybee, http://ccrjustice.org/get-involved/action/impeach-torture-architect-jay-bybee (last visited Nov. 13, 2009).

[12] CIA, INSPECTOR GENERAL, SPECIAL REVIEW, COUNTERTERRORISM AND DETENTION ACTIVITIES (SEPTEMBER 2001–OCTOBER 2003) (2003-7123-IG) (May 7, 2004) (redacted version), *available at* http://luxmedia.vo.llnwd.net/o10/clients/aclu/IG_Report.pdf (last visited Nov. 13, 2009).

[13] Mark Mazzetti & Scott Shane, *C.I.A. Abuse Cases Detailed in Report on Detainees*, N.Y. TIMES, Aug. 24, 2009, at A1, *available at* http://www.nytimes.com/2009/08/25/us/politics/25detain.html?scp=1&sq=cia%20interrogations%20kill&st=cse (last visited Nov. 13, 2009).

[14] *See Prosecuting the C.I.A.*, N.Y. TIMES, Aug. 24, 2009, http://roomfordebate.blogs.nytimes.com/2009/08/24/prosecuting-the-cia/ (last visited Nov. 13, 2009).

proach in terms of the legal regimes and the countries analyzed. It is however justified for the following reasons. The countries selected constitute a representative sample among the European jurisdictions in that they possess different legal regimes and practices with regard to the prosecution of extraterritorial offences. These differences present, in turn, different legal and practical issues which make their comparison interesting and rewarding with a view to the future of universal jurisdiction in Europe. While Germany currently has perhaps the broadest universal jurisdiction regime in Europe (at least on paper), Belgium and Spain have recently suffered a legislative rollback *de facto* derogating universal jurisdiction but still are considered as the most active jurisdictions.[15] As to the focus on the jurisdictional and related issues, it should be noted that this does not mean that the relevant substantive law, in particular the form or mode of liability of the (intellectual) authors of the torture memos, does not present tricky problems. The opposite is the case, but at this stage of the proceedings these problems are of no practical relevance and, indeed, they will never become relevant if the result of this investigation—that no prosecutions or even trials will ever take place—proves to be correct.

II. PROSECUTION IN EUROPE

A. Belgium

While torture is a criminal offence under Belgian law as an individual act[16] and a crime against humanity (see *infra*), Belgium lacks jurisdiction to prosecute the masterminds of the torture memos. The 1993 Belgian law to prosecute international crimes has been amended three times, ultimately preventing victims from directly triggering proceedings and abolishing universal jurisdiction. Thus, it is not surprising that, to the knowledge of this author, so far no complaint with regard to Guantánamo or the torture memos has been filed in Belgium.

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[15] *See* Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 MICH. J. INT'L L. 927, 935 (2009) ("Belgium is still one of the most active jurisdictions in pursuing international crimes."); *id.* at 954 ("Spain has perhaps become the most welcoming forum for those seeking accountability for international crimes.").

[16] PENAL CODE (Belg.) art. 417*bis*–art. 417 *quinquies*, *available at* http://www.juridat.be/cgi_loi/loi_a1.pl?cn=1867060801&language=fr&caller=list&la=F&fromtab=loi&tri=dd+AS+RANK&rech=1&numero=1&sql=(text+contains+('))#LNK0106 (last visited Nov. 13, 2009) *See also* http://www.ejustice.just.fgov.be/loi/loi.htm (last visited Nov. 13, 2009). *See* Comm. Against Torture, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Addendum, Belgium*, ¶ 19, U.N. Doc. CAT/C/52/Add.2 (July 8, 2002).

1. The law

a. The original version of 1993

In 1993, the Belgian Parliament adopted the "Act Concerning the Punishment of Grave Breaches of the Geneva Conventions and Their Additional Protocols" (Act)[17] in order to incorporate the grave breaches of international humanitarian law as criminal offences in the domestic law. The Act provided for *unlimited universal jurisdiction* of the Belgian courts, i.e., jurisdiction irrespective of the place of commission and the nationality of the perpetrator or the victim. The relevant provision reads:

> The Belgian Courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed.[18]

Thus, a genuine link to Belgium was not required.[19] In addition, the Act applied to any conflict notwithstanding its character as international or non-international; otherwise, crimes committed during the Rwandan genocide, having taken place within the framework of a non-international conflict, could not have been prosecuted.[20]

As to the *victim's right* to initiate criminal proceedings, it is important to note, first of all, the strong position of victims under Belgian procedural law.[21] Each person allegedly injured by an offence may file a complaint and, in case of the prosecutor's decision not to open an investigation, turn to an examining magistrate (*judge d'instruction*) as a civil party (*partie civile*).[22] This procedural situation enables victims to initiate proceedings

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[17] *See* Loi du 16 Juin 1993 Relative à la Répression des Infractions Graves aux Conventions Internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, Additionnels à ces Conventions.

[18] The French original reads: "Les jurisdictions belges sont compétentes pour connaître des infractions prévues à la présente loi, indépendamment du lieu où celles-ci auront été commises." *See* Loi de Juin 1993 Relative à la Repression des Infractions Graves aux Conventions Internationales de Genève du 12 Août 1949 et aux Protocoles I et II du 8 Juin 1977 art. 7(1) (Belg).

[19] Luc Reydams, *Universal Criminal Jurisdiction: The Belgian State of Affairs,* 11 CRIM. L.F. 183, 191 (2000).

[20] Linda Keller, *Belgian Jury to Decide Case Concerning Rwandan Genocide*, ASIL INSIGHTS, May 2001, *available at* http://www.asil.org/insigh72.cfm; Stefaan Smis & Kim Van der Borght, *Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law*, 38 I.L.M. 918, 919 (1999).

[21] *See generally* HENRI-D. BOSLY ET AL., DROIT DE LA PROCÉDURE PÉNALE 327 (2008) (describing victims' rights in criminal proceedings).

[22] The corresponding Article 63 *Code d'Instruction Criminelle* reads: "Toute personne qui se prétendra lésée par un crime ou délit pourra en rendre plainte et se constituer partie civile

even if there is no realistic expectation that the suspect will ever enter Belgium territory and can thus be detained by the Belgium authorities. Thus, the absolute jurisdiction rule, combined with the procedural standing of victims, leads to what some call—mixing the jurisdictional with the procedural regime—universal jurisdiction *in absentia.*[23] I will come back to this conceptual error at the end of this paper.[24]

b. Amendments

In 1999 the Act was extended to crimes against humanity and genocide by the Act Concerning the Punishment of Grave Breaches of International Humanitarian Law[25] (the second Act). It adopted, inter alia, the offence definitions as contained in the ICC Statute.[26] Further, Article 9(3) of the second Act extended the victim's right to initiate proceedings for offences that fall under the competence of a military court.[27] Also, Article 5(3) of the second Act explicitly excluded any immunity attached to the official capacity of a person,[28] and on this basis complaints against sitting Heads of State (e.g., Ariel Sharon, Fidel Castro, Jiang Zemin, George H. W. Bush) have been filed.[29]

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devant le juge d'instruction compétent." *See also* LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 108 (2003).

[23] *See* Smis & Van der Borght, *supra* note 20, at 920; Reydams, *supra* note 19, at 190–91.

[24] *See infra* note 230 and accompanying text.

[25] Loi relative à la répression des violations graves de droit international humanitaire (Moniteur Belge 23.03.09) (Belg.); *translated in* Smis & Van der Borght, *supra* note 20, at 921.

[26] Article 1(2) of the second Act reads:

> Conformément au Statut de la Cour pénale internationale, le crime contre l'humanité s'entend de l'un des actes ci-après commis dans le cadre d'une attaque généralisée ou systématique lancée contre une population civile et en connaissance de cette attaque.

See Loi Relative à la Répression des Violations Graves de droit International Humanitaire (Moniteur Belge 23.03.09) (Belg.) art. 1(2).

[27] Article 9(3) states:

> Lorsqu'une infraction prévue à la présente loi ressortit à la compétence de la juridiction militaire, l'action publique est mise en mouvement soit par la citation de l'inculpé par le ministère public devant la juridiction de jugement soit par la plainte de toute personne qui se prétendra lésée par l'infraction et qui se sera constituée partie civile devant le président de la commission judiciaire au siège du Conseil de guerre dans les conditions prévues à l'article 66 du Code d'instruction criminelle.

Id. art. 9(3).

[28] Article 5(3) reads: "L'immunité attachée à la qualité officielle d'une personne n'empêche pas l'application de la présente loi." *Id.* art. 5(3).

[29] *See* HUMAN RIGHTS WATCH, VOL. 18, NO. 5(D), UNIVERSAL JURISDICTION IN EUROPE—THE STATE OF THE ART 37 (2006) [hereinafter HRW]; Stefaan Smis & Kim Van der Borght,

More important jurisdictional changes took place in April 2003.[30] Belgium came under increasing diplomatic pressure because of the high number of complaints against foreign Heads of State and Ministers such as Donald Rumsfeld. In addition, the International Court of Justice (ICJ) decided in its *Arrest Warrant* case that a Belgium arrest warrant against the incumbent Congolese foreign minister was illegal for violating the rules of state immunity *ratione personae* under international law.[31] The Belgian Court of Cassation followed implicitly this verdict in February 2003 in *Abbas Hijazi v. Sharon*, finding that the second Act could not exclude immunities under international law.[32] Thus, two months later, Article 5(3) was amended to the effect that immunities, while not applicable in principle, govern the application of the Act in accordance with the "limits established under international law."[33]

On the other hand, the rule on universal jurisdiction under Article 7 was limited, providing for an explicit prosecution request (*requisition*) of the Federal Prosecutor (*Parquet Fédéral*) if:

1. the violation was not committed on Belgian territory
2. the alleged offender is not Belgian
3. the alleged offender is not located within Belgian territory [and]

Introductory Note to Belgium's Amendment to the Law on June 16, 1993 (as Amended by the Law of February 10, 1999) Concerning the Punishment of Grave Breaches of Humanitarian Law, 42 I.L.M. 740, 742–43 (2003); REYDAMS, *supra* note 22, at 107 (explaining the conflict of this provision with absolute immunity of the King and partial immunity of Belgian ministers during their time of office). Luc Reydams, *Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law*, 1 J. INT'L CRIM. JUST. 679, 680 (2003).

[30] Loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire (Moniteur Belge 07. 05.2003)(Belg.); *translated in* Belgium Amendment to the Law of June 15, 1993 (As Amended by yhe Law of February 10, 1999) Concerning the Punishment of Grave Breaches of Humanitarian Law, 42 I.L.M. 749 (2003).

[31] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), ¶ 70 (Feb. 14, 2005), *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=36&case=121&code=cobe&p3=4.

[32] Hijazi v. Sharon, Cour de Cassation, (Feb, 12, 2003) (Belg.), *available at* www.cass.be/juris/jucf.htm. On this judgment, *see* Antonio Cassese, *The Belgian Court of Cassation v. the International Court of Justice: The Sharon and Others Case*, 1 J. INT'L CRIM. JUST. 437 (2003).

[33] The (new) Article 5(3) reads: "L' immunité internationale attachée à la qualité officielle d'une personne n'empêche l'application de la présente loi *que dans les limites établies par le droit international*." Loi Modifiant la loi du 16 Juin 1993 Relative à la Repression des Violations Graves du Droit International Humnaitaire et l'article 144*ter* du Code Judicaire (1), art.4(3) (Moniteur Belge 07.05.2003) (emphasis added). An unofficial English translation is available at 42 I.L.M. 749 (2003).

> 4. the victim is not Belgian or has not resided in Belgium for at least three years.[34]

Thus, the exercise of extraterritorial jurisdiction was made dependant on a Federal Prosecutor's decision to act.[35] He was not obliged to act if the complaint appeared unfounded or if an international court or another court with a certain link to the offence offered a fair, independent, and more effective avenue to justice—the *forum conveniens* doctrine.[36] While the victims could appeal the prosecutor's decision not to act,[37] their ability to initiate proceedings in cases without any link to Belgium, i.e., true universal jurisdiction cases, was practically abolished since the investigating judge was now prevented from acting solely on the basis of a complaint by a *par-*

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[34] *See* Unofficial English Translation, *supra* note 33, 755. The French original reads:

> L'action publique ne pourra toutefois être engagée que sur réquisition du procureur fédéral lorsque:
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> 1° l'infraction n'a pas été commise sur le territoire du Royaume;
>
> 2° l'auteur présumé n'est pas belge;
>
> 3° l'auteur présumé ne se trouve pas sur le territoire du Royaume et
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> 4° la victime n'est pas belge ou ne réside pas en Belgique depuis au moins trios ans.

See Moniteur Belge, *supra* note 33, 24851.

[35] *See also* Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 589 (2003).

[36] Article 7(1) reads:

> Saisi d'une plainte […] le procureur fédéral requiert du juge d'instruction qu'il instruise cette plainte, sauf si:
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> 1° la plainte est manifestement non fondée ou
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> 2° les faits relevés dans la plainte ne correspondent pas à une qualification de la présente loi; ou
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> 3° une action publique recevable ne peut résulter de cette plainte, ou
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> 4° des circonstances concretes de l'affaire, il resort que, dans l'intérêt d'une bonne administration de la justice et dans le respect des obligations internationales de la Belgique, cette affaire devrait être portée soit devant les juridictions intrnationales, soit devant la juridiction du lieu où les faits ont été commis, soit devant ja juridiction de l'Etat don't l'auteur est ressortissant ou celle du lieu où il peut être trouvé, et pour autant que cette juridiction est compétente, indépendante, impartial et équitable.

See Moniteur Belge, *supra* note 33, 24851.

[37] *See* Article 7(1): "La partie plaignante peut introduire un recours contre la decisión . . . ." *Id.*

tie civil.[38] Thus, the possibility of private petitioners to go "venue shopping" was severely restricted.[39]

In August 2003, Belgium abolished the second Act Concerning the Punishment of Grave Breaches of International Humanitarian Law and incorporated its norms into the Criminal Code and the Code of Criminal Procedure (CCP). On the one hand, the three ICC core *crimes* have been incorporated into the Criminal Code.[40] On the other hand, the *immunity* provision was inserted into Article 1*bis* of the CCP recognizing immunity on the basis of international law or binding treaty law and for persons invited to stay in Belgium either by Belgian authorities or "by an international organization established in Belgium and with which Belgium has concluded a headquarters agreement."[41] In particular, the latter part of the provision is said to be a consequence of the U.S. threats to have the NATO headquarters removed from Brussels if Belgium does not restrict its (universal) jurisdiction.[42]

As to the *exercise of jurisdiction*, the decisions concerning cases with no link to Belgium (CCP Article 12*bis*) or when the victim was Belgian or had been living in Belgium for at least three years (CCP Article 10(1)*bis*) now lie exclusively in the domain of the federal prosecutor whose decision cannot be appealed. Articles 10(1)*bis* and 12*bis* of the CCP have insofar an identical wording which states,

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[38] On the establishment of "certain filters" concerning civil petitioners, *see* Damien Vandermeersch, *Prosecuting International Crimes in Belgium*, 3 J. INT'L CRIM. JUST. 400, 402 (2005).

[39] *See* Reydams, *supra* note 29, at 687.

[40] *See* PENAL CODE, *supra* note 16, art. 136. *See also* Loi Relative aux Violations Graves du Droit International Humanitaire (1), arts. 6–12 (Moniteur Belge 07.08.2003) (Belg), *translated in* 42 I.L.M. 1258 (2003) (unofficial english translation).

[41] *See* Unofficial English Translation *supra* note 40, 1265–66. The original Article 1*bis* reads:

> (1) Conformément au droit international, les poursuites sont exclues à l'égard: - des chefs d'Etat, chefs de gouvernement et ministres des Affaires étrangères étrangers, pendant la période où ils exercent leur fonction, ainsi que des autres personnes dont l'immunité est reconnue par le droit international; - des personnes qui disposent d'une immunité, totale ou partielle, fondée sur un traité qui lie la Belgique.
>
> (2) Conformément au droit international, nul acte de contrainte relatif à l'exercice de l'action publique ne peut être posé pendant la durée de leur séjour, à l'encontre de toute personne ayant été officiellement invitée à séjourner sur le territoire du Royaume par les autorités belges ou par une organisation internationale établie en Belgique et avec laquelle la Belgique a conclu un accord de siège.

Code de Procedure Penale art. 1 (Belg.), *available at* http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&la=F&cn=1878041701&table_name=loi&&caller=list&F&fromtab=loi&tri=dd+AS+RANK&rech=1&numero=1&sql=(text+contains+(%27%27))#LNK0003 (last visited Nov. 13, 2009).

[42] Reydams, *supra* note 29, at 685.

> Prosecution . . . may only be undertaken at the request of the Federal Prosecutor, who shall evaluate any complaints and whose decision may not be appealed.[43]

The last part of the provision—as to the lack of a remedy against the Prosecutor's decision—was declared unconstitutional in 2005[44] and thus amended by a law in 2006 which no longer excludes an appeal.[45] Also, while originally the prosecutor only had to notify the Ministry of Justice of his decision, the 2006 law provides for the notification of the Court of Appeals if the prosecutor declines to proceed with a complaint.[46] In any case, the possibility of a civil party triggering an investigation autonomously no longer exists.

Furthermore, the *forum conveniens* doctrine of April 2003 has been confirmed; the prosecutor may not proceed with a complaint if (1) it is clearly without merit; (2) the facts alleged in the complaint do not constitute a criminal offence; (3) there is no Belgian jurisdiction; or (4) if a more convenient forum with an independent, impartial and fair court is available.[47] It

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[43] Unofficial English Translation, *supra* note 40, 1266. The French original reads: "Les poursuites . . . ne peuvent être engagées qu'à la requête du procureur fédéral qui apprécie les plaintes éventuelles. Il n'y a pas de voie de recours contre cette décision."

[44] La Cour d'Arbitrage, Judgment nr. 62/2005, numéro du rôle 2914, ¶ B.9 (Mar. 23, 2005), *available at* http://www.arbitrage.be.

[45] *See* Moniteur Belge 07/07/2006 at 34135 (Belg.) ("Loi du 22 mai 2006 modifiant certaines dispositions de la loi du 17 avril 1878 contenant le Titre préliminaire du Code de procedure pénale, ainsi qu'une disposition de la loi du 5 août 2003 relative aux violations graves de droit international humanitaire"). Article 10(1*bis*) now reads: "Les poursuites, en ce compris l'instruction, ne peuvent être engagées qu'à la requête du procureur fédéral qui apprécie les plaintes éventuelles." Code de Procedure Penale, *supra* note 41, art. 10(1*bis*) (Belg.).

[46] Code de Procedure Penale, *supra* note 41, art. 10(1*bis*)(Belg.)

[47] *See id.* art. 10 (1*bis*), art. 12*bis*. These provisions read:

> Saisi d'une plainte en application des alinéas précédents, le procureur fédéral requiert le juge d'instruction d'instruire cette plainte sauf si:
>
> 1° la plainte est manifestement non fondée; ou
>
> 2° les faits relevés dans la plainte ne correspondent pas à une qualification des infractions visées au livre II, titre Ibis, du Code pénal; ou
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> 3° une action publique recevable ne peut résulter de cette plainte; ou
>
> 4° des circonstances concrètes de l'affaire, il ressort que, dans l'intérêt d'une bonne administration de la justice et dans le respect des obligations internationales de la Belgique, cette affaire devrait être portée soit devant les juridictions internationales, soit devant la juridiction du lieu où les faits ont été commis, soit devant la juridiction de l'Etat dont l'auteur est ressortissant ou celle du lieu où il peut être trouvé, et pour autant que cette juridiction présente les qualités d'indépendance, d'impartialité et d'équité, tel que cela peut notamment ressortir des engagements internationaux relevants liant la Belgique et cet Etat.

Id.

is important to note that the new law contains a transitional clause according to which pending cases could be continued under certain circumstances.[48]

It has been argued that these new restrictions of August 2003 were the result of continued criticism by certain countries which urged Belgium to restrict its jurisdiction even further, especially after a complaint was filed in May 2003 against U.S. General Thomas Franks for alleged war crimes in Iraq.[49] Be that as it may, the fact of the matter is that the once broad universal jurisdiction regime of Belgium has practically been abolished with this new legislation; instead, *traditional jurisdictional principles* and the idea of *subsidiarity*, also contained in the *forum conveniens* doctrine, won the day.[50] Interestingly enough, as to the traditional principles the law of August 2003 extended the active and passive personality principles to persons, either alleged perpetrators or victims, who have had their principle residence in Belgium for at least three years. There is a difference in determining three years between perpetrators (active personality) and victims (passive personality): The victims should have been residents at least three years before the commission of the crime,[51] whereas in the case of the perpetra-

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[48] *See* Cour d'Arbitrage Extrait de l'arrêt n° 104/2006 du 21 Juin 2006 art. 29(3) (Moniteur Belge 12/07/2006) (Belg.). The corresponding Article 29(3) reads:

> Les affaires pendantes à l'information à la date d'entrée en vigueur de la présente loi et portant sur des infractions visés au titre Ibis, du livre II, du Code pénal sont classées sans suite par le procureur fédéral dans les trente jours de l'entrée en vigueur de la présente loi lorsqu'elles ne rencontrent pas les critères visés aux articles 6, 1°bis, 10, 1°bis et 12bis du titre préliminaire du Code de procédure pénale. Les affaires pendantes à l'instruction à la date d'entrée en vigueur de la présente loi et portant sur des faits visés au titre Ibis, du livre II, du Code pénal, sont transférées par le procureur fédéral au procureur général près la Cour de cassation endéans les trente jours après la date d'entrée en vigueur de la présente loi, à l'exception des affaires ayant fait l'objet d'un acte d'instruction à la date d'entrée en vigueur de la présente loi, dès lors que, soit au moins un plaignant était de nationalité belge au moment de l'engagement initial de l'action publique, soit au moins un auteur présumé a sa résidence principale en Belgique, à la date d'entrée en vigueur de la présente loi. . . .
>
> Pour les affaires qui ne sont pas classées sans suite sur base de l'alinéa 1er, du § 3, du présent article ou dont le dessaisissement n'est pas prononcé sur base du précédent alinéa, les juridictions belges restent compétentes.

Id.

[49] Vandermeersch, *supra* note 38, at 402; Kaleck, *supra* note 15, at 934. *See also* Human Rights Watch, Belgium: Universal Jurisdiction Law Repealed, Aug. 1, 2003, http://www.hrw.org/en/news/2003/08/01/belgium-universal-jurisdiction-law-repealed (last visited Nov. 13, 2009).

[50] Cedric Ryngaert, *Applying the Rome Statutes Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting under the Universality Principle*, 19 CRIM. L.F. 153, 170 (2008).

[51] Article 10(1*bis*) as to passive personality reads: "[C]ommise contre une personne qui, au moment des faits, est un ressortissant belge ou une personne qui, depuis au moins trois

tors jurisdiction may even exist if residence has been acquired after commission of the crime.[52]

2. Practice

Despite the increasingly restrictive legislation and policy, Belgium still maintains a special police unit to investigate and prosecute international crimes already created in 1998.[53] While there exists no special unit on the level of the federal prosecution and investigative judges, the Belgian justice system has gained considerable experience in prosecuting international crimes and still is one of the most active jurisdictions.[54] Because of the colonial ties between Belgium and Rwanda, many Rwandans fled to Belgium after the beginning of the genocide in 1994.[55] Several complaints were filed by relatives of Belgian and Rwandan victims in order to have the perpetrators prosecuted under the 1993 Act.[56] After some initial difficulties,[57] the Belgian authorities started investigating and, in 2001, convicted four Rwandans in the first war crimes trial. The "Butare Four" were found to be guilty of violations of common Article 3 of the Geneva Conventions and Article 4(2)(a) of the Additional Protocol II.[58] There was no *forum (non) conveniens* problem in this trial. Since both the alleged perpetrators and victims were present in Belgium territory, the ICTR declined to take over the case and Rwanda collaborated with the Belgian officials.[59] To avoid a problem with the principle of legality (prohibition of retroactivity), crimes against

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ans, séjourne effectivement, habituellement et légalement en Belgique." Code de Procedure Penale, *supra* note 41, art. 10(1*bis*).

[52] CCP Articles 6 and 7 as to active personality read: "[T]out Belge ou toute personne ayant sa résidence principale sur le territoire du Royaume." For Article 6 to apply, it is necessary that one of the listed crimes be committed (inter alia violations of International Humanitarian Law). Article 7 only applies in a case of double incrimination; according to Article 7(2), if the crime was committed against a foreigner then the prosecution may only occur at the request of the federal prosecutor and only if, additionally, the prosecution was preceded by a complaint of the victim or his family or by a formal notice from the authorities of the place of commission to the Belgian authorities.

[53] HRW, *supra* note 29, at 11, 40.

[54] *See* Kaleck, *supra* note 15, at 935; HRW, *supra* note 29, at 11.

[55] *See* Vandermeersch, *supra* note 38, at 403.

[56] *See id.* at 403–04.

[57] For a discussion, *see* REYDAMS, *supra* note 22, at 110.

[58] Public Prosecutor v. the Butare Four (Assize Court of Brussles, June 8, 2001) (Belg.), *available at* http://jure.juridat.just.fgov.be/?lang=fr.

[59] REYDAMS, *supra* note 22, at 112; Luc Reydams, *Belgium's First Application of Universal Jurisdiction: The Butare Four Case*, 1 J. INT'L CRIM. JUST. 428, 434 (2003).

humanity only incorporated into Belgian law by the 1999 Act have not been charged.[60]

An exceptional case is that of *Hissène Habré*, the former Chadian dictator who is accused of genocide, political murder, and crimes against humanity committed by his government in the 1980s. In 2000, victims filed a criminal complaint against Habré in Belgium on the basis of universal jurisdiction[61] and Chad waived Habré's immunity in 2002.[62] Although Belgium repealed the law under which the complaints were filed in April and August 2003 respectively, the case could nevertheless go forward because of the August 2003 Act's transitional clause quoted above. In 2005, Belgium issued an arrest warrant and requested Senegal, where Habré is under house arrest, to extradite him.[63] After several changes in its domestic law and consultations with the African Union, Senegal decided to prosecute Habré itself.[64] The president of Senegal, however, stated that the trial could not commence until his country received international funding because Senegal was not willing to bear the costs of Habré's trial.[65] Faced with Senegal's inaction, Belgium asked the ICJ on February 19, 2009 to order Senegal to prosecute or extradite Mr. Habré.[66] Belgium also asked the Court for provisional measures to order Senegal not to allow Habré to leave Senegal pending the court's judgment on the merits.[67] The Court, however, declined the necessity of provisional measures. Belgium's memorial is scheduled for July 2010.[68]

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[60] Reydams, *supra* note 59, at 432. *See also* Keller, *supra* note 20; Kaleck, *supra* note 15, at 935–36.

[61] *See* Human Rights Watch, Chronology of the Habré Case, http://www.hrw.org/en/news/2009/02/12/chronology-habr-case (last visited Nov. 13, 2009).

[62] On the question of immunity *ratione materiae* concerning Habré, *see* Paola Gaeta, *Ratione Materiae Immunities of Former Heads of State and International Crimes: The Hissène Habré Case*, 1 J. INT'L CRIM. JUST. 186 (2003).

[63] Human Rights Watch, *supra* note 61.

[64] *Id.*

[65] *See* Human Rights Watch, *African Union: Press Senegal on Habré*, Jan. 28, 2009, http://www.hrw.org/en/news/2009/01/28/African-union-press-senegal-habr-trial?.

[66] Press Release, Int'l Court of Justice, Belgium Institutes Proceedings Against Senegal and Requests the Court to Indicate Provisional Measures (Feb. 19, 2009), *available at* http://www.icj-cij.org/docket/files/144/15052.pdf.

[67] *Id.*

[68] Press Release, Int'l Court of Justice, Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Fixing of Time-Limits for the Filing of the Initial Pleadings (July 17, 2009), *available at* http://www.icj-cij.org/docket/files/144/15343.pdf. All relevant documents for the Belgium v. Senegal case are available at http://www.icj-cij.org/docket/index.php (follow "Contentious Cases" hyperlink; then follow "2009: Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)" hyperlink).

B. Germany

1. Introduction

The former German government opted for a full-fledged and autonomous implementation of the ICC Statute into domestic law. Apart from the actual ICC Statute Act of December 7, 2000[69]—as the formal constitutional precondition for the ratification of the ICC Statute—and a reform of the constitutional ban on the extradition of nationals with a view to international criminal tribunals and member states of the EU,[70] two comprehensive laws covering the substantive and the procedural side of this implementation have been approved with an overwhelming majority across the political spectrum in both houses of parliament (*Bundestag* and *Bundesrat*). The substantive law is the *Code of Crimes Against International Law* (*Völkerstrafgesetzbuch,* "VStGB" (CCAIL))[71] of June 26, 2002 which—apart from a few rules on the General Part—provides for an unlimited principle of universal jurisdiction, to be discussed in detail below, and incorporates the crimes of Articles 5 through 8 of the ICC Statute into domestic law. The CCAIL entered into force on July 1, 2002, the same day as the ICC Statute. It has been the object of extensive academic debate[72] and has so far been

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[69] BUNDESGESETZBLATT, Teil II (2000) at 1393 [*FEDERAL OFFICIAL GAZETTE*, hereinafter BGBL 2000.]; official draft *in* Bundestag Doc. 14/2682.

[70] *See* GRUNDGESETZ [Constitution] art. 16.

[71] BUNDESGESETZBLATT, Teil I (2002) at 2254 [hereinafter BGBL 2002]. The travaux can be found *in* BUNDESMINISTERIUM DER JUSTIZ, ARBEITSENTWURF EINES GESETZES ZUR EINFÜHRUNG DES VSTGB (2001); MATERIALIEN ZUM VSTGB (Sascha Rolf Lüder & Thomas Vormbaum eds. 2003) [hereinafter Lüder & Vormbaum].

[72] *Cf.* Steffen Wirth & Jan C. Harder, *Die Anpassung des Deutschen Rechts an das Römische Statut des Internationalen Strafgerichtshofs aus Sicht Deutscher Nichtregierungsorganisationen*, 33 ZEITSCHRIFT FÜR RECHTSPOLITIK 144, 146 (2000); Gerhard Werle, *Völkerstrafrecht und Geltendes Deutsches Strafrecht*, 55 JURISTENZEITUNG 755 (2000); Gerhard Werle, *Konturen eines Deutschen Völkerstrafrechts*, 56 JURISTENZEITUNG 885 (2001); Gerhard Werle & Florian Jeßberger, *Das Völkerstrafgesetzbuch*, 57 JURISTENZEITUNG 725 (2002); Gerhard Werle & Florian Jeßberger, *International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law*, 13 CRIM. L.F. 191 (2002); CLAUS KREß, VOM NUTZEN EINES DEUTSCHEN VÖLKERSTRAFGESETZBUCHS (2000); Claus Kreß, *Völkerstrafrecht in Deutschland*, 20 NEUE ZEITSCHRIFT FÜR STRAFRECHT 617, 619 (2000); Andreas Zimmermann, *Bestrafung Völkerrechtlicher Verbrechen Durch Deutsche Gericht Nach In-Kraft-Treten des Völkerstrafgesetzbuchs*, 55 NEUE JURISTISCHE WOCHENSCHRIFT 3068 (2002); Andreas Zimmermann, *Auf dem Weg zu einem Deutschen Völkerstrafgesetzbuch—Entstehung, Völkerrechtlicher Rahmen und Wesentliche Inhalte*, 35 ZEITSCHRIFT FÜR RECHTSPOLITIK 97 (2002); Helmut Kreicker, *Deutschland*, *in* NATIONALE STRAFVERFOLGUNG VÖLKERRECHTLICHER VERBRECHEN. NATIONAL PROSECUTION OF INTERNATIONAL CRIMES 58 (Albin Eser & Helmut Kreicker eds., 2003); Steffen Wirth, *Germany's New International Crimes Code: Bringing a Case to Court*, 1 J. INT'L CRIM. JUST. 151 (2003); Stefano Manacorda & Gerhard Werle, *L'adaptation des Systèmes Pénaux Nationaux au Status de Rome, Le Paradigme du Völker-*

translated into eight languages (all U.N. languages—Arabic, Chinese, English, French, Russian, Spanish—as well as Greek and Portuguese).[73] The procedural or cooperation law is the ICC Implementation Act (*Gesetz zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofs* (IStGH-AusführungsG)) of June 21, 2002.[74] This law is a so-called "Artikelgesetz," i.e., a law that consists of various articles which either create autonomous laws in it or reform other laws. In fact, it contains thirteen articles, the most important of which is Article 1 which contains the actual *ICC Cooperation Law* (*Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof* (IStGHG))[75] and which in turn consists of seventy-three sections or paragraphs. This cooperation law, including the motives, was translated into English, Arabic, French, Russian and Spanish.[76]

It is important to note that both laws—the CCAIL as well as the Implementation Act—are autonomous laws that, in principle, can be understood and applied on their own without references to other laws. This is es-

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strafgesetzbuch Allemand, 1 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 501 (2003); Thomas Weigend, *Das Völkerstrafgesetzbuch—Nationale Kodifikation Internationalen Rechts*, *in* GEDÄCHTNISSCHRIFT FÜR THEO VOGLER 197, 201 (Otto Triffterer ed., 2004); Hansjörg Geiger, *O Tribunal Penal Internacional e os Aspectos do Novo Código Penal Internacional Alemão, in* TRIBUNAL PENAL INTERNACIONAL 61, 77 (Pablo Rodrigo Alflen da Silva ed., 2004); Marc Engelhart, *Der Weg zum Völkerstrafgesetzbuch—Eine Kurze Geschichte des Völkerstrafrechts*, 26 JURA. 734, 742 (2004); Albin Eser, *Das Rom-Statut des Internationalen Strafgerichtshofs als Herausforderung für die Nationale Strafrechtspflege: Exemplifiziert an der Implementierung in das Deutsche Recht*, *in* FESTSCHRIFT FÜR MANFRED BURGSTALLER ZUM 65 GEBURTSTAG 355–73, 369 (Christian Grafl & Ursula Medigovic eds., 2004); JAN HÜBNER, DAS VERBRECHEN DES VÖLKERMORDS IM NATIONALEN UND INTERNATIONALEN RECHT 302 (2004); Christoph Safferling, *Germany's Adoption of an International Criminal Code, in* 1 ANNUAL OF GERMAN & EUROPEAN LAW 365 (Russell A. Miller & Peer Zumbansen eds., 2003); Helmut Satzger, *Das Neue Völkerstrafgesetzbuch*, 22 NEUE ZEITSCHRIFT FÜR STRAFRECHT 125 (2002); Frank Dietmeier, *Völkerstrafrecht und Deutsche Gesetzgeber-kritische Anmerkung zum Projekt eines Deutschen "Völkerstrafgesetzbuches"*, *in* GEDÄCHTNISSCHRIFT FÜR DIETER MEURER 333 (Eva Graul & Gerhard Wolf eds., 2002).

[73] See the translations of the German law on Cooperation with the ICC at www.department-ambos.unigoettingen.de/index.php?option=com_content&view=article&id=351&Itemid=179 (last visited Nov. 13, 2009).

[74] BGBL. 2002, *supra* note 71, 2144. Thereto MacLean, *Gesetzentwurf Über die Zusammenarbeit mit dem IStGH*, 35 ZEITSCHRIFT FÜR RECHTSPOLITIK 261 (2002); Jörg Meißner, *Das Gesetz zur Ausführung des Römischen Status des IStGH*, 56 NEUE JUSTIZ 347 (2002); Peter Wilkitzki, *The German Law on Co-operation with the ICC*, 2 INT'L CRIM. L. R. 197 (2002); Weigend, *supra* note 72, at 199.

[75] The rules governing cooperation with the ICTY and ICTR can be found in *Jugoslawien Strafgerichtshof Gesetz (JStGHG)* and the *Ruanda-Strafgerichsthof-Gesetz (RStGHG)*, *in* WOLFGANG SCHOMBURG ET AL., INTERNATIONALE RECHTSHILFE IN STRAFSACHEN 1743–59, 1760–70 (2006).

[76] *See* www.department-ambos.uni-goettingen.de/index.php?option=com_content&view=article&id=351&Itemid=179.

pecially true of the ICC Cooperation Law, which provides for a special cooperation regime with the ICC without making reference to the German Act on International Assistance in Criminal Matters (*Gesetz über die Rechtshilfe in Strafsachen* (IRG)).[77] This legislative technique was not accidental but the result of long discussions within the government with the participation of experts. The main arguments in favor of an autonomous approach were the easier application of the laws and their model function.

2. The jurisdictional regime

The traditional German law on jurisdiction (*Strafanwendungsrecht*) is contained in sections 3 to 7 of the German Criminal Code (*Strafgesetzbuch* (CC)). These norms implement—more or less adequately[78]—the international principles of jurisdiction, i.e., territoriality with its extension to ships and aircrafts (sections 3, 4), protection (section 5: "domestic legal interests"), universal jurisdiction (section 6: "internationally protected legal interests"), passive and active personality (sections 7(1) and (2) no. 1) and representation (section 7(2) no. 2). Section 6, the provision on universal jurisdiction, mixes up a set of highly different offences ranging from "offences involving nuclear energy" (no. 2), attacks on air and maritime traffic (no. 3), "humane trafficking" (no. 4), "unlawful drug dealing" (no. 5), "distribution of pornography" (no. 6), "counterfeiting money and securities" (no. 7), "subsidy fraud" (no. 8) to offences "which on the basis of an international agreement binding on the Federal Republic of Germany must be prosecuted even though committed abroad."[79] With the entry into force of the CCAIL, the jurisdictional regime for international core crimes within the meaning of Articles 5 to 8 of the ICC Statute (implemented in sections 6 to 12 of the CCAIL) is contained in CCAIL section 1, which provides for an *unlimited* ("true") principle of *universal jurisdiction*:[80]

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[77] German Law on Cooperation with the International Criminal Court [IStGHG–ICC Act] Dec. 10, 1988, pt. 1, § 1, *available at* http://www.auswaertiges-amt.de/diplo/en/Aussenpolitik/.../dl__IStGHG.pdf.

[78] For a detailed analysis and criticism, see KAI AMBOS, INTERNATIONALES STRAFRECHT 23, § 3 (2008).

[79] *See* Strafgesetzbuch [StGB] [German Criminal Code] Nov. 13, 1998, Federal Law Gazette [Bundesgesetzblatt] Teil 1, *translated in* MICHAEL BOHLANDER, THE GERMAN CRIMINAL CODE: A MODERN ENGLISH TRANSLATION (2008). The original of § 6 no. 9 reads: "Taten, die auf Grund eines für die Bundesrepublik Deutschland verbindlichen zwischenstaatlichen Abkommens auch dann zu verfolgen sind, wenn sie im Ausland begangen werden." *Id.*

[80] Contrary to the qualified or limited principle of universal jurisdiction, in the absolute or unlimited form the jurisdiction is not attached to certain conditions (e.g., residence). *See* AMBOS, *supra* note 78, at 54, § 3 mn. 95.

> This Act shall apply to all criminal offences [*Straftaten*] against international law designated under this Act, to serious criminal offences [*Verbrechen*][81] designated therein even when the offence was committed abroad and bears no relation to Germany.[82]

The regulation, using the wording "bears no relation to Germany," explicitly revokes[83] the traditional jurisprudence of the Federal Supreme Court (*Bundesgerichtshof* (BGH)), which demanded such a domestic link.[84] This broad concept of universal jurisdiction, which was already defended by the German delegation at the Rome ICC Conference arguing for its inclusion in the ICC Statute,[85] finds its rationale in the fundamental interests protected by international criminal law and the seriousness of international core crimes trying to prevent the violation of these interests. The protection of these interests and the prosecution of the respective crimes lie in the interest of humanity[86] and thus cannot be regarded as a domestic issue of the State where the crime was committed. Consequently, the principle of non-intervention is not violated.[87] We will return to this normative foundation of universal jurisdiction in the conclusion of this paper.[88]

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[81] In German law the term "serious criminal offence" (*Verbrechen*) is used to denote criminal offences (*Straftaten*) that are punishable with not less than one year of imprisonment. Mitigating (and aggravating) circumstances are to be disregarded. *See* German Criminal Code, *supra* note 79, § 12. The other offences (misdemeanours, *Vergehen*) do not have a minimum punishment of one year. In the Code of Crimes Against International Law, all offences are "serious criminal offences" (*Verbrechen*) except the "Vergehen" of sections 13 and 14.

[82] For the source of the translation, *see supra* note 73.

[83] *Cf.* the travaux *in* Lüder & Vormbaum, *supra* note 71, at 26 ("*Referentenentwurf*" according to BR-Drucks. 29/02). *Cf.* Werle, *supra* note 72, at 890; Werle & Jeßberger, *supra* note 72, at 729*;* Zimmermann, *supra* note 72, at 3069; *Member of Parliamente Pick*, *in* Lüder & Vormbaum, *supra* note 71, at 80; Brigitte Zypries, *in* DER ISTGH FÜNF JAHRE NACH ROM 11, 14 (Gunnar Theissen & Martin Nagler eds., 2004).

[84] *See* Bundesgerichtshof [Federal Supreme Court], 1 BGs 100/94 (Feb. 13, 1994) *in* 14 NEUE ZEITSCHRIFT FÜR STRAFRECHT 232, 233 (1994); Bundesgerichtshof, 2 ARs 499-98 (Dec. 11, 1998), *in* 19 NEUE ZEITSCHRIFT FÜR STRAFRECHT 236 (1999); Bundesgerichtshof, 2 ARs 51/99 2 AR 199/98 (Feb. 11, 1999), *in* 19 STRAFVERTEIDIGER 240 (1999); Bundesgerichtshof, 4 StR 19/99 (Apr. 22, 1999), *in* 45 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN STRAFSACHEN 64, 65, 68 (1999), though clearly for war crimes (at 69). *See also* for case-law Kai Ambos, *§ 6 Auslandstaten gegen international geschützte Rechtsgüter*, *in* MÜNCHNER KOMMENTAR STRAFGESETZBUCH §§ 1–51 , 177, 178 § 6 mn. 1, 4 (Wolfgang Joecks et al. eds., 2003).

[85] The author was 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 78, at 287, § 8 mn. 7).

[86] See motives in Lüder & Vormbaum*, supra* note 71, at 26.

[87] Critique however Oberlandesgericht [Higher Regional Court] Stuttgart, 5 Ws 109/05 (Sep. 13, 2005), *reprinted in* 26 NEUE ZEITSCHRIFT FÜR STRAFRECHT 117, 119 (2006)

There exist, however, *political and practical concerns* which, in the German case, have been especially echoed by the Federal Prosecutor General (*Generalbundesanwalt* (GBA)) already during the drafting process of the CCAIL. As a result, the unlimited principle of universal jurisdiction, in terms of substantive law, has been limited by the procedural norm of section 153f of the Criminal Procedure Code (*Strafprozessordnung* (CPC)):

> (1) In the cases referred to under section 153c subsection (1), numbers 1 and 2, the public prosecution office may dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, if the accused [suspect][89] is not present in Germany and such presence is not to be anticipated. If in the cases referred to under section 153c subsection (1), number 1, the accused [suspect] is a German, this shall however apply only where the offence is being prosecuted before an international court or by a state on whose territory the offence was committed or whose national was harmed by the offence.
>
> (2) In the cases referred to under section 153c subsection (1), numbers 1 and 2, the public prosecution office can, in particular, dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, if
>
> 1. there is no suspicion of a German having committed such offence,
> 2. such offence was not committed against a German,
> 3. no suspect in respect of such offence is residing in Germany and such residence is not to be anticipated and
> 4. the offence is being prosecuted before an international court or by a state on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offence.
>
> The same shall apply if a foreigner accused of an offence committed abroad is residing in Germany but the requirements pursuant to the first sentence, numbers 2 and 4, have been fulfilled and transfer to an international court or extradition to the prosecuting state is permissible and is intended.
>
> (3) If in the cases referred to under subsection (1) or (2) public charges have already been preferred, the public prosecution office may withdraw

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[hereinafter OLG Stuttgart]. Note the left column, which sees a "doubtful extension" of jurisdiction.

[88] *See infra* text accompanying note 217.

[89] The provision originally referred mistakenly to the "accused." *See* Werner Beulke, *§ 153f*, *in* 5 LÖWE-ROSENBERG DIE STRAFPROZEßORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ, 225, 232, § 153f mn. 14 (Volker Erb et al. eds., 2008); Weigend, *supra* note 72, at 209 n.49). As this has been correctly changed to "suspect" ("*Beschuldigter*"), the author changed the translation accordingly.

> the charges at any stage of the proceedings and terminate the proceedings.[90]

The *interplay between CCAIL section 1 and CPC section 153f* can be explained as follows:[91] CCAIL section 1 fits the German criminal prosecution of international crimes within an "international criminal justice system," which—to avoid impunity of serious human rights violations—relies primarily on the territorial/suspect/victim States; second, on the ICC and, if applicable, other international criminal courts;[92] and third, on third States exercising extraterritorial jurisdiction on the basis of the principle of universal jurisdiction.[93] This system entails a *conditional subsidiarity* of the universal jurisdiction principle which CPC section 153f secures by directing the Prosecutor's discretion. The overall aim of the provision is to counteract an alleged overload of the judiciary[94] through so-called "Forum-Shopping" with regard to international core crimes[95] and to limit criminal proceedings to "*reasonable* cases."[96] The conflicting procedural principles of legality (mandatory prosecution) and opportunity (discretion) are adjusted in accordance with the particularities of international crimes committed abroad as

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[90] *See* GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 133, mn. 359, n.737 (2009) (quoting section 153f).

[91] I draw from my earlier paper 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*, 18 CRIM. L.F. 43, 43–58 (2007). For a good English analysis of section 153f, *see* AMNESTY INTERNATIONAL, GERMANY: END IMPUNITY THROUGH UNIVERSAL JURISDICTION [NO SAFE HAVEN SERIES 3] 55 (2008), *available at* http://www.amnesty.org/en/library/info/EUR23/003/2008/en.

[92] *Cf.* AMBOS, *supra* note 78, at 116, § 6 mn. 58.

[93] *Cf. id.* at 30 § 3 mn. 21. *See also* Rainer Keller, *Grenzen, Unabhängigkeit und Subsidiarität der Weltrechtspflege*, 153 GOLTDAMMER'S ARCHIV 25, 34, 37 (2006); Michael E. Kurth, *Zum Verfolgungsermessen des Generalbundesanwaltes Nach § 153f StPO*, 1 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 81, 84 (2006), *available at* http://www.zis-online.com. For a "flexible" principle of universal jurisdiction, *see* Hans Vest, *Zum Universalitätsprinzip bei Völkerrechtsverbrechen. Bemerkungen de Lege Ferenda*, 123 SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT 331 (2005). 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, ¶ 616 (2005), *available at* http://www.un.org/news/dh/sudan/com_inq_darfur.pdf ("[T]he ICC should defer to national courts other than those of Sudan which genuinely undertake proceedings on the basis of universal jurisdiction."). *Compare with* Mireille Delmas-Marty, *Interactions Between National and International Criminal Law in the Preliminary Phase of Trial at the ICC*, 4 J.INT'L CRIM. JUST. 2, 6 (2006).

[94] *See* motives *in* Lüder & Vormbaum, *supra* note 71, at 60; Werle, *supra* note 72, at 890.

[95] For an analysis of the danger posed by an arbitrary expansionist choice of jurisdiction, *see* Kurth, *supra* note 93, at 83.

[96] Zypries, *supra* note 83, at 14.

opposed to the rules for ordinary crimes committed abroad for which CPC section 153c(1) remains applicable.[97]

CPC section 153f refers to *all* offences of the CCAIL (sections 6 through 14), although only the serious criminal offences (*Verbrechen*) of sections 6 through 12 fall under the principle of universal jurisdiction, while for the less serious misdemeanours (*Vergehen*) of sections 13 and 14 the general criminal law[98] remain applicable.[99] Insofar one could have left it with the application of the general rules in CPC section 153c.[100] The discretion as a result of the opportunity principle is structured in two directions, always taking care of the superior goal of preventing impunity:[101] In case of *crimes committed abroad with a domestic link*—i.e., when the suspect is present in Germany[102] and/or when he/she is a German[103]—it follows from the cited rules *e contrario* that an obligation to prosecute exists *in principle*; there could only then be a refrain from prosecuting a German national when the offence is being prosecuted before an international court or by the territorial or victim State,[104] since in this case the overall goal (to avoid impunity) could also be achieved.[105] If, however, there is *no domestic link* whatsoever—when a German is neither involved as victim nor as perpetrator,[106] and no suspect of such offence is residing in Germany, and such residence

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[97] This provision gives the prosecutor discretion with regard to the "non-prosecution of extraterritorial offences," CPC section 153(c)(1) clause 2 provides for the application of section 153f in case of international crimes. For the travaux, *see* Lüder & Vormbaum, *supra* note 71, at 59; KREß, *supra* note 72, at 625; Jeßberger, *in* Theisen & Nagler, *supra* note 83, at 48; Beulke, *supra* note 89, at 218, § 153f mn. 9.

[98] *See* StGB, *supra* note 79, § 3.

[99] For the distinction, *see supra* note 81.

[100] *Cf.* Edda Weßlau, *§153f [Absehen von der Verfolgung einer Nach VStGB Strafbaren Tat]*, *in* SYSTEMATISCHER KOMMENTAR ZUR STRAFPROZEßORDNUNG UND ZUM GERICHTSVERFASSUNGSGESETZ § 153f mn. 5 (Hans-Joachim Rudolphi et al., Apr. 2009).

[101] *See* motives *in* Lüder & Vormbaum, *supra* note 71, at 60. *See also* Armin Schoreit, *§ 153f [Taten nach dem Völkerstrafgesetzbuch]*, *in* KARLSRUHER KOMMENTAR 950–51, § 153f mn. 2 (Rolf Hannich ed., 2008); Beulke, *supra* note 89, at 228, § 153f mn. 4.

[102] Strafprozeßordnung [StPO] [Code of Criminal Procedure] Jun 26, 2002, § 153f(1) cl. 1.

[103] *Id.* § 153f(1) cl. 2.

[104] *Id.*

[105] *See supra* notes 75–76 and accompanying text. Section 28 (in conjunction with section 68) of the "IStGHG" supports this argument since there is basically a refrain from prosecuting a German national where there is a (declared) ICC surrender request. *See* BGBL 2002, *supra* note 71, at 2254. *Cf.* Beulke, *supra* note 89, at 235, § 153f mn. 24; Weßlau, *supra* note 100, § 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 can be enough without any concrete proof an investigation is really being carried out.

[106] Strafprozeßordnung [StPO] [Code of Criminal Procedure] Jun 26, 2002, § 153f(2) nos. 1, 2.

is not to be anticipated[107]—the prosecution may in particular ("*insbesondere*") be dispensed of, if—avoidance of impunity!—an international court or the territorial/suspect/victim State prosecutes the respective offence(s).[108] The same applies—as an exception to the duty to prosecute crimes according to CPC section 153f(1) cl. 1 *e contrario*—where the foreign suspect of an offence committed abroad is residing in Germany, but there are no German victims to deplore[109] and the suspect's transfer to an international court or extradition to the prosecuting State[110] is permissible and is intended.[111] Besides, it ensues from CPC section 153f(1) cl. 1 in conjunction with 153c(1) no. 1 and 2 that in cases 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).[112]

Section 153f thus adopts a "jurisdictional hierarchy by stages" (*gestufte Zuständigkeitspriorität*)[113] according to which foreign courts with a close link to the alleged offence and the ICC to a large extent are given primacy for the cases dealt with in CPC section 153f(2). While, on the one hand, the wording "may" (instead of "ought to"),[114] inserted by the Legal Committee (*Rechtsausschuss*) of the *Bundestag*, expresses that there should be "normally"[115] and, as the case may be, "regularly"[116] a refrain in prosecuting the mentioned cases, on the other hand the substitution of "ought to," which expresses a binding discretionary power, with "may" makes it clear that a partial withdrawal of universal jurisdiction proper, as recognized in the substantive law, is neither intended nor is it excluded that the prosecutor could—despite the existence of nos. 1–4 of subs. 2 of section 153f—make use of its competence to prosecute.[117] Also, the above-mentioned extensive discretionary powers in the case of "*purely foreign acts*" is not to be under-

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[107] *See id.* § 153f(2) no 3.

[108] *See id.* § 153f(1).

[109] *See id.* § 153f(2) cl. 2; cl.1 no. 2.

[110] *See id.* § 153f (2) cl. 1 no. 4; cl. 2.

[111] *Id.* § 153f(2) cl. 2. *Cf.* the motives *in* Lüder & Vormbaum, *supra* note 71, at 60.

[112] *Cf.* Lüder & Vormbaum, *supra* note 71, at 61; Weigend, *supra* note 72, at 209; Schoreit, *supra* note 101, at 951, § 153f mn. 3.

[113] *See* motives *in* Lüder & Vormbaum, *supra* note 71, at 61; Weigend, *supra* note 72, at 209.

[114] For the old wording see the expert draft *in* BUNDESMINISTERIUM DER JUSTIZ, *supra* note 71, at 14 and the official government draft (*Referentenentwurf*) *in* Lüder & Vormbaum, *supra* note 71, at 20.

[115] Weigend, *supra* note 72, at 209.

[116] Schoreit, *supra* note 101, at 952, § 153f mn. 7.

[117] *Cf.* REPORT OF LEGAL COMMITTEE OF THE BUNDESTAG *in* Lüder & Vormbaum, *supra* note 71, at 88; Beulke, *supra* note 89, at 238, § 153f mn. 32.

stood 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.[118] The costs generated by unnecessary investigations ought to be avoided and only cases with realistic chances of success ought to be prosecuted.[119] 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.[120] The reduction of the discretion also follows from the wide understanding of *residence within German territory*, as it suffices any (voluntary or involuntary) contact with German territory (e.g., temporary stay, transfer) which would permit detention.[121]

3. Critical assessment of the practice

Since the entry into force of the CCAIL until January 3, 2008—more recent data is not available[122]—the Federal Prosecutor has filed eighty-six "incidents to be observed" (*Beobachtungsvorgänge*),[123] the majority of which is based on complaints or communications filed by victims or NGOs representing victims; a few have been filed *de oficio* based on information from generally accessible sources.[124] According to recent information from the Federal Prosecutor, "the number of investigations currently stands in the low double figures (or digits), with an increasing ten-

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[118] *See* motives *in* Lüder & Vormbaum, *supra* note 71, at 61; also *see* Beulke, *supra* note 89, at 228, § 153f mn. 5; Tobias Singelnstein & Peer Stolle, *Völkerstrafrecht und Legalitätsprinzip—Klageerzwingungsverfahren bei Opportunitätseinstellungen und Auslegung des § 153f StPO,* 1 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 120 (2006).

[119] *See* Schoreit, *supra* note 101, at 951, § 153f mn. 3.

[120] On "provisional investigations" or "investigatory help" in connection with CPC § 153f(2), *see* motives *in* Lüder & Vormbaum, *supra* note 71, at 61; Weigend, *supra* note 72, at 209; Schoreit, *supra* note 101, at 953, § 153f mn. 9; Beulke, *supra* note 89, at 240, § 153f mn. 42; Weßlau, *supra* note 100, § 153f mn. 11.

[121] *See* motives *in* BUNDESMINISTERIUM DER JUSTIZ, *supra* note 71, at 86, Lüder & Vormbaum, *supra* note 71, at 61. *See also* Beulke, *supra* note 89, at 232, § 153f mn. 15; Weßlau, *supra* note 100, § 153f mn. 9.

[122] In an email of Oct. 2, 2008 the Federal Prosecutor informed the author that further information could not be provided anymore for fear of endangering ongoing investigations.

[123] For an explanation, *see Justice in the Name of All, Die Praktische Anwendung des Völkerstrafgesetzbuchs aus der Sicht des Generalbundesanwalts Beim Bundesgerichtshof*, 2 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 507, 511 (2007).

[124] Letter of the Federal Prosecutor to the Author (Jan. 3, 2008) (on file with author). For earlier data, *see* AMBOS, *supra* note 78, at 480, § 1 mn. 28, n.179; Ambos, *supra* note 91, at 43. For an overview of some cases, *see* AMNESTY INTERNATIONAL, *supra* note 91, at 101.

dency."[125] The complaints target members of the U.S., German, and Israeli governments; others also target members of governments and heads of states of various African and Asian States. In most cases, the Federal Prosecutor has refrained from initiating a formal investigation invoking CPC sections 152(2), 153f(1) and (2), either 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 on the lack of any prospects of success.[126] Formal investigations, implying interrogations of suspects and witnesses, have only been initiated in four cases, none of which have yet led to any further measures e.g., the request of an arrest warrant or the filing of an accusation. The Federal Prosecutor and members of her office have, however, expressed confidence that soon a formal investigation may lead to further measures.[127] Indeed, at the time of reviewing this paper, two leading members of the "Forces Démocratiques de Libération du Rwanda" (FDLR), a paramilitary group accused of crimes against humanity and war crimes committed in the border area between the Dem. Republic of Congo and Rwanda, have been arrested in Germany on the basis of an arrest warrant requested by the Federal Prosecutor.[128]

The two complaints against the former U.S. Secretary of State for Defence Donald Rumsfeld and others alleging the maltreatment of Iraqi prisoners in the Abu Ghraib prison complex have attracted special attention.[129] The Federal Prosecutor General dismissed the first complaint in his decision on February 10, 2005.[130] The Stuttgart Higher Regional Court (*Oberlandesgericht* (OLG)) declared the motion for a court decision as inadmissible on September 13, 2005.[131] This was the first High Court decision

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[125] Email to the author of Sept. 7, 2009 ("Die Zahl der vom GBA auf dem Gebiet des Völkerstrafrechts geführten Ermittlungsverfahren liegt derzeit—mit steigender Tendenz—im unteren zweistelligen Bereich."). In an email of Oct. 2, 2008 the Federal Prosecutor informed the author that further, more concrete information could not be provided anymore for fear of endangering ongoing investigations.

[126] Strafprozeßordnung [StPO] [Code of Criminal Procedure] Jun 26, 2002, 153f(1) cl. 1.

[127] Conversations of this author with Federal Prosecutors held during the German Speaking Working Group of International Criminal Law, Lausanne, Switzerland (June 26–27, 2009) (on file with author); Conversation held with the Federal Prosecutor General, Prof. Dr. Monika Harms, Göttingen, Germany (July 10, 2009) (on file with author).

[128] *See* Press Release, GBA, 17 Nov. 2009 - 24/2009 (Nov. 2009), *available at* www.generalbundesanwalt.de.

[129] *See* Denis Basak, *Abu Ghraib, das Pentagon und die Deutsche Justiz*, 18 HUMANITÄRES VÖLKERRECHT-INFORMATIONSSCHRIFTEN (HuV-I) 85 (2005). For the case of the complainants, *see* REPUBLIKANISCHER ANWÄLTINNEN UND ANWÄLTEVEREIN, STRAFANZEIGE/ RUMSFELD U.A., 26 (2005).

[130] *See* Press Release, GBA, Keine Deutschen Ermittlungen Wegen der Angezeigten Vorfälle von Abu Ghraib/Irak (Feb. 10, 2005).

[131] OLG Stuttgart, *supra* note 87.

on the application of the complicated regulation of CPC section 153f and, implicitly, also on the principle of universal jurisdiction contained in CCAIL section 1. Yet both the decision from the Federal Prosecutor General as well as that from the Higher Regional Court are not convincing. As has been criticized elsewhere,[132] the decisions neither fully comply with the legal purpose of CCAIL section 1 or CPC section 153f, nor fully grasp the interaction of both regulations as explained above.

The second, considerably extended complaint of November 14, 2006 (which included the authors of the torture memos to the list of the suspects)[133] was also rejected by the Federal Prosecutor who invoked clause 1 of section 153f(1).[134] According to the Prosecutor, there must be a realistic expectation that the person will be present in Germany and can be brought to trial. Given the national investigators' lack of operational powers in foreign territories, an investigation about extraterritorial facts can only produce relevant information if the territorial state offers effective legal and judicial assistance. This reasoning has been confirmed by the OLG Stuttgart arguing, inter alia, that there must be a continuing presence of the suspect on German territory or concrete indicia for his expected presence; such indicia, to be assessed exclusively by the Prosecutor within his discretion, are lacking if the suspect has no professional, personal, or family connections in Germany.[135] In fact, with this argumentation the criterion of the territorial link has been reintroduced through the backdoor, ignoring the clear wording of CCAIL section 1 and paragraph two of CPC section 153f which shall guide prosecutorial discretion.[136]

The scarce practice since the entry into force of the CCAIL has led to considerable criticism, in particular from NGOs.[137] On October 24, 2007,

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[132] Ambos, *supra* note 91, at 50 with further references. *See also* Denis Basak, *Der Fall Rumsfeld—Ein Begräbnis dritter Klasse für das Völkerstrafgesetzbuch*, 90 KRITISCHE VIERTELJAHRESCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT [hereinafter KritV] 333 (2007): Kaleck, *supra* note 15, at 961.

[133] *See* Kaleck, *supra* note 15, at 953. *See also infra* note 220.

[134] Press release, GBA, (April 27, 2007), *available at* www.generalbundesanwalt.de. The appeal against this decision was finally declared inadmissible by the OLG Stuttgart on April 21, 2009, 5 Ws 21/09.

[135] OLG Stuttgart, *supra* note 87, at ¶ 6, ¶¶ 7–8.

[136] This is apparently not the view of OLG Stuttgart, *id.* ¶ 9, which argues that the application of paragraph 1 cl. 1 excludes the application of paragraph 2.

[137] *See* AMNESTY INTERNATIONAL, *supra* note 91, at 106 (with recommendations). Regarding the Rumsfeld et al. dismissals, *see* Press Release, Center for Constitutional Rights, Other Human Rights Groups Ask German Court to Review Federal Prosecutor's Decision to Dismiss Rumsfeld Torture Case (Nov. 13, 2007), *available at* http://ccrjustice.org/newsroom/press-releases/ccr%2C-other-human-rights-groups-ask-german-court-review-federal-prosecutor%2526%25230. *See also* Kaleck, *supra* note 15, at 953 (discussing the "limited" approach). For a quite objective description of the practice, *see* HRW, *supra* note 29, at 63.

the "Committee for Human Rights and Humanitarian Aid" (*Ausschuss für Menschenrechte und Humanitäre Hilfe*) of the German *Bundestag* held a public hearing on the national implementation of the CCAIL, and the restrictive application of the law by the Federal Prosecutor has received considerable criticism by all invited independent experts.[138] There are concerns that the Federal Prosecutor's broad interpretation of CPC section 153f entails an unfettered discretion and to a *de facto* derogation of the principle of universal jurisdiction through the procedural backdoor. One author warns of an executive (political) control over the exercise of criminal proceedings.[139] In this respect, the traditional view that prosecutorial decisions to terminate proceedings on the basis of the opportunity principle[140] are not open to judicial review is not convincing. This view already deserves criticism with regard to the "traditional" reasons for dismissing a case stated in CPC section 153 through 154f,[141] but it is even less justifiable in the case of CPC section 153f, and the alleged inadmissibility of a judicial review should not be understood as the legislature's conscious decision.[142] As a matter of fact, the legislature adopted CPC section 153f as a result of the Federal Prosecutor's concerns about the principle of universal jurisdiction in CCAIL section

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[138] Apart from Senior Federal Prosecutor Rolf Hannich himself, other experts were invited as follows (in alphabetical order): Professor Dr. Horst Fischer (Universities Bochum and Leiden), Wolfgang Kalek (Lawyer, Berlin), Judge Hans-Peter Kaul (ICC, The Hague), Professor Dr. Claus Kreß (Universität Köln), Geraldine Mattioli (Justice Advocate Human Rights Watch) and this author. All written statements are available at http://www.bundestag.de/ausschuesse /a17/anhoerungen/voelkerstrafgerichtshof/index.html. For the most comprehensive brief, *see* Claus Kreß, *Stellungnahme Öffentliche Anhörung im Ausschuss für Menschenrechte und Humanitäre Hilfe des Deutschen Bundestages zum Thema Nationale Umsetzung des VStGB 24. 10. 2007*, 2 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 515 (2007). For a summary, *see also* AMNESTY INTERNATIONAL, *supra* note 91, at 61–62.

[139] Weßlau, *supra* note 100, § 153f mn. 3.

[140] *See* Strafprozeßordnung [StPO] [Code of Criminal Procedure] Jun 26, 2002, §§ 153–154f, *argumentum ex* 172(2) cl. 3. *Cf.* Kirsten Graalmann-Scheerer, *§ 172*, *in* 5 LÖWE-ROSENBERG DIE STRAFPROZEßORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ, *supra* note 89, at 896, 911 § 172, mn. 21, 26 with further references.

[141] For general demands for the control of the legality of discretionary decisions, *see* § 174a Alternative Draft Investigation (Alternativentwurf-Ermittlungsverfahren) with further references. *See also* MARKUS HORSTMANN, ZUR PRÄZISIERUNG UND KONTROLLE VON OPPORTUNITÄTSEINSTELLUNGEN 308 (2002). For a limited compulsory procedure, *see* VOLKER ERB, LEGALITÄT UND OPPORTUNITÄT 230 (1999); HELMUT SATZGER, CHANCEN UND RISIKEN EINER REFORM DES STRAFRECHTLICHEN ERMITTLUNGSVERFAHRENS, GUTACHTEN C ZUM 65: DEUTSCHEN JURISTENTAG C 78 (2004). One must take into account, however, that the argument of procedural economy shifts, given the gravity of the offences, in favor of the interests of victims.

[142] *See* OLG Stuttgart, *supra* note 87, at 118 at the left column: "bewusste gesetzgeberische Entscheidung" ("conscious legislative decision"). This was confirmed by OLG Stuttgart. *See supra* note 134, at 6.

1.[143] Due to time constraints—the German legislation on the implementation of the ICC Statute was to come into force no later than the ICC Statute (July 1, 2002)—the legislature did not dedicate any thought to possible legal remedies and, in particular, it did not take into account that section 153f falls under the provisions listed in section 172 (2) cl. 3, the last part of the CPC.[144] It is also due to the speed of the legislation process that CPC section 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 sections 153 through 154f since judicial consent is, in principle, required;[145] this requirement is only waived[146] when acts of less gravity are concerned, be they minor misdemeanours[147] or any other offences committed abroad,[148] or when there are overwhelming political interests opposing a criminal prosecution.[149] None of these grounds apply to CPC section 153f. It is neither concerned with lesser offences—it only concerns the most important international core crimes—nor should divergent political interests play a role.[150] The only relevant question is whether—with regard to the overall aim of preventing impunity—the criminal prosecution could be carried out otherwise, such as 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 CPC sections 153f through 154f 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.[151] According

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[143] The author was a member of the working group appointed by the German Federal Ministry of Justice to draft the CCAIL and CPC § 153f.

[144] *See* Strafprozeßordnung [StPO] [Code of Criminal Procedure] Jun 26, 2002, § 172(2) cl. 3 ("§§ 153c bis 154 Abs. 1"). The OLG Stuttgart, *supra* note 87, invokes this to support its position.

[145] *See* Strafprozeßordnung [StPO] [Code of Criminal Procedure] Jun 26, 2002, §§ 153(I)(1), 153a(I)(1), 153b, 153e. On the importance of judicial consent in this context, *see* Friedrich-Christian Schroeder, *Zur Rechtskraft Staatsanwaltschaftlicher Einstellungsverfügungen*, 16 NEUE ZEITSCHRIFT FÜR STRAFRECHT 319 (1996). *See also* ERB, *supra* note 141, at 228. Erb correctly points out the low efficiency of the control by judicial consent. *Id.* at 224.

[146] *See* Strafprozeßordnung [StPO] [Code of Criminal Procedure Civil Code], Apr. 7, 1987, §§ 153(2), 153a(I)(7), 153c, (d).

[147] *See id.* §§ 153(2), 153a.

[148] *See id.* § 153c.

[149] *See id.* § 153c III, IV, § 153d.

[150] On these demands, *see* Weigend, *supra* note 72, at 209; Kreicker, *supra* note 72, at 434; rather critically, Kurth, *supra* note 93, at 86.

[151] Peter Rieß, *§ 172*, *in* 2 LÖWE-ROSENBERG DIE STRAFPROZEßORDNUNG UND DAS GERICHTS-VERFASSUNGSGESETZ, § 172 mn. 26 (Peter Rieß ed., 1989); Graalmann-Scheerer,

to the case law of the higher courts, a claim for judicial review is admissible when an initial suspicion, on legal grounds, must be rejected and, therefore an investigation on the facts of the case has been omitted.[152] Thus, an enforcement action in order to secure the principle of legality could be used even in the case of CPC sections 153 through 154f, for it does not make a difference if investigations were already carried out[153] and a right of review has arisen,[154] or if they were omitted from the very beginning.[155] These considerations apply *a fortiori* to CPC section 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[156]—an *international duty to prosecute and punish*.[157] This means that

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supra note 140, at 911 § 172 mn. 22, 26; Wolfgang Wohlers, *§ 172 [Klageerzwingungsverfahren]*, *in* SYSTEMATISCHER KOMMENTAR ZUR STRAFPROZEßORDNUNG UND ZUM GERICHTSVERFASSUNGSGESETZ § 172 mn. 38 (Hans-Joachim Rudolphi et al., Apr. 2009); Johann Plöd, *§ 172 [Beschwerderecht des Verletzten, Antrag auf Gerichtliche Entscheidung]*, *in* 2 KOMMENTAR ZUR STRAFPROZESSORDNUNG § 172 mn. 15 (H. Müller et al. eds., July 2009); Christoph Krehl, *§ 172 [Klageerzwingungsverfahren]*, *in* HEIDELBERGER KOMMENTAR ZUR STRAFPROZESSORDNUNG, 671, 673, § 172 mn. 7 (Michael Lemke et al. eds., 2001). *See also* Karl-Heinz Schmid, *§ 172 [Klageerzwingungsverfahren]*, *in* KARLSRUHER KOMMENTAR 1123, 1133, § 172 mn. 41 (Rolf Hannich ed., 2008); LUTZ MEYER-GOßNER, STRAFPROZESSORDNUNG 778, § 172 mn. 3 et seq. (2006). For an inquiry into the legal elements of the dismissal rules through interpretation, *see* Singelnstein & Stolle, *supra* note 118, at 118; HORSTMANN, *supra* note 141, at 239. The OLG Stuttgart (*see supra* note 134, ¶ 6) has however recently reaffirmed its view that such an appeal is not admissible (*nicht statthaft*).

[152] *See* Oberlandesgericht Karlsruhe, 1 Ws 152/04 (Jan. 10, 2005), *available at* http://www.jurpc.de/rechtspr/20050052.htm; Oberlandesgericht Karlsruhe, 1 Ws 85/02 (Dec. 16, 2002), *available at* http://www.urteile.net/gerichte/olg-karlsruhe/Beschluss_vom_16.12.2002_1_Ws_85_02.html; 52 DIE JUSTIZ 270, 271 (2003). *See also* Oberlandesgericht Zweibrücken, 1 Ws 424/79 (Feb. 05, 1980); 1 NEUE ZEITSCHRIFT FÜR STRAFRECHT 193 (1981); Oberlandesgericht Bremen, Ws 71/82 (Aug. 27, 1982); 5 ENTSCHEIDUNGEN DER OBERLANDESGERICHTE IN STRAFSACHEN UND ÜBER ORDNUNGSWIDRIGKEITEN § 175 no. 1 (Michael Lemke ed., loose leaflet update Apr. 2009); Oberlandesgericht Koblenz, 1 Ws 164/94 (Sept. 5, 1994); 15 NEUE ZEITSCHRIFT FÜR STRAFRECHT 50 (1995); Oberlandesgericht Braunschweig, Ws 48/91 (Sept. 23, 1992); 12 ZEITSCHRIFT FÜR WIRTSCHAFTS UND STEUERSTRAFRECHT 31 (1993); Kammergericht, 4 Ws 220/89 (Mar. 26, 1990); 10 NEUE ZEITSCHRIFT FÜR STRAFRECHT 355 (1990); Oberlandesgericht Celle, 2 Ws 94/02 (Apr. 26, 2002). *See also* Oberlandesgericht Köln, 1 Zs 120/03 - 19/03 (Mar. 28, 2003); 8 NEUE ZEITSCHRIFT FÜR STRAFRECHT, RECHTSPRECHUNGS-REPORT 212 (2003); Oberlandesgericht Hamm, 1 Ws 227/98 (Sept. 29, 1998); 22 STRAFVERTEIDIGER 128, 129 (2002).

[153] *See* Strafprozeßordnung [StPO] [Code of Criminal Procedure Civil Code], Apr. 7, 1987, § 170.

[154] *See id.* § 172.

[155] Oberlandesgericht Karlsruhe, 1 Ws 152/04 (Jan. 10, 2005); Oberlandesgericht Karlsruhe 1 Ws 85/02, *supra* note 152.

[156] On the procedure to compel criminal proceedings (*Klageerzwingungsverfahren*), *see generally* Wohlers, *supra* note 151, § 172 mn. 2 with further references on the case law; Schmid, *supra* note 151, at 1124, § 172 mn. 1; Plöd, *supra* note 151, § 172 mn. 1; WERNER BEULKE, STRAFPROZESSRECHT 213, mn. 344 (2008).

CPC section 153f constitutes a distinctive feature in the system of CPC sections 153 through 154f 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.[158] The need for judicial control is particularly evident with regard to the requirement that the offence is actually being prosecuted by an international criminal court or State (CPC section 153f(1) cl. 2, (2) cl. 2 no. 4), since this requirement serves to fulfill the prevention of impunity as the overall aim of the substantive universal jurisdiction principle provided for by CCAIL section 1.[159] In fact, this requirement does not constitute a discretionary element but a strict legal one as part of the normative structure of CPC section 153f(2).

C. Spain

On March 17, 2009 D. Javier Fernández Estrada, *Procurador judicial*,[160] filed a complaint (*querella*)[161] before the *Audiencia Nacional* (AN), the competent Spanish Court for national and transnational crimes,[162] against the "Bush Six."[163] The complaint was first admitted by the competent investigating judge (*juez de instrucción*) of the Fifth Circuit (*juzgado*

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[157] Kai Ambos, *Völkerrechtliche Bestrafungspflichten bei Schweren Menschenrechtsverletzungen,* 37 ARCHIV DES VÖLKERRECHTS 319 (1999).

[158] *See* Rome Statute of the International Criminal Court arts. 53(1)(c), (3)(b), July 17, 1998, 2187 U.N.T.S. 90.

[159] For the same result, *see* Singelnstein & Stolle*, supra* note 118, at 119, who also consider 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).

[160] The *Procurador* is a lawyer who represents private parties in any kind of judicial proceedings. *See* Real Decreto 1281/2002 art. 1.

[161] The *querella* must always be presented by a *procurador judicial*. *See* Ley de Enjuiciamiento Criminal (L.E. CRIM.), art. 277(1) [hereinafter LECJ].

[162] According to Article 65(1) of the Ley Orgánica del Poder Judicial [LOPJ], the *Audiencia Nacional* (AN) is competent, inter alia, for extraterritorial offences. *See* LOPJ art. 65(1) (Spain). For a good English explanation of the jurisdiction and structure, *see* Lorena Bachmaier Winter & Antonio del Moral García, *Criminal Law: Spain*, *in* 4 INTERNATIONAL ENCYCLOPEDIA OF LAW 200 (June 2009) (Roger Blanpain et al. eds., 1999).

[163] Escrito de querella al "Decanato de los Juzgados Centrales de Instrucción de la Audiencia Nacional para el Juzgado de Instrucción que por turno corresponda", March 17, 2009 (on file with author). On the recent case against Israel for alleged war crimes in the Gaza campaign, *see* Sharon Weill, *The Targeted Killing of Salah Shedadeh: From Gaza to Madrid*, 7 J.INT'L CRIM. JUST. 617 (2009). *See also* Ignacio de la Rasilla del Moral, *The Swan Song of Universal Jurisdiction in Spain*, 9 INT'L CRIM. L. R. 777, 786 (2009), with further examples at 784.

central 5 de instrucción),[164] the well-known Baltazar Garzón, on March 28, 2009. However, on April 23, the case was, at the request of the Attorney General (who does not support the proceedings),[165] referred to investigating judge Eloy Velasco.[166] This judge requested the U.S. authorities on May 4 to respond if the case is being or will be investigated in the U.S.[167] On the other hand, Baltazar Garzón opened an investigation on April 27, 2009 against "the possible authors, instigators, necessary cooperators, and accomplices" in the torturing of detainees at Guantánamo.[168] The suspects include "members of the American air forces or military intelligence and all those who executed and/or designed a systematic torture plan and inhuman and degrading treatment against prisoners under their custody."[169]

1. Initiation and jurisdiction

To understand how these cases are triggered one must first be aware that the Spanish procedural system[170] provides for an *actio popularis (acusación popular*, popular accusation),[171] i.e., in principle every citizen has the constitutional right to initiate criminal proceedings[172] by way of a

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[164] According to Article 88 of the LOPJ, the offences competence of the AN are to be investigated for the "Jueces Centrales de Instrucción" whose competence extends to the whole Spanish territory. *See* LOPJ, *supra* note 162, art. 88.

[165] *See* Christina Mateo-Yanguas, *Spanish Court Considers Prosecuting Bush Officials*, GLOBAL POST, Apr. 18 2009, http://www.globalpost.com/dispatch/spain/090415/spanish-court-considers-prosecuting-bush-officials ("Attorney General Candido Conde-Pumpido said he will not support the National Court pursuing the case . . . ."). *See also* de la Rasilla del Moral, *supra* note 163, at 788–89.

[166] *See* Guantánamo La Fiscalía Española Rechaza que Garzón Instruya la Causa y Pide Remitirla a otro Juez para que se Archive, LUKOR, http://www.lukor.com/not-por/0904/17132701.htm .

[167] Sumario 19/97-L, Auto, Juzgado Central de Instruccion num. 6, Diligencias Previas 134/2009 (May 4, 2009) (on file with author).

[168] Sumario 19/97-L, Auto, Juzgado Central de Instruccion num. 5, Diligencias Previas 150/09—N, Torturas y Otros (Apr. 27, 2009) (on file with author). *See also* Christina Mateo-Yanguas, *Christina Mateo-Yanguna's Notebook: Garzon Stops at Nothing,* GLOBAL POST, Apr. 13, 2009, http://www.globalpost.com/bio/cristina-mateo-yangunas?page=1; Juez Garzon abre Causa por Presuntas Torturas en Guantanamo (Apr. 29, 2009), http://informe21.com/actualidad/juez-garzon-abre-causa-presuntas-torturas-guantanamo.

[169] Christina Mateo-Yanguas, *Garzon Stops at Nothing*, GLOBAL POST, Apr. 30, 2009, http://www.globalpost.com/notebook/spain/090430/garzon-stops-at-nothing.

[170] For a good overview of the Spanish procedural system in English, *see* Bachmaier Winter & del Moral, *supra* note 162, at 203

[171] On the English roots of the concept, *see* VÍCTOR MORENO CATENA ET. AL., 1 EL PROCESO PENAL 395 (Tirant lo Banch ed. 2000); VICENTE GIMENO SENDRA, DERECHO PROCESAL PENAL 206 (Colex ed., 2007). On the importance in the universal jurisdiction cases, *see* Kaleck, *supra* note 15, at 955.

[172] SPAIN CONST. art. 125.

private complaint (*querella*) without being directly affected by the offence.[173] The person who presses charges in criminal proceedings is called a non-public or particular accuser (*acusación particular*).[174] This right is not limited to natural persons but also includes associations with regard to their specific purpose as defined in their statutes or rules.[175] Thus, human rights associations may initiate proceedings relating to the violation of human rights. The popular accuser may ask for investigative measures to be ordered by the investigating judge if appropriate. The rationale of the popular accusation lies in the idea of a democratization of criminal justice[176] or, in more concrete terms, the control of the State's exercise of the *ius puniendi* in cases where there may be a private interest to prosecute. Yet in a recent polemical case against a leading executive of the *Banco Santander* the Supreme Court (*Tribunal Supremo*) has limited this right stating that a case cannot go to trial on the basis of an *actio popularis* alone if the Prosecutor (*Ministerio Publico*) and the victim ask for the case to be dropped.[177] A few months later, the same Court supported an accusation of a civil servants' union called *Manos Limpias* despite objections by the Prosecutor, distinguishing this case from the one before.[178] In any case, the extensive use of the *querella*, not least in the universal jurisdiction cases, has led critics to call for restrictions. The basic argument is that the *actio popularis* does not transfer the *ius puniendi* from the State to the citizens but only enables the citizens to trigger an investigation, leaving the final decision to continue such an investigation and thus exercise the *ius puniendi* in the hands of the state.[179] Consequently, it is in the Prosecutor's discretion if he takes on the case or not.

Apart from this controversy about the triggering power of ordinary citizens, it is questionable if Spanish jurisdiction over these cases exists at all. After years of jurisprudential and academic dispute over the correct interpretation of the principle of universal jurisdiction contained in Article

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[173] LOPJ, *supra* note 162, art. 19(1). *See* JACOBO LOPEZ BORJA DE QUIROGA, TRATADO DE DERECHO PROCESAL PENAL 765 (2004). *See also* JOSÉ MARTÍN OSTOS, INTRODUCCIÓN AL DERECHO PROCESAL 62–63 (2006); MORENO CATENA ET AL., *supra* note 171, at 395; M. OLLÉ SESÉ, JUSTICIA UNIVERSAL PARA CRÍMENES INTERNACIONALES 427 (discussing the prosecution of international crimes); Bachmaier Winter & del Moral, *supra* note 162, at 216–17 (containing a short explanation in English).

[174] For the distinction between the *acusación popular, acusación particular* and the *acusador privado* (for certain "private offences"), *see* Bachmaier Winter & del Moral, *supra* note 162, at 203.

[175] *See* Constitutional Court, STC 241/1992 (Dec. 21, 1992).

[176] MORENO CATENA ET AL., *supra* note 171, at 395.

[177] STS, Dec. 17, 2007 (Botin Case) (R.G.D., No. 1045/2007). Mr. Emilio Botín is the president of the bank and one of its owners.

[178] STS, Apr. 8, 2008 (Atutxa Case) (R.G.D., No. 54/2008).

[179] GIMENO SENDRA, *supra* note 171, at 206.

23(4) of the *Ley Orgánica del Poder Judicial* (LOPJ),[180] on June 25, 2009, the Chamber of Deputies approved a reform which considerably limits the Spanish jurisdiction over extraterritorial acts.[181] Under the old Article 23(4) LOPJ, Spanish jurisdiction existed for acts "committed by Spanish nationals or foreigners outside the national territory"[182] with regard to, inter alia, genocide, terrorism and other offences for which an obligation to prosecute exists in international treaties,[183] but the new law, while including crimes against humanity and war crimes in the list of offences (Article 23(4)(a) LOPJ),[184] introduces the requirement of a *link or connection* to Spain stating:

> Notwithstanding the provisions contained in the international treaties and conventions signed by Spain, for Spanish Tribunals to have jurisdiction

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[180] Act of 1 July 1985 of the Boletín Oficial del Estado (B.O.E. 1985, 157).

[181] 121/000028 Proyecto de Ley Orgánica Complementaria de la Ley de Reforma de la Legislación Procesal para la Implantación de la Nueva Oficina judicial, por la que se Modifica la Ley Orgánica 6/1985, de 1 de Julio, del Poder Judicial. Boletín Oficial de las Corte Generales, Congreso de los Diputados, IX Legislatura, Serie A: Proyectos de Ley 6 de julio de 2009, Núm. 28-3.

[182] All translations from Spanish into English were done by the author.

[183] The original text of LOPJ Article 23(4) reads as follows:

> 4. [S]erá competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley penal española, como alguno de los siguientes delitos:
>
> a. Genocidio . . . .
>
> b. Terrorismo.
>
> c. Piratería y apoderamiento ilícito de aeronaves.
>
> d. Falsificación de moneda extranjera.
>
> e. Los delitos relativos a la prostitución y los de corrupción de menores o incapaces.
>
> f. Tráfico ilegal de drogas psicotrópicas, tóxicas y estupefacientes.
>
> g. Tráfico ilegal o inmigración clandestina de personas, sean o no trabajadores.
>
> h. Los relativos a la mutilación genital femenina, siempre que los responsables se encuentren en España.
>
> i.Y cualquier otro que, según los tratados o convenios internacionales, deba ser perseguido en España.

LOPJ, *supra* note 162, art. 23(4) (original).

[184] While these crimes were not mentioned in the old Article 23(4) LOPJ (*see id.)*, the Supreme Court affirmed Spanish (extraterritorial) jurisdiction about crimes against humanity by analogy. *See* STS, Oct. 1, 2007 (Scilingo Case) (R.J., No. 6). *See also* Alicia Gil Gil, *Principio de Legalidad y Crímenes Internacionales*, *in* NUEVOS DESAFÍOS DE DERECHO PENAL INTERNACIONAL 391, 405–06 (Antonio Cuerda Riezu & Francisco Jimenez García eds., 2009); OLLÉ SESÉ, *supra* note 173, at 217, 243–44 (invoking universal jurisdiction on the basis of a direct application of international criminal law).

> over the offences previously mentioned it shall be demonstrated that the alleged responsible are *present* in Spanish territory or that victims of *Spanish nationality* exist or that any relevant *connection* with Spain can be acknowledged and, that, in any case, *no proceedings* entailing an investigation and effective prosecution have been initiated in another competent country or by an international tribunal for these offences.
>
> The criminal process initiated before Spanish tribunals will be provisionally suspended when it is demonstrated that another process regarding the alleged acts has been started in the country or the tribunal to which the previous clause makes reference.[185]

The Spanish Senate approved this reform on October 15, 2009 deleting, however, on the one hand, war crimes from the list of crimes mentioned in Article 23(4)(a) LOPJ and adding, on the other, a special reference to "the conventions of international humanitarian law and human rights" to the general clause extending the jurisdiction on the basis of Spain's international treaty obligations.[186] Thus, in the result, at least the grave breaches of

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[185] The original text of article 23 no. 4 lit. (h) ¶¶ 2 and 3 reads:

> Sin perjuicio de lo que pudieran disponer los tratados y convenios internacionales suscritos por España, para que puedan conocer los Tribunales españoles de los anteriores delitos deberá quedar acreditado que sus presuntos responsables *se encuentran* en España o que existen víctimas de *nacionalidad española*, o constatarse algún vínculo de *conexión* relevante con España y, en todo caso, que en otro país competente o en el seno de un Tribunal internacional *no se ha iniciado procedimiento* que suponga una investigación y una persecución efectiva, en su caso, de tales hechos punibles.
>
> El proceso penal iniciado ante la jurisdicción española se sobreseerá provisionalmente cuando quede constancia del comienzo de otro proceso sobre los hechos denunciados en el país o por el Tribunal a los que se refiere el párrafo anterior.

LOPJ, *supra* note 162, art. 23(4)(h) (original) (emphasis added). For a critical analysis of this reform, *see* Javier Chinchón Álvarez, *Análisis Formal y Material de la Reforma del Principio de Jurisdicción Universal en la Legislación Española: De la Abrogación de Facto a la Derogación de Iure*, 30 DIARIO LA LEY, Sección Doctrina (núm. 7211) 1 (2009), *available at* http://www.laley.es/Content/Documento.aspx?idd=DT0000127211&version=20090623&verifyDocType=false&ebook=DT0000127211_20090623; Manuel Ollé Sesé, *La Limitación del Principio de Justicia Universal, Contraria al Derecho Internacional,* 13 IURIS 17 (2009); Manuel Ollé Sesé, *El Avance de la Justicia Universal*, EL PAÍS 35–36 (May 23, 2009), *available at* http://www.elpais.com/articulo/opinion/avance/justicia/universal/elpepiopi/20090523elpepiopi_4/Tes.

[186] The old article 23 no. 4 lit. (i), *supra* note 185, now reads (new art. 23 (4)(h) ¶ 1):

> Cualquier otro que, según los tratados y convenios internacionales, *en particular los Convenios de derecho internacional humanitario y de protección de los derechos humanos*, deba ser perseguido en España.

Id. (emphasis added).

the Geneva Conventions can be prosecuted by Spanish Tribunals;[187] in any case, with this last minute change of the reform by the Senate it remains to be seen what the Spanish Tribunals will make out of the new law.[188] The new law entered into force November 4, 2009.[189]

With this reform the legislature in fact adopted the position of the Spanish Supreme Court which, since its Guatemala decision of February 25, 2003,[190] called for a "teleological reduction" of the principle of universal jurisdiction. In this decision, the Court argued that for "criteria of rationality" and the "principle of no-intervention" the extraterritorial prosecution of crimes on the basis of universal jurisdiction presupposes "the existence of a connection with a national interest as a legitimizing element."[191] More concretely, the Court listed three alternative requirements: (1) the Spanish nationality of the victims; (2) the existence of "other relevant Spanish interests;" or (3) on the basis of international treaties, the presence of the suspect on Spanish territory and the non-extradition to another state with jurisdiction.[192] Thus, the Court interpreted the principle of universal jurisdiction in the sense of three *traditional principles*: passive personality, protection, and representation (*aut dedere aut iudicare*).

In addition, the Court recognized, in principle, a criterion of *subsidiarity* according to which the Spanish jurisdiction only becomes active if the other competent national jurisdictions or the ICC do not exercise their jurisdiction.[193] This principle has been confirmed in the Cooperation Act

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[187] On their effect of universal jurisdiction see recently Roger O'Keefe, *The Grave Breaches Regime and Universal Jurisdiction*, 7 J. INT'L CRIM. JUST. 811 (2009).

[188] For two Spanish colleagues (Javier Chinchón and Manuel Ollé Sesé), the reform process remains "mysterious" and it is not clear what motivated the Senate to make this last change (emails to the author on Nov. 16, 2009).

[189] B.O.E. No. 266, 4 Nov. 2009, sect. I, at 92089.

[190] *See* STS, Feb. 25, 2003 (R.J., No. 327) [hereinafter Guatemala Judgment]. Regarding the background and the facts of this case and subsequent case law, *see* Mariona Llobet Anglí, *El Alcance del Principio de Jurisdicción Universal Según el Tribunal Constitucional*, 4 INDRET. REVISTA PARA EL ANÁLISIS DEL DERECHO 3 (2006). *See also* Chinchón Álvarez, *supra* note 185, at 4; Alicia Gil Gil, *España*, *in* JURISPRUDENCIA LATINOAMERICANA SOBRE DERECHO PENAL INTERNACIONAL 471, 493 (Kai Ambos & Ezequiel Malarino eds., 2008); AMNESTY INTERNATIONAL, ESPAÑA: EL DEBER DE RESPETAR LAS OBLIGACIONES DE DERECHO INTERNACIONAL NO PUEDE SER ELUDIDO 10 (2005), *available at* http://www.amnesty.org/es/library/info/EUR41/003/2005/es.

[191] Guatemala Judgment, *supra* note 190 (stating "existencia de una conexión con un interés nacional como elemento legitimador . . . modulando su extensión con arreglo a criterios de racionalidad y con respeto al principio de no-intervención.").

[192] *Id.*

[193] *Id. See also* Chinchón Álvarez, *supra* note 185, at 4; Gil Gil, *supra* note 190, at 494. For a detailed analysis of this and other cases regarding subsidiarity, *see* Cedric Ryngaert, *Applying the Rome Statute's Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting Under the Universality Principle*, 19 CRIM. L.F. 153, 160

with the ICC which states that the Spanish judicial authorities do, in principle, refrain from any activity with regard to extraterritorial cases which fall within the ICC's jurisdiction except preliminary urgent investigatory measures within their competence.[194] The Constitutional Court (*Tribunal Constitucional*), however, rejected the Supreme Court's restrictive interpretation.[195] It argued that it violates the right to an effective remedy guaranteed in Article 24(1) of the Spanish Constitution in that it entails an interpretation against the letter of the law of Article 23(4) LOPJ and overlooks the purpose of the principle of universal jurisdiction *de facto* abolishing it.[196] In light of this decision and the subsidiarity principle as established by the ICC Cooperation Act, the Plenary of the AN published an agreement (*acuerdo*) in order to "unify criteria in the field of extraterritorial jurisdiction accord-

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(2008) (however, referring incorrectly to a "Peruvian genocide case"). *See also* AMNESTY INTERNATIONAL, *supra* note 190, at 17. In *casu*, however, the Court rejected subsidiarity as applied by the AN as the inferior tribunal arguing that it would imply a judgment about the capacity of the judicial organs of a foreign and sovereign State. On this point, *see* Alicia Gil Gil, *España*, *in* PERSECUCIÓN PENAL NACIONAL DE CRÍMENES INTERNACIONALES EN AMÉRICA LATINA Y ESPAÑA 335, 358–59 (Kai Ambos & Ezequiel Malarino eds., 2003).

[194] *See* Article 7(2) of the Ley Orgánica 18/2003 de Cooperación con la Corte Penal Internacional (December 2003), *available at* http://www.derechos.org/nizkor/icc/fiscpi.html, which reads in the original:

> Cuando se presentare una denuncia o querella ante un órgano judicial o del Ministerio Fiscal o una solicitud en un departamento ministerial, en relación con hechos sucedidos en otros Estados, cuyos presuntos autores no sean nacionales españoles y para cuyo enjuiciamiento pudiera ser competente la Corte, dichos órganos se abstendrán de todo procedimiento, limitándose a informar al denunciante, querellante o solicitante de la posibilidad de acudir directamente al Fiscal de la Corte, que podrá, en su caso, iniciar una investigación, sin perjuicio de adoptar, si fuera necesario, las primeras diligencias urgentes para las que pudieran tener competencia. En iguales circunstancias, los órganos judiciales y el Ministerio Fiscal se abstendrán de proceder de oficio.

Id. For a critique regarding the subsidiarity principle, *see* OLLÉ SESÉ, *supra* note 173, at 419.

[195] *See* Tribunal Constitucional, STC 237/2005 (Sept. 26, 2005). For criticism, *see* Llobet Anglí, *supra* note 190, 6–7, 11. In favor, *see* Chinchón Álvarez, *supra* note 185, 4–5; Gil Gil, *supra* note 190, at 494–95 in conjunction with all further references. *See also* Ryngaert, *supra* note 193, at 161; de la Rasilla del Moral, *supra* note 163, at 778.

[196] Tribunal Constitucional, *supra* note 195, at 32–33. The case states:

> [D]esborda los cauces de lo constitucionalmente admisible desde el marco que establece el derecho a la tutela judicial efectiva consagrada en el art. 24.1 CE, en la medida en que supone una reducción *contra legem* a partir de criterios correctores que ni siquiera implícitamente pueden considerarse presentes en la ley y que, además, se muestran palmariamente contrarios a la finalidad que inspira la institución, que resulta alterada hasta hacer irreconocible el principio de jurisdicción universal . . . hasta casi suponer una derogación *de facto* del art. 23.4 LOPJ.

See id.

ing to Article 23(4) LOPJ."[197] Accordingly, the AN will analyze, *de oficio*, its own jurisdiction as well as the activity, or lack thereof, of the territorial and international tribunals; it will, as a rule (*como regla*), on the basis of a criterion of *reasonability* (*criterio de razonabilidad*), accept its jurisdiction if the other jurisdictions do not act, except that this would constitute an excess or abuse of right because of the absolute alienation (*ajeineidad*) of the case to the Spanish jurisdiction dealing with totally strange and/or remote offences and places without any direct interest of the *querellante* or relation with them.[198] With this latter criterion, the AN pursued the obvious objective to *exclude politically motivated prosecutions* but it remains to be seen if this criterion can be determined more exactly by the case law.[199] In any case, the AN certainly wants to take a more cautious approach to extraterritorial (universal) jurisdiction, an approach which goes hand-in-hand with its future emphasis on the fight against organized crime.[200]

In a subsequent decision, the Supreme Court, while formally abiding by the Constitutional Court judgment invoking the supremacy of the Constitution,[201] in substance affirmed its restrictive interpretation of universal jurisdiction extensively.[202]

2. The consequences of the *de jure* abrogation of universal jurisdiction by the new law for ongoing investigations

The legislative reform of Article 23(4) LOPJ follows the jurisprudence of the Supreme Court and thus converts the *de facto* derogation of the principle of universal jurisdiction into a *de jure* one. While under the old law the mere text of Article 23(4) did not provide for a limitation and, thus, the Supreme Court's teleological restriction could well be rejected as *contra*

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[197] *See* Acuerdo del Pleno de la Sala de lo Penal de la Audiencia Nacional Relativo a la Interpretación de la Sentencia del Tribunal Constitucional Sobre Guatemala (Nov. 3, 2005), *available at* http://www.derechos.org/nizkor/espana/doc/interp.html ("[P]ara unificar criterios en materia de jurisdicción extraterritorial del art. 23.4. LOPJ . . . .").

[198] *See id.* at no. 4 ("[S]alvo que se aprecie exceso o abuso de derecho por la absoluta ajeneidad del asunto por tratarse de delitos y lugares totalmente extraños y/o alejados y no acreditar el denunciante o querellante interés directo o relación con ellos." (footnote omitted)). For a full english version, *see* de la Rasilla del Moral, *supra* note 163, at 782.

[199] *See* Gil Gil, *supra* note 190, at 496. For criticism, *see* OLLÉ SESÉ, *supra* note 173, at 376–77 (arguing basically that it is always "reasonable" to prosecute international core crimes and that these are never "strange" to the Spanish jurisdiction).

[200] As declared by its President Ángel de Juanes on July 10, 2009 in an interview with the Spanish news agency Efe. *See* Juanes Afirma que la Audiencia Nacional "Tiene Futuro" como Tribunal Especial Contra el Crimen Organizado (July 7, 2009), http://www.soitu.es/soitu/2009/07/10/info/1247227098_865123.html.

[201] LOPJ, *supra* note 162, art. 5(1).

[202] Tribunal Supremo, Judgment of 20 June 2006, case 645/2006 (*Falun Gong*). *See also* Llobet Anglí, *supra* note 190, at 7.

legem, this restriction is now explicitly part of the law. Thus, Spanish jurisdiction only exists if one of the three mentioned *traditional principles* is applicable. In addition, even if Spanish jurisdiction exists, a Spanish prosecution is always subsidiary to proceedings in a country with jurisdiction or before an International Criminal Tribunal. While this *subsidiarity* principle had already been read into the old law by the Supreme Court, it is now explicitly part of the written law.

As for the case at hand, however, the question arises whether this new legislation applies at all to investigations which started before its entry into force. The jurisdictional norms of the LOPJ are considered as procedural norms by the case law[203] and the doctrine.[204] As a consequence, the applicable procedural law is not the one which is valid at the moment of commission of the relevant offence (principle of non-retroactivity) but, according to the *tempus regit actum* rule, the one in force at the moment in

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[203] Auto de la Sala de lo Penal de la Audiencia Nacional Confirmando la Jurisdicción de España para Conocer de los Crímenes de Genocidio y Terrorismo Cometidos durante la Dictadura Argentina, Madrid, Nov. 4, 1998, *available at* http://www.derechos.org/nizkor/arg/espana/audi.html [hereinafter Audencia Nacional]. Fundamento de derecho tercero:

> Aplicabilidad actual del Art. 23, apartado 4, de la Ley Orgánica del Poder Judicial, como norma procesal ahora vigente. El Art. 23, apartado 4, de la Ley Orgánica del Poder Judicial -en cuanto proclama la jurisdicción de España para el conocimiento de determinados hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la Ley penal española, como alguno de los delitos que enumera-, no se aplica retroactivamente cuando la jurisdicción proclamada se ejerce en el tiempo de la vigencia de la norma -tal sucede en este caso-, con independencia de cuál fue el tiempo de los hechos que se enjuician. El citado Art. 23, apartado 4, de la Ley Orgánica del Poder Judicial, no es norma de punición, sino procesal. No tipifica o pena ninguna acción u omisión y se limita a proclamar la jurisdicción de España para el enjuiciamiento de delitos definidos y sancionados en otras Leyes. La norma procesal en cuestión ni es sancionadora desfavorable ni es restrictiva de derechos individuales, por lo que su aplicación a efectos de enjuiciamiento penal de hechos anteriores a su vigencia no contraviene el Art. 9, apartado 3, de la Constitución Española. La consecuencia jurídica restrictiva de derechos, derivada de la comisión de un delito de genocidio -la pena-, trae causa de la norma penal que castiga el genocidio, no de la norma procesal que atribuye jurisdicción a España para castigar el delito. El principio de legalidad (Art. 25 de la Constitución Española), impone que los hechos sean delito -conforme a las Leyes españolas, según el Art. 23, apartado 4, tan mencionado-, cuando su ocurrencia, que la pena que pueda ser impuesta venga ya determinada por Ley anterior a la perpetración del crimen, pero no que la norma de jurisdicción y de procedimiento sea preexistente al hecho enjuiciable. La jurisdicción es presupuesto del proceso, no del delito.

Id.

[204] MORENO CATENA ET AL., *supra* note 171, at 203 ("El citado art. 23.4 LOPJ no es norma de punición, sino procesal.") *See also* VICTOR MORENO CATENA & VALENTIN CORTES DOMINGUEZ, INTRODUCCIÓN AL DERECHO PROCESAL PENAL 30 (2004).

which the relevant procedural act took place.[205] Accordingly, the decisive moment for the applicable procedural law is the time (*tempus*) when the decisive procedural act (*actum*) has been undertaken, i.e., *in casu*, when the jurisdictional nexus has been invoked. In general terms, a new procedural law does not apply to investigations or prosecutions which have been formally initiated before its entry into force, i.e., in terms of Spanish procedural law, where the complaint has already been received by the competent authority and this authority has initiated an investigation (*auto de incoación de diligencias preliminares*).[206] This means, in principle, that the new law has no retroactive effect and, with regard to our case, that the old law would be applicable since the process was initiated on March 17, 2009, or with the acceptance of the investigating judge on March 28, and at that very moment the jurisdictional link was required.[207] Furthermore, the Spanish jurisdiction could also follow from the passive personality principle—albeit not contained in Article 23 LOPJ but recognized by the case law—as to Spanish nationals detained in Guantánamo; this applies, for example, to the former detainee Hamed Abderraman.[208]

Yet this leads to another problem. Since the crime of torture, neither as an individual crime (Article 174 Código Penal (CP), Criminal Code), crime against humanity (Article 607 *bis* (8) CP), or war crime (Article 609 CP), is explicitly mentioned in the old version of Article 23(4) LOPJ, the jurisdiction for torture as an individual crime may only be based on Article 23(4)(i) in connection with the 1984 U.N. Torture Convention. This provision refers to *international treaties* which impose an obligation on Spain to prosecute the crimes contained in them.[209] The Supreme Court,[210] supported by most academic writers,[211] has qualified the Geneva Conventions with

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[205] *Cf.* SANTIAGO MIR PUIG, DERECHO PENAL: PARTE GENERAL 122 mn. 35 (2006); Gil Gil, *supra* note 190, at 363–64.

[206] On the initiation of the criminal process by the filing of the *notitia criminis*, *see* GIMENO SENDRA, *supra* note 171, at 206. *See also* RICARDO RODRÍGUEZ FERNANDEZ, EL PROCESO PENAL: NOCIONES BÁSICAS 60 (2006); FRANCISCO RAMOS MENDEZ, ENJUICIAMIENTO CRIMINAL. OCTAVA LECTURA CONSTITUCIONAL 37 (2006).

[207] For the same result, *see* Ollé Sesé, *supra* note 185, at 19; too superficial, *see* de la Rasilla del Moral, *supra* note 163, at 804.

[208] *See* Alicia Gil Gil, La Turbia Herencia de Guantánamo (Feb. 4, 2009), *available at* http://www.elpais.com/articulo/opinion/turbia/herencia/Guantanamo/elpepiopi/20090204elpepiopi_26/Tes. *See also* de la Rasilla del Moral, *supra* note 163, at 805.

[209] *See* the original wording of Article 23(4)(i) in *supra* note 183 ("[S]egún los tratados o convenios internacionales, *deba* ser perseguido en España.") (emphasis added). For a critique of a restrictive interpretation, *see* OLLÉ SESÉ, *supra* note 173, at 215–16.

[210] STS, Dec. 11, 2006 (Couso case) (R.G.D. 1.240/2006).

[211] *See* Gil Gil, *supra* note 190, at 362–63; J. CEREZO MIR, CURSO DE DERECHO PENAL ESPAÑOL I 257 (2004); A. Remiro Brotons, *Los crímenes de Derecho Internacional y su Persecución Judicial*, *in* EL DERECHO PENAL INTERNACIONAL 72 (2001); A. SÁNCHEZ

regard to their grave breaches as such treaties. Thus, torture committed as a grave breach within the framework of an international armed conflict (e.g., Article 50 of the First Geneva Convention) could be prosecuted by Spanish Tribunals. As to torture as an individual crime, under the 1984 U.N. Torture Convention the AN held, in the *Chile* and *Argentina* cases, that this Convention also constitutes a treaty in the sense of Article 23(4)(i) LOPJ;[212] yet the AN does not discuss whether a treaty within the meaning of this provision must oblige the State Party to prosecute and punish its offences independently of the place of commission and, in the affirmative, whether the Torture Convention does so.[213] As to the latter question, the relevant Article 5 of the Torture Convention clearly refers to the principles of territoriality, active, and passive personality (paragraph 1(a) to (c) as well as to the principle of representation in paragraph 2), i.e., it does not provide for universal jurisdiction. The Spanish Supreme Court could, in the *Guatemala* case, get around the problem by invoking passive personality under Article 5(1)(c) of the Torture Convention since there were Spanish victims in the case.[214] Be

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LEGIDO, JURISDICCIÓN UNIVERSAL PENAL Y DERECHO INTERNACIONAL 71 (2004); Francisco Jiménez García, *Justicia Universal e Inmunidades Estatales: Justicia o Impunidad: ¿Una Encrucijada Dualista para el Derecho Internacional?*, 18 ANUARIO DE DERECHO INTERNACIONAL 87 (2002); José B. Acosta Estévez, *Las Infracciones Graves de los Convenios de Ginebra en el Derecho Penal Español Bajo el Principio de Jurisdicción Universal*, 7 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 13 (2007). Against this view, *see* Bernardo Feijóo Sánchez, *in* COMENTARIOS AL CÓDIGO PENAL 1432 (G. Rodríguez Mourullo et al. eds., 1997); F. MUÑOZ CONDE, DERECHO PENAL: PARTE ESPECIAL 757 (1999).

[212] *See* Audencia Nacional, s*upra* note 203, at Part 7.

> Las torturas denunciadas formarían parte del delito de mayor entidad de genocidio o terrorismo. Por ello resulta estéril examinar si el delito de tortura es, en nuestro Derecho, delito de persecución universal por la vía del art. 23, apartado 4, letra g), de la Ley Orgánica del Poder Judicial, puesto en relación con el art. 5 de la Convención de 10 de diciembre de 1984 contra la tortura y otros tratos o penas crueles, inhumanos o degradantes. Si España tiene jurisdicción para la persecución del genocidio en el extranjero, la investigación y enjuiciamiento tendrá necesariamente que alcanzar a delitos de tortura integrados en el genocidio. Y no sólo en el caso de víctimas de nacionalidad española, conforme podría resultar del art. 5, apartado 1, letra c), de la Convención citada, que no constituye una obligación ineludible para los Estados firmantes. España tendría jurisdicción propia como derivada de un tratado internacional en el caso del apartado 2 del art. 5 de la Convención mencionada, pero, como se ha dicho, la cuestión es irrelevante jurídicamente a los efectos de la apelación y del sumario.

Id.

[213] Gil Gil, *supra* note 190, at 491 (rejecting both concepts and therefore disagreeing with the AN); confusing on this provision, *see* Weill, *supra* note 163, at 620.

[214] Guatemala Judgment, *supra* note 190 (in *Fundamento de derecho duodecimo* affirming the universal consensus with regard to the duty to prosecute and punish torture as well as the obligation of State parties to prosecute suspects present on the territory or, inter alia, in case of Spanish victims ("*personalidad pasiva que permite perseguir los hechos cuando la victim*

that as it may, it may well be argued that a treaty in the sense of Article 23(4)(i) need not provide for universal jurisdiction itself. Rather, what is required is—as in the case of practically identical section 6 no. 9 of the German Criminal Code[215]—an international treaty containing a duty to prosecute; this treaty-based duty alone serves as the legitimizing link for the extraterritorial application of the State party's criminal law; no further links are necessary.[216] If one follows this broader view, Spanish jurisdiction would exist in principle for extraterritorial acts of torture. Still, it may be limited by the now apparently settled criteria of *subsidiarity* and *reasonability* as developed by the case law and the underlying rationale of the recent reform. It seems especially clear now that politically motivated prosecutions are no longer desired.

III. CONCLUSION

A pure or absolute theory of universal jurisdiction is based on a *normative concept of universal jurisdiction* which conceives the universal and transnational prosecution of international core crimes as the defense of universal values common to all mankind and enshrined in international human rights, humanitarian and international criminal law treaties, and other documents.[217] Such a normative foundation of universal jurisdiction also finds support in a normative theory of international core crimes, in particular crimes against humanity, as developed by David Luban.[218] If one sees in these crimes, following Luban, an attack against all humankind, and thus

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sea de la nacionalidad de ese Estado y éste lo considere apropiado."). For a critique, *see* Gil Gil, *supra* note 190, at 492.

[215] For the text, *see supra* text accompanying note 79.

[216] This has also been recognized with regard to the identical German provision (*see id.*) by the German Supreme Court (*see* Bundesgerichtshof, 3 StR 372/00 (Feb. 21, 2001), *in* 46 BUNDESGERICHTSHOFS IN STRAFSACHEN 292, 307 (2001)) and by the majority doctrine, *see* Ambos, *supra* note 84, § 6 mn. 20 with further references. In a similar vein, *see* OLLÉ SESÉ, *supra* note 173, at 203, 220, 243–44 (basically arguing that universal jurisdiction exists as a general principle of international criminal law for core crimes (*crímenes de primer grado*), including torture, and as such must be applied directly on the domestic level). For a more restrictive view, *see* Gerhard Werle & Florian Jessberger, *§ 6 Auslandstaten Gegen International Geschützte Rechtsgüter*, *in* 1 LEIPZIGER KOMMENTAR STRAFGESETZBUCH § 6 mn. 109, 112 (Gerhard Dannecker et al. eds., 2007) (arguing that the respective treaty must provide for a duty to prosecute on the basis of universal jurisdiction and that the German jurisdiction cannot reach beyond the jurisdiction provided for in the treaty).

[217] For the full argument, *see* AMBOS, *supra* note 78, at 5, § 3 mn. 94; Kai Ambos, *'§ 1 Anwendungsbereich'*, *in* MÜNCHNER KOMMENTAR STRAFGESETZBUCH. NEBENSTRAFRECHT III. VÖLKERSTRAFGESETZBUCH 461, 465, § 1 mn. 4 (Wolfgang Joecks et al. eds., 2009), both with references. *See also* in this vein OLLÉ SESÉ, *supra* note 173, at 247.

[218] This theory has been most convincingly developed by David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L. L. 85 (2004).

considers a criminal against humanity as a *hostis humani generis*,[219] every individual, acting as a representative of the humankind as a whole, has an interest, a right, or even a duty to repress these crimes.[220] Universal jurisdiction appears under this theory as a form of vigilante jurisdiction in which everyone is interested and entitled to bring the criminal against humanity to justice,[221] but, in order to avoid abuses linked to any form of private justice of that kind, it is necessary to delegate the exercise of universal jurisdiction to states and tribunals which comply with fair trial standards.[222] Thus, universal jurisdiction is a "kind of delegated or representative jurisdiction, derived from the vigilante jurisdiction."[223]

While such a theoretical foundation is sound and indeed makes a theoretically compelling case for an unlimited universal jurisdiction regime, its practical application has generated *various problems* which are partly of a political nature and partly of a technical-practical nature. The most obvious political problem of universal (indeed, any extraterritorial jurisdiction), is its unavoidable interference into the judicial affairs of the territorial state. While this interference may be *legally* justified on the basis of the normative concept of universal jurisdiction defended in this paper,[224] it cannot be denied that its *political* and *diplomatic* implications can be counterproductive, especially if a "developed," strong, "first world" State (or even worse, a former colonial power) extends its jurisdiction into the domain of a "underdeveloped," weak, "third world" State (former colony). Clearly, universal jurisdiction of this kind—and this has been mostly its practice—smacks of neo-colonial domination and touches upon understandable sensitivities of any people or government in the poorer parts of the world.[225] Indeed, from this perspective, it is easily understandable that for many like-minded States the establishment of the ICC was also seen as a more legitimate tool in the fight against impunity than the continuing reliance on third

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[219] *Id.* at 91–92, 137, 139–40, 160.

[220] *Id.* at 137, 141 ("To say that humanity has an interest in suppressing crimes against humanity is to say that human individuals share that interest . . . . " Also, "interest in repressing CaH is universal among *people*, not necessarily among states." (emphasis in original)).

[221] *Id.* at 140–41, 160.

[222] *Id.* at 142–43, 145 (referring to natural justice standards).

[223] *Id.* at 143, 160.

[224] *See supra* note 87 and accompanying text.

[225] For a recent discussion of the African sensibilities *vis-à-vis* the ICC which a fortiori exist *vis-à-vis* third states prosecuting African case on the basis of universal jurisdiction, *see* Charles Chernor Jalloh, *Regionalizing International Criminal Law*? 9 INT'L CRIM. L. R. 445, 462, 496–97 (2009) (referring, inter alia, to Anghie and Chimni, two scholars of the so-called Third World Approaches to International Law who argue that "it was principally through colonial expansion that international law achieved one of its defining characteristics: universality.").

states' universal jurisdiction. If, on the other hand, governments of strong states are the object of universal jurisdiction litigation, like in the cases at hand, only few forum States may be able to resist their pressure to terminate proceedings or to not initiate them in the first place. Yet there is also the other extreme of hijacking criminal justice for purely political purposes or initiating proceedings against political opponents or enemies without having reliable evidence or even indicia for the commission of international crimes. The right of private citizens to trigger criminal proceedings, independent of any victim status as in the above discussed *actio popularis*, is highly problematic and open to abuse. Obviously, the concerns with regard to such broad power for private individuals to trigger criminal proceedings must be distinguished from victims' participation in criminal proceedings for serious human rights violations. Such participation, if it is substantial and not an "empty ritual,"[226] is highly desirable since it lends these proceedings much more legitimacy as these proceedings often depend on victims' testimony.[227]

Apart from these political problems, the experience in universal jurisdiction litigation has also shown that there are many *practical*—sometimes insurmountable—problems in bringing such cases to a successful end. While the often criticized lack of infrastructure and capacity in some European countries may be solved by the creation of special police and prosecutorial units and the providing of sufficient resources on the part of the governments concerned,[228] it is much more difficult to tackle all the problems linked to the necessary evidence gathering abroad in such proceedings.[229] The difficulties start with logistical problems—like security and transport—and ignorance of the local language and culture and end with a lack of cooperation on the part of the territorial State. In addition, the investigations are regularly of a highly complex and sensitive nature. From a purely practical perspective, it is easily understandable that practitioners think twice before they undertake such investigations.

All these problems, together with the pressure by some major powers, especially the U.S. under the Bush administration, caused the universal rollback of universal jurisdiction,[230] as confirmed by the law and practice of

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[226] For a recent critique with regard to the Cambodian Extraordinary Chambers, *see* Mahdev Mohan, *The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal*, 9 INT'L CRIM. L. R. 733, 752 (2009).

[227] *See* Kaleck, *supra* note 15, at 975–76.

[228] *See* HRW, *supra* note 29, at 34–35; Kaleck, *supra* note 15, at 953, 974–75.

[229] *See* Kaleck, *supra* note 15, at 961.

[230] According to the most comprehensive study of the Max Planck Institute for Foreign and International Criminal Law (*see* NATIONALE STRAFVERFOLGUNG VÖLKERRECHTLICHER VERBRECHEN (Albin Eser et al. eds., 2003–2006), extraterritorial jurisdiction on the basis of universal jurisdiction is "practically always limited by one way or the other." Either it de-

the countries analyzed in this paper. This development led to the gradual substitution of absolute or "true" universal jurisdiction in a proper sense by its *subsidiary or cooperative* surrogates.[231] The reference to universal jurisdiction *in absentia* in this context is, however, misleading. It mixes presence as a *factual* requirement, which may condition a criminal prosecution in *practical* terms with presence as a legal requirement in the trial phase in procedural systems, which do not allow—unlike e.g., the French and Italian systems—for an *in absentia* trial. Yet, the presence in the forum State is not a constitutive element of universal jurisdiction, i.e., presence in this sense concerns only the "jurisdiction to enforce," but not the "jurisdiction to prescribe" or "to adjudicate"[232] which exist independent of such a presence.[233]

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pends on an international (treaty-based) duty to prosecute (in Austria, Belarus, China, Croatia, England and Wales, Estland, Greece, Poland, Russia) or on the presence of the suspect in the forum State (Canada, Croatia, Serbia and Montenegro, Spain, the Netherlands, Switzerland, the U.S.). Only in exceptional cases does universal jurisdiction apply in an unlimited form to all international core crimes (Australia, Germany, Slovenia) or for some of them (Finland, Italy, Israel, Sweden). *See* Helmut Kreicker, *Völkerstrafrecht im Ländervergleich*, *in* 7 NATIONALE STRAFVERFOLGUNG VÖLKERRECHTLICHER VERBRECHEN 191 (2006) (translation from German by the author). More recently, Wolfgang Kaleck found that more than fifty court proceedings and a dozen convictions took place in Europe between 1998 and 2008 in universal jurisdiction cases. *See* Kaleck, *supra* note 15, at 931.

[231] *See* the dissenting votes of Judges Higgins, Kooijmans, and Buergenthal *in* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 2002 I.C.J. ¶ 21 (Feb. 14), *available at* http://www.icj-cij.org/docket/files/121/8136.pdf ("trend . . . for the trial and punishment of certain crimes . . . committed extraterritorially[ ]" but no "classical assertion of a universal jurisdiction . . . having no relationship or connection with the forum State."). *See also* REYDAMS, *supra* note 22, at 223 ("The practice of most States . . . falls under the co-operative limited universality principle."). *See also* Ambos, *supra* note 217, at 472–73 § 1 mn. 15.

[232] On the different forms of jurisdiction, *see* AM. RESTATEMENT (THIRD) OF FOREIGN REL. L. *See also* Werner Meng, *Regeln über die Jurisdiktion der Staaten im Amerikanischen Restatement (Third) of Foreign Relations Law*, 27 ARCHIV DES VÖLKERRECHTS 156, 163–64 (1989); Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145 (1972); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 126 (2007); ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 37 (2007) (referring to "legislative," "adjudicative," and "executive jurisdiction").

[233] In the same vein, *see* Thomas Weigend, *Grund und Grenzen Universaler Gerichtsbarkeit*, *in* FESTSCHRIFT FÜR ALBIN ESER 955, 970 (Jörg Arnold et al. eds., 2005). *See also* CRYER ET AL., *supra* note 232, at 45; ROBERT KOLB & PHILIP GRANT, DROIT INTERNATIONAL PÉNAL 455, 463–64 (2008); Herbert Ascensio, *Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in Guatemalan Generals*, 1 J. INT'L CRIM. JUST. 690, 700 (2003) (presence is "only a procedural condition"); Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept,* 2 J. INT'L CRIM. JUST. 735, 750–51, 755 (2004). For a different view, *see* Cedric Ryngaert, *Universal Jurisdiction in an ICC Era—A Role to Play for EU Member States with the Support of the European Union*, 14 EUR. J. C., CRIM. L. & CRIM. JUST. 46, 52, 54 (2006).

An investigation may well begin in the absence of the suspect, but a resulting trial can normally not be held *in absentia*.[234]

In any case, subsidiary or cooperative universal jurisdiction, sometimes enriched by highly normative criteria such as reasonableness and convenience to prosecute extraterritorially, makes it more important than ever to strengthen, on the one hand, the criminal justice systems of the territorial states and the ICC and, on the other, to think in broader strategic terms. Indeed, it is high time to develop a comprehensive strategy in which criminal prosecution on an extraterritorial, universal basis is only one of a variety of tools available to bring perpetrators of serious human rights violations to account. As one leading human rights lawyer put it: "universal jurisdiction as a sometimes overestimated but still important tool that should be considered and used alongside other local, regional, and international remedies. Legal efforts should be embedded in broader interdisciplinary strategies."[235]

Contrary to increasingly popular neo-punitivist approaches, widespread, for example, among human rights activists in Latin America,[236] which seem to see criminal law as the cure for all structural ills of their societies, we should not lose sight of the fundamental principles of criminal law which are the product of long fights for fairness and the rule of law.[237] We should indeed remind ourselves that according to the classical liberal criminal law theories, criminal law is only the *ultima ratio*, the last resort.[238]

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[234] *Cf.* Kaleck, *supra* note 15, at 959.

[235] *Id.* at 980.

[236] For a radical critique, *see* Daniel Pastor, *La Deriva Neopunitivista de Organismos y Activistas como Causa del Desprestigio Actual de los Derechos Humanos*, 10 NUEVA DOCTRINA PENAL 73 (2005A).

[237] I have made this point repeatedly, most recently in Kai Ambos, *Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the 'Most Responsible'*, *in* SYSTEM CRIMINALITY IN INTERNATIONAL LAW 127 (André Nollkaemper & Harmen van der Wilt eds., 2009).

[238] The humanist argument for a restrictive use of criminal law and in particular its sanctions can already be found in the work of Immanuel Kant (1724–1804) when he makes the case for pure retribution rejecting punishing for preventive purposes, i.e., to (negatively) deter or (positively) encourage others, since this would mean to instrumentalize the person punished for another purpose that his having broken the law. *See* IMMANUEL KANT, METAPHYSIK DER SITTEN (1919) (1785). From a similar humanist perspective Cesar Beccaria (1738–1794) tried to solve the conflict between the "utilitarist purpose of punishment and penal humanism" by calling for proportional punishment which imposes on the guilty the "less physical suffering possible." *See* DEI DELITTI E DELLE PENE § 15 (1828). On both, *see* MARIO A. CATTANEO, AUFKLÄRUNG UND STRAFRECHT, 33, 37, 39, 42–43 (1998). In a similar vein, Paul Johann Anselm von Feuerbach (1775–1833) called for a restrictive application of coercion (*Zwang*) by the State, also in the field of criminal law and punishment. *See* 1 REVISION DER GRUNDSÄTZE UND GRUNDBEGRIFFE DES POSITIVEN PEINLICHEN RECHTS 31 (1966) (1799). *See also* Arthur Kaufmann, *Subsidiarität und Strafrecht*, *in* GRUNDFRAGEN DER GESAMTEN STRAFRECHTSWISSENSCHAFT: FESTSCHRIFT FÜR HEINRICH HENKEL 89, 103 (Claus Roxin et al. eds., 1974). Among English philosophers, John Stuart Mill (1806–1873)

One should recall that the exercise of the *ius puniendi* is the most powerful weapon of the State and that this weapon can also be abused to repress civil unrest and dissident voices.[239] Indeed, criminal law has always been, and is still being, both used and abused in this sense; current examples such as Burma, China, Russia, and Iran abound and sadly show how liberal theorists in their call for a cautious use of criminal law have always been right. Indeed, much more reflection is necessary as to the role criminal law should play in dealing with serious human rights violations. While there must certainly be an ingredient of criminal law if important legal interests are at stake and serious crimes are being committed, the transitional justice discourse[240] shows that criminal law must be part of a range of measures and should always be applied carefully.

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called for a restrictive use of the criminal law in the sense of *ultima ratio* with regard to "justice" as "a name for certain moral requirements . . . higher in the scale of social utility . . . than any others" and which therefore may be protected and promoted "by the sterner character of its sanctions." *See* UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 59–60 (1948) (1863). *See also* GERHARD SEHER, LIBERALISMUS UND STRAFE: ZUR STRAFRECHTSTHEORIE JOEL FEINBERGS 32–33 (2000).

[239] *See* Kaleck, *supra* note 15, at 978 ("[J]udging and incarcerating individuals is still an exercise of power that may violate the rights of the accused . . . ."

[240] *Cf.* Kai Ambos, *The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC*, *in* BUILDING A FUTURE ON PEACE AND JUSTICE: STUDIES ON TRANSITIONAL JUSTICE, CONFLICT RESOLUTION AND DEVELOPMENT 19, 22 (Kai Ambos et al. eds., 2009). For a recent critique on an exclusively retributive approach from an empirical perspective, *see* Janine Natalya Clark, *The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Hercegovina*, 7 J.INT'L CRIM. JUST. 463 (2009); equally critical from a sentencing perspective, *see* Ralph Henham, *Towards Restorative Sentencing in International Criminal* Law, 9 INT'L CRIM. L. R. 809 (2009) (arguing for more restorative trial outcomes).