

# FROM «ABU GHRAIB» TO THE «RUMSFELD CASE»\*

FLORIAN JESSBERGER

Professeur de Droit Pénal de l'Université Humboldt de Berlin, Allemagne

## I.

On February 12, 2005, the then US Defense Secretary Donald Rumsfeld arrived in Munich to take part in the prestigious Conference on Security Policy. In a Pentagon press release a week earlier it was still unclear whether Rumsfeld would accept the organizer's invitation. The reason for this indecision was a criminal complaint filed by a US civil rights group, the Center for Constitutional Rights, and seventeen Iraqi citizens before the German Federal Prosecutor who is responsible for prosecuting international crimes in Germany.<sup>1</sup> On February 10, 2005, two days before the conference was about to start, the Federal Prosecutor announced that he would not prosecute the allegations made in the complaint.<sup>2</sup> Shortly after this announcement the Pentagon declared that Mr. Rumsfeld would come to Munich and attend the conference. This little story marks the beginning of a chain of events which has been

---

\* This paper has been presented to the XV. International Congress of the Société Internationale de Défense Sociale. Parts of the paper are based on previously published talks the author gave in Berlin and Naples in 2005 and 2006 respectively.

1 An English translation of the complaint is available at <http://www.ccr-ny.org>. For a discussion of the complaint, see also A. Fischer-Lescano, *German Law Journal* 2005, pp. 689 et seq., and – in German – K. Ambos, *Neue Zeitschrift für Strafrecht* 2006, pp. 434 et seq.; R. Keller, *Goldammer's Archiv für Strafrecht* 2006, pp. 25 et seq.; T. Singelstein and P. Stolle, *Zeitschrift für Internationale Strafrechtsdogmatik* <[www.zis-online.com](http://www.zis-online.com)> 2006, pp. 118 et seq.

2 An English translation of the prosecutor's decision is available at <http://www.ccr-ny.org>

receiving much public attention in Germany and in the US: The Rumsfeld Case. A case which sheds light on the chances of and the obstacles to the enforcement of international criminal law through national criminal justice systems.

## II.

The aforementioned complaint was the first of two to be brought against Donald Rumsfeld, the former CIA Director George Tenet and other high-ranking members of the US military and secret services, all of them being US citizens. The second complaint was filed in November 2006.<sup>3</sup> This time the complaint was submitted by a broad coalition of more than forty human rights organisations and individuals from all over the world. Unlike the first, the second 380-page complaint was additionally directed against the former White House Counsel Alberto Gonzales and former Deputy and Assistant Attorneys General John Yoo and Jay Bybee for being the «legal architects» of the US torture practice. Also this second complaint was dismissed by the Federal Prosecutor.<sup>4</sup>

Subject of and reason for both complaints was the abuse of prisoners in the infamous Iraqi prison Abu Ghraib in 2003 and 2004.<sup>5</sup> In the complaints it is exhaustively explained why these acts – described in detail in several reports of official US investigative commissions<sup>6</sup> – constitute war crimes, especially the war crime of torture under international and under German criminal law. Internal guidelines and memos were used to prove that, while none of the high-ranking persons named was personally involved in the abuse, the acts of their subordinates could be imputed to them.

## III.

Before I come to the reasons given for the Federal Prosecutor's decisions not to prosecute Rumsfeld and the other suspects, let me address a preliminary question: How comes that a complaint be filed in Germany for a crime committed abroad, in faraway Iraq, against a secretary of state and other high-ranking representatives of a

---

3 See <http://www.rav.de/rumsfeld2.html> (visited on January 8, 2008). The site includes several expert reports and the complaint as pdf-files.

4 See the press release of the Federal Prosecutor from April 27, 2007, available online at <http://www.generalbundesanwalt.de/de/showpress.php?themenid=9&newsid=273> (visited on January 8, 2008).

5 See G. Werle, *Völkerstrafrecht* (2nd edition 2007) at p. 315.

6 See the compilation of official documents by K. J. Greenberg and J. L. Dratel (eds.), *The Torture Papers* (2005).

powerful foreign state allied with Germany, a complaint, in addition, that even critical observers were unwilling to dismiss as an abstruse effort of misguided grouseers?

Let me mention three reasons. First, some of the suspects had spent time in Germany as members of the US military. Second, no criminal investigations had been initiated either in Iraq or the United States—that is, neither on the site of the alleged crime nor in the alleged perpetrator’s home country—against the persons named in the complaint. Of the few trials that did occur, none involved the persons named in the complaint. Only lower-ranking members of the guard units were prosecuted and in some cases convicted, the most prominent examples being Lyndie England and Charles Graner. And third, the jurisdiction of German courts is unusually broad when it comes to prosecuting crimes under international law. Let me elaborate a bit on this last reason and illustrate why it was possible and in fact somewhat obvious to lodge these complaints in Germany.

#### IV.

Both complaints were based on the German Code of Crimes Against International Law (CCIL), the *Völkerstrafgesetzbuch*,<sup>7</sup> which entered into force in 2002. The Code adapts German substantive criminal law to the provisions of the Rome Statute. It does so primarily by creating new crime provisions for war crimes and crimes against humanity. Most relevant for our purposes, the Code provides for universal jurisdiction over genocide, crimes against humanity and war crimes. According to its Section 1, it is also applicable when the offense was committed abroad and bears no relation to Germany. This Section embodies the principle of universal jurisdiction in its purest, least restrictive form. By so broadly expanding the scope of criminal law, Germany has taken perhaps a courageous, but also a lonely path in comparison with other countries.<sup>8</sup>

#### V.

However, the German legislator also recognized that the unlimited universal applicability of German criminal law to all crimes under international law committed anywhere in the world could create great difficulties for the criminal law system – difficulties of an evidentiary, economic, and, not least, of a foreign policy nature. For this reason, among others, the provision on universal jurisdiction was complemented

---

<sup>7</sup> Art. 1 Gesetz zur Einführung des Völkerstrafgesetzbuches, Bundesgesetzblatt 2002 I, pp. 2254 et seq. For details see G. Werle and F. Jessberger, *Criminal Law Forum* 2002, pp. 191 et seq.

<sup>8</sup> See the comparative analysis by L. Reydams, *Universal Jurisdiction* (2003).

by a «procedural safeguard»: Section 153f of the Code of Criminal Procedure, added upon adoption of the *Völkerstrafgesetzbuch*, regulates the Federal Prosecutor's discretion to refuse to prosecute a crime under international law if it is committed abroad.<sup>9</sup> Its main purposes are to allow for a limitation of proceedings to reasonable cases, to combat overburdening of German prosecution authorities, and to avoid the so-called 'forum shopping', the arbitrary choice of the German jurisdiction by the complainants.<sup>10</sup>

However, because the German lawmaker wanted the *Völkerstrafgesetzbuch* to be an effective tool in order to allow Germany to efficiently contribute to the global fight against impunity of international crimes, prosecutorial discretion was restricted to specific cases, while, at the same time, the law provides for a duty to prosecute under certain circumstances. According to Section 153f, prosecution of international crimes is mandatory if a connection to Germany can be established. Then, there is a duty to investigate and prosecute, not only with regard to crimes committed on German territory but even if the crime was committed abroad. Under the law, such a domestic connection exists, for instance, if the suspect is a German national; if he or she is a foreigner but present in Germany, even if only temporarily; or if he or she can be expected to enter the country.

However, if there is no connection to Germany, investigation and prosecution are discretionary. In these cases, the Prosecutor is not under an obligation to investigate and prosecute. Furthermore, the Code of Criminal Procedure explicitly emphasizes

---

9 Section 153f reads as follows:

(1) ... the public prosecution office may dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, if the accused is not present in Germany and such presence is not to be expected. If ... the accused is a German, this shall however apply only where the offence is being prosecuted before an international court or by a State on whose territory the offence was committed or whose national was harmed by the offence.

(2) ... 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, in particular 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 expected 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 present in Germany but the requirements pursuant to the first sentence, number 2 and 4, have been fulfilled and transfer to an international court or extradition to the prosecuting state is permissible and is intended.

(3) ...

10 On the legislature's motives, see Bundestags-Drucksache 14/8524, pp. 11 et seq.; see also T. Weigend, in O. Triffler (ed.), *Gedächtnisschrift für Theo Vogel* (2004), p. 197 at pp. 206 et seq.

that, as a rule, the Prosecutor shall give precedence to the primarily responsible foreign or international courts rather than making use of her own right to prosecute.

## **VI.**

Let us return to the complaints against Donald Rumsfeld. In both cases, the Prosecutor found the requirements of Section 153f to be present and exercised her discretion by refusing to prosecute the alleged crimes. As a consequence, issues of substantive criminal law were not addressed.

## **VII.**

As concerns the first complaint the Federal Prosecutor's arguments may be summarized as follows: Although some of the suspects were unquestionably located on German territory – some of them had spent time in Germany as members of the US military – or could be expected to come to Germany, such as Donald Rumsfeld, the conditions for mandatory prosecution were, in the opinion of the Prosecutor, not established since the respective suspects, as members of the US army, were within the unlimited reach of the jurisdiction of the US. Therefore an «impunity gap» did not need to be feared and investigation and prosecution were placed at the discretion of the Federal Prosecutor.

Furthermore, the Prosecutor argued that, similarly to the complementarity principle of the Rome Statute, exercise of criminal jurisdiction on the basis of universal jurisdiction would only be permissible as a backup mechanism, that is in cases where the primary jurisdiction is unable or unwilling to prosecute. In this respect the Prosecutor concluded somewhat remarkably that «no indications are apparent that US courts have refused to take action based on the circumstances described in the complaint.»

This conclusion is remarkable because, as it is well known, none of the high-ranking officials named in the complaint have ever been a target of any criminal investigation in the US with regard to the events in Abu Ghraib. The Prosecutor resolved this problem (that, indisputably, no investigations have been launched against the persons named concretely in the complaint) through further reference to the Rome Statute. In her view, the crucial factor should not be whether a jurisdiction with priority has taken an action against the individual suspect accused of a specific offense. Instead, the Prosecutor's notion of «offense» is based upon the concept of «situation» as laid down in Article 14 of the Rome Statute<sup>11</sup> and thus refers not to a

---

11 Article 14 (1) reads as follows: «A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the

certain individual or a certain act, but to the entire complex of (allegedly) criminal acts – in the case of the complaint, to the events in Abu Ghraib in general.<sup>12</sup>

### VIII.

In the second complaint the Federal Prosecutor's line of argument was different: This time, according to an information given to her upon inquiry by the top advisor to the Foreign Law Branch at the headquarters of the US Armed Forces in Europe, none of the suspects was present on German territory anymore. Therefore, according to Section 153f it was clearly at her full discretion whether or not to go forward with an investigation. In exercising this discretion the Federal Prosecutor argued that investigations by German prosecution authorities would have no reasonable chance of producing significant evidence or even of resulting in indictments or convictions, first, considering the legal and security situation in Iraq, and second, because the necessary legal assistance requests to the US authorities would obviously be unpromising. Thus – as one of the major aims of Section 153f is to protect German investigative resources against being overburdened with complicated and fruitless investigations – the Federal Prosecutor came to the conclusion that no circumstances exist that could justify to open a case.

### IX.

It cannot be denied that the Prosecutor's decisions possess the charm of criminal-policy realism, for who would seriously maintain that the US Secretary of Defense could in fact be tried and convicted by a German criminal court? At the same time, perhaps unfairly, it leaves the bland aftertaste of decisions supported more by foreign policy opportunism than by a striving for unbiased implementation of the law.<sup>13</sup> Anyway, the grounds for the decisions also provide points of criticism from a purely legal standpoint. Let me now outline two possible lines of arguments.

A first objection relates to the Federal Prosecutor's attempt to define the concept of «offense» through recourse to the concept of «situation» in Article 14 of the Rome Statute. First of all, if strictly applied, the Prosecutor's interpretation would have far-

---

Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.»

12 On the background of the concept of «situation», see P. Kirsch and D. Robinson, in A. Cassese, P. Gaeta, and J. R. Jones (eds.), *Rome Statute of the International Court* (2002), Vol. I. pp. 620 et seq.

13 The decision of the Federal Prosecutor, by the way, was subject of the annual report of Leandro Despouy, UN Special Rapporteur on the Independence of Judges and Lawyers, who expresses concern that the Federal Prosecutor might have acted under pressure from the US, see A/HRC/4/25/Add.1 on p. 97. The relevant addendum to the report is available online at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/128/12/pdf/G0712812.pdf> (visited on January 8, 2008).

reaching consequences: As soon as a jurisdiction with priority takes criminal measures regarding conduct of one or a few individuals that can be attributed to such a situation (e.g., «Abu Ghraib», «Srebrenica»), Germany's subsidiary jurisdiction as a third state would be blocked in regard to any act and any individual allegedly criminally involved in the situation. Furthermore, I am of the view that the Prosecutor's «Rome Statute-oriented» interpretation refers to the wrong provision. Article 14 regulates a so-called trigger mechanism, including the possibilities of a referral by State Partie, and determines whether such a referral must refer to a «situation» only, or, in contrast, to a specific person or crime. Article 14, however, does not provide an answer to the question under which preconditions and to what extent investigative measures on state level may render a proceeding before the International Criminal Court inadmissible. This question is instead covered by Article 53, which deals with the admissibility of «a case» before the International Criminal Court and the concept of complementarity. A trial before the Court is inadmissible not if «the situation» is being investigated or prosecuted by a state, but if «a case» is investigated or prosecuted by a state. Unlike a «situation», a «case» refers to a specific person and a specific act or crime. If the Prosecutor would have applied this standard in her interpretation of «offense» within the meaning of Section 153f, it would have been very difficult, if not impossible, to argue like she did, namely, that there are no indications «the offenses» allegedly committed by the persons named in the complaint are not being prosecuted.

Also, the Prosecutor's decision on the second complaint deserves criticism. Of course it is correct that without a domestic link an obligation to prosecute does not exist under Sections 152(2) and 153f. However, it is oversimplified to assume that only because the alleged perpetrators are not present on German territory there could be no reason which would justify the initiation of preliminary proceedings. Even if the chances of a conviction in Germany are slim at present, one reason for further formal investigations could be to secure evidence and to prepare the case for later prosecution whether in Germany or abroad. This idea of international solidarity – although explicitly mentioned by the German legislation as one of the main motives for the enactment of the CCIL – was not even considered in the Federal Prosecutor's decision. Besides, in any number of cases the absence of the suspects does not hinder the initiation of investigations since international cooperation in criminal matters is regular and effective – also between the US and German prosecution authorities, for example concerning the so-called «war on terror».

## **X.**

Let me conclude my presentation with a few thoughts on the prospects of domestic prosecutions of international crimes in general and of prosecution in Germany in particular.

In many countries, like in Germany, the Rome Statute proved as a catalyst for national law reform and as a pacemaker for the «internationalization» of domestic criminal justice systems. In many states new legislation created novel «tools» for the prosecution of genocide, crimes against humanity, and war crimes. This development is in line with the observation that domestic prosecutions are and will remain the backbone of the international system of criminal justice – even after the establishment of the permanent International Criminal Court.

Yet, compared to the lofty aims of this legislation, such as the promise to contribute to the fight against impunity, the experiences with the practical application of these «tools» have been sobering so far. Again German experiences support this view. Since the *Völkerstrafgesetzbuch* entered into force more than five years ago approximately sixty criminal complaints have been lodged with the Federal Prosecutor's office. Most of them dealt with accusations in connection with the Iraq War or the Middle East conflict, others were directed against Chinese government officials for human rights violations against members of Falun Gong, and against the former Uzbek Minister of the Interior Almatov for the Andijan massacre.<sup>14</sup> As in the «Rumsfeld Case» not a single one has led to the initiation of a formal investigation. As a matter of fact, only in one case — concerning the leader of a Rwandan militia operating in the Democratic Republic of the Congo who applied for asylum in Germany – formal investigations have been initiated by the prosecutor *proprio motu*. In short: We have a very ambitious legislation, but it is not applied.

From the point of view of the «fight against impunity,» many may regret this, but as regards the majority of complaints, the Prosecutor had good reasons to proceed as she did from a strictly legal point of view. In some cases sovereign immunity posed an insurmountable obstacle to criminal proceedings. In others, the prohibition on retroactive punishment prevented application of the Code. And finally, we can assume that when in some cases – as, in the Federal Prosecutor's opinion, in the Rumsfeld case – no domestic link existed under the relevant provision of the Code of Criminal Procedure, the Prosecutor could refuse to carry out a criminal investigation.

However, it is obvious that «German international criminal law», like international criminal law in general, still faces the task of overcoming the split between established legal positions on the one hand and the still-flawed practical implementation and enforcement on the other. This is perhaps the greatest challenge for the coming years. If and how it is met will determine whether international criminal law will succeed, or whether it will once again disappear into bureaucrats' filing cabinets.

---

14 For an overview, see W. Kaleck in *id./M. Rantner/T. Singelstein/P. Weiss* (eds.), *International Prosecution of Human Rights Crimes* (2007), at pp. 102 et seq.