Criminal Law and Procedure

Universal Jurisdiction: The German Case Against Donald Rumsfeld

*By Tom Gede**

Straftaten sind auch Straftaten, wenn sie von besonders mächtigen Verbrechern wie Herrn [Donald] Rumsfeld begangen werden.

- Wolfgang Kaleck, Die Zeit On-Line Interview[1]

On April 27, 2007, the German Federal Prosecutor General announced that she would not commence an investigation against former U.S. Defense Secretary Donald Rumsfeld and others for international human rights violations associated with the handling of prisoners at Abu Ghraib in Iraq and Guantánamo in Cuba.[2] For the second time within the last two years, the Federal Public Prosecutor's office declined to commence an investigation against Rumsfeld, based upon a criminal accusation filed by German human rights lawyer Wolfgang Kaleck, on behalf of the Center for Constitutional Rights (CCR) and other organizations and individuals. Kaleck argued for, among other things, the application of Germany's Code of Crimes Against International Law (CCAIL), a controversial law adopted in 2002 that purports to extend Germany's domestic criminal law jurisdiction to crimes against international law, specifically genocide, crimes against humanity and war crimes.[3] While the German law restrains itself in significant ways, providing the discretion used by the prosecutor in Karlsruhe to dismiss the Rumsfeld complaint, it nonetheless purports to do what most "universal jurisdiction" laws do: apply criminal jurisdiction over persons whose alleged crimes against international law occurred outside of the prosecuting state, regardless of nationality, residence or relation to the prosecuting country.

The Rumsfeld complaint in Germany illustrates a number of legal and juridical dilemmas faced by countries adopting pure universal jurisdiction statutes. Aside from jurisdictional challenges, such as presence in the prosecuting country, immunity for current or former heads of state or government, limitations periods and the concept of subsidiarity, serious questions persist as to the mere exercise of universal jurisdiction by one state over the nationals of another state where no legitimizing link to the investigating state exists and where no treaty or other international positive law governs.[4] Foremost among these is the core problem, at once political and legal, of breaching the sovereignty of another state. No doubt a breach arises where a foreign suspect is investigated and/or charged with a crime, whether against humanity or otherwise, committed outside the prosecuting country, and where there is no ostensible connection to the prosecuting country, such as the suspect residing in the prosecuting country, or the victim of the alleged crime residing in or being a national of the prosecuting country, and in the absence of an extradition, relevant treaty arrangement, or the use of an international tribunal to which the suspect's state has already surrendered a portion of its judicial sovereignty. Thus, where the International Criminal Court (ICC) and other international justice tribunals may assume jurisdiction to address genocide, crimes against humanity or war crimes, their jurisdiction derives from consenting or member states, or from the transfer of political or judicial authority to a successor body or tribunal, as in the case of the Nuremburg Trials, where such authority was transferred to the Allied Control Council under the Instrument of Surrender of Germany.[5]

However, when a sovereign state unilaterally assumes jurisdiction to try non-nationals for crimes (no matter how heinous) that occurred elsewhere, with no connection to the prosecuting state, what should be raised is the warning flag. While a principal legal objection to the exercise of universal jurisdiction may be that the prosecuting state does not have a proper sovereign interest in the matter, the core political objection is that the exercise, in its rawest form, with no connection to the prosecuting state, threatens the sovereignty of another state. At its worst it can be an excuse for kidnapping, detaining and prosecuting the citizen of another state, quite possibly for a politically-motivated show trial, without the benefit of a treaty or international mechanism to turn over that citizen to the court of another state. At its most benign, it still affronts the notion of national sovereignty sufficiently to call into question whether it is an instrument of international law or of extraordinary international politics.

Proponents of universal jurisdiction make the argument that certain crimes are so heinous and repugnant to the international community that they are in fact crimes against all, and therefore, punishable by any. Amnesty International, for example, calls on all states to:

> Enact and use universal jurisdiction legislation for the crimes of genocide, crimes against humanity, war crimes, torture, extra-judicial executions and "disappearances", in order that their national courts can investigate and, if there is sufficient admissible evidence, prosecute anyone who enters its territory suspected of these crimes, regardless of where the crime was committed or the nationality of the accused or the victim.[6]

Thus, it seems proponents argue that a state does in fact have a proper sovereign interest in such prosecutions, namely to "end[] impunity to the perpetrators of the worst crimes known to humanity." Beyond wishful thinking and political activism, however, there is little support or law to suggest that this is contrary to accepted international law. Assuming customary is that which is generally accepted, there is serious doubt that the above principle is customary international law, given that few nations have adopted it as their own. Even in Germany, where it is nominally adopted, it is subject to key restraints, codified rules of reasonableness, which call into question whether it is truly a universal jurisdiction statute. This paper argues that the German Code of Crimes Against International Law (CCAIL), to the extent that it provides the prosecutor with discretion to dismiss a complaint based on accepted rules of reasonableness relating to the exercise of extraterritorial jurisdiction, becomes

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simply another form of an extraterritorial jurisdiction statute. However, to the extent it is employed to prosecute a foreigner for serious offenses committed in a foreign setting, where the suspect is present in Germany, perhaps even only stepping foot in Germany, it would match the vision of its proponents, but, in such a case, it would constitute a serious breach of another state's sovereignty, and perhaps international comity and order.

Opponents of universal jurisdiction point to the idea, cherished in the United Nations Charter, that all states are equal in sovereignty, and that, accordingly, no state has authority to try a crime wholly within the cognizance of another state's jurisdiction. Indeed, in the governing principles in article 2 of the Charter, it states that the "[o]rganization is based on the principle of the sovereign equality of all its Members." It calls for respect of the "territorial integrity [and] political independence of [the] state," and generally disclaims the authority of the organization to "intervene in matters which are essentially within the domestic jurisdiction of any state." Universal jurisdiction, as defined above, allows a state to arrogate to itself judicial authority not surrendered by another state. It is difficult to see how it does not but disrespect the territorial integrity, political independence and domestic powers of a state which does have a legitimate link to the human rights violation or alleged war crime. As multiple states arrogate universal judicial power unto themselves, they will have to compete for the honor of enforcing international humanitarian law. A better answer lies in the reliance upon existing bi-lateral and multi-lateral treaties, charters and agreements that permit extradition, or in the use of international tribunals established through compact, treaty or other internationally recognized instruments. Even the traditional exercise of better-understood extraterritorial jurisdiction is preferable to the unilateral arrogation of universal judicial power by individual states.

By way of background, it is worth examining how universal jurisdiction differs from, or is perhaps an extension of, recognized forms of extraterritorial jurisdiction. It is often simply cast as one type of extraterritorial jurisdiction. Generally, the authority of a state to adjudicate and to compel persons to a domestic judicial process is dependent upon that state's jurisdiction to prescribe, or in the case of criminal law, proscribe, certain conduct.[7] Under commonly understood notions of territorial jurisdiction, a state has jurisdiction to prescribe laws affecting persons within the boundaries of that state,[8] but also may legislate extraterritorially, so as to apply its criminal statutes to its citizens wherever located; and where it has not done so clearly, it may be inferred.[9] This prescriptive authority relating to when a state may reach conduct outside its territory is often summed up in five principles:[10] (1) the objective territorial principle, where a state has jurisdiction to prescribe law with respect to conduct "that has or is intended to have substantial effect within its territory;"[11] (2) the protective principle, with respect to "certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests;"[12] (3) the nationality principle, with respect to "the activities, interests, status, or relations of its nationals outside as well as within its territory;"[13] (4) the passive personality principle, where "a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the *victim* of the act was its national;"[14] and finally, (5) the universality principle, which, as the Restatement (Third) of the Foreign Relations Law of the United States ("Restatement") provides, where "[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism," regardless of the locus of the occurrence.[15]

The above principles of extraterritorial jurisdiction are not uniformly accepted or applied, but merely, and often, restated. For example, in *U.S. v. Vasquez-Velasco,* the U.S. Court of Appeals for the Ninth Circuit stated that extraterritorial jurisdiction over a foreign murder suspect of an American tourist while in the foreign state may not be justified.[16]

> Thus, extraterritoriality would be based solely on the passive personality principle, under which jurisdiction is asserted based on the nationality of the victim. In general, this principle has not been accepted as a sufficient basis for extraterritorial jurisdiction for ordinary torts and crimes. *See* Restatement § 402 cmt. g; *see also* Restatement (Second) of Foreign Relations Law of the United States § 30(2) (1965) (stating that "[a] state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals"). More recently, the passive personality principle has become increasingly accepted as an appropriate basis for extraterritoriality when applied to terrorist activities and organized attacks on a state's nationals because of the victim's nationality. Restatement § 402, cmt. g.[17]

Following a long history of debate and dissent among the American Law Institute participants preparing the Restatement, the body agreed upon the notion that an exercise of jurisdiction on one of above bases may violate international principles if it is "unreasonable." Accordingly, they settled upon certain limits or restraints on the exercise of extraterritorial jurisdiction:

> … (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
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> (a) the link of the activity to the territory of the regulating state, *i.e.,* the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
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> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
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> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.[18]

As is evident, regardless which principle of extraterritorial jurisdiction is relied upon by the state, an argument against its application will arise not only as to the intent of the underlying criminal legislation's extraterritorial reach, but also to the "reasonableness" of any application extraterritorially. Arguably each of the reasonableness factors looks to some nexus or connection with the sovereign interests of the legislating state, less perhaps factors (e) and (f). Reliance upon those factors alone to assert the propriety of a well-articulated universal jurisdiction statute may indeed be questionable, and certainly is not fully accepted in the international community.

Germany, and undoubtedly Belgium and Spain, have wrestled with the question of whether a pure application of universal jurisdiction would stand without some nexus to the state, either in the form of the perpetrator's residence or connection with the state, or the victim's residence or connection with the state, or the existence of some other significant effect on or within the state.[19] Enacted on June 26, 2002, concomitant with the enactment of CCAIL, Germany amended its Criminal Procedure Code, adding a new section 153f. The section provides that the public prosecution office "may" dispense with prosecuting an offense punishable pursuant to section 6 through 14 of the CCAIL if the accused is not present in Germany and such presence is not to be anticipated ("ein solcher Aufenhalt auch nicht zu erwarten ist").[20] Additionally the public prosecutor "can" dispense with prosecuting an offense punishable under section 6 through 14 of the CCAIL if:

(1) there is no suspicion of a German having committed such offense;

(2) such offense was not committed against a German;

(3) no suspect in respect to such offense is present in Germany and such presence is not to be anticipated; and

(4) the offense is being prosecuted by an international court or by a state on whose territory the offense was committed, whose national is suspected of its commission or whose national was harmed by the offense.[21]

The fourth factor in the Criminal Procedure Code is similar to the complementarity principle in Article 17 of the Statute of the International Criminal Court (ICC), allowing for the deferral of prosecutorial action when another state's court prosecutes the offense.[22] In any case, as sections 6 through 14 of the CCAIL define and make punishable the specific crimes against humanity and war crimes, the amended Criminal Procedure Code mitigates, if not qualifies, the statement in the CCAIL that it applies even when the offense bears no relation to Germany ("keinen Bezug zum Inland aufweist").[23]

The complaint dismissed by the Federal Public Prosecutor in Karlsruhe on April 27, 2007, was filed November 30, 2004, dismissed by the prosecutor, appealed, dismissed again and supplemented in 2006. It named Lieutenant General Ricardo Sanchez, Major General Walter Wojdakowski, Brigadier General Janis L. Karpinski, Lieutenant Colonel Jerry L. Phillabaum, Colonel Thomas Pappas, Lieutenant Colonel Stephen L. Jordan, George Tenet, Major General Geoffrey Miller, Dr. Stephen Cambone, and then Secretary of Defense Donald Rumsfeld.[24] It alleged that persons detained at the facility at Abu Ghraib during the course of conflict in Iraq were treated cruelly and inhumanely in systematic torture, four of whom were beaten and sexually abused, deprived of sleep and food, subjected to sensory deprivation, and exposed to extreme temperatures and other mistreatment. The complaint charged then-Secretary Rumsfeld and the others as responsible both as sole perpetrators and as indirect perpetrators, by dint of their organizational command position, referring to the elements of crimes of persons in authority in the CCAIL, §§4, 13 and 14.[25] Section 4, for example, provides that a military or civilian commander who fails to prevent a subordinate from committing an offense under the CCAIL shall be punished in the same manner as the perpetrator; section 13 similarly provides that a civilian or military commander who intentionally or negligently omits or fails to supervise a subordinate shall be punished for violation of the duty of supervision if the subordinate commits a violation of the CCAIL, particularly if it was discernible to the superior and he or she could have prevented it. The complaint alleged that Secretary Rumsfeld is directly responsible for the war crimes, and that he ordered in April 2003 specific acts of torture against prisoners and further ordered others to violate human rights in order to gain critical intelligence.[26] Thus, the complaint charges him with responsibility for directly violating the CCAIL as well as violating the CCAIL under the doctrine of superior responsibility and the duty of supervision.

While torture is not defined in the CCAIL, it is argued that an internationally accepted definition is contained in Article 1 of the 1984 U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which refers to when "severe pain or suffering, whether physical or mental, is inflicted on a person."[27] The purpose of this paper is not to discuss the merits of the allegations, but it should be noted that the complaint incorporates principles derived from international humanitarian law and customary international law to justify the prosecutor's initiating an investigation under Germany's universal jurisdiction in the CCAIL.[28]

German legal scholar Professor Andreas Fischer-Lescano at the J. W. Goethe-Universität makes the argument that the CCAIL is an independent regulatory corpus, independent of the ICC and the German Criminal Code, and that because it provides for the application of universal jurisdiction, "it is always incumbent on the Prosecutor General to prosecute all crimes against international law stipulated in the CCAIL…"[29] He quotes the Federal Minister of Justice from the time of the enactment of the CCAIL, Herta Däubler-Gmelin:[30]

> Even perpetrators, who are neither German themselves nor commit their crimes against humanity in Germany or against Germans, can be made responsible here. This makes sense simply in order to underline the global significance of the proscription and prosecution of the most serious crimes.[31]

And therein again lies the core issue: the proponents of the German universal jurisdiction law do not rest it upon settled principles of extraterritorial reach, where a connection to the prosecuting state exists, but upon the need to "underline the global significance" of various serious crimes.

On February 10, 2005, German Federal Prosecutor General Kay Nehm dismissed the complaint. He looked to the Criminal Procedure Code section 153f, and relied upon virtually all the elements in the provision allowing the exercise of his discretion not to commence an investigation. He specifically noted that the primary jurisdiction for criminal prosecution was the United States, the home country of the defendants, and that there was no indication that the United States had refused to take action on the circumstances described in the complaint; that the acts were committed outside of Germany; and that no German was involved as a perpetrator or a victim of the described acts.

Critics immediately seized upon the prosecutor's decision as an abuse of discretion, arguing that the prosecutor incorrectly viewed the circumstances of the offenses as a single complex of criminal acts ("Gesamtkomplex"), thereby allowing the principle of complementarity to trigger dismissal of the complaint as the United States was about to initiate an investigation relating to the complex of criminal acts, rather than to the individual discrete offenses alleged against the named defendants. The decision was viewed by the proponents of the complaint as political and as a means to "protect the [German] federal government from further transatlantic disturbances."[32] Professor Fischer-Lescano further suggests the prosecutor had a duty to investigate whether there was in fact a court proceeding in the United States, and that a higher standard, derived from Article 129 of the Third Geneva Convention, should have required the superior officers to have been the subject of a U.S. prosecution before the activation of the complementarity principle in paragraph 4 of subsection 2 of Criminal Procedure Code 153f. [33] Nonetheless, the German higher regional court rejected the claim of prosecutorial abuse of discretion, supported the reasoning of the prosecutor and denied the request to force the prosecutor to commence the criminal investigation.[34]

Following a supplementation of the complaint in 2006, the complaint was again sent to the new Federal Prosecutor General, Monika Harms. It provided additional material on Abu Ghraib, including the 2005 congressional hearings and testimony of former U.S. Army Brig. Gen. Janis Karpinski—the one-time commander of all U.S. military prisons in Iraq. It again focused on the goal of the complainants to force an investigation and to nullify what they called the continuing impunity of the "string pullers" („andauernden Straflosigkeit für die Drahtzieher"). As noted, on April 27, 2007, the prosecutor dismissed the complaint, noting that there was no domestic connection and that it was not to be expected that the suspects would be present in Germany.[35] She dismissed the idea that American troop activity or movement in or through Germany had any factual connection to the offenses; neither the grant of overflight rights nor the permitting of intermediate stays on German soil constituted legally culpable preparation for the events in Guantánamo Bay or Iraq. She also noted that there were no concrete facts that orders were given from Germany that served to violate the CCAIL.[36] She also cautioned against the kind of "forum-shopping" that occurred here, where those bringing complaints alleging matters with no connection to the state did so because of the friendly forum; the result is an overloading of the resources of the prosecutor's office. Finally, she remarked on the limits on her investigatory powers, and the likelihood of a lack of success in a German investigation of the American activity, even with the testimony of Americans in Germany, all of which in turn militated against granting the investigation. If it were to be a one-sided trial, it would be contrary to the legislative intent of the statute.[37] Ultimately, her exercise of discretion was founded in the provisions of the Criminal Procedure Code, which provided the key grounds for dismissal—the lack of a connection and presence in Germany. These factors reflect precisely the accepted standards of reasonableness in determining when any authority considers the exercise of extraterritorial jurisdiction.

Nonetheless, the prosecutor's action led the principal lawyer, Wolfgang Kaleck, to complain: "Is this law meant only to look good on the books but never to be invoked?"[38]

The April 27 dismissal of the complaint may not signify Germany's unwillingness fully to embrace the CCAIL, nor does it undercut the juridical foundation of universal jurisdiction from the perspective of the proponents and defenders. Amnesty International has provided a legal memorandum on its website that exhaustively outlines the nature of genocide, crimes against humanity and war crimes,[39] but it draws the conclusion that the exercise of universal jurisdiction is compelled by conventional and customary international law and international humanitarian law (the law of armed conflict), all of which arise from treaty obligations and universally accepted principles.[40] In fact, while most states accept the universally accepted principles and their treaty obligations, none of those norms expressly confer or require a state to exercise pure universal jurisdiction to investigate, prosecute and enforce the relevant crimes when committed by extra-nationals abroad with no legitimate link to the state.

To support its view that pure universal jurisdiction is justified, the Amnesty International memorandum quotes a statement of the Inter-American Commission on Human Rights (IACHR), Organization of American States, that suggests that states should exercise universal jurisdiction because (1) signatory states have an obligation in the American Convention on Human Rights to prevent, investigate and punish violations of the relevant rights, (2) it is vital to thwart impunity from these violations granted through asylum, and (3) the Commission previously had stated in its Recommendations on Universal Jurisdiction and the International Criminal Court (Annual Report 1998, Ch. VII) that "the evolution of the standards in public international law has consolidated the notion of universal jurisdiction."[41] This reasoning brings to mind the notion that if

something is said often enough, it must be true. Indeed, some of these "standards in public international law" appear to be simply what is repeated in the recommendations of law commissions, law professors and international human rights activists.

Clearly, all that is "consolidated" on the topic of universal jurisdiction is the legislative adoption by a small number of European countries. Germany's experience, however, shows that not only does the country have to face its various jurisdictional challenges and practical arrangements for the exercise of the universal jurisdiction, but it might also reflect on whether, because of the discretion exercised by the prosecutor using principles of reasonableness, it is ever likely that a German court will proceed with a prosecution of serious crimes against humanity committed outside of Germany with no link to Germany. Only then will Germans have to face the more serious question of whether such a step breaches the sovereignty of one or more other states and what that means to the international order.

Taking a lunge at "realpoliticians," a term presumably referring to those who dwell in *realpolitik*, Professor Fischer-Lescano posits that international law ought to "succeed in reacting to its increasing politicization by generating a movement capable of guaranteeing legal autonomy."[42] Thus, he suggests the complaint regarding the occurrences at Abu Ghraib "is part of a world struggle for the rule of law on a global scale," and dismisses the following quote from Henry Kissinger that he himself provides, calls dramatic and fails to answer.[43] Kissinger noted:

> The advocates of universal jurisdiction argue that the state is the basic cause of war and cannot be trusted to deliver justice. If the law replaced politics, peace and justice would prevail. But even a cursory examination of history shows that there is no evidence to support such a theory. The role of the statesman is to choose the best option when seeking to advance peace and justice, realizing that there is frequently a tension between the two and that any reconciliation is likely to be partial. The choice, however, is not simply between universal and national jurisdictions.[44]

It is likely that German prosecutors will continue to dismiss complaints against the senior military officers and defense officials of the United States over the conduct of armed conflicts in which the United States is engaged, using the discretion provided by the Criminal Procedure Code section 153f. It would be a reasonable thing to do.

Endnotes

1 http://www.zeit.de/2005/01/Abu_Ghraib_2fAnwalt.

2 *See* Statement of the Generalbundesanwalt beim Bundesgerichthof, (Federal Prosecutor General, sometimes Federal Public Prosecutor), *at* http://www.generalbundesanwalt.de/de/showpress.php?themenid=9&newsid=273.

3 The Völkerstrafgesetzbuch [Code of Crimes Against International Law] provides as serious crimes subject to the act: § 6, Völkermord [genocide]; § 7, Verbrechen gegen die Menschlichkeit [crimes against humanity]; and in Chapter 2, Kriegsverbrechen [war crimes]. The latter is broken into: § 8, Kriegsverbrechen gegen Personen [war crimes against persons]; § 9, Kriegsverbrechen gegen Eigentum und sonstige Rechte [war crimes against property and other rights]; § 10, Kriegsverbrechen gegen humanitäre Operationen und Embleme [war crimes against humanitarian operations and emblems]; § 11, Kriegsverbrechen des Einsatzes verbotener Methoden der Kriegsführung [war crimes in the use of prohibited methods of warfare]; § 12, Kriegsverbrechen des Einsatzes verbotener Mittel der Kriegsführung [war crimes in the use of prohibited means of warfare]; § 13, Verletzung der Aufsichtspflicht [violation of the duty of supervision]; and § 14, Unterlassen der Meldung einer Straftat [failure to report a crime]. For text, *see* http://bundesrecht.juris.de/vstgb/index.html.

4 Also called the principle of complementarity, it applies to restrain prosecution under an exercise of universal jurisdiction if the authorities of the state of nationality of the suspect or victim or a competent international tribunal investigates the case; the principle is incorporated in Article 17 of the Rome Statute of the International Criminal Court (ICC) (July 17, 1998, and as amended)(U.N. Doc. A/CONF.183/9). The ICC is a court established by treaty and exercises jurisdiction among its member states as a court "of last resort" for serious crimes of genocide, crimes against humanity and war crimes. The United States is no longer a signatory. As to complementarity, Article 17 of the Statute specifies that the ICC shall determine a case is inadmissible if, among other things, it is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution or the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute, and the court may also consider whether there has been an unjustified delay or whether proceedings are or were not conducted independently or impartially. ICC, Art. 17.

5 *See supra* note 3.

6 *See* http://web.amnesty.org/pages/jus-index-eng

7 *See* Louis Henkin et al., International Law 1046 (3d ed. 1993); *also* Restatement (Third) of Foreign Relations Law of the United States §401(a) (1987).

8 Henkin, *supra* note 7; *see also* American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909).

9 U.S. v. Bowman, 260 U.S. 94, 98-99 (1922); *also* United States v. Felix-Gutierrez, 940 F.2d 1200, 1204 (9th Cir. 1991), *cert. denied,* 124 L. Ed. 2d 244, 113 S.Ct. 2332 (1993).

10 U.S. v. Usama Bin Laden, 92 F. Supp. 2d 189, 195-96 (USDC SDNY 2000); Christopher L. Blakesley, International Criminal Law 50-78 (2d ed. 1999); *also* Christopher L. Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. Crim. L. & Criminology 1109, 1110 (1982).

11 *Usama Bin Laden*; Restatement (Third) of the Foreign Relations Law of the United States ("Restatement") § 402(1)(c) (1987).

12 Restatement, *supra* note 11, § 402(3).

13 *Id.* at § 402(2).

14 *Id.* at § 402, comment g (emphasis added); sometimes the principle is characterized as including both the "passive personality principle" relating to where the *victim* of the act is the national and the "active personality principle" relating to where the *suspect* of the act is the national, *see* Amnesty International, *Legal Memorandum on Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation*, ch. 1, *at* http://web.amnesty.org/pages/uj-memorandum-eng.

15 *Id. at* § 404; note that in this rendition of the universality principle, the Restatement reflects certain historical roots, namely, that pirates and other outlaws were deemed to be effectively stateless or acting without the political authority of a state. It should be contrasted with the assertion of universal jurisdiction over state actors, as does the complaint in the Rumsfeld case.

16 15 F.3d 833 (1994).

17 *Id.* at 842.

18 Restatement, *supra* note 11, § 403(2).

19 Belgium adopted a law of universal jurisdiction in 1993, but its courts

were quickly deluged with accusations against not only certain Rwandans allegedly involved in genocide, but also former Israeli Prime Minister Ariel Sharon, Yasser Arafat, George H.W. Bush, Colin Powell, and Richard Cheney. Belgium then amended its law to require the accused person be Belgian or present in Belgium. Spain's Constitutional Court decreed a version of universal jurisdiction, but even in the case of former Chilean dictator Augusto Pinochet, the Spanish judge who issued an arrest order did so not on the grounds of universal jurisdiction but on the grounds that some of the victims of the abuses committed in Chile were Spanish citizens, and ultimately the judge relied on the extradition law of the European Union to gain jurisdiction. Similarly, the International Court of Justice, an organ of the United Nations, has not relied entirely on universal jurisdiction, and where confronted with similar questions, has decided certain of these cases on the basis of the immunity of key government officials.

20 Strafprozeßordnung, § 153f(1).

21 Strafprozeßordnung, § 153f(2).

22 *See supra* note 3.

23 Völkerstrafgesetzbuch, § 1.

24 29.11.2004 Strafanzeige gegen den US-Verteidigungsminister Donald Rumsfeld, den ehemaligen CIA-Direktor George Tenet, den General Ricardo Sanchez und andere Mitglieder der Regierung und der Streitkräfte der Vereinigten Staaten von Amerika wegen Kriegsverbrechen und Folter zum Nachteil irakischer Internierter im Gefängnis Abu Ghraib/Irak 2003/2004

25 *Id*. at ¶ 4.

26 *Id*. at ¶ 4.2.1.

27 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, 1465 U.N.T.S. 85.

28 *See* Andreas Fischer-Lescano, *Torture in Abu Ghraib: The Complaint Against Donald Rumsfeld*, 6 German Law Journal No. 3 (2005).

29 *Id.*

30 Minister Däubler-Gmelin resigned from her position in 2002 after making a public statement about George Bush relying on a war strategy not unlike that of Adolf Hiltler; she strongly denied she was comparing them as persons.

31 *See supra* note 28.

32 *Id*. (citing article in Die Welt, 11 Feb. 2005).

33 Article 129 of the Third Geneva Convention (Geneva Convention relative to the Treatment of Prisoners of War adopted on 12 August 1949), provides:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. [¶] Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case. [¶] Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. [¶] In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

34 Decision [Beschluss] from September 13th, 2005, Higher Regional Court [Oberlandesgericht] Stuttgart, 5th Senate for Criminal Matters.

35 *Supra* note 2.

36 *Id*.

37 *Id*.

38 Center for Constitutional Rights, *German Federal Prosecutor's Office Dismisses Rumsfeld War Crimes Case: Critics Call Move Political Capitulation To U.S. Pressure, at* http://www.ccr-ny.org/v2/reports/report.asp?ObjID=XpDtcb1AiP&Content=1011.

39 *See supra* note 13.

40 Amnesty International, *supra* note 14, ch. 3, esp. nn. 1-9.

41 *Id*.

42 *See supra* nn. 28, 25.

43 *Id*.

44 *Id*.