INTRODUCTORY NOTE TO DECISION OF THE GENERAL FEDERAL PROSECUTOR: CENTER FOR CONSTITUTIONAL RIGHTS V. RUMSFELD

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INTRODUCTORY NOTE TO DECISION OF THE GENERAL FEDERAL PROSECUTOR: CENTER FOR CONSTITUTIONAL RIGHTS V. RUMSFELD BY ANDREAS FISCHER-LESCANO*

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Introductory Note to Federal Republic of Germany, General Prosecutor (Decision of February 10, 2005) and Higher Regional Court, Stuttgart (Decision of September 13, 2005): Case of Criminal Complaint Against U.S. Secretary of Defense Donald Rumsfeld, et al. for the Allegation of War Crimes (Abu Ghraib)

June 30, 2002 marks the entry into force of the German Code of Crimes against International Law[1] (CCAIL – German Federal Law Gazette I 2002, 2254). This code defines war crimes and crimes against humanity as criminal violations and provides for the criminal liability of superiors who do not prevent the commission of such acts by their subordinates. Fifty years after Germany acceded to the Geneva Conventions of 1949 for the protection of victims of armed conflict (German Federal Law Gazette II 1954 781; 75 U.N.T.S. 135), German law now incorporates the international norms with exemplary clarity: the German judiciary is required to treat serious violations as violations of criminal law regardless of where the crime was committed; Section 1, Part 1, Sentence 1 of the CCAIL states:

> ''This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.''

In November 2004, an American legal organization, the Center for Constitutional Rights (CCR, New York), as well as four Iraqi citizens, supported by NGOs like International Federation for Human Rights (FIDH, Paris), Lawyers against the War (Vancouver) and International Legal Resources Center (ILRC, Montreal) filed a criminal complaint with the German Federal Prosecutor's Office in Karlsruhe, Germany. Represented by Wolfgang Kaleck, a Berlin-based lawyer, they accused ten U.S. officials, among them U.S. Secretary of Defense Donald Rumsfeld, Former CIA Director George Tenet, Undersecretary of Defense for Intelligence Dr. Stephen Cambone, Lieutenant General Ricardo Sanchez, Major General Walter Wojdakowski and other high ranking military and civilian officials of causing, in a variety of ways, the abuses which took place in the Abu Ghraib prison, thereby implicating their criminal responsibility for war crimes, as codified in Sections 6 to 14 CCAIL and Article 130 of the Geneva Convention (Third) of 12 August 1949 on the Treatment of Prisoners of War (German Federal Law Gazette 1954 II 781; 75 U.N.T.S. 135, 150).

In view of the modern development of international criminal law and the judicial enforcement of human rights this was a consequent step. Even beyond the Geneva Conventions of 1949, modern international law has accepted the principle that a person responsible for the violation of basic norms of the international order can be prosecuted and punished anywhere in the world – the principle of ''universal jurisdiction''. Rumsfeld took the complaint so seriously that he only agreed to participate in a security conference in Munich after the General Prosecutor, Kay Nehm, rejected the initiation of an investigation on February 10, 2005 (3 ARP 207/04). The General Prosecutor's rejection was mainly based on the argument of ''subsidiarity.'' He dismissed the complaint on the ground that the United States, which shall be empowered with primary jurisdiction for prosecuting the alleged crimes, would investigate the matter. Nehm's decision to dismiss the case is thus primarily based on the assumption that ''there are no indications that the authorities and courts of the United States of America are refraining, or would refrain, from penal measures as regards the violations described in the complaint.'' The prosecutor thereby relied on Section 153f Para. 2 (esp. No. 4) of the Code of Criminal Procedure, newly introduced in the legislative process associated with the enactment of the CCAIL:

> ''the public prosecution office can, in particular, refrain from 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 present in Germany and such presence is

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1 For an unofficial translation: http://www.iuscomp.org/gla/statutes/VoeStGB.pdf.

> 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 General Prosecutor interpreted this norm to mean that the state of the perpetrator or the victim is supposed to have primary jurisdiction for criminal prosecution, whereas other states shall merely posses a ''subsidiary'' competence. In ''what order and with what means the state with primary jurisdiction carries out an investigation of the overall series of events'', the General Prosecutor holds to be left up to this state. This reading is far-reaching. The General Prosecutor argues on the basis of an amalgam of international treaty law and international customary law. He draws especially on Article 17 of the Statute of the International Criminal Court (2187 U.N.T.S. 90), which for the General Prosecutor is the guide for the interpretation and application of Section 153f of the Code of Criminal Procedure. As the complementary principle in the Statute of the International Criminal Court concerns the relationship between an international court and domestic courts, the General Prosecutor's argument might be categorized as a conclusion by analogy. He develops arguments on the scope of the subsidiarity principle by relying on the principle of complementarity. This is disputable, especially because these principles serve different functions. Whereas the subsidiarity principle, as adopted by the German legislator, has to be read in light of the obligation to prosecute which arises from Article 129 of the Third Geneva Convention, it implements a much more rigorous regime than the principle of complementarity provided for in the Statute of the International Criminal Court, which serves the purpose of coordinating centralized and decentralized, e.g. international and domestic, legal remedies. In his restrictive interpretation of the subsidiarity principle, the General Prosecutor does not mention the judgment on the Peruvian Genocide Case of the Tribunal Supremo (Supreme Court) of Spain (Judgment No. 712/2003 [May 20, 2003]; I.L.M. 42 [2003], 1200; see also Tribunal Supremo, Judgment No. 237/2005 [September 26, 2005], strengthening the principle of universal jurisdiction in cases of crimes against humanity), in which the Spanish court identified the principle of ''necessity of jurisdictional intervention'' and provided for a careful restriction of the principle of universal jurisdiction in cases where the territorial judiciary conducts effective measures. In order not to render the right to seek redress before the Spanish courts futile, the Spanish Court only demands the ''submission of serious and reasonable indications'' [*aportación de indicios serios y razonables*] that the alleged crimes have not been prosecuted effectively by the territorial jurisdiction.''

Under German law, pursuant to Section 172 (Proceeding to Compel Public Charges) of the Code of Criminal Procedure, the victim of a crime has a basic legal remedy when the office of the prosecutor rejects a public complaint – the mandamus procedure (*Klageerzwingungsverfahren*). Its function is to control the prosecutor's application of the legality principle (*Legalitätsprinzip*) and thus to guarantee the principle of equality. The principle of legality (Section 152 Para. 2 of the Code of Criminal Procedure) requires the prosecutor to investigate any case that gives rise to criminal suspicion. Regarding the decision to initiate investigations he has no discretionary power, unless otherwise mandated by the principle of discretionary prosecution (*Opportunitätsprinzip*; Sections 153 et seq. of the Code of Criminal Procedure).

The complainants filed the case for a mandamus procedure at the Higher Regional Court (*Oberlandesgericht*) in Stuttgart. They argued that the far-reaching reading of the subsidiarity principle, relied on by the General Prosecutor, had no basis in international law. Article 129, Para. 2 of the Geneva Conventions of 12 August 1949 on the Treatment of Prisoners of War, incorporated in German law in 1954 (Federal Law Gazette 1954 II 781), stipulated the duty of instantaneous investigation and prosecution of persons who are accused of having ordered the commission or having committed under orders, grave breaches of the conventions:

> ''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 [. . .]''

The petitioners in this case argued that, given the obligation described above, the General Prosecutor's examination of a prosecution occurring in the United States was done in a cursory manner. They maintained that the specific charge was the culpable violation of the responsibility of commanders, not the violation of the prohibition of torture by subordinates. They also alleged that the General Prosecutor's assumption that American justice would deal seriously with the criminal responsibility of others than subordinate soldiers, was in violation of the obligations under international law, *aut dedere aut iudicare* (*see* generally, Commission on Human Rights, April 21, 2005, U.N. Doc. E/CN.4/2005/L.10/Add.17).

Concerning the admissibility of the mandamus procedure the legal argument is subtle. The difficulty to constitute admissibility arises from the wording of Section 172 Para. 2 Sentence 3 of the Code of Criminal Procedure:

> "The application shall not be admissible when the subject of the proceedings is solely a criminal offence which may be prosecuted by the aggrieved party by way of a private prosecution, or if the public prosecution office refrains from bringing public charges [. . .]; the same shall apply in cases under Sections 153 c to 154 [. . .]"

The General Prosecutor relied on Section 153f of the Criminal Procedure Code for justifying his discretionary power. Given the wording of Section 172 of the Code of Criminal Procedure a mandamus procedure could be inadmissible. The petitioners based their arguments on the legislator's rationale, as expressed in the materials:

> "If the act shows no domestic link, and if no primary jurisdiction has begun investigations, the *legality principle*, in connection with the principle of universal jurisdiction, then demands that German prosecutorial authorities make assiduous efforts at the investigations that are possible for them in order to prepare a subsequent prosecution (whether in Germany or abroad)" (German Parliament, March 13, 2002, Document 14/8524, 38, emphasize A.F.L.).

As indicated in Section 172 of the Criminal Procedure Code the mandamus procedure is only precluded if the Chief Prosecutor's Office can refrain from prosecuting based on the discretionary power assigned to him under the principle of discretionary prosecution. The petitioners insisted on the duty to prosecute stated in the Geneva Conventions and the legislator's disposal of the legality principle, which leaves no scope for discretionary authority and allows judicial control via Section 172 of the Code of Criminal Procedure. This view can also be supported by a systematic argument: Section 153f Para. 2 Code of Criminal Procedure gives discretionary power to the General Prosecutor only in limited cases. In fact, Section 153f Para. 2 Code of Criminal Procedure mentions two important restrictions: first, if any of the suspects in respect of such offence is present in Germany or such presence is to be anticipated and, second, if the allegations are not effectively prosecuted by other jurisdictions. The petitioners relied on both provisions: the accusations of responsibility of superiors were not to be criminally prosecuted in the U.S. and several of the suspects were present in Germany. Actually, former Iraq-commander Sanchez's unit is stationed in Heidelberg; the offices of the accused Wodjakowski and Pappas are situated in Germany. The petitioners contended that this presence gave rise to questions of customary international law – in respect of the *aut dedere aut iudicare* duty and the immunities provided under international law (cf. ICJ, Arrest Warrant of 11 April 2000 [Dem. Rep. Congo v. Belg.], ILM 41 [2002], 536) – and therefore suggested that the court present the case to the German Constitutional Court under Article 100, Para. 2 of the German Constitution, which reads:

> "If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court."

With the decision of September 13, 2005 the Higher Regional Court in Stuttgart (5 WS 109/05) dismissed the appeal and refused to present the case to the Federal Constitutional Court. The judges stated that the petition was inadmissible, because the contested decision was subject to the principle of discretionary prosecution and "neither falls into the case group of inadequate exercise of discretion nor into the case group of arbitrariness." The court thus dismissed the case on basis of the wording of Section 172 Para. 2 Sentence 3 of the Code of Criminal Procedure. It denied the petitioners' appeal for presenting the case to the Federal Constitutional Court, without mentioning the possible conflict of norms arising from the *aut dedere aut iudicare* obligations and the restrictive interpretation of Section 153 f of the Criminal Procedure Code.

The mandamus proceeding is anchored in the German constitution. It is the implementation of the duty of the state to protect the right to life and to corporeal security and to guarantee the principle of equality before the law. Although there is no *de novo* review of the prosecutor's exercise of discretion in the mandamus proceeding, German constitutional law allows the initiation of a constitutional complaint against the court's decision, at least in cases where the limits of the General Prosecutor's discretion are misjudged, respectively if a discretionary power is exerted which the legal texts do not provide for. At the time being, the petitioners have not used this legal remedy. According to press announcements of their legal representative, Wolfgang Kaleck (http://

www.diefirma.net), they are embarking on a strategy to file a new complaint and, in case of its rejection by the General Prosecutor, to initiate the legal proceedings anew; the rationale being that due to the fact that there is a tendency in the U.S. courts not to prosecute superior officials, even the application of the subsidiarity principle according to the broad interpretation of the General Prosecutor should lead to the initiation of a German criminal prosecution of those superiors who did not prevent the commission of criminal abuses by their subordinates in Abu Ghraib.