

5<sup>th</sup> periodic report on the implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Submission from TRIAL (Swiss Association against Impunity) to the Committee Against Torture.

September 2011

## EXECUTIVE SUMMARY

The present written submission to the Committee Against Torture is for the purposes of the examination of the 5<sup>th</sup> periodic report (CAT/C/DEU/5) of Germany on its implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture). TRIAL is focusing on the topic of universal jurisdiction with a view to the effective prosecution of the crime of torture, considered as one of the necessary measures to properly implement the Convention Against Torture, ratified by Germany on 1 October 1990.<sup>1</sup>

A detailed review of German criminal legislation leads TRIAL to highlight that the legal framework of the State, whilst providing for universal jurisdiction over torture as an underlying act of various international crimes, as well as an offence under an international agreement binding on Germany which must be prosecuted even though committed abroad, does not define torture as an international crime in its own right. It is unfortunate that the new legislation implementing the Rome Convention of the International Criminal Court<sup>2</sup> was not extended to include the crime of torture outside the scope of other international crimes.

## TRIAL

TRIAL (Swiss Association against Impunity) is an association under Swiss law founded in June 2002. It is apolitical and non-confessional. Its principal goal is the fight against impunity of the perpetrators, accomplices and instigators of genocide, war crimes, crimes against humanity and acts of torture.

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<sup>1</sup> The German Democratic Republic signed and ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) on 7 April 1986 and 9 September 1987, respectively.

<sup>2</sup> Code of Crimes Against Criminal Law 2002.

In this sense, TRIAL:

- ▶ fights against the impunity of the perpetrators and instigators of the most serious international crimes and their accomplices
- ▶ defends the interests of the victims before Swiss tribunals, international human rights organisms and the International Criminal Court
- ▶ raises awareness among the authorities and the general public regarding the necessity of an efficient national and international justice system for the prosecution of international crimes.

In particular, TRIAL litigates cases before international human rights bodies (UN Treaty bodies and regional courts) and files criminal complaints on behalf of victims before national courts on the basis of universal jurisdiction.

The organization enjoys consultative status with the UN Economic and Social Council (ECOSOC).

More information can be found at [www.trial-ch.org](http://www.trial-ch.org)

## **DEVELOPMENTS**

TRIAL appreciates the opportunity to bring to the attention of the Committee Against Torture information regarding the implementation of the Convention Against Torture in Germany.

The following sections address the international legal status of universal jurisdiction and the principle of *aut dedere aut judicare*, and current German legislation establishing jurisdiction of German courts for the crime of torture.

### ***Universal jurisdiction***

Universal jurisdiction is the capacity or competence of a state to exercise jurisdiction where none of the traditional bases of jurisdiction exist (i.e. territorial, nationality, passive personality, or protective jurisdiction). It is a form of jurisdiction which does not require any particular nexus between the perpetrator and the forum, allowing for all States to prosecute perpetrators of international crimes, thereby combating impunity by ensuring there is no safe haven for the perpetrators of international crimes.

The importance of universal jurisdiction is highlighted by the fact that it is States that have the primary

responsibility to prosecute suspected international criminals<sup>3</sup>.

Whilst the status of universal jurisdiction in international law is not definitively established, there are a growing number of States which have provided for universal jurisdiction in their national legislation<sup>4</sup>. The International Criminal Tribunal for the former Yugoslavia, the judicial body at the forefront of modern international criminal law, was less circumspect, stating that “universal jurisdiction (is) nowadays acknowledged in the case of international crimes.”<sup>5</sup> In the case of *Furundžija*, the Tribunal noted, specifically in relation to torture, that:

«it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States’ universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in *Eichmann*, and echoed by a USA court in *Demjanjuk*, “it is the universal character of the crimes in question (*i.e.* international crimes) which vests in every State the authority to try and punish those who participated in their commission”»<sup>6</sup>

### ***Aut dedere, aut judicare: States have an obligation to prosecute or extradite persons suspected of torture***

The Convention Against Torture was the first human rights treaty to set out the obligation to establish

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<sup>3</sup> Indeed, the ad hoc international criminal tribunals (the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda) have concurrent primary jurisdiction in relation to States, whereas the International Criminal Court only has complementary jurisdiction which may only be exercised when States are not competent or not willing to exercise their jurisdiction. It is the States that retain, in most cases, the primary jurisdiction to investigate and prosecute international crimes.

<sup>4</sup> Such as, most notoriously, Belgium, as well as Australia, Austria, Canada, Denmark, Finland, France, Germany, Netherlands, Norway, Senegal, Spain, the United Kingdom and the United States of America, see <http://www.amnesty.org/en/international-justice/issues/universal-jurisdiction>, accessed 25 August 2011.

<sup>5</sup> International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Decision of 2 October 1995 on the defence motion for interlocutory appeal on jurisdiction in the case of *Prosecutor v. Tadić* (no. IT-94-1), para 62.

<sup>6</sup> International Criminal Tribunal for the former Yugoslavia, Trial Chamber, *Prosecutor v Furundžija*, Judgment of 10 December 1998 (no. IT-95-17/1-T), para 156.

universal jurisdiction.<sup>7</sup> Articles 4 to 9 of the Convention set out a matrix of obligations which have the result that States may, and in certain circumstances, must exercise universal jurisdiction.

Article 4 provides that “each State Party shall ensure that all acts of torture are offences under its criminal law”. Article 5(1) provides that “each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4” and lists three heads of jurisdiction: territorial, nationality and passive personality. Article 5(2) sets out a further requirement for States to establish jurisdiction “over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.”

Article 6 requires States “in whose territory a person alleged to have committed any offence referred to in Article 4 is present (to) take him into custody or (to) take other legal measures to ensure his presence”. Article 7 requires States in whose territory a person who is suspected of torture is found, “if it does not extradite him, (to) submit the case to its competent authorities for the purpose of prosecution”. Article 8 sets out the requirement that “the offences referred to in Article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties” and Article 9 provides that “States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in Article 4, including the supply of all evidence at their disposal necessary for the proceedings.”

In particular, the combination of Articles 5(2) and 7(1) of the Convention requires States parties to either extradite alleged offenders or to both establish and exercise jurisdiction over alleged offenders, by submitting the case to the competent authorities for the purpose of prosecution. These provisions thus enshrine the principle of *aut dedere, aut judicare*.

Universal jurisdiction is a method of establishing jurisdiction over individuals. The principle of *aut dedere, aut judicare* is more specific. It requires States not only to establish jurisdiction over alleged perpetrators of international crimes who are in their territory (which may include universal jurisdiction, if there is no other applicable form of jurisdiction) but also to exercise such jurisdiction, i.e. to bring proceedings against the suspect – or to extradite the suspect.

If the authorities have reasonable grounds to believe that torture has been committed by a person present in their territory, the Convention Against Torture requires them to take the person into custody

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<sup>7</sup> Many international treaties dealing with international crimes provide for a form of universal jurisdiction through the principle of *aut dedere aut judicare*, including the Geneva Conventions of 1949, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons of 1973, the International Convention Against the Taking of Hostages of 1979, the International Convention for the Suppression of Terrorist Bombings 1997, the International Convention on the Suppression of the Financing of Terrorism of 1999, the United Nations Convention against Corruption of 2003, and the International Convention for the Protection of All Persons from Enforced Disappearance of 2006.

(or otherwise ensure his presence) and to commence a preliminary inquiry.<sup>8</sup> Unless another State requests extradition,<sup>9</sup> the forum State is required to prosecute the alleged offender. The presence of the perpetrator is the only condition to the requirement of a State to bring to justice an alleged torturer.<sup>10</sup> Thus *aut dedere aut judicare* is an unequal choice – extradition is only an option if a request has been made and the extradition is not contrary to international law.<sup>11</sup> Otherwise, the State must prosecute.

*Aut dedere, aut judicare* is not a rule of jurisdiction but a principle of law. First, States parties are required to establish jurisdiction over the crime and the suspect, i.e. they must criminalise torture and subsequently ensure the prosecution of any alleged perpetrators of the crime. The purpose is to create jurisdiction without loopholes – using universal jurisdiction in a remedial manner where other approaches or heads of jurisdiction are not available. Second, States parties are required to cooperate in terms of extradition and judicial assistance. Article 8 of the Convention is aimed at removing legal obstacles to extradition from one State party to another, whilst Article 9 provides that all States parties are required to provide judicial assistance to the forum State.

Jurists have argued that the principle of *aut dedere aut judicare* is developing as a rule of customary international law, or indeed, that it has already attained customary status, at least as concerns certain categories of international crimes.<sup>12</sup> Consistent reaffirmation of the principle through its inclusion in treaties is put forward as proof that the principle is a positive norm of general international law and a condition for the effective repression of offences which are universally condemned by the international community.<sup>13</sup> The International Law Commission has included the topic “Obligation to extradite or obligation to prosecute” in its current programme of work, including the possibility of elaborating draft articles on the obligation *aut dedere aut judicare*.<sup>14</sup> The Special Rapporteur, Zdzislaw Galicki, whilst noting that the varying positions of States on the question of the customary basis of the obligation to extradite or prosecute, pointed out that “the critical approach of States to the idea of a possible

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<sup>8</sup> Article 6, Convention Against Torture.

<sup>9</sup> The States listed in Article 5(1) of the Convention Against Torture, namely the territorial State, national State of the alleged offender or national State of the victim.

<sup>10</sup> See *Suleymane Guengueng et al v Senegal*, CAT/C/36/D/181/2001, 19 May 2006 (*Habré Case*), paras 9.7-9.9 in which the Committee rejected the argument that an extradition request must be made and rejected by the forum State. See also M. Nowak, E. McArthur, *The United Nations Convention Against Torture: A Commentary*, Oxford University Press, 2008, which notes that the drafting process of Articles 5-9 bears out this interpretation.

<sup>11</sup> Nowak and McArthur, above n 9.

<sup>12</sup> M. Cherif Bassiouni, E. M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Martinus Nijhoff Publishers, 1995; Z. Galicki, “Preliminary report on the obligation to extradite or prosecute, International Law Commission”, 58<sup>th</sup> Session, 2006, A/CN.4/571, paras 40-42.

<sup>13</sup> Above n 6.

<sup>14</sup> Z. Galicki, “Second report on the obligation to extradite or prosecute”, International Law Commission, 59<sup>th</sup> Session, 2007, A/CN.4/585, para 18.

customary basis for the obligation *aut dedere aut judicare* has been to some extent relaxed.”<sup>15</sup>

Certainly the principle of *aut dedere aut judicare* is essential to the effectiveness of the Convention. The Committee has frequently expressed concern regarding the internal laws of States parties which do not confer jurisdiction for acts of torture.<sup>16</sup> See, for example, the Committee’s Concluding Observations on Nepal in 2007, in which the Committee stated that it “regrets the absence of universal jurisdiction in domestic legislation for acts of torture, as well as the fact that certain provisions of the draft Criminal Code are not in line with articles 5 to 9 of the Convention” and recommended that the State “take the necessary measures to ensure that acts of torture are made subject to universal jurisdiction under the draft Criminal Code, in accordance with article 5 of the Convention. The State party should also make every effort to ensure compliance with articles 6 to 9 of the Convention”.<sup>17</sup> The Committee has also expressed concern regarding limitations on universal jurisdiction provisions, such as the French legislative requirement that the suspect be normally resident on France.<sup>18</sup>

In the case of *Suleymane Guengueng et al v Senegal*,<sup>19</sup> the Committee found Senegal to be in violation of Articles 5(2) and 7 of the Convention, in relation to the failure of the Senegalese courts to prosecute or extradite Hissène Habré, the former President of Chad, accused of acts of torture in Chad. Both the Court of Cassation of Senegal and the Dakar Court of Appeal found that they lacked jurisdiction to try Mr Habré, despite his presence on within their territory, in contravention of the obligation under Article 5 (2). Further, in the absence of a request for extradition being made at the time when the complainants submitted their complaint in January 2000, Senegal did not prosecute Mr Habré, in contravention of the obligation under Article 7. The Committee found a separate contravention of Article 7 from the time that Belgium issued its extradition request, on 19 September 2005, for the refusal of Senegal to comply with the extradition request. The Committee also noted as a positive development the UK House of Lords judgment of 24 March 1999 in the case of *R v Bartle and the Commissioner of Police for the Metropolis, ex parte Pinochet*, in particular the findings that UK Courts have jurisdiction over acts of torture

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<sup>15</sup> Z. Galiciki, “Third report on the obligation to extradite or prosecute”, International Law Commission, 60th Session, 2008, A/CN.4/603, para 98.

<sup>16</sup> See, *inter alia*, Concluding Observations of the Committee against Torture: Ukraine, A/57/44, 21 November 2001, para 5(d); Conclusions and Recommendations of the Committee against Torture: Uganda, CAT/C/CR/34/UGA, 21 June 2005, para 5(c); Conclusions and Recommendations of the Committee against Torture: Democratic Republic of Congo, CAT/C/DRC/CO/1, 1 April 2006, para 5(b); Conclusions and Recommendations of the Committee against Torture: South Africa, CAT/C/ZAF/CO/1, 7 December 2006, para 17; Conclusions and Recommendations of the Committee against Torture: Benin, CAT/C/BEN/CO/2, 19 February 2008, para 15; Concluding Observations of the Committee against Torture: Indonesia, CAT/C/IDN/CO/, 2 July 2008, para 29.

<sup>17</sup> Conclusions and Recommendations of the Committee against Torture, Nepal, CAT/C/NPL/CO/2, 13 April 2007, para 18.

<sup>18</sup> Conclusions and Recommendations of the Committee against Torture: France, CAT/C/FRA/CO/4-6, 20 May 2010, para 19.

<sup>19</sup> CAT/C/36/D/181/2001, 19 May 2006.

committed abroad, and that a Head of State does not have immunity for torture.<sup>20</sup>

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment also recently expressed concern regarding the prevalence of impunity as one the root causes of the widespread practice of torture, and disappointment with respect to the low number of prosecutions for torture. He highlighted the challenge of effective application of the international legal framework, noting that “torture occurs because national legal frameworks are deficient... Torture persists because national criminal systems lack the essential procedural safeguards to prevent its occurrence, to effectively investigate allegations and to bring perpetrators to justice.”<sup>21</sup>

### ***Criminalization of torture under German Law***

#### Prohibition of Torture

The Basic Law for the Federal Republic of Germany on 1949 provides for the right to human dignity, life and physical integrity.<sup>22</sup>

#### Torture not constituting other international crimes

The German Criminal Code does not contain the criminal offence of torture, but provides for various offences of causing bodily harm, without defining any such offences as torture.<sup>23</sup> However it does provide for the application of German law to “offences which on the basis of an international agreement binding on the Federal Republic of Germany must be prosecuted even though committed abroad”<sup>24</sup> hereby giving German courts the capacity, through the application of the Convention, to prosecute the crime of torture using various criminal provisions such as bodily harm, rape, constraint, etc.

#### Torture as part of other international crimes (crimes against humanity, war crimes or genocide)

The German Code of Crimes Against Criminal Law (CCAIL) was adopted on 26 June 2002 in order to implement the provisions of the Rome Statute of the International Criminal Court. The CCAIL criminalises torture, but is restricted to certain instances under the heads of crimes against humanity, war crimes, or genocide committed after 30 June 2002.

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<sup>20</sup> Conclusions and Recommendations of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland, Crown Dependencies, and Overseas Territories, CAT/C/CR/33/3, 10 December 2004, para 3(d).

<sup>21</sup> Final report of Manfred Nowak: “Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment”, A/65/273, 10 August 2010.

<sup>22</sup> Articles 1 and 2 of the Basic Law for the Federal Republic of Germany of 1949.

<sup>23</sup> See Section 223: Causing bodily harm; Section 224: Causing bodily harm by dangerous means; Section 226: Causing grievous bodily harm; Section 227: Infliction of bodily harm causing death and Section 340: Causing bodily harm whilst exercising a public office.

<sup>24</sup> Section 6(9) of the German Criminal Code.

Section 7(1) of the CCAIL defines torture committed as an underlying act of crimes against humanity. Section 7 provides:

“(1) Whoever, as part of a widespread or systematic attack directed against any civilian population, (...)

5. tortures a person in his or her custody or otherwise under his or her control by causing that person substantial physical or mental harm or suffering where such harm or suffering does not arise only from sanctions that are compatible with international law, (...)

causes another person severe physical or mental harm, especially of the kind referred to in section 226 of the Criminal Code”<sup>25</sup>

Section 8(1) of the CCAIL defines torture committed in an armed conflict as a war crime. Section 8 provides:

“(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character (...)

3. treats a person who is to be protected under international humanitarian law cruelly or inhumanly by causing him or her substantial physical or mental harm or suffering, especially by torturing or mutilating that person,(...)

9. treats a person who is to be protected under international humanitarian law in a gravely humiliating or degrading manner”

Section 6(1) also criminalises grievous bodily harm in the context of genocide:

“(1) Whoever with the intent of destroying as such, in whole or in part, a national, racial, religious or ethnic group (...)

2. causes serious bodily or mental harm to a member of the group, especially of the kind referred to in section 226 of the Criminal Code”

Acts of torture can, therefore, only be punished as such under the CCAIL if they were committed in an armed conflict or as part of a systematic or widespread attack against the civilian population, or as an act of genocide.

Consequently, German law does not contain a comprehensive definition of torture as set out in Article 1 of the Convention Against Torture, and does not specifically criminalise torture as required under Articles 2 and 4 of the Convention Against Torture.

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<sup>25</sup> Section 226 of the Criminal Code refers to grievous bodily harm.

Even though the Criminal Code can apply to offences committed abroad by non-nationals if this is provided for in an international treaty binding upon Germany, this does not exempt the State from taking effective legislative measures to criminalise torture by ensuring that all acts of torture are offences under its criminal law. In order to effectively combat torture, the crime of torture must be separately defined and specifically criminalised in the domestic legislation of a State.

In its Conclusions and Recommendations on Germany in 2004, the Committee Against Torture welcomed the passage of legislation in Germany to implement the Rome Statute of the International Criminal Court, stating that it “comprehensively codifies crimes against international law, including torture in the context of genocide, war crimes or crimes against humanity”<sup>26</sup> However the Committee also recommended that Germany “comprehensively group together its criminal provisions relating to torture and other cruel, inhuman or degrading treatment or punishment”.<sup>27</sup> In effect, grouping together the provisions on torture would involve the separate criminalisation of torture as a crime in its own right, as required by Article 4 of the Convention.

The Committee has frequently expressed concern at the lack of a comprehensive definition of torture in numerous States,<sup>28</sup> and has recently made a number of recommendations that States Parties ensure that the definition of torture incorporates all elements contained in Article 1 of the Convention.<sup>29</sup>

Germany, too, must thus ensure that its legislation contains a definition of torture incorporating all elements contained in Article 1 of the Convention.

### ***Jurisdiction of German Courts to prosecute acts of torture***

#### Scope of jurisdiction

As noted above, section 6(9) of the Criminal Code provides for universal jurisdiction for offences

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<sup>26</sup> Conclusions and Recommendations of the Committee Against Torture: Germany, CAT/C/CR/32/7, 11 June 2004, para 3(f).

<sup>27</sup> Above n 25, para 5(d).

<sup>28</sup> Conclusions and Recommendations of the Committee Against Torture: Lithuania, CAT/C/CR/31/5, 5 February 2004, 5(a); Conclusions and Recommendations of the Committee against Torture: Bulgaria, CAT/C/CR/32/6, 11 June 2004, para 5(a); Conclusions and Recommendations of the Committee Against Torture: Bahrain, CAT/C/CR/34/BHR, 21 June 2005, para 6(b); Conclusions and Recommendations of the Committee Against Torture: Uganda, CAT/C/CR/34/UGA, 21 June 2005, para 5(a); Conclusions and Recommendations of the Committee against Torture: Sri Lanka, CAT/C/LKA/CO/2, 15 December 2005, para 5; Conclusions and Recommendations of the Committee Against Torture: Qatar, CAT/C/QAT/CO/1, 25 July 2006, para 10; Conclusions and Recommendations of the Committee Against Torture: Nepal, CAT/C/NPL/CO/2, 13 April 2007, para 12; Concluding Observations of the Committee Against Torture: Yemen, CAT/C/YEM/CO/2/Rev.1, 25 May 2010, para 7.

<sup>29</sup> Concluding Observations of the Committee Against Torture: Switzerland, CAT/C/CHE/CO/06, 25 May 2010, para 5; Concluding Observations of the Committee Against Torture: Ghana, CAT/C/GHA/CO/1, 15 June 2011, para 9; Concluding Observations of the Committee Against Torture: Monaco, CAT/C/MCO/CO/4-5 17 June 2011, para 7; Concluding Observations of the Committee Against Torture: Kuwait, CAT/C/KWT/CO/2, 28 June 2011, para 7.

which on the basis of an international agreement binding on Germany must be prosecuted even though committed abroad. Under this provision of the Criminal Code the German courts may exercise universal jurisdiction over crimes which are criminalised in international treaties to which Germany is a party.

Section 1 of the CCAIL provides for universal jurisdiction over the international crimes of genocide, crimes against humanity and war crimes, and as such, for torture as a crime against humanity, as a war crime or as an act of genocide, committed after 30 June 2002.

### Exercise of jurisdiction

Pursuant to section 152(2) of the Code of Criminal Procedure, provided there is sufficient evidence, the public prosecution office is obliged to prosecute all criminal offences. However, the Code of Criminal Procedure sets out a number of exceptions, in particular in relation to the exercise of extraterritorial and universal jurisdiction.

Section 153(c) of the Code of Criminal Procedure provides that the public prosecution office may dispense with prosecuting criminal offences committed abroad.

Section 153(f) of the Code of Criminal Procedure applies specifically to crimes under the CCAIL. Under this provision, the prosecutor may dispense with prosecuting criminal offences committed under the CCAIL if the offences were committed outside Germany and the alleged perpetrator is not present<sup>30</sup> in Germany and his presence there is not to be expected. However, where the alleged perpetrator is of German nationality, he or she must nevertheless be prosecuted for crimes committed abroad unless the offence is being prosecuted by an international court, in the territory where the offence was committed or by the state of the nationality of the victim of the offence.<sup>31</sup>

Section 153(f)(2) provides that the prosecutor may dispense with prosecuting, in particular, if the alleged perpetrator is not of German nationality, the victim is not of German nationality, and proceedings are being brought before an international court, in the territory where the offence was committed or by the state of the nationality of the victim of the offence. In the case where proceedings are being brought before an international court, in the territory where the offence was committed or by the state of the nationality of the victim of the offence, but the alleged perpetrator is present in Germany, the prosecutor may only decline prosecution if the victim was not German and the extradition of the suspect is

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<sup>30</sup> Note that the official translation reads “resident”, which requires a stronger link to Germany than “presence”. [www.gesetze-im-internet.de/englisch\\_stpo/index.html](http://www.gesetze-im-internet.de/englisch_stpo/index.html). However, other legal materials refer to the presence of the alleged perpetrator, in conformity with the Convention.

<sup>31</sup> This provision must be interpreted in parallel with Article 17 of the ICC Statute. The prosecutor cannot base the decision not to prosecute on proceedings abroad which are merely set up to shield the suspect from criminal responsibility, see S. Wirth, “Germany’s New International Crime Code: Bringing a Case to Court”, 1 *Journal of International Criminal Justice* 151 (2003).

permissible and the authorities intend to proceed with it.

In introducing universal jurisdiction over international crimes, according to the Federal Prosecutor General at Germany's Federal Court of Justice:

“The national legislator of the Federal Republic of Germany has taken subsidiarity into account not by revoking the basic decision for the principle of universal jurisdiction, but with the differentiated procedural regulation of Section 153(f) of the Criminal Procedure Code... Accordingly, the obligation to prosecute criminal offences under the International Crimes Code is regulated in tiers:

Primarily, the State in which the conduct in question occurred and the home State of the perpetrator and victim, as well as a competent international court of justice, are competent to prosecute ... In contrast, the competence of uninvolved third States is to be understood as a subsidiary competence, which is meant to avoid impunity, but, apart from that, not to push aside inappropriately the primarily competent jurisdictions ... Only if criminal prosecution by primarily competent States or an international criminal court is not or cannot be ensured, for example because the perpetrator has absconded from criminal prosecution by fleeing abroad, the subsidiary competence of the German criminal prosecution authorities comes into action. This tiered approach is justified by the special interest in criminal prosecution of the home State of perpetrator and victim and because the primarily competent jurisdictions usually are closer to the evidence.”<sup>32</sup>

In summary, for acts of torture not constituting crimes against humanity, war crimes or genocide, that could be prosecuted by resorting to various provisions of the Criminal Code, the prosecutor is not required to bring charges if such acts of torture were committed abroad. Read together with Section 6(9) of the Criminal Code, this appears to allow the prosecutor to apply his discretion to bringing charges for acts of torture (outside the context of other international crimes), in direct contravention of Article 5(2) of the Convention.

With respect to the universal jurisdiction provisions for acts of torture prosecuted under the CCAIL, such jurisdiction is only required to be exercised where the suspect is a German national, unless another country with jurisdiction is already carrying out a genuine investigation, or where the suspect is a foreigner who is present or likely to be present in German territory, again, unless another country with jurisdiction is carrying out a genuine investigation, and extradition of the suspect is both permissible and intended by the authorities. Thus, German law allows for limitations on the exercise of universal jurisdiction on the basis of purely pragmatic reasons, giving preference to courts with primary

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<sup>32</sup> Generalbundesanwalt beim Bundesgerichtshof, “Keine deutschen Ermittlungen wegen der angezeigten Vorfälle in Abu Ghraib/Irak”, 6/2005, Press release of 10 February 2005, [www.generalbundesanwalt.de/de/showpress.php?newsid=163](http://www.generalbundesanwalt.de/de/showpress.php?newsid=163), see English translation on the ICRC website, [www.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_de\\_rule157](http://www.icrc.org/customary-ihl/eng/docs/v2_cou_de_rule157).

competence.<sup>33</sup> As noted by Manfred Nowak, “since Article 5 does not establish any order of priority among the various grounds of jurisdiction, there exists no obligation of the forum State to extradite the alleged torturer to a State with better jurisdiction.”<sup>34</sup> Nevertheless, German law provides for the mandatory prosecution of acts of torture within the scope of the CCAIL, where the suspect is present in Germany and extradition is both possible and anticipated, which - with regards to acts of torture that also constitute genocide, crimes against humanity or war crimes - is coherent with the obligations of States parties under Articles 5 and 7 of the Convention Against Torture.

## CONCLUSIONS

Despite the newly implemented legislative provisions incorporating international crimes, torture is not separately defined as a crime under German law, in contravention of Article 4 of the Convention. Whilst German criminal law contains provisions regarding grievous bodily harm and torture in the context of customary international crimes, this is not sufficient to fulfil the requirements of the Convention.

Torture can be prosecuted in Germany on the basis of universal jurisdiction under Article 6(9) of the Criminal Code, through direct application of the Convention Against Torture. However, the prosecutor retains the discretion to decline to prosecute if the offence was committed abroad, in contravention of Article 5(2) of the Convention. Since 30 June 2002, torture can also be prosecuted in Germany through the CCAIL on the basis of universal jurisdiction, but only those acts of torture committed in the context of customary international crimes.<sup>35</sup> For prosecutions under the CCAIL, the prosecutor retains the discretion to decline to open an investigation where the suspect is not present or expected to be present in Germany.

TRIAL therefore respectfully submits to the Committee Against Torture that the current state of German

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<sup>33</sup> In February 2005 the Federal Prosecutor General dismissed a complaint filed by the US Center for Constitutional Rights against Donald Rumsfeld for torture in Abu Ghraib, Iraq, on the basis of Section 153(f)(1), sentence 1, as the suspects were not present in Germany nor anticipated to be present in Germany, see Generalbundesanwalt beim Bundesgerichtshof, “Kein Ermittlungsverfahren wegen der angezeigten Vorfälle in Abu Ghraib/Irak und in Guantánamo Bay/Kuba”, 9/2007, Press release of 27 April 2007, see English translation on the ICRC website, [www.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_de\\_rule157](http://www.icrc.org/customary-ihl/eng/docs/v2_cou_de_rule157). This decision was upheld by the Higher Regional Court of Stuttgart in a decision dated 13 September 2005: *Verwurf des Antrags auf gerichtliche Entscheidung wegen der angezeigten Vorfälle in Abu Ghraib/Irak*, 5 Ws 109/05. In February 2007 the Federal Prosecutor General again dismissed a complaint filed by the US Center for Constitutional Rights against Donald Rumsfeld, in this case including acts of torture in Guantánamo Bay, Cuba, on the same grounds. The applicants submitted that the United States of America was unwilling to prosecute, however the Federal Prosecutor maintained that the balance between the risk of impunity and the burden on German investigative authorities being forced to conduct “extensive but ultimately unproductive investigations” or “purely symbolic investigations” supported the decision to decline to prosecute.

<sup>34</sup> Nowak and McArthur, above n 9, p 360.

<sup>35</sup> Germany considers all crimes under the Rome Statute of the International Criminal Court to be customary, see E. Handl, “Introductory Note to the German Act to Introduce the Code of Crimes Against International Law”, 42 *International Legal Materials* 995 (2003).

legislation does not fully implement the Convention Against Torture, due to the lack of a separately defined, comprehensive definition of torture, and due to the scope of the prosecutor's discretion to decline prosecutions, which may be exercised contrary to the requirements of the Convention.<sup>36</sup>

## RECOMMENDATIONS

TRIAL respectfully suggests that the Committee Against Torture take the following action:

1. During the dialogue with Germany:
  - a. request the State Party to explain the continued lack of a precise definition of torture; and
  - b. ask for clarification regarding the actual exercise of jurisdiction over suspected perpetrators of torture present in Germany.
2. After the dialogue with Germany:
  - a. recommend that the State Party ensure that the crime of torture is separately defined and criminalised in its Criminal Code;
  - b. recommend that the State Party ensure that all acts of torture, and not only those constituting other international crimes, are capable of being prosecuted under universal jurisdiction provisions; and
  - c. recommend that the State Party ensure that all suspected perpetrators of acts of torture who are found on German territory, are either extradited or prosecuted.

TRIAL remains at the full disposal of the Committee Against Torture should it require additional information and takes the opportunity of the present communication to renew to the Committee the assurance of its highest consideration.



Philip Grant  
TRIAL Director

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<sup>36</sup> Whilst the scope of the discretion to decline prosecution for acts of torture committed under the CCAIL is consistent with the principle of *aut dedere, aut judicare*, for acts of torture outside the scope of armed conflict, attacks on the civilian population and genocide, prosecuted under the Criminal Code, the prosecutor is not required to prosecute if the torture was committed abroad.