

LIMITS TO INTERNATIONAL COOPERATION IN CRIMINAL MATTERS UNDER THE GERMAN CONSTITUTION

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This paper explores the boundaries of international cooperation in criminal matters with respect to the German Constitution. The paper argues that a critical observation of developments in international cooperation in criminal matters is advisable. Cooperation in itself is not a guarantee for the protection of human rights. The guaranteed standard in the involved legal orders should be carefully studied and compared, before competences are “outsourced” to other international legal bodies. With respect to the German legal order, it is especially the guilt principle that raises concerns vis-à-vis other international legal orders.

I. INTRODUCTION

The last 20 years have seen a surge in the development of international cooperation in criminal matters. Both in the areas of transnational and international criminal law, States have opted for closer cooperation. While the first wave of cooperation in international criminal law was made possible by the end of the Cold War and a decrease in the animosities between the former blocs,¹ the second wave was brought on by the so-called “war on terror”,² increasing the political will of the States to cooperate in the fight against transnational crimes. Legal scholars, human rights activists, and victims’ organizations have long propagated both forms of cooperation. Occasional political support, however, has never been strong enough to fight through the armour of sovereignty, carefully protected by the States in their international relations. Now, the playing field has changed. The States seem to be resolved that their interests in a globalised world of international crime would be better served by international cooperation. Time has, however, disclosed some major problems in the new international order of the fight against different forms of criminalised behaviour, ranging from the criticism of the International Criminal Court

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¹ See GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW Rn. 45 ff (2009); T.V.G.N.S. Sudhakar, *International Criminal Justice: An Analysis of International Criminal Judicial Institutions with Special Reference to ICTY and ICTR*, 1 NUJS L.REV. 1, 4 (2008).

² For a critical analysis of the German legal measures, see Oliver Lepsius, *Liberty, Security and Terrorism: The Legal Position in Germany*, 5 GERMAN LAW JOURNAL 435 ff (2004).

for allegedly targeting only the African Countries,³ to the treatment of the prisoners at Guantanamo Bay by the United States of America.⁴

While this paper attempts to raise awareness about these problems, it does not seek to understate the relevance of international cooperation as such. Salvation does not necessarily lie in a national legal order, but neither does it lie in the international one. In his writings, Kant warns against the dangers a unified world state could pose to the individual.⁵ Within States, it is for the critical lawyer to keep a close eye on the developments that concern their human rights. Similarly, the international legal order is in need of critical comment to ensure that law prevails over power. This has become increasingly necessary now that individuals are being directly affected by the rule of international law.

II. LEGAL FRAMEWORK OF INTERNATIONAL COOPERATION AS SET OUT IN THE GERMAN CONSTITUTION

The German Constitution, which is also referred to as the Basic Law, is the foundation of the rule of law in Germany.⁶ As with every creation of men, the Basic Law is not perfect. Overall, however, it has proven to be a remarkable legal tool, capable of coping with both old and new challenges. An early decision of the Federal Constitutional Court, which allowed individual legal recourse against any act of State or public authority deriving from Art. 2(1) of the Basic Law⁷ ('BL'), even if none of the other specific rights guarantees is applicable, created a constitutional framework centred in individual rights.⁸ Considering this status quo of human rights protection in the German legal system, growing international cooperation should not impair this system of

³ See Mary Kimani, *Pursuit of justice or Western plot?*, October 2009, available at <http://www.un.org/ecosocdev/geninfo/afrec/vol23no3/233-icc.html> (Last visited on June 30, 2012); For an overview of the instigated preliminary examinations, see Homepage of the Prosecutor of the ICC available at <http://icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/> (Last visited on June 30, 2012).

⁴ See Study of the Human Rights Council of the United Nations, A/HRC/13/42 (20 May 2010).

⁵ See IMMANUEL KANT, *DIE SCHRIFT ZUM EWIGEN FRIEDEN* 32 (1781/1995 (Reclam)) (He speaks of the "soulless despotism" created by the enlargement of government).

⁶ See Karl-Peter Sommermann in MANGOLDT/KLEIN/STARCK, *KOMMENTAR ZUM GRUNDGESETZ* Art. 20 Rn. 227 ff (2010) (The concept of "rule of law" comprises a formal and a material element (formeller/materieller Rechtsstaat; état de droit/état du droit)).

⁷ German laws are available at www.gesetze-im-internet.de (English translations are available at www.gesetze-im-internet.de/Teilliste_translations.html).

⁸ This is a consequence of the "Elfes" decision by the Federal Constitutional Court, BVerfGE 6, 32 ff; See also Horst Dreier, in: *DREIER GRUNDGESETZ-KOMMENTAR* Art. 2 I Rn. 27 (2004). For an analysis of the method employed by the Federal Supreme Court, see Dieter Grimm, *Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics*, 4 NUJS L. REV. 15, 26 (2011).

recourse. As it is the express aim of most international cooperation to enhance existing mechanisms for human rights protection,⁹ the growing connection between the national and international legal orders should normally not create a conflict between these two legal frameworks. Linking the two systems without compromising on the existing standard of individual rights protection, is thus a major point of interest.

A. COMPETENCE AND PROCEDURE FOR INTERNATIONAL COOPERATION

Germany is a dualistic state, which means that for the application of every act of public international law within the country, a transformation into the German legal order is mandatory, which allows this law to be applied in the German legal order.¹⁰ Those acts can take the form of a law, an act of State or a judicial decision on the matter. Acts of public international law, like treaties that are transformed by a law according to Art. 59(2) BL,¹¹ can be applied in the German legal order as a law, if their content is self-executing.¹² Acts of foreign States are normally accepted through an incorporating decision, if they do not infringe the German ordre public.¹³

This is the framework of the traditional form of international cooperation, which is still valid for most international relations. It only involves and obligates States. Individuals are mediated by their States and thus, the rights and duties of individuals are only legal reflexes. These rights and duties only have real consequences for them if their States decide to transform their respective international obligations into “normal” national legal rules, which are then subject to challenge before national courts.¹⁴

The modern form of international cooperation tends to involve individuals directly at the level of public international law, raising them to the level of being subjects of international law in certain specific areas, like international criminal law.¹⁵ While both rights as well as duties are created at the international level, the option to challenge them is not always available to affected individuals.

⁹ See, e.g., European Convention on Human Rights, September 3, 1953, Art. 53.

¹⁰ RUDOLF GEIGER, GRUNDGESETZ UND VÖLKERRECHT 140 (2010).

¹¹ Art. 59(2) BL (“Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply *mutatis mutandis*”).

¹² GEIGER, *supra* note 10, 160.

¹³ *Id.*, 297.

¹⁴ This is a consequence of the principle of hierarchy of norms, which gives a treaty the force of law only upon enactment of a transforming law; See also *id.*, 160.

¹⁵ See CHRISTINA GLOBKE, AUSLIEFERUNG AN DEN INTERNATIONALEN STRAFGERICHTSHOF 16 (2009).

B. POSSIBLE SCOPE OF INTERNATIONAL COOPERATION

In the context of the German legal order, the most prominent example of this new version of international cooperation is the European Union.¹⁶ The most recent one is the International Criminal Court.¹⁷ It is characterised by the fact that each of these organisations has certain competences, which enable them to take decisions and enact legislations having direct and immediate effect for German authorities or individuals, without the necessity of a transforming act. The legal opinion of the Court of the European Union is thus binding on the German courts. Similarly, the European Commission can legislate acts that are binding on market participants and on the State's representatives who are responsible for enforcing the common market rules. This form of international cooperation is called "supranational" to characterise this special consequence for the contracting State parties.¹⁸ Germany is competent to conclude such treaties under Arts. 23¹⁹ and 24(1)²⁰ BL. In this way, the German legal order opens up to another legal order, incorporating the competences of the other institution into its own legal order.²¹ By accepting the competences of an international organisation in its treaty, the German legislator accepts that some of those competences, which lie within the prerogative of the sovereign State, will no longer be exercised by it. The exercise of this right will vest instead with the international organisation, by way of its inclusion in the primary law.²²

The result is a direct and immediate hierarchy in the German legal order comprising both national and supranational bodies. As in any other

¹⁶ Treaty on European Union (EU), February 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253 ('Treaty on the European Union'); Treaty on the Functioning of the European Union, December 13, 2007, 2008/C 115/01.

¹⁷ UN General Assembly, *Rome Statute of the International Criminal Court (last amended January 2002)*, July 17, 1998, A/CONF. 183/9 ('ICC Statute').

¹⁸ See Ingolf Pernice in DREIER GRUNDGESETZ-KOMMENTAR Art. 24 Rn. 25 (2006); GEIGER, *supra* note 10, 19.

¹⁹ Art. 23 (1) BL ("With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79...").

²⁰ Art. 24(1) BL ("The Federation may by a law transfer sovereign powers to international organizations.").

²¹ GLOBKE, *supra* note 15, 80.

²² An example of this is the competence to legislate on customs, which is an exclusive competence of the European Union, even though it is still a competence written in the Basic Law (Art. 73 (1) Nr. 5 BL).

case, as long as the respective bodies do not transgress their competences, other bodies are bound by their decision.²³ An additional decision of any national body stating that the decision of a supranational body should be applied is not required. As to the scope of competences that may be exercised by international organisations, the Federal Constitutional Court has remained silent for a long time. Only in its last decision on the Amendment to the European Union Treaty through the Treaty of Lisbon, the Federal Constitutional Court excluded matters like defence and substantive criminal law from being exercised by (and vested in) the European Union.²⁴

C. LIMITS TO INTERNATIONAL COOPERATION IN GENERAL

German jurisprudence and doctrine have interpreted Arts. 23 and 24(1) BL in a way that defines the scope and the limits of this new form of international cooperation. A prerequisite to such cooperation is the passing of a law, which also doubles as the law incorporating the international treaty into the German legal order.²⁵ This law can be challenged in the Federal Constitutional Court. Once approved, the international organisation is empowered to act according to its treaty; it is not bound by any conditions of the German Constitution.²⁶ There, however, have to be limits. German authorities, who are allowing this interference from an authority that is not bound by the Constitution – and by the basic rights in it – are not free to do so at all costs. Art. 1 BL sets the framework for the limits to their powers. The State has to protect human dignity (Art. 1(1) BL). Art. 1(2) BL clarifies that the Constitution ensures that this is possible through the protection and guarantee of human rights. In the German legal order, these rights are the basic rights as set out in Art. 2 ff BL. As all State authorities are bound by those rights in everything that they do, they are also bound when they conclude international treaties.²⁷ They can install an organ, which will make independent decisions, only if this organ is under a duty to respect human rights as well.

Once the treaty is signed, the international organisation can take decisions based on its treaty, which will be directly binding on German authorities in German territory, although its decisions do not emanate directly from German authorities. As it is not an official act of a German authority, it is generally not possible to raise a challenge in German courts, because they would

²³ See KNUT IPSEN, *VÖLKERRECHT* §6 Rn. 12 (2004); Rudolf Bernhardt, *International Organizations, Internal Rules*, 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1316 (1995).

²⁴ BVerfGE 123, 267, 359 f (decision on the Treaty of Lisbon).

²⁵ Bernhard Kempen in MANGOLDT/KLEIN/STARCK, *KOMMENTAR ZUM GRUNDGESETZ* Art. 59 Rn. 44 (2010); Ondolf Rojahn in v. MÜNCH/KUNIG, *GRUNDGESETZ-KOMMENTAR* Art. 24 Rn. 32 (2012).

²⁶ See GLOBKE, *supra* note 15, 38.

²⁷ See *id.*, 37.

not have the competence.²⁸ The Federal Constitutional Court, however, has interpreted the obligation under Art. 1(3) BL, as one that requires the judiciary (and in this case, the Court) to analyse whether or not the international organisation is guaranteeing basic rights in the course of its actions.²⁹ The scope of the rights guaranteed has to be equivalent in general to the protection of basic rights in Germany.³⁰ The international organisation has to generally recognize these basic rights as relevant to specific situations.³¹ It is not necessary, that a particular right must have the same name as in Germany.³² Neither is it necessary that a court reach the same conclusion as a German court would (which might not have a single opinion on the subject either). It is important though, that the international organisation, having recognized the possible rights of the interested groups in the situation, weighs those rights and comes to a balanced decision giving full regard to the rights involved.³³ This process can then be analysed by the Federal Constitutional Court.³⁴ In this way, Germany can fulfil its obligations under Arts. 79(3)³⁵ and 1(3) BL, that certain principles of the Constitution may not be amended.³⁶

III. APPLICATION TO SPECIFIC SITUATIONS

Against this background, this part tackles certain legal questions, while addressing issues which have arisen in the past as well as those that will arise in the future as more international cooperation in criminal matters takes place. This analysis neither pretends to be exhaustive, nor does it address the issues in great depth. It aims primarily at presenting some questions and raising awareness about critical developments in international cooperation in criminal matters.

²⁸ BVerfGE 22, 293, 296.

²⁹ For the first time stated in BVerfGE 37, 271, 285 (Solange I (“as long as”) decision).

³⁰ See BVerfGE 73, 339, 378 (“... that a measure of protection of fundamental rights has been established in the meantime within the sovereign jurisdiction of the European Community which in its conception, substance and manner of implementation is essentially comparable with the standards of fundamental rights provided in the Basic Law, and that there are no decisive factors to lead one to conclude that the standard of fundamental rights which has been achieved under Community law is not adequately consolidated and only of a transitory nature.”); Translation of the relevant paragraph taken from the Decision on the Common Market of Bananas (07.06.2000), available at http://www.bverfg.de/entscheidungen/lis20000607_2bvl000197en.html (Last visited on June 30, 2012).

³¹ GLOBKE, *supra* note 15, 100; See also BVerfGE 73, 339, 378.

³² See GLOBKE, *supra* note 15, 100.

³³ *Id.*, 101.

³⁴ *Id.*, 110 f.

³⁵ For an analysis of the “Eternity Clause” of Art. 79 (3) BL, see Helmut Goerlich, *Concept of Special Protection for Certain Elements and Principles of the Constitution against Amendments and Article 79 (3), Basic Law of Germany*, 1 NUJS L. REV. 397 (2008).

³⁶ See GLOBKE, *supra* note 15, 44.

A. ENFORCEMENT OF THE JUDGMENTS OF AN INTERNATIONAL COURT/TRIBUNAL

The first example would be the enforcement of judgments of an international court or tribunal in Germany. So far, practically, the only cases that have arisen for enforcement are those of the International Criminal Tribunal for the former Yugoslavia (ICTY). Germany is currently enforcing four sentences of the ICTY, with convictions of 12, 20 and 28 years and one life term in prison.³⁷ The lengths of these sentences are remarkable, as the German Criminal Code – for ‘normal’ national cases – only recognises fixed-term sentences up to 15 years. Normally, higher sentences would be considered to be contrary to the German *ordre public* and would therefore, not be enforced in German prisons.³⁸ The German law for the cooperation with the ICTY contains the special possibility of enforcing sentences up to 30 years; a possibility that holds true for the other international criminal courts as well.³⁹

According to the regulations of the *ad hoc* tribunals, as well as those of the Rome Statute of the International Criminal Court (‘ICC Statute’), the enforcement of the sentences is done in accordance with the national laws.⁴⁰ Thus, the prison conditions, the right to visitors and other rights available to the accused are subject to the national legal order. This is a major problem, in light of the right to equal treatment of those convicted of international crimes. Even within Europe, prison conditions vary widely. However, taking into consideration the convictions of the ICTR, where most convicts serve their term in Africa, possible demands of equal treatment for all prisoners of UN Tribunals or those of the ICC have a long way to go.⁴¹

The practical problem that now arises is that German law recognizes the possibility of conditional early release, both for fixed-term sentences and for life-term sentences. §57 of the Criminal Code⁴² states that:

³⁷ See Homepage of the ICTY, available at <http://www.icty.org/sid/10276> (Last visited on June 30, 2012); For the interaction of Art. 79 (3) BL with Art. 24 (1) BL, see Goerlich, *supra* note 35, 410.

³⁸ It should be noticed as well that without the special law, German legal order would have more problems enforcing a fixed-term sentence of more than 15 years than a life-term sentence.

³⁹ YUGStrGHG (Law on the Cooperation with the ICTY), §5(2); RUAStrGHG (Law on the Cooperation with the ICTR), §5(2); IStGHG (Law on the Cooperation with the ICC), §41(2).

⁴⁰ ICC Statute, Art. 106(2); Statute of the International Tribunal for the Former Yugoslavia, May 25, 1993, (‘ICTY Statute’) Art. 27; Statute of the International Criminal Tribunal for Rwanda, November 8, 1994 (‘ICTR Statute’), Art. 26.

⁴¹ For an analysis concerning the international prisons, see Culp, *Enforcement and Monitoring of Sentences in the Modern war Crimes Process*, New York, April 7, 2011, HUMAN RIGHTS SEMINAR SERIES (2010-2011). One of the generally acknowledged problems is the possibility of capital punishment in Rwanda, which is (obviously) not possible at the ICTR, see also Sudhakar, *supra* note 1, 29.

⁴² Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I 3322 (last amended by Art. 3 of the Law of October 2, 2009, Federal

- (1) The court shall grant conditional early release from a fixed-term sentence of imprisonment under an operational period of probation, if:
 1. two-thirds of the imposed sentence, but not less than two months, have been served; and
 2. the release is appropriate considering public security interests; and
 3. the convicted person consents.
 4. The decision shall particularly consider the personality of the convicted person, his previous history, the circumstances of his offence, the importance of the legal interest endangered should he re-offend, the conduct of the convicted person while serving his sentence, his circumstances and the effects an early release is expected to have on him.
- (2) After one half of a fixed-term sentence of imprisonment, but not less than six months, have been served, the court may grant conditional early release, if
 1. the convicted person is serving his first sentence of imprisonment, the term not exceeding two years; or
 2. a comprehensive evaluation of the offence, the personality of the convicted person and his development while in custody warrant the acceptance of special circumstances, and the remaining requirements of subsection (1) above have been fulfilled.

The “shall” in the first paragraph implies that under the above-mentioned conditions, conditional early release would be the normal case, so the court would have to justify why the person should not be set free in a particular case. The “may” in the second paragraph implies that here early release is the exception, and that the judge would have to justify why he has let the person go already after one half of the fixed-term sentence.

§57a of the Criminal Code states similar conditions for release in case of life imprisonment. As the Federal Constitutional Court stated at one point, it is not compatible with the principle of human dignity recognised in Art. 1(1) BL, to keep someone in prison for life without at least giving him the chance to get out in his lifetime.⁴³ This rule was introduced in the German Criminal Code as a consequence of the Court’s decision. The argument is that keeping someone in prison without offering him a chance to return to a

Law Gazette I, 3214).

⁴³ BVerfGE 45, 187, 229; 117, 71, 114.

normal life would reduce him to an object of State authority, because he would only be administered in the system without any further aim and purpose.⁴⁴ As the person has to be treated at least a subject of law, this would violate the Constitution.⁴⁵ This argument is based on the principle of guilt and human dignity,⁴⁶ which is rooted in Art. 1(1) BL. Hence, it is a part of the 'eternity clause' under Art. 79(3) BL and is therefore, not negotiable.⁴⁷ To have the opportunity of early release is thus a necessary prerequisite for Germany to sign a treaty with an international criminal court. Art. 110(3) of the ICC Statute contains the possibility of early release.

Returning to §57a of the Criminal Code, the legal conditions for early release are:

(1) The court shall grant conditional early release from a sentence of imprisonment for life under an operational period of probation, if

fifteen years of the sentence have been served;

the particular seriousness of the convicted person's guilt does not require its continued enforcement; and

the requirements of §57(1) 1st sentence Nos. 2 and 3 are met.

The only possibility of a review of the sentence is contained in sub-clause (2) of §57a(1). It requires that at the time of the sentencing, the court had pronounced on the particular seriousness of the guilt of the person.⁴⁸ For "normal" cases of life imprisonment, convicted persons, on average, are released after 20 years in prison.⁴⁹ For particularly serious cases, an average cannot be easily discovered.

In the context of international crimes that have been judged by the ICTY, there are now two problems that arise with regard to enforcement within the German praxis and legal framework. First, it might mean that someone convicted for a life-term might be eligible for a review earlier than someone

⁴⁴ See BVerfGE 45, 187, 238.

⁴⁵ For the so-called "object-formula" of the Federal Supreme Court, see Christian Starck, in MANGOLDT/KLEIN/STARCK, KOMMENTAR ZUM GRUNDGESETZ Art. 1 Rn. 14 ff (2010) (This formula is based on Kant's categorical imperative).

⁴⁶ See Philip Kunig, in: v. MÜNCH/KUNIG, GRUNDGESETZ-KOMMENTAR Art. 1 Rn. 36 (2012); For a detailed analysis of German sentencing practices, see Franz Streng, *Sentencing in Germany: Basic Questions and New Developments*, 8 GERMAN LAW JOURNAL 153 ff (2007).

⁴⁷ Goerlich, *supra* note 35, 401, 403 f.

⁴⁸ Pronouncing the particular seriousness of guilt is the task of the trial judge, if he considers the act of the accused to be considerably worse than the "normal" case of murder. For details, see THOMAS FISCHER, KOMMENTARZUM STRAFGESETZBUCH § 57 a Rn. 9 ff (2012).

⁴⁹ 20 years is the average time of enforcement of life-term sentences; See *id.*, § 57 a Rn. 5.

convicted for a fixed-term. As two-thirds of 30 years (in case of a fixed-term) is 20 years, you would normally have to spend the same number of years in jail as a person with a life-term sentence before the possibility of early release, which hardly seems to be a proper solution. Second, it may give rise to problems if the convicted person, has committed particularly heinous war crimes even for a war criminal. In that case, a German court would probably have pronounced the particular seriousness of the guilt, thus preventing a release after 20 years. The ICTY, however, does not recognize such a possibility. According to German law, a German Court cannot pronounce later on the particular seriousness of guilt.⁵⁰ It is – in any case – not possible to argue that as the crime being committed is a war crime or an international crime in general, it has to be an offence that warrants a decision on the particular seriousness of the convicted person’s guilt. According to §46(3) of the Criminal Code, “circumstances which are already statutory elements of the offence must not be considered” for the sentencing.

Thus, the mere commission of the crime itself does not necessarily make the crime a particularly serious one of its kind.⁵¹

The war criminals of the former Yugoslavia are mostly “normal” people who can be integrated into society. Since they are doing their studies in prison and the risk of them repeating their crimes is nil, they actually qualify easily for an early release.⁵² Now the question that must be answered is whether or not the ICTY can influence a decision on their early release and if the German authorities are bound by the decision of the ICTY.

The Security Council has acted under Chapter VII of the UN Charter (Art. 41 UN Charter), thus using measures which are legally binding on Member States as subjects of international law.⁵³ The internal organs of a State are, however, generally not directly bound by such measures.⁵⁴ In the

⁵⁰ The decision about the particular seriousness of guilt has to be taken by the trial judge because only he hears all the evidence related to the case; *See id.*, § 57 a Rn. 9.

⁵¹ *See id.*, § 46 Rn. 76.

⁵² Klaus Hoffmann, *Some Remarks on the Enforcement of International Sentences in Light of Galic case at the ICTY* in ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTS DOGMATIK, 838, 841 (2011) (He concludes from this fact, that the applicable rules should be changed, as they prove not to be adequate for macro-criminality. This is an acceptable deduction, however, doubtful, as it would mean ignoring the progress of doctrine and science in the field of criminology, saying nothing about the ensuing violation of the constitutional principle of guilt); For a critical analysis of the motives and methods of sentencing in international criminal law, *see* Aaron Fichtelberg, *Liberal Values in International Criminal Law: A Critique of Erdemovic*, 6 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 3 ff (2008); Sabine Swoboda, *Didaktische Dimensionen internationaler Strafverfahren – dargestellt am Beispiel der UN ad hoc-Tribunale*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTS DOGMATIK, 100 ff (2010).

⁵³ *See* THEODOR SCHWEISFURTH, VÖLKERRECHT Chapter 11 Rn. 112 ff (2006).

⁵⁴ For the controversy in public international law on the legislating powers of the Security Council, *see, e.g.*, Eric Rosand, *The Security Council As “Global Legislator”*: *Ultra Vires or Ultra Innovative?*, 28 FORDHAM INTERNATIONAL LAW JOURNAL, 542, 551 ff (2004); Stefan

German legal order, these resolutions would normally require an act of the German legislator before they can be applied within the State. In the case of the ICTY, German doctrine is undecided on the reach of the ICTY's powers.⁵⁵ The Statute of the ICTY (Art. 27) states that the enforcement of sentences "shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal."

Nonetheless, the German legislator has decided to treat all international courts in the same way, by applying the regime of the ICC to other courts as well.⁵⁶ The ICTY can thus supervise the enforcement to the extent it needs to be informed of any major decisions regarding the prisoner.⁵⁷ Early release would hence need to be reported. If the ICTY does not agree to an early release in accordance with German law, it has to demand that Germany surrender the prisoner to the ICTY, thereby creating an obligation under international law for Germany.⁵⁸ In the end, however, the national German authorities are not bound by this decision of the ICTY, since the German courts may decide that a surrender would violate the core principles of the German Constitution as laid out in the jurisprudence of the Federal Supreme Court. The German State would have no choice but to violate its international obligations.⁵⁹

B. ENFORCEMENT OF THE "SMART SANCTIONS" REGIME OF THE UN SECURITY COUNCIL

Another situation that presented itself is the case of "Kadi". The case relates to the smart sanctions regime of the United Nations Security Council, which was set in place after the 9/11 attacks.⁶⁰ The United Nations Security Council put Kadi on a black list and all his assets were frozen. The United Nations established a Committee, which monitored the list, but at the time of freezing of assets, there was no possibility of judicial recourse and

Talmon, *The Security Council as World Legislature*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW, 175, 178 ff (2005).

⁵⁵ E.g., Claus Dieter Classen, in MANGOLDT/KLEIN/STARCK, KOMMENTAR ZUM GRUNDGESETZ, Vol. 2, Art. 24 Rn. 62 (2010); Rojahn, *supra* note 25, Art. 24 Rn. 51; If, however, the Tribunals would be installed by the General Assembly (for this demand, *see* Sudhakar, *supra* note 1, 24), they could not have the same legal impact, because the General Assembly's powers do not allow for binding measures.

⁵⁶ *See* §5(2), YUGStrGHG (Law on the Cooperation with the ICTY) which relegates to §41(4) IStGHG (Law on the Cooperation with the ICC). According to this, the ICC (or the ICTY / ICTR) is competent for all decisions concerning the enforcement of the sentence, e.g. in questions of early release.

⁵⁷ ICTY Statute, Art. 28.

⁵⁸ ICTY Statute, Arts. 27 – 29.

⁵⁹ As the Constitution, especially with regard to Art. 79(3) BL, takes precedence; there is no choice about which obligation to break. Public international law has to stand back, should there actually be an irreconcilable collision of norms.

⁶⁰ For the facts of the case(s), *see* the Judgment of the General Court of the European Union in this affair, T-85/09, Rn. 1 ff, Kadi / European Commission, September 30, 2010.

no justifications were given for being on the list.⁶¹ The Member States of the United Nations were required to implement this regime. For those States who are also Members of the European Union, this meant accepting the European Commission's adaptation of the smart sanctions regime, since the European Union is competent to implement such sanctions vis-à-vis the Member States of the European Union.⁶² The European Commission basically adapted the United Nations list without any changes and without any further investigation of the matter, because it believed itself to be bound by the Chapter VII regime.⁶³ Kadi tried to challenge the decision in the General Court and actually had to wait until the second level of jurisdiction. The European Court of Justice decided - if not to abrogate the Commission's decision - to at least force the Commission to make an independent decision based on their own information, after giving the aggrieved parties a fair hearing.⁶⁴ The Commission then re-evaluated the situation, but still took the legal stand that it could not contradict the United Nations Security Council. The General Court of the European Union abrogated this decision in first instance. But the case is not over as some Member States, like the UK, have decided to appeal against the decision of the General Court.⁶⁵

Although the legal situation at the level of the United Nations has slightly improved over the last few years, this is, admittedly, a shocking case. Evidently, not even one of the democratic States on the Security Council had a problem with establishing a regime, which none of them could have possibly established in their own legal orders.⁶⁶ So far, a case like this has not yet reached the German legal order, so the courts have not had a chance to decide on the matter. However, should a case like this be brought before the German Constitutional Court in the future, such a measure would constitute a clear

⁶¹ For a critical analysis of the smart sanctions against presumed terrorists, see Michael Bothe, *Security Council's Targeted Sanctions against Presumed Terrorists: The Need to Comply with Human Rights Standards*, 6 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 541 ff (2008).

⁶² For the intricacies of the European Union Law, see Maria Tzanou, *Case-note on Joined Cases C-402/05 P & C-415/05 P Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities*, 10 GERMAN LAW JOURNAL 123 ff (2009).

⁶³ In the national legal orders of the Member States of the European Union, similar argumentation can be found vis-à-vis acts of the European Union or other obligations deriving from public international law, notably the WTO obligations. This is not a problem as long as the other organisation does offer means of legal recourse. It is a problem, if there is no individual recourse, as in the cases of the WTO.

⁶⁴ See European Court of Justice C-402/05 P, C-415/05 P, Rn. 326 f, *Kadi and Al Barakaat International Foundation / European Commission*, September 3, 2008.

⁶⁵ See InfoCuria, *Case Law of the Court of Justice*, available at <http://curia.europa.eu/juris/liste.jsf?num=C-584/10&language=en> (Last visited on June 30, 2012).

⁶⁶ The prison at Guantanamo is an analogous example, as the USA applies their domestic law differently on the state's territory and reluctantly on foreign soil, without taking into consideration the actual situation of power. For the Member States of the European Convention on Human Rights, the ECHR has stated that the states are bound by the Convention rights as soon as they exercise effective overall control over a territory; See *Loizidou v. Turkey*, 23.03.1995, ECHR (40/1993/435/514); CHRISTOPH GRABENWARTER, *EUROPÄISCHE MENSCHENRECHTSKONVENTION* § 17 Rn. 11 ff (2009).

and obvious violation of the core principles of the German Constitution. As a consequence, the German Constitutional Court would have to deny all legal value to the European Commission's decision. By completely denying any right to be heard, the United Nations Security Council and the European Union had stated that they do not recognise this right given the present situation, without even weighing different positions. The aggrieved person would therefore be denied the status of a subject of law, which also constitutes a violation of the principle of human dignity.⁶⁷

Another issue, which could cause problems for the European Union, should be raised in this context. Considering that the sanctions have been in place now for a considerable period of time, the measure may well amount to a criminal punishment, which the General Court has pointed out in its most recent decision on the matter.⁶⁸ This punishment would have been inflicted without any trial, and without the European Union having the competence to administer criminal punishment. Even from this angle, the Federal Constitutional Court would have to abrogate any European decision on the matter, as the Decision on the Lisbon Treaty has clarified that the EU must not have a competence for criminal law, since it would violate the core of Germany's sovereignty.⁶⁹

Even though a final decision has not been reached yet, it should be noted that the Member States of the European Union included a provision within their last revision of the European Union Treaty, clarifying that in cases where there is a transformation of any individual sanction imposed by the United Nations Security Council into the European legal order, the procedure in the European legal order must provide the aggrieved person with the possibility of legal recourse.⁷⁰

C. EXTRADITION TO THE INTERNATIONAL COURTS/ TRIBUNALS

The last situation that might arise in the future is extradition to the International Criminal Court. Even though there is a special provision covering the extradition of German nationals to the International Criminal Court (Art. 16(2) BL), the legal status of a foreigner is not different from that of a German national. The core principles of the Constitution do not differ for these groups as long as they are based on the principle of human dignity.⁷¹

⁶⁷ See Starck, in: MANGOLDT/KLEIN/STARCK, KOMMENTAR ZUM GRUNDGESETZ Art. 1 Rn. 14 (2010).

⁶⁸ General Court of the European Union, T-85/09 Rn. 150 f., Kadi / European Commission, September 30, 2010.

⁶⁹ BVerfGE 123, 267, 359 f (Treaty of Lisbon).

⁷⁰ See Treaty of the European Union, Art. 215(3).

⁷¹ See GLOBKE, *supra* note 15, 118 (note 345).

1. General Aspects

Extradition is a common, but highly disputed measure of international legal assistance, especially when it involves one's own nationals.⁷² The arguments derive generally from the idea of State sovereignty, which serves political rhetoric more than it having any legal standing.⁷³ More serious problems arise in light of the need to protect human rights.⁷⁴ The extradited person has not, in most cases, been convicted of any crime, so the presumption of innocence applies.⁷⁵ Moreover, surrendering a person to another legal order deprives that person automatically of all legal rights and protections he would have enjoyed in this legal order. The State can, by way of extradition, abandon its responsibility towards the protection of the human rights of the extradited person in a given situation.

The German Constitution, however, does not allow that in all cases. Responsibility, once acquired, cannot be relinquished at the drop of a hat.⁷⁶ International cooperation is possible, but – where individuals' rights are concerned – such cooperation can only be granted in cases where the human rights guaranteed are comparable to those granted in the German legal order.⁷⁷ Art. 1(2) BL stresses that human rights are the basis for peace in the international community. Art. 16(2) BL establishes the obligation of the German legal order to ensure that the international court can offer adequate and comparable protection of human rights. This obligation is the same as the one under Art. 24(1) BL.⁷⁸ Art. 24(1) BL and Art. 16(2) BL, however, differ in one respect: Decisions taken by an international organisation under a treaty based on Art. 24(2) BL can be challenged before the Federal Constitutional Court as a last resort. Once a decision to extradite is taken under Art. 16(2) BL, any further decision by the international court on the procedure cannot be effectively challenged in the Federal Constitutional Court. The extradited person is out of the reach of German state authority, which cannot therefore correct a decision on extradition as a last resort. The legal order must, therefore, decide based on a prognosis of whether the international court will recognise the basic human

⁷² See DIETRICH OEHLER, INTERNATIONALES STRAFRECHT Rn. 191 f (1983); For the decision of the Federal Constitutional Court concerning the European Arrest Warrant and the alternative of extradition to a Member State of the European Union, see *Entscheidungen, European Arrest Warrant Act case*, available at http://www.bverfg.de/entscheidungen/rs20050718_2bvr223604en.html (Last visited on June 30, 2012); For an analysis of this decision, see Simone Mölders, *European Arrest Warrant Act is Void – The Decision of the German Federal Constitutional Court of 18 July 2005*, 7 GERMAN LAW JOURNAL 45 ff (2006).

⁷³ See GLOBKE, *supra* note 15, 147.

⁷⁴ For a discussion of human rights protection in “normal” cases, see Rainer Nickel, *Human Rights, and the Public Order – “The Extradition to India” – Decision of the FCC*, 4 GERMAN LAW JOURNAL 1241, 1250 ff (2003), for an Indian example.

⁷⁵ See BVerfGE 113, 273, 323 (dissenting opinion Broß); Globke, *supra* note 15, 269.

⁷⁶ GLOBKE, *supra* note 15, 41f.

⁷⁷ See BVerfGE 73, 339, 376.

⁷⁸ See GLOBKE, *supra* note 15, 272.

rights, which are mandated by the German Constitution for a fair trial by a German court. The courts can establish this by analysing the legal texts and any praxis of the international court.

2. Extradition and the Guilt Principle

For the International Criminal Court in particular, the German courts will have to keep an eye on the developments regarding the guilt principle. Fortunately, the International Criminal Court is doing far better in this respect than the United Nations *ad hoc* tribunals.⁷⁹ Under the Basic Law, the guilt principle requires the judge to establish the actual events of the crime in order to determine the defendant's guilt. Guilty pleas that are accepted without an investigation, even if the guilty plea was probably correct and reflected the actual events of the crime would be irreconcilable with the German understanding of the guilt principle.⁸⁰ The development of customary law on criminal liability, especially concepts like self-defence and duress, need to be monitored. These concepts have a far broader scope of application in German law than they do in international criminal law (or in the common law systems). They are reflections of the guilt principle⁸¹ and are therefore not completely negotiable. The emphasis on weighing conflicting interests before applying these concepts in international criminal law reveals a different approach to the principle of personal guilt. If the personal guilt of the accused were to be discarded in favour of other interests, such a decision could be challenged successfully before the Federal Constitutional Court.

3. Extradition and the Right to a lawful judge

Another problematic point, which derives solely from the Basic Law, is the question of the "right to the lawful judge".⁸² The right to a lawful judge gives everyone the right to have a competent judge for his case fixed in advance, either by the law or the internal regulations of the courts.⁸³ A judge may not be assigned to a special case after the case has been filed.⁸⁴ Courts for

⁷⁹ With regard to the guilt principle, the ICTY jurisprudence in the *Erdemovic* case is highly problematic. For an analysis of this case, see Illan Rua Wall, *Duress International Criminal Law and Literature*, 4 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 724, 725 ff (2006); Kai Ambos, *Remarks on The General Part of International Criminal Law*, 4 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 660, 666 ff (2006), for the importance of a differentiation between justification and excuse.

⁸⁰ For the guilt principle, see Fischer, *supra* note 48, v. §13 Rn. 47 ff.; Ivo Appel, VERFASSUNG UND STRAFE 109 ff (1998).

⁸¹ The guilt principle is a sub-category of the material rule of law (materieller Rechtsstaat); See Sommermann, *supra* note 6, Vol. 2, Art. 20 Rn. 324.

⁸² The right to a lawful judge is a right that developed as a German constitutional tradition; See MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL PROCEDURE 12 f (2012); Classen, *supra* note 55, Art. 101 Rn. 2; Kunig, *supra* note 25, Art. 101 Rn. 1 ff.

⁸³ Classen, *supra* note 55, Art. 101 Rn. 16 f.

⁸⁴ That is the content of the interdiction in Art. 101(1) 1 BL.

particular fields of law, however, are allowed, if they have been established in advance by law.⁸⁵

The International Criminal Court is a court set up for a particular field of law, which is international criminal law. On the other hand, there is always the parallel competence of the German courts, because of the principle of universality that is applicable to international crimes.⁸⁶ German courts may also be competent to try such cases because of the German nationality of an offender. As a result, there always will be double competence, which means that the lawful judge is not fixed in advance.⁸⁷ A lawful judge could be fixed if there were clear criteria for a decision on the competence of the two courts. But the principle of compatibility is rather and probably necessarily vague.⁸⁸ Art. 17 of the ICC Statute refers to situations where the State is unable or unwilling to exercise its jurisdiction. The decision about this question is to be taken by the ICC and cannot be answered in advance, because the criteria technically apply only after a procedure has been initialized.⁸⁹ The German law about the cooperation with the ICC as well provides for a decision on extradition, which is based on a political assessment of the situation.⁹⁰ In light of the right to a lawful judge, this competence has to be interpreted in a restrictive way, if there is to be no violation of the Constitution. To balance the injury done to the right upon extradition, the German authorities would then have to claim extradition to be necessary for the protection of another fundamental principle of the Basic Law.⁹¹ This could be maintaining of international peace, if international peace would be endangered by not cooperating with the International Criminal Court. In any case, the decision would have to be carefully justified.⁹² Realistically, a situation like this will not happen: If the German State obeys the rule of law, an extradition would neither be necessary nor allowed, as Germany would effectively prosecute war criminals. If Germany does not follow the rule of law, there would be no extradition anyway.

⁸⁵ Classen, *supra* note 55, Art. 101 Rn. 59.

⁸⁶ For the principle of universality in a German context, see Ruth Rissing-van Saan, *The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia*, 3 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 381, 384 f (2005).

⁸⁷ See Globke, *supra* note 15, 347.

⁸⁸ The complementarity principle is a consequence of state sovereignty and the principle “*par in parem non habet iudicium*” of public international law; See Sharon Williams/Williams Schabas in TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Art. 17 Rn. 1, 20 (2008).

⁸⁹ See Xavier Philippe, *The principles of universal jurisdiction and complementarity: how do the two principles intermesh?*, 88 INTERNATIONAL REVIEW OF THE RED CROSS 375, 381 (2006); for problems with the application of this principle, see James A. Goldston, *More Candour about Criteria*, 8 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 383 ff (2010).

⁹⁰ See GLOBKE, *supra* note 15, 349.

⁹¹ This is a consequence of the general theory of basic rights; See Starck, *supra* note 6, Vol. 1, Art. 1 Rn. 275.

⁹² See GLOBKE, *supra* note 15, 350.

IV. CONCLUSION

International, and particularly supranational, cooperation in the field of criminal law proves to be more complicated than in most other cases. It involves major infringements of basic rights, and highlights – more clearly than other legal frameworks – the dangers that can lie in the “outsourcing” of competences. That is not to say that cooperation is or should be impossible. Criminal law offers the growing international community a challenge to develop proper ideas on how to develop a rule of law in an international environment. As in the wake of the age of enlightenment, when criminal law was one of the major legal battlefields for limiting state intervention in individual rights,⁹³ it might just play this role again at the international level.

⁹³ See Appel, *Rechtsgüterschutz durch Strafrecht?*, 82 KRITISCHE VIERTELJAHRESSCHRIFT 278, 280 (1999).

