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The Prosecutor General
at the Federal Supreme Court Karlsruhe, April 5, 2007

3 ARP 156/06-2

Re: Criminal Complaint against Donald **Rumsfeld** et al.

Remarks:

A.

1.

On November 30, 2004 (supplemented by a submission on January 29, 2005), attorney Wolfgang Kaleck, in the name of the Center for Constitutional Rights and four Iraqi citizens, lodged a criminal complaint against Donald H. Rumsfeld, former Secretary of Defense of the United States of America, and ten named and additional unnamed persons accused of participating in crimes under the Code of Crimes Against International Law (CCIL). The complaint concerned incidents that had occurred in the period between September 15, 2003 and January 8, 2004 in the prison complex at Abu Ghraib. It was claimed that there were 44 cases of abuse. Prisoners had been beaten and kicked; one prisoner died as a result. In addition, it was claimed that prisoners had been seriously sexually harassed and in one case raped. Prisoners were said to have been stripped completely naked and purposely subjected to degrading treatment and intimidation by the use of dogs. Prisoners were bound for long periods of time in so-called stress positions; they were threatened with "solitary confinement," which was in some cases employed. It was claimed that the acts were committed by members of the U.S. armed forces, civilian employees, and possibly also members of intelligence services, especially the CIA. Some victims had already been abused during their arrest and imprisonment in other places in Iraq. One person was said to have been shot by soldiers.

The complaint accused the indicated persons of criminal liability as civil and military superiors of the direct perpetrators, under Sections 4, 13, 14 CCIL. They gave subordinates instructions on treatment of prisoners that violate international protective rules, among them the UN Torture Convention. Despite awareness of this abuse, it is claimed, no steps were initiated to prevent further violations or to penalize already-committed abuse.

The criminal complaint was not taken up. In a decision of February 10, 2005, the Prosecutor General at the Federal Supreme Court declined to prosecute under Sec. 153f of the StPO (Criminal Procedure Code). A petition for a court decision that was subsequently lodged was declared inadmissible by the Stuttgart State Supreme Court on September 13, 2005.

II.

In a letter of November 14, 2006, Attorney Kaleck once again lodged a criminal complaint in the name and on behalf of a total of 44 organizations and individuals against Donald Rumsfeld, former Secretary of Defense of the United States of America, and 13 individually named U.S. citizens, as well as additional unnamed citizens, on suspicion of violations of Secs. 4, 8, 13 and 14 CCIL and Secs. 211 et seq., 223 et seq., 239 et seq. of the Criminal Code in conjunction with Sec. 6 no. 9 of the Criminal Code in conjunction with the UN Torture Convention and Art. 129 of the Third Geneva Convention on the Treatment of Prisoners of War.

The objects of the complaint are, first of all, events in the prison complex at Abu Ghraib, and second of all, incidents at Guantanamo Bay, Cuba.

1. Where the complaint deals with incidents at the prison complex at Abu Ghraib, these were largely included and described in detail in the submissions of November 30, 2004 and January 29, 2005. In addition to the events described there, the complainants have now supplemented their report with additional incidents, especially those said to have occurred after January 8, 2004. Numerous incidents included in the complaint obviously do not lend themselves to precise classification by time or place. They are based not least upon a report by the International Committee of the Red Cross, internal army reports by the armed forces of the United States of America, and the so-called Schlesinger Report, prepared on behalf of the U.S. Defense Department, as well as the reports of individual complainants in some cases. To more precisely specify the incidents complained of, the complainants translated and included in the complaint excerpts from an internal investigative report by the 205th Military Intelligence Brigade of August 9, 2004 ("Fay-Jones Report")—as in the complaint of November 30, 2004 (using identical words). In addition, several reports, mainly by U.S. human rights organizations, were included as appendices to the complaint.

The abuse of which the indicated persons are accused ranges from prohibition of prayer and intimidation through the use of dogs, to being forced into unpleasant "stress positions" and "longtime standing," to forced nakedness and shaving, sleep deprivation, light deprivation, constant noise and overheating or undercooling; it went as far as cutting off air using water ("water boarding") and sexual and violent physical attacks.

2. In addition, similar incidents were complained of that, according to the complainant, occurred in the US prison camp at Guantanamo Bay. There, too, prisoners are said to have been abused using the aforementioned methods, including being confronted with photos of "scantily clad" women. The incidents complained of are said to have occurred in 2002 and 2003; the prisoner Mohammed al Qahtani is mentioned as a concrete victim. The description of the events is based largely on reports from US authorities and Lieutenant General Randall Marc Schmidt, a member of the US Air Force, who, according to the complainant, made his report to the Army's Inspector General.

3. In addition to unnamed persons directly involved in the incidents described, the complaint includes the individually listed defendants, whom the complainant accuses, depending on their civil or military function, of either planning and legally preparing, ordering or at least tacitly approving, or failing to prevent the stated abuses. They are thus said to be liable under Sec. 8 CCIL, and subsidiarily under Sec. 13 or 14 CCIL, in conjunction with either Sec. 25 or 27 of the Criminal Code. They point specifically to the superior responsibility of some of the accused persons under Sec. 4 CCIL. For incidents from the period before the CCIL went into effect, the accused Gonzales and Addington (and possibly the accused Rumsfeld) are said to be liable under German law under Secs. 21 et seq., 223 et seq., and 239 et seq. of the Criminal Code and should be prosecuted by German authorities.

4. The lodging of a complaint in Germany is justified by the fact that no prosecution of the accused is occurring in the United States of America for the incidents in Iraq and Guantanamo Bay, which allows one to assume a lack of will on the part of the authorities there to carry out criminal investigations against these persons. Only lower-ranking members of the military have been held criminally liable for the events in Iraq, with, in the view of the complainant, far too “minor” punishments or mere disciplinary penalties. In this view, those actually responsible, who planned, ordered, or at least knowingly tolerated and justified the “systematic” abuse of prisoners, have all gone unpunished. The belief that this will not change in the future is based on the Military Commissions Act of October 17, 2006, adopted by the political and military authorities (though described elsewhere in the complaint as inoperative), which changes the War Crimes Act and affects criminal liability. It is said that in the USA, because of a strict understanding of separation of powers, it is not structurally possible to urge prosecuting authorities to initiate investigations. There is no such thing as a proceeding to force criminal prosecution in the United States of America.

Prosecution by the International Criminal Court is not possible, since the USA effectively withdrew its signature to the Rome Statute and has ruled out ratification.

The legal provisions of the Code of Crimes Against International Law, especially the universal jurisdiction principle anchored in Sec. 1, are said to force the German criminal prosecution authorities to initiate an investigation against the defendants. Furthermore, the Federal Republic of Germany is said to be involved itself in many respects in the incidents listed in the complaint. This ranges from the stationing and training of US soldiers later used in Iraq at military bases on German soil, to the (temporary) presence—to be expected in the future as well—of the individual accused persons in Germany and the granting of permission for landing and overflight rights for aircraft taking part in military operations in Iraq, to the training of Iraqi soldiers by German trainers. However, complainants argue that no domestic links are required by law under the CCIL for German jurisdiction to prosecute.

Whether prosecution by German authorities could be feasible or not is a criterion that, complainants argue, is at most relevant in the exercise of discretion by the Prosecutor General under Sec. 153f of the Criminal Procedure Code—that is, in respect of legal

consequences. It is typical of the prosecution of international crimes that states whose members are being prosecuted regularly act uncooperatively. Thus the fact that a request for legal assistance from the USA would likely receive no response cannot be a reason to refrain entirely from investigating. In the instant case, successful investigation could certainly be accomplished in Germany. Thus, the complainants argue, one could gain custody of the defendants through a European arrest warrant, or at least on the basis of the European Extradition Treaty of December 13, 1957, even if they are not present in Germany. Furthermore, witnesses are available, in the persons of Janis Karpinski, David DeBatto, and additional participants in the Iraq war, who are willing to testify to the German authorities regarding the incidents listed.

The complainants argue that Germany must therefore undertake prosecution, as a representative of the international community, to prevent the charged acts from going unpunished.

B.

I.

We decline to initiate proceedings, in accordance with Sec. 153f (1)(1) of the Criminal Procedure Code (StPO). The decision of February 10, 2005, to the extent it involves incidents that are said to have occurred between September 15, 2003 and January 8, 2004 in Iraq, is affirmed.

1. Sec. 153f(1)(1) of the Criminal Procedure Code establishes the authority not to prosecute (Beulke, in Löwe/Rosenberg, StPO, 25th ed., appendix Sec. 153f marginal no. 14). Prosecution can be refused in the case of acts committed abroad, as contained in Sec. 153c(1)(1) and (2) of the Criminal Procedure Code, if a perpetrator is neither present in the country nor can be expected to be present. This is the case here.

a) In the indicated cases, in the absence of a domestic site of effects or action, as defined in Sec. 2 CCIL in conjunction with Sec. 9 of the Criminal Code, we are dealing with acts committed abroad.

aa) In none of the indicated cases did the acts of which the defendants are accused have an effect in Germany, as defined in Sec. 8 et seq. CCIL. It is not apparent that persons affected by the acts described in the complaint were brought from Iraq or Afghanistan via the Federal Republic of Germany to Cuba/Guantanamo, resulting in Germany being a possible “transit location” (see Ambos/Ruegenberg, in Münchener Kommentar, StGB, Sec. 9 marginal no. 23, 24).

bb) Furthermore, there are no factually-grounded indications that the site of any act is located within the country.

It is not clear that the concretely-discussed crimes were prepared in Germany. The mere stationing of US troops is, contrary to the view of the complainant, no more preparation

of the charged war crimes than is the guarding of US military facilities in Germany by German soldiers, making US soldiers available for deployment to Iraq. The same is true of training soldiers for deployment in Iraq. Whether this actually occurred in Germany, and was therefore "deficient" in terms of international humanitarian law, as the complainant claims, need not be determined. Insufficient preparation for care of prisoners of war is also not a part of preparation for the criminal act, as defined in Sec. 8 CCIL. There is no rule of experience regarding the idea that soldiers not sufficiently prepared for acts of war and made aware of the content of the Geneva Conventions will always, or even normally, commit the claimed war crimes. The complainants' claim that US soldiers later deployed to Iraq were informed in Germany that they could ignore the Geneva Conventions is purely speculative. There is no factual evidence of this. The written statement by David DeBatto provided by the complainants, according to which the Geneva Convention rules on interrogation were taught to all new soldiers and officers from the first day of their training on, in fact argues against this claim (see Testimony of Former U. S. Army Counterintelligence Special Agent David DeBatto, previously assigned to the 205th Military Intelligence Brigade in Iraq under Col. Thomas Pappas in 2003, for the German criminal procedure against DOD Donald Rumsfeld and others, p. 3). The granting of overflight rights or permission for stopovers on German soil, to which the complainants also refer, is not criminally-liable preparation of the indicated occurrences—neither those in Guantanamo Bay nor those in Iraq. The same is true of the deployment of German citizens to train Iraqis abroad.

Finally, there is no concrete evidence that orders were given in Germany to independently commit violations of the CCIL or that concepts were designed to apply methods of treating prisoners that contravened the Third Geneva Convention. The mere fact that individual defendants were temporarily stationed at US facilities in the Federal Republic of Germany provides no factually-based evidence that the acts themselves could have had their starting point in Germany.

b) Neither the accused persons nor other possible suspects under the complaint are currently present in the Federal Republic of Germany. Also, they cannot be expected to be present here.

aa) According to the top advisor to the Foreign Law Branch at the headquarters of the US Armed Forces in Europe, none of the persons listed as having German residency in the complaint is stationed in the country or otherwise present here any longer. From his point of view, such presence cannot be expected in the future.

bb) There is also no other concrete evidence that any of the accused or those considered possible suspects in the complaint can be expected to be present here. Such evidence can be ruled out if, as is the case here, data available domestically shows no links or relationships of a professional, personal or family nature in Germany (see Beulke, in Löwe/Rosenberg, StPO, 25th edition, appendix Sec. 153f, marginal no. 16; Wesslau, in Systematischer Kommentar, StPO, Sec. 153f, marginal no. 9). In contrast to the complainants' view, the merely theoretical possibility of entry into Germany or a country in which the accused persons could be sought on the basis of a European or international

arrest warrant is not sufficient. The phrase “to be expected” expresses, even in the negation used in Sec. 153f (1)(1) and (2)(1)(3) of the Code of Criminal Procedure, a standard of probability based on concrete evidence. If we assumed an obligation to prosecute even if the future presence of a foreign suspect merely cannot be ruled out, Sec. 153f(1)(1) and (2)(1)(3) of the StPO would be meaningless in most cases, since “preliminary investigation” of the present and future travels of people living abroad promises little success. It would not then be possible to achieve Sec. 153f(1)(1)’s purpose of avoiding fruitless investigative work in cases that exhibit no domestic links and therefore have little chance of successful investigation (see Beulke, in Löwe/Rosenberg, StPO, 25th ed., appendix Sec. 153f, marginal no. 5).

cc) Former Brigadier General Janis Karpinski, who according to the legal representative of the complainant was the top commander at the Abu Ghraib prison and sixteen other Iraqi detention centers from May 2003 to early 2004 and who is willing to testify in Germany as a witness before German investigative authorities, was not included as a suspect and cannot be considered a suspect, at least not according to the complaint.

According to the complainant and to a written “affidavit” included as an appendix to one of the complaints, Janis Karpinski was not constantly, but only temporarily, present at Abu Ghraib. She only became aware of the abuse in 2004, when investigations into the incidents had already been initiated and command authority over the Abu Ghraib prison facility had been “transferred” de facto to an officer of military intelligence. Once she became aware of the accusations of abuse at Abu Ghraib, it is said that she was refused contact to the soldiers serving at Abu Ghraib, with the explanation that they were no longer under her command. Insufficient factual evidence is available that would contradict this assertion by the complainant and instead justify an initial suspicion of liability for Janis Karpinski for a crime under Secs. 6 et. seq. (possible in conjunction with Sec. 4) CCIL. Whether Karpinski’s military function, given the assertion, could support suspicion of a violation of the duty of supervision (Sec. 13 CCIL) requires no decision, as the principle of universal jurisdiction in Sec. 1 CCIL does not apply to this offense and German criminal law would therefore not be applicable to it.

2. The balancing test to be undertaken under Sec. 153f(1)(1) of the Code of Criminal Procedure yields no area in which German investigative authorities can become active.

a) The purpose of Sec. 153f StPO is to take account of the consequences for the German justice system arising from the applicability of universal jurisdiction. The view that the most consistent possible worldwide prosecution of violations of international criminal law should be ensured militates in favor of carrying out investigations. On the other hand, it is necessary to counteract the danger that complainants will seek out certain states as sites of prosecution—like Germany in this case—that have no direct connection with the acts complained of, simply because their criminal law is favorable to international law (so-called forum shopping; Kurth, ZIS 2006, 81, 83; Ambos, NStZ 2006, 434, 435), and in this way force investigative authorities into complicated, but ultimately unsuccessful investigations. Since, under Sec. 1 CCIL, every crime under the Code of Crimes Against International Law is (also) subject to German substantive criminal authority, Sec. 153f

StPO establishes a corrective on the procedural level to combat overburdening through inexpedient investigations (BT-Drs. 14/8524 p. 27; Beulke, in Löwe/Rosenberg, StPO, 25th ed., Sec. 153f marginal no. 5; Eser/Kreicker, Nationale Strafverfolgung völkerrechtlicher Verbrechen, 2003, p. 261). In accordance with this, Sec. 153f (1)(1) StPO allows us to decline to prosecute purely foreign acts in certain cases, regardless of whether another justice system is prepared to prosecute (Weigend, in Gedächtnisschrift für Theo Vogler, p. 197, 209; Ambos, NStZ 2006, 434, 435; Schoreit, in Karlsruher Kommentar, StPO, 5th edition, Sec. 153f marginal no. 3). This is especially so if there is no chance that the accused could actually be brought to court in Germany (Singelnstein/Stolle, ZIS 2006, 118, 119). The exercise of discretion is to be oriented towards this purpose. The view of the complainant that the Federal Republic of Germany must act as a representative of the "international community" and therefore at least take up investigations is thus mistaken.

b) No circumstances are present that could justify beginning an investigation despite the presence of the conditions of Sec. 153f (1)(1) StPO. They would only exist if significant success in resolving the situation could be achieved by investigations by German prosecution authorities, in order to prepare for future prosecution (either in Germany or abroad). But this is not the case.

To resolve possible accusations, investigation on the scene and in the United States of America would be unavoidable. Because the German investigative authorities have no executive powers abroad, this could only occur through legal assistance. But such requests are obviously futile—especially if we consider the legal and security situation in Iraq.

A loss of evidence if German prosecution authorities do not act is not to be feared. This is not changed by the fact that, according to the complainant, the former top commander of the prison at Abu Ghraib, Janis Karpinski, is willing to give testimony to German investigators. It is not apparent that she could make more extensive statements than she would be capable of making to the legal representative of the complainants, with whom she is in contact. The same is true for additional witnesses with whom the legal representative of the complainants has contact, and whom he has agreed to name, along with conveying the essential content of such testimony. The fact that the testimony of Janis Karpinski and possible additional witnesses announced by the complainants were not accorded the same weight in US investigations that the complainants would wish does not force us to take up an investigation in Germany. The view that a German investigative procedure must nevertheless document and systematically consider such testimony, even if a successful investigation in Germany, for the aforementioned reasons, is no more to be expected than the success of a request for legal assistance in interrogating these persons, is mistaken. This would lead to purely symbolic prosecution, which—given the lack of comprehensive possibilities for successful investigation—would necessarily remain one-sided. This, however, was explicitly not the desire of the German legislature, even for violations of international crimes, especially as this would unnecessarily tie up the already limited personnel and financial resources available for prosecution, to the detriment of other prosecutions with greater likelihood of success.

Dealing with possible violations of the prohibition on torture at Guantanamo Bay/Cuba or connected with the Iraq war through criminal law thus remains the task of the justice system of the United States of America, which has been assigned this task and is responsible for it.

II.

The crimes of which the suspects have been accused under Secs. 211 et.seq., 223 et.seq., 239 et.seq. of the Criminal Code in conjunction with Sec. 6 (9) CCIL in conjunction with the UN Torture Convention as well as Art. 129 of the Third Geneva Convention on the Treatment of Prisoners of War are included in the decision to refrain from prosecution under Sec. 153f (1)(1) StPO, to the extent the accusations involve the same acts for which the complainants claim liability under the Code of Crimes Against International Law. Where the suspects are accused of additional crimes occurring before the Code of Crimes Against International Law went into effect, under Secs. 211 et seq., 223 et seq., 239 et seq. of the Criminal Code, there is no prosecutorial responsibility on the part of the Prosecutor General (Secs. 142a(1), 120 of the Constitution of the Courts Act).

Thus no presentation is needed to the Federal Supreme Court to determine an appropriate prosecutor or court under Sec. 13a StPO. There is no space for such a decision.

The complainants have applied for a determination of jurisdiction only “subject to the initiation of a procedure to force prosecution [*Klageerzwingungsverfahren*],” but they naturally did not initiate such a procedure. Therefore, it need not be determined whether such an application would be an unconditional, and therefore ineffective, step (see Meyer-Gossner, StPO, 43rd ed., introduction, marginal no. 118).

Officially, an application is not necessary under Sec. 13a StPO. It may remain an open question whether the accusations against the indicated persons, on the basis of the general presentation in the complaint, even provide a sufficient degree of concreteness and individualization to undertake a determination of jurisdiction under Sec. 13a StPO, as court status cannot be determined for sweepingly-described overall complexes (see BGHR StPO Sec. 13a, areas of application 1 and 2). In any case, it can be seen that, for the crimes indicated, neither a site of effects nor a site of action lies in Germany (see supra, B.II.1.a). Also, the applicability of German law, contrary to the view of the complainants, cannot be based on Sec. 6(9) of the Criminal Code, either in conjunction with the UN Torture Convention or in conjunction with Article 129 of the Third Geneva Convention. Under Sec. 6(9) of the Criminal Code, German criminal law does apply, regardless of the law of the place of commission, to offenses committed abroad that, based on a treaty binding on Germany, must be prosecuted even if they were committed abroad. These international treaties have the effect that existing criminal law can be applied to foreign crimes, even if special criminal laws to implement the treaty do not yet exist or do not entirely comprehend what is to be punished under it (Tröndle/Fischer, StGB, 54th ed., Sec. 6 marginal no. 9). To justify German jurisdiction to prosecute crimes committed by foreigners against foreigners outside the country, however, a legitimizing domestic linkage is necessary (BGH NStZ 1999, 236; BGHR StGB Sec. 6(1) Genocide 2;

leaving it open, BVerfG, NStZ 1999, 240, 243; BGHSt 46, 292, 306 et. seq.). That is lacking here (see supra, B. II.1.b).

By order of
Ritscher
Dr. Schultheis

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