

EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS



The Federal Public Prosecutor at the Federal Court of Justice

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SUMMARY OF CRIMINAL COMPLAINT

Berlin, 17/12/2014

In awareness of the fact that the procedures set out in this criminal complaint are of a high factual and legal complexity and raise many questions that must be examined in more detail over the coming months, the following

criminal complaint

is hereby filed against George Tenet, Donald Rumsfeld, et al.,

encompassing all relevant offences, in particular the war crime of torture under paragraph 8 section 1(3) of the German Code of Crimes against International Law (*Völkerstrafgesetzbuch – VStGB*).

The criminal complaint previously lodged by attorney Wolfgang Kaleck and the Center for Constitutional Rights on 14 November 2006 set out the crimes committed in the context of detainee interrogation – which are described in detail in the recently published US Senate report – and for this and other reasons called for criminal investigations to be launched against former CIA director George Tenet. In the previous complaint the abuses committed by the CIA in the context of a wider and systematic program of torture were assessed and legally classified

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as war crimes.

Further to this earlier submission we are once again requesting that investigations be carried out and that at the very least a monitoring process be set up with regard to the war crimes, in particular torture, committed by state agents of the United States of America, in particular the Central Intelligence Agency (CIA) as well as the Department of Defense. Monitoring proceedings are already advisable in light of the parallel preliminary examinations of the Office of the Prosecutor at the International Criminal Court in The Hague. There is extensive evidence showing that after 11 September 2001 a state organized program of torture of terrorism suspects and detainees encompassing what was known as “enhanced interrogation methods” was authorized at the highest level and carried out in various places around the world, including at detention centers in Guantanamo, Afghanistan, Iraq, Lithuania, Poland, Romania and Thailand.

New evidence on the crimes in question was revealed recently in extracts from the report of the US Senate Select Committee on Intelligence published on 9 December 2014 which examined the detention and interrogation methods of the CIA as part of the fight against international terrorism after 2001 (Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program). The Senate Committee comes to the conclusion that the CIA committed torture on a wide scale. The report dedicates one section to the case of German citizen Khaled El Masri and finds that Mr. El Masri was arrested solely due to mistake made in relation to his name. The report also finds that after discovering the error, the CIA Director at the time explicitly refused to take further action against those responsible.

(More information on presence of suspects and ECCHR's experience follows...)

I. Facts of the case

In response to the attacks in Washington and New York on 11 September 2001, the USA developed and applied so-called “enhanced interrogation techniques” for detainees held in detention centers abroad in order to obtain information on the perpetrators of the attacks and on any further planned attacks.

The enhanced interrogation techniques were discussed, decided on and adopted at the highest level in Washington. The White House and numerous departments were aware of the use of enhanced interrogation methods by the CIA. The Department of Justice approved the use of the methods in summer 2002. An internal review by the Inspector General of the CIA stated back in 2004 that there had been an exchange between the CIA and the National Security Council on the enhanced interrogation methods in summer of 2002 (see CIA Inspector General’s Special Review: Counterterrorism, Detention and Interrogation Activities, September 2001 – October 2003, 7 May 2004, published on 24 August 2009, http://luxmedia.com.edgesuite.net/aclu/IG_Report.pdf). Members of the National Security Council include the President, the Vice President, the Secretary of Defense, the Chairman of the Joint Chiefs of Staff and the Director of National Intelligence. In 2003 the CIA once again informed this group about the use of the enhanced interrogation techniques (see the report of

the US Senate Committee on Intelligence, p. 115 et seq.). The CIA used enhanced interrogation methods in CIA-controlled detention centers in Afghanistan, Lithuania, Poland, Romania and Thailand. This list of locations is non-exhaustive.

(More information on recent publications, torture techniques and on single cases such as El Masri follows...)

II. Legal evaluation

Torture as a war crime

The enhanced interrogation techniques fulfil the requisite elements of the crime of torture as a war crime in accordance with paragraph 8 section 1(3) of the VStGB. That the elements of the crime of torture are given in this case was confirmed most recently by the US Senate Committee on Intelligence.

(Sources are given)

Some survivors of torture are resident in Germany and could be named for the purposes of giving evidence.

The torture occurred in the context of a number of armed conflicts. It relates partly to the USA's armed conflict in Afghanistan against the Taliban, which began with numerous airstrikes on targets in Afghanistan on 7 October 2001 and which has been ongoing ever since. The Annual Report on Preliminary Examination Activities 2014 by the Office of the Prosecutor of the International Criminal Court indicates that they have been carrying out preliminary examinations on Afghanistan since 2007 as Afghanistan is a state party to the Court's statute and there is an ongoing armed conflict in the country. Prosecutors in The Hague are looking in particular at the issue of torture and detainee abuse by government troops and US military forces; the extent and the legal approach remain undefined. The Office of the Prosecutor explicitly states their plans to continue with their examinations and examine the admissibility of potential cases under Article 15 (3) of the Statute.

On this see Office of the Prosecutor of the International Criminal Court, Report on Preliminary Examination 2014, 2 December 2014, p. 18 et seq.; German Federal Public Prosecutor, note on the closing of proceedings of 16 April 2010 (case "Kunduz").

The case also relates to the armed conflict of the USA and its allies in Iraq, which began with strikes in Iraq on 20 March 2003 and concluded with the end of the United Nations mandate for multinational troops on 31 December 2008.

On this see Office of the Prosecutor of the International Criminal Court, Report on Preliminary Examination 2014, 2 December 2014, p. 11 et seq., paras. 46-48.

The USA alongside the UK has in both conflicts – in Afghanistan and Iraq – established and used detention centers in order to apply enhanced interrogation techniques. This applies to the Abu Ghraib prison in Iraq, as detailed extensively in the criminal complaint of 14 November

2006. It also concerns the establishment of the Bagram Air Base, which is situated circa 60km north of Kabul, Afghanistan. Enhanced interrogation techniques were used in both locations, both by members of military forces and by CIA agents. Khaled El Masri was abducted and taken to a detention center in Afghanistan known as the “Salt Pit” (see the ECHR decision in *Masri v Macedonia*) and over a period of months was subjected to torture by CIA agents applying the enhanced interrogation methods. In this way the USA made use of detention centers outside its own territory and in a region of ongoing conflict to apply the enhanced interrogation techniques. By carrying out these acts at locations within conflict regions the CIA and the Department of Defense was able to avoid more comprehensive political and court oversight within the USA or by a third party state. The perpetrators intentionally exploited the armed conflict to commit crimes such as torture. For this reason all instances of torture in Iraqi and Afghani detention centers are linked to the armed conflict underway in these regions at the time, even if the detainees were not apprehended within the territorial limits of the region of armed conflict and were only brought within the conflict zone after their arrest. Through this territorial and functional link to the armed conflict the abuse can be seen as related to the conflict according to the interpretation of the Office of the Prosecutor of the International Criminal Court.

Individual criminal responsibility

This criminal complaint is directed against perpetrators in senior positions within the Department of Defense, the Department of Justice, the CIA and other departments. Further submissions on individual suspects will be submitted in early 2015.

The torture in question in this complaint resulted from the use of so-called “enhanced interrogation techniques” which were used by military forces as well as CIA agents in various detention centers around the world. The investigation should also examine the contribution of the lawyers as well as the medical staff and psychologists to the development of the enhanced techniques and the legal justification of their application.

The facts surrounding this case indicate that there are grounds for initial suspicion against a range of individuals. Various potential perpetrator groups will be outlined and presented shortly. Further information on individual suspects could be gathered through monitoring proceedings.

(It follows a more detailed list of perpetrator groups and units as well as suspects.)

(It follows a part on jurisdiction and prosecutorial discretion, including failure of US to conduct own prosecutions.)

Monitoring proceedings would allow immediate action to be taken in the event that a suspect enters German territory. The same applies to responding to requests for legal assistance from other states or from the International Criminal Court for their own proceedings against suspected perpetrators of the crimes outlined above.

This submission will be followed by a comprehensive opinion on the details of individual suspects and suspect groups as well as an assessment of the legal issues.



Wolfgang Kaleck

Attorney and as ECCHR General Secretary on behalf of ECCHR as well on the explicit behalf of the following members of ECCHR's Advisory Board and Council:

Michael Ratner, President Emeritus of the Center for Constitutional Rights (CCR), New York

Dieter Hummel, attorney, *dka Rechtsanwälte Fachanwälte*, Berlin

Alejandra Ancheita, attorney, founder and director of ProDESC (Project of Economic, Cultural, and Social Rights), Mexico City, 2014 winner of the Martin Ennals Award for Human Rights Defenders

Florian Jeßberger, Professor of Criminal Law, Criminal Procedure, International Criminal Law and Contemporary Legal History at the University of Hamburg

Manfred Nowak, founder and academic director of the Ludwig Boltzmann Institute of Human Rights in Vienna and former UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Annemie Schaus, attorney and Professor for International and Public Law at the Centre for Public Law (Centre de droit public) at the Université libre de Bruxelles (ULB).

Peter Weiss, Vice President of the Center for Constitutional Rights, New York

This criminal complaint is also signed by the Center for Constitutional Rights in New York, represented by its Legal Director Baher Azmy. The Center for Constitutional Rights will also make its own separate written submission to the Federal Prosecution at a later stage.