Below is a translation into English of the decision by the Prosecutor in Germany to dismiss the complaint against Rumsfeld et. al. filed by the Center for Constitutional Rights.

(original German file: http://www.ccr-ny.org/v2/legal/september_11th/docs/German_Prosecutors_Decision2_10_05.pdf)

The General Prosecuting Attorney
of the Federal Court

To:

Wolfgang Kaleck, Attorney
Immanuelkirchstraße 3-4
10405 Berlin

File No.	Staff person	Date
3 ARP 207 / 04 2	StA Lantz	February 10 2005

Re: Complaint Against Donald Rumsfeld et al.

Reference: Your complaint of November 29, 2004 with addenda of January 29, 2005

Attachments: A notarized copy of the memorandum of February 10, 2005

Dear Attorney,

I have examined the complaint you filed with your plea of November 29, 2004 and with your added communication of January 29, 2005. For the reasons laid out in the attached memorandum I have dismissed the complaint.

Sincerely Yours

Nehm

NOTARIZED COPY:

RE: Criminal Complaint Against Donald Rumsfeld et al.

MEMORANDUM:

A.

On November 30, 2004 Attorney Wolfgang Kaleck filed a criminal complaint in the name of:

1. The Center for Constitutional Rights, represented by its President Michael Ratner and Vice President Peter Weiss, 666 Broadway, New York, NY 10014, USA.

as well as of the Iraqi citizens:

2. Ahmed Shehab Ahmed
3. Ahmed Hassan Mahawis Derweesh
4. Faisal Abdulla Abdullatif
5. Ahmed Salih Nouh

The complaint supplemented on January 29, 2005 is directed against Donald H. Rumsfeld, Secretary of Defense of the United States of America and against 10 named persons and further unnamed persons, who are accused of participating in crimes according to the German Code of Crimes Against International Law [CCAIL]. The following occurrences are involved:

1. In the period between September 15, 2003 and January 8, 2004, 44 cases of mistreatment are said to have arisen in the prison complex of Abu Ghraib in Iraq. It is claimed that some prisoners were beaten and tread upon by several persons acting in collaboration. In one case a prisoner died. In addition, it is charged that detainees were, in a massive way, sexually assaulted and, in one case, raped. Prisoners were completely stripped of clothing. Their clothing is said to have been removed and moreover they were in other ways treated in a consciously degrading way. Dogs were allegedly set on them for purposes of

intimidation. Prisoners were said to be shackled for long periods in so-called stressful positions, prisoners were in part threatened with solitary confinement, which was in somce cases carried out.

The deeds were committed by personnel of the 800th U.S. Military Police Brigade deployed in Abu Ghraib and especially of the 320th Military Police Bataillon, which is subordinate to it members of the 205th U.S. Military Intelligence Brigade, civilian co-workers, and possibly also by members of the intelligence services.

2. Plaintiffs 2 through 5 are said to have been likewise mistreated and exposed to assault during their detention in other places in Iraq. They are alleged to have been beaten. At times they were stripped of clothing and denied necessary medical treatment as well as sleep and food. In these cases there is also allegation of sexual assault. In three cases the perpetrators pilfered objects of value during the detention. The 80-year-old disabled father of Ahmed Shebab Ahmed is said to have been shot by soldiers.

The complaint accuses the defendants of making themselves culpable, according to §§ 4, 13, 14 CCAIL, as civilian and military superiors of those acting directly. They are alleged to have issued instructions to subordinates on the treatment of prisoners, which were breaches of protective provisions in effect internationally, for instance in the UN Convention on Torture. Despite knowledge of the mistreatments they are alleged not to have taken any steps to prevent further violations on the part of their subordinates and to penalize already occurring mistreatment.

B.

The criminal complaint has been dismissed.

There is no need to examine whether the material presented by the plaintiffs qualifies for the establishment of initial suspicion justifying the introduction of an investigative procedure. Similarly, there is no need to examine the extent to which immunity provisions speak against the introduction of an investigative procedure. The necessary deliberations according to the requirements of § 153 f StPO [German Criminal Trial Procedure] have led to the conclusion that there is no room for an activation of German investigative authorities in consideration of the principle of subsidiarity.

It is true that the world law principle (§ 1 CCAIL) holds for the crimes subjected to the threat

of punishment in the CCAIL. Accordingly, the application of the CCAIL requires no connection to domestic issues. However, the world law principle does not automatically legitimize unlimited criminal prosecution. The aim of the CCAIL is to close gaps in punishability and criminal prosecution. This must, however, occur in the framework of non-interference in the affairs of foreign countries. This also follows from Article 17 of the Statute of the International Criminal Court [ICC], which has to be seen in the context of provisions of the CCAIL. Accordingly, the jurisdiction of the ICC is subisdiary in respect to the competence of the state of the perpetrator or of the perpetrated act; the ICC can only be active if the nation-states first called upon to adjudicate are unwilling or unable to prosecute. For the same reasons a third state cannot examine the legal practice of foreign countries according to its own standards, or correct or replace it in specific cases.

The national legislature of the Federal Republic of Germany has not made allowances for subsidiarity through the retraction of the fundamental in favor of the principle of world law but through the differentiated procedural provision of § 153 f Criminal Trial Procedure created simultaneously with the CCAIL (BT-Drucks. 14/8524 Draft law for the introduction of the CCAIL p. 36; Kreß, *ZStW* [E.C.: a jurisprudence journal] 114 (2002), p. 845 f.). For the interpretation and application of § 153 f Criminal Trial Procedure the ICC Statute is the guide. Accordingly, the obligation to prosecute crimes is provided for in the CCAIL in the context of a certain hierarchy:

In the first place, the state of the scene of the crime and the state whose nationals the perpetrators and victims are, as well as a competent international court, are called upon to prosecute (Weigend, *Gedächtnisschrift für Theo Vogler*, p. 209). The jurisdiction of uninvolved third countries is, on the other hand, to be understood as an initial intercepting jurisdiction, which should avoid impunity, yet not inappropriately push aside the primarily competent jurisdictions (BT-Drucks. 14/8524 Draft law for the introduction of the CCAIL pp. 37, 38; Werle/Jeßberger, *JZ* [“Journal of Jurisprudence”] 2002, pp. 725, 733; Beulke in Löwe-Rosenberg StPO [Criminal Trial Procedure], 25th edition, Supplement 2003, § 153 f, Rn. 6; also thus the Statute of the ICC, Preamble, BGB I, II [German Civil Code] 2000 p. 1394; Schoreit in Karlsruher Kommentar zur StPO [Criminal Trial Procedure], 5th edition, § 153 f, Rn. 2). Only if criminal prosecution by primarily competent states, or an international court, is not ensured or cannot be ensured, for instance if the perpetrator has removed himself from criminal prosecution by fleeing abroad, is the interception-jurisdiction of German prsoecutorial authorities activated. This hierarchy is justified by the special interests of the home country of the perpetrator and victim in criminal prosecution, as well as by the usually greater proximity of these first-to-be-called-upon jurisdictions to the evidence (BT-

Drucks. 14/8524 draft law for the introduction of the CCAIL p. 37; Weigend, Gedächtnisschrift für Leo Vogler, p. 209).

The conditions of § 153 f StPO [CCAIL] are present. The primary jursidiction for criminal prosecution according to these principles is the United States of America as the home country of the defendants.

The described deeds were committed outside the territorial limits of the Criminal Trial Procedure in the sense of § 153 f StPO [Criminal Trial Procedure]. The Federal Republic of Germany is in this respect, even taking into consideration the arguments of the plaintiff, neither the scene of the deed nor of its completion. (§ 9 German Criminal Code).

There are no indications that a German was involved as a perpetrator of the described acts (§ 153 f para. 1 sentence 1, para. 2 sentence 1 No. 1 Criminal Trial Procedure) or that a German citizen was a victim of the described acts (§ 153 para. 2 sentence 1 no. 2 Criminal Trial Procedure).

The requirements for a prosecution elsewhere (§ 153 f para. 2 sentence 1 No. 1 Criminal Trial Procedure) is fulfilled. The concept of prosecution of the deed ought to be constructed on the basis of the whole complex and not in relation to an individual alleged criminal and his special part in the deed. According to the wording of the prescription, what is decisive is the occurrence as a totality. Such a construction of the concept of deed follows from the Statute of Rome, whose implementation is the purpose of the CCAIL. Art. 14 para 1 of the Statute expressly refers to the concept of a “situation ... in which there is an appearance that one or several crimes were committed, which lie within the jurisdiction of the court ...” [E.C.: of course, the official English version of this text should be used]. In what order and with what means the state with prior jurisdiction carries out an investigation of individuals in the framework of a whole complex, must be left up to this state according to the principle of subsidiarity. An alternative only obtains if the investigation is being carried out only for the sake of appearances or without a serious intent to prosecute (see BT-Drucks. 14/8524 draft law for the introduction of the CCAIL p. 38).

In this instance there are no indications that the authorities and courts of the United States of America are refraining, or would refrain, from penal measures as regards the violations described in the complaint. Thus, several proceedings have already been conducted against participants, even against members of the 800th Military Police Brigade. The means used, and the timeframe envisioned, for the investigation of further possible suspects in connection

with the violations described in the complaint must therefore be left to the judicial authorities of the United States of America.

Therefore, for the circumstances laid out in the complaint the following obtains:

As far as the indicated persons do not visit the territory in which the CCAIL has effect, and if such a sojourn is also not expected, the requirements of § 153 f para 1 sent. 1 Criminal Trial Procedure holds (see Weigend, *Gedächtnisschrift für Theo Vogler*, p. 209).

In the case of the indicated persons who are residing in the Federal Republic of Germany or who are expected to visit it, the complaint is dismissed following § 153 f para. 2 sent. 2 Criminal Trial Procedure.

The defendants who are, according to the plaintiffs, residing in Germany, are stationed, as members of the US Army, in their bases in Germany. They are thus subject, even in view of their residence [in Germany], to a special duty to obey in relation to their employers. As the prosecuting state, the United States of America therefore has unlimited access to these persons. Therefore the latter even if they are stationed in Germany are at the disposal of American jurisdiction just as if they were residing in the United States. According to the principle of world law, the punishability gap does not exist, so that there is no room for the initial jurisdiction of the German prosecutorial authorities. This also follows from § 153 f para 2 sent. 2 Criminal Trial Procedure. According to it, abstention from prosecution can occur if the extradition to the prosecuting state is permissible and intended. This can only obtain if the prosecuting state has, as in this case, unlimited access to a suspect and there is consequently no need for extradition.

The same holds in the case of an expected temporally limited sojourn in the territory of application of the CCAIL if investigations of the whole complex are being carried out in the privileged state. In such a case, the defendants would still not be protected from criminal prosecution by the judiciary of the United States.

Indications that could justify the introduction of investigations despite the presence of the required conditions of § 153 f Criminal Trial Procedure are not present. Nevertheless, according to the principle of subsidiarity, those measures could be taken, which could not be taken by the US authorities themselves who are primarily competent to investigate the occurrences for reasons of actual or legal obstacles. Such obstacles are not apparent here.

Signed

Nehm

Notarized .....