

US group files war crimes complaint in Germany against Rumsfeld

US defence secretary may skip Munich conference

By Justus Leicht
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US Defence Secretary Donald Rumsfeld may be forced to skip a major international security conference in Munich next month as a result of a legal action charging him with war crimes.

The American human rights organisation Center for Constitutional Rights (CCR) and four Iraqis who were tortured by American military personnel in Iraq have brought legal proceedings in Germany against Rumsfeld. Also named are former CIA Director George Tenet; the deputy secretary for the intelligence at the US Defence Department, Stephen Cambone; and US generals Robert Sanchez, Walter Wojdakowski, Geoffrey Miller and Janis Karpinski; as well as military officers Jerry Phillabaum, Thomas Pappas and Stephen Jordan. All are charged with war crimes.

The lawsuit begins at the point in the chain of command where the US courts left off: with the commanders of the military units that carried out atrocities at Abu Ghraib and other prisons. The document finally ends with Donald Rumsfeld, who was recently granted a second term in office as defence secretary by President George W. Bush.

The indictment drawn up by the Berlin-based lawyer Wolfgang Kaleck maintains that what the Pentagon euphemistically called “abuse” amounted to “torture and other grave violations of humanitarian law.” It charges that the practices involved were “not the work of a handful of ‘rogue’ individuals,” but “were widespread among the United States (US) military and had been, and were continuing to be applied in Afghanistan, Guantanamo, Iraq and detention centres located in other countries, both known and secret. The practices involved were not only directly or indirectly condoned by officials at the highest levels of the US government, but also condoned by incorrect and unlawful legal advice emanating from civilian and military government lawyers.”

The 170-page document meticulously details the responsibility of those named for the torture and abuse of Iraqis and substantiates its claims with extensive references taken from official US documents, newspaper reports and testimony from eyewitnesses. ([Click here to read the document](#))

The CCR explained that it filed its case in Germany, because there is no prospect that the accused will be charged in either the US or Iraq. The German Statutes of Criminal Law (VStGB) introduced in 2002 makes it possible—at least theoretically—to prosecute in Germany those accused of war crimes and crimes against humanity, even if such crimes were committed abroad and no German citizens were involved.

The CCR document directly links the torture at Abu Ghraib with the illegal character of the Iraq war itself. By studying what led up to Abu Ghraib, it states, we learn “with what methods the war on terror has been carried on since September 11, 2001. The right to war (*jus ad bellum*) is reformulated and relied on in the Iraq war, while international law restraints, in particular those of the United Nations Charter, no longer play a role. In addition, humanitarian law and other legal restraints are

increasingly disregarded.”

The document then quotes a well-known passage from the German expert in constitutional law, Carl Schmitt, who provided legal justifications for the Nazi dictatorship: “ ‘He who decides on the state of emergency is the sovereign.’ In a time in which a permanent state of emergency is being proclaimed, this dictum increasingly determines political everyday life.”

It is in this context that the criminal complaint assesses the decisive significance of torture: “It took many decades to arrive at the universal, ethical, theoretical and legal recognition of the prohibition of torture. Nevertheless, torture is still commonplace in dozens of states. The fight against torture, whether in each concrete case or in abstract terms, is thus of crucial significance for the future of a humane and civilised humanity. Fighting against torture means being decisive in acting against its propagation and insisting on the punishment of those directly responsible for torture as well as those who organise the practice of torture. This is the context in which this complaint should be understood.”

The document cites as precedent the arguments of Robert Jackson, who was the chief American prosecutor at the Nuremberg trial of the Nazi war criminals. In his opening statement to the international tribunal, Jackson stated on November 21, 1945: “Let me make clear that while this law is first applied against German aggressors, the law, if it is to serve a useful purpose, must condemn aggression by any other nations, including those which sit here now in judgement. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law.”

The document admits that those attempting to try the US defence secretary in the Federal Republic of Germany “will be accused of having lost touch with reality.” It counters, however, that international law has experienced an “explosive development” in recent years. It cites as precedent cases brought by the torture victims of South American dictatorships, the tribunals established following the war in Yugoslavia and the massacres in Rwanda, and the setting up of the International Criminal Court in 2002, as well as the still ongoing legal proceedings against Chile’s ex-dictator Augusto Pinochet.

It invokes the principle of upholding international law that was used to prosecute German and Japanese war criminals after the Second World War for war crimes and the crime of carrying out an illegal war of aggression. On these grounds, it states, “that the international community is fundamentally authorised to prosecute and punish such crimes, irrespective of where, by whom or against whom the act was committed.” German legal statutes expressly recognise this principle.

The lawsuit deals with the cases of torture at Abu Ghraib, as follows: “The legal assessment of these incidents provides a clear definition of war crimes within the meaning of § 8 of the CCIL [German Code of Crimes

against International Law] and of the relevant international rules. The American Secretary of Defence Donald H. Rumsfeld and the other nine accused have either by commission or by omission committed war crimes. According to the criteria of Responsibility of Those in Authority they are to be prosecuted.”

Under the heading “The Road from 9/11 to Abu Ghraib,” the document describes in detail how, following the terror attacks of September 11, the methods which would later be used at Abu Ghraib were tested out in the war in Afghanistan and at the Guantanamo Bay prison camp, with US government representatives providing a pseudo-legal cover.

Citing internal memoranda released in March 2004, the document describes the debate inside the American government over how to deal with prisoners.

Just a few days before the first batch of prisoners from Afghanistan arrived at Guantanamo, Rumsfeld had declared that the Geneva Convention was only valid to the extent that it suited the American government. He based his assertion on a January 9, 2002, report drawn up by John C. Yoo and Robert J. Delahunty, both at the time attached to the Office of Legal Counsel at the US Justice Department. (Yoo is currently professor of jurisprudence at the University of California at Berkeley.) In this document, they advised William J. Haynes II, the General Counsel of the Department of Defence, to declare that the Geneva Conventions did not apply to captured members of the Al Qaeda network and the Taliban militia.

A few months later, a memorandum that has since become notorious was sent to Bush’s attorney general-designate (at that time his White House counsel) Alberto Gonzales. It swept aside the commonly understood definition of torture, asserting that any interrogation methods were justified as long as they did not “result in death, in the failure of an organ, or in permanent damage to important bodily functions.”

After further discussions, Rumsfeld finalised in April 2002 a “list of techniques for interrogation officers to break resistance.” The list detailed a series of psychological methods, as well as “negative change of scene—transferring the detainee from the normal interrogation environment to a less pleasant one,” and “exerting influence through food” (i.e., deprivation of regular meals). The removal of all materials, including the Koran, was to be allowed. Stress positions were not mentioned, but using sleep adjustment—“altering the prisoner’s sleeping times, e.g., shifting the rhythm of sleep cycles from night-time to daytime”—was.

At the end of 2002 and beginning of 2003, Major-General Geoffrey Miller, commander of the Joint Task Force-Guantanamo, introduced a series of methods for wearing down the Guantanamo prisoners in order to pry loose useful intelligence. These included sleep deprivation, extended isolation, simulated drowning, and being forced to stand and lie in stress positions. At a subsequent Senate hearing, it became known that Secretary of Defence Rumsfeld had approved these tactics, including exposure to extremely hot and cold temperatures, sleep deprivation, and maintaining stress positions for long periods.

In addition, the document cites a report published by the US Army in September 2004, which stated that a total of 54 detainee deaths in Afghanistan and Iraq were under investigation. A number of concrete examples are listed in which Iraqi prisoners were killed by US soldiers through abuse and torture administered in the course of interrogations.

Following the outbreak of the Iraq war, methods developed in Afghanistan and Guantanamo were transferred to Iraq. Appended to the complaint are a number of official documents, including the results of internal investigations into various military units in Iraq as well as the findings of the International Committee of the Red Cross (ICRC).

Extensive quotes are taken from the “Fay/Jones-report,” an internal US Army investigation. It describes a number of shocking cases in which soldiers “poked into” the wounds of prisoners in order to torment them,

threatened young prisoners with aggressive dogs and then placed bets on which of the youth would soil his pants. In addition to sexual humiliations and abuse, prisoners were viciously beaten at every available opportunity. A number of soldiers who witnessed such atrocities told investigators that the senior military intelligence and military police commanders had either personally ordered the mistreatment or were later informed and did nothing about the practices.

The second half of the document provides detailed case histories implicating individual military officers named in the indictment.

Lieutenant General Ricardo Sanchez, commanding general of ground forces in Iraq, for example, provided memoranda for interrogations permitting the “use of military dogs, temperature extremes, reversed sleep patterns, sensory deprivation, stress positions, shackling, forcing detainees to strip, and manipulation of diets.” In addition, he allowed solitary confinement for periods in excess of 30 days. Upon receiving reports of torture and abuse that went beyond even these guidelines (e.g., through the ICRC), he did nothing to stop such practices.

Another Pentagon report cited in the indictment states that “Sanchez and MG [Walter] Wojdakowski failed to ensure proper staff oversight of detention and interrogation operations.” In reality, they encouraged the torturers. The Pentagon report states, “With the active insurgency in Iraq, pressure was placed on the interrogators to produce ‘actionable’ intelligence. With lives at stake, senior leaders expressed, forcibly at times, their needs for better intelligence.” Sanchez’s deputy Wojdakowski bears equal responsibility for sanctioning torture practices, according to the indictment.

Brigadier General Janis Karpinski, then commander of the military police unit at Abu Ghraib, visited the prison nearly every two days and was also aware of the ICRC report. A number of official reports and even comments by Sanchez himself make clear that no measures were undertaken to ensure respect of the Geneva Conventions.

According to the Armed Services Committee of the US Senate, then-CIA Director Tenet saw to it that dozens of prisoners “disappeared,” taken to secret bases and held incommunicado. In many cases, the relatives of those involved and international organisations only knew that these people had been arrested. In several cases, it is known that prisoners held by the CIA died as a result of their abuse. The report refers to investigation documents and articles in newspapers and magazines such as the *New York Times*, *Wall Street Journal*, *Washington Post* and *New Yorker*.

It has since been revealed that the CIA has transferred prisoners to countries such as Egypt, Syria and Saudi Arabia, all notorious for their use of torture. Accompanying the prisoners is a list of questions drawn up by the CIA. On occasion, the “interrogation” is subject to observation by a CIA agent. Tenet was aware of such practices over a period of years and did nothing to stop them.

Finally, at the end of the chain of command, was Donald Rumsfeld. The only reason why George W. Bush does not appear on the charge sheet is because as an incumbent president he enjoys immunity from prosecution.

Rumsfeld agreed to using torture, including the use of dogs against prisoners, sleep deprivation, hours of so-called “stress positions,” the stripping of prisoners and exposure to extremes of heat and cold. Official investigation reports reveal that memoranda from the Pentagon demanded additional intelligence and more aggressive methods, resulting in ever more brutal interrogation techniques.

Rumsfeld personally ordered that the “disappearance” of individual prisoners be kept secret. At the beginning of 2002, he declared that alleged members of the Taliban and Al Qaida were “unlawful combatants” and therefore were not entitled to the rights provided by the Geneva Convention. Even following revelations of widespread abuse of prisoners in Abu Ghraib, he continued to maintain that the Geneva Convention “did not apply precisely” in Iraq. In response to the scandal,

he established a working group to study interrogation techniques. The working group played a significant role in relaxing the definition of torture.

Rumsfeld and his department thereby created the climate in which torture could be carried out. He was also informed of what was taking place by the ICRC and human rights organisations but did nothing halt the abuses.

The lawsuit emphasises that there are no indications that those responsible for such crimes will be legally held to account for their actions in Iraq or the US. The same applies to the International Court of Law. This is why the complaint has been lodged in Germany, on the basis of German legal statutes.

The authors of the suit make clear that, according to German law, the authorities in Germany are obliged to take up and pursue the case. Sanchez, Pappas and Wojdakowski are regular visitors to Germany in the course of their official duties. It is also expected that the remaining accused persons will also visit Germany at some point.

Despite differences over the Iraq war, there is still significant military co-operation between the US and Germany. Currently, the German government has deployed 1,250 soldiers as part of the International Security Assistance Forces (ISAF) active in Afghanistan. It is true that Germany has not been directly involved in the Iraq war through deployments of its own troops. However, US military airfields in Germany are the hub for air traffic between the US and the Middle East. The US military infrastructure in Germany performs an important function in relation to the Iraq war. Germany has granted the United States overflight rights, as well as the use of the whole military infrastructure found on German soil. This applies to both the storage and the onward transport of war materiel as well as the transport of troops and their stopovers in Germany.

US command facilities, such as US-EUCOM in Stuttgart-Vaihingen, along with communication and infrastructure facilities, were used to launch the invasion of Iraq and are still being used in combating the uprising there. Moreover, there are approximately 2,600 German Federal Army soldiers deployed on a daily basis to guard more than 50 US Army facilities. As a result, reserves of US soldiers are freed up to take part in the killing in Iraq. A German army unit is currently active in the United Arab Emirates for the purpose of training 140 Iraqi military personnel as drivers and mechanics.

Leaving aside direct involvement, Germany is active in manifold ways in the conduct of the war by the US-led occupation forces. According to German law, such collaboration brings with it the responsibility to respect humanitarian laws in the course of the Iraq war.

The legal proceedings—and Rumsfeld’s apparent cancellation of his planned attendance at this year’s Munich Security Conference—are an embarrassment for the German government. Although it rejected the Iraq war as detrimental to its own interests in the region, the government is strictly opposed to an action that would indict the US administration for war crimes. Instead it is hoping that the German legal system will “see sense,” accept political reality and reject the indictment.

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