

## German Prosecutor Won't Pursue Rumsfeld Case

Posted by

Thursday, 10 February 2005 12:41 - Last Updated Thursday, 10 February 2005 12:41

---

Germany's federal prosecutor says the allegations that United States Defense Secretary of Defense Donald Rumsfeld and other top Washington brass were responsible for Abu Ghraib must be investigated in the US, not under German war crimes laws. The decision deals a blow to the American group that brought the case, but it could ease German-American tensions. *by*

**Daryl Lindsey**

*in Berlin*

? SPIEGEL ONLINE 2005

Germany's federal prosecutor says the allegations that United States Defense Secretary of Defense Donald Rumsfeld and other top Washington brass were responsible for Abu Ghraib must be investigated in the US, not under German war crimes laws. The decision deals a blow to the American group that brought the case, but it could ease German-American tensions.

For more than two months, a legal petition to investigate United States Defense Secretary Donald Rumsfeld on war crimes charges connected to the Abu Ghraib torture scandal threatened to further strain relations between Berlin and Washington, where diplomats have been working overtime to patch up relations lately. The case made headlines again in recent weeks in the run-up to an annual Security Conference in Munich because Rumsfeld had threatened to sit out the meeting if the petition against him wasn't dropped.

On Thursday, Germany's federal prosecutor, Kay Nehm, said his office would not pursue the case. In his statement, Nehm said that German authorities could only pursue the allegations if US authorities refused to do so -- and currently, there is no evidence that they won't. The men accused of torture at Abu Ghraib are all American citizens, none of the victims are German, and the cases should either be tried in the US or the victims' own countries, Nehm's office said.

Rumsfeld left open last week whether he would attend the prestigious conference and attributed his uncertainty to the petition. "It's certainly an issue, as it was in Belgium. It's something that we have to take into consideration," he said.

The conference, officially known as the Munich Conference on Security Policy, could be described as the World Economic Forum of defense issues -- it brings together minister-level defense experts and members of government from around the world. Even without Rumsfeld, infamous for his spirited defense of the Iraq at last year's conference and his sparring with Germany's foreign minister in the run up to the war the year before, Americans will still be well-represented at the event, with speeches by Sens. Joseph Lieberman, Hillary Clinton and John McCain.

### ***Universal jurisdiction***

In November, the New York-based Center for Constitutional Rights (CCR) filed a petition demanding a federal investigation in Germany of the role played by Rumsfeld and other top officials at Abu Ghraib. The case raised considerable attention because CCR is no fly-by-night legal group -- it's the same organization that successfully argued the case that prisoners at Guantanamo Bay should be able to challenge their detentions in federal court last year before

## German Prosecutor Won't Pursue Rumsfeld Case

Posted by

Thursday, 10 February 2005 12:41 - Last Updated Thursday, 10 February 2005 12:41

---

the US Supreme Court.

After that success, four Iraqis who had been jailed at Abu Ghraib approached the organization seeking to sue the US government. After cramming through stacks of legal books, CCR concluded it should try the case in Germany, which passed the progressive Code of Crimes Against International Law in 2002 in response to the creation of the International Criminal Court. The law provides German courts with "universal jurisdiction" to prosecute war crimes, genocide and crimes against humanity -- regardless of where or by whom they have been committed. However, prosecution under the law is discretionary and only mandatory if the perpetrator or victim is German.

"The Center for Constitutional Rights considered for quite some time whether criminal proceedings would be possible in the United States," said Hannes Honecker, an attorney for the Republican Attorneys' Association (RAV) in Berlin, which represents CCR in Germany. "They concluded they probably wouldn't be able to prosecute the so-called 'chain of command.' Instead they decided to take the case to Germany."

Honecker said his group agreed to help with CCR's case because it shared the organization's fundamental belief that serious crimes had been committed at Abu Ghraib. "I fear that the rule of law will perish if we don't further pursue this and that Abu Ghraib will at some point take on significance in our cultural history -- namely that people don't give a damn about law as long as they are in power. This situation is undemocratic, it disregards human rights, it's intolerable and I'm afraid it will become standard if we do not take legal action against it."

### ***"Irritation" in Berlin***

Though German politicians were outspoken in their criticism of the Abu Ghraib torture scandal, German Chancellor Gerhard Schroeder's government, which has been working to smooth over German-US relations that soured in the run-up to the war in Iraq, had little appetite for the the divisive and negative publicity-generating petition. Many, too, were frustrated that it took so long for federal prosecutor's office to drop the case.

"This has been a very uncomfortable incident for the German government," Gernot Erler, the deputy head of the Social Democrats in parliament, said in a phone interview from his home, "that has also, of course, caused a lot of irritation for the Americans. We regret that a decision wasn't made punctually enough to possibly have an influence on the Munich conference. But this is a constitutional country and we couldn't do anything about it. It was a question for the prosecutor and it surprised us it took so long to answer, since it does nothing but irritate." He added that any German has the right to file this type of case, but that it was "still regrettable."

The case has also brought up uncomfortable memories of the 2003 dispute between Washington and Brussels over a 1992 Belgian war crimes law. The legislation, created with well-meaning intentions, allowed cases to be tried in Belgium even if neither the perpetrators nor the victims had anything to do with the country. But after a petition was filed against former US President George W. Bush, Dick Cheney, Colin Powell and others, it became a flashpoint in trans-Atlantic relations and the US threatened to stop holding NATO meetings in Brussels. The

## German Prosecutor Won't Pursue Rumsfeld Case

Posted by

Thursday, 10 February 2005 12:41 - Last Updated Thursday, 10 February 2005 12:41

---

country eventually amended its law so it could only be applied to crimes with a direct link to Belgium.

There has been no public talk, however, of amending Germany's universal jurisdiction law. And RAV's Honecker says that his organization and CCR will now explore other legal options, including a challenge to Federal Prosecutor Nehm's decision not to take the case. He expressed frustration that Nehm's office seemed willing to go along with the Pentagon line that only a handful of "black sheep" were responsible for the torture and that there were no senior-level officials involved. Nehm is letting Washington off the hook, he argued, by allowing it to investigate the "issue" of Abu Ghraib through prosecutions of soldiers like Privates Lynndie England and Charles Graner and not frying the bigger fish involved, like Attorney General Alberto Gonzales who helped the administration redefine the rules of torture as a White House legal aid in the run-up to Abu Ghraib and Guantanamo. Now Gonzales runs the Justice Department, which would have oversight over any US-based investigation of the crimes.

In an affidavit filed on behalf of CCR and RAV, Columbia University law professor Scott Horton summed up the disconnect this way: "No such criminal investigation would occur in the United States for the reason that the criminal investigative and prosecutorial functions are currently controlled by individuals who are involved in the conspiracy to commit war crimes."

For Honecker's group and his colleagues in New York, the job won't be finished until they get some answers. And what about those trans-Atlantic relations?

"If you want to talk about trans-Atlantic relations," he said, "then let's first investigate to determine whether Rumsfeld, Gonzales, Tenet and the others are responsible for what's happened," he said. "Afterwards we can talk about whether relations are suffering because of this case. But I think it would be far worse if the rule of law -- the right to prosecute crimes -- suffered as a result of Abu Ghraib. You can't just say that you'll prosecute African dictators but not the representatives of a democratically elected government."