

## I.

In May 2002 Murat Kurnaz' mother, Rabiye, entered my office in Bremen and signed a power of attorney expecting me to bring her son as soon as possible out of Guantánamo back to Bremen. It was not that easy.

Murat left Bremen for a pilgrimage in Pakistan at October 2001—probably the worst possible time to travel in that area. He got arrested with no cause by Pakistanian police and sold for 3,000 dollars across the border to U.S. forces in Afghanistan. His family in Bremen was informed in January 2002 that Murat was detained by the U.S. His mother wrote letters to the U.S. embassy, the German government, and the Turkish embassy. They all gave her the run around. The U.S. embassy answered that she should get in contact with the Turkish government to get more information, the Turkish embassy could not help, and the German State Department regretted limited chances to help because the U.S. would restrict talks and negotiations on the detainees to their home countries. Murat Kurnaz held—despite being born and raised in Germany—the Turkish citizenship.

To take on that case was a strange Orwellian experience. I felt as though I was travelling by time machine in times of absolute rulers, before enlightenment. All legal steps and tools to defend a detained person that ought to be self evident for a country based on the rule of law were denied. My skills and knowledge as a criminal defense lawyer were expropriated; however, I hit a wall: no access to the client, no file to inspect, no warrant of arrest, no charge, no prosecutor, no court—but torture, as we were later informed. We had no idea when, where or why he got arrested, how long he had to stay or if there would be proceedings to prove any possible allegations. It was a feeling of powerlessness—a German lawyer against the most powerful man in the world who presumed to ignore international and domestic law. The picture of David versus Goliath did not fit; there was no slingshot for legal steps before the landmark decision of the Supreme Court in June 2004.

Imperative to this framework, the role of lawyers' work had to be changed. It has been a fight in the court of public opinion rather than in courtrooms, a kind of lobby of the media, directed towards the German and Turkish governments, to initiate diplomatic pressure and towards the European Parliament und the Council of Europe to put Guantánamo on the agenda.

## II.

The turning point came when we had contact and cooperation with U.S. human rights organizations and U.S. lawyers. After winning at the Supreme Court in June 2004, the legal limbo that existed at Guantánamo came under the scrutiny of U.S. courts. The battle in the courts is still going on, delayed by appeals and neutralized by new laws, laws with court stripping provisions even for pending proceedings. Justice delayed is justice denied; however, these endless proceedings were extremely helpful, even if no detainee was released by a court order.

My colleague, Baher Azmy, got access to our “ghost” client so that we could get his story and inform him about the outside world, his family and our efforts to release him. We wanted to give him hope. We could inspect the CSRT file and get the chance to inform the public concerning the ridiculous allegations and torture.

The decision of the Supreme Court in 2004 and of Judge Green in the federal district court on January 31, 2005<sup>5</sup> were incredibly important to win over the media. In early 2002, many papers branded Kurnaz as the "Bremen Taliban." According to investigations of the prosecutor in Bremen, Murat Kurnaz left Bremen to join the Taliban in Afghanistan. These allegations turned out to be unsubstantiated and the prosecutor closed that file. Nevertheless, in the media that brand remained, and the realities of Guantánamo remained a phenomenon of peripheral importance. This attitude later changed for two reasons: after the U.S. courts attacked the Bush administration for ignoring the law, it was not anti-American anymore to criticize the Guantánamo system. In 2005 we could inform the media of systematic torture and repudiate silly accusations from the CSRT proceedings that labeled Kurnaz as an enemy combatant. The proceedings simply ignored exculpatory evidence. Almost all paper, radio and TV forums stressed the fundamental human rights of due process and fair treatment. In 2005 we won in the court of public opinion, and this was of significant importance for Kurnaz.

At the end of 2005 I wrote a letter to our new Chancellor, Angela Merkel, requesting assistance. The former red-green government answered, stereotypically, that it could not really help because the U.S. would not allow it. Angela Merkel answered within three days. Yes, she would do it. And she did; in January 2006, she put the Kurnaz case on President Bush's table. She wanted Kurnaz back. In August 2006, Kurnaz was released.

It is an irony of history that it was a conservative Chancellor who opened the door for Murat Kurnaz after Schröder, as head of the red-green government, had allowed him to languish in Guantánamo for years. It is a bitter but true reality that Germany was complicit from the beginning. After Murat's release, his story had to be rewritten.

### III.

Murat's release created a media frenzy. Baher Azmy and I fought hard to preserve his privacy and to manage the pressure. Murat needed a while before he was willing and able to speak to the public.

The media focused more and more on Germany's role, and many journalists did an incredible investigative job to dig out the truth. Under public pressure, the Bundestag set up two investigative committees to examine whether the former Government missed the chance to release Kurnaz years earlier and whether German soldiers beat Kurnaz during his stay in U.S. custody in Kandahar/Afghanistan before the transfer to Guantánamo. The reports on these investigations are not yet published but some facts seem to be quite likely clear.

First, the German army and Secret Service informed the government in Berlin in the beginning of January 2002 of Kurnaz' detainment in Kandahar. The Bundeskriminalamt (federal police) supplied the FBI with a file compiled by the Bremen police containing later disproved suspicions Kurnaz might have intended to join the Taliban forces. Information transfers of this kind require a request for legal assistance and proof from the prosecutor's office that the demanding state assures a fair trial and that the information will not be used to impose a death sentence. In this case, Germany rushed ahead and supplied the information without any assurance of the former. Not all detainees from Kandahar were sent to Guantánamo, and the U.S. had caught just five percent of the prisoners in Kandahar. The U.S. obviously had no information concerning whom Kurnaz was

Bernhard Docke

or if he fit in the criteria of a member of the Taliban. Because of incorrect German information, the U.S. might have been convinced that Kurnaz was a terror suspect. It would be quite interesting to one day disclose the U.S. documents concerning the motives to bring Kurnaz to Guantánamo. It seems that Germany bears some responsibility for Kurnaz' imprisonment.

Second, in September 2002 three German agents interrogated Murat Kurnaz in Guantánamo. After two days of intense questioning, the agents came to the conclusion that Kurnaz picked a bad time to travel. According to those agents, he seemed to be a naive young man without links to terrorists or involvement in criminal or terrorist plots. Kurnaz would not pose any threat to American, Israeli or German interests. After talks with the CIA, these agents informed Berlin that the United States believed Kurnaz was innocent and that he was to be released in approximately six to eight weeks.

In October 2002 the prosecutor in Bremen suspended the investigation into Kurnaz and his fellow suspects because of a lack of evidence. On October 29, 2002 the Kurnaz case was discussed by the presidents of the German security services and top officials of the interior ministry and the Chancellors Office. Despite the fact that all German and U.S. services stressed that Kurnaz was innocent, Germany ignored Kurnaz' case and blocked his return to Germany. In October 2002 the door was partially open, but Germany slammed it shut. According to disclosed documents the United States was not amused; the release was planned as diplomatic favor to Germany. But instead of releasing Kurnaz to Turkey, the U.S. left him in Guantánamo for four more years. The United States later justified this through fabricated allegations.

Third, by joint action in Berlin and his hometown of Bremen, Kurnaz' residency permit was revoked. According to German law, a foreigner's permission to stay is to be cut off once a he stays abroad for more than six months. Fortunately, we appealed this decision successfully. The court of administration decided that Kurnaz' stay in Guantánamo—what a surprise—was not of his own free will. He intended to come back to Germany, but Germany tried to rid itself of any responsibility by annulling his right to return. This court decision was very important in changing Germany's attitude towards Kurnaz.

Fourth, after his release, Kurnaz claimed he was beaten by German Special Forces during his stay in U.S. custody in Kandahar/Afghanistan. The reaction of the Defense Ministry was a sort of denial-cascade. They first claimed that Kurnaz was a liar, claiming that in January 2002 there were no German troops in Afghaniatan. The ministry then changed its story, admitting German troops were there, but claiming it had no idea about the United States' custody of Kurnaz. Weeks later, the story again changed. The ministry claimed soldiers knew about his detainment but had no contact with him. Finally the ministry admitted that it saw him and talked to him, but nobody beat him. After the interrogation of about twenty elite German soldiers, the prosecutor had doubts that the witnesses had told the full truth. He had the impression they coordinated their responses before questioning.

A key element of the case was the existence of a truck in the camp. According to Kurnaz, the beating supposedly took place behind a truck with a tank for emptying human waste. All the soldier witnesses denied the existence of such a truck in the camp. No truck, no mistreatment was their formula. It was easy to check this with U.S. witnesses who served in the camp. A German news magazine, "Der Spiegel," interviewed American soldiers in the U.S. They all confirmed that the waste was taken out of the camp by a two-and-a-half-ton military truck driven through the camp's

Bernhard Docke

main gate. The prosecutor requested the U.S. government permit U.S. military personnel to testify concerning activities of German military personnel relevant to the investigation. The Embassy answered:

After careful consideration of all aspects of this matter, the United States has determined it cannot provide the assistance you have requested. The United States appreciates Germany's important contributions to the Afghanistan mission and is confident that any reports of abuses will be appropriately investigated and addressed through existing law enforcement and judicial processes.

When information concerning Germany's disgraceful role was published, it caused a political crisis. Two parliamentary inquiries ensued, and Germany's Foreign Minister, Frank Walter Steinmeier, the former Chief of the Chancellor's Office, came under fire for his role in preventing the release of Murat Kurnaz. He defended his decisions with two arguments. First, there had been no formal offer to release Kurnaz in the Fall of 2002. Guantánamo was a law-free-zone, and offers to release are not sent by sealed letters. However, release was initiated through talks between the two countries' secret services, and clear signs of U.S. intentions for such talks had been documented. It was Germany's simple lack of political will to give a positive response.

Second, Steinmeier insisted that Kurnaz represented a possible threat to German security interests. This is inconsistent with all findings of the prosecutor, the German secret services, and the U.S. investigations at that time. And even if such claims were true, Germany is not allowed to use a lawless torture camp as tool of its security interests. Germany was obliged to get him out. If there were serious allegations, Kurnaz could have been charged in Germany and given a fair trial.

It was a dirty blaming-the-victim strategy to get rid of the political pressure on Steinmeier. Some media were used to recycle old and disproved allegations that Kurnaz had terrorist intentions and that he posed a security risk. Some papers ask why Germans should sacrifice their Foreign Minister for a Turk. Even Kurnaz' long Guantánamo beard was exploited to create fear and to increase prejudice. Other media branded Steinmeier as a heartless technocrat. Although he was close to resigning at first, Steinmeier survived this crisis. Top officials in the secret service stated that Steinmeier was not informed of reports from three agents who visited Kurnaz in Guantánamo in September 2002.

Up to now there is no excuse, no remorse, no compensation. And Steinmeier said he made no mistakes and would do it again.

#### IV.

Even after Murat Kurnaz' release, my work as his lawyer was still very different from my regular cases. On the one hand, my work was to rehabilitate him, to help him walk on his own two feet after five years of imprisonment. He had a very warm-hearted reunion with his family. Friends, neighbors, and even the mayor of Bremen welcomed him home. The city of Bremen helped him to get a job. On the other hand the public interest had to be managed. I helped him arrange interviews and tell his story for his book, *Five Years of My Life*. Plans for a movie are in the making. I assisted him in testifying in the two investigative committees at the Bundestag and at the committee of the

Bernhard Docke

European Parliament responsible for analyzing the renditions. And I represent him in the criminal investigation against two German soldiers who are suspected of the beatings in Kandahar.

Murat lost five years of his life. He could have been released in the Fall 2002. The U.S. kept him, despite their own findings that Kurnaz was innocent. Germany is responsible for missing the chance to get him out four years earlier.

Is there a chance for compensation?

Under the Military Commissions Act, anyone charged with being an enemy combatant has no right to sue the U.S. government. I hope this law will be lifted after a political change at the end of the year.

In Germany we are analyzing the disclosed documents to decide whether to start a lawsuit. One problem is Murat's Turkish citizenship. The degree of the government's obligation to help is different for citizens and foreigners. Moreover, some facts are still missing; for example, up to now we are not sure if Kurnaz was taken in Kandahar because of German information or some other reason. If this decision was based on German files, it would be much easier to create not only a political or moral obligation, but a legal obligation for Germany to generate diplomatic pressure that would have saved Kurnaz from years of detention in Guantánamo.

V.

Working on that case was stressful, time consuming, sometimes frustrating and depressing; however, it was also delighting. My personal highlight of the case, beyond Murat's release, was my work with U.S. Human Rights Organizations and especially work with my colleague, Baher Azmy, who became a close friend. The transatlantic lawyer cooperation to defend the rule of law worked very well.

To cite Minister Steinmeier: I would do it again.