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Prosecute Rumsfeld? Not Ridiculous

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Those seeking to bring war crimes charges against Donald Rumsfeld and other top US officials in a German court can no longer be ignored--indeed, the legal action now unfolding in Germany has received extensive coverage not only in *The Nation* but also in mainstream media.

But at least one critic of the case has responded with ridicule.

The CNN show *Anderson Cooper 360* featured a November 14 report by correspondent Brian Todd on the complaint being brought before the German federal court by the New York-based Center for Constitutional Rights and its German and international allies on behalf of victims of torture at US detention facilities. The report included interviews with CCR's Vincent Warren, former Brig. Gen. Janis Karpinski, commander of US prisons in Iraq at the time of the initial Abu Ghraib torture incidents, Pentagon spokesman Brian Whitman and Duke University Law School professor Scott Sillman. Fair enough.

But then CNN correspondent John King asked the network's senior legal analyst (and *New Yorker* legal writer) Jeffrey Toobin to comment on the case. King opened the interview asking whether the case was a serious lawsuit or a stunt. Toobin was the only commentator in this segment, and his message was simple. "I mean, this is a totally ridiculous lawsuit," Toobin said. "This is a request of the German government by an American left-wing public-interest law firm," Toobin said, referring to the Center for Constitutional Rights. "That is all this is. This is not the German government trying to get Don Rumsfeld."

Toobin explained that Germany has an unusual and up-to-now untested law that allows individuals--in this case CCR activists--to ask a prosecutor to bring charges against Rumsfeld and others for crimes committed beyond German borders.

"They do have this unusual law in Germany that gives them jurisdiction around the whole world, but they have never used it," Toobin explained. "The only slightly analogous situation is that a Spanish court, a Spanish investigator a few years ago filed a lawsuit against Augusto Pinochet...saying that he had masterminded the torture of Spanish civilians. And Pinochet was actually held in custody in London, pursuant to that lawsuit, until they found he was too old and senile to be able to stand trial."

The dismissive tone of Toobin's commentary effectively obscured the legal basis on which the case is

being brought--courts in Germany, Belgium, Denmark, France, Germany, the Netherlands, Norway, Spain, Britain and Canada all have universal jurisdiction laws allowing prosecution of perpetrators of the most serious human rights abuses, such as torture and other war crimes.

Rather than being a farfetched idea from the American left, the principle of universal jurisdiction under which Rumsfeld and his potential co-defendants would be charged is enshrined in Article 49 of the First Geneva Convention: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches [of the Geneva Convention,] and shall bring such persons, regardless of their nationality, before its own courts."

The statute that establishes the International Criminal Court, which has been ratified by 104 states and signed by thirty-five more--notes that every state has the duty to exercise its criminal jurisdiction over those responsible for international crimes.

The United Nations Convention Against Torture (as summarized by international law authority Peter Weiss) obliges every signatory of the convention to detain a suspected torturer; investigate the alleged torture, no matter where committed; notify other states having certain contact points with the suspect; and, depending on the results of the preliminary investigation, proceed to prosecute the suspect in its own courts if it decides against extradition. The United States is a party to the convention.

US jurisdiction for international abuses like torture was upheld in 1980 by Chief Judge Irving Kaufman of the US Court of Appeals (Second Circuit), who ruled that "the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind."

Even though Toobin thinks the Pinochet case is an anomaly, it isn't. In 2005 a British jury convicted an Afghan warlord of crimes against humanity committed in Afghanistan under the British Criminal Justice Act and the UN Convention Against Torture. A Dutch court convicted two Afghan generals who had sought asylum in the Netherlands of war crimes committed under Communist rule in Afghanistan. A French court sentenced Mauritanian military official Ely Ould Dah to ten years of prison in absentia for torturing prisoners. And a Spanish court convicted Argentine Adolfo Scilingo for crimes against humanity committed in Argentina and sentenced him to 640 years in prison.

CCR brought a similar case forward two years ago; Toobin said, "They tried this once before. So I assume it will go nowhere." But the current case against Rumsfeld includes far more comprehensive evidence of torture and other crimes, not only at Abu Ghraib but at Guantánamo. It includes much more evidence of the role played by the former Defense Secretary and other top officials, this time including government lawyer John Yoo and Attorney General Alberto Gonzales, who provided the justification for such actions. The case demonstrates that for the past two years the US legal system, while blaming a few low-level bad apples in the military, has utterly failed even to investigate the well-documented charges of crimes against Rumsfeld and others because the Attorney General responsible for ordering such investigations is one of the likely targets of any such investigation. And it includes what is perhaps the most damning evidence of all--the Bush Administration's initiative to repeal the very aspects of the US War Crimes Act under which such crimes might be prosecuted.

Asked if Rumsfeld would be at any risk if he went on a vacation in Germany, Toobin initially said no, then backtracked slightly: If the process were to continue, he said, the only risk Rumsfeld would have would be if he were to travel to Germany.

Perhaps Toobin would have a different opinion if he considered what actually happened in the Pinochet case. After pointing out that Pinochet was held in custody in London pursuant to a similar lawsuit,

Toobin noted in his analysis that the court found he was too old and senile to be able to stand trial. But that is not the end of the story. It is true that Pinochet was eventually released in England on medical grounds and returned to Chile. But, prodded by the attention drawn by the international case against him, in 2004 Chile charged him with serious crimes. Pinochet awaits trial today for his role in the disappearance of dissidents.

The case against Rumsfeld in Germany may well soon be echoed by similar cases in other countries that have universal jurisdiction legislation. He will have to reckon with the strategy of human rights campaigners: to assure that those responsible for torture are recognized as the enemy of mankind and have no place to hide.

Mohandas Gandhi famously said, "First they ignore you, then they ridicule you, then they fight you, then you win." Now that those bringing war crimes charges against Rumsfeld and his associates can no longer be ignored, it is no surprise that they are being ridiculed.

Toobin's CNN colloquy with John King focused on whether the case was "ridiculous," thereby eliminating the need even to ask whether or not Rumsfeld might be culpable. After the ridicule dissolves in the face of the serious questions raised by this case, don't be surprised to see massive resistance from the Bush Administration and its supporters to efforts to restore the rule of law. Meanwhile, Rumsfeld and his potential co-defendants might want to look for a defense attorney who doesn't consider their legal vulnerability such a laughing matter.