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In Search of a Criminal: Donald Rumsfeld's Name Tops the List of Accused of War Crimes

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No one thinks that Donald Rumsfeld will end his days in a German prison. Or that there is any real chance he will have to face trial in Germany over allegations that he authorized policies leading to the torture of prisoners at U.S. detention facilities in Iraq and Guantánamo Bay, Cuba.

But that doesn't mean that a complaint filed in Germany last month won't have some ripple effects. The complaint asks a federal prosecutor there to begin an investigation, and ultimately a criminal prosecution, of the former secretary of defense and other U.S. officials for their roles in the abuses.

"Rumsfeld is no longer untouchable," says Wolfgang Kaleck, the German lawyer who filed the complaint along with the New York-based **Center for Constitutional Rights** and the **International Federation for Human Rights**. "He is now deeply connected with claims of abuses and torture. We have taken the first step to begin the legal discussion on his accountability."

The complaint against Rumsfeld, Attorney General Alberto Gonzales, former CIA director George Tenet, and other senior civilian and military officials, was filed in mid-November on behalf of 11 Iraqis who had been detained at Abu Ghraib prison and Mohammed al-Qahtani, a Saudi detained at Guantánamo. It alleges that the defendants ordered, aided, and abetted war crimes and failed to prevent the commission of war crimes by their subordinates. In international law, war crimes are defined as grave breaches of the Geneva Conventions, including torture and inhuman treatment.

Rumsfeld has said the abuse that occurred at Abu Ghraib was the work of a few low-level soldiers and the prisoners affected were mostly not the subject of interrogations, but just "common criminals" who were also detained. "It's pretty clear that on the midnight shift, for a period of some weeks, there were people there who were behaving in a way that was fundamentally inconsistent with the president's instructions to treat people humanely [and] my instructions that they were to treat people humanely," Rumsfeld said in a Dec. 15 television interview.

But the plaintiffs claim that the torture that occurred at detention centers in Iraq and Guantánamo were not isolated incidents or the product of a few soldiers gone bad, but rather was widespread and systemic, having been ordered from the top levels of the military and the Defense Department. "The interrogational torture applied by the United States was not an accident, not a mistake, not a secret action," the complaint states. (Pentagon and Department of Justice spokesmen declined to comment for this article.)

Stymied in their call for high-level accountability in the United States, the groups thought their best shot was to bring a case in a country, like Germany, that has a strong universal-jurisdiction law, says Michael Ratner, the CCR's president.

The CCR has been involved in much of the litigation challenging the Bush administration's post-Sept. 11 policies on the treatment of detainees in the context of the war on terror, including the landmark case **Rasul v. Bush**, which challenged the indefinite detention of foreign nationals at Guantánamo.

German law recognizes the principle of universal jurisdiction, whereby some crimes, such as torture, war crimes, genocide, and crimes against humanity, are considered so heinous they can be prosecuted anywhere, regardless of

where they took place or the residence or nationality of the victims or perpetrators.

But legal experts predict that the Bush administration is sure to vigorously oppose the case and that Germany will be reluctant to take it. Under Germany's universal-jurisdiction statute, the prosecutor has the discretion to decline to take a case.

"It's quite risky for Germany to do this," says Eric Posner, an international law professor at the University of Chicago. "The danger of backlash is quite real. Congress, even a Democratic Congress, could very well retaliate if a serious prosecution went forward."

Moreover, the filing could also strengthen the position of those in the government who oppose the International Criminal Court, says Lee Feinstein, a senior fellow at the Council on Foreign Relations and a former Defense Department and State Department official during the Clinton administration.

But human rights lawyers contend that even if the case doesn't result in the prosecution of a specific defendant, it could reopen a debate in the United States about Rumsfeld's responsibility. They also say filing cases abroad under universal-jurisdiction laws may catalyze domestic efforts to open investigations and push for accountability.

RISK AND RETALIATION

The Iraqis filing the complaint in Germany say they were severely beaten, deprived of sleep and food, sexually abused, stripped naked, hooded, and exposed to extreme temperatures.

A team of Philadelphia-based attorneys, led by Susan Burke, collected their stories. Burke's firm, Burke Pyle, opened a Baghdad office when the Abu Ghraib story surfaced in 2004. Burke and her team periodically travel to Jordan and Turkey to meet former detainees and have collected about 160 testimonies so far, Burke says.

But meeting with her is dangerous for former detainees, she says, because of both the travel involved and possible retaliation. "It's not a risk-free endeavor, but it's a real way for them to get their humanity back," says Burke. "They want to know that the world doesn't think that it's OK."

Burke and CCR lawyers are also co-counsel in civil lawsuits filed against military contractors Titan Corp. and CACI International Inc. Those lawsuits allege that the contractors conspired with military personnel to torture detainees at Abu Ghraib. The plaintiffs say the contractors' employees beat them; deprived them of food, water and sleep; urinated on them; raped them; attacked them with dogs; gouged out a prisoner's eye; electrocuted one of them; and tortured them in other ways. The cases, *Ibrahim v. Titan* and *Saleh v. Titan*, are currently before D.C.-based U.S. District Judge James Robertson, who dismissed several of the plaintiffs' claims last year but let others proceed to discovery.

Similar lawsuits seeking to hold Rumsfeld and senior military officials responsible for the torture and widespread abuses of detainees in U.S. military custody are also wending their way through the courts. In 2004, the CCR brought suit on behalf of four British detainees released from Guantánamo Bay.

In the case, *Rasul v. Rumsfeld*, the plaintiffs charged that the Pentagon chain of command authorized and condoned torture in violation of the Alien Tort Statute, the U.S. Constitution, the Geneva Conventions, and the Religious Freedom Restoration Act. The CCR is currently appealing U.S. District Judge Ricardo Urbina's dismissal of the majority of the plaintiffs' claims. Also, the American Civil Liberties Union and Human Rights First filed a lawsuit on similar grounds against Rumsfeld and others on behalf of former detainees in Iraq and Afghanistan. Chief Judge Thomas Hogan of the U.S. District Court for the District of Columbia is currently considering the government's motion to dismiss in that case.

'JUDGE US BY OUR ACTIONS'

It's been more than 2 1/2 years since the photos of U.S. soldiers abusing detainees at Abu Ghraib surfaced in April 2004, including the infamous pictures of a hooded detainee with fake electrical wires hanging from his extended arms and of U.S. Army reservist Lynndie England leading a naked prisoner on a leash.

"The photos give these incidents a vividness — indeed a horror — in the eyes of the world," Rumsfeld said on May 7, 2004, before the Senate and House Armed Services committees. Rumsfeld recognized the damage done to the nation's reputation, but said the United States should not be judged for the fact that the abuses took place but, rather, by how it dealt with them. "Judge us by our actions," he said. "Watch how Americans, watch how a democracy deals with the wrongdoing and scandal and the pain of acknowledging and correcting our own mistakes and weaknesses."

Since then only a few low-ranking soldiers, including England, have been convicted. Congress hasn't launched any serious investigations up the chain of command, and numerous reports produced by the Pentagon have stuck with

the theory that "a few rotten apples" were responsible, Ratner says.

The CCR filed a case in Germany because its efforts in the United States to demand accountability for torture have been thwarted, he says. The chances of a criminal investigation being launched in the country while the Bush administration is in power are slim, legal experts say, because Gonzales would have to authorize the prosecution himself.

Moreover, the passage of the **Military Commissions Act** this fall will make prosecution in U.S. courts impossible, Ratner says. A provision of that law narrows the definition of what constitutes torture under the War Crimes Act, the law that implements the Geneva Conventions, and applies that definition retroactively back to 1997, when the **War Crimes Act** was first enacted. The law also gives military and intelligence officers retroactive immunity for the use of abusive interrogation techniques. The CCR argues that the MCA essentially provides amnesty.

PRESSURE NOT TO PROSECUTE

This is not the first time that CCR has filed a complaint asking a German prosecutor to open an investigation into Rumsfeld's role in the Abu Ghraib scandal. An initial complaint was filed in November 2004, but the case never went forward. German law gives the prosecutor the right to decline to exercise its jurisdiction if the defendants are not present in Germany and neither the victims nor the defendants are German nationals. One section of the law, in particular, states that the prosecutor can refuse to take the case if the crimes are being prosecuted by an international court or by a country with more of a connection to the crimes, the victims, or the perpetrators.

So when the United States reportedly put political pressure on Germany to drop the 2004 case, a German prosecutor dismissed the complaint on the eve of a visit by Rumsfeld to a conference in Munich in February 2005. The prosecutor stated that there was no indication that U.S. courts were refraining or would refrain from taking action based on the circumstances described in the complaint.

Ratner says the CCR's case will be more difficult to dismiss this time around. The Military Commissions Act provides clear evidence that the United States has no intention to prosecute these crimes, he contends. In addition, new evidence has come to light since 2004, in particular with respect to Rumsfeld's personal involvement in al-Qahtani's interrogation, Ratner adds, and U.S. Brig. Gen. Janis Karpinski, the commanding officer at Abu Ghraib, has agreed to testify on behalf of the plaintiffs.

"I'm willing to testify in a German criminal investigation because of the prisoner abuses in Abu Ghraib," Karpinski said in her written testimony, "and the release of intentionally misleading information attempting to blame 'seven bad apples' when it was clear that the knowledge and responsibility goes all the way to the top of the chain of command to the Secretary of Defense, Donald Rumsfeld and to the Vice President, Dick Cheney."

But it is hard to understate the weight of the political pressure the Bush administration is sure to bring to bear to urge Germany to drop the case.

For a German prosecutor to take the case would be unprecedented. "It's never happened that one government has prosecuted the officials of a friendly government without the consent of that government," the University of Chicago's Posner says. "It could end up causing a lot of friction between otherwise friendly states."

The case puts German Chancellor Angela Merkel, who has been trying to repair U.S.-German relations in the wake of a lack of cooperation on the war in Iraq, in an awkward position, he adds.

"There's a limit to what law can do," says Naomi Roht-Arriaza, a professor at the University of California, Hastings College of the Law and the author of *The Pinochet Effect: Transnational Justice in the Age of Human Rights*. "Eventually law runs up against politics, and it will lose."

For example, Belgium passed an extremely broad universal-jurisdiction statute in 1993. The statute was similar to the German law in scope but didn't provide any way for prosecutors to decline to take a case. At first, many cases were filed without being considered overly controversial, Roht-Arriaza says, but then cases were filed in 2003 against higher-profile defendants, including former U.S. President George H.W. Bush, Cheney, and retired General Norman Schwarzkopf, for allegedly committing war crimes during the 1991 Gulf War, and against Gen. Tommy Franks and Rumsfeld for alleged crimes arising from the current war in Iraq. U.S. pressure, including threats to compel the removal of NATO headquarters from Brussels, forced Belgium to drastically scale back its universal jurisdiction statute.

But even if Germany declines to take the case, the complaint could spur domestic efforts to investigate the prisoners' claims. "If you have officials saying it's ridiculous to have this kind of case abroad," Roht-Arriaza says, "it can create pressure to develop avenues domestically."

The fate of Chile's former dictator, Augusto Pinochet, who died earlier this month at age 91, is perhaps the best

example of this effect. At the time of his death, Pinochet, who had ordered the execution and torture of thousands of people during his 1973-1990 regime, was under house arrest and facing prosecutions on a bevy of human rights charges.

Before his arrest in London on a Spanish warrant in 1998, such a scenario would have been unthinkable because the general appeared immune from prosecution due to the amnesty his own government had put into place. Pinochet fought his extradition, saying he was immune from prosecution for the charges brought against him in Spain, but the House of Lords, Britain's highest court, ruled that there was no immunity for the worst sorts of crimes and that perpetrators could not be shielded by legal amnesties at home.

Pinochet was eventually returned to Chile on the grounds that he was not healthy enough to stand trial, but his arrest in London opened the flood gates in Chile. "His solid wall of immunity began to crumble and previously timid judges found chinks in his legal armor," says Reed Brody, a lawyer with Human Rights Watch who was involved in the arguments on the Pinochet case before the House of Lords. Hundreds of criminal cases were filed against him, and Pinochet spent his last years fighting off a tightening web of prosecution.

The "Pinochet precedent" energized the use of national courts to end impunity for the worst abusers, and cases against former dictators and generals, mostly from African and Latin American countries, followed.

Germany's response to the Rumsfeld case will be an important test of whether the Pinochet precedent applies to the leaders of superpowers as well as leaders from weaker countries, Brody says.

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