

## **Can Former U.S. Secretary of Defense Donald Rumsfeld Legally be Tried by Germany Under Universal Jurisdiction?**

by Sarah Hall

Torture, war crimes, crimes against humanity, and genocide are considered to be some of the most heinous acts violating customary international law. Throughout history, we can find examples of each of these crimes, yet they still continue to this day. Toward the goal of applying nonviolent means of enhancing international justice and promoting respect for the rule of law, the International Criminal Court stands as one of the most important international institutions. Recently, former United States Secretary of Defense Donald Rumsfeld has become the main focus for a criminal complaint filed against him and eleven other high-ranking US officials.<sup>1</sup> The complaint was filed in Germany by eleven Iraqi citizens held at Abu Ghraib in Iraq and one Saudi Arabian citizen imprisoned at Guantánamo Bay in Cuba, on charges of war crimes and torture. However, Germany has not yet begun prosecution, as several questions of immunity and universal jurisdiction have kept proceedings at a standstill. In this paper, the crimes for which Rumsfeld and other US officials are charged will be explained, as well as the issues of immunity and the role of universal jurisdiction in Germany. Finally, the paper concludes with an analysis of the current situation regarding the possible prosecution of these charges.

### **Torture and War Crimes**

Rumsfeld and other US officials cited in the complaint allegedly practiced (and perhaps still continue to do so) torture and war crimes in military prisons at both Abu Ghraib and Guantánamo Bay. Those included in the complaint are former CIA Director George Tenet, high-ranking military officials, and several former government lawyers, including US Attorney General Alberto Gonzales.<sup>2</sup> Generally, lawyers and other members of a country's judicial system are unlikely subjected to such proceedings, according to the United Nations' *Convention on the Jurisdictional Immunities of States and Their Property*.<sup>3</sup> However, in this particular case, former US government lawyers are cited due to the adoption of the Military Commissions Act of 2006, which granted legal justification to the alleged torture.<sup>4</sup> This complaint, filed upon the resignation of Rumsfeld as Secretary of Defense, varies from the original complaint, filed in 2004, in that it removes the possible immunities enjoyed by Rumsfeld and thereby allows Germany to prosecute under universal jurisdiction.<sup>5</sup>

Investigation and research into the alleged crimes at Abu Ghraib and Guantánamo Bay have been unearthed by the International Committee of the Red Cross and various other human rights organizations. Specific to Abu Ghraib, "The complaints assert that the ... Iraqi detainees were beaten and sexually abused ...deprived of sleep and food, and ... by means of hoods they were subjected to sensory deprivation. It is alleged that these actions were taken in order to intimidate the detainees and obtain intelligence information from them."<sup>6</sup> Other acts of alleged torture at both military prisons included exposure to extreme variations in temperature, loud music, standing for long periods of time, attacks by dogs, and solitary confinement.<sup>7</sup> The International Committee of the Red Cross then stated, "The

construction of such a system, whose stated purpose is the production of intelligence, cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture."<sup>8</sup> Based upon these alleged violations of customary international law, as a superior member of government leadership, Rumsfeld should be held responsible.

## Immunity

In order to understand how immunity plays a role in the complaint, a distinction must first be made between *diplomatic* and *state immunity*. *Diplomatic immunity* refers to the exemption of members of a diplomatic mission to a foreign state from that state's criminal jurisdiction, in both the public and private sectors.<sup>9</sup> Diplomats are, however, still required to abide by their resident country's laws, but those laws cannot be enforced when the diplomat is exercising his or her immunity.<sup>10</sup> *State immunity*, on the other hand, is widely understood under customary international law, and is based in each country's understanding and practice of their respective legal systems.<sup>11</sup> Lodged within the provisions for state immunity is immunity for Heads of State, Government, and Foreign Ministers. In some cases, this may also include heads of government agencies, such as the Secretary of Defense.<sup>12</sup>

Criminal proceedings within a foreign state where customary international law is violated differ greatly from civil proceedings. It should be noted that personal immunity enjoyed by heads of state does not mean they cannot be prosecuted for grave breaches of human rights, "since human rights infractions do not belong to the exercise of public functions."<sup>13</sup> Several cases have arisen in international law concerning head of state immunity, including a case in 2000 filed in New York City against Zimbabwean President Robert Mugabe and Foreign Minister Stan Mudenge, while they were visiting the country to participate in a United Nations session.<sup>14</sup> The United States government granted both Mugabe and Mudenge various forms of immunity, based in customary international law.<sup>15</sup> The case was later dismissed because of Mugabe's and Mudenge's head-of-state and diplomatic immunities.<sup>16</sup>

Another case concerning immunity from the International Court of Justice was the 2000-2002 case of the Democratic Republic of Congo versus Belgium, also known as the Arrest Warrant case.<sup>17</sup> The Minister of Foreign Affairs of Congo, Abdulaye Yerodia Ndombasi, allegedly committed grave breaches of the Geneva Conventions and Additional Protocols, including war crimes and crimes against humanity, and was issued an arrest warrant *in absentia* by a Belgian judge.<sup>18</sup> The Congo argued that the arrest warrant was illegitimate, stating that Belgium violated the laws of immunity in customary international law, and therefore requested the charge be dropped.<sup>19</sup> Universal jurisdiction was also an issue in the case; the Congo argued that Belgium violated its sovereignty.<sup>20</sup> Prior to the hearing, however, Belgium withdrew the complaint regarding universal jurisdiction; the court did not pass judgment on the issue. The Court ruled that Belgium violated Mr. Yerodia's immunity, and stated that Belgium must drop the international warrant.<sup>21</sup>

The issue regarding Rumsfeld's possibility of immunity in this case has many facets. First, he is no longer the current Defense Secretary in the United States; thus he cannot invoke any form of immunity he may have held as Secretary. Secondly, the International Court of Justice has ruled that foreign ministers hold *rationae personae* immunities from the jurisdiction of third states (in this case, Germany), "as long as the actions of which they are accused are taken in the exercise of their official capacity."<sup>22</sup> However, upon the conclusion of their term, immunity from judicial procedures is revoked, and whatever alleged breaches

of international crimes have been committed during the minister's tenure must be prosecuted.<sup>23</sup> This pertains directly to the first question of Rumsfeld's immunity. According to the Court, Rumsfeld must be prosecuted for war crimes and torture. The question of where this prosecution may take place has yet to be discussed.

## Germany and Universal Jurisdiction

Germany's ability to prosecute under universal jurisdiction began with the creation of the International Criminal Court in July 2002, the statute of which Germany signed and duly ratified.<sup>24</sup> That same summer, Germany drafted the *Code of Crimes against International Law*, based upon crimes as outlined in the Rome Statute.<sup>25</sup> The Code grants Germany *universal jurisdiction* over crimes against customary international law, but only for crimes committed after the draft date of 30 June 2002.<sup>26</sup> Therefore, German barristers have the power to prosecute offenders regardless of the nationality of the offender, the location of the crime, and the nationality of the victim(s).<sup>27</sup>

Some may argue that universal jurisdiction overrides the sovereignty of a nation. Many former colonies would not prefer universal jurisdiction. They see it as creating spheres of interest; superior countries exercising jurisdiction over former colonies, thus overriding sovereignty in their eyes.<sup>28</sup> In this particular case, Germany can only exercise universal jurisdiction if or when the United States chooses not to (or is unable to) exercise its jurisdiction as the primary source for justice.<sup>29</sup>

The legal aspect behind the issue of the United States' jurisdiction versus Germany's universal jurisdiction is the question of complementarity, which means that states having direct nexus to the perpetrators, alleged acts, or victims of the alleged crime(s) hold the primary rights and obligations to prosecute the international crimes allegedly committed.<sup>30</sup> Therefore, Germany cannot exercise its universal jurisdiction, due to the principle of complementarity, unless the United States fails to prosecute.<sup>31</sup> The US has yet to prosecute Rumsfeld; however, there is no hard evidence demonstrating a refusal to do so.<sup>32</sup> If the United States fails to prosecute Rumsfeld for war crimes, it should be seen as an invitation for Germany to exercise jurisdiction, not as an obstacle for such an action. However, will the international community be able to clearly determine when the US is not taking action against Rumsfeld or when the US has failed to act?

The Status of Forces Agreement between Germany and the United States, developed under the North Atlantic Treaty Organization, add another dimension to German jurisdiction. The Agreement has two sections regarding jurisdiction; the first section regarding the Sending State, and the second regarding the Receiving State; in this case, the United States and Germany, respectively. The main component in this situation is paragraph 3, section two, from Article VII: "The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to (ii) offences arising out of any act or omission done in the performance of official duty."<sup>33</sup> With regard to the Agreements, conflicting views have been found. In one source, after applying the Status of Forces Agreement, US soldiers stationed in Germany are not subject to German jurisdiction.<sup>34</sup> However, in another source, those living and working on US military bases in Germany and are suspected of the alleged acts of torture and war crimes may be tried within Germany.<sup>35</sup> In cases of concurrent jurisdiction, the US military has primary (but not exclusive) jurisdiction over its officers who have committed crimes while on official duty.<sup>36</sup> The Agreement would not apply to Rumsfeld, as he is not stationed in Germany, but it could apply to lower-level soldiers who allegedly committed the acts of torture and war

crimes, either in act or omission, as such actions would be defined as punishable under official duty.

Various states have exercised, or at least attempted to exercise, some form of universal jurisdiction over other nations. For example, a recent case of an attempt to utilize universal jurisdiction was the Yerodia case between Congo and Belgium, mentioned previously with regard to head-of-state immunity. Henry Kissinger, another former US official, has also been subject to questioning regarding his involvement with various dictatorships in Latin America during the 1970s.<sup>37</sup> General Augusto Pinochet of Chile was nearly prosecuted under universal jurisdiction for human rights violations, but was declared physically unfit to stand trial.<sup>38</sup> Based upon past trials, and Germany's refusal in 2005 to prosecute, the outlook is not promising for those who would like to see Rumsfeld tried and convicted for war crimes and torture under universal jurisdiction.

However, there do exist organizations highly in favor of universal jurisdiction; so much so they have drafted resolutions in support of the issue. One such organization is the Institute of International Law. In 2005, a resolution was drafted entitled *Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity, and war crimes*.<sup>39</sup> In essence, it argues that "the jurisdiction of States to prosecute crimes committed by non-nationals in the territory of another State must be governed by clear rules in order to ensure legal certainty" and therefore serves as a model for future cases concerning universal jurisdiction.<sup>40</sup> According to then-Minister of Justice Däuber-Gmelin, German jurisdiction "makes sense simply in order to underline the global significance of the proscription and prosecution of the most serious crimes."<sup>41</sup>

## **Analysis**

The possibility Rumsfeld will be required to stand trial in the United States seems to be a political issue, not necessarily one of legality. Rumsfeld has yet to be tried in a US court for several important reasons. First, he represents the political party currently controlling the US presidency, and which ordered the war in Iraq in the first place. The current administration believes quite strongly in their mission in Iraq to combat terrorism, and it seems they will use any means necessary to ensure suspects learn their lesson, so to speak. The questions of immunity and universal jurisdiction seem to impede the proceedings. The issue posing the largest obstacle for any movement toward prosecution is Rumsfeld's connection to the current administration in the US. Many think of Rumsfeld as an "untouchable" even though he and the rest of the administration are not above the law. Obviously this is not just a flaw in the Rumsfeld case; it permeates the US justice system.

Another area of interest in this case is the responsibility of superiors. Excellent commentary on this subject as it specifically relates to the case against Rumsfeld exists in an article from the *German Law Journal*, which states that trying superiors for a case as such is much more difficult than trying those who directly committed the acts.<sup>42</sup> Due to Rumsfeld's high profile, it is much more difficult to prosecute him than the military officers stationed at Abu Ghraib and Guantánamo Bay.

The issue of immunity poses interesting questions in the case against Rumsfeld. As previously mentioned, the second criminal complaint against him, filed in 2006, specifically dealt with the question of whether he could invoke immunity from the proceedings. However, his extradition to Germany seems unlikely, as does the possibility that he will travel there in the near future. Rumsfeld is no longer Secretary of Defense for the United States, and therefore should not legally be able to use immunity as a means to avoid

prosecution. As Fischer-Lescano points out, the International Court of Justice granted *rationae personae* immunity to foreign ministers, when the actions in question are committed under official duty.<sup>43</sup> However, upon the conclusion of the minister's term, immunity privileges are revoked.<sup>44</sup> Fischer-Lescano also argues that "human rights infractions do not belong to the exercise of public functions."<sup>45</sup> Therefore, Rumsfeld should not be able to invoke immunity to avoid prosecution for war crimes and torture.

From a legal standpoint, it is therefore reasonable to assume that Rumsfeld could be tried for war crimes and for instances of torture that took place in Abu Ghraib and Guantánamo Bay prison. Germany possesses the authority of universal jurisdiction in such cases of human rights violations, yet the prosecution of Rumsfeld seems highly unlikely since Germany has already turned down the case, due to its high profile.<sup>46</sup> Rumsfeld however, should not be allowed to invoke any form of immunity, as the crimes allegedly committed were human rights violations. Politically, with the state of the world as it is today, holding the former Secretary of Defense of the most powerful nation in the world accountable for grave human rights abuses is not a task many other countries seek to pursue unilaterally, even with the opinion polls in the United States ranking the current administration at all-time lows. The prosecution of Rumsfeld is highly unlikely, and even given a radical change in the administration of the United States, the possibility of prosecution remains uncertain. However, perhaps justice may one day be served. By so doing, the world community will also have achieved an important advance toward the goals of nonviolently deterring war crimes and promoting international respect for the rule of law.

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## End Notes

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