

**The Politics of Universal Jurisdiction, Legal Accountability and the  
Case against Donald Rumsfeld**

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*“The torturer has become like the pirate and slave trader before him, hostis humani generis, an enemy of all mankind.”* – Chief Judge Irving Kaufman, U.S. Court of Appeals

*“These [acts of torture] occurred on my watch. As Secretary of Defense I am accountable for them. I take full responsibility.”* – Donald Rumsfeld

## **I. Introduction**

This paper will be concerned with the exercise of universal jurisdiction, or, more to the point, the exercise of criminal jurisdiction by domestic courts in respect of gross human rights offenses. In so doing, I will acquaint the reader with the evidence against ex-Secretary of Defense, Donald Rumsfeld, for alleged war crimes and crimes against humanity.<sup>1</sup> While there remains a considerable amount of criticism and challenges to the exercise of universal jurisdiction it is my belief that such arguments are often overstated, misguided, and politically self-serving—a dubious means for those accused of rights violations to evade accountability. Overall, I will contend that universal jurisdiction not only represents a necessary instrument of justice in the twenty-first century, but also one that may in fact serve to benefit the United States’ long-term national interest.

I will embrace a cross-disciplinary approach and demonstrate how international relations and international law have much to learn and borrow from one another, thereby attempting to avoid the tendency of one discipline speaking past the other.<sup>2</sup> My efforts

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<sup>1</sup> I will specifically focus on the criminal charges that have been filed against Secretary Rumsfeld, not to be confused with the civil case that was recently dismissed by U.S. Federal Court. The civil case, *Ali v. Rumsfeld*, sought compensatory damages and a judicial declaration that the legal rights of prisoners were violated under the U.S. Constitution and the Geneva Accords. See: “Rumsfeld Faces Personal Suit by Detainees: Quick Ruling Promised on Whether Torture Case can Continue.” 8 December 2006. <http://www.msnbc.msn.com/id/16099926/>; “Suit accusing Rumsfeld of ignoring torture dropped.” 27 March 2007. <http://www.cnn.com/2007/LAW/03/27/iraq.torturesuit/index.html>.

<sup>2</sup> It should be duly noted that two particular approaches to IR theory, namely, the English School and more recently, Global Governance (GG), draw upon international law to a certain, sometimes, considerable extent. For those interested in the English School approach, see generally: Buzan, Barry. (2004). *From*

then will be twofold. First, I hope to demonstrate that taking the charges of alleged misconduct by Mr. Rumsfeld seriously will not only benefit the long-term interests of the United States, but international society writ large. Second, I will partake in a broader effort to prompt both international lawyers and political scientists alike to move just “far enough away from their intellectual traditions to join in creating new approaches to address new issues, problems, and progress in international relations (Ku 2001, 4).”<sup>3</sup>

## **II. Universal Jurisdiction: Meaning, Context, and Precedent**

There are few today who would argue against the fact that we have begun to witness an increasingly broad interest in, and concern, for human rights issues across the globe. The past few decades have seen the inexorable rise of the application of international human rights law as well as the extension of a wider public discourse on human rights, to the point where human rights could be seen as one of the most globalized political values of our times (Wilson 1997, 1). Some commentators have aptly labeled this trend as part of the “internationalization of human rights (Forsythe 2000),”<sup>4</sup> the “global diffusion of human rights culture (Ignatieff 2001),” or similarly, the evolution of the international human rights regime (Donnelly 2003, 151-154). Contra the hammerlock of realist ideology in most academic and policymaking circles, human rights has “gone global” not

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*International to World Society? English School Theory and the Social Structure of Globalisation.* Cambridge: Cambridge University Press. For a nicely edited volume of various Global Governance approaches, see: Ba, Alice D. and Matthew J. Hoffmann, eds. (2005). *Contending Perspectives on Global Governance: Coherence, Contestation, and World Order.* New York: Routledge.

<sup>3</sup> The gap between the two fields of study has prompted one commentator to ask: “Why does work in international relations and political science, which focuses on problems of system-wide change, compliance, and effectiveness of norms and regulations, ignore international law (Ku 2001, 3)?”

<sup>4</sup> The so-called “internationalization of human rights” goes hand-in-hand with changing or evolving concepts of state sovereignty. For a good collection of such “constructivist” arguments refer primarily to the work of Alexander Wendt, also: Biersteker, Thomas J. and Cynthia Weber, eds. (1996). *State Sovereignty as Social Construct.* Cambridge University Press.

because it serves the particular interests of the powerful, but primarily because it has advanced the interests of the powerless (Ignatieff 2001, 7).<sup>5</sup>

In recent years the human rights movement has also taken on increasing ambition, breadth, and complexity. There has been an enormous proliferation of instruments and institutions, world conferences and nongovernmental initiatives, active proposals in many directions, as well as growing conflicts about premises and goals within the movement itself. The human rights movement, to be sure, is a vibrant one. Human rights now have a greater prominence in the contemporary foreign policy of more states than at any other time in history (Forsythe 2000, 159-160; Donnelly 2003, 172).

Against this global backdrop there have been indications of strengthened international law and a meaningful push towards criminal justice on the international stage. A prominent example of this trend has been the exercise of universal jurisdiction in respect of gross human rights offenses. Universal jurisdiction is premised on the notion that there exists a certain class of criminal offenses deemed to be so serious, so unacceptable by a civilized world, that any court anywhere is permitted by international law to both prosecute and punish, irrespective of the crime's place of commission or the nationality of the offender or the victims. Universal jurisdiction arises not only because such crimes are "against humanity," but because they are crimes *simpliciter*, under any domestic law, which might otherwise go unpunished (Robertson 1999, 238).

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<sup>5</sup> One could also reasonably contend that the opposite is true. Indeed, "human rights talk" has certainly been used to justify powerful military intervention or what has lately come to be regarded as "muscular humanitarianism." One must look no further than the recent Anglo invasions of Afghanistan and Iraq. For a collection of liberal arguments in favor of intervention, see: Cushman, Thomas, ed. 2005. *A Matter of Principle: Humanitarian Arguments for War in Iraq*. California: University of California Press. Also see: Cushman, Thomas. 2005. "The Human Rights Case for the War in Iraq." In Richard A. Wilson, ed. *Human Rights in the 'War on Terror.'* United Kingdom: Cambridge University Press. For an equally compelling, though altogether critical analysis of the Iraq invasion, see: Roth, Ken. 2004. "War in Iraq: Not a Humanitarian Intervention." January 2004. <http://hrw.org/wr2k4/3.htm>.

Today, nearly 125 countries recognize some form of universal jurisdiction in their national constitutions—including, but not limited to, Australia, Austria, Belgium, Canada, Denmark, France, Germany, Israel, Mexico, Netherlands, Senegal, Spain, Sweden, Switzerland, the United Kingdom, as well as the United States (The Economist, 18 November 2006; Amnesty International USA). Human rights abuses widely considered to be subject to universal jurisdiction include piracy, slavery, war crimes, crimes against humanity, genocide, apartheid, and torture (Bassiouni 2004, 47-56). Advocates of the exercise of universal jurisdiction primarily subscribe to the idea that there exists some common denominator of human behavior; some “fundamental values of the human spirit (Schabas 2001, 1).” For others, there is an inherent utopian dimension that envisions a vibrant and broadly-based political community (Steiner 1991, 929). For most it “holds the promise for greater justice for the victims of serious human rights violations around the world (Robinson 2004, 17).”

Despite such wide-ranging rhetoric, however, universal jurisdiction is broadly understood to represent a “reserve tool” in the fight against gross violations of human rights. The principle of universal jurisdiction is therefore only to be applied where “the justice system of the country that was home to the violations is unable or unwilling to do so (Human Rights Watch, June 2006).” This principle, known as “complementarity” in most legal circles, or otherwise “subsidiarity,” implies that courts which preside within the territorial state that are able and willing to prosecute individuals for international crimes should have priority in exercising jurisdiction. In this regard, it is important to note that more than three-fifths of all states have enacted universal jurisdiction laws to ensure that their national courts are able to investigate and effectively prosecute persons

suspected of committing these crimes, and to ensure that their country is not merely used as a “safe haven” to evade justice (Amnesty International USA).<sup>6</sup>

Overall, the exercise of universal jurisdiction represents an impressive indicator of the continuing globalization of the administration of criminal justice (Kamminga 2001, 964). There is no more dramatic instance of this fact than the indictment and prosecution of those responsible for the perpetration of crimes against humanity (Falk 2004a, 124).

The logic of the crime against humanity<sup>7</sup> was first articulated in the Nuremberg Judgment, which stated that, “international law imposes duties and liabilities upon individuals...crimes against international law are committed by men, not by abstract entities (quoted in Alston & Steiner 2000, 1134).” According to legal scholar Naomi Roht-Arriaza, “the moral and policy arguments for enforcing an obligation to investigate, prosecute, and provide redress rest heavily on the fact that the crimes at issue were committed by state officials, acting as part of a perhaps unwritten but nonetheless real state policy, who therefore found it easier to remain above the law (1995, 70).”

While universal jurisdiction today is not considered mandatory, there has been a noticeable trend in the last half-century to both expand the offenses subject to universal jurisdiction and to “make the assumption of jurisdiction mandatory (Roht-Arriaza 1995, 25).” An early test of this post-Nuremberg sentiment emerged with the Eichmann ordeal of 1961. Adolf Eichmann, operationally in charge of the mass murder of Jews in

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<sup>6</sup> This unfortunate fact has become all too evident during the so-called “hunt” for suspected terrorist, Osama Bin Laden, as he first sought refuge in Sudan during the late 1990s, later Afghanistan under Taliban rule, and now, suspected to be traipsing the northwest corner of Pakistan—all states in which the rule of law is clearly not up to minimum international standards.

<sup>7</sup> Crimes against humanity were first defined in positive international law in Article 6(c) of the Nuremberg Charter as “murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.”

Germany and German-occupied territories during World War II, fled Germany after the war. He was later abducted from Argentina by Israeli agents and brought to trial in Israel under the Nazi Collaborators Law.<sup>8</sup> Eichmann was eventually convicted and later executed for his “active and significant participation” in the ‘Final Solution to the Jewish Problem (quoted in Alston & Steiner 2000, 1138).’ While it is reasonable to object to the procedure that led to Eichmann’s capture, it nevertheless represented a formative building block for the foundation of international criminal law. More to the point, the muddled nature of Eichmann’s capture may be viewed to have led to the much more legalized, predictable process that jurists and statesmen alike are presented with today.

In the decades that have followed the Eichman trial there have been several instances in which top officials from traditionally powerful states—or those aligned with powerful states such as the U.S.—have been investigated for serious international crimes, namely, Ariel Sharon, Henry Kissinger, and Augusto Pinochet.

#### *A. The Case of Ariel Sharon*

During the 1982 Lebanon War, while Ariel Sharon was defense minister of Israel, the Sabra and Shatila massacres took place in which an estimated 3,500 Palestinian civilians were murdered at the hands of a Christian militia group closely associated with the Israeli security forces. Sharon was later found to bear “personal responsibility” by a government

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<sup>8</sup> Under this specific law, Eichmann was charged with 15 counts of “crimes against the Jewish people,” which was equated with the gravest “crime against humanity” by Justice Simon Agranat, who would play a key role in the Israeli Supreme Court’s affirmance of Eichmann’s conviction and death sentence. This “simple” technique enabled Justice Arganat to devote the bulk of his opinion to the “universal aspects” of the Eichmann case. In other words, Eichmann’s crimes had a special universal characteristic that was not confined to Jewish people as such (Alston & Steiner 2000, 1142).

commission set up to investigate the massacre.<sup>9</sup> On 18 June 2001, relatives of the victims of the Sabra massacre began proceedings in Belgium, based on its universal jurisdiction statute, to have Mr. Sharon indicted on war crimes charges.<sup>10</sup> At the time, a Human Rights Watch report stated that “[t]here is abundant evidence that war crimes and crimes against humanity were committed on a wide scale in the Sabra and Shatila massacre... The findings and conclusions of the [government] Commission, however authoritative in terms of investigation and documentation of the facts surrounding the massacre, cannot substitute for proceedings in a criminal court in Israel or elsewhere that will bring to justice those responsible for the killing of hundreds of innocent civilians (Human Rights Watch, 23 June 2001).”

After many twists and turns, the case against Mr. Sharon was ultimately blocked when, in June 2003, the Belgian parliament rescinded the country’s universal jurisdiction, or Anti-Atrocity Law, passed in 1993 and further strengthened in 1999 (King Irani 2003, 21). In fact, at the time of the Sharon proceedings, Belgium claimed the most far-reaching legislation permitting the exercise of universal jurisdiction in the world. Later in 2003, however, a Brussels appeals court would uphold the decision not to pursue a criminal case against Mr. Sharon on behalf of the family members of the Sabra massacre. This decision was widely believed to be a result of pressure from foreign governments,

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<sup>9</sup> The Kahan Commission, as it was called, stated in their closing remarks, “we have found, as has been detailed in this report, that the Minister of Defense [Ariel Sharon] bears personal responsibility. In our opinion, it is fitting that the Minister of Defense draw the appropriate personal conclusions arising out of the defects revealed with regard to the manner in which he discharged the duties of his office—and if necessary, that the Prime Minister consider whether he should exercise his authority under Section 21-A(a) of the Basic Law: the Government, according to which the Prime Minister may, after informing the Cabinet of his intention to do so, remove a minister from office (Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut, 8 February 1983).” Also see: Borneman, John, ed. (2004). *The Case of Ariel Sharon and the Fate of Universal Jurisdiction*. Princeton University Press.

<sup>10</sup> See, “The Complaint against Ariel Sharon for his involvement in the massacres at Sabra and Shatila,” 18 July 2001.

including the United States, which threatened to have the NATO headquarters removed from Brussels.<sup>11</sup> Western powers, in other words, feared a dangerous legal precedent—one in which high-ranking leaders, both past and present, could be held accountable for crimes committed in an official capacity.

### *B. The Case of Henry Kissinger*

Given the Sharon precedent (or lack thereof), it is not altogether surprising to find that Henry Kissinger has similarly managed to escape accountability for his alleged complicity in crimes against humanity.<sup>12</sup> It is also not surprising that Mr. Kissinger himself has been one of the most vocal and vociferous critics of universal jurisdiction, as well the activities of the newly constituted International Criminal Court.<sup>13</sup>

The arrival of Mr. Kissinger in London to attend a conference on 24 April 2002 touched off several legal proceedings concerning actions during his tenure as U.S. National Security Advisor and then U.S. Secretary of State in the Nixon Administration. For instance, two judges from Spain and France requested permission to question him in connection with cases brought against former Chilean military leaders. Later in 2002, eleven victims who suffered grave human rights violations following the 1973 coup in Chile brought suit against Mr. Kissinger in U.S. District Court in Washington, D.C. The

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<sup>11</sup>See: Reydams, Luc. (2003). “Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law,” *Journal of International Criminal Justice*. 1, p. 679. Also of note, a magistrate based in Brussels has carried out a number of investigations of crimes committed during the civil war in Rwanda. On 8 June 2001, for example, Alphonse Higaniro, Vincent Nteziman and two Catholic nuns, were convicted in a Brussels court of various counts of murder for their share in the Rwandan genocide and subsequently sentenced to long prison terms (Kamminga 2001, 966).

<sup>12</sup> There is considerable evidence to suggest that Mr. Kissinger played a central role in the assassination of Chile’s President-elect Salvador Allende. In addition, there is evidence (though, much is still “classified”) to suggest his involvement in a number of atrocities ranging from Southeast Asia, Sub Sahara Africa, in particular, Angola, as well the Indonesian genocide of East Timorese. Though he is most often associated, with the many atrocities that occurred in Latin America throughout the 1970s.

<sup>13</sup> See: Kissinger, Henry. 2001. “The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny.” *Foreign Affairs*. July/August.

suit alleged that Mr. Kissinger's involvement in the 11 September 1973 coup makes him responsible for crimes against humanity, forced disappearance, torture, arbitrary detention, and wrongful death. A British activist would also attempt to have him arrested for crimes allegedly committed in Cambodia, Laos and Vietnam during the United States' engagement in Vietnam.<sup>14</sup> Despite the collection of extensive evidence and testimony, however, Mr. Kissinger has yet to face any sort of legal ordeal.

### *C. The Case of Augusto Pinochet*

The investigation into, and attempted legal proceedings against, Mr. Sharon and Mr. Kissinger were certainly noteworthy. If anything, the two cases presented the world with the possibility that powerful leaders may one day be held to account in a court of law. Today, however, the arrest of former Chilean military dictator, Augusto Pinochet, is regarded as the most well-known case where states have exercised universal jurisdiction.

Mr. Pinochet was detained by authorities in London on 16 October 1998. An international warrant was then issued by Spain and a magistrate in London followed with a provisional warrant under the UK Extradition Act of 1989.<sup>15</sup> Judicial authorities sought to extradite Mr. Pinochet to stand trial in Spain. The rationale for extradition was based on his alleged responsibility for numerous human rights violations that occurred during his time as President of Chile between 1973 and 1990. The violations were related to the

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<sup>14</sup> For more detailed information on all of these legal proceedings, as well as continued updates, visit the International Campaign against Impunity website: [www.icaei.com](http://www.icaei.com).

<sup>15</sup> The basis for the extradition proceedings was the European Convention on Extradition, to which the UK and Spain were parties. The UK had incorporated its terms into domestic law in the Extradition Act of 1989 and the European Convention on Extradition Order of 1990 (Alston & Steiner 2000, 1212). It should be noted herein that France, Belgium, and Switzerland also made extradition requests. For a good summary of the European human rights regime, see: Goldstein, Leslie F. and Cornel Ban. 2005. "The European human-rights regime as a case study in the emergence of global governance." In *Contending Perspectives on Global Governance: Coherence, contestation, and world order*, ed. Ba, Alice D. and Matthew J. Hoffman. New York: Routledge: 154-177.

overthrow of democratically-elected President Salvador Allende—in collusion with figures such as Henry Kissinger and the Central Intelligence Agency of the United States. The political repression that would follow included several thousand documented murders, systematic use of torture, and “disappearances.” After a lengthy, often contentious legal process, the British government would ultimately decide to send the 84-year-old general back to Chile, ostensibly on health-related grounds after a panel of medical specialists determined that he was “mentally incapable” of standing trial.<sup>16</sup>

Mr. Pinochet would later die while under house arrest in Chile, ending his legal ordeal before it ever really began. As of this writing, however, 109 agents of his regime have been convicted on human rights grounds (Brody 2006).

### **III. Universal Jurisdiction: Progress in International Society**

In the aftermath of the “Pinochet precedent”—despite the absence of a legal solution—the culture of legal accountability has gained noticeable momentum within international society, often enmeshing a newfound legal culture in many parts of the globe previously untouched by its force. Above all, the so-called “myth of immunity” for sovereign heads of state has now been severely challenged. It can no longer be doubted that as a “matter of general customary international law, a head of state will personally be liable to be called to account if there is sufficient evidence that he authorized or perpetrated...serious international crimes (quoted in Alston & Steiner 2000, 1205).”<sup>17</sup> The presumed immunity

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<sup>16</sup> See: Regina V. Bartle. House of Lords, 24 March 1999. [1999] 2 All ER 97, [1999] 2 WLR 827.

<sup>17</sup> More recently, the International Court of Justice (ICJ) interpreted international law to hold that the Congolese foreign minister was immune from a universal jurisdiction prosecution in Belgium for alleged war crimes and crimes against humanity he committed in his country. The ICJ decision technically has not precedential effect beyond the case it decided. So the scope of official immunity from a universal jurisdiction prosecution remains an open question (Goldsmith and Krasner 2005, 353).

of Mr. Pinochet, for example, was effectively stripped in six major cases, ranging from death squads and abductions, to the hiding of millions of dollars abroad.<sup>18</sup>

As a result, the Supreme Court of Argentina would strike down immunity laws for its former government officials that operated during its dictatorial rule from 1976-1983. A Mexican court would follow suit on 12 January 2001 and permit the extradition to Spain of Ricardo Miguel Cavallo, a former Argentine military officer accused of having committed numerous human rights violations during that country's so-called "Dirty War (Kamminga 2001, 970)." Most recently, the extradition of ex-Peruvian head of state, Alberto Fujimori, by a Chilean court to face rights charges in Peru, where he ruled from 1990-2000, was particularly welcome.<sup>19</sup>

Africa as well, whose people have long been victims of cycles of atrocity and impunity has demonstrated an increasing willingness to invoke the principle of universal jurisdiction. The July 2006 summit meeting of the African Union, an assembly comprising such notable despots as Robert Mugabe of Zimbabwe, Omar al-Bashir of Sudan and Muammar el-Qaddafi of Libya, called on Senegal to prosecute, "on behalf of Africa," one of their old colleagues, the former dictator of Chad, Hissène Habré, otherwise known as the "African Pinochet." Earlier this year, Charles Taylor of Liberia, was extradited to the UN-backed Special Court for Sierra Leone to face war crimes charges. Also, as of late 2006, the International Criminal Court is now investigating alleged crimes in Darfur, Uganda and Congo.<sup>20</sup>

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<sup>18</sup> A DC-based bank is alleged to have aided Mr. Pinochet in the stashing of untold amounts of currency. The bank in question had helped Mr. Pinochet set up false accounts to avoid having his assets frozen. As of this writing, victims and survivors in Chile have put legal pressure on the bank to agree to pay damages into a fund established to compensate the families hit hardest by Mr. Pinochet's violations.

<sup>19</sup> See: "Chile Returns Fujimori to Peru to face Rights Charges." *New York Times*. 23 September 2007.

<sup>20</sup> For a discussion of these developments, see: Brody, Reed. (2006). "Pinochet: Justice and the general." *International Herald Tribune*. <http://www.ihf.com/articles/2006/12/11/opinion/edbrody.php>.

Aside from the Sharon investigation, the Middle East—a region notorious for granting impunity to the most vicious human rights offenders—has witnessed a shift towards individual accountability. In December 2005, for instance, human rights groups brought a class action lawsuit against Avi Dichter, the former director of Israel's general security service, and Moshe Ya'alon, the former head of the intelligence branch and former chief of staff of the Israel Defense Forces. Moshe Ya'alon is alleged to be responsible for war crimes, extrajudicial killings, crimes against humanity, and cruel, inhuman or degrading treatment or punishment in connection with hundreds of civilian deaths and injuries in the 1996 shelling of a U.N. compound in Qana, Lebanon. Avi Dichter, who successfully sought refuge and currently resides in the United States, is now being sued for his role in dropping a one-ton bomb on a residential neighborhood in Gaza City in 2002 (Amnesty International USA). In addition, former interior Minister of Uzbekistan, Zorkirjon Almatov is actively being sought for his alleged role in the systematic torture of detainees and “disappearances” during the May 2005 Andijan massacre of unarmed protestors (Amnesty International USA).<sup>21</sup> These particular developments may in due time add a disclaimer to oft-stated remark that “justice does not have a local address in the Middle East (King-Irani 2003, 25).”

In Asia proper, recent events in Burma have also raised the possibility that leaders of that country's military junta will one day be held to account for human rights violations, including extreme violence against ethnic groups, forced displacement, and an overall crackdown on civil society.<sup>22</sup> Aside from recent congressional hearings in the

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<sup>21</sup> Much like Mr. Rumsfeld, it is currently a German prosecutor that is actively investigating the case.

<sup>22</sup> For the most recent summary of events in Burma, refer to the 2007 Human Rights Watch World Report.

United States on the matter, a decision was made in the Human Rights Council<sup>23</sup> to hold a full-day meeting on the situation in Burma. This decision was certainly a welcome step, as it may indeed foreshadow future prosecutions for those individuals responsible for the most serious crimes, as was the case in Sudan and the Democratic Republic of Congo when similar steps were taken. In addition, on 19 September 2007, Nuon Chea, the top surviving leader of the Khmer Rouge regime in Cambodia, was arrested by Cambodian authorities and charged with war crimes and crimes against humanity in the deaths of 1.7 million people from 1975-1979. Mr. Nuon Chea is the second major Khmer Rouge figure arrested. Indeed, seven weeks after the tribunal—established in conjunction with the United Nations—charged Kaing Guek Eav, who was the commandant of the Tuol Sleng prison in Phnom Penh, where at least 14,000 people died. Prosecutors have also sent three other undisclosed names to the court for possible indictment.<sup>24</sup> Events in Cambodia have demonstrated that human rights violations are indeed taken seriously in the region, and that the rule of law provides the most acceptable option for holding perpetrators accountable. One can only hope that such developments, with the symbolic and financial support of the United Nations, and international society in general, spread to places like Burma, and perhaps North Korea and China<sup>25</sup>, whose populations have long suffered at the hands of repressive governmental policies.

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<sup>23</sup> See: “Human Rights Council Takes Important First Step on Burma.” 28 September 2007. Human Rights Watch. <http://hrw.org/english/docs/2007/09/28/burma16971.htm>. Also, for a (critical) history of the Human Rights Council, see: Forsythe, David and Baekkwon Park. 2007. (Forthcoming) “Turbulent Transition: From U.N. Human Rights Commission to the Council.”

<sup>24</sup> See, “Former Khmer Rouge Leader Arrested.” 20 September 2007. *New York Times*. [http://www.nytimes.com/2007/09/20/world/asia/20cambodia.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/09/20/world/asia/20cambodia.html?_r=1&oref=slogin).

<sup>25</sup> Large-scale prosecutions in China, let alone the formation of an international tribunal (perhaps in response to the Chinese government’s brutal repression of its Muslim minority) seem rather doubtful. To my mind, however, the choice of Beijing to host the 2008 Summer Olympics will pose an interesting crossroads of sorts for China. While one may reasonably argue that the choice of China in the first place was altogether dubious, I am apt to believe that the world’s attention may indeed usher in positive

Finally, there have also been widespread instances of prosecution in Europe, where international law has traditionally found a receptive audience.<sup>26</sup> For example, a British jury in 2005 would convict an Afghan warlord of crimes against humanity committed in Afghanistan under the British Criminal Justice Act and the U.N. Torture Convention. Similarly, in the Netherlands—perhaps the word’s most consistent supporter of international law—a judge would convict two Afghan generals for war crimes committed under Communist rule in Afghanistan. A Spanish court would convict Adolfo Scilingo for crimes against humanity committed in Argentina, sentencing him to 640 years in prison.<sup>27</sup> A court in France would sentence Mauritanian military official, Ely Ould Dah, to ten years of prison in absentia for torturing prisoners.<sup>28</sup> In Switzerland, the first conviction in Europe of a Rwandan national in connection with the Rwandan genocide, Fulgence Niyonteze, was sentenced to life imprisonment.<sup>29</sup> In short, it is clear to most observers that Europe—mainly a result of the establishment of the European Court of Human Rights<sup>30</sup>—has been the shining example in both prosecuting and holding human rights violators accountable for their actions.

To be sure, the exercise of universal jurisdiction is on the rise. With increased exposure we have also come to witness increased legitimacy and a belief that impunity for the most serious human rights crimes is unacceptable. At the very least, according to

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developments. For an interesting, comprehensive exploration of these issues, see: Human Rights Watch. 2007. “China’s Olympian Human Rights Challenges.” <http://china.hrw.org/>.

<sup>26</sup> For an in-depth overview of current developments in Europe, see: Human Rights Watch. June 2006. “Universal Jurisdiction in Europe: The State of the Art.” <http://hrw.org/reports/2006/ij0606/index.htm>.

<sup>27</sup> See: Brecher, Jeremy and Brendan Smith (2006c) for a more detailed discussion.

<sup>28</sup> It should be noted that many legal practitioners and leading human rights NGO’s believe unequivocally that the accused should be present during the trial to hear the prosecution’s full case, and, more importantly, to put forward a defense or assist their counsel in doing so (Amnesty International USA).

<sup>29</sup> The sentence, however, would later be reduced to 14 years. There arose problems in regards to recognizing crimes against humanity as subject to universal jurisdiction under Swiss law.

<sup>30</sup> For a complete overview of historical background and recent developments, see: European Court of Human Rights. Council of Europe. <http://www.echr.coe.int/ECHR>.

Antoine Bernard, executive director of the International Federation of Human Rights<sup>31</sup>, “now fear is not just on the side of the victims, but also of the torturers” because they cannot safely travel abroad as they may have been allowed to in the past (quoted in Brecher & Smith 2006b).<sup>32</sup> The fact of universal jurisdiction may cause a torturer to consider “some time somewhere some prosecutor may feel strongly enough about his crime to put him on trial (Robertson 1999, 242).”<sup>33</sup> For instance, ex-Indonesian President Suharto—who was forced from office in 1998 after three decades of autocratic rule and who is now under investigation by the new Indonesian government—has been highly reluctant to travel to Germany for medical treatment as he had done on many occasions in the past. According to those close to his family, he is not likely to travel abroad any time soon, as a host of authorities would surely be waiting (Crosette 1999).

After years in which the principle of universal jurisdiction for gross human rights offenses laid dormant in treaty provisions, it is now beginning to move to center stage (Kamminga 2001, 941). With that said, however, the concern associated with universal jurisdiction should not be obscured, nor its critics ignored. Instead, such viewpoints must be taken as an invitation to participate in constructive dialogue—a dialogue which may

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<sup>31</sup> For more information on this conglomerate of human rights organizations, see: <http://www.fidh.org/>.

<sup>32</sup> Human Rights Watch has compiled a list of ex-tyrants who have fled their battered countries for what they thought were safer addresses. Idi Amin of Uganda is still in Saudi Arabia; Jean-Claude Duvalier of Haiti is in France and one of his successors, Raul Cedras is in Panama; Paraguay’s Alfredo Stroessner is in Brazil, and Hissan Habre of Chad is in Senegal, where hope of prosecution is high, as Senegal is regarded as having one of the few independent judiciaries in Africa (for more detailed information, see: Crosette, Barbara. “Dictators Face the Pinochet Syndrome.” *New York Times*. August 22, 1999, p. WK 3.).

<sup>33</sup> Human rights historian and legal scholar, Geoffrey Robertson (1999), focuses on universal jurisdiction’s “deterrent effect” in quite some detail. While the exercise of universal jurisdiction may provide some sort of deterrence, I do not believe that it would necessarily enter into the mental or moral calculus of a would-be torturer, or any other criminal for that matter, as much as Robertson presupposes. It is quite simply an empirical matter; and one that may not be falsifiable or otherwise proven. Therefore, I have consciously chosen not to focus on that particular argument in any sort of detail. For more on the deterrence effect, see: Akhavan, Payam. 2004. “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” Hathaway, Oona Anne and Harold Hongju Koh, eds. 2004. *Foundations of International Law and Politics*. Foundation Press: 340-349.

lead to a better understanding of, and fuller appreciation about, its overall effects on international society. It is to those very issues that I now turn.

#### **IV. Universal Jurisdiction: Procedural Challenges and Substantive Obstacles**

To be sure, international criminal law is not a simple matter. It is complicated by nature, difficult to implement, and often manipulated by (power) politics. For example, the efforts to prosecute top officials such as Ariel Sharon, Henry Kissinger, and Augusto Pinochet obviously fell short of legal accountability, whereas most “successful” universal jurisdiction prosecutions have been brought against offenders in weak countries.

According to some critics universal jurisdiction is “extraordinarily vague,” “contested,” and “unconvincing (Goldsmith and Krasner 2005, 352-353).” It is therefore necessary to explore both the procedural challenges and substantive obstacles to the legitimate exercise of universal jurisdiction; namely, the procedural issues of domestic implementation, judicial overreach, and the so-called “democratic deficit,” as well as the substantive matters of state sovereignty and American exceptionalism.

##### *A. The Issue of Domestic Implementation and Judicial Overreach*

Put simply, different states have different constitutional structures. Hence there is an inevitable clash between international legal obligations and domestic legal requirements.

For universal jurisdiction (largely) depends on domestic courts for its application.<sup>34</sup>

Universal jurisdiction, in other words, aims to strengthen international human rights law

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<sup>34</sup> Here I take a rather hard-nosed realist interpretation of universal jurisdiction. To say that the exercise of universal jurisdiction depends on domestic courts for its application is both true to a certain extent, but also a bit extreme. While international tribunals rely on domestic jurisdiction for powers of search and seizure, arrest and the issue of subpoenas, they do not necessarily rely on them for rules of procedure, evidence, or sentencing. Here I must thank Professor Richard Wilson for pointing out this important distinction.

by marshaling politically independent domestic courts to enforce the law. While domestic legislatures and executives together with international tribunals all contribute to the definition and scope of universal jurisdiction, its final point of application will fall within the domestic courtroom.<sup>35</sup> It is domestic judges who must grapple with defining the relationship between international law and national law. It is domestic judges who must tell us how, when, and why universal jurisdiction is or is not applicable in a given case (Slaughter 2004, 168).” There is, however, a growing recognition that obstacles to domestic implementation of international law are mostly procedural in nature, rather than substantive (Butler 2004, 76). Anne-Marie Slaughter has therefore proposed a “global judicial dialogue” that may transform the imposition of multiple limits on universal jurisdiction by multiple national courts into a “common global search for solutions to the problem that the exercise of such jurisdiction inevitably poses (2004, 189).”

Naturally, the perceived amount of power that may become vested in the hands of domestic judges prompts the fear of domestic overreach, or what some commentators have deemed “judicial activism.” For instance, Michael Chertoff, the current United States Homeland Security Secretary, has recently lambasted what he refers to as “broad legal activism” and the “left wing interpretation” of laws in foreign countries that has served to “undermine the U.S. government’s ability to conduct its domestic security affairs (Strohm 2006).”<sup>36</sup> Though the hostility displayed by Mr. Chertoff—not uncommon among current United States officials—is a bit overstated, the exercise of

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<sup>35</sup> Here it is important to note that the ICTY and the International Criminal Tribunal for Rwanda (ICTR) both enjoy primacy over domestic courts.

<sup>36</sup> This particular sentiment is not altogether surprising, as it is widely shared amongst the many appointed officials within the George W. Bush administration. See: Strohm, Chris. “DHS Chief Says Foreign Courts Inhibit U.S. Security Efforts,” *Congress Daily*, 17 November 2006. [http://www.govexec.com/story\\_page.cfm?articleid=35527](http://www.govexec.com/story_page.cfm?articleid=35527)

universal jurisdiction must nevertheless be reserved for the most serious of international crimes; for instance, genocide, war crimes, and crimes against humanity.<sup>37</sup> This idea is premised on the fact that universal jurisdiction is a potentially “fearsome power” that ought to be exercised in extraordinary circumstances only (Slaughter 2004, 175).<sup>38</sup>

Indeed, if the exercise of universal jurisdiction is used in a politically motivated manner, or simply to vex and harass leaders of other states, it could disrupt world order and in so doing deprive individuals of their basic rights (Bassiouni 2004, 39). National judges, however, have been rather mindful of the problems raised by exercising universal jurisdiction—both in terms of the basis of their own judicial power and the potential for interfering in the affairs of other states (Slaughter 2004, 168). In fact, one recent survey conducted by Amnesty International found no “evidence whatsoever of frivolous or politically motivated prosecutions (Amnesty International USA).” Hence the current Bush Administration’s claim, for example, that universal jurisdiction is a dangerous political tool that can be used against American officials and service personnel is altogether dubious.<sup>39</sup> One cannot completely discount what Washington may perceive as a “rogue prosecutor,” but that worst case scenario is highly improbable (Forsythe 2002, 984).<sup>40</sup> What is more, the cases described herein demonstrate that universal jurisdiction,

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<sup>37</sup> There is also an argument to be made in regards to cases of international terrorism, where applicable treaties have recently proliferated, thus, making claims to universal jurisdiction that much more legitimate.

<sup>38</sup> Framing the exercise of universal jurisdiction in this particular manner will also undercut the arguments like those put forth by David Forsythe, who has essentially equated the exercise of universal jurisdiction with “judicial romanticism”—an idea premised on the belief that one does not always have to advance human welfare and human rights by “over-criminalizing” behavior (2000, 107).

<sup>39</sup> This has also been a main concern in regards to the ICC. In May of 2002, the Bush administration officially notified the U.N. that “the United States does not intend to become a party to the treaty”—this after President Clinton had signed the ICC treaty in 2001. In August of 2002, President Bush signed the American Servicemen’s Protection Act (ASPA), otherwise known as the “Hague Invasion Act” because it authorizes the president to use all necessary means to release U.S. officials from ICC captivity.

<sup>40</sup> What is more likely, according to Forsythe, is the instance of a “conscientious prosecutor who found questionable U.S. policies in armed conflict involving choices of targets and/or weapons, and who found—

if anything, is first and foremost an effective road to justice for victims who have nowhere else to go. Those critics, then, who carelessly throw about the charge of “domestic overreach” seem to be misguided at best or politically self-serving at worst.

Nevertheless, while the rate of universal jurisdiction prosecutions has increased in recent years—and while the basis for jurisdiction over war criminals and perpetrators of genocide and crimes against humanity has been established in many countries— actual prosecution has been blocked in a majority of cases. When political motivations have come into play at all “it has been to block legitimate cases from moving forward (Amnesty International USA).” International society, then, would seem to face less a need for limits on the exercise of universal jurisdiction than a need to overcome many of the stringent limits already imposed (Slaughter 2004, 170). Similarly, while the current number of universal jurisdiction cases may manifest themselves in a selective ad hoc manner it is reasonable to assume that the “progressive internalization of international criminal justice will gradually spread from the periphery to the center and give rise to a more inclusive universal framework ( Akhavan 2005, 349).”

*B. The Issue of Accountability and the “Democratic Deficit”*

Some of the most ardent critics of the exercise of universal jurisdiction claim that it “consistently slights the value of democratic accountability (Goldsmith and Krasner 2005, 351).” This is the objection based on a “democratic deficit”—that universal jurisdiction, like the ICC, is not “embedded in a broader system of democratic policy-making (Forsythe 2002, 986).” It is also based on the belief that universal jurisdiction

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as is normally the case in such situations—that no authority in the U.S. wanted to carry out a serious investigation of executive choices [in accordance with complementarity principle] (2002, 984-985).”

may cause more harm than the original crime it purports to address in so far as universal jurisdiction courts and prosecutors possess neither the competence nor the incentive to fully consider these harms. They are “doubly unaccountable in the sense that they are relatively unaccountable to their own government—to the extent that they are politically independent—and they are completely unaccountable to the citizens of the nation whose fate they are ruling upon (Goldsmith and Krasner 2005, 353-354).” In a domestic prosecution, for example, at least in the United States, the prosecutor is accountable to the community in which he or she serves in the sense that he or she is either elected or appointed and therefore subject to removal. As a result, according to Jack Goldsmith and Stephen Krasner, “in deciding whether and how to prosecute a crime, a domestic prosecutor will often take into account the consequences of the prosecution for community health, safety, and morale (2005, 354).” Overall, the contention is that because universal jurisdiction prosecution necessarily takes place outside “affected communities,” universal jurisdiction courts and prosecutors lack the incentive, or the institutional capacity, to consider essential trade-offs—a trade-off, for instance, between forgoing prosecution in favor of national reconciliation and collective forgiveness.

This argument, to be sure, has a certain ring of truth to it. However, it fails to recognize that the obligations inherent within the exercise of universal jurisdiction are layered upon more general obligations already established in international law. Indeed, genocide, crimes against humanity, and grave breaches of the 1949 Geneva Conventions necessarily entail universal jurisdiction in the first place.<sup>41</sup>

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<sup>41</sup> Interestingly, this observation lends considerable strength to those who argue in favor of an effective International Criminal Court despite the strength of opposition from the United States—whereas individual states might be unwilling to prosecute U.S. citizens given the power of the U.S. and its ability to retaliate,

In addition, the United States—perhaps the most vocal proponent of the “democratic deficit” viewpoint—has not been a champion of democracy in international relations, whether at the U.N. or in related fora like the World Trade Organization. Thus its arguments about a democratic deficit should not be given great weight until Washington shows a broader concern for majority rule in international policy-making (Forsythe 2002, 986).

Lastly, the legitimacy of universal jurisdiction prosecutions can come from sources other than the so-called “affected communities.” This argument is based in part on the observation that the protection of human rights is a worthwhile ethical position in contemporary international relations. It is also consistent with the Charter of the United Nations, which “reaffirms faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.” In this regard, it is appropriate to note that the ICC treaty—now ratified by 104 states including most NATO states—permits the prosecutor to decline to investigate when there are “substantial reasons to believe an investigation would not serve the interests of justice.” While universal jurisdiction prosecutions are distinct from, and operate outside the domain of, the ICC, both institutions operate on the principle of achieving justice, *not* the destabilization of an already fragile or otherwise precarious state of internal affairs. The larger question therefore is whether universal jurisdiction can be entangled in

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an ICC prosecutor with the responsibility to oversee particular crimes might feel no such restraint (Forsythe 2002, 986-987).

arrangements to such an extent that is required of all states to rethink its self-image and national interests in terms of a broader theme of international peace and security.

This discussion, and the conclusions drawn herein, ultimately dovetails with a discussion of state sovereignty. As such, it is to that topic to which I now turn.

### *C. The Principle of State Sovereignty*

To varying degrees, state sovereignty has been conceived in terms of the categories of untrammelled effective power. States have long trumped any attempt to limit or even question the absolutism of the sovereign creed. An example is the 1919 Treaty of Versailles, which established a commission to investigate and identify persons, including the Kaiser of Germany Wilhelm II, as liable for war crimes, recommending the creation of an international tribunal. The victorious states, however, opposed such an option, regarding the trial in international court of a head of State as “unprecedented in national and international law, contrary to the basic concept of national sovereignty (Sunga 1992, 23).” The principle of state sovereignty would later take on its “benchmark status” following enumeration within the United Nations Charter. Article 2, clause 7 specifically states, “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”<sup>42</sup> No doubt, the principle of state sovereignty has long been regarded as “overwhelming” and “unconditional” in international law.

There is, however, an increasing tendency within international relations scholarship to question the very foundations of state sovereignty, particularly in light of the end of the Cold War and the possibilities associated with a so-called “new World

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<sup>42</sup> See generally: Charter of the United Nations. <http://www.un.org/aboutun/charter/>.

Order (Biersteker & Weber 1996, 1).” According to one commentator, “the classic regime of sovereignty has been recast by changing processes and structures...states are [now] locked into diverse, overlapping political and legal domains (Held 2004, 137).” More to the point, “states are increasingly but one site for the exercise of political power and authority (Held 2004, 137).” Therefore, we may live “not in an era of marginal alterations and adaptations, but in an era of ultimate discontinuity with past (Holsti 2004, 2). According to one prominent observer, any assumption that sovereignty is an “indivisible, illimitable, exclusive and perpetual form of public power—entrenched within an individual state—is now defunct (Held 2004, 139).”

Instead of the ultimate inviolability of state sovereignty many academics have explored the ways in which states instead “negotiate” their sovereignty. Indeed, although state sovereignty is not likely to disappear from world affairs any time soon, it is currently “being restricted and revised in a continuing and complex process (Forsythe 2000, 56).” For instance, there has been a noticeable trend away from the idea of unconditional sovereignty and toward a concept of “responsible sovereignty”—the idea that governmental legitimacy which validates the exercise of sovereignty necessarily involves a minimum adherence to humanitarian norms and a capacity to act effectively to protect citizens from acute threats to their security and well-being that derive from adverse conditions within a country.<sup>43</sup> As with other fundamental norms and principles, sovereignty has evolved in relation to practice and to changes in community expectations—changes that have been driven by globalization, as well as the “rapid

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<sup>43</sup> See generally: “The Responsibility to Protect.” 2001. Report of the International Commission on Intervention and State Sovereignty. International Development Research Center. <http://www.iciss.ca/menu-en.asp>.

growth of transnational networks (Slaughter 2005, 302-3030),” transnational institutions and problem-solving networks related to human rights (Ruggie 2005, 322-323).

Though many observers of this trend are correct to note that there are important changes taking place—changes that certainly would have been unfathomable merely a few decades ago—it must be conceded by even the most wide-eyed optimist that much has also remained the same. For example, one would surely be naïve to suggest that the era of power politics has somehow passed us by. On the contrary, it would be much more prudent to measure shifting notions of state sovereignty against a realist backdrop; a backdrop where the relative capability of a given nation-state (largely) determines its role and effectiveness in the international system. Put simply, we do not live in a “new World Order,” as some would encourage us to believe. The sovereign state system has not been replaced by an altogether novel paradigm of world politics, though the forces of globalization have certainly provided us with a new lens from which to observe.

If there is any such phenomenon that may hold the potential to revolutionize, or otherwise transform the current international system it would be international law. This is a reasonable assumption for the simple fact that since 1945—largely under U.S. leadership—it has become promoted, accepted, and applied in nearly every corner of the globe. By Kal Holsti’s estimation, it is both the “authority and increasing legitimacy of international law, more than anything else, that has distinguished the contemporary society of states from historical analogues (2004, 176).”

In particular, one area of international law has already marked a transformation of considerable legal and diplomatic significance. This has been in terms of the personal immunity claims of foreign heads of state in regards to crimes against humanity (Holsti

2004, 160-161). Today, defenses of sovereign immunity have been widely determined to be unacceptable, and, more importantly, legally unsustainable. In this regard, the decision of the British House of Lords in the Pinochet case, which confirmed that former heads of state do not enjoy immunity for the crime of torture under United Kingdom law, was both a refreshing and welcome development. In the words of Mary Robinson, former United Nations High Commissioner of Human Rights, the decision “seriously challenged the notion of immunity from criminal liability for crimes under international law committed in an official capacity (2004, 17).”

Whether or not international law is necessarily subsumed to the national interest is an empirical matter. It should suffice to note, however, that sovereignty has not been relegated to the so-called “dustbin of history.” After all, international law is still “made by states for states.” I am more apt to believe, however, that interests are *not* reducible to power. As the term suggests, they are a function of what states are interested in, what they value—which in “all cases is much more than power...most states are in fact interested in international human rights (Donnelly 2003, 157).” Power, in this sense, is at most, only the cardinal, not the exclusive concern for foreign policy. Alongside the prevalence of power politics in international relations there has been increasing agreement among state leaders that investigations into gross human rights violations are not only necessary, but also the “right thing to do (Donnelly 2003, 168).”

Though it is difficult to agree with those like James Rosenau, who propose that the world is simply “too interdependent and authority too dispersed for any one country to command the global scene as fully as earlier empires did (2005, 149),” it does in fact appear that world politics is now more dynamic than ever. It is filled with a multitude of

rules and distinct rule systems that have started to move away from a world where powerful states, due to their power *alone*, set the rules of international politics. World order today seems to increasingly result from the dynamic actions and interactions of many actors in many different contexts (Hoffmann 2005, 114).

While the sovereign state does indeed remain the primary point of reference in international relations, it may no longer enjoy the same “illimitable” and “exclusive” status as it has in years past. The same is also true of the state’s chief representatives; namely, those who are elected to office, and those appointed to primary positions of power within the state’s political apparatus. In short, state sovereignty is no longer an accepted rationale— in theory, nor in practice—for political leaders accused of gross human rights offenses to hide behind. The United States, in particular, must therefore recognize the strong incentives to become less “exceptional,” to align its laws, markets, trade practices, and even its domestic rights with those of other states (Slaughter 2005, 302-3030). Indeed, that is precisely the topic to which I now turn.

#### *D. American Exceptionalism*

For many Americans the premise of universal jurisdiction and the lofty rhetoric that it naturally engenders has the advantage of sounding morally persuasive, but a bit dubious nevertheless.<sup>44</sup> By and large, the rise of international criminal justice has met with strenuous resistance, ranging from cynical dismissal to outright hostility. In short, U.S. policy is often characterized by a pronounced tendency toward arrogance, a hubris deeply

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<sup>44</sup> Nearly every movement for social change in the United States, whether right wing or left, has combined a moral, religious, or aesthetic dimension in its campaign to win public approval. Thus, moral rhetoric of any sort continues to hold considerable sway with the American public (Schulz 2002, 5).

rooted in U.S. exceptionalism (Forsythe 2002, 978).<sup>45</sup> The prospect of a U.S. citizen, let alone a high-ranking U.S. official, being charged in a foreign court is highly controversial and does not sit well with a majority of those in Washington, regardless of political affiliation (Forsythe 2002, 987-989). In particular, the aftermath of the Pinochet extradition proceedings caused grave concern that a U.S. official, present or former, involved in the planning of military actions, say, the Gulf War or in Kosovo might be placed on trial in states like Iraq or Yugoslavia on charges of having committed crimes under international law (Alston & Steiner 2000, 1214). This reality poses the so-called “paradox of American exceptionalism,” insofar as the United States has demonstrated an unwillingness to impose on itself general international rules that Washington has both vigorously promoted and accepted in principle as just (Moravcsik 2005, 148).<sup>46</sup>

According to one prominent scholar, the U.S., in other words, “preaches universalism, but it practices national particularity and cultural relativism (Forsythe 2002, 976).” Indeed, the dismissal of things deemed “foreign” or “different” continues to have considerable currency in the highest judicial and political circles within the United States. In this regard, the comments of former Chief Justice William Rehnquist and current Supreme Court Justice Antonin Scalia, dissenting in *Atkins v. Virginia*, are very direct.<sup>47</sup> Justice Scalia, in particular, repudiated in the strongest term any suggestion that foreign

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<sup>45</sup> Here it should be noted that this general observation does not follow in regards to the World Trade Organization (WTO). The U.S. has recently accepted meaningful international procedures that restricted national independence, and the U.S. has had several national standards disallowed by WTO panels. It is the only “major and persistent limitation on national decision-making that the U.S. has accepted in contemporary international relations (Forsythe 2002, 980).”

<sup>46</sup> It also goes without saying that at least since 1945, the United States has displayed exceptional leadership in promoting international human rights. To my mind, this reality makes American exceptionalism all the more troubling, damaging, and all the more perplexing.

<sup>47</sup> This particular case dealt with the constitutionality of the imposition of the death penalty on persons said to be mentally retarded criminals. Among other things, the dissenting judges took objection to the majority’s reference to the views of professional organizations, opinion polls and the laws and practices of other countries in the search for an evolving standard of decency in relation to the Eighth Amendment prohibition against cruel and unusual punishment (Arbour 2005).

law could have any domestic relevance. American exceptionalism, it would seem, is a “cultural phenomenon,” broadly and especially evident in U.S. approaches to internationally recognized human rights (Forsythe 2002, 976).

One of the most recent examples of U.S. defiance has been the passage of the Military Commissions Act. In effect, the Military Commissions Act will provide “retroactive immunity” dating to 11 September 2001 for those individuals who violated the War Crimes Act.<sup>48</sup> Under the provisions of the U.S. War Crimes Act, it is a federal crime for an American to commit “grave violations” of the Geneva Conventions.

However, while the United States may presumably continue, at least in the meantime, to resist equitable enforcement of crimes against humanity, Washington is not in control of the further internalization of these norms, nor of the international community’s ways and means of enforcing them (Johansen 2006, 329). American opposition cannot stop multilateral transnational institutions and problem-solving networks from emerging. That is why the pursuit of American exceptionalism—easy enough to conjure up as an ideological desire—will become increasingly difficult to achieve in practice (Ruggie 2005, 323). Like William Schulz, executive director of Amnesty International U.S.A., one is urged to take the long view. After all, “let us keep in mind, there are no statutes of limitations here (quoted in Rothschild 2005).”

It would thus appear to be in the best interests of the United States to pursue the rule-of-law path that it has so far rejected, particularly given the ever-changing power realities characteristic of international relations.<sup>49</sup> For the sake of their own safety, U.S.

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<sup>48</sup> For a clear and concise outline of the War Crimes Act, refer to: [http://www4.law.cornell.edu/uscode/html/uscode18/usc\\_sec\\_18\\_00002441----000-.html](http://www4.law.cornell.edu/uscode/html/uscode18/usc_sec_18_00002441----000-.html)

<sup>49</sup> In this regard, the referral by the United States of those accused of crimes against humanity and genocide in Darfur to the International Criminal Court (ICC) is a promising development.

citizens may very well wish that their government had established “the norm that every individual in all countries should be held accountable for violating fundamental norms of human rights (Johansen 2006, 331).” Double standards not only increase resistance to American leadership on human rights, but they also may end up endangering U.S. security in the long-run (Koh 2005, 23-24). Nevertheless, the United States has rhetorically supported universal human rights with great enthusiasm, but has continued to reserve to itself the practice of “national particularism (Forsythe 2000, 148).”

As Benjamin Ferencz (2006), prosecutor at the Nuremberg Trials, has noted, “Our insistence that U.S. nationals are not bound by laws that others are required to accept repudiates what we stood for at Nuremberg. It brings us into disrepute as a hypocritical bully. Fair trial requires that everyone be bound equally by the same laws...Fairness is determined not only by how an interrogation or trial is conducted but also by who sits on the dock.” So far at least those in Washington have positioned America in a highly paradoxical relation to an international legal order based on human rights.

In order to highlight the inherent paradox of American foreign policy, as well as to demonstrate the difficulty inherent within the exercise of universal jurisdiction itself, I have chosen to focus on the proposed legal case against ex-Secretary of Defense Donald Rumsfeld. In so doing, I will hope to demonstrate that prosecuting those like Mr. Rumsfeld for alleged crimes against humanity will go a long way towards setting international society down the rule of law path—a path that would no doubt prove beneficial to the United States’ vested long-term interests.

## V. The Evidence against Secretary Rumsfeld

A week after President George W. Bush announced that Defense Secretary Donald Rumsfeld would resign, lawyers asked a German prosecutor to investigate Mr. Rumsfeld and several other prominent American officials for suspected crimes against humanity stemming from the mistreatment of suspects in America's so-called 'War on Terror'—most notably the military prisons in Abu Ghraib and Guantanamo Bay.<sup>50</sup> The 220-page indictment was delivered to federal prosecutors based on Germany's 2002 universal jurisdiction statute. The choice of Germany was, most likely, due to the fact that it "has so far been the most active [state] in exercising universal jurisdiction in respect of gross human rights offenses (Kamminga 2001, 969)."<sup>51</sup> Indeed, Germany's reputation as a supporter of universal jurisdiction was cemented in 1994 during the landmark Dusko Tadic extradition proceedings that operated in conjunction with the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>52</sup>

Interestingly enough, this was not the first time that German prosecutors were requested to investigate Mr. Rumsfeld.<sup>53</sup> Indeed, in February 2005 Mr. Rumsfeld was

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<sup>50</sup> Those also under investigation include former CIA Director George Tenet, Attorney General Alberto Gonzales, and former commander of all U.S. forces in Iraq, Lt. Gen. Ricardo Sanchez. For more information on the Abu Ghraib situation, see: Strasser, Steven, ed. 2004. *The Abu Ghraib Investigations: The Official Reports of the Independent Panel on the Pentagon on the Shocking Prisoner Abuse in Iraq*. New York: Public Affairs. In addition, it has also become clear that the American military and the Central Intelligence Agency have been holding terrorist suspects at places other than Abu Ghraib and Guantanamo. Some have not been listed with the Red Cross, which complained that it was unable to check on the condition of all American prisoners. And some died while under interrogation. One, an Iraqi general, Abed Hamed Mowhoush, was found in an autopsy to have died from "asphyxia due to smothering and chest compression (Lewis 2005, XV)."

<sup>51</sup> According to Kamminga (2001), this fact may be explained by the presence in its territory of large numbers of asylum seekers from the former Yugoslavia.

<sup>52</sup> Dusko Tadic was arrested by German authorities in Munich after having fled his native Serbia on suspicion of having committed numerous crimes against humanity, most notably at the now infamous Omarska camp, and violations of the customs of war. He would eventually be found guilty by the ICTY on 13 of the charges and sentenced to a twenty-year imprisonment.

<sup>53</sup> See: Harper, Tim, "Rumsfeld Fears War Crimes Charges in Germany," *Toronto Star*, 4 February 2005, <http://www.commondreams.org/headlines05/0204-21.htm>; Human Rights Watch. 2005. "Getting Away With Torture? Command Responsibility For the U.S. Abuse of Detainees."

identified by Human Rights Watch as being “personally involved” in the abuse of Guantanamo Bay prisoner Mohammed al-Qahtani, a Saudi national and alleged would-be participant in the September 11 terrorist attacks (Human Rights Watch 2006). According to the respected journalist, Seymour Hersh, then Secretary Rumsfeld allegedly sanctioned the use of “physical coercion” and “sexual humiliation” to extract information.<sup>54</sup>

These revelations, however, were not surprising given the overall attitude displayed by the Bush Administration following the events of September 11—an attitude best described as “any means necessary,” an attitude that viewed the Geneva Conventions<sup>55</sup>, at the most as obsolete, and at the very least, in the words of then Attorney General Alberto Gonzales, as “quaint.”<sup>56</sup> Even when the Bush Administration, in January 2006, signed a congressional bill outlawing torture, it reserved to itself the right to bypass the law under President Bush’s powers as commander in chief.<sup>57</sup> Many legal specialists at the time remarked that President Bush’s “signing statement” raised serious questions about whether he intended to follow the ban on torture at all. According to David Golove, a New York University law professor who specializes in executive

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<http://www.hrw.org/reports/2005/us0405/>; Brecher, Jeremy and Brendan Smith. 2006b. “War Criminals Beware.” *The Nation* 20 November 2006.

<sup>54</sup> See: Hersh, Seymour (2004). “Torture at Abu Ghraib.” *The New Yorker*, 10 May 2004. [http://www.newyorker.com/archive/2004/05/10/040510fa\\_fact](http://www.newyorker.com/archive/2004/05/10/040510fa_fact); also, Cohn, Marjorie. “The War Crimes Case Against Donald Rumsfeld.” 13 November 2006.

<http://www.globalresearch.ca/index.php?context=viewArticle&code=COH2006113&articleId=3841>. More importantly, for an extensive, in-depth account of the crimes committed by U.S. officials, and the clear paper trail involved, there is no better account than *The Torture Papers*, eds. (2005).

<sup>55</sup> The basic Geneva Conventions and the two Protocols cover a vast range of issues, canvassing land, air, or naval warfare, including the protection of wounded combatants and prisoners of war, of civilian populations and civilian objects affected by military operations or present in occupied territories, and of medical and religious personnel and buildings. Overall, the provisions of the four Conventions and the two Protocols constitute the principal contemporary regulation of *jus in bello* (Alston & Steiner 2000, 67).

<sup>56</sup> See: Memo 7. January 25, 2002. In *The Torture Papers*: 118-121.

<sup>57</sup> See generally: “Bush Could Bypass New Torture Ban: Waiver right is reserved.” *The Boston Globe*. January 4, 2006.

[http://www.boston.com/news/nation/articles/2006/01/04/bush\\_could\\_bypass\\_ne\\_torture\\_ban/](http://www.boston.com/news/nation/articles/2006/01/04/bush_could_bypass_ne_torture_ban/)

power issues, said that the signing statement meant that President Bush may authorize harsh interrogation tactics “when he sees fit.”<sup>58</sup>

Over the objections of key Administration figures, including then Secretary of State Colin Powell and the State Department’s Legal Adviser, William H. Taft, the Justice Department in collusion with Mr. Rumsfeld’s Department of Defense, would systematically reverse “over a century of U.S. policy and practice.”<sup>59</sup> On 15 January 2003, one may witness the initial involvement of Mr. Rumsfeld. In response to an “action memo” by General Counsel William J. Haynes<sup>60</sup>, Mr. Rumsfeld approved a departmental working group to investigate both the legal and policy considerations that would allow for the “employment of particular interrogation techniques by interrogators.”<sup>61</sup>

On 6 March 2003, the “Working Group Report on Detainee Interrogations in the Global War on Terrorism”<sup>62</sup> would present its conclusions to Mr. Rumsfeld. Perhaps its most disturbing “finding” was that “none of the provisions of the Geneva Convention...apply to [suspected] Al Qaeda detainees because...al Qaeda is not a [party] to the Convention. Similarly, the Working Group found that “Taliban detainees do not qualify as prisoners of war under...the Geneva Convention.”<sup>63</sup> Therefore, both suspected Al Qaeda and Taliban detainees were not seen, in the Administration’s view, as lawful military combatants, but rather “unlawful combatants,” a term that has since provided the primary rationale for the mistreatment of terror suspects, not to mention the fact that

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<sup>58</sup> Ibid.

<sup>59</sup> See: Memo 8. January 26, 2002. In *The Torture Papers*: 122-125; Memo 10. February 2, 2002. In *The Torture Papers*: 129-133.

<sup>60</sup> See: Memo 21. November 27, 2002. In *The Torture Papers*: 237. In a hand-written note Mr. Rumsfeld dubiously states, “...I stand for 8-10 a day. Why is standing [of suspects] limited to 4 hours?”

<sup>61</sup> See: Memo 22. January 15, 2003. In *The Torture Papers*: 238.

<sup>62</sup> See: Memo 25. March 6, 2003. In *The Torture Papers*: 241-285.

<sup>63</sup> *Ibid*, 241

detainees have not been allowed to contest their detention—leading some, for instance, Lord Steyn of Britain’s highest court, to label Guantanamo as a “legal black hole.”

The Working Group report also declared the prohibition against “cruel, inhuman and degrading treatment or punishment” as outlined in the United Nations Torture Convention<sup>64</sup>—which the United States is a signatory—as “vague and ambiguous.”<sup>65</sup> This observation would then lead to Mr. Rumsfeld’s memorandum to U.S. Southern Command—effectively in charge of the military prison at Guantanamo Bay—which said, “it is important that interrogators be provided reasonable latitude to vary techniques.” In addition, “the title of a particular [interrogation] technique is not always fully descriptive of a particular technique...techniques involving physical contact, stress or that could produce physical pain or harm must be provided to the decision authority prior to any decision.”<sup>66</sup> In other words, prior to any “questionable” or “enhanced” interrogation techniques, Mr. Rumsfeld would have had to been made aware of them in the first place, or, at the very least, made aware that such techniques were being considered.

Although prosecutors in 2005 were unwilling to move forward with a legal suit against Mr. Rumsfeld, attorneys now involved have the benefit of additional evidence, including key documents from congressional hearings on the al-Qahtani case. According to Human Rights Watch, the newly filed complaint is part of a more “determined effort to bring high-level officials to account.” It is an attempt to check the general military tendency to blame allegations of torture and gross misconduct on a few so-called “bad

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<sup>64</sup> See, generally: <http://www.hrweb.org/legal/cat.html>.

<sup>65</sup> *Ibid*, 243

<sup>66</sup> See: Memo 27. April 16, 2003. In *The Torture Papers*: 360-365.

apples.”<sup>67</sup> As Ken Roth, executive director of Human Right Watch, has remarked, “We have had two years of complete inaction by the Bush administration. They have been very good at prosecuting lower-level officials, but have done nothing to investigate high-level officials (Landler 2006).” Despite public claims from the Pentagon that allegations of abuse have been “investigated very thoroughly” and appropriate individuals “held accountable (Rising 2006),” there is a blank record of government-sanctioned investigations, let alone convictions of those who had both set and dictated military policy. This fact has led some commentators, such as Mark Danner, to ruefully observe that “those who ran the process and issued the orders will unlikely face any sort of legal ordeal (2004, 9).”<sup>68</sup>

Notwithstanding this reasonable cynicism there does appear to be a substantial case to be answered by Mr. Rumsfeld. Citing *prima facie* evidence, the 2006 legal suit<sup>69</sup> on behalf of 12 detainees—eleven Iraqis and the Saudi-born al-Qahtani—has asserted that Mr. Rumsfeld personally ordered and condoned multiple beatings, sleep deprivation, withholding of food, and sexual humiliation that amounted to torture.<sup>70</sup>

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<sup>67</sup> One of the stated reasons why the German prosecutor failed to move the case forward in 2005 was because torture allegations against low-ranking soldiers were already under investigation. In the prosecutor’s view, the fact that low-level investigations did not address the “responsibility” of then Secretary Rumsfeld was not “relevant to the assessment,” provided U.S. authorities were investigating the “complex as a whole (Human Rights Watch, June 2006).”

<sup>68</sup> According to the *Washington Post*, figures were only immediately available from the Army, which has said that by the middle of this year, there were some 85 courts-martial, 93 nonjudicial punishments and 81 administrative actions against troops for detainee abuses around the world. There have been about a dozen Abu Ghraib-related courts-martial and 11 Abu Ghraib-related convictions (Rising, 14 November 2006).

<sup>69</sup> Along with Amnesty International and Human Rights Watch, the Center for Constitutional Rights (CCR), the American Civil Liberties Union (ACLU), the American Bar Association, and Human Rights First (formerly known as the Lawyers Committee for Human Rights) are also standing behind the legal suit.

<sup>70</sup> For a more detailed account of the story, see: Landler, Mark, “12 Detainees Sue Rumsfeld in Germany, Citing Abuse,” *New York Times*, 15 November 2006; Rising, David, “Group Sues to Have Rumsfeld Investigated”, *Washington Post*, 14 November 2006; Tran, Mark, “Rumsfeld Faces Renewed War Crimes Claims,” *The Guardian*, 14 November 2006, <http://www.guardian.co.uk/guantanamo/story/0,,1947663,00.html>.

Today, prosecutors may also draw from the testimony of former Brigadier General Janis Karpinski, the one-time commander of all U.S. military prisons in Iraq, as well as Lieutenant General Randall Schmidt who has directly implicated Mr. Rumsfeld in a sworn statement obtained by Human Rights Watch on 20 December 2005. General Schmidt, in particular, has claimed Mr. Rumsfeld had been “talking weekly” to military personnel at Guantanamo about the al-Qahtani interrogation. According to the same report, the Pentagon has acknowledged that al-Qahtani’s mistreatment was part of a very detailed plan with “active supervision and oversight (Human Rights Watch 2006).” At the very least, then, Mr. Rumsfeld may be guilty of turning a blind eye to reports of torture—a cardinal crime under international law.

Mr. Rumsfeld has therefore attempted to declare “personal immunity from responsibility” for such crimes (U.S. Department of Justice, 21 July 2006). However, having resigned from his position of U.S. Secretary of Defense a year ago, Mr. Rumsfeld can no longer claim immunity as a head of state or government official. Nor can he claim immunity as a former state official, as international law does not recognize such immunity in the case of international crimes including the crime of torture. More to the point, Mr. Rumsfeld may be legally charged under the doctrine of “command responsibility”—the established legal principle that holds a superior officer responsible for crimes committed by his or her subordinates when he or she knew or should have known that they were being committed but fails to take reasonable measures to stop them.<sup>71</sup> It is important to note in this regard that Mr. Rumsfeld may not be charged by the

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<sup>71</sup> The doctrine of “command responsibility” was first articulated in the Nuremberg Judgment, and later adopted at the Tokyo trial of General Yamashita and approved by the US Supreme Court. It states, “a person in a position of superior authority should be held individually responsible for giving the unlawful order to commit a crime, and he should also be held responsible for failure to deter the unlawful behavior

International Criminal Court. Unlike domestic courts, the ICC does not enjoy universal jurisdiction. In fact, if a case is not directly referred to it by the U.N. Security Council—of which the United States has veto power—the ICC will only be able to exercise jurisdiction if the crime occurred in a state that is a “party to the Statute,” or if the crime was committed by a person who is a national of a party to the Statute. The ICC therefore is only able to exercise jurisdiction on the basis of the “territoriality principle”—otherwise known as the “active personality principle”—neither of which apply to the charges against Mr. Rumsfeld; the United States is not a signatory of the Rome Statute<sup>72</sup>, and neither is Iraq where the alleged acts of torture occurred.

Nonetheless, the evidence would seem to suggest that not only did Mr. Rumsfeld fail to intervene or “attempt to stop” acts of torture, but that he was both a conscious and willing participant in the process itself. By officially condoning the conditions for U.S. troops to commit war crimes and torture by “sidelining and disparaging” the Geneva Conventions, approving interrogation techniques for Guantánamo that violated, among other treaties, the U.N. Torture Convention, and hiding detainees from the International

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of subordinates if he knew they had committed or were about to commit crimes yet failed to take the necessary and reasonable steps to prevent their commission or to punish those who had committed them (quoted in Robertson 1999, 207). Perhaps the most impressive development in this regard was the recent Krstic Judgment, found at: <http://www.un.org/icty/krstic/TrialC1/judgement/>. Pay particular attention to section C entitled: The Role of General Krstic in the Srebrenica Crimes, and also the section entitled: “The criminal responsibility of General Krstic for the crimes proved at trial” under the heading: III. Legal Findings. The indictment of Slobodan Milosevic, also by the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY), is important. What’s more, the reader should take note that the ICTY was aggressively supported by the U.S. government. Obviously space limits my discussion herein of “command responsibility.” What’s more, it is better left to more ably-equipped minds. See: Kittichaisaree, Kriangsak. 2001. *International Criminal Law*. Oxford University Press. Pay particular attention to Part III, which deals specifically with modes of perpetration of international crimes and grounds for excluding international criminal responsibility.

<sup>72</sup>The Rome Statute of the ICC entered into force on 1 July 2002 after crossing the threshold of 60 state ratifications. Please see: Rome Statute of the International Criminal Court. <http://www.un.org/law/icc/index.html>. As of this writing, the Rome Statue has 139 signatories and 105 ratifications, the last being Japan on 17 July 2007. For continuous updates, see generally: Coalition for the International Criminal Court. <http://www.iccnw.org/?mod=home>.

Red Cross (ICRC), Mr. Rumsfeld “should have been alert to the possibility that troops would commit these crimes (Human Rights Watch 2005b).” Even from the early days of the war in Afghanistan, Mr. Rumsfeld must have been on notice through official briefings, ICRC reports, human rights reporting, and press accounts that some U.S. troops were committing war crimes and acts of torture.<sup>73</sup> Most troubling, “there is no indication that at any time over a three-year period of mounting evidence of abuse did he exert his authority and warn those under his command that the mistreatment of prisoners must stop. Had he done so, many of the crimes committed by U.S. forces certainly could have been avoided (Human Rights Watch 2005b).”

To date, Mr. Rumsfeld has been charged with direct involvement in torture on five separate occasions.<sup>74</sup> Most recently, on 26 October 2007, while attending a conference in Paris, a number of U.S.-based human rights groups along with the European Center for Constitutional and Human Rights and the French League of Human Rights, filed a complaint with the Paris Prosecutor before the “Court of First Instance,” charging Mr. Rumsfeld once again with “ordering and authorizing” torture.<sup>75</sup> The criminal complaint states that because of the failure of authorities in the United States and Iraq to launch any independent investigation into the responsibility of Mr. Rumsfeld and other high-level U.S. officials for torture despite a documented paper trail and government memos implicating them in direct as well as command responsibility for torture—and

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<sup>73</sup> Non-military U.S. personnel have also been suspected of serious crimes. Most recently, on 16 February 2007 a North Carolina judge sentenced former CIA contractor David Passaro, who was convicted of beating an Afghan detainee to death with a flashlight, to eight years and four months in prison. An HRW spokesman commented, “one person going to prison is not accountability for widespread abuse” and called for an independent prosecutor to investigate numerous other crimes. See: US Fails to Probe Afghan Detainee Abuse: Rights Group. 16 February 2007.

<sup>74</sup> See generally: Center for Constitutional Rights: <http://ccrjustice.org/newsroom/press-releases/donald-rumsfeld-charged-torture-during-trip-france>.

<sup>75</sup> See: *New York Times*. 27 October 2007. [http://www.nytimes.com/2007/10/27/world/europe/27rumsfeld.html?\\_r=2&ref=europe](http://www.nytimes.com/2007/10/27/world/europe/27rumsfeld.html?_r=2&ref=europe).

because the U.S. has refused to join the International Criminal Court—it is the legal obligation of states such as France to take up the case.<sup>76</sup> Given the increasing evidence against Mr. Rumsfeld, there have also been appeals within the United States for the appointment of a Special Prosecutor.<sup>77</sup>

So far, however, the efforts to hold Mr. Rumsfeld legally accountable have not been successful. Yet to claim that Mr. Rumsfeld will not be prosecuted in the future merely because he is an ex-official of the world's lone superpower, is rather myopic, and may miss the mark in some important respects. Indeed, according to Michael Ratner, President of the Center for Constitutional Rights, “the filing of the [French] case against Rumsfeld demonstrates that we will not rest until those U.S. officials involved in the torture program are brought to justice. Rumsfeld must understand that he has no place to hide. A torturer is an enemy of all humankind.”<sup>78</sup>

Although the recent passage of the Military Commissions Act will add to the difficulty of holding Mr. Rumsfeld accountable it does seem to have the effect of providing a central argument for legal action under the doctrine of universal jurisdiction. For it “demonstrates the intent of the Bush Administration to immunize itself legally from prosecution in the United States, even for the most serious crimes (Brecher & Smith 2006b). Thus, prosecutors may draw on a powerful new argument, while also relying on past experience. In this regard, the example of the former Yugoslavia is useful. According to Scott Horton, chairman of the International Law Committee, when Yugoslavia sought to immunize senior government officials from charges of war crimes,

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<sup>76</sup> The “obligation” in this sense stems from the 1984 U.N. Convention on Torture ratified by the United States and France. In fact, several cases have been tried in France under the guidelines of the Convention.

<sup>77</sup> See: Human Rights Watch. 2005a. “The Need for a Special Prosecutor.”

<sup>78</sup> See: Center for Constitutional Rights. 27 October 2007. <http://ccrjustice.org/newsroom/press-releases/donald-rumsfeld-charged-torture-during-trip-france>.

the United States declared the act itself to be “evidence of such a conspiracy (Brecher & Smith 2006b).” As various U.S. memoranda, authorizations, and actions have demonstrated, there were intentional plans to deny protections under the Geneva Conventions to persons detained during the armed conflicts in Afghanistan and Iraq (Paust 2005). What is more, there may be no other instance in United States history when a Secretary of Defense approved such denials of protection or the use of interrogation tactics that were either patently violative of the law of war or could clearly constitute violations in various circumstances.<sup>79</sup>

## **VI. Concluding Remarks**

There is no doubt we are currently embedded within a variegated international milieu—one in which power politics largely continues to prevail though alongside an upsurge of interest in holding principal rights-violators legally accountable. Similarly, while power politics may predominate in international relations, there remains an important caveat: many observers have failed to both recognize and fully anticipate how “enormously relevant” international law would be to the broad agenda of international relations in the twenty-first century (Jacobson 2001, 21).

After the now infamous photographs of young Americans smiling back at us in Abu Ghraib were first made public on 28 April 2004, conservative commentator David Brooks remarked that, “We have got bigger problems than whether Rumsfeld keeps his

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<sup>79</sup> Perhaps it is not altogether surprising, then, that eight former Generals and Admirals have called upon President Bush “to support the creation of a comprehensive, independent commission to investigate and report on the truth (Paust 2005).” On a related note, Mr. Rumsfeld, and his longtime political ally and friend, Dick Cheney, have a history of suppressing war crimes investigations. Cheney was White House chief of staff, and Rumsfeld secretary of defense, in November 1975 when the army investigation into the horrific atrocities committed by Tiger Force in Vietnam was stopped by the White House and the Pentagon. Such actions essentially ensured that no one was charged with well-documented war crimes (Skelly 2006).

job. We have got the problem of defining America's role in the world from here on out (2005, 66).” Shortly after the first public revelations of torture, Mr. Rumsfeld would himself proclaim to the world, “Judge us by our actions. Watch how Americans, watch how a democracy deals with wrongdoing and scandal and the pain of acknowledging and correcting our own mistakes and weaknesses.”<sup>80</sup> Since then, Mr. Rumsfeld has indeed lost his job, largely due to the political fallout from allegations of torture—not to mention the declining American support for a military presence in Iraq. Nevertheless, that still leaves us with the task of defining America's role in the world from here on out.

Based on the argument herein, the United States may contribute to a viable framework of global justice and do much to repair its diminished reputation by taking seriously the allegations against Mr. Rumsfeld. By respecting the human rights of detainees and prisoners of war, the United States can demonstrate that it is genuinely committed to the ideals of liberty and democracy that it officially espouses (Wilson 2005, 25). After September 11 our challenge, as American lawyers, academics, and activists is not to condone double standards or ignore the abuses committed in our name, but to prod the country we love to follow the “better angels of its national nature (Koh 2005, 143).” America's global interest in, and global influence on, human rights policy is genuinely exceptional. But if critics of American double standards too often repeat, “America is the problem, America is the problem,” they will overlook the occasions where America is not the problem but in fact the solution so desperately needed (Koh 2005, 120).”

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<sup>80</sup> See: Rumsfeld, Donald. “Congressional Testimony of Secretary of Defense Donald Rumsfeld,” Hearing of the Senate Armed Services Committee on Mistreatment of Iraqi Prisoners. *Federal News Service*. May 7, 2004. It should be noted that ex-Secretary of State Colin Powell made similar public statements. See: “Abuse Scandal ‘Terrible’ for U.S., Powell Concedes,” MSNBC, May 17, 2004. <http://www.msnbc.com/id/4855930/>.

The fact is most states and international NGOs desire more legalization regarding genocide, crimes against humanity, and war crimes, and thus want law to not only be better specified but adjudicated as well (Forsythe 2002, 991). Washington can ill afford to remain an outlier in this regard. A foreign policy premised on “exceptionalism (Ruggie 2005)” and a defiance of international standards of minimum decency will likely prove to be politically and militarily self-defeating in the long-run (Johansen 2006, 324-328).<sup>81</sup> American exceptionalism, in other words, may be tragically out of step with globalization and with the convergence of state interests and practices in an interdependent world.<sup>82</sup>

In closing, it would surely be naïve to suggest that we are on the eve of experiencing a “primacy of the juridical over the political” in international relations.<sup>83</sup> Nevertheless, if the last century has taught us anything, it is that the human rights movement—increasingly legalized in nature—will be on the offensive. If legalism is understood as the inevitable outcome of the globalization of human rights then there necessarily opens up a considerable space from which activists, legal scholars, and practitioners alike may move forward. As the scholar Payam Akhavan has noted, “even these modest and early glimmerings of international criminal justice may be dramatic and transformative (2005, 349).” The evidence has been gathered and pragmatic steps have been taken to hold Mr. Rumsfeld accountable for his alleged war crimes and torture by U.S. troops in Afghanistan, Iraq, and Guantanamo. As the top civilian official in the

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<sup>81</sup> America’s Iraq policy, for instance, over the past twenty years demonstrates that when the U.S. supports authoritarian regimes, ignoring their human rights performance, these authoritarian rulers can metamorphose into a national security threat (Ignatieff 2005, 24).

<sup>82</sup> See generally: Macedo Stephen 2004, 3; Orentlicher, Diane. 2004, 238. Both of these scholars refer to a “transnational process of lawmaking and enforcement” and the emerging regime of individual accountability in international law.

<sup>83</sup> See: Arbour, Louise. “Remarks made by Justice Louise Arbour, United Nations High Commissioner for Human Rights.” 17 October 2005. University of Connecticut: Storrs, CT.

Pentagon, by law, and in fact, Mr. Rumsfeld had command responsibility over all geographic and functional military commands.<sup>84</sup> Unless those who designed or authorized the illegal policies are held to account, all the protestations of “disgust” at the Abu Ghraib prison photos, for example, by President George W. Bush and others, will be meaningless.<sup>85</sup> If there is no real accountability for these crimes, for years to come the perpetrators of atrocities around the world will inevitably point to the United States’ treatment of prisoners to deflect criticism of their own conduct (Human Rights Watch 2005a). What matters and what determines whether torture and crimes against humanity are a mere aberration or an example of real state policy, is how a government responds. In this regard, the real danger of United States policy is that it will turn the country—which has been the major architect of the global system of international law and human rights—into its major outlier, weakening that system and reducing its capacity to promote universal values, and, most importantly, to protect America’s long-term national interests.

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<sup>84</sup> “Unless otherwise directed by the President, the chain of command to a unified or specified combatant command runs: (1) from the President to the Secretary of Defense; and (2) from the Secretary of Defense to the commander of the combatant command.” See “National Security Structure and Strategy (Chapter 24),” The Judge Advocate General’s Corps, U.S. Army. As Secretary Rumsfeld himself noted, “I am in the chain of command;” See: “Secretary Rumsfeld on ABC’s Today Show with Diane Sawyer,” news transcript, U.S. Department of Defense, May 5, 2004. <http://www.defenselink.mil/transcripts/2004/tr20040505-secdef0703.html>.

<sup>85</sup> See: Shanker, Tom and Jacques Steinberg, “Bush Voices ‘Disgust’ at Abuse of Iraqi Prisoners,” *The New York Times*, May 1, 2004.

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