

## War Criminals, Beware

By Jeremy Brecher and Brendan Smith

**11/05/06 "The Nation"** -- -- On November 14 a group of lawyers and other experts will come before the German federal prosecutor and ask him to open a criminal investigation targeting Donald Rumsfeld, Alberto Gonzales and other key Bush Administration figures for war crimes. The recent passage of the Military Commissions Act provides a central argument for the legal action, under the doctrine of universal jurisdiction: It demonstrates the intent of the Bush Administration to immunize itself legally from prosecution in the United States, even for the most serious crimes.

The Rumsfeld action was announced at a conference in New York City in late October titled "Is Universal Jurisdiction an Effective Tool?" The doctrine allows domestic courts to prosecute international crimes regardless of where the crime was committed, the nationality of the perpetrator or the nationality of the victim. It is reserved for only the most heinous offenses: genocide, war crimes and crimes against humanity, including torture. A number of countries around the world have enacted universal jurisdiction statutes; even the United States allows it for certain terrorist offenses and torture.

Many of the participants in the New York conference were human rights lawyers who have been expanding the use of universal jurisdiction since it was employed against former Chilean dictator Augusto Pinochet. In a recent case brought in Spain, for example, Argentine Adolfo Scilingo was tried and found guilty of crimes against humanity he committed in Argentina and sentenced to serve a 640-year prison term [see Geoff Pingree and Lisa Abend, "Spanish Justice," October 9]. The decision was made to try to prosecute Rumsfeld in Germany because its laws facilitate the use of universal jurisdiction.

The conference was sponsored by the Center for Constitutional Rights (CCR), which is bringing the case against Rumsfeld, and by the International Federation for Human Rights (FIDH), a network of 141 national human rights organizations founded in 1922.

An earlier case against Rumsfeld was brought two years ago in Germany by CCR on behalf of four Iraqi victims of Abu Ghraib, drawing largely on documents and photos that revealed abuse at the prison. As the case was being considered, a security conference loomed in Munich. Rumsfeld, who could have been served papers or even arrested, refused to attend unless the case was dismissed. It was dismissed February 10; Rumsfeld flew to Germany the next day.

The reason the prosecutor gave for the dismissal was that there was "no reason to believe that the accused would not be prosecuted in the United States"--notwithstanding powerful evidence that the officials who controlled prosecution were themselves part of the conspiracy to commit war crimes. The new complaint will be based on the failure of US authorities to investigate and prosecute high-level officials.

The case will draw on a powerful new argument. The Military Commissions Act of 2006, which the President promoted and recently signed into law, provides retroactive immunity for civilians who violated the War Crimes Act, including officials of the Bush Administration.

Such an attempt to provide immunity for their crimes, it will be argued, is in itself evidence of an effort to block prosecution of those crimes. Indeed, according to Scott Horton, chair of the International Law Committee of the New York City Bar Association, when Yugoslavia sought to immunize senior government officials, the United States declared the act itself to be evidence of such a conspiracy.

The new case will introduce other important elements as well. Lawyers who served as advocates, architects and enablers of prisoner abuse policies, like Alberto Gonzales and John Yoo, will be added as defendants. Abuse in Guantánamo will be added to that in Abu Ghraib. The complaint will present new evidence showing responsibility for torture and prisoner abuse at the highest levels of the chain of command.

Wolfgang Kaleck, a German human rights lawyer who is bringing the case in cooperation with CCR, FIDH and other groups, told the conference in New York that he is often asked, Do you really expect Rumsfeld to be arrested for war crimes? His answer is that he doesn't expect it immediately. "But we make it possible that someday Rumsfeld will be arrested," he says. According to Kaleck, the German government regularly receives calls from potential high-level visitors asking, "Are there any complaints against me?"

Antoine Bernard, FIDH executive director, says that although there have been few convictions so far based on universal jurisdiction, "now fear is not just on the side of the victims but also of the torturers." And that, supporters argue, will have a deterrent effect on government officials who contemplate using torture.

Peter Weiss, vice president of both CCR and FIDH and an elder statesman of international human rights law, notes that it took fifty years to get the Supreme Court's Brown decision outlawing school segregation, but during all that time people kept bringing cases that eventually changed the legal system's fundamental position. "New norms are being constituted to deal with the reality on the ground," he said. "Later those norms become real, practical, enforceable law."

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