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U.S. Officials’ Vulnerability to “Global Justice”: Will Universal Jurisdiction over War Crimes Make Traveling for Pleasure Less Pleasurable?

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Whether it takes only a few years or the thirty it has taken to initiate proceedings against Pinochet, those officials accused of war crimes will be brought to justice.¹

INTRODUCTION

Several months after the gruesome images from Abu Ghraib filled American airwaves and cyberspace, the Center for Constitutional Rights (CCR) filed a criminal complaint in Germany against high-ranking U.S. political and military leaders.² The CCR petitioned for an investigation and prosecution of U.S. officials under the German 2002 Code of Crimes Against International Law (CCAIL).³ The CCAIL criminalizes grave breaches of the four Geneva Conventions and violations of the laws of war, as defined under customary international law.⁴ Under the CCAIL,

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⁴. CCAIL, supra note 3, § 8; Litigating Against Torture, supra note 1.
The direct commission of crimes is criminalized as well as actions by superiors who knew or should have known that a subordinate was about to commit a crime and failed to prevent it. The CCAIL also establishes that German courts have universal jurisdiction over war crimes and crimes against humanity, which enables Germany to prosecute any suspects of these international crimes, regardless of where they are located and their connections or lack of connections to the German forum.

The CCR named Secretary of Defense Donald Rumsfeld, former CIA Director George Tenet, Undersecretary of Defense for Intelligence Steven Cambone, Lieutenant General Ricardo Sanchez, Brigadier General Janis Karpinski, Army Colonel Pappas, Major General Walter Wojdakowski, and other high-level officers who served in Iraq in the 160-page report filed with the German prosecutor in Karlsruhe, Germany. The CCR later amended the complaint to include U.S. Attorney General Alberto Gonzales, after his admission at his confirmation hearings that he had participated in the drafting and approval of legal memoraanda which authorized torture and inhumane treatment of detainees.

The Bush administration, after refusing to ratify the Statute of the International Criminal Court signed by the Clinton administration (Rome Statute), has pursued a policy to ensure that the International Criminal Court (ICC) will not obtain jurisdiction over American citizens involved in military operations overseas.

5. CCAIL, supra note 3, §§ 3-4; see Litigating Against Torture, supra note 1.
6. CCAIL, supra note 3, § 1; see Litigating Against Torture, supra note 1. But see Code of Criminal Procedure, § 153f (Ge.), translated in Translated CCAIL, supra note 3, at 16 (labeled as “Article 3: Amendment to Code of Criminal Procedure”). Although the CCAIL requires no link to Germany in cases of genocide, crimes against humanity and war crimes, section 153f of the Code of Criminal Procedure instructs the public prosecutor to exercise discretion in proceeding with cases in which there is not a tie to Germany, and to defer to an international court or state that does have ties to the crime, defendant or victim. NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS 191 (2005).
7. Lawsuit Against Rumsfeld, supra note 2; Litigating Against Torture, supra note 1.
8. Center for Constitutional Rights, Gonzales Added to War Crimes Complaint in Germany; New Evidence Shows Fay Report On Abu Ghraib Protected Officials, at http://www.ccr-ny.org/v2/reports/report.asp?ObjID=c138xk71Hk&Content=509 (last visited Mar. 17, 2005). CCR Vice President Peter Weiss stated that Gonzales' testimony in front of the Senate Judiciary Committee "demonstrates his involvement in setting policy where torture and inhumane treatment was authorized at the highest levels of the Bush Administration." Id. Referencing Gonzales' claim that aliens in U.S. custody overseas are not protected by the prohibition on cruel, inhuman and degrading treatment, Weiss stated "this makes clear that Gonzales and the Bush Administration continue to believe that non-citizens held outside the U.S. can be treated inhumanely." Id.; see also Litigating Against Torture, supra note 1.
instigated a series of bilateral agreements, called "Article 98 Agreements," to gain commitments from other states not to extradite U.S. citizens to the ICC. The threat of prosecution in a forum outside U.S. jurisdiction is exactly the scenario that the Bush administration hoped to avoid through these Article 98 Agreements.

In the past, the Bush administration has used political pressure to abort foreign attempts to prosecute U.S. citizens under national universal jurisdiction laws. For example, when a case was filed in Belgium against General Tommy Franks for his actions in the Iraq war, the United States coerced Belgium into revising its law to exclude this type of prosecution. After the administration threatened to cut off funding for a new NATO headquarters in Brussels, the Belgian government complied with the United States' request. It was not unexpected that the United States would pursue a political solution in response to the CCR's complaint as well, and the Bush administration brought similar pressure to bear on the German government. The Pentagon threatened that "frivolous lawsuits" could harm the U.S.-German relationship, and Secretary Donald Rumsfeld stated he would not attend the annual Munich security conference.

The CCR saw the German court as the court of last resort based on the documented unwillingness of the U.S. government to investigate the involvement of all but the lowest level of participants in the Abu Ghraib crimes. The German special prosecutor ultimately dismissed the
complaint, not based on any dispute over the allegations of war crimes by high-ranking officials, but out of deference to the U.S. government to perform its own investigation.\textsuperscript{19} The German prosecutor concluded, despite weighty evidence to the contrary, that "there are no indications that the authorities and courts of the United States of America are refraining from, or would refrain from, penal measures as regards violations in the complaint."\textsuperscript{20}

The CCR is pursuing two avenues of appeal by asking the prosecutor to reconsider his decision and by directly petitioning the German court.\textsuperscript{21} Even if these measures do not result in an investigation and prosecution during this administration, the threat of prosecution for these officials will not easily disappear.\textsuperscript{22} There are no statutes of limitations on war crimes and crimes against humanity under international law,\textsuperscript{23} and victims of these crimes do not easily come to terms with their traumatic experiences without seeing justice served.\textsuperscript{24} The CCR, representing Iraqi torture victims in this quest for accountability, promises that whether "it takes only a few years or the thirty it has taken to initiate proceedings against Pinochet, those officials accused of war crimes will be brought to justice."\textsuperscript{25}

The failure of the political branches to instigate or allow an independent investigation of high-ranking officials' involvement and culpability for the crimes committed at Abu Ghraib creates at least two problems: it allows for the perception and possibility that U.S. officials may commit war crimes through U.S. military operations with impunity; and it contributes to the likelihood that U.S. citizens traveling overseas will be hauled into criminal courts in foreign jurisdictions where the U.S. government cannot guarantee their rights to due process and a fair trial. The solution is simple: provide domestic checks and balances to the activities of the U.S. political branches through independent, transparent investigation mechanisms so that the task of ensuring U.S. accountability

Committee on International Law of the Association of the Bar of the City of New York, Director of the International Law Association, and Adjunct Professor of Law at Columbia University, where he lectures on international law and international humanitarian law. \textit{Id.} para. 1. Horton prepared the Expert Report on "whether in fact a proper criminal investigation of the matters covered in the criminal complaint would be conducted in the United States so that a reasonable basis would exist to defer action so as to allow United States authorities to act." \textit{Id.} para. 2. Horton's Expert Report was filed with the German Prosecutor along with the 160-page complaint. \textit{Litigating Against Torture, supra} note 1.

\textsuperscript{19} \textit{Litigating Against Torture, supra} note 1.
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW} 567 (6th ed. 2003); \textit{see e.g., CCAIL, supra} note 3, § 5; \textit{Rome Statute, supra} note 9, art. 29.
\textsuperscript{24} \textit{See Litigating Against Torture, supra} note 1.
\textsuperscript{25} \textit{Id.}
for political and military actions overseas is not left to the international community.

Failure to investigate these alleged crimes domestically may spur the international community to intervene. Any resulting legal actions may create additional legal precedent for prosecuting foreign nationals in foreign forums through universal jurisdiction. While use of universal jurisdiction may be appropriate in some cases, as the only method of bringing "enemies [of] all mankind" to justice, some issues pertaining to the protection of individual rights are unresolved. The concern is that prosecutions based on universal jurisdiction will be subject to politically motivated investigations, result in multiple prosecutions of an individual for the same crime, or be vulnerable to other violations of due process. This potential for abuse through the proverbial "slippery slope" makes some U.S. citizens wary.

The Bush administration's current use of political tools and pressure like a bandage to cover up the truth and avoid both domestic and international investigation and prosecution is not just a temporary solution; it is, in fact, part of the problem. Allowing impunity to fester within our political and military ranks, hidden beneath shallow political gamesmanship, corrodes our democracy and tarnishes our credibility. There is no telling what will be revealed once the bandage is pulled off. And, with the inevitability of changing political tides, ultimately the bandage will be pulled off. The question that remains is: by whom?

Part I of this note describes the status of universal jurisdiction over international crimes as it currently stands under international law. Part II will explain the application of the German Criminal Code's universal jurisdiction provisions to alleged U.S. war crimes committed in Iraq. Finally, Part III postulates that domestic accountability through independent investigation is the only tenable solution to the "threat" of global justice.


27. Id. But see PINOCHET EFFECT, supra note 6, at 184, which states:

[N]ot all courts are equally independent or equally free of pressure or equally solicitous of the rights of the accused and the victims. In the hands of the wrong court, a prosecution could turn into either a witchhunt or a whitewash. On the other hand, the same is true for prosecutions based on any other ground of jurisdiction. Most politicized or unfair trials are run-of-the-mill territorial affairs, and in these no one argues that the courts have no jurisdiction. Instead rules to determine what constitutes a fair trial, basic but still meaningful, can be found in the core global and regional treaties on human rights and the dozens of Guidelines, Principles and other such documents crafted by international lawyers and judges over the years. The rules specify such bedrock principles as an independent judiciary, the accused's right to a lawyer and to not incriminate himself, the rule against ex post facto charges, and the like. If states implementing universal jurisdiction fail to respect those rules, they can be challenged and criticized just as they would be for any other type of prosecution.
I. THE EVOLUTION OF UNIVERSAL JURISDICTION OVER INTERNATIONAL CRIMES

Under international law, the exercise of criminal jurisdiction is a right of sovereign states. Consequently, the reach of a state's criminal jurisdiction is traditionally tied to the scope of its national sovereignty. States have jurisdiction over crimes occurring within their sovereign territory, as well as extraterritorial jurisdiction in some circumstances over crimes occurring outside of their sovereign territory that is based upon a connection between the crime and the state.

A. UNIVERSAL JURISDICTION DEFINED

Generally, under international law, a state establishes criminal jurisdiction based on a connection between the state and the crime. Under this model, there are four ways that a state may find criminal jurisdiction: 1) territorial, in which an alleged crime is committed within a state's territory, or a crime is committed outside of the territory with the intent and effect of creating harm within the territory; 2) nationality, in which the offender is a national of the state regardless of where he or she commits the crime; 3) protective, in which jurisdiction is required to protect the interests and integrity of the state; and 4) passive personality, in which the victim is a national of the state.

Universal criminal jurisdiction allows states to exercise jurisdiction over a narrow set of crimes even when there is no nexus between the state and the criminal act. Traditionally, under universal jurisdiction, a
state has jurisdiction over certain international crimes when the offender is in its custody. However, the presence of the offender is not always required. Under this pure form of universal jurisdiction, no nexus is required between the state and the universal jurisdiction crime it wishes to prosecute.

Rather than nexus, the nature of the crime defines the scope of universal jurisdiction. A state’s authority to prosecute universal jurisdiction crimes arises from the idea that the crimes are so heinous that they are “universally condemned.” The international community as a whole, including any nation which obtained custody of a perpetrator of one of these offenses, has an interest in prosecuting because the perpetrators are considered “the enemies of all people.” Prosecution based on universal jurisdiction may also be warranted where the circumstances of the crime make it difficult to prosecute within a single state.

Generally, whether or not an act is lawful or unlawful is determined

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37. Brownlie, supra note 23, at 303-05. 38. According to an Amnesty International Study in 2001, more than 120 states have universal jurisdiction provisions, and the majority of these provisions do not indicate whether the defendant must initially be present. Pinochet Effect, supra note 6, at 192. Universal jurisdiction provisions enacted more recently, in order to conform with the Rome Statute (creating the International Criminal Court), demonstrate no clear trend, but the majority requires the defendant’s presence in the absence of any other link to the forum. Id. at 192-93. Furthermore, under international law, some universal jurisdiction crimes do not require that the defendant be in custody, such as grave breaches of the 1949 Geneva Convention. Id. at 193. Other universal jurisdiction crimes, such as torture under the Convention Against Torture, do require custody. Id.

39. See Meron, supra note 36, at 570. 40. Principle 1.1 of the Princeton Principles on Universal Jurisdiction states that “universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.” Princeton Project on Universal Jurisdiction, The Princeton Principles on Universal Jurisdiction 28 (2001), available at http://www1.umn.edu/humanrts/instree/princeton.html [hereinafter Princeton Principles].

41. Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985); see Kontorovich, supra note 13, at 205-06; Meron, supra note 36, at 570; Jordan J. Paust, U.S. Schizophrenia with Respect to Prosecution of Core International Crimes, 103 J. Int’l L. & Dipl. 58, 61 (2004).

42. Demjanjuk, 776 F.2d at 582; see Meron, supra note 36, at 570; Paust, supra note 41, at 61.

43. See Bassiouni, supra note 26, at 96 (“The rationale behind the exercise of [universal] jurisdiction is: (1) no other state can exercise jurisdiction on the basis of the traditional doctrines; (2) no other state has a direct interest; and (3) there is an interest of the international community to enforce. Thus, states exercise universal jurisdiction not only as national jurisdiction, but also as a surrogate for the international community.”).
by the law of the country where the act occurred. However, a state may punish a perpetrator of a universal jurisdiction crime whom it has in physical custody under its own national laws that apply to the offense committed. A state invoking universal jurisdiction is thus enforcing customary international law on behalf of the international community. This shared responsibility and right to prosecute perpetrators of heinous crimes can eliminate impunity by preventing perpetrators from finding a “safe haven in third countries.”

B. Universal Jurisdiction Crimes

Universal jurisdiction is a well-recognized basis of jurisdiction for prosecuting some offenses that are criminalized under customary international law. The principle of universality establishes jurisdiction for a state to prescribe domestic laws and to enforce sanctions for some crimes that are independently based in international law. At the very least, universality applies to crimes that “affect the international community and are against customary international law.” However, not all international crimes may be universally prosecuted.

For an international crime to be subject to universal jurisdiction there must be explicit recognition of this jurisdiction through international custom or convention. International crimes over which a state may exercise universal jurisdiction historically include: piracy, war

44. Demjanjuk, 776 F.2d at 582 (quoting Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909)).
45. Id.
46. Paust, supra note 41, at 61.
48. Paust, supra note 41, at 61.
49. Id.
52. Bottini, supra note 31, at 515; see Shaw, supra note 51, at 473.
53. See, e.g., Arrest Warrant of 11 April 2000 (Congo v. Belg.) (Feb. 14, 2002), para. 5 (separate opinion of President Guillaume); Princeton Principles supra note 40, princ. 2(1)(1); Restatement, supra note 36, § 404; 1 Oppenheim’s International Law 469 (Robert Jennings & Arthur Watts eds., 9th ed. 1996); Starke, supra note 47, at 234; Bottini, supra note 31, at 527.
crimes,\textsuperscript{54} genocide,\textsuperscript{55} crimes against humanity,\textsuperscript{56} and torture.\textsuperscript{57} Currently controversy exists as to whether terrorism,\textsuperscript{58} slave trade,\textsuperscript{59} or illicit drug traffic\textsuperscript{60} may be included in this list.\textsuperscript{61} Furthermore, the determination of what constitutes a universal crime against humanity varies across international conventions, creating doubts as to appropriate application

\textsuperscript{54} See, e.g., Princeton Principles, supra note 40, princ. 2(1)(3); Restatement, supra note 36, § 404; Brownlie, supra note 23, at 304; Bottini, supra note 31, at 531–32 (quoting The Almelo Trial (Brit. Mil. Ct. 1945), in 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 35, 42 (U.N. War Crimes Comm’n ed., 1947) in which a British military court stated “under the general doctrine called Universality of Jurisdiction over War Crimes, every independent state has [a]n International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed”). See also the Geneva Conventions, which codified the principle that “persons alleged to have committed, or to have ordered to be committed, such grave breaches “of the laws of war are subject to the jurisdiction of all the state parties. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 75 U.N.T.S. 31, 62 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 75 U.N.T.S. 85, 116 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 75 U.N.T.S. 135, 236 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 75 U.N.T.S. 287, 386 [hereinafter Fourth Geneva Convention].

\textsuperscript{55} Princeton Principles, supra note 40, princ. 2(1)(6); Restatement, supra note 36, § 404 (Reporter’s Note 1 states that “[u]niversal jurisdiction to punish genocide is widely accepted as a principle of customary law.”); M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law 234–35 (2d ed. 1999); Jonathan L. Charney, Progress in International Criminal Law?, 93 AM. J. INT’L L. 452, 455 (1999); Bottini, supra note 31, at 537.

\textsuperscript{56} See, e.g., Attorney-Gen. of Isr. v. Eichmann, 36 I.L.R. 277, 298–304 (Isr. S. Ct. 1962) (in which the Israeli Supreme Court upheld the right to hear charges of crimes against humanity that arose from events prior to Israel’s statehood based on the principle of universal jurisdiction); Princeton Principles, supra note 40, princ. 2(1)(5); Brownlie, supra note 23, at 304; Bottini, supra note 31, at 538.

\textsuperscript{57} Bassiouni, supra note 26, at 156.

\textsuperscript{58} Restatement, supra note 36, § 404. But see Bottini, supra note 31, at 540 (stating that terrorism is recognized as a crime of international concern necessitating international cooperation, but that there exists no international consensus as to what acts constitute terrorism).

\textsuperscript{59} Bottini, supra note 31, at 526 n.112. For the proposition that slave trade is subject to universal jurisdiction see Restatement, supra note 36, § 404; Princeton Principles, supra note 40, princ. 2(1)(2); Randall, supra note 51, at 798–99; Jon B. Jordan, Universal Jurisdiction in a DANGEROUS WORLD: A WEAPON FOR ALL NATIONS AGAINST INTERNATIONAL CRIME, 9 Mich. St. U.-DCL J. INT’L L. 1, 9 (2000). However, there doesn’t seem to be enough state practice to reach the conclusion that slave trade is subject to universal jurisdiction under customary law. See Roger S. Clark, Steven Spielberg’s Amistad and Other Things I Have Thought About in the Past Forty Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery, 30 RUTGERS L.J. 371, 396 n.55 (1999).


\textsuperscript{61} Bottini, supra note 31, at 526–27 n.112, 540.
of universal jurisdiction over these crimes. For example, the Rome Statute of the ICC recognizes apartheid, enforced disappearances of persons, and torture as crimes against humanity that are subject to universal jurisdiction under specific treaty regimes. But universal jurisdiction over torture may be exercised as a matter of customary international law, outside the framework of the Convention Against Torture.

C. HISTORICAL DEVELOPMENT OF UNIVERSAL JURISDICTION OVER WAR CRIMES

Universal jurisdiction was first recognized for the crime of piracy, and was uniquely applied to that crime for hundreds of years. At least since the early seventeenth century, states were empowered to catch and prosecute any pirate, regardless of the individual’s nationality or location of capture. According to the law of nations, a state could even summarily execute a pirate at sea.

The expansion of universal jurisdiction to other crimes has only occurred since WWII, beginning with the Nazi war crimes tribunals at Nuremberg and the Tokyo trials. In addition to Nuremberg, the Eichmann case in Israel, Filartiga v. Pena-Irala in the United States, and the Yugoslavian war crimes tribunal created by the United Nations contributed to the expansion of the universal jurisdiction jurisprudence.

1. Expansion of Universal Jurisdiction Following WWII: Nuremberg and Eichmann

The principle that it is the right, or responsibility, of states to bring to justice individuals who committed war crimes when they are not prosecuted by their own countries arose out of the International Military
Tribunal (IMT), which conducted the Nuremberg trials, and the International Military Tribunals for Asia (IMTA), which conducted the Tokyo trials. In establishing the IMT to prosecute Axis leaders for unprecedented atrocities, the Allies did not have a clear nexus to prosecute all the Nazi crimes under existing rules of jurisdiction, since not all crimes were committed against Allied nations. The tribunals utilized universal jurisdiction, as exemplified through piracy, and asserted that this “general doctrine” included war crimes. U.S. Article III courts have subsequently held that any state may prosecute Nazi war criminals, not just the Allied powers.

The Israeli courts did just that in prosecuting Nazi war criminal Adolf Eichmann in 1968. The lower court used universal jurisdiction to prosecute an offense against the Jewish people, committed prior to the formation of the State of Israel, holding: “The State of Israel’s ‘right to punish’ the Accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind), which vests the right to prosecute and punish crimes of this order in every state within the family of nations; and a specific or national source, which gives the victim nation the right to try any who assault its existence.” The Supreme Court reasoned that the broad principle of universal jurisdiction extends to acts that “damage vital international interests;

73. Redress, Universal Jurisdiction in Europe: Criminal Prosecutions in Europe Since 1990 for War Crimes, Crimes Against Humanity, Torture and Genocide, at 3, at http://www.redress.org/documents/unijeur.html (last visited Nov. 5, 2005). The principle that national courts may determine that the courts of another nation are “unable or unwilling” to investigate and prosecute is controversial. See Pinochet Effect, supra note 6, at 194-95. For example, in a case before the Spanish Supreme Court involving the massacre of hundreds of thousands of Guatemalans who were mostly Mayan indigenous people, the majority opinion stated that “[b]asing subsidiarity on the real or apparent inactivity of local courts implies a judgment of one state’s courts about the ability to administer justice of the similarly situated organs of another sovereign state.” Id. at 170, 176. The court implied that these types of inquiries were inappropriate for national courts to make as they might impact foreign relations. Id. at 176. These types of determinations which might be appropriate for international courts like the International Criminal Court, were better left to the political branches at the national level. Id.

74. Kontorovich, supra note 13, at 195; see also Randall, supra note 51, at 802-03 (summarizing charges brought against war criminals, many of which would not have violated domestic law and could only be prosecuted under a universal theory).

75. Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985) (stating “[i]t is generally agreed that the establishment of these tribunals [the International Military Tribunal and the zonal tribunals run by particular Allied countries] and their proceedings were based on universal jurisdiction”); Kontorovich, supra note 13, at 195; Randall, supra note 51, at 806-10 (listing Tribunal cases that invoke universal principle).

76. See, e.g., In re Extradition of Demjanjuk, 612 F. Supp. 544, 556 (N.D. Ohio 1985) (stating “[t]he principle that the perpetrators of crimes against humanity and war crimes are subject to universal jurisdiction found acceptance in the aftermath of World War II”).


they impair the foundations and security of the international community [and] violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations.”

Though relying on universal jurisdiction, the Israeli courts could have rested jurisdiction on the passive-personality principle, as Israel was the state in which many of the Holocaust victims took refuge, or the protective principle, since Israel was the sole sovereign representative of the Jewish people. Universal jurisdiction principles from the Eichmann trial have been utilized by other national courts. For example, in 1989 the Ontario High Court of Justice accepted the concept that state courts can exercise criminal jurisdiction over “acts which occurred outside its territory” in Regina v. Finta.

In addition to a basis in customary international law, universal jurisdiction to prosecute suspects of war crimes or to extradite them to stand trial elsewhere, is codified in a number of international treaties. The four Geneva Conventions create a duty to prosecute or extradite perpetrators of war crimes. State parties must prosecute or extradite individuals suspected of commission of “grave breaches” of the Geneva Conventions:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

80. Kontorovich, supra note 13, at 197.
81. See Luc Reydams, Universal Jurisdiction: International and Municipal Legal Perspectives 161 (Ian Brownlie & Vaughan Lowe eds., 2003) (stating “[f]or lack of other precedents, [Eichmann] was for a long time at the centre of any discussion on universal jurisdiction”); see e.g., Regina v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3), [2000] 1 A.C. 147, 273-76 (discussing Eichmann as a “landmark decision … of great significance in extending universal jurisdiction to crimes aside from piracy”); Polyukhovich v. The Commonwealth (1990 172 C.L.R. 501, 661-62 (en banc) (Austl.) (holding that international and Australian law applies universal jurisdiction to war crimes, and that Australia’s 1945 War Crimes Act grants this jurisdiction to Australian courts).

It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on any permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory. . . .
83. Redress, supra note 73, at 3.
84. First Geneva Convention, supra note 54, art. 49; Second Geneva Convention, supra note 54, art. 50; Third Geneva Convention, supra note 54, art. 129; Fourth Geneva Convention, supra note 54.
Grave breaches include: willful killing, torture or inhuman treatment, causing great suffering or serious injury to body or health, and other serious violations of the laws of war.\textsuperscript{85} Aside from the Geneva Conventions, article 15 of the International Covenant on Civil and Political Rights (ICCPR), opened for signature in 1966, is considered "to give some recognition" to universal jurisdiction.\textsuperscript{86} Additionally, articles 5 and 7(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment establish universal jurisdiction over nationals of state parties to the treaty for the crime of torture or complicity in committing torture.\textsuperscript{87} The United States is a state party to all three of these conventions.\textsuperscript{88}

2. Universal Jurisdiction in U.S. Civil Litigation

U.S. courts have begun to adjudicate cases based solely on the principle of universal jurisdiction.\textsuperscript{89} However, these cases have been limited to civil litigation and situations in which the defendant is present in the United States.\textsuperscript{90} In the field of tort law, U.S. courts have exercised universal jurisdiction over civil claims through the Alien Tort Claims Act (ATCA) and Torture Victim Protection Act (TVPA).\textsuperscript{91} ATCA, as part of the first Judiciary Act, has been on the books since 1789.\textsuperscript{92} However, ATCA was rarely invoked until the seminal case that opened U.S. federal courts to international human rights litigation: Filartiga v. Pena-Irala.\textsuperscript{93}

\textsuperscript{85} First Geneva Convention, supra note 54, art. 50; Second Geneva Convention, supra note 54, art. 51; Third Geneva Convention, supra note 54, art. 130; Fourth Geneva Convention, supra note 54, art. 147.

\textsuperscript{86} Kastenberg, supra note 77, at 25-26; see International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), U.N. GAOR, 21st sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Article 15(2) states: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of the law recognized by the community of nations." Id.

\textsuperscript{87} Convention Against Torture, supra note 63, arts. 5, 7(1). Both the United States and Germany are stated parties to the Convention Against Torture. United Nations, Multilateral Treaties Deposited with the Secretary General: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at http://untreaty.un.org/ENGLISH/bible/englishinternationalbible/partI/chapterIV/treaty14.asp#N7 (Dec. 10, 1984).


\textsuperscript{89} See Kontorovich, supra note 13, at 201.

\textsuperscript{90} See id.

\textsuperscript{91} See id. at 202.

\textsuperscript{92} See id.

\textsuperscript{93} See id.

\textsuperscript{94} Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
Filartiga was a wrongful death case in which Paraguayan citizens alleged that a Paraguayan official had tortured their family member, causing his death. The Second Circuit held that it had subject matter jurisdiction over the case based on the principle of universal jurisdiction. The Circuit Court stated: “for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—hostis humani generis, an enemy of all mankind.” The Second Circuit’s decision, though controversial, has been followed by other circuits. At least two circuits have applied universal jurisdiction to high-profile cases in which the defendants were foreign heads of state or senior officials.

Filartiga was a radical departure from the twenty-one prior cases that had invoked the ATCA since the passage of the Judiciary Act in 1789. Not only was jurisdiction denied in most of these cases, but none relied on the universality principle in upholding jurisdiction. Filartiga broadly endorsed the universal jurisdiction principle as the basis of jurisdiction over suits between aliens in which there was no connection to the United States.

3. The Tribunals for the Former Yugoslavia and Rwanda

The principle of universal jurisdiction was further expanded by the U.N. Security Council’s establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International

95. Id. at 878–79.
96. Id. at 887.
97. Id. at 890. The Second Circuit went on to say, “[o]ur holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.” Id.
98. See, e.g., Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (affirming judgment under ATCA against former Ethiopian official for torture and cruel, inhuman, and degrading treatment); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (concluding that alleged war crimes, genocide, torture, and other atrocities committed by a leader of insurgent Bosnian Serb forces in Bosnia were actionable under the ATCA in a suit filed by victims in a U.S. District Court in Manhattan); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (deeming torture, summary execution, “disappearance,” and arbitrary detention by Guatemalan military to be actionable violations under the ATCA); Trajano v. Marcos (In re Estate of Marcos Human Rights Litig.), 978 F.2d 493 (9th Cir. 1992) (concluding that the plaintiff, an alien, had properly invoked the subject matter jurisdiction of the federal courts under the ATCA, for a wrongful death action against former Philippine President Ferdinand Marcos and his daughter, for the torture and murder of a Philippine citizen); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 776 (D.C. Cir. 1984) (adhering “to the legal principles established in Filartiga but finding that factual distinctions preclude reliance on that case to find subject matter jurisdiction” for claims brought against the Palestine Liberation Organization, the Libyan government, and other entities for terrorist activities allegedly in violation of the law of nations).
99. Abebe-Jira, 72 F.3d at 844 (Eleventh Circuit suit against former Ethiopian official); Kadic, 70 F.3d at 232 (Second Circuit suit against leader of Bosnian Serb insurgency); Trajano, 978 F.2d at 493 (Ninth Circuit suit against former Philippine President Ferdinand Marcos).
100. Kontorovich, supra note 13, at 202 n.111.
101. Id.
102. Id.
Criminal Tribunal for Rwanda (ICTR). The Security Council created both tribunals pursuant to its power to act in the face of threats to peace, under Chapter VII of the United Nations Charter. The Security Council established the tribunals to investigate and prosecute international crimes including genocide, war crimes, and crimes against humanity, committed during the Yugoslav and Rwandan civil wars. Each tribunal is located outside the territory of the nation whose crimes it adjudicates. The investigations and prosecutions before the tribunals have raised many new legal issues and have contributed greatly to the development of international criminal law jurisprudence arising from the Nuremberg tribunals.

4. Modern Developments in National Application of Universal Criminal Jurisdiction

Use of universal jurisdiction by states has grown more in the 1990s than in any previous period, stimulated in large part by Eichmann, the ICTY and ICTR, and Filartiga. Since 1991, numerous European states have exercised universal jurisdiction over war crimes and crimes against humanity, including Austria, Belgium, Denmark, France, Germany, The Netherlands, Spain, Switzerland, and the United Kingdom. Of all the state sponsored universal jurisdiction prosecutions, the most notable, high-profile case is the Pinochet case.

Many of these cases in which universal jurisdiction was invoked...
differed from past cases in which the crimes were committed in states where government authority had collapsed. The majority of cases prosecuted arose from "failed states" like Yugoslavia and Rwanda. However, European nations have not limited investigations and prosecutions of universal jurisdiction crimes to the Eastern Hemisphere. A number of cases have arisen from defunct military dictatorships in Latin America. Furthermore, in the majority of cases, the suspect was a national of a state that was politically less powerful in the international community than the prosecuting state.

The cases arising out of the wars in the former Yugoslavia and Rwanda were largely spurred by the immigration of refugees into European states from all sides of these conflicts, as transplanted victims began encountering the people who had victimized them in their home countries. Most European states enacted legislation to deal with this problem, including legislation to cooperate in extradition of suspects to international tribunals, but also to allow for prosecution within national courts. However, implementing legislation is not always necessary for domestic courts to assert universal jurisdiction.

Prosecutions in national courts have included the courts of Germany, Denmark, Belgium, France, and Switzerland. In Germany, for example, two Bosnian Serbs were convicted in 1997 for crimes against Muslims in former Yugoslavia. Novislav Djajic was sentenced to five years' imprisonment for war crimes he committed. Nikola Jorgic was sentenced to life imprisonment for genocide and murder. In 1994, a

119. Kontorovich, supra note 13, at 198.
120. Id.; Redress, supra note 73, at 8.
121. Redress, supra note 73, at 8.
122. Id.
123. Bottini, supra note 31, at 556, 559 (noting the cases of Henry Kissinger and Ariel Sharon as examples of the inability of states to use universal jurisdiction to bring suit against accused who are nationals of a powerful country); see Kontorovich, supra note 13, at 199.
124. Redress, supra note 73, at 8–12 ("The Experience so Far: Cases in European States in the 1990s").
125. For example, Germany extradited suspect Dusko Tadic to the ICTY. Id.
126. Id.
127. Id.
128. Id.
129. Id.
130. Id. at 28–30.
131. Id.
Danish court convicted Bosnian Muslim Refik Saric for torturing prisoners of war in a Croat-run prison camp in Bosnia, sentencing him to incarceration for eight years. And in 1999, a Swiss military court convicted a Rwandan national for committing war crimes in Rwanda. Both Austria and Switzerland have each tried and acquitted a Bosnian Serb of war crimes.

European domestic courts have also taken up cases of human rights violations committed during military dictatorships in Latin America, particularly in Chile and Argentina. However, many of these cases are not strict examples of jurisdiction based on the universality principle since many European citizens were victims of torture and disappearance during these regimes. In addition to cases based on the victimization of European nationals, cases arose from immigrants living in refugee communities who were former victims as well. National amnesty laws removed the possibility of criminal prosecution of former military leaders and officers following democratic transition in many Latin American states. It is possible that European courts felt compelled to investigate and prosecute these crimes since the perpetrators were not held accountable by their own governments and were living in impunity.

Investigations of universal jurisdiction crimes have not been limited...
to situations where the perpetrator is already found within the country. Investigation into the crimes of the former Chilean military dictator Augusto Pinochet Ugarte in numerous European states was the most notable example of investigation in absentia. Spain, France, Belgium, and Switzerland initiated criminal investigations against Pinochet and then sought his extradition from the United Kingdom, where he was arrested while in London seeking medical treatment. The House of Lords affirmed that the principle of universal jurisdiction would apply and held that, as a matter of U.K. law, a former head of state is not immune (despite the doctrine of head-of-state immunity) from criminal charges of official torture committed during the time he was in power. For health reasons, Pinochet was deemed unfit to stand trial and was allowed to return to Chile, but the international investigations served as a catalyst for political change in Chile regarding

\[140. \text{Id.}\]

\[141. \text{Id. However, although France allows trials in absentia, the French Cour de Cassation ruled in March 1996 that French courts could only exercise universal jurisdiction over suspects of international crimes that France was obligated to prosecute under international treaties when the accused was present in France. Id. French courts have instigated proceedings without the accused present in France when jurisdiction was based on the passive personality principle. Id. For example, France tried, convicted, and sentenced Argentine Captain Alfredo Astiz in absentia for his participation in the torture and disappearance of two French nuns in Argentina. Id.}\]

\[142. \text{Id. Similarly, in the case of Argentine Navy Officer Adolfo Scilingo, Scilingo was arrested at a later stage in a Spanish investigation for throwing political opponents out of airplanes. Id.}\]

\[143. \text{See Roht-Arriaza, supra note 136.}\]

\[144. \text{France's case was based on the passive personality principle, for the torture and disappearance of four French nationals in Chile during Pinochet's dictatorship. Redress, supra note 73, at 24-28.}\]

\[145. \text{The Belgium case was based on universal jurisdiction, and involved Chilean citizens living in Europe. Roht-Arriaza, supra note 135, at 315.}\]

\[146. \text{Switzerland based jurisdiction on the passive personality principle, following a complaint by a widow whose husband (with dual Swiss and Chilean nationality) disappeared in Chile in 1977. Redress, supra note 73, at 41-44.}\]

\[147. \text{Redress, supra note 73, at 8-12 ("The Experience so Far: Cases in European States in the 1990s").}\]

\[148. \text{Roht-Arriaza, supra note 135, at 312.}\]

\[149. \text{Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, [1998] 3 W.L.R. 1456 (H.L.) (appeal taken from Q.B.D), reprinted in 37 I.L.M. 1302, 1334, 1338-39 (1998); see also Redress, supra note 73, § b ("The Experience so Far: Cases in European States in the 1990s"); Roht-Arriaza, supra note 135, at 312. A second House of Lords decision approved the extradition, but limited the extraditable charges to those that alleged torture occurring after 1988, which was the date the United Kingdom passed legislation to implement the Convention Against Torture on which universal jurisdiction over torture was based in Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, [1999] 2 W.L.R. 272 (H.L.), reprinted in 38 I.L.M. 430 (1999). A third decision in the Pinochet case, from the Appeal Chamber of the Spanish Audiencia Nacional, composed of eleven judges, affirmed Spanish jurisdiction over that case and other Argentine and Chilean cases, finding that domestic amnesty laws did not bind the Spanish courts. Roht-Arriaza, supra note 135, at 313.}\]
amnesty laws.\textsuperscript{150} The Supreme Court of Chile stripped Pinochet of immunity from prosecution there, and a trial judge instigated an investigation, with over 170 separate complaints pending.\textsuperscript{151}

II. GERMAN UNIVERSAL JURISDICTION: U.S. OFFICIALS’ VULNERABILITY FOR ACTIONS IN IRAQ

In many European countries, including Germany, a victim can initiate a criminal proceeding and appeal to a court if the prosecutor refuses to go forward.\textsuperscript{152} This is how the CCR, on its own behalf and representing four Iraqi torture victims, was able to petition a German prosecutor to open an investigation.\textsuperscript{153} The CCR chose to file in Germany, as opposed to a handful of other European countries with similar universal jurisdiction codes, due to the favorability of German law and because some of the named defendants were present or stationed at U.S. military bases in Germany at times during the Iraq War.\textsuperscript{154} Since the United States has not ratified the Rome Statute, the ICC was not an available forum.\textsuperscript{155} Furthermore, because no other international courts have jurisdiction over these alleged war crimes, a national court with universal jurisdiction over war crimes was the last resort.\textsuperscript{156}

A. GERMAN UNIVERSAL JURISDICTION OVER WAR CRIMES

Germany’s Code of Crimes Against International Law (CCAIL), passed in 2002, grants German courts universal jurisdiction over cases of war crimes and crimes against humanity.\textsuperscript{157} The CAIL does not require any connection between Germany and either the perpetrator of a war

\textsuperscript{150} Roht-Arriaza, supra note 135, at 315.

\textsuperscript{151} Id. A similar process occurred in Argentina, with cases based on kidnapping children of the disappeared. The European investigations encouraged Argentine magistrates to renew efforts to gather new evidence in cases that had been languishing for lack of evidence. A number of high-level Argentine ex-military officials were jailed or placed under house arrest as a result, including Videla, Massera, and Suarez-Mason. Id. New or reinstigated investigations have begun in Uruguay, Brazil and Paraguay as well. Id at 317. The U.S. Department of Justice reopened a stale investigation into the case of the Letelier bombing in Washington, D.C., which was believed to have been tied to Pinochet’s military government. Id.

\textsuperscript{152} Id. at 318; Litigating Against Torture, supra note 1. In the United States, prosecutors retain complete discretion in filing a criminal case. Id.

\textsuperscript{153} Litigating Against Torture, supra note 1.

\textsuperscript{154} Id. Approximately 70,000 troops are stationed in Germany, many of whom have been deployed to Iraq, “rotat[ing] into and out of Iraq from German bases,” Lawsuit Against Rumsfeld, supra note 2. Lt. Gen. Ricardo Sanchez, named in the suit, was the former U.S. commander in Iraq and has been stationed in Germany as commander of the Army’s 5th Corps. Id.

\textsuperscript{155} Litigating Against Torture, supra note 1.

\textsuperscript{156} Id.

\textsuperscript{157} CCAIL, supra note 3, §§ 1, 6–12; Roht Arriaza, supra note 6, at 191; Mohamed M. El Zeidy, Universal Jurisdiction in Absentia: Is It a Legal Valid Option for Repressing Heinous Crimes?, 37 INT’L LAW. 835, 848 (2003); Lawsuit Against Rumsfeld, supra note 2.
crime or the victim in order to prosecute. The code covers not just direct commission of war crimes and crimes against humanity, but reaches the conduct of military or civilian leaders who fail to prevent the commission of these crimes by their subordinates.

1. War Crimes

The German CCAIL is consistent with the definition of crimes codified in the Rome Statute of the International Criminal Court. CCAIL criminalizes acts which constitute grave breaches of the Geneva Conventions as well as violations of the laws of war under customary international law. Under CCAIL, both torture and inhumane treatment of detainees are deemed war crimes.

An example of a "criminal act" under the German CCAIL is the use of unmuzzled dogs in Abu Ghraib to threaten detainees. Under CCAIL, not only would the soldier who committed the act be guilty of a war crime, but superior officers who ordered or authorized the use of dogs in this manner would also be guilty of war crimes. Evidence exists in the public record of Rumsfeld and Sanchez authorizing the use of dogs in interrogations. If proven that superiors directly ordered dogs to be

158. CCAIL, supra note 3, § 1; ROHT-ARRIAZA, supra note 6, at 191; Litigating Against Torture, supra note 1. However, section 153f of the Code of Criminal Procedure instructs the public prosecutor to exercise discretion in proceeding with cases in which there is not a tie to Germany, and to defer to an international court or state that does have ties to the crime, defendant or victim. ROHT-ARRIAZA, supra note 6, at 191; see also Daniel D. Ntanda Nserekob, Prosecutorial Discretion Before National Courts and International Tribunals, 3 J. Int'l Crim. Just. 124, 127 (2005) ("[T]he prosecutor is free to prosecute or not to prosecute where the crimes are committed outside Germany by a non-German against a non-German national and the perpetrator is not expected to enter Germany."); Ryan Rabinovitch, Universal Jurisdiction in Absentia, 28 Fordham Int'l L.J. 500, 508 (2005) ("[C]ourts have held that in order for the federation to exercise universal normative jurisdiction there must be some 'link' between the accused and the State, such as the presence of the accused in the country."). But see ROHT-ARRIAZA, supra note 6, at 191 (stating that the CCAIL does "allow cases without a nationality or presence link in extraordinary circumstances"); El Zeidy, supra note 157, at 848.

"Section 1 [of CCAIL] permits the exercise of universal jurisdiction to genocide, crimes against humanity, and war crimes, despite the fact that the offences have no specific link to Germany." Professor Gerhard Werle therefore argues that the "deviating jurisprudence" which set out the requirement of 'the additional link to Germany' has no standing for the application of the [CCAIL]." El Zeidy, supra note 157, at 848.

159. CCAIL, supra note 3, § 4; Lawsuit Against Rumsfeld, supra note 2.

160. Litigating Against Torture, supra note 1 (stating that CCAIL "more or less parallels" the ICC definitions).

161. Id.

162. CCAIL, supra note 3, §§ 8(1)(3), 8(1)(6). Under CCAIL, war crimes include: "treat[ing] a person who is to be protected under international humanitarian law cruelly or inhumanely by causing him or her substantial physical or mental harm or suffering, especially by torturing or mutilating that person," and "treat[ing] a person who is to be protected under international humanitarian law in a gravely humiliating or degrading manner." Id.; see also Litigating Against Torture, supra note 1.

163. Litigating Against Torture, supra note 1.

164. Id.

used against detainees, these officials would be directly responsible for war crimes and possibly punished by imprisonment in Germany.  

Under CCAIL, in the absence of evidence of direct orders, superiors may still be held accountable for war crimes, as indirectly responsible, if they were aware of torture and abuse and either failed to prevent the crimes or failed to bring the guilty to justice. Evidence exists that the abuse in Iraq was brought to the attention of high-level U.S. officials by internal officers and officials, and by external entities such as the International Committee of the Red Cross (ICRC). However, no action was taken by these high-level officials to stop the crimes or punish the perpetrators.

2. Jurisdiction

In addition to the universal jurisdiction principle codified in CCAIL, which gives Germany the right to try war criminals with no connection to

that Secretary Rumsfeld authorized the following techniques, which were an “unprecedented expansion of army doctrine,” to be used on detainees in Guantánamo Bay:

- "The use of stress positions (like standing) for a maximum of four hours";
- "Isolation up to 30 days”;
- "The detainee may also have a hood placed over his head during transportation and questioning”;
- "Deprivation of light and auditory stimuli”;
- "Removal of comfort items (including religious items)”;
- "Forced grooming (shaving of facial hair, etc)”;  
- "Removal of clothing”; and
- "Using detainees' individual phobias (such as fear of dogs) to induce stress."

Id. at 32–33 (citing memorandum from Jerald Phifer to Commander of Joint Task Force 170, Request for Approval of Counter-resistance Techniques (Oct. 11, 2002) (attached to memorandum from William J. Haynes II to Sec'y of Def., Counter-resistance Techniques (Nov. 27, 2002) (approved by memorandum from Secretary Rumsfeld (Dec. 2, 2002), available at http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf))). Secretary Rumsfeld appended a handwritten note to his authorization of these techniques: "However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?" HRW REPORT 2, supra, at n.105. Illegal methods of interrogation approved by Rumsfeld for use in Guantánamo were later used in Afghanistan and Iraq. Id. at 37–38 ("At Abu Ghrabi, of course, the techniques put into play by Secretary Rumsfeld, such as the use of dogs, figured prominently in the war crimes committed against detainees.") The report further documented:

On September 14, 2003, the top U.S. commander in Iraq, Lt. Gen. Ricardo Sanchez, implemented Gen. Miller’s proposals by adopting a policy that brought back into play the techniques which Secretary Rumsfeld had approved in December 2002 for use at Guantánamo. Gen. Sanchez’s memo authorized 29 interrogation techniques, including the “presence of military working dog: Exploits Arab fear of dogs while maintaining security during interrogations,” and sleep deprivation, both approved by Secretary Rumsfeld for Guantánamo.

Id. at 42 (citing memorandum from Ricardo S. Sanchez, Lieutenant General, to Combined Joint Staff Force Seven, Baghdad, Iraq, and Commander, 205th Military Intelligence Brigade, Baghdad, Iraq, CJTF-7 Interrogation and Counter-Resistance Policy (Sept. 14, 2003), available at http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17851&c=206).

166. Litigating Against Torture, supra note 1.
167. Id.
168. See infra note 203.
169. Id.
170. Id.
the German forum, German law mandates investigations of war crimes in cases that do in fact have ties to Germany.\textsuperscript{171} Investigation and prosecution of war criminals who are living within German territory is obligatory.\textsuperscript{172}

The U.S. military maintains large bases in Germany.\textsuperscript{173} The 205th intelligence brigade, which was involved in the abuse of detainees in Abu Ghraib, is stationed in Wiesbaden. U.S. Army Colonel Pappas, the leader of the 205th brigade, was also stationed at Wiesbaden and was allegedly involved in the Abu Ghraib abuse.\textsuperscript{174} Lieutenant General Ricardo Sanchez and his deputy, Major General Walter Wojdakowski, led the Army's V Corp and were stationed at Heidelberg.\textsuperscript{175} The V Corp was the Army's occupying force at the time of the Abu Ghraib scandal.\textsuperscript{176} U.S. Army presence in Germany before and during the time that crimes were committed at Abu Ghraib adds additional weight to the argument that Germany has an interest in the investigation and prosecution of these crimes.\textsuperscript{177}

\begin{footnotes}
\footnote{171. Id.}
\footnote{172. Id.}
\footnote{173. Id. The 1951 Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, and the 1959 Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces with Respect to Foreign Forces Stationed in the Federal Republic of Germany, govern the status of U.S. forces in Germany. Gennady M. Danilenko, \textit{The Statute of the International Criminal Court and Third States}, 21 Mich. J. Int'l L. 445, 474 (2000); see also German Federal Foreign Office, \textit{The Status of Foreign Forces in Germany}, at http://www.auswaertiges-amt.de/www/en/aussenpolitik/vn/voelkerrecht/truppenstationierung_html#3 (last visited Oct. 16, 2005). The agreements provide the basic legal framework defining immunities for military personnel stationed abroad. Danilenko, \textit{supra}, at 474. The “sending” State's military personnel do not enjoy absolute immunity to all crimes, but do have partial immunity to prosecution for crimes committed while stationed in Germany. \textit{Id.} Under Article VII of the 1951 NATO Agreement, U.S. forces stationed in Germany may be subject to German criminal jurisdiction. \textit{Id.} However, the United States has the “primary right” to exercise jurisdiction over “offences arising out of any act or omission done in the performance of official duty.” \textit{Id.} It is not clear who determines what constitutes “official duty.” \textit{Id.} In the majority of cases, “receiving” States accept the judgment of the sending State as to whether the offense of the sending State's citizen arose out of the performance of “official duty.” \textit{Id.} at 474–75. However, there seems to be no legal obligation to accept the sending State's determination, and the receiving State's courts may determine whether the offense was committed within the scope of official duty. \textit{Id.} at 475; see also Dieter Fleck, \textit{Are Foreign Military Personnel Exempt from International Criminal Jurisdiction Under Status of Forces Agreements?}, 1 J. Int'l Crim. Just. 651, 659–60 (2003). The 1959 NATO Agreement provides that the determination shall be made “in accordance with the law of the sending state and that the German court or authority 'shall make its decision in conformity with' the certificate of the military authority of the sending state.” \textit{Id.} But in “exceptional cases,” a certificate may be made the subject of review through “discussions between the Federal Government and the diplomatic mission in the Federal Republic of the sending State.” \textit{Id.}
\footnote{174. \textit{Litigating Against Torture}, \textit{supra} note 1.}
\footnote{175. Id.}
\footnote{176. Id.}
\footnote{177. See id.}
3. Unwillingness of the Primary Jurisdiction to Investigate

Authority to investigate universal jurisdiction cases in Germany is dependent on a finding that the state with "primary jurisdiction" is unwilling to conduct its own investigation. Since U.S. officials were alleged to have committed crimes in the complaint, the United States would have primary jurisdiction over these crimes. The German prosecutor could act only if he found the United States "unwilling" to investigate and prosecute the high-level officials named in the complaint.

The Bush administration has allowed investigation and prosecution of low-level soldiers who were directly involved and whose documented involvement was on film. However, in press briefings and statements, the administration has asserted that officers in the chain of command and civilians in the Pentagon (such as Rumsfeld) were not involved in the torture and abuse of detainees. The administration has continued to demonstrate an unwillingness to investigate up the chain of command.

B. U.S. Actions in Iraq: "Winning Hearts and Minds" or War Crimes?

The photos that emerged from Abu Ghraib were sinister and shocking. The actions were brazen. Capturing those acts on film was intended, not covert. The photographs told a story, but one that was open to interpretation. Questions remained. Why were these acts of torture and degradation discovered when usually such abuse remains carefully hidden behind closed doors? Why did the soldiers involved appear to feel justified in their actions?

Perhaps the soldiers believed, at the time, that they were not doing anything wrong. In fact, the actions in Abu Ghraib were not isolated
incidents but represented patterns of abuse taking place in U.S. detention centers created for "enemy combatants" in the war on terror.\textsuperscript{185} Incidents of abuse have been documented in Guantánamo Bay, Cuba, Afghanistan and throughout detention centers in Iraq.\textsuperscript{186}

1. The "War on Terror" Policy of the Bush Administration

Human Rights Watch (HRW) maintained in a 2004 report, "The Road to Abu Ghraib" (HRW Report), that the abuse at Abu Ghraib was a direct result of Bush administration policies emerging from and supporting the war on terror.\textsuperscript{187} HRW lawyers argue that administration policies created the climate for Abu Ghraib in three fundamental ways. First, the administration seemed to believe that winning the war on terror would not be possible within the confines of international law.\textsuperscript{188} Therefore, the administration pursued legal strategies, undermining the intent and language of the Geneva Conventions, to argue that: 1) international law on treatment of prisoners of war and detainees was not "technically" applicable in the war on terror;\textsuperscript{189} 2) the need to protect
national security justified any breach of international law; and, 3) laws impeding the President's exercise of commander-in-chief power in "fighting" the war on terror might even be unconstitutional.\(^{190}\)

Second, the United States expanded the list of permissible interrogation techniques for purposes of getting better information from detainees.\(^ {197}\) The new methods included: use of "painful stress positions"; deprivation of sleep and light for extended periods of time; exposure to extreme heat, cold, noise and light; "hooding"; and denial of clothing.\(^ {192}\) These methods were utilized systematically in Afghanistan and Iraq.\(^ {193}\) Use of "water boarding," in which a person is held underwater to simulate drowning, was also documented as a method used contingent on special, individualized approval.\(^ {194}\)

Third, the Bush administration was unresponsive to reports and allegations of abuse.\(^ {195}\) For example, rather than address concerns articulated by of the International Committee of the Red Cross (ICRC) to the Coalition Forces, Army officials responded by attempting to limit the ICRC's access to detention centers.\(^ {196}\) The cumulative effect of this policy was to create an environment in which U.S. military personnel might have reasonably believed that the new interrogation techniques employed for the war on terror were authorized and lawful.

2. **U.S. Interrogation Techniques at Abu Ghraib**

The ICRC in its February 2004 report found that "methods of physical and psychological coercion were used by the military intelligence in a systematic way to gain confessions and extract information."\(^ {197}\) The ICRC documented the following methods of interrogation:

- hooding to disorient and prevent detainees from breathing freely
- being forced to remain for prolonged periods in painful stress positions
- being attached repeatedly over several days for several hours each time to the bars of cell doors naked or in positions causing physical pain
- being held naked in dark cells for several days and paraded naked,

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\(^{190}\) HRW REPORT \textsc{1}, supra note 54, at 1-2.
\(^{191}\) Id. at 2.
\(^{192}\) Id.
\(^{193}\) Id.
\(^{194}\) Id.
\(^{195}\) Id. at 3.
\(^{196}\) Id.

\(^{197}\) Id. at 25 (quoting \textsc{International Committee of the Red Cross, \textit{Report on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation}}, Feb. 2004.)
sometimes hooded or with women's underwear over their heads
sleep, food, and water deprivation
prolonged exposure while hooded to the sun during the hottest time of
day.\textsuperscript{198}

A classified investigative military report compiled by Major General
Antonio Taguba confirmed the ICRC's findings and documented even
more types of abuse.\textsuperscript{199} His report stated that "numerous incidents of
sadistic, blatant, and wanton criminal abuses" were inflicted on several
detainees.\textsuperscript{200}

3. Involvement of U.S. Officials

Whether or not the Bush administration's policy contributed to or
was responsible for the abuses at Abu Ghraib, significant evidence exists
that, at the very least, senior officials had knowledge that abuse was

\textsuperscript{198} Id. at 25–26.
\textsuperscript{199} Id. at 26. Abuse documented in the Taguba report included:
- Punching, slapping and kicking detainees; jumping on their naked feet;
- Videotaping and photographing naked male and female detainees;
- Forcibly arranging detainees in various sexually explicit positions for
  photographing;
- Forcing groups of male detainees to masturbate themselves while being
  photographed and videotaped;
- Arranging naked detainees in a pile and then jumping on them;
- Positioning a naked detainee on a box, with a sandbag on his head, and attaching
  wires to his fingers, toes and penis to simulate electric torture;
- Writing "I am a Rapist" (sic) on the leg of a detainee alleged to have forcibly raped
  a 15-year-old fellow detainee, and then photographing him naked;
- Placing a dog chain or strap around a naked detainee's neck and having a female
  soldier pose with him for a picture;
- A male military police guard having sex with a female detainee;
- Breaking chemical lights and pouring phosphoric liquid on detainees;
- Threatening detainees with a loaded 9-mm pistol;
- Pouring cold water on naked detainees;
- Beating detainees with a broom handle and a chair;
- Threatening male detainees with rape;
- Allowing a military police guard to stitch the wound of a detainee who was injured
  after being slammed against the wall in his cell;
- Sodomizing a detainee with a chemical light and perhaps a broom stick;
- Using military working dogs (without muzzles) to frighten and intimidate detainees
  with threats of attack, and in at least one case biting and severely injuring a
  detainee;
- Forcing detainees to remove their clothing and keeping them naked for several
days at a time;
- Forcing naked male detainees to wear women's underwear;
- Taking pictures of dead Iraqi detainees.

\textsuperscript{200} Id. at 26 (citation omitted).
occurring and failed to take actions to arrest it. 201 Organizations including HRW and the ICRC petitioned the U.S. government to take action to stop the abusive practices that were coming to light in the media and through their own investigations. 202 Reports of abuse from within the military ranks were also ignored. 203 In fact, interviews with soldiers stationed at Abu Ghraib indicated that soldiers were left with the impression that anyone proffering evidence of abuse would be subject to retaliation in the form of criminal charges, "hazing and harassment," or "potential exposure and ‘friendly fire’ death" on the battlefield. 204 Soldiers who did come forward about abuse in Iraq were subject to "ridicule and threat," including one case in which a soldier was found to be "mentally deranged" after filing a report of severe abuse, and was "strapped to a gurney and ... flown out of Iraq." 205

Furthermore, evidence exists demonstrating that senior officials made decisions that resulted in or contributed to the abusive actions taken on the ground in Iraq. For example, in the early stages of the occupation of Iraq, senior officials were dissatisfied with the quality of intelligence being produced from interrogations taking place. 206 Evidence indicates that senior officials sent pressure down the chain of command to improve the information being extracted from detainees. 207 For

201. Id. at 27–28 ("From the earliest days of the U.S. occupation of Iraq, the U.S. government has been aware of allegations of abuses, including the death of some 30 persons in detention. Yet soldiers accused of abuse have—until after the Abu Ghraib scandal broke—escaped judicial punishment.").

202. See id. at 3–4.

203. See Horton, Expert Report, supra note 18, para. 12 (describing interviews with soldiers stationed in Germany during May 2004, who were part of the military intelligence units previously stationed, or present, at Abu Ghraib). Horton also describes a visit he received from a delegation of senior uniformed military lawyers in May 2003 (whose identities remain confidential) in his capacity as Chair for the Committee on International Law of the Association of the Bar of the City of New York ("Bar Association"): The visitors advised me at that time that important policy decisions had been taken in the office of secretary of defense ("OSD") which were calculated to, and would, lead to the abuse of detainees held in the Global War on Terror ("GWOT"). They cited a number of specific decisions concerning the involvement of civilian contractors in the interrogation process, as well as the disengagement of military lawyers from a "watchdog" role in the interrogation facilities. These decisions, they said, "served no legitimate policy purpose." It was clear at the time that there were other decisions, probably reflected in secret or classified documents, which caused severe concern but which the officers were not a liberty to discuss. They further noted that military lawyers were being continuously circumvented in the process of policy analysis, presumably because they had consistently raised objection to initiatives of Rumsfeld on grounds that they were inconsistent with, or would violate, the law of armed conflict. The visitors sought the engagement of the organs of the legal profession with these issues with the hope that the Administration would resume the observance of standards firmly dictated by law and common decency.

Id. para. 4. Following this visit, the Bar Association raised concerns directly with the Department of Defense, the Central Intelligence Agency, the National Security Council, and oversight organs of Congress. Id.


205. Id. (citing David Debatto, Whitewashing Torture?, at www.salon.com (Dec. 8, 2004)).

206. Id. para. 16; see also HRW REPORT 1, supra note 184, at 3.

207. See Horton, Expert Report, supra note 18, para. 16; see also HRW REPORT 1, supra note 184, at
instance, at a Pentagon intelligence briefing in summer 2003 (at which Rumsfeld, Stephen Cambone, William Boykin and other senior officers were present), Rumsfeld reportedly "complained loudly about the quality of the intelligence" coming out of Iraq. He reportedly compared it to the more useful intelligence being gained at Guantánamo, following the introduction of new "extreme" interrogation techniques.

Rumsfeld allegedly expressed "anger and frustration over the application of Geneva Convention Rules in Iraq," and verbally ordered Major General Geoffrey Miller from Guantánamo to Iraq "to 'Gitmoize' the intelligence gathering operations there." "Gitmoize" reportedly refers to the introduction of Guantánamo interrogation techniques in Iraq.

After Rumsfeld's decision to "step up the hunt for 'actionable intelligence'" in Iraq, the officer responsible for intelligence in Guantánamo was re-deployed to Iraq, and teams of interrogators from Guantánamo arrived at Abu Ghraib. The commanding general in Iraq issued orders to "manipulate an internee's emotions and weaknesses," and military intelligence ordered military police to "set physical and mental conditions for favorable interrogation of witnesses." A captain who previously was in charge of interrogation at "an Afghan detention center where two prisoners died in detention posted 'Interrogation Rules of Engagement' at Abu Ghraib." These rules authorized coercive practices of interrogation "such as the use of military guard dogs to instill fear," which violates the Geneva Conventions and the Convention Against Torture. Following these changes in policy and practice, the severest abuses at Abu Ghraib were committed.

III. ELIMINATING IMPUNITY AND AVOIDING FOREIGN PROSECUTION: CHECKING THE "CHECKS AND BALANCES"

Recent experience with transnational investigations and prosecutions based on universal jurisdiction suggests that their principal value is the ability to stimulate investigations and prosecutions domestically. Transnational investigations focus international attention on the government’s incapacity or unwillingness to address human rights violations, force the government to defend its judicial system, and
empower domestic lawyers and activists demanding accountability at home.\textsuperscript{218} The primary goal of transnational prosecutions should be to force the hand of national officials to establish legitimate investigations and, where necessary, prosecutions, to hold the architects and perpetrators of atrocities accountable for their actions.\textsuperscript{219}

The United States has primary jurisdiction over alleged war crimes of senior U.S. officials and officers. The perceived willingness of the U.S. government to investigate the charges filed in the CCR’s complaint was the lynchpin issue and stated reason for the German prosecutor’s decision not to move forward with an investigation. Whether or not this was a legitimate legal concern of the prosecutor and/or a legal justification for a political solution to a foreign relations crisis with the United States, the United States’ willingness to investigate and prosecute those individuals suspected of war crimes is the simple solution to a complex set of problems. The United States’ implementation of independent investigative mechanisms that are not subject to political manipulation would serve the purposes of: 1) ensuring that the United States does not become a safe haven for American war criminals; 2) preserving the image of the United States as a law-abiding state; and 3) eliminating the vulnerability of U.S. citizens to criminal prosecution in unfamiliar foreign forums for participation in U.S. military operations, where U.S. constitutional guarantees that Americans count on (such as trial by jury) may or may not apply.

A. UNWILLINGNESS OF THE U.S. GOVERNMENT TO INVESTIGATE AND PROSECUTE

In his expert report filed with the complaint to the German prosecutor, Scott Horton, Chair of the Committee on International Law of the Association of the Bar of the City of New York, provides a number of reasons why U.S. investigation of senior officials is unlikely to occur.\textsuperscript{220} First, the Department of Defense’s criminal investigatory functions are under the complete authority of the Secretary of Defense who is the principal defendant in this case.\textsuperscript{221} Because Rumsfeld has “convening authority” over these mechanisms, he effectively has immunity from investigation.\textsuperscript{222}

Second, the criminal investigations that are currently underway pursuant to Army Regulation 15-6 effectively serve only to investigate down the chain of command.\textsuperscript{223} The investigation does not look up the

\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Horton, Expert Report, supra note 18, para. 3.
\textsuperscript{221} Id. para. 3.1.
\textsuperscript{222} Id. paras. 3.1, 9.
\textsuperscript{223} Id. para. 3.2. See generally id. paras. 9–19 (describing U.S. military criminal justice system).
chain of command, which protects higher-level officers and officials from accountability for their participation in the misconduct.224

Third, the criminal investigations of lower-level officers were influenced from above.225 The intent was to "whitewash" the culpability of those in higher command.226

Fourth, limiting criminal prosecution to the lowest-ranking participants indicates a "continuing scheme in corruption of the military criminal justice system," the purpose of which is to eclipse the role played by higher-level officers and officials.227 In interviews that Horton conducted with soldiers regarding the court martial hearings in Ft. Hood, Texas, soldiers indicated that "they had a clear understanding from [the court martial] process, that it wasn't the abuse of prisoners which was being punished, but the fact that the military, and particularly Rumsfeld, has been embarrassed by these matters becoming public."228

Fifth, responsibility for oversight, which is constitutionally vested in the legislative branch, has been abdicated.229 This was demonstrated by the actions of the Senate Armed Services Committee, which initially convened hearings on prisoner abuse, but never followed through with the inquiry.230 After a series of meetings with Republican congressional leaders, the Chair of the Committee, Senator John Warner, expressed concern that an investigation might interfere with the nation's war effort.231

Sixth, the War Crimes Act gives prosecutorial discretion to the Attorney General and the U.S. Attorneys.232 Not only was former Attorney General John Ashcroft implicated in the conspiracy to commit war crimes, his replacement, Alberto Gonzales, was the principal author of a "scheme" to commit war crimes.233 Gonzales's memorandum dated January 25, 2005, expressly noted that "he was motivated by a well-founded fear of war crimes prosecution" under U.S. law, which he "sought to evade for the benefit of himself and others in the Administration."234

Finally, Department of Justice (DOJ) officers who have raised the issue of war crimes culpability have been "disciplined, reprimanded, and
subjected to a malicious campaign of harassment. This indicates that the DOJ is unwilling to address the issue of responsibility for war crimes. Therefore, because the criminal investigative and prosecutorial functions are currently controlled by the same officials who are implicated in the conspiracy to commit war crimes, criminal investigation or prosecution is unlikely to occur in the near future.

B. THE NEED FOR INDEPENDENT MECHANISMS FOR INVESTIGATION

Since current administration officials are implicated in war crimes, an independent investigative mechanism must be established to preclude political interference with the initiation and pursuit of a criminal investigation. One source of independent investigative authority, which was intended to serve as a “check and balance” upon the executive branch’s investigative and prosecutorial authority, was the special prosecutor function. The Independent Counsel Act allowed for the appointment of a special prosecutor; however, the Act expired in 1999. Currently, no mechanism exists under American law to force an independent investigation of alleged misconduct by the executive branch.

235. *Id.* paras. 3.7, 29.
236. *Id.* para. 3.7.
237. See HRW REPORT 2, supra note 165, at 83, stating that:
Under the civilian justice system, criminal enforcement is committed to the U.S. Department of Justice and, in particular, to the Attorney General—Alberto Gonzales.
Under the military justice system, criminal investigations may be undertaken by command authority, with the Secretary of Defense—Donald Rumsfeld—as the ultimate authority.
Given that the two people who can trigger investigations and prosecutions for the alleged war crimes and acts of torture discussed in this report have been deeply involved in the policies leading to these alleged crimes, if not in the crimes themselves, it is extremely unlikely that any such investigations will be undertaken.
238. See Horton, Expert Report, supra note 18, para. 3.8.
240. Horton, Expert Report, supra note 18, para. 3.8. Under U.S. Department of Justice regulations, the Attorney General must appoint a special counsel from outside the government to investigate criminal matters in which the department may have a conflict of interest when a three-prong test is met. 28 C.F.R. § 600.1 (2004). First, a “criminal investigation of a person or matter [must be] warranted.” *Id.* Second, the “investigation or prosecution of that person or matter by a United States Attorney’s Office of or litigating Division of the Department of Justice would present a conflict of interest for the Department.” *Id.* Third, “under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.” *Id.* If the regulation’s
Recent history has shown that the special prosecutor role can itself be subject to political manipulations. To avoid any future threat that the special prosecutor’s authority would be abused, more checks and balances must be built into the oversight of this type of a role. For example, the special prosecutor could be limited to investigation of criminal violations implicating foreign affairs, affecting international relations, or occurring outside the territorial jurisdiction of the United States, since the foreign affairs power is broadly vested in the executive branch. To lessen the threat of political wrangling in the initiation and appointment of a special prosecutor, the invocation of the law could require direct Supreme Court oversight, such as the approval of a minimum number of Supreme Court justices to initiate an appointment, and agreement by some majority of justices to ratify the appointment of the specific individual to the position.

Having an effective mechanism three-prong test is met, then the Attorney General is to select a special counsel from outside the government. Id. Based on these regulations, Human Rights Watch, the American Bar Association, the American Civil Liberties Union, the Center for Constitutional Rights, Human Rights First, and other groups have called for the appointment of a special prosecutor to investigate these crimes. See HRW REPORT 2, supra note 165, at 83-84. Despite the existence of Department of Justice regulations, and political pressure to comply with them, Attorney General Alberto Gonzales has not appointed a special counsel to investigate.


We have seen that the use of the appearance of impropriety as a standard for judging politicians can be slippery and subjective, and that when combined with the power of the Independent Counsel Act, before its merciful expiration in 1999, it can be profoundly dangerous to our democratic system of justice. But even without the misuse of this statute by a prosecutor who has lost all perspective and reasonable discretion, such as Donald Smaltz, the Act became probably the most insidious element of the post-Watergate scandal machine; it gave the machine its most terrible, terrifying, and potentially destructive power. This is because the Independent Counsel Act, as it evolved in the 1980s and 1990s, became the instrument of choice in the political arena to serve partisan purposes. The Act was used by both parties—first, by the Democrats, and then, in the Clinton years, by the Republicans. The view of the Act from the start depended very much on whose political ox was being gored.


242. Formerly, under the expired Independent Counsel law, a Special Division of the Court of Appeals for the District of Columbia Circuit was created to appoint independent counsel. 28 U.S.C. § 49 (1993 & Supp. 2005). The Chief Justice of the United States determined which three Circuit Court Judges or Justices would sit on the Special Division, with the requirement that one appointment must be a judge of the U.S. Court of Appeals for the District of Columbia. Id. Appointments lasted for a two-year period. Id. The Special Division was required to appoint an appropriate independent counsel and specify the scope of his or her prosecutorial jurisdiction, upon receipt of an application requesting the appointment of independent counsel from the Attorney General. 28 U.S.C. § 593(b) (1993). The appointment must be an individual who does not hold any office of profit or trust under the U.S. government. 28 U.S.C. § 593(b)(2) (1993). Congress may “request in writing that the Attorney General apply for the appointment of an independent counsel” if a majority of the majority party
to initiate an independent, non-politically-motivated investigation, and prosecution if warranted, would serve both the conservative and liberal agendas of protecting a citizen who is threatened by prosecution abroad, and ensuring that impunity finds no safe haven in American politics.

CONCLUSION

Over the long term, if the international community gains the perception that the United States allows heinous war crimes to go unpunished, the willingness of nations to apply their universal jurisdiction laws to U.S. suspects found within their territories could very well increase, especially when the victims are citizens of those nations (citizens of almost forty-five different nations were held in Guantánamo). If this happens, long-awaited retirement plans to travel around the world might be thwarted for former U.S. officials and officers. For those former public servants, the U.S. safe haven might start looking a lot more like an isolated island. Ordinary citizens might even become deterred from going into public office by the threat of becoming embroiled in scandals beyond their control with international implications. The creation of an independent prosecutor function, with the appropriate checks and balances on its investigative and prosecutorial authority, would provide a long-term solution to the problem of protecting U.S. citizens while simultaneously holding them accountable.

members or of the minority party members of the Committee on the Judiciary of either house of Congress agrees to do so. 28 U.S.C. § 592(g)(1) (1993).

243. More than 700 detainees from forty-four nations were held incommunicado at Guantánamo Bay. Lord Johan Steyan, a judicial member of Britain’s House of Lords, referred to Guantánamo as a “legal black hole.” HRW REPORT I, supra note 184, at 13. Incommunicado detention facilitates conditions in which abuse is more likely to take place. Id. at 14. The Human Rights Committee, which is the United Nations entity that monitors compliance with the International Covenant on Civil and Political Rights, states:

To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends.

Id. at 14 n.31 (citation omitted).