AFFIDAVIT OF RICHARD FALK ON UNIVERSAL JURISDICTION AND THE ROLE OF NATIONAL COURTS WITH RESPECT TO THE CRIMINAL COMPLAINT LODGED IN GERMANY AGAINST DONALD RUMSFELD AND OTHER UNITED STATES GOVERNMENT HIGH OFFICIALS

My name is Richard Falk, and I currently reside at 723 Alston Road, Santa Barbara, California. I am a lawyer by training, graduating from Yale Law School in 1955, and being admitted to the New York bar in the following year. I spent the next six years on the faculty of the College of Law at Ohio State University where I taught international law and criminal law. In 1961 I joined the faculty of Princeton University where I remained until I retired in 2001 with the title Albert G. Milbank Professor of International Law and Practice. In 1962 I completed doctoral studies at Harvard Law School, receiving the degree of SJD. I served for many years on the editorial board of the American Journal of International Law, and am currently an Honorary Editor. My published scholarly writing has emphasized the relevance of law to war, including issues involving the criminal accountability of political and military leaders. During the Vietnam War I edited a four volume series with the title *The Vietnam War and International Law,* and also co-edited a volume entitled *Crimes of War: Indochina.* I have also written several book on these themes including *International Law in a Violent World (1968)* and *The Great Terror War (2003).* In 2006 I published a co-edited volume entitled *Crimes of War: Iraq*. I did submit an affidavit in 1980 supporting the view that torture was an international crime in the *Filitarga* (Filartiga v. Pena-Irala, 630 F.2d 878(2d Cir. 1980) case, and I have appeared in many cases as an expert witness on the relevance of international law to issues of war and peace.

1. Impressive progress has been made in recent years in establishing the existence of a group of international crimes and in securing agreement from most governments in the world that those guilty of committing such crimes should be held accountable. The crimes so condemned are most authoritatively specified in Statute of the International Criminal Court, Article 5: (a) genocide; (b) crimes against humanity; (c) war crimes. In clarifying the scope of crimes against humanity and war crimes, the distinct international crime of torture is included and defined. The complaint against American high officials as amended and refiled in 2006 makes accusations that relate to this corpus of established international criminal law, which is reinforced by separate, more specific and widely ratified international treaties, most notably the 1984 Torture Convention, as well as by the rules and principles of customary international law applicable to the behavior of belligerents.

2. The main international legal instruments governing the specifications of the basic norms of international humanitarian law and of international criminal law clearly call upon parties to these international treaty arrangements to take steps, as a matter of legal obligation, to ensure maximum level of compliance. For instance, in Article 1 of the Genocide Convention the parties undertake the obligation "to prevent and punish" the crime of genocide.

Similarly, in the Geneva Conventions of 1949, common Article 1 commits the parties not only to respect the treaty, but "to ensure respect for the present Convention in all circumstances." Articles 146 and 147 of the Geneva Convention IV 'On the Protection of Civilians in Time of War' is particularly significant. Article 146 commits the parties 'to enact any necessary legislation to provide effective penal sanctions for persons committing..grave breaches of the present Convention.' The same provision imposes an 'obligation to search for persons alleged to have committed..such grave breaches, and shall bring such persons, regardless of nationality, before its own courts.' Article 147 specifies 'torture or inhuman treatment' and 'wilfully causing great suffering or serious injury to body or health' as among those wrongs to be deemed as 'grave breaches.'

3. It is against such a background that a trend toward the assertion of universal jurisdiction by national legislation and judicial practice can be discerned. This trend has been encouraged by the high-profile detention in 1998 of the former Chilean dictator Augusto Pinochet in Britain to determine whether extradition to Spain for criminal prosecution should be granted. The litigation in British courts affirmed that extradition was appropriate so far as international crimes had been internalized by implementing legislation, which was the case for torture after a certain date. Academic commentary by distinguished jurists have also advocated reliance by national courts on universal jurisdiction to address criminal charges against individuals involving those international crimes that have been authoritatively established as recognized by contemporary international law. The reliance on universal jurisdiction is nothing new. International crimes associated with piracy or international slave trade were prosecuted before national courts long before the modern tradition of international accountability was launched after World War II in the Nuremberg and Tokyo War Crimes Tribunals. A comprehensive framework for judicial practice relative to universal jurisdiction was developed by a group of jurists collaborating over a period of years, with their work under the auspices of Princeton University, and eventuating in 'The Princeton Principles on Universal Jurisdiction.'[1]

4. Universal jurisdiction with respect to the prosecution of international crimes perpetrated outside the sovereign limits of a country and in which nationals were not victims, exhibit a commitment to the wider goals of justice in a world order with fledging international judicial institutions. In effect, national courts are fulfilling a deeper world community function of augmenting the implementation of international law rules, and with respect to criminality, constraining the domain of impunity. Such a function for national courts has been

[1] For the text of and commentary on the Princeton Principles, as well as essays on the various dimensions of universal jurisdiction see Stephen Macedo, ed., *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia, PA: University of Pennsylvania Press, 2004); also helpful, John Borneman, ed., *The Case of Ariel Sharon and the Fate of Universal Jurisdicttion* (Princeton Institute for Regional and Transnational Studies, Princeton University, 2004)

affirmed by leading international jurists decades ago. Among the most celebrated formulation was that of Georges Scelle who wrote about *le dédoublement fonctionnel* by which he meant that a national court was both an instrument of law within the confines of a particular sovereign state, but also that it was an agent of the international legal community with a mandate to give effect, as permitted by the domestic legal system, to international legal policy.[2] My own earlier work encouraged national courts to distinguish between those areas of international law where *legitimate diversity* of opinion existed (e.g. obligations to compensate foreign investors), and it was appropriate to defer to the legal policies of another state, and those areas where *universal standards* existed (e.g. fundamental human rights, international crimes as specified in para. 1), and it is appropriate for national courts to be assertive in attaching legal consequences.[3]

5. Reliance on universal jurisdiction is intended to be supplementary, as well as deferential to other national or international judicial approaches that have a better claim to prosecute either because of the locus of the crime or the identity of the defendant. The German Code of Crimes Against International Law acknowledges this by providing in Section 153f for a discretionary refusal to prosecute in the event that there is no German connection with the alleged crimes. The dismissal of the 2004 complaint on the basis that the alleged criminality of Rumsfeld and other was under investigation in the United States. Such a dismissal leaned over backwards to accord the United States an opportunity to hold accountable its own high officials, but it was evident to independent observers that such a prospect was so improbable as to be totally implausible. In 2006 there is no longer any basis for a discretionary dismissal. Even with the Democratic Party now in control of the US Congress there is no indication whatsoever of a disposition to initiate an inquiry to whether various high American officials in charge of Iraqi policy should be prosecuted for their role in criminal abuses, amounting to torture, that occurred in the Abu Ghraib and other prisons holding Iraqi and other detainees.

6. In the circumstances of this case, there is no alternative to impunity for those accused in the complaint unless a national court proceeds. There is no prospect for the foreseeable future that any court in the United States or in Iraq would be available to assess such charges. And in that respect, the passage of the Military Commissions Act of 2006 (MCA) is another illustration of such unlikelihood. Indeed, the MCA, signed by President Bush on October 17, 2006, attempts to immunize American military and civilian leaders from prosecution for war crimes in the United States by retroactively (back to September 2001)

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[2] For exposition, see Scelle, "Le Phénomène juridique du dédoublement fonctionnel," in *Rechtsfragen der internationalen Organisation: Festscrift für Hans Wehberg* (1956); also supporting this idea was Myres S. McDougal, *Studies in World Public Order* (New Haven: Yale University Press, 1960), at 171, 774.

[3] Richard Falk, *The Role of Domestic Courts in the International Legal Order* (Syracuse, NY: Syracuse University Press, 1964).

redefining in a narrow way what constitutes a war crime under the American War Crimes Act – thereby amounting to the grant of a self-pardon for any abuses of law that took place since 9/11. At the same time, the International Criminal Court is not available as the United States has not signed the Rome Treaty and has indicated in many ways its rejection of this institution with respect to American citizens. For these reasons, there is no reasonable basis for an exercise of prosecutorial discretion to dismiss this revised complaint. The facts as set forth in elaborate detail, and corroborated by a variety of impartial and respected international fact finding investigations, as well as by U.S. Government reports and Congressional hearings, are beyond serious doubt. In these circumstances, the overriding interest of a German legal proceeding would be to give maximum effect to applicable international criminal law, as well as to give what legal relief is possible to the Iraqi initiators of this complaint who have been victimized by the practices authorized and endorsed by Rumsfeld and the other high officials of the U.S. Government mentioned in the complaint.

7. The norms of international law in question are to be found in the general directive of common Article 3 of the Geneva Conventions, and as extended to conflicts that are not clearly of an international character by the Geneva Protocols I and II. The United States is a party to the Geneva Conventions, but has failed to submit either protocol to the US Senate for ratification; at the same time, it is the consensus view of international legal specialists that the fundamental provisions of the Protocols are embedded in customary international law and are binding on states, whether or not parties to the treaty instrument. Article 3 seems to apply directly to those detained in Abu Ghraib prison administered by American military personnel following directives as to obtaining information by harsh interrogation and humiliation methods. Article 3(1) insists that all persons held in detention "shall in all circumstances be treated humanely'; it goes on to enumerate acts that would qualify as inhumane, including in Article 3(c) "outrages upon personal dignity, in particular humiliating and degrading treatment."

8. The other important source of legal authority is derived from the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of which the United States is a party. It is significant that the prohibition against torture admits of no exceptions of the sort that government lawyers in the United States have produced, either by redefining 'torture' in a manner that is well below international standards or by claiming that the exigencies of the war on terror create circumstances warranting exceptions to the prohibition, especially in the case of high level detainees. Article 2(2) is very clear about disallowing such efforts to free states from the obligations of the Torture Convention: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture." It is also significant that Article 2(1) imposes an obligation by a party to the Convention to take "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." In effect, the prohibition on torture illustrates a 'zero tolerance' attitude toward pragmatic arguments advocating a weakening of the unconditional character of the obligation.

9. The facts enumerated in the complaint, which are substantially uncontested, establish a strong presumption that the practices at Abu Ghraib violate treaty rules in the Geneva Conventions and in the Torture Convention. It also appears convincing that these practices were a direct and indirect consequence of command policies in the Pentagon and elsewhere in the U.S. Government that implicate the highest officials, including the then Secretary of Defense, Donald Rumsfeld. Given these circumstances, the argument in favor of exercising universal jurisdiction seems exceedingly strong. It would provide a German court with an invaluable opportunity to reassert the validity of international humanitarian law in the face of its disregard in the war on terror that has been waged by the United States since the September 11, 2001 attacks. Such a reassertion is not likely to be forthcoming elsewhere, and so it is indispensable that this opportunity be taken, especially as the 'war on terror' has no boundaries as to geographic scope or temporal duration. The alternative, by way of dismissal, would invite cynicism about the relevance of international humanitarian law, including the torture prohibition, to the realities of contemporary armed conflict. Such a message would be a tragic blow struck against the efforts of many throughout the world to strengthen the rule of law in times of war, and make it applicable to the policies and practices of the strong as well as of the weak. It would also show that national courts supported the broader effort in the world to make individual military and civilian leaders criminally accountable for fundamental and grave violations of the law of war, and not create the public impression that international criminal law is implemented only by the 'winners' in a war, or only against the leaders of weak and occupied countries (as in the recent prosecutions of Milosevic and Saddam Hussein).

Respectfully submitted,

Richard Falk

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