

Criminalizing Extraordinary Rendition: Global Civil Society and the Promise of International Law

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ABSTRACT

This article draws on the literature on accountability mechanisms to predict that Bush administration officials will be held criminally liable under international law for their roles in developing and implementing the practice of “extraordinary rendition.” Through an analysis of recent developments, including the widespread publication of facts about secret rendition flights, the creation of reports, and a complaint filed against high officials of the Bush administration, this article demonstrates that the US government’s arguments defending the extraordinary rendition program have been rejected by global civil society as artful policymaking aimed at allowing the United States to shirk its obligations under international law. The transnational push for accountability is likely to succeed, I argue, even though such challenges have rarely been levied against officials of superpower states.

INTRODUCTION

As part of the institutionalization of human rights norms, mechanisms for holding torturers and perpetrators of war crimes accountable have been created. Antonio Cassese has argued that the prosecution and punishment of international criminals provides “the most effective ‘sanction’” against gross violations of

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international law.¹ The first part of this article provides a brief overview of the development of international humanitarian law and human rights, beginning with its early codification in the United Nations Charter and the Universal Declaration of Human Rights, to recent applications of these norms using the legal principle of universal jurisdiction. I draw on the work of scholars who describe accountability mechanisms, which become, in the hands of transnational advocates, or global civil society, tools for challenging state abuse of power. In the second part of this article, I examine the specific issue of extraordinary rendition, a practice which has been described by the United States government as a “vital tool” in the “war on terror.” Recent developments—the widespread publication of facts about secret rendition flights, the creation of reports, and a complaint filed against high officials of the Bush administration—demonstrate that the US government’s arguments defending extraordinary rendition have been rejected. Global civil society has understood the US government’s arguments as artful policymaking aimed at allowing the United States to shirk its obligations under international law. My research into this issue leads me to posit that there is a transnational push for accountability on this issue. The visible signs of transnational advocacy lead me to predict that serious consequences await officials of the Bush administration, even though some important legal principles, such as universal jurisdiction, have rarely been levied against officials of superpower states.

PART I

¹ Antonio Cassese, “International Criminal Justice: Is it Really So Needed in the Present World Community?” Public lecture at the London School of Economics, November 13, 2001, available at www.lse.ac.uk/Depts/global/Publications/PublicLectures/PL_InternationalCriminalJustice.pdf, last visited December 5, 2006.

THE EMERGENCE OF HUMAN RIGHTS DOCTRINE

In the past fifty-eight years international humanitarian law has evolved from a seemingly insignificant development into a legal doctrine internalized by states and employed by global civil society. International humanitarian law can be traced historically to the United Nations Charter, ratified in 1945, and to the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948. Richard Falk notes the marginal role that human rights had in international politics shortly after World War II. Though the Universal Declaration marked the first attempt by the international community to codify a language of human rights, its status as a “declaration” meant that the Universal Declaration had no binding power, and indeed it did not reflect the “operative reality” of the time.² Jack Donnelly explains that the Universal Declaration was merely perceived as a list of ambitious goals to which nations could aspire.

Human rights point beyond actual conditions of existence; they are less about the way that people are, in the sense of what has already been realized, than about how people *might* live, a possibility that is viewed as a deeper moral reality. The Universal Declaration of Human Rights tells us little about what life is like in most countries, but it sets out minimum conditions for a *dignified* life, a life *worthy of a human* being, and it sets out these requirements in the form of *rights*, with all that implies.³

Now in the twenty-first century, the Universal Declaration has come to be viewed as customary international law or *jus cogens*, evidenced by the numerous constitutions of newly independent states and in human rights treaties which have echoed the principles of the Declaration.⁴ The rise of international institutions, such as the UN Human Rights Council and the Council of Europe, which are committed to protecting and promoting human rights, also clearly demonstrates the institutionalization of human rights in international relations. Falk writes, “One of the most impressive

² Richard Falk, *Human Rights Horizons* (New York: Routledge, 2000), 37-8.

³ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989), 18.

⁴ Falk, 243, at note 4.

achievements of the United Nations in its first half-century has been to provide the peoples of the world with the normative architecture of a comprehensive human rights system.”⁵ Though born out of a fundamentally statist perspective—illustrated best by institutions such as the UN whose members were primarily concerned with peace, order, and war prevention—the human rights system has evolved to acknowledge the role of non-state actors and has grown sensitive to individual and community claims for global justice.⁶ The ability to legitimately make demands for global justice is evidenced by accountability mechanisms and various forums provided by the international law system.

INSTITUTIONALIZING INDIVIDUAL ACCOUNTABILITY AND SUPERIOR LIABILITY

The notion that individuals are criminally liable and can be prosecuted for the most severe violations of human rights was institutionalized with the Nuremberg and Tokyo trials following World War II. The principles of the Nuremberg Charter, which in turn were adopted by the UN International Law Commission in 1950, established that war crimes, crimes against peace, and crimes against humanity were punishable under international law. In the last two decades, the model set by the Nuremberg and Tokyo tribunals has been used to create ad hoc International Criminal Tribunals for Rwanda and Yugoslavia. In 1998 the idea of a “permanent Nuremberg,” an independent tribunal for addressing gross violations of human rights committed by states, was finally realized with the passage of the Rome Statute of the International Criminal Court.⁷ In addition to reaffirming the principles of the UN Charter, the Rome Statute established the crimes over which the Court had jurisdiction: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. The Preamble of the Rome Statute expresses the determination of all state parties “to put an end to

⁵ *Ibid.*, 30.

⁶ *Ibid.*, 14.

⁷ Robert F. Drinan, S.J., *The Mobilization of Shame* (New Haven: Yale University Press, 2001), 76.

impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes," and recalled "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." The International Criminal Court, which owes its creation to the principles in UN mandates, represents a decided shift away from realist views promulgated by such scholars as Hans J. Morgenthau, who, writing in 1951, rejected the idea that the UN could "becom[e] the forum before which the peace-loving, law-abiding nations summon the criminal aggressors."⁸

Another important development in the twenty-first century that has enabled the prosecution of international criminals is the emergence of the concept of the criminal liability of superiors, which effectively acknowledges that crimes are committed by "foot soldiers" taking orders from above. James Meernik examines the impact that the two International Criminal Tribunals and the International Criminal Court have had on the international law system and describes the conceptualization of "the liability of superiors for the actions of military and civilian subordinates, those in their employ and even those outside of any official hierarchy of authority."⁹ Based on the opinions given by these courts, Meernik identifies four elements that can be used to determine superior liability: first, it must be proven that a crime has occurred; second, it must be proven that the accused had superior authority over those involved in perpetrating the offense; third, it must be shown that the accused had knowledge of or was in the position to know the offense would take place; fourth, in spite of this knowledge, the accused failed to act, prevent, or punish the perpetrators.¹⁰ Meernik speculates that the growing acceptance of the notion of superior liability may impact the behavior of leaders and may thus have an effect on policymaking. However, he suggests that these outcomes ultimately depend on the international community's willingness to

⁸ Hans J. Morgenthau, *In Defense of the National Interest* (New York: Knopf, 1951), 102.

⁹ James Meernik, "Reaching Inside the State: International Law and Superior Liability," *International Studies Perspective* 5 (2004): 356-377, at 357.

¹⁰ *Ibid.*, 361.

enforce compliance with international law.¹¹ What is particularly significant about the developing notion of superior liability is how it challenges traditional norms of state sovereignty. As Meernik explains, the pursuit of global justice has weakened the privileged status of the norm of sovereign immunity.¹²

One of the most significant examples of the trend in international legalization and institutionalization of superior liability and the corresponding weakening privilege of sovereign immunity has been the case against Chilean dictator General Augusto Pinochet. On October 16, 1998, British authorities based their arrest of Pinochet on an extradition request by Spain. Earlier, a Spanish judge, Balthazar Garzón, had invoked the customary international law principle of universal jurisdiction, which permits any state to arrest and prosecute perpetrators of universally condemned crimes including torture, genocide, crimes against humanity, and war crimes. Universal jurisdiction is supported by the Geneva Conventions, the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment (CAT), as well as the Rome Statute of the International Criminal Court, which each call on state parties to enact national legislation that enables them to exercise universal jurisdiction.¹³ In fact, Amnesty International has argued that even those states that are not parties to such conventions must, on the basis of general principles, either exercise jurisdiction or extradite the alleged criminal to a state that is able and willing to prosecute the suspect.¹⁴ Donald Francis Donovan and Anthea Roberts explain that national law will necessarily affect the enforcement of universal jurisdiction, but they maintain that there is growing acceptance of universal jurisdiction in a civil dimension:

The considerable convergence of *jus cogens* norms, *erga omnes* obligations, and universal jurisdiction reflects the growing acceptance by international law of

¹¹ *Ibid.*, 365, 370-1.

¹² *Ibid.*, 356.

¹³ Redress, "Universal Jurisdiction in Europe in Practice," www.redress.org/documents/inpract.html#30, last visited December 10, 2006.

¹⁴ Amnesty International, "Universal Jurisdiction: the duty of states to enact and implement legislation: Torture," September 1, 2001. <http://web.amnesty.org/library/index/engior530122001?OpenDocument>, last visited December 10, 2006.

two important points. First, some norms are fundamental because the conduct they proscribe is so heinous that they bind every state and every individual, without exception. Second, international law must increase the prospect of enforcing these norms by expanding the scope of concepts such as standing and jurisdiction that might otherwise circumscribe the possibility of adjudication. Thus, while these bodies of law are not coextensive, they are, at a minimum, mutually reinforcing, and the extent of their correspondence is likely to increase.¹⁵

Still, scholars acknowledge the important fact that, despite the great number of crimes which could be prosecuted under universal jurisdiction, few criminals have had to appear in court and thus universal jurisdiction has not been fully utilized as a tool for “ending impunity for serious violations of international law.”¹⁶ For this reason, the actions of Spain and the precedent created by efforts to prosecute Pinochet, known as the *Pinochet precedent*, have been welcome to those seeking to advance accountability in human rights law and international humanitarian law. Juan Garcés writes, “The current regulations that establish universal jurisdiction over crimes against humanity assume that state rulers are subordinate to the double control of international law and local law that in both cases must be applied by independent judges....This compatibility is dreaded by those who favor the impunity of crime insofar as this is their instrument for imposing a particular view of the work.”¹⁷ The profound impact of the case of Pinochet in advancing the notion of the criminal liability of high-level officials was summarized in a Human Rights Watch article posted on December 10, 2006, the day of Pinochet’s death: “Pinochet’s greatest legacy may be the cautionary lesson he provides....His case showed the world that even the most powerful human rights abusers can be made to face justice.”¹⁸

¹⁵ Donald Francis Donovan and Anthea Roberts, “The Emerging Recognition of Universal Civil Jurisdiction,” *American Journal of International Law* 100 (2006): 142-163, at 145.

¹⁶ *Ibid.*, 156; See also Peter Weiss, “Universal Jurisdiction: Past, Present, and Future.” Paper presented at a conference entitled, *Is Universal Jurisdiction an Effective Tool? Holding Officials Accountable for Violations of Human Rights and Humanitarian Law*, October 25, 2006 at Columbia University.

¹⁷ Juan Garcés, “Kissinger and Pinochet Facing Universal Jurisdiction,” in Madeleine Davis, ed., *The Pinochet Case: Origins, Progress and Implications* (London: Institute of Latin American Studies, 2003), 35.

¹⁸ Human Rights Watch, “Chile: Pinochet’s Legacy May End Up Aiding Victims,” December 10, 2006. www.hrw.org/english/docs/2006/12/10/chile14805.htm, last visited December 10, 2006.

The role that global civil society plays in holding norm-violating states to account has been explained and theorized in different ways. Focusing on the process by which states are made to confront their human rights violations, some scholars argue that states never voluntarily relinquish power to their challengers and that advocates have had to struggle to wrest power from states in order to secure a place for human rights on the foreign policy agenda. This view is echoed in the work of activist-writer Arundhati Roy, who offers this analysis:

The minute you allow the state to take away your freedoms, it will. So whatever freedoms a society has exist because those freedoms have been insisted upon by its people, not because the state is inherently good or bad....I think it's not just important but urgent for us to become extremely troublesome citizens, to refuse to allow the state to take away what it is grabbing with both hands just now.²⁰

Other scholars place a similar emphasis on how "troublesome citizens" and human rights advocates interact with the state. Margaret E. Keck and Kathryn Sikkink examine how transnational advocacy networks have impacted foreign policy-making.²¹ Transnational networks "use the power of their information, ideas, and strategies to alter the information and value contexts within which states make policies....Persuasion and socialization often involve not just reasoning with opponents, but also bringing pressure, arm-twisting, encouraging sanctions, and shaming." Keck and Sikkink identify a typology of tactics used by activists to persuade, socialize, and pressure

¹⁹ I use the term "global civil society" as John Keane defines it: "as an ideal-type, it properly refers to a dynamic nongovernmental system of interconnected socio-economic institutions that straddle the whole earth, and that have complex effects that are felt in its four corners. Global civil society is neither a static object nor a fait accompli....These nongovernmental institutions and actors tend to pluralize power and to problematize violence; consequently, their peaceful or 'civil' effects are felt everywhere, here and there, far and wide, to and from local areas, through wider regions, to the planetary level itself....All of these forms of life have at least one thing in common: across vast geographic distances and despite barriers of time, they deliberately organize themselves and conduct their cross-border social activities, business and politics outside the boundaries of governmental structures." See John Keane, *Global Civil Society* (Cambridge: Cambridge University Press, 2003), 8-9.

²⁰ David Barsamian and Arundhati Roy, *The Checkbook and the Cruise Missile: Conversations with Arundhati Roy, Interviews by David Barsamian* (Massachusetts: South End Press, 2004), 61.

²¹ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998), 2.

norm-violating states: information politics, symbolic politics, leverage politics, and accountability politics.²² For example, in accountability politics, network activists attempt to make the government accountable to its discursive positions, using “their command of information to expose the distance between discourse and practice.”²³ Through processes that involve “communication, argumentation, and persuasion,” transnational networks of activists pressure states to start “walking the talk.”²⁴

Illuminating the processes involved in accountability politics, Thomas Risse and Kathryn Sikkink offer a “spiral model,” which explains how interactions between transnational advocates and states eventually lead to the socialization and internalization of human rights norms.²⁵ The model includes a “denial phase,” in which “the norm-violating government refuses to accept the validity of international human rights norms themselves” and rejects “suggestions that its national practices in this area are subject to international jurisdiction.” This denial signifies that at least part of the socialization process has occurred: “The fact that the state feels compelled to deny charges demonstrates that a process of international socialization is already under way. If socialization were not yet under way, the state would feel no need to deny the accusations that are made.”²⁶ Thomas Franck also recognizes “denial” as one of the responses of a norm-violating state, which in turn signals the strength of an international law norm.

[T]hose who violate [law’s] strictures invariably claim not to be doing so. We tend to overlook the tribute paid by scofflaws to the law they are breaching. If violators defend their actions either by distorting the law’s meaning, or by lying about the facts of their violation, that strategy of denial tells us something.

²² *Ibid.*, 16.

²³ *Ibid.*, 24.

²⁴ Thomas Risse and Kathryn Sikkink, “The Socialization of Human Rights Norms,” in Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999), 13.

²⁵ *Ibid.*, 17-35. The “spiral model” includes five phases: 1: state repression and activation of advocacy network; 2: state’s denial; 3: tactical concessions; 4: prescriptive status; 5: rule-consistent behavior.

²⁶ Risse and Sikkink, 23.

Perhaps it tells us that even the violators think that there is some life—some bite—left in those rules.²⁷

Under continued pressure from the domestic-transnational networks, norm-violating governments then begin to make “tactical concessions”; the state begins to engage the human rights discourse. While it casts doubt on the competence of its critics and “reject[s] any concrete allegations of violations,” the state “no longer den[ies] the validity of international human rights norms.” In the argumentative mode and in full view of the public, the state is forced to keep up its end of the dialogue with human rights advocates.

Slowly but surely, governments become entrapped in their own rhetoric and the logic of arguing takes over. The more norm-violating governments argue with their critics, the more likely they are to make argumentative concessions and to specify their justifications and the less likely they are to leave the arguing mode by openly denouncing their critics.²⁸

By engaging in a dialogue on international human rights norms, the government in essence opens itself up to questioning and makes itself accountable to others. At this point, advocates have the opportunity to mobilize shame, a form of moral leverage politics, and states become “sufficiently disturb[ed]” with respect to their domestic and international reputation.²⁹ As a state is forced to make tactical concessions, a space opens up in the domestic sphere: “the focus of activities is likely to shift from the transnational to the domestic level. The increased international attention serves to create and/or strengthen local networks of human rights activists whose demands are empowered.”³⁰

Similarly, Ruth W. Grant and Robert O. Keohane analyze the relationship between states and non-state actors in the context of a state’s reputational concerns when it has been accused of violations of international law. Grant and Keohane argue

²⁷ Thomas Franck, “The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium,” *American Journal of International Law* 100 (2006): 88-106, at 95-96.

²⁸ Risse and Sikkink, 26-28.

²⁹ *Ibid.*, 27. See Keck and Sikkink, 23, regarding shame in leverage politics.

³⁰ Risse and Sikkink, 25.

that several mechanisms for holding powerwielders accountable materialize when a state participates in world politics, since the legitimacy of the state's participation depends on its adherence to human rights norms, normative principles, and international law.³¹ One of those mechanisms is legal accountability, which is common to constitutional democracies and which is manifested in the existence of institutions such as the International Criminal Court. Another mechanism, public reputational accountability is "a form of 'soft power,' " which "appl[ies] to situations in which reputation, widely and publicly known, provides a mechanism for accountability even in the absence of other mechanisms as well as in conjunction with them."³² In addition, Grant and Keohane identify other factors that play a significant role in making powerwielders accountable: strong internal legitimacy, the strength of internal/domestic institutions, and transparency or the widespread availability of information.³³ The scholars argue that by clarifying acceptable standards of behavior, increasing the availability of sanctions, and facilitating the spread of information, there will be more "opportunities for feasible actions to improve accountability."³⁴

The following section of this article provides a critical examination into the way that advocates have responded to the US government's policies and its rationale for the extraordinary rendition program. By mapping global civil society's response— investigation, widespread information, and official condemnation—it is possible to discern not only evidence of accountability politics at work, but indeed the emerging recognition of a states' vulnerability in an era of superior liability and the institutionalization of the international human rights system.

PART II

³¹ Ruth W. Grant and Robert O. Keohane, "Accountability and Abuses of Power in World Politics," *American Political Science Review* 99 (2005): 29-43, at 35.

³² *Ibid.*, 36-37.

³³ *Ibid.*, 39-40.

³⁴ *Ibid.*, 41-42.

Reports of the existence of the extraordinary rendition program first began to emerge in the US press in December 2002.³⁵ In response, the international community demonstrated its outrage over the apparent violations of fundamental human rights, including the right to due process and the right not to be subjected to torture. Nongovernmental organizations responded immediately to the first reports in 2002. Human Rights Watch released a statement and addressed a letter to President Bush, calling on him to clarify the US government's stance and "to issue a presidential statement that it is contrary to US policy to use or facilitate torture in any circumstances."³⁶ In 2004 lawyers from the New York Bar Association and the Center for Human Rights and Global Justice at New York University released a detailed report, *Torture by Proxy*, which concluded that extraordinary rendition violated US obligations under CAT, the International Covenant on Civil and Political Rights, the four Geneva Conventions, the Refugee Convention, as well as "an evolving body in international law...[that] requires criminalization and prosecution of ancillary acts, such as complicity to, and aiding and abetting, torture."³⁷ In 2005 the Parliamentary Assembly of the Council of Europe (PACE), an organ of the oldest political organization of European states, made its position clear with Resolution 1433. PACE "call[ed] on the United States Government to ensure respect for the rule of law and human rights" by taking action:

³⁵ Dana Priest and Barton Gellman, "US Decries Abuse but Defends Interrogations," *Washington Post*, December 26, 2002, A01; Dana Priest, "CIA Holds Terror Suspects in Secret Prisons," *Washington Post*, November 2, 2005, A01. In a 2004 article in the UK's *New Statesmen*, Stephen Grey described the extensive "secret global network of prisons and planes" that lay behind the extraordinary rendition program. "America's Gulag," *New Statesmen*, May 17, 2004. <http://www.newstatesman.com/200405170016>, last visited December 9, 2006. See also Stephen Grey, "US Accused of Torture Flights," *Sunday Times* of London, November 14, 2004.

³⁶ Human Rights Watch, "United States: Reports of Torture of Al-Qaeda Suspects," December 27, 2002. <http://hrw.org/english/docs/2002/12/27/usint9381.htm>, last visited December 2, 2006.

³⁷ Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* (New York: ABCNY & NYU School of Law, 2004), 70-71.

vii. to cease immediately the practice of secret detentions and to ensure full respect for the rights of any detainees currently held in secret, in particular the prohibition on torture and cruel, inhuman or degrading treatment and the right to have relatives informed of the fact of detention, to recognition as a person before the law, to judicial review of the lawfulness of detention and to release or trial without delay...

ix. to cease the practice of "rendition" in violation of the prohibition on *non-refoulement*...³⁸

When the reports first emerged in the mainstream press in 2002, the Bush administration did not deny that renditions were taking place, but it did reject the allegations of torture.³⁹ *Washington Post* journalists Dana Priest and Barton Gellman relayed the US government's explanation of the extraordinary rendition program:

US officials who defend the renditions say the prisoners are sent to these third countries not because of their coercive questioning techniques, but because of their cultural affinity with the captives....They look to foreign allies more because their intelligence services can develop a culture of intimacy that Americans cannot. They may use interrogators who speak the captive's Arabic dialect and often use the prospects of shame and the reputation of the captive's family to goad the captive into talking.⁴⁰

In 2005, in the aftermath of the Abu Ghraib scandal and in the midst of more frequent reports on the torture of prisoners and statements of former detainees, government officials avoided offering justifications for the need to render prisoners to foreign nations. In response to the allegations, government officials, including Secretary of State Condoleezza Rice, Attorney General Alberto Gonzales, and then

³⁸ Parliamentary Assembly of the Council of Europe, *Resolution 1433 (2005): Lawfulness of detentions by the United States in Guantánamo Bay*, April 2005. <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1433.htm>, last visited December 2, 2006.

³⁹ Stephen Grey has noted that while the US government has admitted that the extraordinary rendition program exists, it has never acknowledged an *individual* rendition. See *Democracy Now*, "Conservative British MP in US to Challenge Extraordinary Rendition; 3,000 Published Flight Logs Expose New CIA Rendition Activities," December 6, 2006. www.democracynow.org/article.pl?sid=06/12/06/1429257, last visited December 6, 2006.

⁴⁰ Priest and Gellman, "US Decries Abuse but Defends Interrogations." The present article lacks critical analysis of how extraordinary rendition has been covered by the mainstream media in the US. It is worth noting however that a Lexis-Nexis (database) search for this exact phrase in the 'paper of record,' the *New York Times*, results with the first mention not in a news article, but in linguist William Safire's weekly column, *On Language*, in June 2004, and a second mention in an editorial by Paul Krugman in October 2004. These were the only two references for the year (2004) and for the preceding year (2003), although the story broke in the *Washington Post* in December 2002. Other articles in the *New York Times* during this time referred to the practice as "rendition." However the distinction between the two phrases is important: "extraordinary rendition" is a euphemism for the current practice under the Bush administration signifying its "extra-legal" nature, that is, detainees have no basic legal protections.

press secretary Scott McClellan, explained that “assurances” were sought from receiving countries that no torture would be used on detainees. Moreover, they insisted on the importance of “bringing terrorists to justice” and the importance of rendition as a “vital tool” in the “war on terror.” Still, when asked about details of the mechanisms in place, for example whether post-rendition monitoring procedures were available to determine the quality of the assurances, questions were left unanswered.⁴¹ At one press briefing, in lieu of providing any direct answer, McClellan repeatedly expressed his belief that the American public would appreciate the need to protect “sources and methods.”⁴² The international community has been less content to let sleeping dogs lie.

There have been attempts to hold the Bush administration legally accountable for acts of torture. On November 30, 2004, an international team of lawyers led by Berlin attorney Wolfgang Kaleck attempted to use the principle of universal jurisdiction in Germany to hold US state officials responsible for torture committed at Abu Ghraib by relying on a national code, Germany’s Code of Crimes against International Law (CCIL).⁴³ The CCIL was “enacted in compliance with the Rome Statute creating the International Criminal Court in 2002.” Although it was dismissed in February 2005, the case serves as evidence of the growing willingness of global civil society to use the tools of the international law system to challenge a state’s abuse of power. Indeed, this case was only the beginning. In November 2006, the same team of lawyers filed a new War Crimes complaint with the German Federal Prosecutor’s Office in Berlin

⁴¹ Michael Scheuer, the architect of the CIA rendition program, has stated that “ultimately diplomatic assurances are worthless. No country, whether it’s the United States or France or Egypt or Saudi Arabia, is going to let you inside their prisons to see how they’re handling their prisoners.” See WITNESS, *Outlawed: Extraordinary Rendition, Torture, and Disappearances in the “War on Terror”* (2006), available at www.witness.org/index.php?option=com_rightsalert&Itemid=178&task=view&alert_id=49, last visited December 7, 2006.

⁴² See Press Briefing by Scott McClellan, December 6, 2005, transcript available at <http://www.whitehouse.gov/news/releases/2005/12/20051206-3.html#e>, and Condoleezza Rice, Remarks Upon Her Departure for Europe, December 5, 2005, transcript available at www.state.gov/secretary/rm/2005/57602.htm, last visited December 2, 2006.

⁴³ Weiss, “Universal Jurisdiction: Past, Present, and Future.”

demanding an investigation into torture and war crimes committed by top officials in the Bush administration.⁴⁴ While it is still too early to know whether the new complaint will lead to an investigation, such an investigation would signal that the US government is not beyond the reach of international law and immune from prosecution. Moreover, one can predict that a full investigation into the US government's complicity in torture would impact those proven to be involved directly or indirectly in the extraordinary rendition program, as the investigation would determine the criminal liability of participants under international law. In order to fully appreciate these possible outcomes, it is necessary to review the history of the extraordinary rendition program as well as how the Bush administration's policy, codified through a series of memoranda and most recently in the Military Commissions Act of 2006, enabled the program to exist in its most recent form.

EXTRAORDINARY RENDITION: HISTORY AND CONTEMPORARY PRACTICE

Extraordinary rendition has no official legal definition. Amnesty International describes this practice in the following way:

"Rendition" usually involves multiple human rights violations, including abduction, arbitrary arrest and detention and unlawful transfer without due process of law. It also violates a number of other human rights safeguards: for example, victims of "rendition" have no possibility of challenging their detention, or the arbitrary decision to transfer them to another country.

"Rendition" is a key element in the global system of secret transfers and arbitrary detention. This system is designed to detain people, often for obtaining intelligence from them, free from any legal restriction or judicial oversight. Most of those held in secret detention centres (so-called "black sites") have been subject to "rendition."⁴⁵

⁴⁴ The Center for Constitutional Rights and the International Federation for Human Rights, "The Criminal Case Against Rumsfeld and Other United States Government High Officials in Germany." Paper presented at a conference entitled, *Is Universal Jurisdiction an Effective Tool? Holding Officials Accountable for Violations of Human Rights and Humanitarian Law*, October 25, 2006 at Columbia University. [herein after "The Criminal Case Against Rumsfeld"].

⁴⁵ Amnesty International, " 'Rendition' and Secret Detention: A Global System of Human Rights Violations, Questions and Answers," January 2006. <http://web.amnesty.org/library/index/engpol300032006>, last visited December 2, 2006.

Though civil rights lawyer Joseph Margulies traces the history of rendition back to the 1980s and the Reagan Administration, he identifies a dramatic shift in its meaning and purpose since September 11, 2001. Prior to September 11th, suspects were rendered from a foreign country *to* the United States, where they then “enjoyed all the protections that the US legal system extends to any criminal defendant, including the right to counsel, the presumption of innocence, the right to a public trial by jury, and the right to confront one’s accusers.”⁴⁶ The practice was then conceived as *renditions to justice*.

Under the current administration, the end purpose of rendition has changed substantially, following an order signed by President Bush on September 17, 2001. In the order, which remains classified, President Bush empowered the CIA with unilateral authority to “render prisoners solely for the purpose of detention and interrogation.”⁴⁷ In effect, the US government has instituted a policy of *renditions out of justice*, removing prisoners to places where they enjoy neither the protections of domestic law, nor the critical gaze of a conscientious public. Margulies summarizes the practice:

The Bush administration maintains that people seized in this conflict [the “war on terror”] may be taken—kidnapped if necessary—from any location in the world, even thousands of miles from any battlefield, without the knowledge or participation of the host government and without any judicial process. They may be shipped to an offshore prison on nothing more than the judgment of a single, anonymous field commander. They may be held for the rest of their lives, based solely on the president’s self-asserted authority. At the prison, they can be subjected to any conditions the military devises. And throughout their imprisonment, without access to courts or counsel, without charges of any kind, unknown to the world, and without the benefit of the Geneva Conventions....The Bush Administration has incarcerated thousands of people in far-flung prisons around the world. Several dozen are being held by the CIA in secret locations unknown to all but a select few. Approximately two hundred others have been rendered to countries with a long history of torturing prisoners.⁴⁸

⁴⁶ Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* (New York: Simon & Schuster, 2006), 188-189, 198. For more on the changes in the program following September 11th, see Jane Mayer, “Outsourcing Torture: the Secret History of America’s “extraordinary rendition” program,” *The New Yorker*, February 7, 2005. www.newyorker.com/fact/content/articles/050214fa_fact6?050214fa_fact6, last visited December 9, 2006.

⁴⁷ *Ibid.*, 189, 198-199.

⁴⁸ *Ibid.*, 3-4.

Investigative journalists have contributed greatly to advancing the public's knowledge of the contemporary extraordinary rendition program. Through their investigations, journalists have found that the prisoners have been transported by planes covertly owned by the CIA. By tracking the flights logged by the "civilian" planes and by relying on meticulous records kept by aviation enthusiasts and plane spotters, the journalists have pieced together a transcontinental narrative that corroborates the claims made by victims of being kidnapped, hauled onto planes, and transported to foreign countries where they suffered torture.⁴⁹ On September 6, 2006, President Bush made his first public acknowledgement of the secret rendition program, referring to the detention of suspects "outside the United States, in a separate program operated by the Central Intelligence Agency."⁵⁰ Although the Bush administration continues to maintain that it does not engage in or condone torture, in light of revelations about the program, the government's ability to rely on defenses of ignorance, plausible deniability, or the 'few bad apples' defense, is growing weaker.⁵¹ Against a growing body of documentation and victims' testimonies, the Bush administration has recourse only to national security doctrine, to invocations of the "state secrets" privilege and to the powers it claims it has during a time of war. Global civil society continues to debunk these claims piece by piece.

THE EXPANSION OF EXECUTIVE POWER AND SUBSEQUENT CHALLENGES

⁴⁹ See generally Stephen Grey, *Ghost Plane: The True Story of the CIA Torture Program* (New York: St. Martin's Press, 2006); and Trevor Paglen and A.C. Thompson, *Torture Taxi: On the Trail of the CIA's Rendition Flights* (Hoboken: Melville House, 2006).

⁵⁰ Transcript of President Bush's announcement, "President Discusses Creation of Military Commissions to Try Suspected Terrorists," September 6, 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>, last visited December 9, 2006. See also Sheryl Gay Stolberg, David Johnston, and Mark Mazzetti, "President Moves 14 Held in Secret to Guantánamo," *New York Times*, September 7, 2006, 1.

⁵¹ In the final months of 2006, frequent exchanges between the media and the Bush administration regarding the official position on torture resulted in a statement by Vice President Cheney that appeared to be a candid admission of the acceptability of the torture technique known as waterboarding. See Neil Lewis, "Furor Over Cheney Remark on Tactics for Terror Suspects," *New York Times*, October 28, 2006, 8.

Shortly after September 11th, legal counsel for the Bush administration drafted a series of memoranda that codified a broad interpretation of the power of the President as “Commander-in-Chief” during a time of war. The expansion of executive power is relevant to the matter at hand since among the actions that the Bush administration’s legal advisors argue are not subject to review by other branches of government are the unilateral suspension of treaty law and violations of customary international law.⁵² For example, a memo drafted by William J. Haynes, General Counsel of the Department of Defense, dismissed the applicability of standards of treatment for prisoners of war described in the Geneva Conventions: the right to petition for the writ of habeas corpus, indefinite detention, and the right to hear charges.⁵³ Legal counsel for the Bush administration also signaled their view that they could unilaterally re-interpret the language of international law treaties. On the issue of torture, a memo drafted by Jay Bybee, then Assistant Attorney General for the Office of Legal Counsel, asserted a narrow definition of torture as a means of limiting the criminalization of acts under CAT. According to Bybee, CAT’s prohibition on torture applied to “only extreme acts,” which were described in the following way: “Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure.” In Bybee’s interpretation, anything short of organ failure and death merely constituted cruel, inhuman, or degrading treatment or punishment and thus could not be covered by CAT.

⁵² William G. Weaver and Robert M. Pallito, “ ‘Extraordinary Rendition’ and Presidential Fiat,” *Presidential Studies Quarterly* 36 (2006): 102-116, at 110.

⁵³ William J. Haynes II, “Memorandum to Members of the ASIL-CFR Roundtable,” December 12, 2002, available at www.cfr.org/publication.html?id=5312. Haynes argued that Geneva Convention protections do not apply to detainees, and the president “has unquestioned authority to detain enemy combatants.” See also Jay Bybee, “Memorandum for Alberto Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2349A*,” August 1, 2002, available at http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf. In a memo dated January 25, 2002, then Defense Department counsel Alberto Gonzales advised the President that by declaring the inapplicability of the Geneva Conventions, the US government “substantially reduces the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441).” See Alberto Gonzales, “Memorandum for the President, *Decisions Re Application of the Geneva Conventions on Prisoners of War to the Conflict with Al Qaeda and the Taliban*,” January 25, 2002, available at <http://www.msnbc.msn.com/id/4999148/site/newsweek/>, last visited December 7, 2006.

The US Supreme Court has challenged the attempt to broaden executive power and has thus also made a contribution to re-affirming international humanitarian law. A number of lawsuits filed on behalf of detainees at Guantánamo Bay have challenged the broad view of the US government's power to reinterpret domestic and international treaty law. On June 28, 2004, the Supreme Court issued rulings for *Hamdi v. Rumsfeld* and *Rasul v. Bush*. In her opinion for *Hamdi v. Rumsfeld*, Supreme Court Judge Sandra Day O'Connor rejected the government's assertion that its decisions were not subject to review by the courts. O'Connor explained that although Hamdi was an enemy combatant, he was still entitled to due process as an American citizen, and she declared that "A state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." In *Rasul v. Bush* the Supreme Court ruled against the Bush administration, holding that prisoners at Guantánamo Bay could have access to US courts to challenge their detention.⁵⁴ On June 29, 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld* that "no president was outside the law," and "the court made clear that Geneva gave a further basic protection in an identical article 3, common to all four Geneva Conventions, that demanded humane treatment for *all* prisoners. It protected them from 'cruel treatment or torture' and banned the passing of any sentences without the judgment of a 'regularly constituted court affording all the judicial guarantees...recognized as indispensable by civilized people.' "⁵⁵

While the Supreme Court's decision was hailed by human rights advocates as a victory, months later the Bush administration pushed back. On October 17, 2006, President Bush signed the Military Commissions Act of 2006 (MCA) into law. By passing this bill, US Congress effectively provided the executive branch with approval for powers which were previously claimed in the Office of Legal Counsel's memos. An article in *The New York Times* described the significance of the MCA:

⁵⁴ *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004); *Rasul v. Bush*, 124 S.Ct. 2686 (2004); *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006)

⁵⁵ Grey, *Ghost Plane*, 267.

With the final passage through Congress of the detainee treatment bill, President Bush on Friday achieved a signal victory, shoring up with legislation his determined conduct of the campaign against terrorism in the face of challenges from critics and the courts. Rather than reining in the formidable presidential powers Mr. Bush and Vice President Dick Cheney have asserted since Sept. 11, 2001, the law gives some of those powers a solid statutory foundation....In very specific ways, the bill is a rejoinder to the *Hamdan* ruling, in which several justices said the absence of Congressional authorization was a central flaw in the administration's approach. The new bill solves that problem, legal experts said.⁵⁶

Sections of the MCA significantly amend the War Crimes Act in such a way as to limit non-citizens' access to courts to challenge their detention and treatment. The MCA asserts a narrow definition of violations that constitute war crimes and vests the President with the power to interpret violations of the Geneva Conventions.⁵⁷ Section 8 of the MCA also amends the Detainee Treatment Act of 2005, immunizing US government personnel from any criminal prosecution regarding actions occurring between September 11, 2001 and December 30, 2005.⁵⁸ Additionally, the MCA "prohibit[s] the US courts from using 'foreign or international law' to inform their decisions in relation to the War Crimes Act."⁵⁹ Critics have thus understood the MCA as an instrument for not only carrying forward policy that violates international treaty law, but also as a means of insulating the Bush administration from all attempts to hold it accountable. Furthermore, although the MCA made no comment on the CIA rendition program, Amnesty International noted that the "during the debates on the Military Commissions Act, members of Congress expressed their support for the [extraordinary rendition] program."⁶⁰ For legal scholars the Military Commissions Act

⁵⁶ Scott Shane and Adam Liptak, "Shifting Power to a President," *New York Times*, September 30, 2006, A1.

⁵⁷ The Center for Constitutional Rights, "CCR Files First New Challenges to Military Commissions Act," October 2006. www.ccr-ny.org/v2/reports/report.asp?ObjID=ZjQ6uNAGGI&Content=850, last visited December 3, 2006.

⁵⁸ Military Commissions Act of 2006. <http://thomas.loc.gov/cgi-bin/query/z?c109:s.3930>, last visited on December 3, 2006.

⁵⁹ Amnesty International, "The Military Commissions Act of 2006: Turning Bad Policy into Bad law," September 29, 2006. <http://web.amnesty.org/library/index/ENGAMR511542006>, last visited December 5, 2006.

⁶⁰ *Ibid.*

of 2006 signals the Bush administration's quest for impunity and the failure of Congress to challenge it.

Recent developments indicate that global civil society is ready to challenge the administration. As mentioned above, the first attempt to use universal jurisdiction in Germany's national courts to hold high-level officials in the Bush administration accountable was dismissed in 2005. In "Universal Jurisdiction: Past, Present, and Future," Peter Weiss explains that the German Prosecutor "reject[ed] the complaint on the ground that there was 'no reason to believe that the accused would not be prosecuted in the United States.'" The lack of such prosecution to-date in the United States has helped spur lawyers to file a new complaint in 2006. The War Crimes complaint filed on November 14, 2006 identified both military and state officials as defendants:

Former Secretary of Defense Donald Rumsfeld
Former Director of the CIA George Tenet
Undersecretary of Defense for Intelligence Stephen Cambone
Commander of US Army V Corps Lieutenant General Ricardo Sanchez
Major General Geoffrey Miller
Major General Walter Wojdakowski
Colonel Thomas Pappas
Major General Barbara Fast
Colonel Marc Warren
Current Attorney General and Former Chief White House Counsel Alberto Gonzales
General Counsel of the Department of Defense William J. Haynes
Chief of Staff and former Chief Counsel to Vice President Cheney David Addington
Former Deputy Assistant Attorney General John Yoo
and Former Assistant Attorney General for the Office of Legal Counsel Jay Bybee.

An international alliance of national NGOs, international and regional NGOs, and individuals make up the co-plaintiffs in the case.⁶¹ In their article, "The Criminal Case Against Rumsfeld," lawyers from these organizations cite the recently adopted Military Commissions Act of 2006 as support for their argument that the US government is

⁶¹ The Center for Constitutional Rights, "War Crimes Complaint Against Rumsfeld et al.," November 2006. www.ccr-ny.org/v2/GermanCase2006/germancase.asp, last visited December 5, 2006.

unwilling to investigate and prosecute high-level officials. Moreover, they note that in spite of “extraordinary new information...[that] shows the widespread and systematic character of the abuses, their perpetration as part of a clearly defined policy, and the direct responsibility of the defendants in these crimes,” the US government still insists that these crimes are the “exclusive responsibility of lower-level military personnel.” Towards the end of their article, the lawyers write that “the complaint in Germany must be seen in the broad context of the fight by international organizations and lawyers against impunity for torturers.”

CHALLENGING STATE POWER: REPUTATIONAL CONCERNS AND ACCOUNTABILITY POLITICS

It is significant that on a single day, November 28, 2006, there were three vivid examples of an active global civil society: an international institution, the European Parliament, issued a condemnatory report on European complicity in extraordinary rendition; the American Civil Liberties Union (ACLU) went to an Appeals Court on behalf of Khaled El-Masri, a victim of extraordinary rendition; and an investigative journalist from the United Kingdom published 3,000 flight logs of the CIA planes involved in extraordinary rendition.⁶² The coordination of these events would seem to indicate that global civil society is operating trans-nationally, publicizing information and making claims simultaneously to pressure the US government on the issue.

As a supranational institution representing people from the twenty-five member states of the European Union, the European Parliament is in a unique position to apply pressure on the European governments allied with the Bush administration. On November 28, the European Parliament issued a report condemning European states for complicity in the CIA rendition program. In the report, the Parliament “condemns extraordinary rendition as an illegal and systematic instrument used by the United

⁶² The first two events were reported the next day in the *New York Times* and the *Washington Post*. The third event was reported by the independent news program, *Democracy Now*, on December 6, 2006.

States in the fight against terrorism; condemns, further, the acceptance and concealing of the practice, on several occasions, by the secret services and governmental authorities of certain European countries.” The report “denounces the very great reluctance of virtually all the Member States, and of the Council of the Europe Union, to cooperate” with the Temporary Committee of the European Parliament. The report then specifically names the governments of Italy, the United Kingdom, Germany, Sweden, Austria, Spain, Portugal, Ireland, Greece, Cyprus, Turkey, the Former Yugoslav Republic of Macedonia, Bosnia and Herzegovina for their role in the extraordinary rendition flights of prisoners. The report provides a total count of the number (“at least 1,245”) of CIA overflights or stopovers in European states and also details the number of stopovers that are attributed to each state.⁶³ Strong language is used to “condemn the active role” of European states, to “deplore the *silence* of the authorities,” and to “express serious concern about the *failure* of the authorities.”⁶⁴ By drawing attention to the governments’ passive complicity—by failing to act to prevent human rights violations and by failing to investigate allegations—the report reminds states of their obligations according to international treaty law, specifically, the European Convention on Human Rights. In many respects, the report does not present new information; it synthesizes the information that has been reported in countless news articles. Yet with its harsh language, the report can thus be understood in the context of a political accountability mechanism, that is, as a tool of shame. The institutional weight of the European Parliament further legitimizes the claims and challenges that both journalists and nongovernmental organizations have made.

⁶³ Giovanni Claudio Fava, “Draft Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners,” November 29, 2006, available at www.europarl.europa.eu/comparl/tempcom/tdip/draft_final_report_en.pdf, last visited December 6, 2006.

⁶⁴ *Ibid.*, my emphasis. The report also acknowledges and thanks those governments that are cooperating.

On the same day in Richmond, Virginia, the ACLU worked to attack the US government's defense of state secrets regarding the specific rendition of Khaled El-Masri. Attorneys for Khaled El-Masri argued in the Fourth Circuit Court of Appeals that the case, *Masri v. Tenet*, had been wrongfully dismissed a year earlier by a federal district court. One of the first victims of extraordinary rendition to emerge to tell his story, El-Masri has appealed to the US government for acknowledgment of its role in his rendition and has asked for an explanation and an apology for his abduction. To-date the US government has offered none.⁶⁵ In a press conference outside the courthouse, El-Masri's attorney, Ben Wizner made reference to the European Parliament's report as a means of stressing the very public nature of the information regarding the CIA rendition program. Wizner elaborated on the convenient and political nature of the US government's stance on extraordinary rendition:

The President's announcement in September of what the world already knew, that is, that the CIA has been operating detention center's around the world shows that this Administration uses national security for political reasons. When it suits the President to divulge this information, he'll have a rose garden ceremony. Yet when the administration is called to account for a mistake it has made in its anti-terror policy, it insists that these very same issues cannot be discussed. So I think the President's recent revelation only underscores how implausible the government's arguments are in this case.⁶⁶

The open dissemination of facts regarding the extraordinary rendition program has been a crucial part of rupturing the US government's last defense. In anticipation of the European Parliament's report and the press conference taking place in Virginia, journalist Stephen Grey announced on November 28 that he would publish 3,000 flight logs of the CIA rendition flights on the Internet the following day. According to his website, the flight logs were posted with the intention of aiding "further research, in particular to allow others to continue to establish the whereabouts of a great number

⁶⁵ ACLU, Press release, November 28, 2006.

www.aclu.org/safefree/extraordinaryrendition/27520prs20061128.html, last visited December 7, 2006.

⁶⁶ Press conference, November 28, 2006, video available at

<http://www.aclu.org/safefree/torture/rendition.html>, last visited December 7, 2006.

of prisoners who have gone missing.”⁶⁷ The publication of this information must also be understood in the context of accountability mechanisms described by Grant and Keohane who write that the widespread dissemination of information to the public is a valuable tool for holding powerwielders accountable.⁶⁸ In fact, in an interview with the independent news program, *Democracy Now*, Grey explained, “By publishing these proofs in the form of these flight logs, I’m showing that it’s very, very clear. It’s not a state secret. It’s not secret information. It’s absolutely clear that it was the CIA that was responsible for the transfer of people under this rendition program and for these specific cases.”⁶⁹

The timing of these three events reveals important features of global civil society’s role in addressing the issue of extraordinary rendition. First, the timing evidences the fact that there *is* a transnational network of advocates working on this issue, coordinating their activities and referencing each other’s work. Second, it demonstrates that the advocates are media-savvy, keenly aware of the potential for information as a tool in accountability politics. Finally, it highlights the fact that for global civil society, disseminating information serves the dual purpose of educating the public, as well as helping other activists to amass the evidence they need to effectively challenge the Bush administration’s defense of state secrets. The disembodied, international nature of extraordinary rendition, a program that disappears individuals and crosses jurisdictional borders, presents a challenge to advocates. However, it is precisely the international nature of this crime that has enabled advocates to invoke the protections of international humanitarian law in order to challenge powerful officials and state policies.

⁶⁷ Stephen Grey, www.ghostplane.net/note, last visited December 6, 2006.

⁶⁸ Grant and Keohane, 39-40.

⁶⁹ *Democracy Now*, “Conservative British MP in US to Challenge Extraordinary Rendition; 3,000 Published Flight Logs Expose New CIA Rendition Activities,” December 6, 2006, available at www.democracynow.org/article.pl?sid=06/12/06/1429257, last visited December 6, 2006.

Future research might examine in greater depth how the availability of information in the public domain has advanced the arguments of advocates. In particular, Amnesty International, Human Rights Watch, the Center for Constitutional Rights, the ACLU, Human Rights First, and media-based organizations such as WITNESS, who have produced countless reports and materials that are in turn available on their websites, deserve attention for their public education efforts.

"EFFECTIVE SANCTIONS" FOR VIOLATIONS OF INTERNATIONAL LAW

At a conference on universal jurisdiction held at Columbia University several weeks before the War Crimes complaint against Rumsfeld and other high level officials was filed on November 14, 2006 in Germany, Wolfgang Kaleck explained that the time for symbolic complaints is over. Kaleck explained that the real purpose behind the case against Rumsfeld filed would be to broadcast the message, as had happened with Pinochet, that torturers and war criminals have no safe haven.

Many legal scholars are currently analyzing the legal questions and ramifications of the US foreign policy since September 11th. These scholars argue that extraordinary rendition constitutes a clear violation of international humanitarian law standards, and many are concerned about the long-term effects of noncompliance with treaty law, namely, they are worried about the diminishing authority of human rights norms. Tom J. Farer offers a concise summary of this fear: "Because every action by a consequential state for which it claims legitimacy will produce prescriptive implications beyond its peculiar facts, it will generate a modification of the principle norm *if* other consequential states follow suit (or even declare a readiness to) when the appropriate occasion arises. On the other hand, should most states reject the rationalization and condemn the act, they would drain out most of its legislative potential."⁷⁰ Cassese

⁷⁰ Tom J. Farer, "The Prospect for International Law and Order in the Wake of Iraq," *American Journal of International Law* 97 (2003): 621-628, at 623.

argues that “by far the most effective ‘sanction’ is the prosecution and punishment by national and international courts of those accused of perpetrating gross violations.”⁷¹ It is precisely for this reason that global civil society has looked to the mechanisms, such as the principle of universal jurisdiction, for holding the US government accountable for torture.

CONCLUSION: THE VULNERABILITY OF THE STATE IN THE INTERNATIONAL LAW CONTEXT

Theoretical work on accountability politics provide a useful frame for understanding how the US government has opened itself up and made itself vulnerable to prosecution for violations of international law with the practice of extraordinary rendition. First and foremost, in spite of all its protests to the contrary, the state has demonstrated its socialization and accountability to international law by engaging in public commentary on rendition practices. William G. Weaver and Robert M. Pallito note that extraordinary rendition thrives on secrecy: “To admit use of the practice risks exposure to negative public opinion (at the very least) and possibly to legal sanctions as well. Thus, some level of official denial is necessary to avoid such problems.”⁷² It follows that revelations about the program proffered by journalists and information gleaned from even the most artful public statements, such as President Bush’s September 6th announcement, can serve to only lift the cloak of secrecy that shields state officials. One might also argue that the shifting positions that government officials took on the issue further demonstrated a gradual, implicit recognition of international humanitarian law standards *and* criminal liability: first, officials justified the program, next, they denied the allegations of torture, and finally, they rejected and/or redefined the state’s obligations under law. Tracking Risse and Sikink’s spiral model, the state moved from denial to tactical concessions, for by drafting legislation

⁷¹ Cassese, “International Criminal Justice: Is It Really So Needed in the Present World Community?”

⁷² Weaver and Pallito, 111.

(the Military Commissions Act of 2006) which attempts to remove the threat of criminal prosecution, the Bush administration has tacitly revealed its awareness of its wrong-doing; it has recognized the real potential of the norm of criminal liability.

A 2005 debate between John Yoo, Former Deputy Assistant Attorney General in the Office of Legal Counsel, and Philippe Sands, a Professor of Law and practicing barrister in England, illustrates the growing acceptance of the norm of superior liability described by Meernik. Invoking the *Pinochet precedent* in his opening remarks, Sands suggested that those individuals who played a part in drafting policy that led to torture might one day be prosecuted according to provisions of Article 4, 5, and 7 of CAT. Sands explained:

I suspect that with the passage of time the rules of international law that are reflected in this Convention will come to be seen as rather robust, and the individuals who have been associated with the deplorable policy, the un-American policy, of torturing anybody under any circumstances whatsoever are likely to find themselves facing the very same tap on the shoulder that Senator Pinochet got so unexpectedly on October 16, 1998.

As the debate continued, Sands went on to address the liability of policymakers, namely individuals such as Yoo:

The problem [regarding violations of the treaty conventions] is not renegade actors, the problem, frankly, is renegade lawyers. I'm sorry to say that Professor Yoo is one of them. He drafted advices which...and I believe you contributed to the famous Bybee memo, which completely redefines torture to mean something that is not set forth in the 1984 Convention [Against Torture and Other Cruel, Inhuman, and Degrading Treatment].... Sure you can unilaterally change the definition and then say what you are doing is not amounting to torture, but you won't get away with it in the international context because in the international context the only standard that is relevant *is* the international law context.⁷³

From a legal perspective, Sands' argument reflects the legacy of the Pinochet case; it reflects an evolving body of international law and the growing acceptance of norms on the criminal liability of the state. From a theoretical perspective, the debate between Sands and Yoo provides a figurative analogue of the dynamics between advocates and

⁷³ Recording of the Sands-Yoo debate, October 31, 2005, available at <http://wacsf.vportal.net/?fileid=4131>, last visited December 2, 2006.

state actors that Risse and Sikkink describe. As explained above, Risse and Sikkink argue that by merely engaging in communication and argumentation with the international community, the state invites its own entrapment, that is, it tacitly reveals the internalization of (human rights) norms.⁷⁴ By making itself available for debate, the state (represented by Yoo) acknowledges the reality of international law, which thus enables advocates (represented by Sands) to insist that the international law *matters*. Advocates thus assert the existence of international law norms by verbally arguing in their defense and through their claims that such debates verify the norms' existence. In the modern international law system, the power to determine international law principles is thus not the exclusive right of the state, as the Bush administration would like to maintain. Global civil society has staked a claim in the international arena and has taken seriously the role of holding even the most powerful states responsible for their actions.

Risse and Sikkink predict that as the reputation of the norm-violating government comes increasingly under fire, a space is created for challenges not only from transnational advocates, but from domestic advocates as well.⁷⁵ There are new promising signs of such challenges being raised. On December 8, 2006, the ACLU appeared in federal court to present an argument that resembled the argument made in the German complaint filed a month earlier in that it drew directly on the norm of superior liability. On behalf of nine former detainees, the ACLU argued that "Defense Secretary Donald H. Rumsfeld was personally responsible, and thus legally liable, for acts of torture inflicted on their clients by American military interrogators."⁷⁶ The continued, persistent attempts by global civil society to pursue justice for victims of extraordinary rendition bode well for the future that Sands predicted, a future in which

⁷⁴ See Risse and Sikkink, 13-35.

⁷⁵ See Keck and Sikkink, 25-27.

⁷⁶ Paul von Zielbauer, "Former Detainees Argue for Right to Sue Rumsfeld Over Torture," *New York Times*, December 9, 2006, 9.

no individual who is complicit in the disappearance and torture of human beings is beyond the reach of international law.