

Nation & World

# A DIFFERENT BRAND OF WARFARE

How cross-border legal moves are giving the White House lots to worry about

By Chitra Ragavan

**A**lleged al Qaeda operative Mohamed al Qahtani had no clue what was in store for him when he was nabbed in Afghanistan after the September 11 attacks and shipped to the U.S. Naval Base in Guantánamo Bay, Cuba. When it was discovered that he might have been part of the 9/11 plot, military intelligence officials took over his interrogation. Qahtani's lawyer contends, based on military documents, that her client was subjected to 20-hour-a-day questioning, sleep deprivation, and blasting music, by order of then Defense Secretary Donald Rumsfeld.

Qahtani has since recanted confessions to terrorism-related activities—confessions so brutally coerced that military officials have said publicly the evidence can never be used to prosecute him. Qahtani remains confined today at Guantánamo Bay, but in a bizarre twist, he could still get his day in court—as the lead plaintiff

in a war-crimes complaint filed in Germany against Rumsfeld and other U.S. officials. Among others accused in the complaint by an American human-rights group, the Center for Constitutional Rights, are former CIA Director George Tenet, Attorney General Alberto Gonzales, David Addington, chief of staff to Vice President Dick Cheney, and former Justice Department officials John Yoo and

aches." Separately, arrest warrants issued by a Munich court against 13 CIA officers allegedly involved in the kidnapping and torture of German citizen Khaled el-Masri have also aggravated U.S.-German tensions. In Milan, Italian prosecutors are seeking the arrest of 26 Americans, many of them CIA operatives alleged to be involved in the kidnapping, rendition to Egypt, and alleged torture of an Egyptian refugee from Italy, Hassan Mustafa Osama Nasr. Portugal and Switzerland are conducting similar criminal probes. U.S. officials have no intention of turning over any of the accused, but "there's a growing risk for current and

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Jay Bybee, who helped draft Bush administration policies on treatment of suspected terrorists.

**Law war.** Publicly, the Pentagon has described the suit as without merit. But privately, Bush administration officials acknowledge that this type of "legal warfare," or "lawfare," is a diplomatic time bomb that could create huge "bilateral head-

former officials [who could be arrested] when they travel abroad," says John Bellinger, the State Department's legal adviser. "Senior officials may be harassed by lawsuits and subpoenas for the rest of their lives." Yoo, the former Justice Department official, was dissuaded from teaching in Italy, sources say, because prosecutors there were mulling over legal action against him. Yoo declined to comment, as did the Justice Department. Rumsfeld's office did not respond to a request for comment.

The criminal complaint was filed on behalf of Qahtani and 11 Iraqi citizens allegedly tortured in Iraq's notorious Abu Ghraib prison, under Germany's tough universal-jurisdiction statute, which allows the German federal prosecutor to investigate and prosecute crimes against humanity anywhere. International human-rights groups have long used such statutes, passed by several countries, including the United States, to target foreign dictators. The most noteworthy example is a Spanish judge's attempts to get former Chilean dictator Gen. Augusto Pinochet extradited from London and try him for crimes against humanity. That case embroiled former Secretary of State Henry Kissinger; U.S. officials had to talk a French judge out of enforcing a sub-



Then Defense Secretary Rumsfeld arrives at an air base in Kirgizstan during a 2005 tour of Central Asia.

3 poena against Kissinger as he sat in a Paris hotel.

The Center for Constitutional Rights' current complaint is a repeat performance. In November 2004, CCR filed a similar complaint against Rumsfeld and the other defendants. But the U.S. threatened a range of sanctions against Germany, and the complaint was dismissed on the eve of a Rumsfeld trip to Munich. The German federal prosecutor said then that the U.S. investigation of the Abu Ghraib scandal displayed the Bush administration's willingness to address possible crimes there. New York City Bar Association lawyer Scott Horton, a leading international law expert, predicts that this time around, German prosecutors will conclude that the complaint against Rumsfeld and others is meritorious, "but for political reasons, they will not proceed with it."

The administration is counting on the fact that international law provides government officials some protections. "Courts have recognized that if senior officials are allowed to be arrested, subpoenaed, or sued while they are traveling on official business," says Bellinger, the State Department legal adviser, "this would cause unworkable interference with diplomacy." It's well settled, Bellinger adds, that sitting heads of state are immune to prosecution or suit while in office unless that immunity is waived by their government or overridden by the U.N. Security Council, and the principle may extend to other senior officials, such as attorneys general, although the law is less clear on that point. Even after President Bush or Secretary of State Condoleezza Rice leaves office, he or she should have "residual" immunity to prosecution, he says. However, Kissinger still faces some legal risk when he travels abroad. Bellinger predicts that there will be still more litigation over the immunity issue in years to come.

Officials at the Center for Constitutional Rights, meanwhile, vow to press ahead. "It's one thing when small countries in the world [conduct torture] and get yelled at," says Michael Ratner, CCR's president. "But when the U.S. does it, who's going to hold them accountable?" Even if the CCR suit goes nowhere, Ratner says, one of his goals is to ensure that Bush administration officials—and Rumsfeld, in particular—will never be able to travel abroad without huge legal hassles. ●