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2.1 The general legal and political situation in the United States

Leaving legal obstacles aside, the general political situation more than any other factor in the United States at present is such that the introduction of criminal proceedings for war crimes committed by the accused would be extremely difficult, if not downright impossible.

“It is quite clear that what we saw in the photos from Abu Ghraib...are among patently illegal interrogation tactics and treatment of detainees of any status covered by various treaty-based and customary international legal prohibitions...” Renowned American attorney Jordan J. Paust makes this determination at the outset in his affidavit written expressly for this suit.

Professor Jordan J. Paust, currently the Mike and Teresa Baker Law Center professor at the University of Houston Law School, establishes his undisputed competency in international criminal law, including especially the laws of war, through some 35 years of teaching international criminal law at various universities in Europe and the United States, active

membership in various international law committees (including the Lieber Society of the American Society for International Law (ASIL) as well as numerous notable published works.⁷

Paust directly addresses the problem of immunity:

“President George Bush, Attorney General Alberto Gonzales, [former] Secretary of Defense Donald Rumsfeld, various other high-level members and former members of the Bush administration, and others within the U.S. Executive branch have been reasonably accused of having authorized or abetted these and other violations of international law and/or having been derelict in duty with respect to crimes of actual or effective subordinates. Yet, there have been no criminal investigations, indictments, or prosecutions of such persons in the United States for more than five years. Moreover, as the U.S. Attorney General in charge of prosecutions in the U.S., it is evident that Alberto Gonzales is less than interested in investigating and prosecuting all persons within or who had previously served in the U.S. Executive branch who are reasonably accused of authorizing or directly perpetrating war crimes, abetting war crimes, being derelict in duty with respect to war crimes, or directly participating in a common plan to deny protections under the laws of war.”

The Defendant and current U.S. Attorney General, Alberto Gonzales, had already stated in a memorandum of January 22, 2002⁸ that – because the war against terror is a “new kind of war” – information from terrorists taken into custody must be attained as quickly as possible and, for that reason, the narrow standards of the Geneva Conventions when questioning prisoners of war have been rendered quaint. He was referring specifically to the prohibited use of force in interrogations under the Geneva Conventions. In a memorandum to the United States President

⁷ Among many others, mentioned only as examples are PAUST, VAN DYKE, MALONE, INTERNATIONAL LAW AND LITIGATION IN THE US (Thomson-West American Casebook Series, 2d Ed., 2005); PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES (2d Ed., 2003) (1st Ed., 1996); PAUST, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS (3d Ed., 2006).

⁸ <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>

of January 25, 2002,⁹ Gonzales was already calling for broad protection against every type of prosecution to be developed; he warned that one could not know for sure which causes of action state attorneys general or other lawyers could pursue based on the War Crimes Act (18 U.S.C. § 2441¹⁰), which makes reference to the Geneva Conventions, to initiate “unjustified” lawsuits. This memorandum on the one hand laid the foundation for practicing torture, and on the other immunized the perpetrators.

In this regard, U.S. President George Bush expressly stated in a memorandum of February 7, 2002¹¹ that the Geneva Conventions were not applicable in the conflict with al Qaeda. He maintained that inapplicability was established by the fact that al Qaeda is not a state actor and therefore not a “high contracting party” of the Geneva Conventions. Therefore, he argued further, al Qaeda prisoners are also not prisoners of war under the Geneva Conventions and therewith are not protected by Common Article 3 of the Geneva Conventions. Still, he said, al Qaeda prisoners should be treated “humanly” and “fairly” even if they would not have any legal right to demand such treatment. One of the consequences of Bush declaring that the Geneva Conventions were inapplicable to the conflict with al Qaeda is that the War Crimes Act (18 U.S.C. § 2441), which defines “grave breaches” of the Geneva Conventions (such as, for example, “willful killing, torture, or inhuman treatment” in Article 130 of the Third Geneva Convention) as war crimes, would also not be applicable.

2.2 Self-granted amnesty by the Military Commissions Act (MCA)

By military order of President Bush of November 13, 2001,¹² the so-called military commissions were declared competent to try persons suspected of terrorist activities. Already as of September 18, 2001 with the Authorization for the Use of Military Force,¹³ the assertion that the law permitted such force against the planners of the September 11th attacks was in place. In the case

⁹ <http://msnbc.msn.com/id/4999148/site/newsweek/>.

¹⁰ http://www.law.cornell.edu/uscode/html/uscode18/usc_sec_18_00002441----000-.html.

¹¹ http://www.pegc.us/archive/White_House/bush_memo_20u020207_ed.pdf.

¹² <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

¹³ <http://news.findlaw.com/wp/docs/terrorism/sjres23es.html>.

of *Hamdan v. Rumsfeld*,¹⁴ the Supreme Court found on June 29, 2006 that the military commissions were unlawful on formal and material grounds.¹⁵ In particular, the Supreme Court required adherence to the U.S. Constitution, military law, and the Geneva Conventions.¹⁶

For more than five years the government has not succeeded in establishing a Military Commission that accords with the laws of war and the U.S. Constitution.¹⁷

With passage of the Military Commissions Act (MCA) of October 17, 2006, which regulates treatment of suspected terrorists and the establishment of military tribunals, the House of Representative and the Senate were included in creating a formal legal basis to that end.¹⁸

However, general opinion holds that the Military Commissions, now as before, are consistent neither with the right to due process as afforded by the U.S. Constitution, nor with international standards of due process.¹⁹ A central criticism, for example, is the reality that prisoners are still denied the right of habeas corpus. The principle of habeas corpus is a component of the American Constitution (Article 1, Sec. 9²⁰); the government is prohibited from suspending the writ of habeas corpus, except in times of invasion or rebellion. Habeas corpus requires review of the justification for incarceration by a court independent from the authority that ordered the arrest.²¹ The principle of habeas corpus therefore protects people being taken into custody without charges for arbitrary or undefined grounds.

¹⁴ <http://www.supremecourtus.gov/opinions//05pdf/05-184.pdf>.

¹⁵ Weiser, Marion, Die Abhaltung von Militärgerichtsverfahren gegen terrorverdächtige Personen in den USA aus menschen- und völkerrechtlicher Perspektive – http://www.ifir.at/themenschwerpunkt/1_2006.pdf.

¹⁶ See also Center for Constitutional Rights, Report on torture and cruel, inhuman and degrading treatment of prisoners at Guantanamo Bay, Cuba, July 2006, p. 13ff – http://www.ccr-ny.org/v2/reports/docs/Torture_Report_Final_version.pdf.

¹⁷ Mariner, Joanne, The Military Commissions Act of 2006: A Short Primer – compare <http://writ.news.findlaw.com/mariner/20061009.html>; Tagesspiegel of October 18, 2006 – <http://www.tagesspiegel.de/politik/archiv/18.10.2006/2842228.asp>.

¹⁸ See <http://jurist.law.pitt.edu/paperchase/2006/10/80-guantanamo-detainees-could-face.php>.

¹⁹ Among other sources, see <http://www.wsws.org/articles/2006/oct2006/min-o17.shtml>.

²⁰ <http://www.usconstitution.net/const.html>.

²¹ <http://www.wsws.org/de/2006/okt2006/mca-o05.shtml>.

Under the new legislation (MCA), however, detainees in Guantanamo are not the only ones affected; the MCA specifies that non-U.S. citizens do not enjoy the protection of the principle of habeas corpus. This is especially evident in section 7 of the MCA, which states that federal courts do not have jurisdiction over petitions for habeas corpus from persons who have been designated as unlawful enemy combatants or are awaiting such a designation.²² After the MCA was passed, the U.S. Department of Justice immediately informed the federal courts that they were no longer competent to hold hearings for Guantanamo detainees.²³ Such a directive is only one example of the progressive weakening of the principle of checks and balances in the United States.

Another very troubling aspect of the MCA is the fact that the MCA empowers the President to detain any person – whether a U.S. citizen or not –if he is of the opinion that he might be an unlawful enemy combatant. The definition of unlawful enemy combatant is very broadly formulated and allows the President to detain almost anyone.

Hence, many of the grisly instances of mistreatment and torture at Abu Ghraib and Guantanamo continue to be allowed and justified. Moreover, those who order and carry out acts of torture against detainees enjoy total immunity from prosecution. Those who ordered punishable acts of torture in the past have retroactive immunity. The MCA secures the secret operations of the CIA by, for example, allowing the disappearance of those under suspicion of terrorist activities to secret locations and grisly methods of interrogation. John Yoo, who wrote the torture memorandum for the Department of Justice, defines torture in such a way that it remains possible for the CIA to torture suspects.²⁴ Section 5 of the MCA expressly states that no one in whose case the United States government or their agents are involved may file an appeal on the basis of the Geneva Conventions.²⁵ The International Red Cross's criticism is brought to bear here:

²² McDonough, Molly, Battle over terror law begins, Detainees Challenge Measure Barring Habeas Petitions <http://www.abanet.org/journal/ereport/oc20terror.html>; Cole, David, Sanctioning Lawlessness, The Nation, October 23, 2006.

²³ A Dangerous New Order, New York Times, October 19, 2006.

²⁴ Cole, David, Sanctioning Lawlessness, The Nation, October 23, 2006, <http://www.thenation.com/doc/20061023/cole>.

²⁵ Mariner, Joanne, The Military Commissions Act of 2006: A Short Primer, October 25, 2005, <http://writ.news.findlaw.com/mariner/20061025.html>.

Numerous fundamental principles such as, for example, the right to a fair trial, the absolute protection of human dignity, and the prohibition of humiliating and degrading treatment of prisoners, are not mentioned in the MCA. Also, the MCA does not address elements of an offense that constitute war crimes under United States laws.²⁶

A prisoner does not get to examine all the evidence that has been brought against him; hearsay evidence is admissible.²⁷ The MCA also allows statements in front of the military tribunals that were obtained by coercion. Thus, mistreatment is legalized²⁸ and an effective defense is rendered impossible.²⁹

In addition, the War Crimes Act (WCA) of 1996 mentioned above, which expressly defines a violation of Common Article 3 of the Geneva Conventions as a war crime, was modified through Section 6 of the MCA so that the President is ultimately allowed to determine the meaning and application of the Geneva Conventions. In section 6b(2), the MCA is expressly declared retroactive to November 26, 1997; this retroactivity means that perpetrators who committed crimes under war crimes laws valid at that time no longer can be punished under the War Crimes Act. As previously mentioned, the original WCA defined war crimes in terms of the Geneva Conventions and also as punishable acts under United States law. Hence, the current version of the WCA, as modified by the MCA, protects U.S. government employees, CIA employees, civil servants, and so-called civilian contractors who are responsible for abuses from criminal prosecution.³⁰ The International Red Cross, which is responsible for ensuring adherence to the

²⁶ Red Cross lambastes US terror law, BBC News, October 19, 2006, <http://news.bbc.co.uk/2/hi/americas/0608394.stm>.

²⁷ Ratner, Michael, Pushing Back on Detainee Act, The Nation, October 4, 2006, <http://www.thenation.com/doc/20061016/ratner>.

²⁸ Mariner, Joanne, The Military Commissions Act of 2006: A Short Primer – compare <http://writ.news.findlaw.com/mariner/20061009.html>; Tagesspiegel of October 18, 2006 – <http://www.tagesspiegel.de/politik/archiv/18.10.2006/2842228.asp>.

²⁹ Olbermann, Keith, 'Beginning of the end of America,' October 19, 2006, <http://www.netscape.com/viewstory/2006/10/18/olbermann-beginning-of-the-end-of-america/?url=http%3A%2F%2Fmsnbc.msn.com%2F15321167%&Frame=true>; Red Cross lambastes US terror law, BBC New, October 19, 2006, <http://news.bbc.co.uk/2/hi/americas/6068394.stm>.

³⁰ <http://hrw.org/backgrounder/usa/qna1006/>.

Geneva Conventions, is very concerned about this change in the WCA because Common Article 3 of the Geneva Conventions sets the absolute minimum standard.³¹

Gonzales explained to Congress that because the provisions were vague, unacceptable risks existed of wrongful criminal proceedings under the WCA, and that this could affect not only soldiers but also those in the chain of command who had authorized the abuses. In that respect, Gonzales continued, the amendments to the WCA were nothing more than a clarification of ambiguous legal texts and not an attempt to define past crimes into non-existence.³²

The MCA defines the term war crimes, which was previously determined by customary international law³³, anew: listed next to other punishable offenses, torture and “cruel treatment” are central elements of an offense.³⁴ The MCA also takes an overly narrow interpretation of the concept of torture as a basis; the UN Committee Against Torture indicated to the U.S. in May of 2006 that its definition was not in accordance with international law.³⁵ According to this overly narrow interpretation, torture only exists when there is “intentional infliction of serious bodily or psychological pain or suffering.” Thus abusive interrogation techniques such as hypothermia, sleep deprivation, and also water boarding, as were practiced after September 11, are not considered torture.³⁶

³¹ R. Jeffrey Smith, *War Crimes Act Changes Would Reduce Threat of Prosecution*, Washington Post, Aug. 9, 2006, at A1.

³² John Sifton, *Criminal, Immunize Thyself*, Slate.com, Aug. 11, 2006, available at <http://www.slate.com/toolbar.aspx?action=print&id=2147585> (last visited Nov. 1, 2006)

³³ Joanne Mariner, *Remarks delivered at The Military Commissions Act of 2006: Executive Power, Interrogation and Detention in the War on Terror*, held at the Benjamin N. Cardozo School of Law, New York (Nov. 1, 2006).

³⁴ Scott Horton, *Remarks delivered at the ASIL Centennial Conference on The Nuremberg War Crimes Trial*, Bowling Green, OH (October 7, 2006) (transcript available at www.nimj.org/documents/Horton-When_Lawyers_Are_War_Criminals.pdf (last visited October 30, 2006)).

³⁵ *Justice At Last or More of the Same? Detentions and Trials After Hamdan v. Rumsfeld*, Amnesty International, September 18, 2006, available at news.amnesty.org/library/Index/ENGAMR511462006 (last visited Nov. 1, 2006).

³⁶ Wells' Notes.

The MCA also contains two definitions of the term “cruel and inhuman treatment”; one refers to mistreatment before the MCA came into effect, the other to the period thereafter. After the act came into effect, abuses that constitute “cruel and inhuman treatment” are those that cause serious and prolonged psychological pain or suffering; abuses that were committed before the MCA came into effect are considered “cruel and inhuman treatment” only if the pain is prolonged. Human Rights Watch observed that this double definition is a definite indicator of the intent to protect U.S. agents.³⁷

According to the MCA, only torture and cruel and inhuman abuse are classified as “grave breaches;” degrading or humiliating treatment, however, is not.³⁸

The MCA ensures special defenses for U.S. employees who are accused of a violation against Common Article 3 of the Geneva Conventions committed between September 11, 2001 and December 30, 2005 by declaring that the Detainee Treatment Act of 2005 (DTA)³⁹ applies retroactively. Herewith, such U.S. agents can escape criminal conviction for acts of torture such as water boarding if they can establish that they acted and intended to act in good faith in adherence to laws and regulations.⁴⁰ There are documents indicating that the U.S. administration may have encouraged government interrogators to use techniques that constituted violations of Common Article 3 of the Geneva Conventions; simultaneously, these government interrogators were assured of immunity from criminal proceedings against them.⁴¹ Moreover, protection from criminal prosecution has been broadened, unlike the original DTA, since modified by the MCA, to apply to occurrences in connection with taking detainees into custody and interrogation, and

³⁷ <http://hrw.org/backgrounder/usa/qna1006/>.

³⁸ van Matre, Craig, Hysteria, Politics and the Rule of Law, Published Sunday, November 5, 2006 – <http://www.columbiatribune.com/2006/Nov/20061105Feat006.asp>.

³⁹ DTA from December 31, 2005 – <http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php>.

⁴⁰ Michael C. Dorf, *Why the Military Commissions Act is No Moderate Compromise*, FindLaw.com, Oct. 11, 2006, <http://writ.news.findlaw.com/dorf/20061011.html> (last visited Oct. 31, 2006).

⁴¹ John H. Richardson, *Acts of Conscience*, Esquire Magazine, Vol. 146, Issue 2, August 2006; cited in *Prepared Statement of Katherine Newell Bierman, Counterterrorism Counsel, U.S. Program, Human Rights Watch, To the Senate Committee on Armed Services*, July 19, 2006, available at <http://hrw.org/pub/2006/usTestimony071906.pdf> (last visited Nov. 1, 2006).

not only those – as in the original version of the DTA – that arise “from the behavior of a civil servant.”

It is expressly stated in the case known as the Barrios-Altos opinion,

*“that all amnesty provisions, provisions on prescription, and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.”*⁴²

With the Barrios-Altos decision of the Inter-American Court of Human Rights of March 2001, the way was shown for ending impunity. The case concerned a massacre that took place in 1991 in Barrios-Altos, Lima and provided that the Peruvian amnesty laws had no “legal validity” and could no longer be an obstacle to an investigation or to identification of the perpetrators in this or in any other case.⁴³

Following the legal reasoning of the Barrios-Altos case, several of the provisions of the MCA already discussed are unacceptable because they also “intend to prevent the investigation and punishment of those responsible for serious human rights violations.” Here only the retroactive effectiveness of the War Crimes Act is mentioned, under which U.S. government employees are protected from conviction for their actions, which according to the “old definition” were still war crimes. The Detainee Treatment Act is also retroactively applicable through the MCA; in as far as the perpetrator can claim as a defense that he did not know that his actions were unlawful, immunity for the war crimes is granted. Finally, the MCA prevents effective prosecution also because under it detainees are prevented from enforcing their rights established in the Geneva

⁴² Judgment of March 14, 2001 – Inter-American Court of Human Rights – <http://www.worldlii.org/int/cases/IACHR/2001/5.html>.

⁴³ <http://www.ruhr-uni-bochum.de/amnesty/Peru/PeruMenschenrechte/PeruZeitFuerTaten/peruzeitfuertaten.html>.

Conventions; simultaneously, the executive branch has used its jurisdiction to suppress secret interrogation techniques.

One of the judges in the Barrios-Altos case, Justice Antonio A. Cançado Trindade, added that what “may pass muster under domestic law does not necessarily adhere to protective standards for human rights under international law.” Therefore “so-called amnesty laws...have no legal validity as far as human rights recognized by international law are concerned.” Transferring this understanding of human rights law to the MCA, it becomes clear that – although the United States duly amended the law under domestic standards to create immunity for the Bush Administration – precisely this impunity amounts to “granting self-amnesty”, which in any case falls short of international standards for human rights.

Justice Trindade pointed out that amnesty provisions may be justifiable when they are the result of a democratic process that precludes prosecution of opposing parties if, in the end, none of them finds punishment suitable for the actions in question. However, “self-granted amnesty” is still “only by those and for those who are in positions of power.” Instead of informing Congress and the public early in the process, the Bush Administration worked almost exclusively under the highest level of secrecy possible and with executive orders. As long as the United States will not subject itself to the authority of an international court,⁴⁴ its immunity provisions, in effect amounting to self-granted amnesty, violate internationally recognized legal standards for the protection of human rights. Another consequence of the MCA is immunity for U.S. politicians, members of the CIA, and former members of the U.S. military for any criminal acts they may have committed.⁴⁵

⁴⁴ *Justice At Last or More of the Same? Detentions and Trials after Hamdan v. Rumsfeld*, Amnesty International, Sept. 18, 2006, available at news.amnesty.org/library/Index/ENGAMR511462006 (last visited Nov. 1, 2006).

⁴⁵ Among many others, Smith, Jeffrey, War Crimes Act would reduce threat of prosecution, August 9, 2006, Washington Post – <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/08/AR2006080801276.html>; Paust, Jordan J., Affidavit; *Justice At Last or More of the Same? Detentions and Trials after Hamdan v. Rumsfeld*, Amnesty International, Sept. 18, 2006, available at news.amnesty.org/library/Index/ENGAMR511462006 (last visited Nov. 1, 2006).

The United Nations Security Council recently reaffirmed “its condemnation in the strongest terms of all acts of violence or abuses committed against civilians in situations of armed conflict...especially...torture and other prohibited treatment.”⁴⁶ The Security Council demanded moreover that all parties in a situation of armed conflict “comply strictly with the obligations applicable to them under international law, in particular those contained in the Hague Conventions of 1899 and 1907 and in the Geneva Conventions of 1949”⁴⁷ and emphasized “the responsibility of States to comply with their relevant obligations to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity and serious violations of international humanitarian law.”

Jordan J. Paust confirms that the United States presently falls short of its duty under standards of international law to prosecute war crimes:

“Despite such requirements, for the last five years the Bush administration has refused to prosecute any person of any nationality under the U.S. War Crimes Act or alternative legislation allowing prosecution of war crimes of any sort in U.S. federal courts, the U.S. torture statute, U.S. genocide legislation, and U.S. legislation permitting prosecution of certain civilian employed by or accompanying U.S. military forces abroad.”

Acts of torture committed in Abu Ghraib and Guantanamo violated not only the U.S.’s obligations under the Geneva Conventions (particularly under Common Article 3) as previously discussed; rather, violations were also committed other international law statutes, such as Article 7 of the International Covenant for Civil and Political Rights (ICCPR),⁴⁸ Articles I and XXV of

⁴⁶ U.N.S.C. Res. 1674, para 5, U.N. Doc. S/RES/1674 (April 28, 2006).

⁴⁷ *Id.* para. See also U.N.S.C. Res. 1566, prml. (Oct. 8, 2004) (States must “ensure that any measures taken to combat terrorism comply with all their obligations under international law..., in particular international human rights, refugee, and humanitarian law”). Security Council Resolutions are binding for the United States and the other UN member states according to Article 25 and 48 of the UN Charter.

⁴⁸ The United States ratified the International Covenant on Civil and Political Rights (see <http://www.uni-potsdam.de/u/mrz/un/int-bill/ipbprde/htm>) in 1992. See <http://www.ohchr.org/english/countries/ratification/4.htm>.

the American Declaration of the Rights and Duties of Man, Articles 55(c) and 56 of the U.N. Charter, Articles 2, 4, and 16 of the Agreement Against Torture and Other Cruel, Inhuman or Humiliating Treatment or Punishment,⁵⁰ customary law quoted therein, inalienable and universally applicable human rights laws, and the laws of war.

2.3 Prosecution for acts of torture only against low-ranking soldiers

The present criminal complaint filed in Germany is directed only against military and civilian authorities for acts of torture in Abu Ghraib because until now criminal and military court investigations and trials have taken place exclusively against low-ranking members of the military who had been direct participants in the crimes.

According to the Taguba Report, 27 members of the intelligence operation unit in Abu Ghraib actively took part in abusing detainees. In addition, there are ten military prison wardens and four civilian contractors who were also directly involved in the occurrences. With the exception of Colonel Pappas's and Lieutenant Colonel Steven Jordan's direct involvement in connection with the death of one of the detainees, no soldier ranked above junior sergeant was charged with taking part in prisoner abuses.

Eight soldiers were indicted for abusing detainees in Abu Ghraib. Seven of them belonged to the 372nd Company of Army Military Police and one to the 325th Intelligence Operations Battalion. Some of those accused pleaded guilty and testified against other defendants, whereby their punishments were substantially reduced.

- **Staff Sergeant Ivan Frederick**, the highest-ranking defendant, pleaded guilty to eight counts of detainee abuse and inhuman and degrading treatment of detainees in U.S. custody. He was sentenced to eight years in prison. His military rank was reduced. He

⁵⁰ The United States ratified the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (<http://www.igfm.de/index.php?id=207>) on October 21, 1994 – see <http://www.ohchr.org/english/countries/ratification/9.htm>.

was no longer paid his salary and he was given a dishonorable discharge (see Jackie Spinner, “MP Gets 8 Years for Iraq Abuse,” Washington Post, October 21, 2004). The charges from the Uniform Code of Military Justice were: conspiracy to maltreat detainees, dereliction of duty for negligently failing to protect detainees from abuse, cruelty and maltreatment, maltreating detainees by photographing them naked, posing for a photograph with a maltreated detainee, ordering detainees to strike each other, striking and assaulting detainees, and committing indecent acts.⁵¹

- **Specialist Jeremy C. Sivits** pleaded guilty. He was sentenced in May 2004 to one year of imprisonment. The charges were conspiracy to maltreat detainees and dereliction of duty for negligently failing to protect detainees from abuse.⁵²
- **Specialist Megan Ambuhl** pleaded guilty to dereliction of duty and came to an agreement with the criminal prosecutors that allowed additional charges for conspiracy, maltreatment of detainees and other acts to be dropped. Ambuhl was demoted from Specialist to Private First Class and was docked half a month’s salary.⁵³
- **Corporal Charles Graner** pleaded not guilty with regard to all the charges (conspiracy to mistreat detainees, dereliction of duty, cruel and inhuman treatment, assault with intent to insult, and indecent acts). Charles Graner asserted in his defense that he was merely carrying out orders from his superiors. On January 14, 2005 Charles Graner was found guilty of all of the charges leveled against him; on January 15, 2005 the tribunal sentenced him to ten years in prison.⁵⁴
- **Sergeant Javal Davis** admitted his guilt and was sentenced on February 4, 2005 to six months in prison on account of dereliction of duty, falsifying official documents, and acts of violence. In addition, his rank was reduced to private.⁵⁵

⁵¹ <http://news.findlaw.com/wp/docs/iraq/ifred32004chrg.html>.

⁵² <http://news.findlaw.com/hdocs/docs/iraq/sivits50504chrg.html>.

⁵³ Josh White, Abu Ghraib Prison MP Pleads Guilty to Reduced Charge, Nov. 3, 2004.

⁵⁴ http://www.trial-ch.org/de/trial-watch/profil/db/legal-procedures/charles_graner_259.html.

⁵⁵ http://www4.army.mil/ocpa/read.php?story_id_key=6843.

- **Corporal Lynndie England**, who was often seen in the photographs, had similar charges brought against her in accordance with the Uniform Code of Military Justice. On September 26, 2005 Lynndie England was sentenced to three years in prison for conspiring to maltreat detainees, maltreatment of detainees and committing indecent acts. The trial had been postponed on account of her pregnancy; she gave birth to a son, the father is purportedly Charles Graner, mentioned above.⁵⁶
- **Private First Class Sabrina Harman** was charged by the U.S. military for conspiring to maltreat detainees, dereliction of duty to protect detainees from abuse, cruelty and maltreatment of detainees. On May 16, 2005 she was found guilty by a military tribunal in six of the seven charges against her and sentenced to six months in prison.⁵⁷
- **Private First Class Armin J. Cruz** from the 325th intelligence unit battalion pleaded guilty in September 2004. On September 11, 2004 Armin Cruz was found guilty of conspiring to maltreat detainees and was sentenced to eight months imprisonment.⁵⁸
- **Steven L. Jordan** was charged on April 27, 2006 with dereliction of his duty to control his subordinates that lead to the maltreatment of detainees, cruel maltreatment, using dogs in interrogations without proper approval, and providing false statements. Jordan forced detainees to strip naked and have sexual contact with dogs.⁵⁹ He was also accused of lying to army investigators.⁶⁰ Only one of these charges, however, incriminated Steven L. Jordan directly. He was blamed for intimidating detainees with military dogs and to having subjected them to forced nudity in the prison. Of those in the scandal surrounding the prison of Abu Ghraib and the convicted members of the army, Lieutenant Colonel

⁵⁶ http://www.trial-ch.org/de/trial-watch/profil/db/legal-procedures/lyndie-r_england_555.html; <http://news.findlaw.com/hdocs/doc/iraq/england21105chrg.html>.

⁵⁷ http://www.trial-ch.org/de/trial-watch/profil/db/legal-procedures/sabrina_harman_559.html.

⁵⁸ http://www.trial-ch.org/de/trial-watch/profil/db/legal-procedures/armin_cruz_550.html.

⁵⁹ See "First officer is charged in Abu Ghraib Scandal," by Mark Benjamin, Salon.com from April 29, 2006. Found at: http://www.salon.com/news/feature/2006/04/29/jordan/index_np.html.

⁶⁰ *Ibid.*

Jordan holds the highest rank.⁶¹ Jordan is the first and only officer who was criminally charged with torturing detainees. Human rights organizations voiced their concerns that the military's failings in prosecuting Jordan effectively lead to "high-ranking military and civilian officials [being] excluded from responsibility for the maltreatment of the detainees."⁶²

- **Roman Krol** was sentenced on February 1, 2005 to ten months in prison for conspiring to maltreat detainees and for maltreatment of detainees.⁶³

- **Santos A. Cardona**, a dog handler, was sentenced on June 1, 2006 to 90 days hard labor and a fine in the amount of \$7,200 USD and was degraded to the rank of Specialist for dereliction of duty and assaulting Iraqi detainees.⁶⁴ Nevertheless, a short time later he regained his rank as sergeant. Cardona, who appears in an al-Qaeda propaganda video, was soon due to be sent back to Iraq with his company of military police.⁶⁵ For security reasons he has already been brought back again.⁶⁶

- **Michael Smith** was sentenced on March 22, 2006 to 179 days in prison for maltreatment of detainees, assaulting detainees, conspiracy to maltreat detainees, dereliction of duty and committing indecent acts. In his defense Michael Smith asserted that acted under the assumption that he was following the orders of his superiors.⁶⁷

⁶¹ http://www.trial-ch.org/de/trial-watch/profil/db/legal-procedures/steven-1._jordan_561.html.

⁶² *Ibid.*

⁶³ http://www.trial-ch.org/de/trial-watch/profil/db/legal-procedures/roman_krol_558.html.

⁶⁴ http://www.trial-ch.org/de/trial-watch/profil/db/legal-procedures/santos-a._cardona_560.html.

⁶⁵ Zagherin, Adam, An Abu Ghraib Offender Heads Back to Iraq, November 2, 2006 – <http://www.time.com/time/world/printout/0,8816,1554326,00.html>.

⁶⁶ Burns, Robert, Deployment of Convicted Soldier is Stopped, November 3, 2006 – <http://www.guardian.co.uk/worldlatest/story/0,-6189817,00.html>.

⁶⁷ http://www.trial-ch.org/de/trial-watch/profil/db/legal-procedures/michael_smith_557.html.

Human rights organizations like Amnesty International criticized that the judgments issued by the military courts were hardly commensurate with the serious nature of the acts of cruelty committed at Abu Ghraib.⁶⁸

One problem with the trying potential defendants is that – under U.N. Resolution 1564 (2004)⁶⁹ – members of the multinational forces (MNF) have immunity from Iraqi criminal and civil laws. Hence, investigations into human rights abuses committed by members of the MNF fall only under the jurisdiction of their respective countries. Amnesty International determined that this fact violates the principle of neutrality among members subject to the MNF.⁷⁰

Immunity of civil contractors' employees

In addition to abuses committed by members of the U.S. military, have been those by the so-called “civil contractors.” The main hurdle in trying civil contractors charged with abuses is that the law applicable to non-military personnel has not been determined. Civil contractors are not bound by military law. With a few exceptions under the principle of territoriality, U.S. courts do not have jurisdiction for crimes committed on Iraqi soil; in Iraq itself they are not prosecuted. Although there is a 2003 directive from the Coalition Provisional Authority, troops and contractors are “protected” from the jurisdiction of Iraqi courts. Theoretically, it would be possible to applying existing law such as the Military Extraterritorial Jurisdiction Act of 2000,⁷¹ however these statutes apply only in very specific circumstances. Ultimately, it becomes clear that a “judicial vacuum” exists. Of the 25,000 civil contractors not a single one was tried or otherwise held accountable.⁷²

Failure to prosecute is evident, for example, in the case of a civil contractor named Adel L. Nakhla from the Titan Company. Nakhla was listed in the Fay Jones Report, later also in the

⁶⁸ Affidavit by Professor Bill Bowring (No. 19).

⁶⁹ <http://daccessdds.un.org/doc/UNDOC/GEN/N04/515/47/PDF/N0451547.pdf?OpenElement>

⁷⁰ Affidavit by Professor Bill Bowring (No. 26f.).

⁷¹ <http://www.pubklaw.com/hi/pl106-523.pdf>.

⁷² PW Singer, Foreign Affairs, 03/04-2005.

Tabuga Report, and yet again in July 2004 in the U.S. Army Investigation Command Memo concerning maltreatment and sexual abuse. Nevertheless, this person ultimately was not tried under criminal law; complaints against Nakhla were dismissed.

Many civil contractors had formerly been members of the military. It was exceedingly difficult for the Titan Company to fill the high demand for Arabic-English speaking translators, especially for operations in a war zone. Later it was discovered that many of these not carefully chosen and recruited translators could barely speak English and horribly abused the detainees (torture, maltreatment).⁷³ Attorney Burky stated that negligent recruitment and training methods contributed to the abuse of the detainees. Many translators were Kurds, Iraqi Christians or members of other minorities that had been oppressed by the Saddam regime and who projected their rage onto the prisoners.⁷⁴

Although the Army Criminal Investigation Command (CID) had probable cause to believe that a crime had been committed based on a photograph of the civil contractor Daniel Johnson in which he is abusing an Abu Ghraib detainee, apparently the evidence was insufficient to further prosecute the case. Also, two soldiers who served in the military police at Abu Ghraib and had themselves been sentenced to time in prison for abusing detainees reported that Johnson had participated in abusing detainees and in some cases had directed it.

A year later, in the beginning of 2006, the Justice Department maintains that it had not made any final decisions in the Johnson case. A statement from the Eastern District of Virginia stated that two of the 19 prisoner-abuse cases had been dropped. That decision was based upon the recommendation of the Department of Justice in Washington. Its internal decision making process has not been made transparent to the public.⁷⁵

⁷³ Justice James Robertson of the Federal District Court in the District of Columbia, June 29, 2006.

⁷⁴ Tara McKelvey, *The Unaccountables*, American Prospect, <http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleID=11863>.

⁷⁵ Benjamin, Mark, *No Justice for all*, April 14, 2006. <http://www.salon.com/news/feature/2006/04/14/contractor/index.html>.

No prosecution for fatalities

Other investigations have been opened in previously mentioned cases and for additional fatalities. Here, reference is made to the comprehensive report, “By the Numbers,” as part of a detainee abuse and accountability project.⁷⁶ The project, an initiative of the Center for Human Rights, Global Justice of New York University, Human Rights Watch and Human Rights First, published a factual background report in April 2006 about the extent to which cases had been instigated for abuse of detainees in U.S. custody in Iraq, Afghanistan, and Guantanamo Bay.

The report conclusively established the broad use of torture in U.S. detention on the one hand and inactive or ineffectual criminal investigations on the other. The project documented 330 credible cases⁷⁷ – approximately 220 in Iraq, at least 60 cases in Afghanistan, and at least 50 cases in Guantanamo Bay – in which members of the U.S. military and civil contractors were accused of abusing, torturing, or killing detainees. These documented cases involve approximately 600 members of the U.S. military and over 460 detainees. Only 210 cases (over 65%) were prosecuted, in which over 410 persons in total were implicated. In the remaining 120 cases, either no investigation took place or investigations, once started, produced no results.

Noteworthy is that only “simple” U.S. soldiers and no U.S. officers were called to account under the principle of command responsibility for crimes committed by their subordinates. Three officers were indeed convicted, but for abuses they committed directly. Twenty cases where civilian officials, including CIA agents, were accused of abusing detainees had been passed on to the Department of Justice, but there were no further investigations (with one exception for a case against a private contractor).

⁷⁶ <http://hrw.org/reports/2006/ct0406/>.

⁷⁷ The *Detainee Abuse and Accountability Project* uses as its sources official United States government documents, NGO reports, Human Rights and Human Rights First documentation from victims’ statements, military investigations, attorneys’ reports, serious press reports, and information from the U.S. military and the Department of Justice. A case is defined as a spatially and chronologically verifiable constellation of a perpetrator and a victim. Abuses are defined as violations of the UCMJ.

The large-scale absence of prosecution is based on several factors. What follows are the three most important reasons:

First, the degree of penalty is insignificant or totally lacking. Of the 600 members in the U.S. military involved only 79 persons were placed before a military court, 64 of whom had their cases heard with 10 cases still pending. Of the 54 cases where the defendant was found guilty, 40 of them were given insignificant prison sentences; 30 persons were sentenced to under a year, 10 to over a year. In the other fourteen cases no prison sentence was imposed, only disciplinary measures such as discharge from service and demotion.

Second, in 95% of the complaints only the lower ranks were indicted and the officers, who are subject to the principle of command responsibility for their subordinates, were ignored.

Third, the U.S. military decides internally and with a broad margin of discretion whether to investigate a senior officer in the U.S. military, and can conduct either criminal or extrajudicial (administrative) proceedings. The latter lead only to extrajudicial disciplinary measures.

In order to work against the serious lack of prosecution for abusing detainees, the report states the following recommendations: It is suggested that Congress should appoint an independent commission to review the interrogation and detention operations. The Secretary of Defense and the Attorney General are urged to commence promptly with investigations through their departments into allegations of torture and to bring charges. For members of U.S. military, a central institution should be instituted by the Department of Defense that initiates, convenes, and prosecutes in military cases and military courts (and also follows the principle of command responsibility). The Senate should implement a review of officer promotions in order to exclude the possibility that the candidate had previously been implicated in cases of detainee abuse.

Investigations have been opened in individual cases previously mentioned or with fatalities as follows:

One case involves two Afghani detainees who died at the Air Force base in Bagram, Afghanistan in December 2002, after an Army investigation implicated 28 American soldiers in their killings. The Army members, some reservists, could be convicted based on charges of negligent homicide, abuse, assault and battery, mutilation, and conspiracy. Army leadership must decide whether to go forward with the trial to convict the 27 soldiers whose names have not been revealed. One soldier, Corporal **James Boland** was already charged with dereliction of duty and assault and battery.⁷⁸ It is notable that Boland was not charged with manslaughter.

Marine reservist **Gary Pittmann** and Major **Clarke Paulus** are currently facing conviction at trial in Camp Pendelton. They are charged with causing the death of the Iraqi detainee Hatab in June 2003 at Camp Withehorse in Iraq. The first eight members of the Marines have been indicted on account of Hatab's death. Charges against six additional Marines were dropped and the most serious counts against Pittmann and Paulus were also dismissed. Paulus had been in command at Camp Withehorse. He is charged with abusing detainees and dereliction of duty. Pittmann, who served as a guard, was charged with assault and battery and dereliction of duty. Both blame the Marines and their lawyers maintain that the detainee died of natural causes during an asthma attack. The prosecutors claim that his windpipes had been crushed. Paulus is facing 5 ½ years in a military prison, and Pittmann 3 years.⁷⁹

CIA agent David Passaro was charged with four counts of battery resulting in serious injury and assault with a deadly weapon against Abdul Wali, who died in U.S. custody in Afghanistan on July 21, 2003. In the summer of 2003, Passaro, while under contract by the CIA, allegedly beat the Afghani detainee Abdul Wali to death during an interrogation at a U.S. military base. At the trial in Raleigh, North Carolina, Passaro was charged with causing bodily injury, but not with murder or manslaughter. He is facing a possible prison sentence of up to 40 years. Passaro pleaded not guilty.

⁷⁸ Nick Moe, U.S. Investigation Finds 28 Soldiers Guilty Over Deaths of Two Taliban Suspects in Afghanistan, *The Independent* (London), Oct. 16, 2004.

⁷⁹ Alex Roth and Jeff McDonald, Iraqi Detainee's Death Hangs Over Marine Unit, *The San Diego Union-Tribune*, May 30, 2004.

Passaro claims that he was following orders from his superiors.⁸⁰ Judge Boyer refused to subpoena Tenet, Yoo, and J. Cofer Black who then worked at the State Department as a coordinator for counterterrorism, although requested to do so by the defense. Passaro will be punished under the provisions of the US Patriot Act.⁸¹

On May 16, 2004, the Los Angeles Times printed that a U.S. soldier was convicted for excessive use of force with a weapon. The detainee had thrown a stone at a guard. A trial will take place in Texas on February 1, 2005 against an Army member named Davis.⁸²

Both officers, **Lewis Welshofer** and **Jeff Williams**, were convicted of negligent homicide and involuntary homicide in the case of General Mowhoush. The events occurred on November 26, 2003 in Qaim, Iraq. They were given a reprimand and prohibited from leading interrogations in the future.⁸³

In September 2004, the Marines announced that three commando members had been convicted for beating detainees. The Fashad Muhammad case concerns an Iraqi who died in Diamondback in Iraq in 2004. The Al-Jamadi case involves an Iraqi detainee who died in Abu Ghraib in 2003. None of the defendants was charged with homicide. On September 24, 2004, a Marines officer asserted this was due to a lack of evidence.⁸⁴

One difficulty for the victims' legal counsel in the United States is that, unlike under German rules of procedure, prosecution can be requested but not compelled. It lies within the exclusive discretion of the prosecutor whether to conduct investigations. The reality speaks for itself: in

⁸⁰ Anna Griffin, Man in Jail until Trial for Prisoner Abuse, Saint Paul Pioneer Press (Minnesota), June 26, 2004. The first action against a civilian for abuse of terror suspects, <http://www.spiegel.de/politik/ausland/0,1518,430595,00.html>.

⁸¹ Thompson, Estes, "Ex-CIA Contractor on Trial in Beating," July 8, 2006; see, "CIA Agent Convicted for Abuses in Afghanistan" by Julian Barnes, LA Times, August 18, 2006, available at http://www.latimes.com/news/printedition/asection/la-na-abuse18aug18,1,22159.story?coll=la-news-a_section.

⁸² GI Trial Dates Set in Abuse Deaths of Captives Into Focus, Los Angeles Times, May 16, 2004.

⁸³ Arthur Kane and Miles Mofeit, Carson GI Eyed in Jail Death Iraqi General Died In Custody, The Denver Post, May 28, 2004.

⁸⁴ Eric Schmitt, 3 Commandos Charged With Beating of Prisoners, N.Y. Times, September 25, 2004.

cases filed and other publicly known cases of war crimes in Guantanamo, Afghanistan, and Iraq not a single trial against high-ranking officers is being conducted. Therefore, the victims' attorneys are helping their clients find justice through another avenue, i.e. by suing in civil court. An extensive case has been brought in a complaint from November 4, 2004 alleging abuse against detainees in Abu Ghraib currently with 10 named victims and other un-named victims against the civilian security contractors of Titan Corporation and CACI International, Inc., whose employees are suspected of abusing detainees. It was filed in the United States District Court for the Northern District of California.

2.4 Reward instead of punishment: No prosecution against high-ranking military officials and responsible politicians and legal counsel

In sum, our conclusion is that in spite of continuous criticism from a portion of the American press and human and civil rights organizations no investigations are under way against higher-ranking officers, not to mention the highest civilian and military authorities, for either torture or fatalities at Abu Ghraib. A tendency in the opposite direction can be faintly detected; take, for example, the defendant and now former Secretary of Defense under President George W. Bush, Donald Rumsfeld. Defendant Alberto R. Gonzales, who drafted a memorandum cited above and played a relevant role (meriting closer inspection) in a criminal law sense, is the officiating Attorney General. He also co-drafted the decisive memorandum of August 1, 2002. J.S. Bybee, who appeared in the memorandum, has since become a federal judge. According to press reports, the defendant Lieutenant General Ricardo S. Sanchez is in line for promotion. Even transferring defendant Geoffrey Miller out of Iraq was not based on dissatisfaction with his performance, according to current reports in the press; rather it was part of routine rotations.

In his affidavit, Jordan J. Paust clearly explains how criminal law is relevant to former Minister of Defense Donald Rumsfeld's actions:

“It is now well-known that Secretary of Defense Donald Rumsfeld had expressly authorized the stripping of persons naked, use of dogs, and hooding as

interrogation tactics, among other unlawful tactics, in an action memo on December 2, 2002 and in another memo on April 16, 2003, the Secretary adding that if additional interrogation techniques for a particular detainee were required he might approve them upon written request. There is no public evidence that the 2003 illegal authorization had been withdrawn before adoption of a necessarily inconsistent Department of Defense directive in September 2006 and there is no evidence that the patently illegal tactics have been completely ruled out by the Bush administration – especially since President Bush has publicly announced that his “program” of secret detention, secret rendition, and “tough” treatment will continue. Further, there is no known criminal investigation of Donald Rumsfeld in the United States with respect to any criminal liability regarding such authorizations or for dereliction of duty, abetting war crimes, or for participation in a common plan to deny rights and protections under the Geneva Conventions.”

On the whole, one gets the impression that the officials mentioned here are being rewarded for their actions, rather than being brought to court on criminal charges. The United States failed to hold high-ranking officials responsible for the use of torture.

Not a single high-ranking U.S. official was made criminally accountable for torture and abuses committed against detainees in Guantanamo, Iraq, or Afghanistan.

Accordingly, Colonel Thomas Pappas was not only “not punished,” he was guaranteed immunity for statements in a case in which two soldiers had been charged with intimidating detainees with dogs in Abu Ghraib: On May 13, 2005 the Department of Defense announced that Colonel Thomas M. Pappas, commander of the 205th Military Intelligence Brigade, was relieved from his post as commander, received a written reprimand, and was fined a penalty of \$8,000.⁸⁵ A two-star Army commander in Germany, Major General Bennie E. Williams, decided to punish

⁸⁵ See “Prosecutions and Convictions,” available at http://www.salon.com/news/abu_ghraib/2006/03/14/prosecutions_convictions/index.html.

Pappas non-judicially, in other words, not in a court-martial but extrajudicially for two counts of dereliction of duty.⁸⁶

No criminal investigations against Geoffrey Miller have been acknowledged in the United States, be it for dereliction of duty, illegal authorization to or as an accomplice to abet violation of the laws of war or other relevant laws stipulated by treaty or customary international law.⁸⁷ General Miller invoked the rights guaranteed under Article 31 against self-incrimination and coerced statements in the same dog handlers' case.⁸⁸ The rights contained under Article 31 are "almost identical to those afforded civilians by the Fifth Amendment."⁸⁹ By invoking such protection he avoided his duty to testify since his statements would have been self-incriminating. Miller, as reported in the Washington Post, "was recommended for administrative punishment for his alleged mishandling of interrogations of a valuable detainee in Guantanamo Bay. But high-ranking military officials have declined to impose the penalty. The detainee was subjected to a number of abuses that mirrored the ones that later emerged in the Abu Ghraib photographs."⁹⁰ In the summer of 2006, General Miller requested retirement and was given honorable discharge.⁹¹

In an interview from August 2005, Brigadier General Janis Karpinski confirmed that in 2003 Major General Geoffrey Miller had been sent to Iraq in order to ensure that interrogation methods approved by former Secretary of Defense Donald Rumsfeld would be employed. As Karpinski explained, he said, "that he was going to use a template from Guantanamo Bay to "Gitmo-ize" [i.e. Guantanamo-ize] the operations out at Abu Ghraib" and that he taped up a Rumsfeld memo on a post outside Abu Ghraib:

⁸⁶ See "Abu Ghraib Officer Gets Reprimand: Non-Court-Martial Punishment for Dereliction of Duty Includes Fine," by R. Jeffrey Smith, Washington Post, May 12, 2005; page A16, found at <http://www.washingtonpost/wp-dyn/content/article/2005/05/11/AR2005051101818.html>.

⁸⁷ See Paust Affidavit.

⁸⁸ See "General Asserts Right On Self-Incrimination In Iraq Abuse Cases," by Josh White, January 12, 2006, Washington Post. Available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/11/AR2006011102502.html>.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ White, Josh, General Who Ran Guantanamo Bay Retires, Washington Post, August 1, 2006 – <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/31/AR2006073101183.html>.

It was a memorandum signed by [former] Secretary of Defense Rumsfeld authorizing a short list of around 6 or 8 techniques: the use of dogs, stress positions, loud music, deprivation of food, keeping the lights on; those sorts of things. And then in a handwritten message in the margin that appeared to be written in the same handwriting as the signature, and the signature was that of [former] Secretary Rumsfeld. And there stood with two exclamation points: “Make sure this happens.”⁹²

An investigation by the Army Inspector General, who is seen as the “last word” of the Army, to determine responsibility for torture and abuses in Abu Ghraib acquitted all high-ranking officers of crimes and misdemeanors, with the significant exception of Brigadier General Janis Karpinski.⁹³ In the words of the Washington Post, “of the 10 major [Army] inquiries, the inspector general’s was designed to be the Army’s final word on the responsibility of senior leadership in relation to the abuses. It was the only investigation designed to assign blame, if any, within the Army’s senior leadership.”⁹⁴ The Army inquiry “essentially found no culpability on the part of Lieutenant General Ricardo S. Sanchez and three of his senior deputies, ruling that allegations that they failed to prevent or stop abuses were ‘unsubstantiated.’”⁹⁵

Human rights organizations, retired members of the military, and some U.S. politicians have vociferously criticized the Department of Defense, Congress, and the White House for the failures/omissions to try high-ranking officials for the use of torture. John H. Johns, Brigadier General U.S. (retired) confirmed that “focusing on lower level soldiers ignores the role of a systemic climate established by official policy, and the apparent acquiescence by the chain of command [...] The entire process, from the Department of Justice to senior officials in the field

⁹² The Torture Question: Interview with Janis Karpinski, Frontline, August 5, 2005, available at <http://www.pbs.org/wgbh/pages/frontline/torture/interviews/karpinski.html>. See Paust, *supra* note 1, at 847. See also Evan Thomas & Michael Hirsch, *The Debate Over Torture*, NEWSWEEK, Nov. 21, 2005, at 26 (“Rumsfeld sent...Lt. Gen. Geoffrey Miller – to ‘Gitmoize’ the interrogation techniques in Iraq.”) Josh White, *General Asserts Right on Self-Incrimination in Iraq Abuse Cases*, WASH. POST, Jan. 12, 2006, at 1.

⁹³ See “Top Army Officers are Cleared in Abuse Cases,” by Josh White, Washington Post, April 23, 2005; page A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A10546-2005Apr22.html>.

⁹⁴ Ibid.

⁹⁵ Ibid.

circumvented international protocols as well as federal law on the treatment of prisoners. [...] The behavior of these senior officials represents more serious violations than those at the end of the process. To exonerate them is inexcusable.”⁹⁶

The White House refused calls for the creation of an independent commission to investigate torture and abuses in the prisons of Iraq, Afghanistan, and Guantanamo,⁹⁷ even though the creation of such a commission is supported by conservatives like Bob Barr (American Conservative Union) and Senator Lindsey Graham of South Carolina.⁹⁸

William Shultz, Director of Amnesty International, appealed to other governments to prosecute high-ranking officials for torture and violation of the Geneva Conventions. Shultz named various defendants in this matter, including Rumsfeld, Gonzalez, and superior officers at the U.S. detention centers in Guantanamo Bay, Cuba and Abu Ghraib, Iraq.⁹⁹

Colonel Larry Wilkerson, former chief of staff for former Secretary of State Colin Powell, explained:

“the Secretary of Defense began under the protection of the Vice President to create an environment – and that started right at the beginning when David Addington...was a zealous proponent for allowing the President...to deviate from the Geneva Conventions... They started with approving measures within the armed forces that lead

⁹⁶ See “Torture and National Security” by Brig. Gen. (Ret.) John H. Johns, May 9, 2005, available at <http://armscontrolcenter.org/archives/001586.php>.

⁹⁷ See “White House Refuses Investigation at Guantanamo,” The Associated Press, June 21, 2005, available at http://www.islamawareness.net/Persecution/Guantanamo/gitmo_news_0001.html.

⁹⁸ See “Some Republicans Want Prison Abuse Commission,” by Douglas Jehl, The New York Times, June 22, 2005, available at <http://select.nytimes.com/gst/abstract/html?res=FB0F15F83A5F0C718EDDAF0894DD404482>.

⁹⁹ See “Give Rumsfeld the Pinochet Treatment, says U.S. Amnesty Director,” by Jim Lobe, Inter Press Service, May 26, 2005, available at <http://www.ipsnews.net/interna/asp?idnews=28823>.

to...what we have now seen...Some of the methods that they specified were not in accordance with the spirit of the Geneva Conventions and the laws of war.”¹⁰⁰

In his affidavit, Jordan J. Paust discusses the extensive arrangements and interconnectedness within U.S. government and secret service circles, and their actions openly in violation of U.S. and international law:

“In November, 2005, David Addington, who has been Vice President Cheney’s top lawyer and is now his chief of staff, openly advocated that the Bush administration continue its illegal policy of not complying with the minimal and absolute requirements concerning treatment of detainees of any status that are reflected in Common Article 3 of the Geneva Conventions, a policy that he helped orchestrate in many ways.

Addington’s unlawful policy received continued support from Under-Secretary of Defense Stephan A. Cambone and DOD General Counsel William J. Haynes. Moreover, President Bush expressly authorized the denial of absolute rights and protections contained in the Geneva Conventions and, thus, authorized violations of the Geneva Conventions in a memorandum that apparently has not been withdrawn. The authorization of violations of the Geneva Conventions is a war crime.

In October, 2005, the United States Senate voted 90 to 9 to approve an amendment to a defense appropriations bill offered by Senator John McCain (the McCain amendment) that merely reaffirmed the absolute ban on use of torture and cruel, inhuman, and degrading treatment of any detainee in U.S. custody or control, but Vice President Cheney openly opposed any congressional reiteration of the prohibition. The evident

¹⁰⁰ Larry Wilkerson discusses Cheney’s role in Iraq War, Morning Edition of NPR, Nov. 3, 2005. See also James Gordon, *Torture’s No Good, Army Cadets Told*, DAILY NEWS (New York), Nov. 13, 2005, at 24 (reporting Wilkerson’s remarks regarding the administration’s so-called prohibition of torture: “That is not what I saw in the paperwork coming out of the vice president’s office and the office of the secretary of defense.”); “Powell Aide: Torture ‘Guidance’ from VP,” CNN, Nov. 20, 2005 (Wilkerson has no doubt that Cheney provided the philosophical guidance and flexibility for torture of detainees); Mayer, *supra* note 16 (“small group of lawyers closely aligned with Vice-President Cheney”); *supra* note 20.

message from the Vice President and several of his associates in the administration has been that such forms of illegal treatment should continue under the Cheney-Bush-Addington-Gonzalez plan and President Bush's earlier illegal authorizations and orders which have still not been withdrawn. In fact, CIA Director Porter Goss has admitted that Agency techniques would be restricted under Senator McCain's amendment. Moreover, some CIA personnel have reported that approved Agency techniques include "striking detainees in an effort to cause pain and fear," "the 'cold cell' ...[where] detainees are held naked in a cell cooled to 50 degrees and periodically doused with cold water," and "'water boarding' ...[which produces] a terrifying fear of drowning," each of which is manifestly illegal under the laws of war and human rights law and can result in criminal and civil sanctions for war crimes.

With respect to CIA interrogation tactics, it has been reported that Alberto Gonzales "convened his colleagues in his...office in the White House," including "top Justice Department and Defense Department lawyers" in July 2002, just before the creation of the infamous Bybee torture memo, to approve illegal interrogation tactics such as "water boarding." It was also reported that "current and former CIA officers...[stated that] there is a presidential finding, signed in 2002, by President Bush, Condoleezza Rice and then-Attorney General John Ashcroft approving the techniques, including water boarding." There is no indication that the presidential finding has been withdrawn. In fact, during a speech in early September 2006, President Bush admitted that a CIA program has been implemented "to move...[high-value] individuals to...where they can be held in secret" and interrogated using "tough" forms of treatment and he stated that the CIA program will continue. Clearly, it is extremely unlikely that members of the Bush administration authorizing, abetting, or engaging in such conduct will be prosecuted in the United States.

Portions of a previously secret December 2002 CIA memo have also been disclosed during prosecution of a CIA civilian contractor in August 2006. The CIA memo notes that the Bush administration allowed three exceptions to prohibited restraints during interrogation of detainees by CIA personnel, although Geneva Convention and human

rights prohibitions, for example, of torture, cruel, inhuman, degrading, or humiliating treatment are patently peremptory. The December 2002 memo prohibits:

Any significant physiological aspects (e.g., direct physical contacts, unusual mental duress, unusual physical restraints or deliberate environmental deprivations) – beyond those reasonably required [1] to ensure the safety and security of our officers and [2] to prevent the escape of the detainee – [3] without prior and specific headquarters guidance.

When asked why President Bush would prefer that the Geneva law strictures not apply, John Yoo, who had been a Deputy Assistant Attorney General in the Bush administration and primary author of the infamous Yoo-Delahunty 2002 memo, responded:

Think about what you want to do when you have captured people from the Taliban and al-Qaeda. You want to interrogate them... [T]he most reliable source of information comes from the people in al-Qaeda you captured... [I]t seems to me that if something is necessary for self-defense, it's permissible to deviate from the principles of Geneva [including the prohibition of torture].

Of course, it is widely known that alleged necessity does not permit violations of relevant Geneva law (such as Common Article 3), the customary laws of war reflected therein, and non-derogable treaty-based, customary, and peremptory human rights. John Yoo has also admitted that “some of the worst possible interrogation methods we’ve heard of in the press have been reserved for the leaders of al-Qaeda that we’ve captured” and, with remarkable candor and abandonment, “I’ve defended the administration’s legal approach to the treatment of al-Qaeda suspects and detainees,” including the use of torture. There is no known criminal investigation of John Yoo by the Bush administration concerning any possible criminal liability for abetting violations of the laws of war while in the administration or after the fact of participating in a common plan to deny rights and protections under the Geneva Conventions.”

Jordan J. Paust characterizes the failure to prosecute high-ranking members of the military and the culpable politicians and attorneys in his affidavit as follows:

“To summarize, in my opinion the Bush administration has been unwilling for more than five years to prosecute any high-level members and former members of the administration for international crimes and it is extremely unlikely that high-level members and formers members of the Bush administration will be prosecuted in the United States for authorizing, abetting, or participating in international criminal activity or for dereliction in duty, although several such persons are reasonably accused of such improprieties.”

2.5 High-ranking military officials and members of the administration actively suppressed occurrences of torture

In the expert opinion written specifically for the purpose of the complaint against the former U.S. Secretary of Defense, Professor Scott Horton concludes,¹⁰¹ along with other experts, that no criminal investigation and prosecution in United States is likely in the near future. His conclusion rests on the fact that the institutions whose function it is to investigate and bring suit are currently under the control of the very individuals who are a part of the conspiratorial network that has committed war crimes.

The renowned American attorney Scott Horton, a respected authority in international humanitarian law, is currently an associate professor for international law and international humanitarian law at Columbia University (New York) as well as the chairman of the Committee on International Law of the Association of the Bar of the City of New York.¹⁰²

Scott Horton addresses the lack of prosecution; including the problem with suppression:

¹⁰¹ Affidavit of Professor Scott Horton, January 19, 2005, http://www.rav.de/StAR_290105_Horton.htm.

¹⁰² Committee on International Law of the Association of the Bar of the City of New York.

“In the United States no effective criminal investigation of high-level officials suspected of a criminal offense would occur. Criminal investigations hitherto undertaken pursuant to Army Regulation 15-6¹⁰³ are required to look only down the chain of command and not up, thus eliminating the possibility of any meaningful inquiry into the criminal misconduct of the defendants.

The criminal investigations undertaken were clearly influenced from above with the intention of producing a “whitewash” exculpating those in higher command...

Conduct of the Department of Justice (“DOJ”) demonstrates its refusal to address the question of war crimes culpability. Conscientious officers of the DOJ who have raised such issues have been disciplined, reprimanded, and subjected to a malicious campaign of harassment...

A notion of “checks and balances” underlies this system [which is the foundation of a government under the rule of law], whereby Congress conducts oversight of the executive’s management of government, holding officers of the executive to account for the discharge of their duties. With respect to the question of abuse of detainees, this constitutional process of oversight has been rendered inoperative through intimidation and political manipulation...

The Senate Armed Services Committee Chair, Senator John Warner, [after a series of meetings with Republican congressional leaders...who threatened him with sharp political retaliation...] suddenly...expressed concerns that any investigation might undermine the nation’s war effort.”

The report “Whitewashing Torture,” by David DeBatto from December 8, 2004,¹⁰⁴ illustrates the strategy of suppression and secrecy in the case of Corporal Frank “Greg” Ford, an agent in the

¹⁰³ “Army Regulations,” http://www.wood/army.mil/sja/ADLAW/army_regulation_15.htm.

¹⁰⁴ DeBatto, David, Whitewashing torture?, December 8, 2004, <http://dir.salon.com/story/news/feature/2004/12/08/coverup/index/html>

counterintelligence unit of the 223rd Californian National Guard of the military intelligence service department¹⁰⁵:

Ford was stationed with his unit in Samarra (Iraq). There he was a witness to multiple occurrences of torture and abusive treatment of detainees; this consequently brought him to decide to end his military career.

According to Ford's statements, "the rules were savagely broken in Samarra in June 2002...Rules that everybody knew...Some of the rules applied only in peacetime, some only in time of war. Some always applied." He described multiple incidents of what he called "war crimes" and "torture" of Iraqi [male] detainees ranging in age from about 15 to 35...[being] systematically and repeatedly abused over a two- to three-week period. Ford describes incidents of asphyxiation,¹⁰⁶ ...and lit cigarettes forced into detainees' ears while they were blindfolded and bound. These atrocities took place in an Iraqi police station, Ford said. His attempts to stop the abuse were met with either indifference or threats by his team leader, who was himself one of the abusers, according to Ford.

After his failed attempts to relay his concerns, Ford told his team leader that he would be filing a complaint against him and the other agent as soon as possible. He said the team leader told him he was "crazy" and "seeing things" and no one would believe him anyway, so "knock yourself out." The next day...Ford said that he immediately went to the company headquarters and met with Artiga and 1st Sgt. John Vegilla... "I told them that I wanted to request a formal investigation into allegations of war crimes committed by my team against Iraqi detainees."... He [Artiga] looked right at me and said, 'Nope, that never happened. You're delusional, you imagined the whole thing.' ...Artiga then instructed Vegilla to take Ford's M-16 and ammunition away from him for safekeeping...Artiga then ordered Ford to report immediately to Capt. Angela Madera, an Army psychiatrist, at the base mental-health facility for a "combat stress

¹⁰⁵ Colonel Thomas Pappas commanded the 223rd as well as the 205th unit.

¹⁰⁶ Depression or cessations of breathing as a result of acute circulatory distress, see Pschyrembel, *Klinisches Wörterbuch*, 257. Edition 1994.

evaluation.”...Dr. Madera had diagnosed Ford as completely ‘normal’ and ‘not a danger to himself or others.’ Artiga was “just livid.”...”He told her that this report cannot stay the way it is. He said that she will change it to read that Ford is unstable and must be sent out of [the Iraqi] theater immediately.” [Marciello, a premier counterintelligence agent, witnessed the changes to the psychiatric evaluation.]

Thirty-six hours later, Ford, who had served for over 30 years in the military, was flown out of Iraq over Kuwait and on to Germany. Psychiatrist Madera told Ford before his evacuation that she had been forced by Timothy Ryan, Artiga’s superior, and Artiga himself to order him out of Iraq. When Ford arrived in Germany, it became evident that no so-called “medevac order” had been issued. No one is allowed out of a theater of operations without either a medevac order or a standard set of written orders authorizing travel to a destination. Ford had neither, which is a violation of Army policy. Doctors at every stop – in Kuwait, Germany, and finally in the United States – confirmed Madera’s initial diagnosis of Ford – that he was mentally stable.

After Ford was back in the United States, he filed a complaint with the Army’s Criminal Investigation Command, or CID, in which he cited both the uninvestigated “war crimes” allegations and the retaliation that he says followed. In August 2004, Ford filed a report on his allegations of war crimes and abduction with the Sacramento office of the FBI. That office forwarded the report to the Bureau’s headquarters in Washington, which in turn passed it along to the Department of Defense...“It was obvious from their line of questioning that their mission was to cover up for the DOD [Department of Defense] and the Army,” Ford said...According to an Army CID special agent who is familiar with Ford’s case:

“This is a classic case of a whitewash. A cover-up... When I asked him whether the CID was complicit in an Army cover-up of the case, he said, “Absolutely... Do you have any idea how ugly this case could get if they ever really looked into it? ...Based on everything I know about this case, I believe Ford. I have seen too many similar cases not to. It fits the pattern. Everyone involved in this blatant

cover-up should be criminally prosecuted.” The special agent wished to remain anonymous.

Scott Horton asked soldiers who had been previously stationed in Iraq and were then in Hessen and Baden-Württemberg about their experiences concerning interrogations. They related that Major General George R. Fay (The Fay Report, spring 2004), assigned with investigating alleged torture in Iraq, first told them that every soldier in Abu Ghraib and other places who had observed detainees being abused and did not call for a halt to it had made himself punishable. All the soldiers Scott Horton interviewed stated that they had gotten the impression that everyone who furnished evidence of torture would expose himself to criminal charges and other substantial disadvantages or even “friendly fire” on Iraqi battlefields. Correspondingly, the internal military investigation was a failure.

Scott Horton analyzed the motivation for assigning someone like Fay with the investigation:

“I believe that Major General Fay was selected to conduct this investigation because of one particular qualification: his political fidelity to the Bush Administration. Major General Fay...was well known as a successful fund-raiser for the Republican Party, and an enthusiastic political retainer of the Bush Administration.”

2.6 Conclusion: No criminal prosecution in the United States

BENJAMIN G. DAVIS, Associate Professor of Law and member of the faculty at the University of Toledo law school, elaborates:

“Through discussion of the specific topic of criminal prosecution in U.S. domestic courts of high level U.S. civilian authority and generals for violation of international humanitarian law and/or international criminal law I hope to address the question whether it is at all likely that there will be criminal prosecutions in the United States of President Bush, Secretary of Defense Donald

Rumsfeld, and various other higher-level members or past members of the Bush administration or military generals for alleged authorizations or abetments of violations of the 1949 Geneva Conventions and other treaty-based and customary international law concerning unlawful treatment of detainees and secret detention and rendition of detainees.

In theory, criminal prosecutions of such persons could go forward in three fora (courts-martial, federal courts, and/or state courts as explained below). In practice, such criminal prosecutions are extremely unlikely for generals and inexistent for high-level U.S. civilian authority.

The only United States general court-martialed for what might be considered violations of the laws of war in over 100 years was Brigadier General Jacob H. Smith in 1902 as regards the Philippines campaign during the Spanish-American War. Anecdotal and statistical evidence suggest that general officers at worst receive reprimand, demotion, or more likely retirement rather than court-martial.

As to present or former high-level U.S. civilian authority, criminal prosecution for violations of international humanitarian law and/or international criminal law does not happen in U.S. domestic courts.

There are numerous difficulties that arise or can be placed in the path of such prosecutions. The process of investigation is complicated as the investigative authorities in each department are under the control of the same high-level U.S. civilians and/or generals who might be targets of such an investigation. Investigative structures such as the Inspector Generals are focused on making recommendations as regards systemic failures rather than individual responsibility. Moreover, they do not have the power to actually begin a prosecution of individual conduct.

In the uniformed services, the convening authority for the court-martial of a given military general is a superior general officer. For four-star generals, it may be impossible to find a higher ranked uniformed officer and some alternative, possibly through the Secretary of Defense, would have to be put in place to convene such a court-martial. Where the Secretary of Defense has worked with his/her generals, an effort to protect those high-ranking uniformed persons (and by

extension the high-level civilian authority) because they are “good soldiers” implementing the policy of the Secretary of Defense is an obvious structural dilemma.

It is possible for evidence to be gathered and referred to the United States Department of Justice so that it might launch a criminal prosecution in federal court. The difficulty is that where the present and former high-level U.S. civilian authorities of the United States Department of Justice are part of the policy formulation and planning process for violations of international humanitarian law and/or international criminal law. They have significant influence over the prosecutor’s exercise of discretion to prosecute and thus are in a position to thwart any prosecution of themselves or other high-level U.S. civilian authority or generals in federal courts.

Provided a nexus with a state was found, state prosecutors might bring such a case against high-level U.S. civilian authority or generals under general state law (whether statutory or when international law might be considered state law) that might be compatible with the international obligations. However, such prosecution appears problematic due to the possible invocation of federal government friendly doctrines such as federal officer immunity, state secrets, and essentially automatic federal officer removal of the case from state court to federal court.

Given the lack of such prosecutions, criminal prosecution by a future administration of present or former high-level U.S. civilian authority and generals of a past administration for violations of international humanitarian law and/or international criminal law is extremely remote.

Conclusion

The United States mechanisms are inadequate for addressing criminal prosecution of high-level U.S. civilian authority and/or general for violations of international humanitarian law and/or international criminal law.

While I continue to explore how these types of criminal prosecutions could be done in the United States, based on the practice and structural constraints described above, in my opinion the United

States is unable to criminally prosecute high level U.S. civilian authority and/or generals in U.S. domestic courts for violations of humanitarian law and/or international criminal law.”

2.7 War crimes by members of the U.S. military are not prosecuted in Iraq

After the invasion of Iraq by U.S. troops and coalition forces in March 2003 and in the occupation following, the U.S. Department of Defense installed an occupational provisional authority from March 2003 to June 2004. Paul Bremer acted as the leader of the provisional coalition authority. This office retained the power of law by force from May 2003 to June 2004. Its first official regulations issued May 16, 2003 stated that all laws that had been valid in Iraq on April 16, 2003 continued to be valid as long as they did not hinder coalition forces in the execution of their powers and did not contravene regulations or orders by the occupational forces.¹⁰⁷

Regulation 7, issued on June 10, 2003, prohibited torture and cruel, degrading, and inhuman treatment or punishment. However, because Regulation 1 issued by the provisional authority explicitly referred to these as orders for the Iraqi people, it can be argued that Regulation 7, like other orders, excludes U.S. citizens in Iraq.

This interpretation is supported by Regulation 13, which established the central criminal court in Iraq in Bagdad.¹⁰⁸

According to this ordinance, members of foreign military forces are expressly excluded from the jurisdiction of the central court (Regulation number 13, §17, paragraph 2).

Correspondingly, Regulation 18 of December 10, 2003 established the statute of the special tribunal in Iraq for the prosecution of genocide, crimes against humanity, war crimes, and

¹⁰⁷ Regulation 1, Section 3(1),

http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_pdf.

¹⁰⁸ http://www.iraqcoalition.org/regulations/0040422_CPAORD_13_Revised_Amended.pdf.

violation of certain Iraqi laws. This special court's jurisdiction is expressly limited to Iraqi citizens and residents of Iraq.¹⁰⁹ In addition, the statute refers to acts between July 17, 1968 and May 1, 2003.¹¹⁰ Under the criminal law code of Iraq of 1969, valid both before and after the occupation, there are no legal clauses regulating war crimes and crimes against humanity. Moreover, § 11 of the Iraqi criminal code specifies that the regulations regarding crimes and misdemeanors committed in Iraq are not applicable to people who have protected status under international, national law, or international treaties. Because the regulations and orders issued by the occupying forces expressly remove members of the coalition security forces from the jurisdiction of the Iraqi justice system, it can be assumed that these groups of persons are exempt from Iraqi jurisdiction.

Also, the justice system in Iraq is utterly unable to prosecute war crimes or similar offenses in a manner befitting the rule of law at the present time. As is generally known, the whole country currently lacks the requisite stability. In region after region the execution of any type of governmental force has been greatly hindered by attacks. The Iraqi justice system, together with individual judges and members of the judiciary, has been targeted for acts of violence.¹¹¹

During the transition of official authority to the provisional Iraqi government in June 2004 it must be stated that the Iraqi justice system was not even functioning up to its pre-war level. For this reason, human rights organizations were outspokenly critical of how the special tribunal established specifically for prosecuting crimes against humanity was being regulated. There was great concern that the statute neglects fundamental international guarantees for due process and that it also appears not to require any kind of special training or experience from judges and

¹⁰⁹ Order Number 48, Section 1(1) available at http://www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf; Article 10, see also the Statute of the Iraqi Special Tribunal at http://www.cpa-iraq.org/human_rights/Statute.htm.

¹¹⁰ See Iraq's special tribunal statute at http://www.cpa-iraq.org/human_rights/Statute.htm.

¹¹¹ See Gunmen Shoot Dead Top Iraqi Judge. BBC News, December 23, 2003, http://news.bbc.co.uk/2/hi/middle_east/3343195.stm; Iraqi Judges Reluctant to Lead War Crimes Trials of Baathists; Fear Reprisals, National Post, January 6, 2004, WL 57226564; 21 shot dead in Iraq police station massacre, AFP, November 7, 2004, http://story.news.yahoo.com/news?tMpl=story&u=/afp/20041107/wl_mideast?afp/iraq_unrest_041107113613&e=3.

district attorneys. For these reasons it is feared that the court will not be deemed sufficiently credible and legitimate should these flaws not be corrected.¹¹²

In sum, it can therefore be concluded that not a single prosecution against members of the U.S. Armed Services has been pursued thus far by the Iraqi justice system. Under current law, this set of persons is shielded from Iraqi jurisdiction by the orders of the occupying forces. The Iraqi justice system is therefore ill equipped, both legally and in fact, to prosecute punishable acts brought to its attention.

2.8 No action brought by the International Criminal Court (ICC)

Neither the United States nor Iraq is a signatory to the Roman Statute of the International Criminal Court. During the Clinton administration the Roman Statute of the International Criminal Court was indeed signed,¹¹³ but under the Bush administration the signature was officially withdrawn¹¹⁴ and ratification precluded. Moreover, the Bush government attempted through pressure and extortionary maneuvers to prevent the statute going into force through the necessary ratification by at least sixty countries.¹¹⁵ On July 1, 2002 the Roman Statute of the International Criminal Court did in fact come into effect. Only 12 days after the law became effective, the Security Council's Resolution 1422¹¹⁶ was drafted under pressure from the United States; it held that, for UN missions, citizens of countries that were not parties to the Statute were exempted from its jurisdiction for twelve months; the corresponding state law was created with the American Service Member Protection Act of April 2, 2002, which does not allow cooperation between the United States and the court and empowers the U.S. President to undertake measures necessary to free U.S. citizens.¹¹⁷ Furthermore, Washington is now

¹¹² See <http://hrw.org/english/docs/2004/09/28/iraq9410.htm>.

¹¹³ On December 31, 2000.

¹¹⁴ On May 5, 2002.

¹¹⁵ See Article 126, ICC Statute

¹¹⁶ <http://daccessdds.un.org/doc/UNDOC/GEN/N02/477/61/PDF/N0247761.pdf?OpenElement>; extended once (for 12 months) by U.N. Resolution 1487.

¹¹⁷ § 42 Rn. 29 in Ipsen, Knut, *Völkerrecht*, 5. Ed., 2004.

attempting to procure worldwide immunity protections for U.S. soldiers through bilateral agreements with other countries.¹¹⁸

Consequently, the International Criminal Court cannot enforce its jurisdiction under Article 12 for the war crimes committed in Iraq in 2003/2004. The court's options for enforcing its jurisdiction under Article 13 of the statute are, for one thing, limited. For another thing, at the present time none of the possibilities pointed out here appears likely. Commencing prosecution on the basis of a Security Council decision in accordance with Chapter VII of the United Nations Charter is factually impossible, since the United States would employ its veto power. Other options have also not been exercised at this time and are, therefore, highly improbable.

In sum, we can conclude that the persons burdened with accusations of criminal acts will be prosecuted neither where the acts took place, in Iraq, nor will they be prosecuted in their home country. The International Criminal Court also took no action for war crimes committed in Abu Ghraib/Iraq, nor is it foreseeable that it will in the future.

¹¹⁸ Andreas Zumach: "Auch Kissinger müsste zittern. Warum die USA gegen den Strafgerichtshof sind." AG Friedensforschung der Universität Kassel, August 22, 2002. Available at <http://www.uni-kassel.de/fb5/frieden/themen/ICC/zumach.html>; <http://www.hrw.org/german/justice/usaundderistgh.html>.