

Journal of Civil Rights and Economic Development

Volume 23
Issue 3 *Volume 23, Fall 2008, Issue 3*

Article 1

October 2008

Refluat Stercus: A Citizen's View of Criminal Prosecution in U.S. Domestic Courts of High-level U.S. Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment

Benjamin G. Davis

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ARTICLES

REFLUAT STERCUS*:

A CITIZEN'S VIEW OF CRIMINAL PROSECUTION IN U.S. DOMESTIC COURTS OF HIGH-LEVEL U.S. CIVILIAN AUTHORITY AND MILITARY GENERALS FOR TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT

BY BENJAMIN G. DAVIS¹

* *Refluat Stercus* is a Latin command that describes the effort to hold high-level civilian authority and military generals criminally responsible for their acts. It is derived from a military adage (almost a military common law principle) known well to generations of soldiers that "shit rolls down hill". In Latin, that is translated as "fluit stercus." To "make shit roll up hill" is "refluat stercus." "Refluat Stercus" pulls together many streams of responsibility. The idea is broader than just command responsibility and really is focused on vindicating international law rules in U.S. domestic courts through all available means so as to criminally prosecute the principals and accessories (both before and after the fact) that put in place horrendous violations of positive international law – not just the persons at the bottom of the hierarchy in government which is the traditional approach as described in this article.

¹ Associate Professor of Law, University of Toledo College of Law. I thank Ian Kierpaul for his research assistance. I thank Robert Jacoby and Diane S. Bitter-Gay for their legal research. I thank Anita Crane for her assistance with diagrams and use of my faculty website. I thank Elijah Santiago and Jessica Williams for their research and hope this encourages them to consider legal careers. I thank Sandra Ellen Garcia for her secretarial

and administrative assistance and Peggye Cummings for her prior secretarial and administrative assistance. I thank Elisa L. Harmon of my Spring 2005 Public International Law class for making me aware of the military adage, "Shit Rolls Down Hill" (*fluit stercus*). I thank all of my Public International Law students for their insights over the years. I thank David Beckwith, Nicholas Russo, Ph.D., members of the OGEMID listserv and others for their assistance with the Latin phrase *Refluat Stercus*. I thank Walt Jordan for pointing out to me the stain glass window at my church St. Mark's Episcopal Church which says "*Semper Fidelis*" and "Keep Our Honor Clean" in memory of a marine who died in the Korean War. I thank Dr. Gary Solis for his insights on courts-martial. I thank Kathleen Duignan of the National Institute of Military Justice for her suggestions. I thank Professor Elizabeth Hillman for her insights on military justice. I thank Marty Lederman for his many interesting posts on Balkinization and other places and in particular with regard to the statement of U.S. Vice Admiral Lowell Jacoby, Director of the Defense Intelligence Agency of the United States. I thank the ASILForum members and The International Law Discussion Space members (TILDS@yahoogroups.com) for their insights over the years. This article is dedicated to Charles Gittings (an extraordinary citizen) creator of the Project to Enforce the Geneva Conventions, the late Professor C. Clyde Ferguson, the late Ralph Andrew Davidson, the late Professor Joseph Kunz, the late Weldon Irvine, Jr., the late Charles Sadler, Ralph and Lou Davidson, Mireze Philippe, Odette Lagace, Muriel C. Davis, Dorothy M. Davis and Dr. Christina A. Davis for the strength they give me. I thank my son Daniel B.R. Davis for his support in these years of high school and my daughter Anne-Laure Davis for her support from afar at college. I thank Professor Sanjay G. Reddy of Barnard College at Columbia University for his perceptive views on personal acquiescence/resistance and keeping one's soul intact. I thank Professor John Barrett, Professor Jeannine Bell, Professor Regina Burch, Professor Beth Eisler, Professor Howard Friedman, Professor Llewellyn Gibbons, Professor Michael H. Hoffheimer, Professor Craig Jackson, Professor Ali Khan, Professor Frank Merritt, Professor Mary-Ellen O'Connell, Senior Lecturer in Law Bruce Michael Oswald CSC, Professor Jordan Paust, Professor Lee Pizzimenti, Professor James Tierney, and Professor David Thomas (As you can see students, this proves Latin is not a dead language) for their comments and support. I thank Dean Douglas Ray and Associate Dean Daniel Steinbock for the support of this work. I owe a spiritual debt to James Meredith who I met in March 2007 at the Robert H. Jackson Center in Jamestown, New York for bringing to my attention the importance for him in integrating Ole Miss in 1961 of asserting the rights of a citizen. I also owe an intellectual debt to Hersch Lauterpacht who reminded us in 1941 of the citizen's role in enforcing international law norms. See H. Lauterpacht, *The Reality of the Law of Nations*, 2 INTERNATIONAL LAW BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT, 35-36 (E. Lauterpacht ed., Cambridge Univ. Press 1975). An early version of the work was presented at the Ohio Legal Scholars Workshop in 2006, at "The Nuremberg War Crimes Trial and its Policy Consequences Today: An Interdisciplinary Conference" American Society of International Law Centennial Regional Meeting, Joint Colloquium of the Graduate Program in Policy History of Bowling Green State University, the University of Toledo College of Law and the Robert H. Jackson Center, Bowling Green, Ohio, October 5-7, 2006 and the International Law Weekend of the Association of the Bar of the City of New York on October 25-27, 2007. This article looks at events up to January 7, 2008.

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Beyond the word, the thing: torture and cruel inhuman and degrading treatment – an Abu Ghraib photo²



“The extraordinary conclusion by the [United States] that some individuals have no right not to be tortured or abused while in detention is simply wrong.”³

² Benjamin G. Davis, *Semper Fidelis: Keep Our Honor Clean*, Presentation to the Executive Council of the American Society of International Law (Mar. 29, 2006), available at <http://www.law.utoledo.edu/students/faculty/BDavis/asil/Semper%20Fidelis%20Final.htm>

³ Mary Ellen O’Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231, 1239 (2005).

FOUR CITATIONS FOR REFLECTION

Citation # 1

“Remember those who are in prison, as though you were in prison with them; those who are being tortured, as though you yourselves were being tortured.” *Hebrews 13:3*

Citation # 2

“We share with the parties to the [Rome] Statute a commitment to ensuring accountability for genocide, war crimes, and crimes against humanity - look, for example, to our unflagging support for the tribunals established to prosecute crimes committed in such disparate places as the former Yugoslavia, Rwanda, and Sierra Leone. *We also believe that our domestic system is capable of prosecuting and punishing our own citizens for these crimes.*” - John B. Bellinger III, U.S. Dep’t of State Legal Adviser, Remarks at the Hague, Netherlands: The United States and International Law (June 6, 2007) (emphasis added), available at <http://www.state.gov/s/l/rls/86123.htm>.

Citation # 3

“From the moment a soldier enlists, we inculcate loyalty, duty, honor, integrity, and selfless service,” Taguba said. “And yet when we get to the senior-officer level we forget those values. I know that my peers in the Army will be mad at me for speaking out, but the fact is that we violated the laws of land warfare in Abu Ghraib. We violated the tenets of the Geneva Convention. We violated our own principles and we violated the core of our military values. *The stress of combat is not an excuse, and I believe, even today, that those civilian and military leaders responsible should be held accountable.*” – Army Major General Antonio M. Taguba (Ret’d.). Seymour M. Hersh, *The General’s Report*, NEW YORKER, June 25, 2007 (emphasis added), available at http://www.newyorker.com/reporting/2007/06/25/070625fa_fact

_hersh?printable=true.

Citation # 4

“From that moment [January 11, 2002], well before previous accounts have suggested, Cheney turned his attention to the practical business of crushing a captive’s will to resist. The vice president’s office played a central role in shattering limits on coercion of prisoners in U.S. custody, commissioning and defending legal opinions that the Bush administration has since portrayed as the initiatives, months later, of lower-ranking officials.

The vice president’s office pushed a policy of robust interrogation that made its way to the U.S. naval prison at Guantanamo Bay, Cuba, . . . and Abu Ghraib prison in Iraq.

Cheney and his allies, according to more than two dozen current and former officials, pioneered a novel distinction between forbidden “torture” and permitted use of “cruel, inhuman or degrading” methods of questioning. They did not originate every idea to rewrite or reinterpret the law, but fresh accounts from participants show that they translated muscular theories, from Yoo and others, into the operational language of government.” Barton Gellman & Jo Becker, *Angler: The Cheney Vice Presidency, Pushing the Envelope on Presidential Power*, WASH. POST, June 25, 2007 (emphasis added), available at http://blog.washingtonpost.com/cheney/chapters/pushing_the_envelope_on_presi/index.html.

INTRODUCTION

This article examines criminal prosecution in U.S. domestic courts of high-level U.S. civilian authority and military generals for torture and cruel, inhuman or degrading treatment. The concerns are with what the United States has done in the past to criminally prosecute this group of high-level individuals,⁴ why the United States should conduct such prosecutions,⁵ how and

⁴ See *infra* Part I.

⁵ See *infra* Part II.

where should such prosecutions occur,⁶ when should such prosecutions occur,⁷ and who should be prosecuted.⁸ This subject is important because, recently, the German Federal Prosecutor declined for the second time to open a War Crimes Trial against present and former high-level civilian authority and generals of the U.S. regarding detainee treatment.⁹ The International Criminal Court is gathering information, but is taking no action, with regard to complaints raised about actions of U.S. high-level civilian authority or military generals in the War on Terror.¹⁰ Over the past few years, several civil complaints have been filed in United States courts by detainees regarding horrendous acts of torture and/or cruel, inhuman and degrading treatment.¹¹ These cases have been rejected on state secrets, federal officer immunity, political question, or similar doctrines.¹² The U.S. Congress

⁶ See *infra* Part III.

⁷ See *infra* Part IV.

⁸ See *infra* Part V.

⁹ See Press Release, Center for Const. Rts., German Federal Prosecutor's Office Dismisses Rumsfeld War Crimes Case, Critics Call Move Political Capitulation to U.S. Pressure (Apr. 27, 2007), available at <http://www.commondreams.org/cgi-bin/newsprint.cgi?file=/news2007/0427-08.htm> (noting the decision of "Germany's Federal Prosecutor" in April 2007 not to proceed with "an investigation"); see also Scott Lyons, *German Criminal Complaint Against Donald Rumsfeld and Others*, ASIL INSIGHTS, Dec. 14, 2006, <http://www.asil.org/insights/2006/12/insights061214.html> (indicating the criminal complaint filing against senior U.S. Officials); but see *U.S. Displeased Over German Hunt for CIA Agents*, SPIEGEL ONLINE INT'L., Mar. 5, 2007, <http://www.spiegel.de/international/0,1518,469884,00.html> [hereinafter *U.S. Displeased*] (discussing the existence of German investigation of CIA agents).

¹⁰ See Int'l Criminal Court, Office of the Prosecutor: Iraq Response (Feb. 9, 2006), available at http://www.iccpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (asserting that no investigation would be continued into the situation in Iraq).

¹¹ See *El-Masri v. United States*, 479 F.3d 296, 300 (4th Cir. 2007) (alleging that the detainee was "beaten, drugged, bound, and blindfolded" during interrogation by CIA operatives); see also *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 88 (D.D.C. 2007) (highlighting the "horrifying" nature of allegations against the United States officers); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (contending that American procedures violated basic tenets of international law); see also *Boumediene v. Bush*, 476 F.3d 981, 984 (D.C. Cir. 2007), *rev'd*, 128 S. Ct. 2229 (2008) (claiming violation of Constitution, common law and law of nations)(the author notes that this reversal does not affect his analysis); see also *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006) (asserting American officers were aware of substantial likelihood that the prisoner would be tortured). See generally Julian G. Ku and John C. Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 179 (2006) (noting the historical importance of *Hamden v. Rumsfeld*).

¹² See *Bush*, 476 F.3d at 994 (concluding that the court lacked jurisdiction to hear the claim); see also *El-Masri*, 479 F.3d at 313 (dismissing the claim on state secrets grounds); see also *Arar*, 414 F.Supp.2d. at 287 (claiming that the plaintiff lacked standing for the

has put in place a series of Combatant Status Review Tribunals¹³ and post-Hamdan Military Commissions.¹⁴ Allegations of torture are routinely redacted from the versions of these proceedings that are made available.¹⁵ The United States Supreme Court has reversed itself recently and decided to take an early post-Hamdan look at the Combatant Status Review Tribunals and the post-Hamdan Military Commissions.¹⁶ Lower courts have accepted Congressional habeas corpus stripping.¹⁷ Outrageous government conduct against an American civilian on American soil has been let pass by our courts as long as evidence from that process is not introduced as part of the criminal trial.¹⁸ The Pres-

court to hear the claim); *see also In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d at 109 (discarding the claim due to qualified immunity of the defendant); *see also Rumsfeld*, 464 F. Supp. 2d at 19 (contending that American procedures violated basic tenets of international law).

¹³ *See* 10 U.S.C. § 948a (2007) (referencing the power of combatant status review tribunals); *see also* 10 U.S.C. § 948d (2007) (referring to the establishment of combatant status review tribunals); *see also* 10 U.S.C. § 801 (2007) (citing other provisions relating to combatant status review tribunals).

¹⁴ *See* 10 U.S.C.A. §§ 948b (a)–(g) (2006). For a critique of these Military Commissions as applied, *see also* Benjamin G. Davis, *No Third Class Process for Foreigners*, 103 NW. U. L. REV. COLLOQUY 88 (2008), available at <http://www.law.northwestern.edu/lawreview/colloquy/2008/32/LRColl2008n32Davis.pdf>.

¹⁵ *See* Combatant Status Review Tribunal hearing of Khalid Sheikh Muhammad, http://www.defenselink.mil/news/transcript_ISN10024.pdf (noting the following exchange: “DETAINEE: CIA peoples. Yes. At the beginning when they transferred me [REDACTED].

PRESIDENT: What I’m trying to get at is any statement that you made was it because of this treatment, to use your word, you claim torture. Do you make any statements because of that?”).

¹⁶ *Compare* *Al Odah v. United States*, 127 S.Ct. 3067, 3067 (2007) (granting petition to hear claim of habeas corpus) *with* *Boumediene v. Bush*, 476 F.3d at 994 (asserting that the court does not have jurisdiction to hear habeas corpus claims).

¹⁷ *See* *Boumediene*, 476 F.3d at 994 (depriving court jurisdiction over habeas petitions); *see also* *El-Masri*, 479 F.3d at 313 (stating that the state secret privilege applied to discovery sought by plaintiff because litigation could not occur without disclosure of state secrets); *see also In re Iraq and Afghanistan Detainees Litigation*, 479 F.Supp.2d at 119–20 (dismissing plaintiffs claims that were alleging torture); *see also* *Arar*, 414 F. Supp. 2d. at 287–88 (granting the United State’s motion to dismiss).

¹⁸ Order Denying Defendant Padilla’s Motion to Dismiss for Outrageous Government Conduct, *United States v. Padilla*, No. 04-6001-CR-COOKE (S.D. Fla. Apr. 9, 2007), available at <http://www.discourse.net/archives/docs/Padilla-motion-denied.pdf> (“Mr. Padilla fails to present a cognizable claim of outrageous government conduct entitling him to dismissal of the indictment. The objectionable conduct Padilla claims violated his due process rights occurred during his military detainment in isolation of the crimes charged. Padilla also fails to adequately explain why excluding any unlawfully obtained evidence would not be an appropriate remedy in this case. Applying the exclusionary rule to bar inclusion of any illegally obtained evidence would sufficiently satisfy due process concerns. This may ultimately be a moot point since the government has averred not to util-

ident has issued a July 20, 2007 Executive Order interpreting Common Article 3 of the Geneva Conventions that appears to further enshrine departures from the object and purpose of the Geneva Conventions and other international law.¹⁹

While low level soldiers have been court-martialed and prosecutors in Italy²⁰, Germany²¹ and Switzerland²² are investigating potential crimes related to extraordinary renditions by lower level U.S. intelligence officers, U.S. high-level civilians and generals have not suffered criminal prosecution as to actions taken during the current war on terror. Rather, they have remained at high-levels in the federal government or moved on to other careers at the World Bank, in the federal courts, academia, or the private sector.²³

Are we enshrining the old military adage of “different spanks for different ranks”?²⁴ Given the failure of overseas processes and domestic civil processes to address command and other responsibility of this select group, this article examines whether and how criminal prosecution of them in U.S. domestic courts might be done.

ize any Naval Brig evidence in its case. However, should the government decide to make use of any such evidence, an appropriate hearing will be scheduled to determine to what extent it is admissible.”)

¹⁹ Exec Order No. 13,440, 72 Fed. Reg. 40,707 (July 20, 2007). For analysis of that Executive Order, see Benjamin G. Davis, *Gutting the Geneva Conventions in the War on Terror*, JURIST, July 25, 2007, available at <http://jurist.law.pitt.edu/forumy/2007/07/gutting-geneva-conventions-in-war-on.php>.

²⁰ See Devika Bhat, *Italian Judge Orders First 'Rendition' Trial of CIA Agents*, TIMES ONLINE, Feb. 16, 2007, <http://www.timesonline.co.uk/tol/news/world/europe/article1395637.ece> (reporting that “[a]n Italian judge has ordered 26 Americans and five Italians to stand trial for the kidnapping of a terror suspect in Milan in 2003, in what will be the first criminal court case over the CIA’s extraordinary rendition programme”); see also Frederic L. Kirgis, *Alleged CIA Kidnapping of Muslim Cleric in Italy*, ASIL INSIGHTS, July 7, 2005, <http://www.asil.org/insights/2005/07/insights050707.html> (commenting on arrest warrants issued by “an Italian judge” for thirteen U.S. CIA agents).

²¹ A German court has opened a case with regard to the extraordinary rendition of Khaled El-Masri. *U.S. Displeased*, *supra* note 9.

²² Alexander G. Higgins, *Switzerland Approves Probe of CIA Flight*, GUARDIAN UNLIMITED, Feb. 15, 2007, available at http://lib.store.yahoo.net/lib/realityzone/UFN_Switzerlandprobe.htm (“Switzerland on Wednesday followed Italy and Germany in raising the threat of criminal prosecution of CIA operatives involved in anti-terrorism operations in Europe.”).

²³ See the list of persons of interest in part VI of this article.

²⁴ James W. Smith III, *A Few Good Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System*, 27 WHITTIER L. REV. 671, 677 (2006).

This article examines criminal prosecution in United States domestic courts of United States high-level civilian authority and/or military generals (whether in courts-martial, federal courts or state courts) for violations of international humanitarian and/or international criminal law. Considering the United States as having international obligations with regard to international humanitarian and/or international criminal law violations committed²⁵ by its high-level civilian authority and military generals,²⁶ this article focuses on one aspect of international humanitarian law and/or international criminal law concerning the current War on Terrorism – torture (including torture, cruel inhuman or degrading treatment and whether seen as war crimes or otherwise).²⁷ The article examines the possibility of a U.S. do-

²⁵ The sense of the word “committed” will be discussed below in the article. *See, e.g.*, pp. 19–20.

²⁶ The external perspective is a vision that examines the United States international obligations looking outward to other nations. It is to be contrasted with the United States foreign relations law perspective that examines United States international law obligations through the framework of the Constitution downward. The essence of the external perspective is the rule of treaty and customary international law that a state may not use its internal law to extract itself from its international law obligations. Thus, the Constitutional, federal and state law debate is of interest but the view of such debates is tempered by the sense that these laws are all variations on internal law. *See Benjamin G. Davis, A Citizen Observer's View of the U.S. Approach to the War on Terrorism*, 17 *TRANSNAT'L L. & CONTEMP. PROBS.* 465 (2008).

²⁷ I recognize that in addition to torture, cruel, inhuman and degrading treatment are prohibited in various international instruments and customary international law. As to torture, it would appear patently obvious that present and former high-level U.S. civilians and military generals put in place over the past years a system of secret black sites, extraordinary renditions, detention facilities (including but not limited to Guantanamo), and interrogation methods to permit torture as defined by treaty and customary international law. For a detailed analysis of the common plan, *see Jordan J. Paust, Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 *UTAH L. REV.* 345, 345 (2007) [hereinafter Paust 1] (describing the “torture” or “violence to life and person” that were “portrayed in photos from Abu Ghraib Prison”); *see also Jordan J. Paust, Responding Lawfully to al Qaeda*, 56 *CATH. U.L. REV.* 759, 759–60 (2007) [hereinafter Paust 2] (“Canada is considering a U.S. request for their extradition to stand trial for conspiracy to commit war crimes and attempted war crimes in the United States.”). *See generally Jordan J. Paust, Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 *COLUM. J. TRANSNAT'L L.* 811, 812 (2005) [hereinafter Paust 3] (“A common plan to violate customary and treaty-based international law concerning the treatment and interrogation of so-called ‘terrorist’ and enemy combatant detainees and their supporters captured during the U.S. war in Afghanistan emerged within the Bush Administration in 2002.”). For a discussion of black site torture and the recent devastatingly critical International Committee of the Red Cross report, *see, e.g., Jane Mayer, The Black Sites: A Rare Look Inside the C.I.A.'s Secret Interrogation Program*, *NEW YORKER*, Aug. 13, 2007, at 46, available at

mestic criminal prosecution as a response to allegations that such international crimes have been committed²⁸ by actors who are U.S. high-level civilian authority and military generals. The concerns are with what the United States has done in the past to criminally prosecute this group of high-level individuals, why the United States should conduct such prosecutions, how, when and where should such prosecutions occur, and who should be prosecuted?

While there is a rich debate about whether torture by the United States has occurred in the War on Terrorism,²⁹ for the purposes of this article that debate is primarily relevant to the evidence gathering, prosecutorial discretion, and defendant identifying processes. While, based on the information that has come out, it is beyond doubt (let alone reasonable doubt) that high-level U.S. civilian authority and/or military generals decided it is in the United States' best interest to breach international law obligations prohibiting torture³⁰ - our inquiry is more focused. To paraphrase John Bellinger's remarks - our concern is whether our domestic system is capable of prosecuting and punishing our own citizens who are high-level civilian or military generals for these international crimes.³¹

http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer (commenting on the "black sites" and the "unusually harsh treatment" that those detainees were subject to).

²⁸ Definition of "committed" will be addressed later in this article. *See, e.g., infra* pp. 19–20.

²⁹ *See* note 275 for a number of references. For utilitarian arguments for and against torture, *see* ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 257 (Yale 2002) [hereinafter DERSHOWITZ 1]; *see also* ALAN M. DERSHOWITZ, *TORTURED REASONING*, IN *TORTURE: A COLLECTION* (Sanford Levinson ed., Oxford 2004) [hereinafter DERSHOWITZ 2]; *see also* Jeannine Bell, "Behind This Mortal Bone": *The (In)effectiveness of Torture*, 83 *IND. L.J.* 339, 339 (2008); *see also* Alan M. Dershowitz, *Can We Even Discuss Torture?*, *LONDON TIMES HIGHER EDUC. SUPPLEMENT*, June 11, 2004 [hereinafter Dershowitz 3]. *See generally* Alan M. Dershowitz, *Commentary, Stop Winking At Torture and Codify It*, *L.A. TIMES*, June 13, 2004 [hereinafter Dershowitz 4].

³⁰ *See* Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 *OHIO ST. L. J.* 1231, 1235–36 (2005) (discussing how the United States has countenanced every conceivable method of torture from waterboarding to chaining prisoners for 24 hours without any break or relief).

³¹ "We also believe that our domestic system is capable of prosecuting and punishing our own citizens for these crimes." John B. Bellinger III, U.S. Dep't of State Legal Adviser, Remarks at the Hague, Netherlands: *The United States and International Law* (June 6, 2007), available at <http://www.state.gov/s/l/rls/86123.htm>.

If our domestic system is capable of prosecuting and punishing our high-level civilians or military generals for these crimes, then this contribution will demonstrate how such prosecutions would be undertaken – in short to provide a roadmap. This roadmap would appear of use to those who sense an injustice in that only low-level persons (all essentially uniformed military) have been subject to criminal prosecution and punishment for war crimes related to the War on Terrorism. This reality raises the specter of the “different spanks for different ranks” problem.³² The effort here is to see how “similar spanks for higher ranks” might occur. If the conclusion is that we are not capable in our domestic system of prosecuting and punishing our own citizens who are high-level civilian or military generals for these crimes, then this contribution will demonstrate the discontinuity between what we support abroad and what we are capable of doing at home. We will understand the limits of our internal system and ponder what, if anything, to do.

This article is particularly timely in light of the First Chautauqua Declaration of August 29, 2007 by which prosecutors from the international criminal tribunals from the International Military Tribunal for Nuremberg, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers of the Cambodian Courts, and the International Criminal Court urged “[t]hat ending impunity by perpetrators of crimes of concern to the international community is a necessary part of preventing the recurrence of atrocities. That it is no longer about whether individuals agree or disagree with the pursuit of justice in political, moral or practical terms; now, it is the law.”³³ Our interest is in applying such

³² This phrase is more vulgarly known in the military as “shit rolls down hill”. This article is in essence about making “shit roll uphill” or in Latin – *Refluat Stercus*. REFLU A T means: “Let it flow back,” a command as in “let us go.” REFLU I T means: “It does flow back,” a statement. Similarly, FLUAT means: “Let it flow,” and FLUIT means: “it does flow.” I thank Dr. Nicholas P. Russo of St. Francis de Sales High School of Toledo, Ohio, for the Latin lesson. Depending on what happens, it is possible that in a certain number of years, someone might write an article entitled “Refluit Stercus” to herald a change. The First Chautauqua Declaration appears to – at least for internal disputes to a given country – herald such a development. See The First Chautauqua Declaration n.33, Aug. 29, 2007 (on file with author).

³³ *Id.*

law through the United States domestic courts for criminal prosecution of high-level US civilians and generals with regard to torture and cruel, inhuman or degrading treatment, as this seems the most possible path to punishing those perpetrators.

Of course, domestic criminal prosecution of fellow citizens requires political will, particularly in the United States system where the prosecutor is not independent of the Executive and there is no equivalent of the *partie civile* as in civil law systems. Building political will is beyond the scope of this article which is written from the point of view of a citizen evaluating what can be done with such high-level civilians and military generals in cases of violations of peremptory norms of international law. It is also useful to be aware that the kind of defendants that are the subject of this article are persons who have access to far more levers of power as compared to such a citizen.³⁴ Co-opting civil society through influencing public opinion and somatizing³⁵ citizens to block investigation and prosecution are efforts that high-level actors are capable of doing. If such persons can prevent an investigation from happening or turn an investigation in a direction away from them, they run little risk of prosecution for underlying crimes. With that kind of power, they would have little need to put in place a cover up and run the risk of obstruction of justice type prosecutions. At least as described in the next section, in the absence of obstruction of justice cases these high-level civilians are able to successfully organize their absolution and the generals are at most likely to have administrative discipline.

³⁴ Having stood in the winter wind and snow in a field to protest war crimes and torture at a January 2004 Presidential visit in northwestern Ohio, while vast police and military forces surrounded the few average citizens corralled in a little pen, I know just how minuscule a citizen's protest on these issues can be. Moreover, even after Abu Ghraib had broken, having been required to stand far away from the organizers of the designated protest site by those who thought bringing up war crimes and torture were not "unifying themes" for the Democratic-led demonstrators at a Presidential visit in August 2004 at Fort Meigs, Ohio, I also know that there seems to be little hope in looking to one or the other party to lead on these issues . . . Having led the effort to have the American Society of International Law pass its Centennial Resolution on the Use of Armed Force and Treatment of Detainees I recognize how fleeting the efforts of citizens can be when compared to the acts of state organs like the Military Commissions Act of 2006. But, these are the tools a citizen has to insist on compliance with international norms by his state and so we make the best use of our meager resources.

³⁵ See generally GEORGE ORWELL, 1984 6 (1949) (Stating that "every sound you made was overheard, and, except in darkness, every moment scrutinized").

As part of sapping the political will to conduct these types of criminal prosecutions, one notes the use of moral and utilitarian arguments in favor of torture in certain circumstances (the ticking time-bomb, for the greater good, the need to relativize absolute prohibitions).³⁶ The search for what seems to be a Kantian categorical imperative morphed through a Carl Schmittian³⁷ view of "total war" might lead persons to believe that, for the survival of a way of life, the moral position would be to torture or cruelly, inhumanely and degradingly treat persons. A utilitarian (rational choice) would try to balance the nature of the cost (the torture of a few persons) with the benefit (it works and we receive some actionable intelligence to avoid a nuclear explosion).³⁸ The

³⁶ See generally ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007) (considering the proper role of judges in light of the American response to al-Qaeda); Yuval Shany, *The Prohibition Against Torture and Cruel, Inhuman, and Degrading Treatment and Punishment: Can the Absolute Be Relativized Under Existing International Law?*, 56 CATH. U.L. REV. 837, 838 (2007) (reviewing "the theoretical underpinnings of the absolute international law prohibition against torture").

³⁷ See Scott Horton, *State of Exception, Bush's war on the rule of law*, HARPER'S MAGAZINE, Sept. 2007, available at <http://www.harpers.org/archive/2007/07/0081595>. This source discussed Carl Schmitt's work as the source of what is called "lawfare" role of law in warfare. It stated that

Carl Schmitt also laid the foundations for a new attitude toward warfare and the role of law in the conduct of war. In his early masterwork, *The Concept of the Political* (1927), Schmitt derided the weakness of liberalism and its efforts at consensus building and instead embraced the legitimacy of a process of extreme demonization of political adversaries. Guaranteeing legal rights to an enemy was thus senseless and counterproductive. In its place, Schmitt advanced the notion of "total war" ("Total Enemy, Total War, Total State," 1937), suggesting that the neatly delineated warfare of prior ages, in which uniformed, professional armies met on a field of war, was in decline in favor of a new kind of all-encompassing warfare. Schmitt ridiculed the law of armed conflict, saying it reflected ideological principles rooted in nineteenth-century English liberalism. At the same time, he turned to the legal concept of piracy as a basis for treating adversaries as persons completely beyond the help of law and the courts, free to be dealt with just as the executive pleased without being bothered by lawyers ("The Concept of Piracy," 1937).

Id.; see Robert J. Delahunty & John C. Yoo, *Executive Power v. International Law*, 30 HARV. J.L. & PUB. POL'Y 73 (2006) (describing further critiques of international law). See generally JACK L. GOLDSMITH, & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

³⁸ See Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEGAL STUD. 115 (2002) (arguing that rational choice theory accounts for international behavior, and this theory is not inconsistent with the persistent use of moral language in international affairs); see also Bell, *supra* note 29, at 346-61 (showing utilitarian critique of the utilitarian argument for

literature is replete with discussions of scenarios that are ultimately suppose to lead us to either one of two conclusions – some torture is permitted *ex ante* (torture warrants)³⁹ or some torture is to be forgiven *ex post* (outlaw and forgive through jury nullification or non-prosecution).⁴⁰ In either case, we would be in aspects of the state of exception.⁴¹

This article does not engage with that debate as I am focused on the legal position. However, for purposes of garnering political will to undertake these types of criminal prosecutions it might be useful that I state my approach to these moral and utilitarian arguments in favor of torture. I categorically reject the moral and utilitarian arguments for torture. The moral argument by definition posits that the one deciding to do the torture is doing it for some good and that such person is therefore good. Yet, our moral history connotes the opposite – particularly with the state: the torturer in all epochs in memory comes to be seen as a symbol of evil not the victim. The torturer with a moral conscience recognizes that the actions he is doing to other people are transgressive of a fundamental moral norm. The torturer without a moral conscience is by definition a sociopath incapable of making reasonable moral choices. In either case, the torturer is not a force of good but of evil.

The torturer may seek to rationalize, as we have seen, his transgressive act through minimizing what he is actually doing

torture); see also *Tom Rick's Inbox*, WASH. POST, Oct. 14, 2007, available at <http://www.washingtonpost.com/wpdyn/content/article/2007/10/12/AR2007101201885.htm?referrer=emailarticlepg> (discussing military persons' views of interrogation techniques).

³⁹ See Dershowitz 4, *supra* note 29, at M-5; see also Dershowitz 3, *supra* note 29; see also DERSHOWITZ 1, *supra* note 29; see also DERSHOWITZ 2, *supra* note 29, at 257. All of these articles touch upon the role of torture in our response to terrorism.

⁴⁰ See generally POSNER & VERMEULE, *supra* note 36 (commenting on the judges role); Shany, *supra* note 36, at 838 (reviewing the absolute international law prohibition against torture).

⁴¹ GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., 2005). "The essential contiguity between the state of exception and sovereignty was established by Carl Schmitt in his book *Politische Theologie* (1922). Although his famous definition of the sovereign as 'he who decides on the state of exception' has been widely commented on and discussed, there is still no theory of the state of exception in public law." *Id.* at 1. The state of exception may be similar to a setting of gross lawlessness regarding international law on the internal plane (see discussion *infra* at footnote 214 and the accompanying text). Even in a democratic state, this type of setting magnifies the concern of depending solely on internal law. See generally WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998) (commenting on the state of civil liberties in wartime during World War I and World War II).

(use of euphemism) or arguing for the benefits of what he has done. The problem with this justification of torture is that because of the transgressive nature of the act, the reliability of the rationalizations are as suspect as the reliability of the evidence that comes out of the torture.⁴² The transgressive act of torture, unless countenanced, raises the risk of vulnerability for the guilty act ("being thrown under the bus"). To avoid or reduce that vulnerability, a rational torturer would (like his victim) say

⁴² I have come to call this the "Abu Zubaydah trope," often used in discourse about "enhanced interrogation techniques." See President's Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1569 (Sept. 6, 2006), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2006_presidential_documents&docid=pd11se06_txt-15.pdf. "[T]he CIA used an alternative set of procedures. . . . the procedures were tough, and they were safe, and lawful and necessary. Zubaydah was questioned using these procedures, and soon he began to provide information on key Al Qaeda operatives." *Id.* at 1571. President Bush further stated that "questioning the detainees in this program has given us information that has saved innocent lives by helping us stop new attacks -- here in the United States and across the world." *Id.* at 1570-71. Presidential candidates have argued in favor of "enhanced interrogation techniques" as part of their campaigning apparently to demonstrate a "tough on terror" position to an electorate. See Adam Nagourney & Marc Santora, *Terror Attack Scenario Exposes Deep Differences Among G.O.P. Hopefuls*, N.Y. TIMES, May 16, 2007, at A17, available at <http://query.nytimes.com/gst/fullpage.html?res=9A06E2D71331F935A25756C0A9619C8B63>.

Senator John McCain of Arizona, a prisoner of war in Vietnam, said he would not resort to torture because the United States would lose more in world opinion than it would gain in information. "When I was in Vietnam, one of the things that sustained us, as we went -- underwent torture ourselves -- is the knowledge that if we had our positions reversed and we were the captors, we would not impose that kind of treatment on them," Mr. McCain said. "It's not about the terrorists, it's about us. It's about what kind of country we are."

Former Mayor Rudolph W. Giuliani of New York said he would back "every method" short of torture that interrogators could think of because "I don't want to see another 3,000 people dead in New York or any place else."

Former Gov. Mitt Romney of Massachusetts said he would support "not torture but enhanced interrogation techniques. [sic] And taking a tougher line than President Bush and Mr. McCain, who have said they would like to shut down the detention center at Guantánamo Bay, Mr. Romney said he wanted the facility doubled in size.

Id.; see also Associated Press, *Bush: U.S. 'does not torture people': President Responds to Report that 2005 Memo Relaxed Interrogation Rules*, MSNBC, Oct. 5, 2007, <http://www.msnbc.msn.com/id/21148801/>. "When we find somebody who may have information regarding a potential attack on America, you bet we're going to detain them, and you bet we're going to question them The American people expect us to find out information This government does not torture people." *Id.* See generally Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347 (2007). "After September 11, 2001, the Bush Administration was determined to stop Al Qaeda, but the United States lacked human intelligence -- spies inside the terrorist organization. Officials within the government reasoned that their best hope for gathering intelligence was by questioning captured terrorist suspects . . . like Abu Zubaydah." *Id.* at 347-38.

precisely those things that appear to give the impression that the torture has worked. Otherwise, the torturer's transgression was without meaning or use – a crime with no reward for the crime. It is possible such unrewarded crime would be of interest to a given torturer, but in that case the torturer would appear to be willing to do the transgressive act whether or not a reward was possible. Again, such a torturer would be a sociopath and not of interest to an analysis of rational choice. In professing the reliability of what he is saying, the victim is speaking to the torturer so as to be relieved of his pain. In the same way, the torturer is speaking to absolve his guilt to the relevant audience outside of the cell that questions the validity of the practice to relieve his own risk. That relevant audience outside the cell, given the unanimity condemning such practices in the positive law of treaties and customary international law, is the local community but extends out through linkages to the world community. The torturer in his justification seeks to hold back the condemnation of that world community for as long as possible by any means necessary.

If the torturer is successful in holding back that world community until his death, he has managed a salvation but only on earth. To the extent such persons are not made to do an expiatory act through the revelation of the truth and being brought to justice in their life then the transgressive act goes unpunished. The transgressive act becomes integrated in the peace of a community. That peaceful community would integrate that transgressive act as part of its nature, laying the seeds for the state again to rise in some future moment against some unfavored persons and repeat the transgressive act. Such a peace is an uneasy peace as the recourse to what is absolutely prohibited remains a temptation in any crisis to the state when there is no memory of consequences for the transgressive act.

Rather than wait 40-50 years for the expiatory moment of apology or not prosecute the heinous underlying transgressive act, I am suggesting that we should root out the transgressor and the transgressive act with regard to torture and cruel inhuman and degrading treatment. As a peremptory norm, it is something that is worth addressing in an early, rather than later, manner and in the most harsh way. This type of resistance to the illegal act maintains the absolute ban on such action, does not relativize

human reaction, and keeps these actions illegitimate and beyond the ken.

PART I. *FLUIT STERCUS*⁴³ - DIFFERENT SPANKS FOR DIFFERENT RANKS

United States criminal prosecution of U.S. high-level civilian authority or military generals for violations of international humanitarian law or international criminal law is an under-examined area.⁴⁴ One possible reason for this lack of analysis might be that such criminal prosecutions under international law have never been done in U.S. domestic courts.⁴⁵ But, just because something like this has not been done before, does not mean that we cannot envision how it should occur now.

To help understand how to address such criminal prosecution now, it is useful to situate such a domestic prosecution in a historical context that is both domestic (internal to the US) and international (external to the US). In order to accomplish this, I first situate this domestic prosecution for these international crimes with these defendants in contrast with other criminal prosecutions of other defendants domestically or similar defendants internationally (A); I next look at the foreign experience with prosecution for high-level civilians or generals in international and national courts that might help us understand what is being done if such a domestic U.S. experience was to be undertaken at this juncture (B); and then I look at the American historical experience with criminal prosecutions that might appear to resemble what we are seeking to discuss in this article (C).

⁴³ See *supra*, note 32. *Fluit stercus* literally means "it does flow" or, as is often said in the military, "shit rolls down hill."

⁴⁴ Since the Green Beret "Medic" Case, following the controversial war in Vietnam, the "Nuremberg defense," a soldier's defense to an allegation of committing war crimes, has gained significant momentum. See Anthony A. D'Amato et al., *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Resister*, 57 CAL. L. REV. 1055, 1055-56 (1969). This source states that "the case does stand for the important precedent that a war-crimes defense is available, in relevant circumstances, to in-service resisters." *Id.* at 1056.

⁴⁵ In a recent analysis, where discussions of such prosecutions are described in both international tribunals and national tribunals of various countries, there appears to be no mention of such criminal prosecutions in the United States. See generally MIREILLE DELMAS-MARTY & ANTONIO CASSESE, *JURIDICTIONS NATIONALES ET CRIMES INTERNATIONAUX [NATIONAL JURISDICTIONS AND INTERNATIONAL CRIMES]* (2002).

A. *Situating these US domestic criminal prosecutions in the world*

There are cases of high-level defendants being prosecuted for violations of international law in other fora around the world.⁴⁶ These cases may help inform our thinking about the U.S. domestic court setting, but I wish to emphasize that our interest in them is only as an aid to our reflection. Our concern is that too much of a focus in this article on these other types of cases with other types of defendants may confuse rather than clarify our understanding of how these cases would operate inside the United States. So the presentation will attempt to be sufficient but succinct, so that we can move to the next issue of why it is important to bring such prosecutions and the further issues discussed in the remaining sections of the article.

International or hybrid tribunals: The types of criminal prosecutions of interest for these U.S. high-level civilians or military generals are not prosecutions in international tribunals such as in the international or hybrid tribunals that the United States has assisted in setting up since World War II such as the International Military Tribunal at Nuremberg, the International Military Tribunal for the Far East, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court in East Timor, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, or the International Criminal Court.⁴⁷ The

⁴⁶ In this section of the article, these cases are discussed in detail.

⁴⁷ Some may wonder why I do not list the Iraqi High Tribunal, International Court of Justice, or the Lockerbie Tribunal. As to the Iraqi High Tribunal, there are significant questions about whether the international minimum standard of justice is provided in that tribunal, created pursuant to the invasion and war in Iraq. See Nehal Buta, *Judging Dujail: The First Trial Before the Iraqi High Tribunal*, HUM. RTS. WATCH, Nov. 2006, at 7, available at <http://www.hrw.org/reports/2006/iraq1106/iraq1106webwcover.pdf>. “[T]he court is a newly created institution in a recently reconstituted legal system, in which lawyers and judges were previously isolated from developments in international criminal law and had no experience in investigating and trying complex international crimes.” *Id.*; see also Eric H. Blinderman, *Lessons from the Saddam Trial: Article: Judging Human Rights Watch: An Appraisal of Human Rights Watch’s Analysis of the Ad-Dujayl Trial*, 39 CASE W. RES. J. INT’L L. 99, 101 (2006/2007). Blinderman noted that the Human Rights Watch found that the Iraqi High Tribunal did not meet essential fair trial standards in the Ad-Dujayl trial and therefore “the credibility of the entire [Iraqi High Tribunal] process [was] doubtful.” *Id.*; see also Michael P. Scharf, *Lessons from the Saddam Trial: Foreword: Lessons from the Sadaam Trial*, 39 CASE W. RES. J. INT’L L. 1, 2 (2006/2007). Sharf commented on how the Iraqi High Tribunal was snakebitten. *Id.*; see also Geoffrey Robertson,

creation of these international tribunals by the allies after World War II or through the United Nations Security Council resolutions more recently created international tribunals acting on the international law plane rather than on the domestic law plane. These types of tribunals have had statutes/treaties specially created to articulate the crimes they will address and their jurisdiction and procedures. These tribunals were for the most part outside of the domestic court systems of individual countries or (in the case of Cambodia) specially inserted into the domestic court system of the country.

There appear to be two very distinct groups of these international tribunals. The International Military Tribunal for Nuremberg ("Nuremberg trials") and the International Military Tribunal for the Far East ("Tokyo trials"), respectively, addressed international crimes committed by the Nazis and the Japanese both internally and externally to their home countries. The focus of the tribunals was not only on the horrors inflicted by each regime on its own population, but also on the horrors committed by such regimes outside of their territories. I call this an internal/external tribunal.

After a long period of silence, the world renewed the international criminal tribunal paradigm with the creation in 1993 of the International Criminal Tribunal for the Former Yugoslavia. This tribunal was focused on the international crimes that occurred in the former Yugoslavia and was created by U.N. reso-

Symposium: Milosevic & Hussein on Trial: Keynote Address: Ending Impunity: How International Criminal Law Can Put Tyrants on Trial, 38 CORNELL INT'L L.J. 649, 649-50 (2005). Robertson comments that a question of bias will arise during the trial of Saddam Hussein. *Id.* at 650. I have had personal qualms about some aspects of the statute and what I have seen of the proceedings. On the other hand, the tribunals which I am discussing here have not been challenged to my memory for failure to provide an international minimum standard of justice for the defendants. Of course, the lack of jury trial in the International Criminal Court system has been a concern raised by the United States. However, the actual operation of that court appears very new and nothing indicates at this time that it will act without the appropriate prudence and serenity required. As to the International Court of Justice, the simple answer is that the focus of this paper is individual criminal responsibility and not state responsibility - the only parties to cases at the ICJ are by definition states. As to the tribunal for Lockerbie, that appears to resemble the type of ad hoc state to state tribunals that in the past have addressed a specific problem - more transient and less stable as a model when one is thinking about conspiracy with regard to multiple crimes that may have occurred over numerous nations (such as, for example extraordinary renditions). For a discussion of the question of terrorism related trials such as Lockerbie, see generally *Symposium: "Terrorism on Trial,"* 36 CASE W. RES. J. INT'L L. 287 (2004).

lution.⁴⁸ The international crimes being addressed were those committed within the former Yugoslavia as it dissolved. Such a tribunal provides significant decisions that help expand the Nuremberg legacy, while operating within a structure that is an international tribunal dealing with international crimes resulting from the dissolution of a state. In contrast to the Nuremberg or the Tokyo trials, and while recognizing the succession of state issues that also affect this tribunal as new states emerged from the former Yugoslavia, I view the International Criminal Tribunal for the Former Yugoslavia as an international tribunal dealing with internal cross ethnic/religious-based international crimes. Said tribunal will wind up its work in the next few years and at that point the question remains whether a rump version will remain in a dormant capacity to prosecute any fugitives (Mladic and Karadzic) or some kind of transfer of jurisdiction will be made to domestic courts in the Balkans to follow-up on any cases of defendants who are currently fugitives.

Similar to the focus in the International Criminal Tribunal for the Former Yugoslavia on international crimes performed by leaders against their nationals in their territories, the International Criminal Tribunal for Rwanda⁴⁹ and the Special Court for Sierra Leone⁵⁰ have in practice and by statute had an internal focus. In this sense, territorial jurisdiction where the crime was committed is the key basis for the jurisdiction of these tribunals. At the same time, in addition to their jurisprudence with regard to high-level leaders in Sierra Leone or Rwanda, there are two significant aspects to these two tribunals for purposes of this article. For Sierra Leone, the arrest of Charles Taylor, the former head of Liberia, by the Special Court of Sierra Leone raised the

⁴⁸ S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (noting the purpose of the court was "to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia").

⁴⁹ See S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing "an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda").

⁵⁰ See S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000) (requesting the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create independent special court to prosecute for "crimes against humanity, war crimes and other serious violations of international humanitarian law . . . committed within the territory of Sierra Leone").

specter of a (present or former) head of state from another country being held to account for international crimes relating to the territory of jurisdiction – in this case Sierra Leone.⁵¹ A foreign head of state being tried brings an external element to the work of the Special Court of Sierra Leone while it maintained its focus on crimes that occurred within the Sierra Leonean territory.⁵² For Rwanda, the statute of the International Criminal Tribunal for Rwanda granted jurisdiction over crimes that occurred in Rwanda or had been committed by Rwandans in neighboring countries.⁵³ This language created the possibility of crimes that were committed by Rwandans in neighboring countries (spill-over crimes) being addressed by such an international criminal tribunal, in addition to crimes that relate to the territory of Rwanda. As a practical matter, the difficulties in terms of resources available to conduct such investigations and prosecutions have limited the actual number of cases involving crimes committed outside Rwanda by Rwandans.

Finally, the Extraordinary Chambers of the Courts of Cambodia⁵⁴ form a hybrid created by treaty and inserted in the domestic court system of that country. While only getting started

⁵¹ See *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT, Prosecution's Second Amended Indictment (May 29, 2007), available at <http://www.sc-sl.org/Documents/SCSL-03-01-PT-263.pdf> (accusing Taylor, Leader of the National Patriotic Front of Liberia and the President of the Republic of Liberia with crimes against humanity, violations of the Geneva Convention and other serious violations of international humanitarian law).

⁵² "1. The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone." Statute of the Special Court for Sierra Leone, art. 1(1), Jan. 16, 2002, available at <http://www.sc-sl.org/Documents/scsl-statute.html>.

⁵³ "1. Decides hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto . . ." S.C. Res. 955, *supra* note 49.

⁵⁴ See Introduction: Extraordinary Chambers in the Courts of Cambodia, <http://www.eccc.gov.kh/english/default.aspx> (last visited Feb. 7, 2008) (explaining that the ECCC is one "special new court" that was created due to the Cambodian-UN agreement, but that operated independently of the UN).

recently, its focus again is internal to one nation: on the heinous crimes committed against persons in Cambodia.⁵⁵

These four international criminal tribunals are examples of essentially internally-focused international criminal tribunals that do not address in a significant manner situations where few international crimes occur in the territory of the state of the leader, but the leaders of that state commit crimes outside of that state. The work of these tribunals is thus distinguishable from the case we are seeking to examine of high-level U.S. civilians and generals whose principal alleged international crimes would be outside the United States.

The next emerging international tribunal structure is the International Criminal Court.⁵⁶ In theory the International Criminal Court is in a position to address international crimes that are both internal to a given state (i.e. leaders against their populations) and external to a given state (leaders of one nation against the leaders and populations of another state).⁵⁷ In practice, its first referrals (Democratic Republic of the Congo, Uganda, Central African Republic and the Sudan)⁵⁸ continue with the traditions of the recent tribunals in the Former Yugoslavia, Rwanda, Sierra Leone, and what is expected in Cambodia by focusing on the internal type international crimes. This cautious approach in its first years is completely understandable as the International Criminal Court attempts to create its credibility as an institution and take on cases that it finds itself capable of handling within its resource constraints. One could imagine the International Criminal Court taking on more external violation

⁵⁵ See Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, ch. 1, art. 1, NS/RKM/1004/006 (Oct. 27, 2004), available at http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf (stating that the purpose of ECCC is to prosecute senior leaders of Democratic Kampuchea and others responsible for crimes committed during period between April 17, 1975 and January 6, 1979).

⁵⁶ See Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999, available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf (establishing an International Criminal Court).

⁵⁷ *Id.*

⁵⁸ Situations and Cases, International Criminal Court, available at <http://www.icc-cpi.int/cases.html> (last visited Sept. 10, 2008).

cases⁵⁹ as it develops as an institution but at what point is still uncertain.

The ad hoc creation of an international tribunal to address international crimes of the United States high-level civilians or military generals appears extremely unlikely as a U.N Security Council creation would be blocked by the United States or (presumably) the United Kingdom (if not other permanent members). Moreover, the United States is unwilling to extradite Americans to such international tribunals. Such international tribunals appear to be anathema to the United States.⁶⁰ Moreover, for the International Criminal Court and even putting aside questions of jurisdiction, the primary aspects of the cases that would be brought against the U.S. high-level civilians or military generals would not be with regard to international crimes inflicted on the American population on American soil – the focus

⁵⁹ Particularly when it comes to the crime of aggression to be defined (or redefined) for the Rome Statute of the International Criminal Court at the end of the decade.

⁶⁰ See American Service Members Protection Act of 2002, 22 U.S.C. §§ 7421–7433 (2002).

Members of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court, especially when they are stationed or deployed around the world to protect the vital national interests of the United States. The United States Government has an obligation to protect the members of its Armed Forces, to the maximum extent possible, against criminal prosecutions carried out by the International Criminal Court.

22 U.S.C. § 7421(8).

In addition to exposing members of the Armed Forces of the United States to the risk of international criminal prosecution, the Rome Statute creates a risk that the President and other senior elected and appointed officials of the United States Government may be prosecuted by the International Criminal Court. Particularly if the Preparatory Commission agrees on a definition of the Crime of Aggression over United States objections, senior United States officials may be at risk of criminal prosecution for national security decisions involving such matters as responding to acts of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression. No less than members of the Armed Forces of the United States, senior officials of the United States Government should be free from the risk of prosecution by the International Criminal Court, especially with respect to official actions taken by them to protect the national interests of the United States.

22 U.S.C.A. § 7421(9). Recently, the President and Congress relaxed prohibitions on military assistance to many countries adhering to the ICC statute. The authority was exercised this fall to allow resumption of military education and training programs with twenty-one ICC parties. See John R. Cook, *President and Congress End Limits on Military Training for Parties to ICC Treaty*, 101 AM. J. INT'L L. 213, 214 (2007).

of jurisdiction of the recent tribunals described above and in part the Nuremberg and Tokyo tribunals. The focus would be on international crimes that had their effects primarily on leaders and persons outside the United States – something that would require a return to a vision more like Nuremberg or Tokyo – tribunals created as an ad hoc measure by allies. It is difficult at this juncture to see how such a tribunal would be able to be created. Moreover, the International Criminal Court appears to be not yet at a stage where it would venture to address those types of crimes.⁶¹

For similar reasons to the international criminal tribunals⁶² and given its current approach to selecting cases, this subject does not concern itself with broader issues of the Interna-

⁶¹ One of the particularly interesting things about the First Chatauqua Declaration is the quote of Robert H. Jackson at Nuremberg in which he said, “We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law.” The First Chatauqua Declaration, *supra* note 32. This quote focuses on the internal aspect of Nuremberg. Our focus in this article is on essentially external crimes to the United States which would be analogized to the external to Germany aspect of the international crimes prosecuted at Nuremberg. On crimes external to Germany addressed at Nuremberg it should be noted that some of the defendants crimes covered vast areas while others were focused on a given state. As a means of highlighting the external to Germany crimes, please note the following summary for the Nazi defendants.

“Von Papen, Schacht and Fritzsche were acquitted. Goering [the Final Solution], von Ribbentrop [Czechoslovakia, Poland, and Russia and the Final Solution], Keitel [Czechoslovakia, Poland, Belgium, Holland, and other countries], Rosenberg [Norway and oppression of Jews], Kaltenbrunner [Einsatzgruppen activities and concentration camps], Frank [Poland and Jews], Frick, Streicher, Sauckel [slave-labor], Seyss-Inquart [the Netherlands], Jodl [Holland, Belgium, Norway, Poland, Greece and Yugoslavia] and Bormann were sentenced to death by hanging. Hess [Austria, Czechoslovakia and Poland], Raeder, and Funk were sentenced to life in prison, while Speer [slave labor] and von Schirach [deportation of Vienna Jews] received sentences of 20 years, von Neurath [Bohemia and Moravia] - 15 years, and Doenitz - 10 years.”

Robert H. Jackson Center, Nuremberg Timeline, http://www.roberthjackson.org/International_Law/time_capsule/ (last visited Sept. 10, 2008). See generally Defendants in the Major War Figures Trial, <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/meetthedefendants.html> (last visited Sept. 10, 2008). This is a good place to find profiles of those defendants at the Nuremberg trials. *Id.*

⁶² While this institutional analysis leads to the conclusion that we cannot expect this type of prosecution from these international tribunals, their work has important aspects for purposes of this article. What is of interest from these tribunals is their ability and commitment to prosecute high-level leader defendants. This ability helps us understand approaches to investigation and prosecution that might provide useful insights for a U.S. domestic court criminal prosecution. To that extent, U.S. prosecutors may borrow from these tribunal experiences to the extent these experiences might be relevant.

tional Criminal Court and United States resistance to its jurisdiction (including the bilateral agreements to prevent United States Citizens from being brought before that court).⁶³ This subject's primary interest with regard to the International Criminal Court is the manner in which our inquiry helps us understand the potential extent of United States complementarity with regard to these specific types of defendants.

Turning from international tribunals to domestic tribunals, this article is not about criminal prosecution of Americans in the domestic courts of other countries for alleged violations of international humanitarian law and/or international criminal law (or other local domestic law) in the War on Terrorism (Germany,⁶⁴ Italy,⁶⁵ Afghanistan, or Iraq⁶⁶ for example). These efforts might be seen as alternative approaches to criminally prosecuting the high-level civilians and generals that are at the heart of this paper, but our interest is more U.S. domestic than comparative. The whole discussion of universal jurisdiction statutes is very interesting and passionate. However, to date these foreign tribunals have either declined to criminally prosecute high-level U.S. civilians or military officers (Germany, twice) or undertaken investigations of subalterns (Italy, Sweden, or Switzerland). These domestic courts appear to be taking traditional approaches that jurisdiction is proper on territorial or passive personality grounds. As the crimes that occur in one or more of these states are committed allegedly by subordinates to those of concern in

⁶³ See Press Release, U.S. Signs 100th Article 98 Agreement (May 3, 2005), available at <http://www.state.gov/r/pa/prs/ps/2005/45573.htm> ("U.S. persons will not be surrendered to the International Criminal Court without our consent."); see also U. S. Dep't of State, Bureau of Political-Military Affairs, Fact Sheet: The International Criminal Court (Aug. 2, 2002), available at <http://www.state.gov/t/pm/rls/fs/2002/23426.htm> ("The U.S. strongly opposes the Rome Statute as seriously flawed, but will work together with other nations to avoid any disruptions that might be caused by the treaty. The treaty itself provides for this, specifically in Article 98. We intend to pursue Article 98 agreements worldwide.")

⁶⁴ A German court has opened a case with regard to the extraordinary rendition of Khaled El-Masri. *U.S. Displeased*, *supra* note 9.

⁶⁵ See Bhat, *supra* note 20 (reporting that "[a]n Italian judge has ordered 26 Americans and five Italians to stand trial for the kidnapping of a terror suspect in Milan in 2003, in what will be the first criminal court case over the CIA's extraordinary rendition programme"); see also Kirgis, *supra* note 20 (describing the legal issues surrounding the accusation that CIA agents kidnapped Hassan Mustafa Osama Nasr in Italy).

⁶⁶ See *Geren v. Omar*, 128 S. Ct. 741 (2007) (not yet assigned a docket number); see also *Munaf v. Geren*, 128 S. Ct. 741 (2007). Both cases involve U.S. citizens being detained abroad by the United States and awaiting transfer to Iraqi authorities for criminal charges against them in Iraq.

this paper, such domestic court systems appear not able or willing to go up the proverbial “chain of command,” whether for reasons of prosecutorial discretion, political, or resource constraints in investigation and evidence. With the advent of a U.S. domestic court prosecution, the tendency might be increased not to go up the chain of command precisely because of the U.S. efforts. So, in either case, overseas domestic court prosecutions appear more of interest as points of pressure on political deciders with regard to horizontal enforcement of international peremptory norms. It is possible that evidence developed in these proceedings might be of use in the U.S. domestic prosecutions here envisaged, but the hope would have to be that there was sufficient compatibility with regard to the gathering and maintaining of evidence to make this evidence gathering useful assistance.

This article is not concerned with the jurisprudence regarding prosecutions of vanquished external/internal enemies of the United States (sometimes by military commissions) for violations that approach the levels of international criminal law or international humanitarian law in the United States courts.⁶⁷ Thus, cases in which the defendants may be high-level civilians or generals that are not American but are in American domestic courts are of interest mainly to provide comparative footnotes here and there to contrast with the cases of prosecution of high-level Americans for the international crimes under discussion. We are focusing on Americans as a means of highlighting how we have and could approach ourselves.

Similar to the prosecutions of vanquished external/internal enemies for alleged violations of international law,

⁶⁷ See *In re Yamashita*, 327 U.S. 1 (1946); see also *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Ex parte Quirin*, 317 U.S. 1 (1942); see also *The Civil War Court Martial Trial of Captain Wirz* (1865), available at <http://www.law.umkc.edu/faculty/projects/ftrials/Wirz/Wirz.htm> (last viewed Feb. 6, 2008). These cases do not concern United States civilian authority or military officers, though Captian Wirz was an American who served the Confederacy as the Commandant of the Andersonville Prison during the Civil War. See *The German High Command Trial of Wilhelm Von Leeb and Thirteen Others*, United States Military Tribunal, Nuremberg (1948), http://www.law.nyu.edu/kingsburyb/fall01/intl_law/PROTECTED/Unit3/PDF/unit3_lll1highcommandcase.pdf (last viewed Feb. 6, 2008); see also *U.S. v. Wilhelm List*, Case No.7, International Military Tribunal No. V (1947), http://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php (last viewed Feb. 6, 2008); see also *The Tokyo War Crimes Trials*, the International Military Tribunal for the Far East (1948), <http://www.cnd.org/mirror/nanjing/NMTT.html> (last viewed Feb. 6, 2008). These cases concern vanquished external enemies of the United States.

this subject is not focusing on the criminal prosecution in United States domestic courts of Al-Qaeda, Taliban or other suspects (for example, Zacarias Moussaoui,⁶⁸ the Lackawanna cell,⁶⁹ John Walker Lindh,⁷⁰ and Jose Padilla⁷¹ and others⁷²). To the extent torture or cruel, inhuman or degrading treatment within the United States has happened to these defendants,⁷³ that, of course, is of interest to this inquiry. However, other than the torture aspect, these are cases in U.S. domestic fora that do not concern the kind of potential defendants that interest this discussion. As a corollary, except for evidence gathered about torture or cruel, inhuman or degrading treatment of these individuals, this paper is not about the efforts of detainees to contest their detention in the War on Terrorism through habeas corpus filings (the recent Supreme Court and other lower court cases).⁷⁴

This paper is not concerned generally with cases of foreigners or U.S. domestic corporations who have allegedly violated international law abroad and who are sued in civil cases under the Alien Tort Statute⁷⁵ or the Torture Victim Protection

⁶⁸ See, e.g., *United States v. Moussaoui*, No. 01-455-A, 2002 U.S. Dist. LEXIS 13323 (E.D. Va. July 11, 2002) (concerning part of Moussaoui's criminal proceedings in the U.S.).

⁶⁹ See Michael Powell, *No Choice But Guilty*, WASHINGTON POST, July 29, 2003, at A01, available at <http://www.washingtonpost.com/ac2/wpdyn?pagename=article&contentId=A59245-2003Jul28¬Found=true> (describing the charges brought against a Lackawanna terror cell and the pleas accepted as well as the legal backdrop in which they occurred).

⁷⁰ See *United States v. Lindh*, 198 F. Supp. 2d 739 (E.D. Va. 2002) (regarding the charges brought against the John Philip Walker Lindh, United States citizen, whose charges allege that the Defendant contributed services to al-Qaeda).

⁷¹ See *United States v. Padilla*, No. 04-6001-CR-COOKE, 2006 U.S. Dist. LEXIS 84497 (S.D. Fla. Nov. 17, 2006) (adjudicating terror charges brought against United States citizen Jose Padilla).

⁷² A compilation of terror related cases is available at <http://news.findlaw.com/legalnews/us/terrorism/cases/index.html> (last viewed Feb. 6, 2008).

⁷³ See, e.g., *United States v. Padilla*, No. 04-60001-CR-COOKE, 2007 U.S. Dist. LEXIS 26077 (S.D. Fla. Apr. 9, 2007) (denying defendant's motion to dismiss the indictment based on outrageous government conduct).

⁷⁴ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 678-79 (2006) (Thomas, J., dissenting) (noting the President's "broad constitutional authority to protect the Nation's security in the manner he deems fit"); see also *Rasul v. Bush*, 542 U.S. 470, 470-72 (2004) (contesting the legality of executive detention at Guantanamo Bay); see also *Hamdi v. Rumsfeld*, 542 U.S. 509, 509 (2004) (challenging the detention); see also *Padilla v. Rumsfeld*, 542 U.S. 426, 430 (discussing whether the President had the authority to detain Padilla); see also FindLaw Legal News: Special Coverage: War on Terror: Cases, FINDLAW, <http://news.findlaw.com/legalnews/us/terrorism/cases/index.html> (listing links to documents filed in detainee cases) (last visited Feb. 6, 2008).

⁷⁵ 28 U.S.C. § 1350 (2007).

Act⁷⁶ or some other tort statute. Nor does it concern criminal prosecutions of such persons or entities. These cases might, as with the detainee discussion above, be of interest to the extent evidence is elicited in them with regard to the international crimes and defendants of which we are concerned, but our primary interest is not in civil process but in criminal process for a select group. Corporate criminal liability or foreigner criminal liability related to torture and cruel, inhuman or degrading treatment are not considered central because, in this vision, the actions that these entities would have undertaken are only of interest as they pertain to the criminal liability of the select group of high-level civilians and military generals that we are considering as potential defendants. For similar reasons, this subject is not concerned with the prosecution of military contractors (whether through Military Extraterritorial Jurisdiction,⁷⁷ the Uniform Code of Military Justice, or in domestic federal or state criminal courts). Interest in them would be only to the extent that higher level civilians or generals were making use of them to violate international humanitarian law and/or international criminal law.

This paper does not concern international law defenses that could be raised by lower-level U.S. soldiers who might be court-martialed or prosecuted in U.S. domestic courts.⁷⁸ Lower-level soldier cases are interesting where information has been found of potential crimes that were not prosecuted (No Gun Ri in Korea, Tiger Force in Vietnam, see below) in the past for lower-level persons, or, when prosecution happened for low-level persons (Song My/My Lai or Abu Ghraib), but no prosecution was

⁷⁶ Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992).

⁷⁷ See generally Ian Kierpaul, Comment, *The Mad Scramble of Congress, Lawyers, and Law Students After Abu Ghraib: The Rush to Bring Private Military Contractors to Justice*, 39 U. TOL. L. REV. 407 (2008) (commenting on the actions of the military in Abu Ghraib).

⁷⁸ See Mike Barber, *Mistrial end Watada Court Martial*, SEATTLE POST-INTELLIGENCER, Feb. 7, 2007, available at http://seattlepi.nwsource.com/local/302733_court martial07ww.html (asserting defense of illegality in Lt. Ehren Watada's court-martial proceedings); see also Peter Boylan, It's 'Back to Square One' for Watada, Feb. 24, 2007, <http://www.thankyoult.org/content/view/1044/23> (reporting that the Army refiled the charges against Lt. Watada); see also Martha Baskin, *The Case of Lt. Ehren Watada: A 'Citizens' Hearing' on the Legality of U.S. Actions in Iraq*, YES! ONLINE, <http://www.yesmagazine.org/article.asp?ID=1619> (last visited Sept. 10, 2008) (reporting on Lt. Watada's situation).

done of higher level persons. Thus, the subject addresses criminal prosecutions of persons who are NOT U.S. high-level civilians or generals only to the extent they help shed light on the situations of U.S. high-level civilians or generals.⁷⁹

This article is not interested in courts-martial of generals for reasons unrelated to the laws of war. For example, courts-martial, demotions or retirements for conduct such as having sex with subordinates (Major General David Hale),⁸⁰ alleged homosexuality (Rear Admiral Selden G. Hooper),⁸¹ insubordination (Brigadier General William "Billy" Mitchell),⁸² diary entries on military secrets (Major General Robert Grow)⁸³ on the surface appear not to be of interest as the acts do not appear to be domestic equivalents or even echoes of what might be international crimes. It is possible that there are underlying issues concerning these persons actions and that these courts-martial were opportunities to remove someone from the service without at the same time revealing criminality of others, but it is very hard to see that type of reality being present.

Cases where U.S. high-level civilians or military generals are criminally prosecuted in U.S. domestic courts for crimes that appear closer to the international crime paradigm are of course of great interest to this study. It is hoped that this short explanation of the linkages to other types of criminal prosecutions helps the reader situate our discussion better. It should be noted that this article is not intended to be prescriptive in terms of recommendations of changes to the law or regulations etc.⁸⁴ Rather, we are focused on just how we might go about doing such prosecu-

⁷⁹ Thus, the non-court-martial of Major General Samuel Koster with regard to My Lai is of more interest than the court-martial and acquittal of Captain Ernest Medina and the court-martial of Lieutenant William Calley that are typically the subjects of command responsibility or war crimes discussion. See Victor Hansen, *What's Good for the Goose is Good for the Gander: Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own*, 42 GONZ. L. REV. 335, 392 (2006/2007).

⁸⁰ See Chris Plante, *Retired General May Face Reduced Rank in Sex Case*, CNN.com, July 14, 1999, <http://www.cnn.com/US/9907/14/army.general.sex/> (reporting how Maj. Gen. David Hale used his rank and power to coerce sex from wives of subordinates).

⁸¹ See ELIZABETH LUTES HILLMAN, DEFENDING AMERICA, MILITARY CULTURE AND THE COLD WAR COURT-MARTIAL 114 (2005) (Commenting on Admiral Hooper's situation).

⁸² See *id.* at 219 n.33 (noting Mitchell's incident).

⁸³ See *id.* (commenting on Major Grow's dismissal).

⁸⁴ There are other published articles which have called for the adoption of command responsibility. See Hansen, *supra* note 79; see also Smith III, *supra* note 24.

tions in the present state of the law.⁸⁵ Thus, we are primarily descriptive of what has been done to criminally prosecute in U.S. domestic courts, why it should be done, how should it be done, where should it be done, when should it be done and to whom should it be done.

I settled on this approach because I felt for practitioners, academics, and the ordinary citizens of our country it was important to demystify how this criminal process might occur. I also thought it would be of interest to our colleagues around the world who are concerned about how the United States is acting in the War on Terrorism. As one can see above, the task requires me to draw on domestic and international approaches to these crimes as well as domestic and international criminal law and military law issues. Constitutional, U.S. foreign relations law, and international law jurisprudence and doctrine from a wide range of sources had to be integrated to help reach the level of understanding necessary to try to make this synthesis. I consider this effort as one step in a process of bringing out more clearly how international law can and should play a role in the United States. I have emphasized the citizen's role here in bringing this out because I have been somewhat dismayed by what appears to be obfuscation at the highest levels of government and the courts about international law. Maybe these are persons who have attempted to make a virtue of their ignorance; maybe they are seeking merely to protect themselves from civil or criminal liability; or maybe they are seeking to turn a blind eye to awful things. Our task in the next sections is to shed light in a way that I hope will be of use to the reader.

⁸⁵ Thus, we are unable to take into consideration such ideas as a proposed National Security Court which has been advocated for by Glenn Sulmasy, *Momentum for a National Security Court*, JURIST, July 13, 2007, available at <http://jurist.law.pitt.edu/forumy/2007/07/momentum-for-national-security-court.php>; Glenn Sulmasy, *The National Security Court: A Natural Evolution*, JURIST, May 10, 2006, available at <http://jurist.law.pitt.edu/forumy/2006/05/national-security-court-natural.php>; Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, available at <http://www.nytimes.com/2007/07/11/opinion/11katyal.html>; Benjamin G. Davis, *Against a US Terrorists' Court*, JURIST, July 12, 2007, available at <http://jurist.law.pitt.edu/forumy/2007/07/against-us-terrorist-court.php>.

B. Relevant foreign experience with domestic court prosecutions for international crimes

As noted above, criminal prosecutions of U.S. high-level civilians or military generals under international law have never been done in U.S. domestic courts. In contrast, vindication of international law rules in other national courts as a result of war crimes and other aspects of armed conflict has occurred.

In the 20th Century,⁸⁶ after World War I, the (in)famous Leipzig trials (domestic trials) occurred as a consequence of Articles 228 to 230 of the Treaty of Versailles pursuant to which the defeated German state recognized the right of the Allied Powers to try persons accused of having committed acts in violation of the laws and customs of war and was obliged to hand over German suspects to the Allied Powers for prosecution.⁸⁷ Germany preempted the Allied Powers by authorizing the Supreme Court of the Reich at Leipzig to try individuals.⁸⁸ The Allied Powers acquiesced. The conventional wisdom is that this was an unsatisfactory experience (and the United States opposed such actions against Kaiser Wilhelm) as leaders were acquitted, given light sentences, or, when jailed, were permitted to escape.⁸⁹

After World War II 100,000 collaboration cases (preponderantly trying French for their collaboration with the Nazis) were tried in French courts.⁹⁰ It has been noted that post-World War II

⁸⁶ See Hansen, *supra* note 79, at 349, for an excellent review of the history of command responsibility from 1439 to the present; see also M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE 1-37* (1980) for a discussion of the origins of international criminal law more broadly back to circa 1280 B.C.

⁸⁷ Similar provisions were placed in the 1920 Treaty of Peace Between the Allied Powers and Turkey (Treaty of Sevres), signed at Sevres August 10, 1920, but never ratified and subsequently replaced by the Treaty of Lausanne. See LYAL S. SUNGA, *INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 22-24* (1992).

⁸⁸ *Id.*

⁸⁹ See Hansen, *supra* note 79, at 352 (citing *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report presented to the Preliminary Peace Conference, March 29, 1919, reprinted in 14 AM. J. INT'L L. 95* (1920)) (discussing how command responsibility developed); see also SUNGA, *supra* note 87, at 24 (highlighting that of the 901 cases of alleged war criminals, 888 were acquitted or summarily dismissed, 13 were convicted with inadequate sentences that were not served as they escaped (citing U.N. WAR CRIMES COMMISSION, *HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 48* (1948))).

⁹⁰ MARK A. DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW 110* (2007); see also Yale L.J. Co., *Wartime Collaborators: A Comparative Study of the Effect of Their Tri-*

proceedings occurred in three waves (1) military and civilian proceedings in the immediate aftermath of the war in Europe and the Far East; (2) civilian proceedings that resurged in a variety of jurisdictions in the 1960's with regard to Nazi atrocity; and (3) a handful of high profile cases, again with regard to Nazi atrocities, in the 1980's and 1990's.⁹¹

In Argentina⁹² and Chile,⁹³ processes for addressing international law violations in internal domestic courts have been ongoing since the 1980's. These efforts to remove immunities of high-level civilians and to proceed with prosecutions for actions in the "dirty war" are another ongoing saga by which domestic courts are seeking to address these types of crimes within a country.

In Argentina, on March 24, 1976, the army overthrew the elected democratic government, disbanded the Parliament, revoked the justices of the Supreme Court of National Justice, and put in place the Process of National Reorganization.⁹⁴ A heavy price was paid in this state of exception. In 1980, the Inter-American Commission on Human Rights of the Organization of American States issued a report in minute detail of what it called a criminal plan to combat terrorism in Argentina. After years of dictatorship, elections installing a new government, parliament, and a new formation of the Supreme Court of National Justice occurred and a new Constitution, replacing that of 1853, was approved in 1994. Dealing with the question of the equality of federal laws and treaties in Argentina, the Supreme Court of Na-

als on the Treason Law of Great Britain, Switzerland and France, 56 YALE L.J. 1210, 1226 (1947) (describing the process by which collaborators were tried in French courts).

⁹¹ DRUMBL, *supra* note 90, at 111.

⁹² For an eloquent discussion of Argentina as it relates to this topic see James Bacchus, *The Garden*, 28 FORDHAM INT'L L.J. 308, 311-14 (2005) (discussing "disappearances" in Argentina under military rule and the outrage that continues to exist over them); see also Charles H. Brower II, *Nunca Mas or Deja Vu?*, 47 VA. J. INT'L L. 525, 526-27 (2007) (comparing atrocities committed by the Argentine junta to current treatment of enemy combatants by US government).

⁹³ See MICHAEL E. TIGAR, THINKING ABOUT TERRORISM: THE THREAT TO CIVIL LIBERTIES IN A TIME OF EMERGENCY 75 (2007) (noting how initially Chilean commissions granted widespread amnesty to military leaders, but have since been undone by Chilean courts); see also U.S. Dep't of State, Hinchey Report: CIA Activities in Chile (Sept. 18, 2000), available at <http://foia.state.gov/Reports/HincheyReport.asp> (outlining the CIA's role in Chile during the 1960s and 1970s).

⁹⁴ See DELMAS-MARTY & CASSESSE, *supra* note 45, (providing the basis for this discussion).

tional Justice came to determine that the new Constitution obliged the court to (1) consider treaties superior to federal laws, (2) the provisions of the Inter-American Convention on Human Rights were self-executing (*application directe*), and (3) when deciding on matters, the judges were to conform their decisions to the interpretations of the Inter-American Court of Human Rights. This structure was hoped would help to protect the state from the return of terror as it had been in the period of the state of exception. While difficult, the incorporation of international law in the internal law of Argentina over the years that followed coupled with the discovery of an old norm of the Constitution permitted the putting in place of universal jurisdiction in Argentina against the authors of the period of the state of exception. Thus, the court systems began to address the crimes that occurred in Argentina in a manner that vindicated international law rules.

In 1970 in Chile, Salvador Allende was elected President.⁹⁵ On September 11, 1973, General Augusto Pinochet led a military coup against the Allende government and maintained control over the country for the next 17 years. Hundreds were tortured and at least 3 000 political opponents were murdered or simply “disappeared.” In 1978, the Pinochet government issued a Decree 2191 granting a general amnesty to immunize Pinochet and other government and military officials from prosecution for crimes committed between September 1973 and March 1978. In 1990, Pinochet agreed to a transition to democracy. A new government was elected which created a Truth and Reconciliation Commission that detailed 3 197 cases of murder and disappearance as well as thousands of cases of torture. Victims filed hundreds of criminal complaints against Pinochet and other members of his government. Because of that amnesty most of these cases stalled in lower courts. Efforts to prosecute Pinochet in Chile accelerated with the efforts of the Spanish authorities to have Pinochet extradited to Spain during his visit to London in 1998. The dual criminality requirement was satisfied for acts of torture after September 29, 1988, the date the United Kingdom

⁹⁵ The discussion of Chile in this paragraph is based on the excellent presentation in JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 667–688 (2d ed. 2006) [hereinafter DUNOFF ET AL. Casebook].

passed legislation giving effect to its obligations under the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment.⁹⁶ After a series of proceedings on the extradition that riveted the Chilean nation and due to Pinochet's failing health, the United Kingdom Foreign Minister Jack Straw returned Pinochet to Chile. On August 9, 2000, the Chilean Supreme Court effectively stripped Pinochet of his immunity from prosecution as those who "disappeared" were to be considered kidnap victims under Chilean law for which the crime was still continuing after the amnesty. Other claims of immunity were also struck down. In December 2006, with criminal charges still pending, Pinochet died. As with Argentina, the Chilean court system addressed crimes that had occurred in Chile, but through an artful interpretation of Chilean domestic law that still vindicated international law rules.

Potential or future transfer/referral of cases from the International Criminal Tribunal for the Former Yugoslavia to national courts in Yugoslavia (or other countries) or the International Criminal Tribunal for Rwanda to national courts in Rwanda (or other countries) are another development through which national courts are being asked to address international crimes of high-level civilians. Gacaca procedures⁹⁷ (with some trepidations about whether the international minimum standard for justice is being applied) in Rwanda are another effort. In the Republic of South Africa, in addition to the Truth and Reconciliation Commission, there have been criminal trials for apartheid era leaders for acts that as domestic crimes might be considered vindications of international law rules.⁹⁸ In Europe, state to state cases in the European Court of Human Rights have provided important jurisprudence regarding torture and cruel, inhuman or degrading treatment.⁹⁹ Israel has also been a source of decisions

⁹⁶ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

⁹⁷ Amnesty Int'l, *Rwanda: Gacaca a Question of Justice*, AI Index AFR 47/007/2002, Dec. 17, 2002, available at <http://web.amnesty.org/library/index/ENGAFR470072002>.

⁹⁸ See, e.g., Celean Jacobson, *Apartheid Era Security Minister Pleads Guilty in Murder Plot*, ASSOCIATED PRESS, Aug. 17, 2007 (commenting on former law and order Minister Adriaan Vlok's guilty plea).

⁹⁹ Republic of Ireland v. United Kingdom 2 Eur. Ct. H.R. 25 (1978), reprinted in DUNOFF ET AL. Casebook, *supra* note 95, at 457-58.

about proper treatment of persons with regard to allegations of torture, and cruel, inhuman or degrading treatment.¹⁰⁰

The particular issue with these cases for the purposes of what is seeking to be vindicated in this article is that in each of them they are, in a sense, vindicating international law norms due to a country's former leaders or high-level persons having injured persons of that country. Persons from other countries come into the discussion only to the extent the acts that were directed in the country also picked up non-citizens who were in the country (for example, a Spaniard in Chile during Pinochet). The non-citizens are a kind of collateral damage (with the important right of diplomatic protection from their home states), but the essence of the conflict appears much more internal to the individual society. Even if actions that are being reviewed occurred in other countries (Klaus Barbie (the butcher in Lyon) with regard to Vichy France, Adolf Eichmann in Israel with regard to the Holocaust, and Erich Priebke with regard to partisans in Italy), the act for which a domestic court (France, Israel, or Italy in these cases) is vindicating an international law rule is for an act done in that country or to victims from that country by nationals from abroad.¹⁰¹ The return of the national to the home country might

¹⁰⁰ See Public Committee Against Torture in Israel v. State of Israel, 38 I.L.M. 1471 (1999), reprinted in DUNOFF ET AL. Casebook, *supra* note 95, at 458–60 (commenting on proper interrogation methods); see also Shany, *supra* note 36, at 840–64 (highlighting one interesting discussion of the Public Committee Against Torture case); see also Amos N. Guiora, *Where Are Terrorists to Be Tried: A Comparative Analysis of Rights Granted to Suspected Terrorists*, 56 CATH. U. L. REV. 805, 805 (2007) (Using Israel as one source in the discussion about where to try terrorists).

¹⁰¹ Although Adolf Eichmann's crimes against humanity did not happen in Israel, the Israeli Supreme Court decision analyzing that case as to universal jurisdiction very carefully understood that concept as a rule of *forum conveniens* and noted that many victims and documentation with regard to the crime were in Israel making it a proper place for the crimes to be examined. With European Jewish emigration to Israel after World War II and the refusal of West Germany to pursue such a prosecution of Eichmann, Israel became a natural site for this criminal trial in a manner similar to the cases in France and Italy noted above. This particular idea comforts the idea of domestic courts criminally prosecuting defendants for international crimes that occurred or with victims residing in that state and not international crimes that occurred or with victims residing outside of that state. A notable recent innovation appears to be the amending of the Senegalese constitution to permit Senegalese courts to hear a case against Hissene Habre, former leader of Chad, for international crimes allegedly committed by him during his tenure as leader of Chad. See Thijs Bouwknecht, *Hissene Habre trial in sight*, INT'L JUST., July 24, 2008, <http://www.rnw.nl/internationaljustice/specials/Universal/080723-habre>; see also Lula Ahrens, *Habré trial in Senegal to go through despite death sentence in Chad*, INT'L

open the way for prosecution on the overseas event in the home country, but these again appear to be marginal aspects of an essentially internal debate within a country. It is not surprising, given this history, that the international tribunals since Nuremberg and Tokyo have followed essentially this same approach – nationals on nationals in a territory.

After Nuremberg and Tokyo, we might look to German domestic court decisions against former Nazis or Japanese domestic court decisions in the post-World War II as a possible example of those kinds of national domestic court cases that address external crimes. There were certainly numerous decisions during the occupation of Germany of military commissions regarding lower-level Nazis for their acts and in subsequent German court proceedings.¹⁰² My attention has not as of yet been pointed to such domestic court decisions in Japan. These cases appear for the most part to be cases that logically flow from Nuremberg or Tokyo – put another way, after the top ranks, lower-level spans.¹⁰³ However, given the horrendous specificity of the Nazi experience and World War II, the defeated status of Germany and Japan after World War II, the post-war international criminal tribunals that addressed high-level leaders and generals (Nuremberg and Tokyo) as opposed to the domestic courts, these experiences appear to have many elements that differ directly from what I am seeking to explore in the current American situation. I am not convinced these experiences in domestic courts would yield sufficient high-level cases to be meaningful as a comparative situation to the United States process I am describing. What they do demonstrate is – possible decades later – the willingness of these states to confront a profoundly evil past and insist on individual criminal responsibility at the lower-level. This, in itself, is extremely significant in demonstrating painfully developed political will to judge oneself.¹⁰⁴

JUST., Aug. 18, 2008, <http://www.rnw.nl/internationaljustice/specials/Universal/080818-HabreChad>

¹⁰² One exception would be the subsequent prosecution of Hans Fritzsche after Nuremberg in Germany. See Defendants in the Major War Figures Trial, *supra* note 61 (Highlighting that Fritzsche was acquitted).

¹⁰³ *Id.* (listing all of the defendants in the major war figures trial).

¹⁰⁴ I thank Professor Michael Scharf for discussing different types of tribunals at a conference at Michigan State University in 2005 that helped me to think through this problem. In fact, it appears there are difficulties at three levels in finding the comparative

In sum, when we look more directly at domestic court prosecution, with the exception of the Leipzig experience of a defeated country taking on the prosecution of former high-level leadership as part of the post-war settlement, what we tend to see is a further intensification of the focus on prior leadership crimes against nationals of the country in the territory with a few collateral injuries to foreigners who were in the way or, actions abroad to problematic citizens abroad.

As to vindicating international law rules through criminal prosecution of fellow countrymen who were high-level civilians in domestic courts, the French experience appears instructive. French domestic courts in the 1990's convicted persons for crimes against humanity (as harmonized between international law and

cases in other domestic fora to what we are seeking to do in a U.S. domestic prosecution before domestic courts. First, the cases of high-level defendants whose crimes were significant and horrendous both internally in their country and externally in other countries appear to be handled in specially constructed international tribunals and post-war occupation commissions. Nuremberg and Tokyo are examples of that type of international tribunal. The next group of cases concern high-level persons who have committed significant crimes with regard to different ethnic and/or religious groups in their own country. Here the international criminal tribunal is operating as a substitute for the domestic courts in addressing the crimes of high-level persons from this inter-ethnic conflict (whether or not the conflict has spillover effects across borders). As discussed above; examples of this would appear to be the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone.

Next, there are the special international tribunals created in states that are addressing the high-level defendants for their international crimes against the persons of that state or that occurred in that state. Here, I would list the Extraordinary Chambers in the Courts of Cambodia as an internationalized internal domestic court with key components seeking to have non-national prosecutors and judges for the cases. Next we might look at the Iraqi High Tribunal as a still less international tribunal and more of a specialized national-international law court different from the ordinary courts – prosecutors and judges are Iraqi nationals applying international law in a specialized court that is a substitute for the ordinary courts. In the current state of its referrals, one might look at the International Criminal Court as a court of the International Criminal Tribunal for the Former Yugoslavia level in that its referrals appear to mirror through an international tribunal the courts that address crimes done in inter-ethnic conflict that essentially is within a given country (Uganda, Sudan, Democratic Republic of Congo, Central African Republic) with some possible spillover to neighboring countries. At the same time, it may have pretensions and possibilities to move to the broader internal and external crimes that we associate with the Nuremberg or Japanese military tribunals in the near or not so near future. Whatever the pretensions, with the exception of Nuremberg and Japan after World War II, the cases that come out of these tribunals appear to be focused on a national leadership with regard to the treatment of nationals in a national territory with some spillover effects to the region.

domestic French law)¹⁰⁵ for actions in World War II (Klaus Barbie, Paul Touvier and Maurice Papon cases). In contrast to the Barbie (German) or Touvier (low-level member of the *milice*) cases, the case of Maurice Papon is particularly instructive as he was a high-level civil servant both during World War II and with Charles de Gaulle and successive French governments after the war. His is an example of how a state – with the assistance of the mechanism of a civil party (*partie civile*) unknown in the American system – was able to criminally prosecute such a high-level civilian for horrendous international crimes in its domestic courts.

Papon was a high-level French civil servant during World War II who acted in the German occupied part of France as secretary general of the Gironde prefecture in Bordeaux.¹⁰⁶ He escaped prosecution immediately after the war and went on to have a sterling career in the French bureaucracy under Charles de Gaulle and others being posted to very prominent positions in the civil service and being active in political circles at the highest levels.¹⁰⁷ In 1994, Papon was convicted of complicity in crimes

¹⁰⁵ DRUMBL, *supra* note 90, at 119. Barbie, the German head of the intelligence section of the Gestapo in Lyon with the task to “destroy the French Resistance,” was convicted on July 4, 1987 for crimes against humanity and was sentenced to life imprisonment. *Id.* The French Touvier was convicted on April 20, 1994 for complicity in crimes against humanity for his involvement in the killing of seven Jewish hostages during his service in the *milice*. Like Barbie, Touvier was sentenced to life in prison, but in addition “a symbolic one franc was awarded in damages upon request by civil parties.” *Id.*

¹⁰⁶ See Craig R. Whitney, *Maurice Papon, Convicted Vichy Official*, 96, *Dies*, N. Y. TIMES, Feb. 18, 2007, at B8, available at <http://www.nytimes.com/2007/02/18/world/europe/18papon.html> (describing Papon’s life).

¹⁰⁷ See *id.*

After the war, Mr. Papon rose through the bureaucracy. He became prefect of police in Paris, one of the country’s top security posts, in 1958, when divisions over how to deal with Algeria’s war for independence threatened to bring on civil war in France. After de Gaulle agreed to take power under a new French Constitution, he confirmed Mr. Papon in the key police position.

In Paris Mr. Papon again presided over police actions that would not be fully exposed until decades later, when it became clear that the forces of order had taken the law into their own hands, beating up and killing scores of Algerians in the riot-torn year of 1962, just before the colony achieved its independence.

A career in Gaullist politics followed his retirement from the civil service in 1967. It was not until 1981, when he was France’s budget minister, that he was confronted with his past. Mr. Slitinsky, whose father died in Auschwitz after being arrested by the French police in Bordeaux in 1942, had found documents showing that Mr. Papon had signed the transport order, and many more besides.

It took until 1983 for French judicial authorities to investigate and indict him, and 14 more years to bring him to trial.

against humanity for his involvement in the deportation of Jews to concentration camps during World War II.¹⁰⁸ The substantive law applied in his case appears to have been a medley of French domestic law and international law, as represented by the Nuremberg Charter and the International Military Tribunal judgments.¹⁰⁹

It would appear to me unfortunate to dismiss the Papon prosecution as just another echo of the World War II aftermath criminal prosecutions. While his 1994 conviction was for his collaboration during World War II – the nearly 40 years of service at the highest levels of the French civil service subsequent to the war and after the 1953 amnesty¹¹⁰ would appear to have demonstrated that his reputation had been rehabilitated significantly if not completely in the higher circles of French society. It was the insistent efforts by his fellow citizens whose families had suffered due to Papon's actions that countered that process of rehabilitation to finally force the case to come forward. His country found a way to prosecute him for his earlier acts, further demonstrating that even such a *commis d'état* was not above the law.

To sum up this section, to the extent we have found such apparently rare prosecutions, the foreign domestic court experience appears to be primarily focused on prosecution of high-level civilians or generals for international crimes committed against their own people in their own territory. The international criminal tribunal experience breaks into the following two groups: 1) Nuremberg and Tokyo addressing internal and external international crimes 2) the other international criminal tribunals addressing essentially internal international crimes. The domestic court prosecutions are under domestic law that might be harmonized with international criminal law.

Id. For a rich discussion of the trial, see generally RICHARD JOSEPH GOLSAN, THE PAPON AFFAIR: MEMORY AND JUSTICE ON TRIAL (Richard J. Golsan ed., Lucy B. Golsan & Richard J. Golsan trans., 2000).

¹⁰⁸ See DRUMBL, *supra* note 90, at 119 (explaining that though Papon was convicted in 1998 and sentenced to 10 years imprisonment, his sentence was suspended in 2002 when he was released from prison).

¹⁰⁹ *Id.*

¹¹⁰ The crimes against humanity were considered imprescriptible by the French courts. See Whitney, *supra* note 106, at B8. In his article Whitney touched on Vichy's conviction. *Id.*

Taking Papon and following this path, in the absence of any evidence of U.S. criminal prosecutions in domestic courts of high-level civilians or generals for violations of international law, we might look to cases in which international law rules are vindicated in U.S. domestic criminal prosecutions of U.S. high-level civilians or generals under the relevant U.S. domestic law as the relevant U.S. practice.¹¹¹ The U.S. domestic experience is the subject of the next section.

C. American experience in general

Moving the inquiry from the international law plane to a domestic law plane, there appear to be very few cases of U.S. criminal prosecution for crimes under domestic law of high-level civilians or generals that might be said to vindicate international law rules – though not necessarily applying them.¹¹² In short, criminal prosecutions for a variety of offenses occur to present or former high-level civilian authority or military generals,¹¹³ but, at least for the entire 20th century to the present, not with regard to violations of international humanitarian law or international criminal law.

In contrast, at the lower end of the spectrum in the unformed services and in civilian authority, whether in Vietnam with Lieutenant William Calley,¹¹⁴ or more recently with scandals related to Afghanistan¹¹⁵ or Abu Ghraib,¹¹⁶ - courts-martial

¹¹¹ This process seems, in some sense, reversed from the experience.

¹¹² Taking this domestic law approach is to try to interpolate from a given criminal setting a relationship with a background rule of international law that was violated and that was vindicated by the criminal prosecution. One needs a link between a high-level international norm and the criminal prosecution, even if the relationship is only tangential for this approach to be a vindication of international law. Otherwise, the cases may be more mundane domestic law cases where international law issues are not of any interest even for the relevant subset of defendants that interest us: high-level civilians or generals.

¹¹³ Famous American Trials: The My Lai Courts-Martial 1970, <http://www.law.umkc.edu/faculty/projects/ftrials/mylai/geneva.html> (listing the laws of war from the Geneva Conventions in 1949).

¹¹⁴ See *id.* (specifying the charges against Lieutenant Calley).

¹¹⁵ See Andrea Weigl, *Passaro Convicted of Assaulting Afghan*, NEWS & OBSERVER, Aug. 18, 2006, http://www.newsobserver.com/nation_world/passaro/story/476483.html (identifying the first CIA operative to be convicted for “beating an Afghan prisoner”).

¹¹⁶ See Josh White, *Army Officer is Cleared in Abu Ghraib Scandal*, WASH. POST, Jan. 10, 2008, at A06, available at <http://www.washingtonpost.com/wpdyn/content/article/2008/01/09/AR2008010903267.html> (stating that Lieutenant Colonel Steven L. Jordan was the “only Army officer charged with a crime” in the Abu Ghraib Scandal).

of some current soldiers and federal prosecutions of discharged soldiers or low level civilians (David Passaro most recently – CIA contract officer)¹¹⁷ have occurred for what could be viewed as domestic law equivalents of violations of international humanitarian law and/or international criminal law.¹¹⁸

Thus, the question arises whether there have been cases regarding generals or high-level civilians in domestic law that have targeted conduct that might - on the international plane - have been considered related to a violation of international humanitarian law and/or international criminal law. We will look first at high-level civilians (1) and then at military generals (2). We then look at what are the lessons from these cases (3).

1. High-level civilians

We can note that prosecutions of then present or then former high-level civilians in the Executive Branch close to the President, Legislative Branch or Judiciary have occurred in most every administration since the beginning of the republic.¹¹⁹ How-

¹¹⁷ See Andrea Weigl, *Passaro Jury Reaches Partial Verdict*, NEWS & OBSERVER, Aug. 17, 2006, http://www.newsobserver.com/nation_world/passaro/story/475921.html (reciting the allegations against Passaro who was charged with assaulting and inflicting serious bodily injury to one of the detainees during interrogation).

¹¹⁸ This is not to give the impression that these types of criminal prosecutions are automatic for lower level officers and soldiers. The Pulitzer prize winning series of the Toledo Blade in 2003 on the Tiger Force in Vietnam is a remarkable tale of just how war crimes could occur without anyone being punished in the military. See Michael D. Selah & Mitch Weiss, *Day 2: Inquiry Ended Without Justice*, TOLEDO BLADE, Oct. 20, 2003, <http://toledoblade.com/apps/pbcs.dll/article?AID=/99999999/SRTIGERFORCE/110200129>. Apparently, no intention of opening an investigation or prosecution of generals, however, formed part of this matter, so we speak of it only as an aside. A description of Vietnam War crimes in the context of military resister defenses is provided in D'Amato et al., *supra* note 44, at 1055–56.

¹¹⁹ See John F. Harris & Allan Lengel, *Berger will Plead Guilty to Taking Classified Paper*, WASH. POST, Apr. 1, 2005, at A01, available at <http://www.washingtonpost.com/wpdyn/articles/A16706-2005Mar31.html> (stating former National Security Advisor Sandy Berger's involvement in the destruction of classified materials); see also David Johnston, *Poindexter Wins Iran-Contra Case in Appeals Court*, N.Y. TIMES, Nov. 16, 1991, at A1, A8, available at <http://query.nytimes.com/gst/fullpage.html?res=9D0CE1DF173DF935A2575-2C1A967958260&sec=&spon=&pagewanted=all> (listing the charges against Elliott Abrams, Oliver North, Admiral Poindexter, and others in the Iran-Contra scandal); see also Carol D. Leonnig & Amy Goldstein, *Libby Loses Bid to Stay out of Jail for Appeal*, WASH. POST, June 15, 2007, at A01, available at <http://www.washingtonpost.com/wpdyn/content/article/2007/06/14/AR2007061400198.html> (explaining the involvement of Vice President Cheney's former chief of staff, Lewis "Scooter" Libby, in the Valerie Plame case); see also Bill Miller, *Cisneros Pleads Guilty to Lying to FBI Agents*, WASH. POST, Sept. 8, 1999, at A1, available at <http://www.washingtonpost.com/wpsrv/politics/special/cisneros/stories/>

ever, for high-level civilians, only seven of these prosecutions (Elliott Abrams,¹²⁰ Alan D. Fiers, Jr.,¹²¹ Clair E. George,¹²² Robert C. McFarlane,¹²³ Oliver L. North,¹²⁴ John M. Poindexter,¹²⁵ and Lewis Libby,¹²⁶ discussed *infra*) and two pre-trial pardons (Duane R. Clarridge¹²⁷ and Caspar W. Weinberger,¹²⁸ see *infra*) could be

cisneros090899.htm (noting the various transgressions of Henry Cisneros and Mike Espy in the Clinton Administration); see also Jeff Stein, *Back-stabbing, CIA Style*, SALON, Feb. 3, 2000, <http://archive.salon.com/news/feature/2000/02/03/cia/index.html> (describing ex-CIA chief John Deutch's mishandling of classified materials); see also *Paragons of Corruption*, FREEDOM MAGAZINE, <http://www.freedommag.org/english/vol27i6/page28a.htm> (last visited Feb. 7, 2008) (detailing criminal activity of former Federal Judge Alcee Hastings that ultimately led to his impeachment and removal from office); see also *Watergate Casualties and Convictions*, <http://watergate.info/casualties/> (last visited Feb. 7, 2008) (specifying the various Watergate prosecutions and convictions).

¹²⁰ See LAWRENCE E. WALSH, U. S. COURT OF APPEAL FOR THE DIST. OF COLUMBIA, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS VOLUME I: INVESTIGATIONS AND PROSECUTIONS 375, Aug. 4, 1993, available at <http://www.fas.org/irp/offdocs/walsh/> (click on the link entitled "Chapter 25" to access this information).

Elliott Abrams in January 1981 joined the Reagan Administration as an assistant secretary of state for international organization affairs and later became assistant secretary for human rights. On April 19, 1985, Secretary of State George P. Shultz offered Abrams the position of assistant secretary of state for inter-American affairs (ARA), overseeing South and Central American and Caribbean issues.

Id. Abrams is currently serving as Deputy National Security Advisor for Global Democracy Strategy.

¹²¹ Fiers was Chief of the Central Intelligence Agency's ("CIA") Central American Task Force from 1984 to 1988. He cooperated with the Office of the Independent Counsel and pleaded guilty to two misdemeanor counts of withholding information from Congress about secret efforts to aid the Nicaraguan contras. See *id.* at Ch. 19.

¹²² George was Deputy Director for Operations in the CIA from 1984 to 1987. He was indicted on ten counts of perjury, false statements and obstruction in connection with congressional and Grand Jury investigations. See *id.* at Ch. 17.

¹²³ McFarlane was the U.S. National Security Adviser from 1983 to 1985. He pleaded guilty to four misdemeanor counts of withholding information from Congress. See *id.* at Ch. 1.

¹²⁴ North was a Marine Lieutenant Colonel assigned to the National Security Council staff from 1981 until he was fired in 1986. He was indicted on 16 felony counts including aiding and abetting in the obstruction of a congressional inquiry, and destruction of documents. See *id.* at Ch. 2.

¹²⁵ Poindexter was National Security Adviser from 1985 to 1986. He was indicted on seven felony charges including conspiracy and obstruction of Congress. See *id.* at Ch. 3.

¹²⁶ Libby was the Chief of Staff to the Vice President of the United States, Dick Cheney, from 2001 to 2006. He was indicted on federal obstruction and perjury charges. See *I. Lewis Libby Jr.*, N.Y. TIMES, Feb. 7, 2008, available at <http://topics.nytimes.com/top/reference/timestopics/people/l/index.html> (follow "Libby, Lewis I. Jr." hyperlink).

¹²⁷ Clarridge was a Career CIA Officer indicted for false statements about a secret shipment of U.S. HAWK missiles to Iran. See WALSH, *supra* note 120, at Ch. 18, available at <http://www.fas.org/irp/offdocs/walsh/summpros.htm>.

tangentially related to alleged violations of international humanitarian law or international criminal law (violations of the laws of war).¹²⁹ The manner by which one gets to this conclusion is from analyzing the underlying international action related to the seven prosecutions and two pardons (the U.S. involvement in the Contra War in Nicaragua or the Iraq War) as being in violation of international law (in violation of treaty obligations, not in self-defense, and as aggressive wars). If that underlying international action is considered a violation of international law, then the domestic criminal prosecution might in some sense be seen as a vindication of that international law rule.

I fully recognize that the connection between the type of domestic conviction presented and the international law rule may appear extremely tenuous in these cases. Yet, there is an adage with regard to criminal prosecutions of high-level civilians that it is the cover-up more than the actual underlying crime that ends up being the basis for conviction. Thus, convictions for improper use of classified materials, obstruction of justice, perjury, and crimes of that nature may be the primary way to vindicate international law rules in the U.S. domestic courts in prosecutions of high-level civilians in the United States.¹³⁰ It may also be relevant to note that in all seven of the prosecution cases noted, the ultimate result was a Presidential pardon,¹³¹ or commutation of any conviction that occurred.¹³² Thus, in the end, there is an indication that Presidents are amenable to eliminating criminal convictions for the type of persons that we are seeking to examine for prosecution in this setting. In the absence of a criminal investigation¹³³ that leads to a cover-up or in the ab-

¹²⁸ Weinberger was Secretary of Defense from 1981–1987. See Caspar Willard Weinberger, COLUMBIA ENCYCLOPEDIA, (6th ed. 2007), available at <http://www.encyclopedia.com/doc/1E1-WeinbrgrCW.html>.

¹²⁹ See generally *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990); *United States v. Poindexter*, 859 F.2d 216, 217–218 (D.C. Cir. 1988); WALSH, *supra* note 120, at xxiii. It is striking that the executive clemency did not extend to the non-high-level civilians that were convicted of crimes in this matter. *Id.*

¹³⁰ Unlike the others, Poindexter was also convicted of conspiracy. See WALSH, *supra* note 120, at xxiii.

¹³¹ See *id.* (reporting the Presidential pardon in each of the seven noted cases).

¹³² See Press Release, Office of the Press Secretary, Statement by the President on Executive Clemency for Lewis Libby (July 2, 2007), available at <http://www.whitehouse.gov/news/releases/2007/07/20070702-3.html> (discussing Lewis Libby's appeals).

¹³³ The types of activities recently revealed about the Central Intelligence Agency in the "Family Jewels" suggests that many types of activities for which such operatives worried

sence of a cover-up, the evidence suggests that high-level civilians are not prosecuted in United States courts for domestic crimes that even tangentially vindicate rules of international humanitarian law and/or international criminal law.

2. Generals

Courts-martial of generals are extremely rare.¹³⁴ Anecdotal evidence suggests that the norm for general officers is, if any punishment is received, to receive nonjudicial punishment (reprimand, demotion, and/or retirement) rather than court-martial.¹³⁵ The last court-martial of a general that suggests, at least tenuously, a relation to international humanitarian law or

about the legality were simply kept classified. See The National Security Archive: The CIA's Family Jewels, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB222/index.htm> (follow the "CIA's 'Family Jewles' – full report" hyperlink) (last visited Feb. 7, 2008). The report notes that "[t]he purpose of this memorandum is to forward for your personal review summaries of activities conducted either by or under the sponsorship of the Office of Security in the past which in my opinion conflict with the provisions of the National Security Act of 1947." *Id.*

¹³⁴ For a remarkable study of the court-martial that confirms at least for the cold war period the rarity of courts-martial of generals, see ELIZABETH LUTES HILLMAN, *DEFENDING AMERICA, MILITARY CULTURE AND THE COLD WAR COURT MARTIAL* (2005). "In the twentieth century, very few American flag officers (generals or admirals) have been court-martialed. Two notable exceptions are the 1925 court-martial of Major General Billy Mitchell and the McCarthy-era court-martial of Major General Robert Grow. Charged with making diary entries about military operations that fell in the hands of Soviet intelligence agents, Grow was court-martialed in 1952, just five years before Hooper." *Id.* at 219. For a discussion on Mitchell, see MICHAEL S. SHERRY, *THE RISE OF AMERICAN AIR POWER: THE CREATION OF ARMAGEDDON 22–46* (1987); see also DOUGLAS WALLER, *A QUESTION OF LOYALTY: GEN. BILLY MITCHELL AND THE COURT-MARTIAL THAT GRIPPED THE NATION* (2004).

¹³⁵ Of 244 cases since 1999 involving unprofessional relationships, adultery, fraternization and sodomy, the majority – 89 per cent – were disposed of with non-judicial punishment. All of the 27 who ended up with a court-martial were men, mostly first lieutenants and captains." Nicole Gaudiano, *Illegal Affairs: The Service's Top Lawyer Didn't Follow His Own Rules*, A. F. TIMES, Jan. 3, 2005, at 16.

[The if any punishment is received is important as, for example, there is the case of] General Joseph W. Ralston, who withdrew his nomination to be chairman of the Joint Chiefs of Staff in 1997 after admitting he had had an affair 13 years earlier.

Ralston moved on to become the head of U.S. European Command and supreme allied commander Europe, NATO, and retired as a four-star general in March 2003. That was the same month Air Force 1st Lt. Philip Perez, a financial officer, was court-martialed at Ellsworth Air Force Base, S.D., for relationships with two women. Perez ultimately was found guilty of adultery and fraternization and conduct unbecoming. He was sentenced to dismissal. The case remains on appeal.

Id.

international criminal law was in 1902.¹³⁶ For at least for the past 100 years, none of the courts-martial of generals have been for violations of international humanitarian law or international criminal law (violations of the laws of war). It has been said that “[n]o Air Force general officer has ever been taken to court-martial for any offense.”¹³⁷ And that “[t]he leadership has a reputation of protecting its own.”¹³⁸ There is an adage in the military that there are “different spanks for different ranks.”¹³⁹ This embodies the idea that lower level non-commissioned soldiers are more likely to be court-martialed than their officer counterparts and that the lowest level of officers are more likely to be court-martialed than are the higher level officers.

With regard to generals, the case of Brigadier General Jacob H. Smith in the Spanish-American War stands out as the one court-martial of a general that has a strong relationship to rules of international law. In 1902 in the Samar campaign in the Philippines, Brigadier General Smith ordered his troops to kill all persons capable of bearing arms. When questioned as to what this meant he defined persons capable of bearing arms as all males over ten years of age. Information as to that order was revealed in the court-martial of a Lieutenant Waller who had refused to obey that order. Ultimately, Smith admitted making the order and in May of 1902, Smith faced court-martial for his order on the grounds of conduct to the prejudice of good order and military discipline. He was found guilty and sentenced to be admonished by the reviewing authority (verbal reprimand). Secretary of War Elihu Root recommended that he be retired and President Theodore Roosevelt accepted the recommendation and retired him with no further punishment.¹⁴⁰

Beyond that court-martial, another approach to this question might be to look for cases where lower level soldiers were court-martialed for related facts while their higher ups were not.

¹³⁶ See Arlington National Cemetery Website: Jacob Hurd Smith: Brigadier General, United States Army, <http://www.arlingtoncemetery.net/jhsmith.htm> (Sept. 26, 2006) [hereinafter Brigadier General Smith] (“In May of 1902, Smith faced court-martial for his orders . . .”).

¹³⁷ Nicole Gaudiano, *One-Star Faces Administrative Punishment; Female Subordinates Said General Asked To Rub Their Feet*, A. F. TIMES, Dec. 5, 2005, at 10.

¹³⁸ *Prosecuting Leaders*, A. F. TIMES, Feb. 20, 2006, at 52.

¹³⁹ Smith III, *supra* note 24, at 677.

¹⁴⁰ Brigadier General Smith, *supra* note 136.

The two principal groups of cases that come to mind would appear to be the following: (a) the investigation but absence of courts-martial of Major General Samuel W. Koster and Brigadier General George H. Young, Jr. with regard to Song My/My Lai as contrasted with the court-martial of Lieutenant William Calley and acquittal of Captain Ernest Medina;¹⁴¹ and (b) the demotion and other non-judicial discipline of Brigadier General Janis Karpinski with regard to Abu Ghraib. These cases might help make explicit the line between prosecution, retirement and demotion that affects general officers.

a. Major General Samuel W. Koster and Brigadier General George H. Young, Jr.

Following revelations of the My Lai Massacre of March 16-19, 1968, then General William Westmoreland ordered on November 26, 1969 that Lieutenant General William R. Peers explore the nature and scope of the original Army investigations of the alleged My Lai (4) incident of March 16, 1968. In his report dated March 14, 1970 ("the Peers Report"), Lieutenant General Peers listed a number of omissions and commissions by Major General Samuel W. Koster and Brigadier General George H. Young, Jr. that can be summarized as (a) failure to make such official report thereof as their duty required them to make; (b) suppressing information concerning the occurrence of such offenses acting singly or in concert with others; and (c) failure to order a thorough investigation and to insure that such was made or failure to conduct an adequate investigation, or failure to submit an adequate report of investigation, or failure to make an

¹⁴¹ See generally Jordan P. Paust, *After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971) (commenting on the United States' decision to "not seek to prosecute United States ex-servicemen who have violated the international law of war in Vietnam"); Richard A. Falk, *Son My: War Crimes and Individual Responsibility*, 3 TOL. L. REV. 21 (1971) (providing commentary on the rules of international law); Alfred P. Rubin, *Legal Aspects of the My Lai Incident*, 49 OR. L. REV. 260 (1970) (describing the My Lai incident and that the international law used to regulate conduct in times of conflict must be respected); Jordan J. Paust, *Legal Aspects of the My Lai Incident - A Response to Professor Rubin*, 50 OR. L. REV. 138 (1971) ("The purpose of this article is to provide a broader understanding of the legal questions concerning the protection of the alleged My Lai victims under the 1949 Geneva Civilian Convention."); Telford Taylor, *Nuremberg and Vietnam: Who is Responsible for War Crimes?*, War/Peace Report (1970), reprinted in 3 THE VIETNAM WAR AND INTERNATIONAL LAW (Richard A. Falk ed., 1972) (analyzing War Crimes responsibility).

adequate review of a report of investigation, as applicable. This information was forwarded to the appropriate convening authority for court-martial.¹⁴² Subsequent to that investigation, Major General Samuel W. Koster resigned from his new posting as the commandant of West Point and he was reassigned to Fort Meade. His commander at Fort Meade decided to drop all charges against Major General Samuel W. Koster for lack of evidence and because of his long service. After a public outcry about the charges being dropped, General Koster was demoted a rank to brigadier general and stripped of his Distinguished Service Medal, and a letter of censure was placed in his file.¹⁴³ With regard to Brigadier General George H. Young, Jr., he was stripped of his Distinguished Service Medal and given a letter of censure.¹⁴⁴

b. Brigadier General Janis Karpinski

After the Abu Ghraib scandal came to light and a series of investigations and reports were made, it was determined that Brigadier General Janis Karpinski, commander of the 800th Military Police Brigade and in charge of military prisons in Iraq, would be reprimanded, demoted to colonel and relieved of her duties. The U.S. military did not bring criminal charges against her.¹⁴⁵

Finally, two further cases that raise a general question about the willingness to investigate are the (c) No Gun Ri massa-

¹⁴² 1 U.S. DEP'T OF THE ARMY, REPORT OF THE DEP'T OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT: REPORT OF THE INVESTIGATION (1971), available at http://www.loc.gov/rr/frd/Military_Law/pdf/RDAR-Vol-I.pdf.

¹⁴³ Patricia Sullivan, *Samuel Koster, General Charged in My Lai Slayings*, B. GLOBE, Feb. 12, 2006, available at http://www.boston.com/news/globe/obituaries/articles/2006/02/12/samuel_koster_general_charged_in_my_lai_slayings/.

¹⁴⁴ *A Star is Lost*, TIME, May 31, 1971, available at <http://www.time.com/time/magazine/article/0,9171,944406,00.html?promoid=googlep>.

¹⁴⁵ See *Head of Abu Ghraib Prison Speaks Out*, ABCNEWS, May 12, 2005, <http://abcnews.go.com/Nightline/IraqCoverage/story?id=751870&page=1>. As to her superiors, charges against former Lieutenant General Ricardo Sanchez, Major General Barbara Fast and Major General Walter Wojdakowski were found to be without substance. See *U.S. Army Details Abuse Investigations Findings*, U.S. DEP'T OF STATE, May 6, 2005, <http://usinfo.state.gov/dhr/Archive/2005/May/09-97556.html>. Former Army Major General Geoffrey Miller who headed Guantanamo and then went to Iraq at the time of the Abu Ghraib scandal retired on July 31, 2006 and was awarded the Distinguished Service Medal. See Josh White, *General Who Ran Guantanamo Bay Retires*, WASH. POST, Aug. 1, 2006, at A06, available at <http://www.washingtonpost.com/wpdyn/content/article/2006/07/31/AR2006073101183.html>.

cre during the Korean War, for which information is only now becoming more available, and (d) the allegations of violations by the Tiger Force in Vietnam. These two cases may shed light on our structural inability in America, at different points in time, to address criminality allegedly done in service to the state by high-level civilians or generals.¹⁴⁶

c. No Gun Ri

As noted in the 2001 review of the event, during the Korean War, the villagers' account of what occurred at No Gun Ri is as follows:

The Korean villagers stated that on July 25, 1950, U.S. soldiers evacuated approximately 500 to 600 villagers from their homes in Im Gae Ri and Joo Gok Ri. The villagers said the U.S. soldiers escorted them towards the south. Later that evening, the American soldiers led the villagers near a riverbank at Ha Ga Ri and ordered them to stay there that night. During the night, the villagers witnessed a long parade of U.S. troops and vehicles moving towards Pusan.

On the morning of July 26, 1950, the villagers continued south along the Seoul-Pusan road. According to their statements, when the villagers reached the vicinity of No Gun Ri, U.S. soldiers stopped them at a roadblock and ordered the group onto the railroad tracks, where the soldiers searched them and their personal belongings. The Koreans state that, although the soldiers found no prohibited items (such as weapons or other military contraband), the soldiers ordered

¹⁴⁶ Each of these cases raises the question as to whether they are anecdotal examples or paradigmatic. I have looked back over the last 100 years with a focus on criminal prosecutions of high-level civilians or generals. Courts-martial of lower-level uniformed persons that have a potential general or above aspect have been of interest. And cases of no criminal prosecution of anyone when one would think that one should have been done to vindicate international law have also been of interest to try to understand what is occurring in this arena. One line I decided to draw in my analysis was at cases such as the firebombing of Dresden, the Tokyo Bombing, Hiroshima, and Nagasaki. Clearly there were no criminal prosecutions of high-level civilians or generals with regard to those enormously important (and controversial) events during World War II. It is possible that excluding these cases may reduce the breadth of the examples that I am seeking to understand. However, I am uneasy with trying to elucidate whether these cases are clearly or not clearly international crimes in order to take steps further towards looking at high-level responsibility. I believe making that determination is beyond the scope of my effort. That is not to belittle the importance of the discussions of these and similar events, but rather to recognize the limits I have placed on my research in order to make this a topic that I can address in a manageable manner. I might turn to those other settings in a further work.

an air attack upon the villagers via radio communications with U.S. aircraft. Shortly afterwards, planes flew over and dropped bombs and fired machine guns, killing approximately 100 villagers on the railroad tracks. Those villagers who survived sought protection in a small culvert underneath the railroad tracks. The U.S. soldiers drove the villagers out of the culvert and into the larger double tunnels nearby (this report subsequently refers to these tunnels as the "double railroad overpass"). The Koreans state that the U.S. soldiers then fired into both ends of the tunnels over a period of four days (July 26-29, 1950), resulting in approximately 300 additional deaths.¹⁴⁷

After examining the incident, the 2001 No Gun Ri review concluded that:

During late July 1950, Korean civilians were caught between withdrawing U.S. Forces and attacking enemy forces. As a result of U.S. actions during the Korean War in the last week of July 1950, Korean civilians were killed and injured in the vicinity of No Gun Ri. The U.S. Review Team did not find that the Korean deaths and injuries occurred exactly as described in the Korean account. To appraise these events, it is necessary to recall the circumstances of the period. U.S. forces on occupation duty in Japan, mostly without training for, or experience in, combat were suddenly ordered to join ROK [Republic of Korea] forces in defending against a determined assault by well-armed and well trained NKPA [North Korean People's Army] forces employing both conventional and guerilla warfare tactics. The U.S. troops had to give up position after position. In the week beginning July 25, 1950, the 1st Cavalry Division, withdrawing from Yongdong toward the Naktong River, passed through the vicinity of No Gun Ri. Earlier, roads and trails in South Korea had been choked with civilians fleeing south. Disguised NKPA soldiers had mingled with these refugees. U.S. and ROK commanders had published a policy designed to limit the threat from NKPA infiltrators, to protect U.S. forces from attacks from the rear, and to prevent civilians from interfering with the flow of supplies and troops. The ROK National Police were supposed to control and strictly limit the movements of in-

¹⁴⁷ U.S. DEP'T OF THE ARMY INSPECTOR GENERAL, NO GUN RI REVIEW i-ii (2001), *available at* <http://www.army.mil/nogunri/BookCoverJan01Summary.pdf>.

nocent refugees.

In these circumstances, especially given the fact that many of the U.S. soldiers lacked combat-experienced officers and Non-commissioned officers, some soldiers may have fired out of fear in response to a perceived enemy threat without considering the possibility that they might be firing on Korean civilians.

Neither the documentary evidence nor the U.S. veterans' statements reviewed by the U.S. Review Team support a hypothesis of deliberate killing of Korean civilians. What befell civilians in the vicinity of No Gun Ri in late July 1950 was a tragic and deeply regrettable accompaniment to a war forced upon unprepared U.S. and ROK forces.¹⁴⁸

Given the mass killing of civilians and that, low level soldiers remembered having orders to act in that manner, the review takes the view that it was not deliberate killing of civilians (a war crime) but a deeply regrettable accompaniment of war – an accident or mistake. On April 14, 2007 (six years after the 2001 No Gun Ri review) it was reported that:

Six years after declaring the U.S. killing of Korean War refugees at No Gun Ri was “not deliberate,” the Army has acknowledged it found but did not divulge that a high-level document said the U.S. military had a policy of shooting approaching civilians in South Korea.

The document, a letter from the U.S. ambassador in South Korea to the State Department in Washington, is dated the day in 1950 when U.S. troops began the No Gun Ri shootings¹⁴⁹

¹⁴⁸ *Id.* at xiv–xv.

¹⁴⁹ Charles Raney, *Shooting Refugees*, ASSOCIATED PRESS, Apr. 14, 2007, available at [http://nl.newsbank.com/nlsearch/we/Archives?p_product=APAB&p_theme=apab&p_action=search&p_maxdocs=200&s_dispstring=No%20Gun%20Ri&p_field_advanced-0=&p_text_advanced0=\(\"No%20Gun%20Ri\"\)&xcal_numdocs=20&p_perpage=10&p_](http://nl.newsbank.com/nlsearch/we/Archives?p_product=APAB&p_theme=apab&p_action=search&p_maxdocs=200&s_dispstring=No%20Gun%20Ri&p_field_advanced0=&p_text_anced0=(\)

d. Tiger Force in Vietnam

In 1967, a Tiger Force was alleged to have committed war crimes in Vietnam.¹⁵⁰ Though the Army substantiated 20 war crimes by 18 Tiger Force soldiers committed in 1967 - with numerous eyewitnesses - no charges were filed. An investigation of a U.S. unit in Vietnam reached the Pentagon and White House but no courts-martial occurred. After a four and one half year investigation the matter was not pursued in 1975.¹⁵¹

sortYMD_date:D&xcal_useweights=no. "A half-century on, the cold, matter-of-fact words leap from the typewritten page of a U.S. warship's journal: 'DeHaven received orders from the SFCP to open fire on a large group of refugee personnel located on the beach.'" *Id.* In 2000, there was much debate about the veracity of the No Gun Ri reporting that appears to be dispelled by the April 14, 2007 revelations. See *Incident at No Gun Ri*, PBS ONLINE NEWSHOUR, May 31, 2000, available at http://www.pbs.org/newshour/bb/media/jan-june00/nogunri_5-31.html; see also *No Gun Ri: Update*, PBS ONLINE NEWSHOUR, June 8, 2000, available at http://www.pbs.org/newshour/media/media_watch/nogunri_6-8.html. This late evidence of an order in the No Gun Ri setting is an eerie reminder of the paper with a handwritten order of then Secretary of Defense Donald Rumsfeld said to be hanging on a column outside a small administrative office in the detention area at Abu Ghraib. CTR. FOR CONSTITUTIONAL RIGHTS, TESTIMONY OF FORMER BRIGADIER GENERAL JANIS KARPINSKI, THE FORMER HEAD OF ABU GHRAIB, FOR THE GERMAN CRIMINAL PROCEDURE AGAINST DOD DONALD RUMSFELD AND OTHERS (2005), available at <http://ccrjustice.org/files/abu%20KarpinskiTestimony2006.pdf>. It was noted by Brigadier General Janis Karpinski that:

[t]he Sergeant showed me the one page log he was talking about. Then he pointed out a memo posted on a column just outside of their small administrative office. The memorandum was signed by the Secretary of Defense, Donald Rumsfeld, and it discussed Authorized Interrogation techniques including use of loud music and prolonged standing positions, amongst several other techniques. It was one page. It mentioned stress positions, noise and light discipline, the use of music, disrupting sleep patterns, those types of techniques. There was also a handwritten note out to the side in the same ink and in the same script as the signature of the Secretary of Defense. The notation written in the margin said "Make sure this happens!" This memorandum was a copy; a photocopy of the original, I would imagine. I thought it was unusual for an interrogation memorandum to be posted inside of a detention cell block, because interrogations were not conducted in the cell block, at least to my understanding and knowledge. Interrogations were conducted in one of the two interrogation facilities outside of the hard site.

Id.

¹⁵⁰ For more on Vietnam and War Crimes and Individual Responsibility, see Tom J. Farer et al., *Vietnam and the Nuremberg Principles: A Colloquy on War Crimes*, 5 RUTGERS-CAM. L.J. 1, 58 (1973); see also Waldemar A. Solf, *A Response to Telford Taylor's "Nuremberg and Vietnam: An American Tragedy"*, 5 AKRON L. REV. 43, 68 (1972), reprinted in 4 THE VIETNAM WAR AND INTERNATIONAL LAW, *supra* note 141.

¹⁵¹ Michael D. Sallah & Mitch Weiss, *DAY 2: Inquiry Ended without Justice: Army substantiated Numerous Charges - then Dropped Case of Vietnam War Crimes*, THE BLADE, Oct. 20, 2003, available at <http://www.toledoblade.com/apps/pbcs.dll/article?AID=/99999999/SRTIGERFORCE/110200129>.

3. Lessons from these cases – *fluit stercus*

What do we learn from these cases? From the military cases, such as General Smith, we note the general's admission that he had given the order to kill all men over the age of ten and Lieutenant Waller's refusal to obey that order. In that case, the battlefield order admitted is a clear violation of the laws of war that leads to the court-martial. One apparent lesson for high-level civilians or generals is that one should never admit the order. From the Song My/My Lai cases we note the instinct to cover up the crime that the generals demonstrated. A second lesson would be to consider "simplifying the investigation" and hold information closely. However, with the photographic evidence and external information that contradicted the official report, the result was that the generals, and, by extension, the American government's position of denial was simply untenable. A third lesson is that when one does not control the public scrutiny, one has to control the inevitable investigation. In the context of an unpopular war, some retribution was necessary, but notwithstanding the recommendations of the Peers Report, no court-martial occurred. In the case of General Karpinski's demotion, the presence of grave images that pointed out fundamental violations of the laws of war showed the failures of the command structure at Abu Ghraib. A fourth lesson is to highlight misfeasance of the general staff through which non-judicial punishment as discipline appears more appropriate rather than malfeasance where a criminal prosecution might be seen as more appropriate.

No Gun Ri and the Tiger Force cases comfort us in considering these to be the lessons. The common theme appears to be to protect internally the information, contradict the low-level "whistleblower," and, if there are investigations, delay the movement, if at all, to the next step of the prosecution of anyone. If one can keep it quiet, then there will be no prosecution up the chain of command. If an investigation is forced by the lower level persons, the investigations appear to be delayed, diverted or downgraded in priority until – at some point – they disappear.

Many might think that overall this manner of dealing with problems (maybe even a system - whether formal or informal in its operation) works well enough. The system recognizes

that mistakes/errors/atrocities/bad things occur sometimes. The match of evidence and crime are much clearer at the lower levels and so criminal prosecution for some malfeasance, if at all, is much easier to accomplish with limited prosecutorial resources. Something becoming public may change the calculus somewhat, but accountability is provided through low-level criminal prosecution and higher-level demotion, retirement, etc. for misfeasance. On the whole, the essential method for dealing with these matters is in the political arena (change those who are in office or bring in a new team). If there are criminal prosecutions, low-level persons may be charged, but the high-level persons need only to change behavior or be retired and new ones brought in to do the task correctly. The approach takes into account the fundamental reality that the high-level persons may have significant tenure in the uniformed service (they are, by definition, good soldiers to get where they are) or the high-level civilians have demonstrated the right attributes (loyalty, competence, etc.) that those with prosecutorial discretion hesitate (or are not encouraged by their higher-ups) to pursue through the criminal prosecution path. This approach may amount to different spansks for different ranks, or more prosaically, (and as known to every military person I have met) “shit rolls down hill” or *fluit stercus*.

But, the weakness of this method is that when the central figures are the high-level civilians or military generals, the method does not really grapple with the criminality of their acts. The method gives the higher-level civilian or military generals a form of absolution when they may well have been the cause of the criminal act.¹⁵² The criminal taint on the lower-level persons leaves an impression that they were “rotten apples” when they are in fact following a course of conduct that may very well have been dictated by their superiors. These same superiors are permitted to not face a risk of deprivation of liberty for their criminal act. While this is convenient for the higher-level persons, it seems that it confuses the issue as to the underlying situation. Misfeasance at lower levels subject to discipline may or may not be the result of misfeasance at higher levels that should also be disciplined. Malfeasance that leads to criminal charges at lower-

¹⁵² See S. G. MEŠTROVIĆ, *THE TRIALS OF ABU GHRAIB* (2007), for a sociological look at this phenomenon.

levels may be the result of misfeasance at the higher-levels, but it may also be due to malfeasance at the higher levels also. That type of malfeasance at higher-levels is rarely, if at all, captured in a manner that is consistent with criminal sanction in these settings where we are attempting to vindicate international law rules.

Even when there is a court-martial of the kind that happened to General Smith or convictions such as happened in the Iran-Contra or Iraqgate cases, the light penalty for Smith (retirement) is a *defacto* pardon, and the Presidential pardons in the Iran-Contra or Iraqgate setting a *dejure* pardon of the malfeasance by the principal actor that may have instigated the actions of the higher-level persons. The political will to seek criminal prosecution as a result of the publicity that surrounds these exercises puts some pressure on the Executive to take action against the high-level civilians or generals, but the examples above suggest a clear hesitancy on the part of the Executive to examine in depth the roles of the higher-level persons. It is a *defacto* kind of absolution.

This type of *defacto* absolution may extend to the lower level persons. For example, in the No Gun Ri, Tiger Force, and Family Jewels settings, criminal prosecutions did not occur for the lower-level persons. To the extent what happened could be portrayed as a mistake or overzealousness, an effort succeeds at minimizing what has occurred. Someone who comes to this culture as a reservist might not appreciate the subtleties of what is expected, but those who are fulltime for an extended period in this setting would understand that promotion and success is not encouraged by calling to account high-level civilians or military generals above one's grade when crimes occur as a result of what the high-level persons put in place.

I am struck how, in this system, the high-level civilians or generals which may have caused the criminality operate in a manner similar to what has been termed "thanatophores."¹⁵³ Thanatophore is a psychological construct to describe persons in organizations who create and fan pathological behavior.¹⁵⁴ Tha-

¹⁵³ Emmanuel Diet, *Le Thanatophore. Travail de la mort et destructivité dans les institutions*, in SOUFFRANCE ET PSYCHOPATHOLOGIE DES LIENS INSTITUTIONNELS: ÉLÉMENTS DE LA PRATIQUE PSYCHANALYTIQUE EN INSTITUTION (René Kaës et al. eds., 1996).

¹⁵⁴ *Id.*

natophores introduce a form of fear of death in the organization that moves beyond normal concerns to dysfunctionality.¹⁵⁵ By having their actions, even when they are malfeasance, masked at most as misfeasance, if anything at all, one senses that high-level civilians or generals appear to have a reduced concern with downside consequences for risky behaviors. Or, maybe to put it another way, the hydraulic pressures on these persons make them more susceptible to participating in risky behaviors. Maintaining perspective on what one was doing would be difficult in this setting particularly when there is a pressure of an incessant nature.¹⁵⁶ The battle between personal ethical concerns and the pressures on the high-level civilians or generals may be terribly difficult on a personal level.

But while one may have great sympathy for the positions of these persons, the key is that they have voluntarily assumed/sought these positions of responsibility. And, to the extent that they create/reproduce behaviors that are criminal as a matter of international law, they are placing the United States in breach of its international obligations. Masking as misfeasance may solve their personal concerns, but they do not address the impact that their acts have on the United States' international obligations and duties. Moreover, the lower-level persons find themselves in a terribly difficult situation where they fear being "thrown under the bus" if a public outcry occurs. This reality places pressure on those low-level persons to surround themselves with legal counsel in order to protect themselves from criminal prosecution down the road. Leaving aside personal ethics and revulsion, this lower-level reaction leads to a diversion of personal and organizational resources into a form of preemptive self-defense by responding with lawyers to potential illegality coming from above. But that response is only possible with those with the wherewithal to commandeer such resources. In the ab-

¹⁵⁵ See *id.* I do find the thanatophore construct from organizational design theory is a powerful idea to help explicit organizations dysfunctionality; I have examined this phenomenon in the setting of international commercial arbitration in a previous article. See Benjamin G. Davis, *The Color Line in International Commercial Arbitration: An American Perspective*, 14 AM. REV. INT'L ARB. 461 (2004).

¹⁵⁶ See JACK L. GOLDSMITH, *THE TERROR PRESIDENCY* (2007) (describing the difficult situation that high-level civilians face when balancing personal ethical concerns against pressure from above).

sence of such ability to commandeer such resources, the lower-level person is left to his or her own devices.

In the next section we discuss why *fluit stercus* should be changed to “make shit roll uphill” or *refluat stercus* with regard to at least torture and cruel, inhuman and/or degrading treatment in the War on Terrorism.

PART II. WHY *REFLUAT STERCUS*? OR WHY IT SHOULD BE DONE?

A. General discussion

Since 9/11, U.S. constitutional, U.S. foreign relations law, and U.S. international law scholars have opined about torture and cruel, inhuman and degrading treatment, as well as other aspects of the War on Terrorism.¹⁵⁷ In government, famous memos have been written (some or maybe many still classified) in which lawyers in the Department of State, Department of Justice, Department of Defense and the Intelligence Services have opined on the subject.¹⁵⁸ Executive Orders on the subject have been carefully drafted with brilliant legal assistance. Closed and open hearings have been held in Congress with regard to allegations of this type of treatment. Military commissions have been presented with allegations by detainees of ill-treatment that we can only see in redacted form. Civil cases have been brought against high-level government types on behalf of present or former detainees with regard to their treatment in places of detention by the United States or in the extraordinary rendition system of a virtual moving gulag. Medical associations have passed divergent resolutions about the topic. A President and Presidential candidates and media have opined in various ways about the merits of torture and cruel, inhuman and/or degrading treatment, as well as “enhanced interrogation techniques.” Laws have been passed in Congress and signed by the President (with signing statements) in which efforts are made to define what is prohibited “now,” which is narrower than what was prohibited as

¹⁵⁷ See sources cited *infra* note 276.

¹⁵⁸ See generally KAREN J. GREENBERG & JOSHUA L. DRATEL, *THE TORTURE PAPERS* (2005) (containing memos and reports that demonstrate the U.S. Government's attempt to authorize the way for torture techniques and coercive interrogation practices).

the law stood before 9/11. I would like to call this panoply the internal U.S. foreign relations law vision.

External to these American processes, the U.N. Committee Against Torture has heard evidence presented by the United States about its practices in the War on Terrorism. A committee of the European Parliament has investigated at length the United States' extraordinary rendition scheme. Some foreign prosecutors have looked into and, in some cases, begun the process of investigating and prosecuting persons for alleged illegal acts done in their countries by American operatives. High-level American civilians have been dispatched to the capitals of the world to address and hopefully mollify concerns of leaders of other states. Apologies to the leaders may be given when errors occur, but not to the detainee who was maltreated. I would like to call this panoply the external international vision.

In the internal U.S. foreign relations law vision, commentators are skeptical about the possibility of prosecutions of high-level civilians (and by extension military generals) for these crimes.¹⁵⁹ More generally, the difficulty of prosecution by one part of the Executive Branch of persons of another part of the Executive Branch, who by definition are close to the President, for these types of war crimes is a structural hurdle.¹⁶⁰ As to high-level civilians, whether one is a believer in a unitary executive or otherwise, in the absence of a special counsel, U.S. attorneys serve at the pleasure of the President, it appears that any U.S. attorney might hesitate to prosecute a high-level civilian who, if still serving or having recently served, may in all likelihood please the President. Also, the President's plenary power to pardon might dissuade prosecutors from devoting scarce resources to the prosecution of such high-level civilians or generals.

Even if a criminal prosecution were sought to be mounted, a second hurdle might be concerns with how the relevant law applies. For example, changes in the law as a result of the Military

¹⁵⁹ See Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 368 (2007) ("To Yoo and Bybee, the prospect of a domestic investigation, let alone prosecution, is probably too remote to consider.").

¹⁶⁰ Of course, prosecutions of high-level civilians in other branches of government do occur, so we might also look beyond the Executive Branch at other high-level civilians in Congress or the Executive to see how prosecution might occur with regard to them. See *infra* Part VI concerning high-level Congress or Judiciary defendants.

Commissions Act of 2006,¹⁶¹ the Detainee Treatment Act of 2005,¹⁶² and the Defense Authorization Acts of 2005 and 2006¹⁶³ might appear to make a prosecution more difficult.¹⁶⁴ In addition, there are issues related to the federal officer immunity doctrine, the public authority defense, state secrets privilege, and political question doctrine that might make the prosecution a thorny process for even an intrepid prosecutor.

In the court-martial setting, there may be structural impediments or difficulties to convene a court-martial for such high-level persons. The convening authority is supposed to be a uniformed person above the potential defendant. As one moves up in the level of generals, the number of potential convenors of a court-martial for a general are reduced. While we prefer to stay with the state of the law as it is for this inquiry to see how to operate in this setting, we must also recognize that proposals have

¹⁶¹ 10 U.S.C. §§ 948(a)–(e) (2006).

¹⁶² 42 U.S.C. § 2000dd-1(a) (West 2006).

¹⁶³ See Ronald W. Reagan National Defense Authorization Act For Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (2004); see also National Defense Authorization Act For Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136 (2006).

¹⁶⁴ Posting of Marty Lederman to Balkinization blog, <http://balkin.blogspot.com/2006/08/cia-cruelty-authorization-act-of-2006.html> (Aug. 14, 2006, 15:11 EST).

I don't think so. To the extent officials violated the standards of Common Article 3 with respect to Al Qaeda prior to June 29, 2006 (the date of *Hamdan*), they could not be prosecuted for such violations of CA3 (as incorporated in the War Crimes Act), even without the Administration's amendment, because the President had determined that CA3 does not apply to the conflict with Al Qaeda, and due process would prevent any prosecutions for conduct undertaken in reasonable reliance on that presidential determination. (Regardless of what one thinks of the merits of the Common Article 3 question, the reliance would be deemed reasonable, since the legal conclusion was adopted by the President and affirmed by four Supreme Court Justices [Correction -- That should be three Justices: Justice Alito did not join that part of Justice Thomas's dissenting opinion.] And even if you disagree with me on that due process question, trust me: No Justice Department, not even in the most anti-Bush Administration imaginable, would ever prosecute someone for violation of a law that the President had determined was inapplicable.)

This is *not* to say that such persons could not be prosecuted under some other law -- say, for violation of the UCMJ, or the assault or torture statutes, or even other parts of the War Crimes Act. But the Administration's proposal (at least the version we've seen so far) would not affect those other statutes or provide immunity for past violations of them. It would only affect Common Article 3 violations of the War Crimes Act -- and prosecution for those violations would be impossible and inconceivable, anyway.

So, it's not really (or primarily) about "immunity" for *past* conduct; it is, instead, about immunity for *future* cruel treatment and torture.

Id.

been made with regard to the Uniform Code of Military Justice to address perceived problems in the operation of the court-martial at the higher levels.¹⁶⁵

Moreover, the tendency not to proceed down the court-martial route for generals described in the previous section makes such criminal prosecutions more unlikely as it stands today. Consistent with the idea of keeping concerns about malfeasance at the lowest level, even with regard to the investigation of the alleged crimes, the mechanisms in place may be of such a nature as to be easily diverted (inspector generals and criminal investigations) due to intra-department/branch and/or inter-department/branch culture or collusion to keep focus away from the higher level civilians and/or generals. There is also the residual concern that these high-level civilians and generals are by definition, "good soldiers," and if the crimes they commit violate international humanitarian law or international criminal law, they may have been done with great patriotism and at the request of still higher-ups.

Those in favor of prosecutions note concerns, alleging deficiencies in the law. Those deficiencies in the law for senior commanders are said to have serious consequences for the military.¹⁶⁶ The concerns are that there may be: (1) a perception, and a reality, that military members are treated inequitably, which undermines discipline; (2) a difficulty for commanders and other senior leaders to conform their conduct and the conduct of their subordinates to the requirements of the law; and (3) a difficulty for officers to place the proper emphasis on law of war compliance.¹⁶⁷ In addition, on the international plane, failures in this regard: (1) adversely affect the United States' credibility and effectiveness on the world stage; and (2) cut to the very essence of a military organization having provided commanders the authority to execute their duties without affixing appropriate responsibility on them when their command failures contribute to violations of the laws of war.¹⁶⁸ A space between U.S. domestic law standards

¹⁶⁵ See Hansen, *supra* note 79 (proposing a standard of command responsibility); see also Smith III, *supra* note 24, at 71 (exploring "what, if any, changes can be made to the Uniform Code of Military Justice").

¹⁶⁶ Hansen, *supra* note 79, at 344.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

and international law standards is a further source of concern, as we are treating ourselves differently from those upon whom we seek to have the law enforced overseas (different folks get different strokes).¹⁶⁹

Given the lack of prosecution of high-level civilians and military generals, the United States' aggressive efforts to be excluded from the international criminal jurisdiction of entities such as the International Criminal Court by unsigning the Statute and entering Article 98 agreements, the United States' unwillingness to turn over Americans to foreign authorities for criminal prosecution in other countries,¹⁷⁰ and the prosecution of

¹⁶⁹ Even concerns about the manner in which the international law standard operates itself might be noted. Compare Anthony D'Amato, *Superior Orders vs. Command Responsibility*, 80 AM. J. INT'L L. 604, 604 (1986) (commenting on the conceptual paradox of a military commander being held responsible for an order that his subordinate was legally required to ignore), with Howard S. Levie, *Some Comments on Professor D'Amato's "Paradox"*, 80 AM. J. INT'L L. 608, 608 (1986) (stating that Professor Levie's arguments do not have merit).

¹⁷⁰ See Press Statement, U.S. Dep't of State, U.S. Signs 100th Article 98 Agreement (May 3, 2005), available at <http://www.state.gov/r/pa/prs/ps/2005/45573.htm>. It states "that U.S. persons will not be surrendered to the International Criminal Court without [the United States'] consent". See Fact Sheet, U.S. Dep't of State, The International Criminal Court (2002), <http://www.state.gov/t/pm/rls/fs/23426.htm>. It also demonstrates the United States' unwillingness by stating that "the U.S. strongly opposes the Rome statute as seriously flawed, but will work together with other nations to avoid any disruptions that might be caused by the treaty. The treaty itself provides for this, specifically in Article 98. We intend to pursue Article 98 agreements worldwide." See American Servicemembers' Protection Act of 2002, 22 U.S.C. §§ 7421-7433 (2000 & Supp. II 2003). 22 U.S.C. § 7421(8) states the following:

Members of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court, especially when they are stationed or deployed around the world to protect the vital national interests of the United States. The United States Government has an obligation to protect the members of its Armed Forces, to the maximum extent possible, against criminal prosecutions carried out by the International Criminal Court.

22 U.S.C. § 7421 (9) states:

In addition to exposing members of the Armed Forces of the United States to the risk of international criminal prosecution, the Rome Statute creates a risk that the President and other senior elected and appointed officials of the United States Government may be prosecuted by the International Criminal Court. Particularly if the Preparatory Commission agrees on a definition of the Crime of Aggression over United States objections, senior United States officials may be at risk of criminal prosecution for national security decisions involving such matters as responding to acts of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression. No less than members of the Armed Forces of the United States, senior officials of the United States Government should be free from the risk of prosecution by the International Criminal Court, especially with respect to official actions taken by them to protect the national in-

low level military persons for acts that appear to have been policy cause some unease. In particular, the prosecution of lower level persons to the exclusion of higher-level persons who most likely ordered the lower level actions might appear profoundly unfair, but also be the best (or optimal) we can do. The hope is that by redefining the law and better training, the result will be that corrections by errant persons will be made over time. For the enhanced interrogation techniques, very sophisticated processes of authorization and determination of techniques are put in place to professionalize any interrogation and make sure it occurs within strict guidelines governed by "brilliant" exegesis on what is torture, what is cruel, inhuman and/or degrading treatment, and "what is permitted where" in the world by the United States or by its allies.

More direct proponents of torture and cruel, inhuman and degrading treatment argue it is a tool needed in the arsenal of self-defense of the United States. They explain the benefits of the enhanced interrogation techniques in helping the U.S. get actionable intelligence that has saved American lives. Proposals for integrating court supervision of detention and interrogation regimes (torture warrants) are posited as reasonable ideas as we address the tradeoffs between liberty and security in a world that is said to have fundamentally changed on 9/11.¹⁷¹ Moral arguments are met with utilitarian calculus. Legal arguments with regard to statute and treaty law are analyzed in a purely intra-American echo chamber with the trump card always seeming to be the Presidential Constitutional Power as Commander-in-Chief. International law is looked to only to the extent it can be "properly" interpreted to concord with the views posited.

terests of the United States.

Recently, the President and Congress relaxed prohibitions on military assistance to many countries adhering to the ICC statute. The authority was exercised this fall "to allow resumption of military education and training programs with twenty-one ICC parties." John R. Crook, *President and Congress End Limits on Military Training for Parties to ICC Treaty*, 101 AM. J. INT'L L. 213, 214 (2007).

¹⁷¹ A fascinating discussion of the idea of 9/11 is presented in *Le «concept» du 11 Septembre, Dialogues à New York*. GIOVANNA BORRADORI, JACQUES DERRIDA & JÜRGEN HABERMAS, *LE «CONCEPT» DU 11 SEPTEMBRE, DIALOGUES A NEW YORK* (2004). This French language translation of *Philosophy in a Time of Terror: Dialogues With Jürgen Habermas and Jacques Derrida* (2003) provides very interesting meditations on the meaning of 9/11 as a philosophical matter.

Criminal prosecution of high-level civilians and military generals is a manner of aggressive internal resistance to the illegal acts alleged committed by such persons. The focus on aggressive resistance is made to maintain the illegitimacy of such acts by denying the said actors any acquiescence that might legitimize their path of operation. This type of resistance to illegality is an internal United States mechanism for enforcing the international norm.

In this next section, prior to engaging directly with the debate described above, I prefer to anchor my thinking in first principles of treaty and customary international law. The reason is that debates within a state, particularly the United States, appear to be made based on the law within that state. Our familiarity with international law in those debates is a subject of great concern as frequently what is in fact being discussed is U.S. foreign relations law and not international law. Thus, rules of interpretation that are perfectly valid within the United States that derive from constitutional or statutory methodologies developed over the years may inform a given internal argument and be persuasive as far as they go.¹⁷² However important, they are merely internal ruminations in one state. How these ideas refract through that one country is of less interest than how these ideas refract in the domain of concern – international law, not U.S. foreign relations law. By starting from first principles in international law I hope that I can give some meaning that has validity for ourselves as well as other states that are also subject to international obligations on the international plane. To stay in the U.S. foreign relations law vision risks focusing too much on an approach that would be, at a minimum, covering one state, and at a maximum, comparative but not international.

Following the approach described above in this section and looking for the positive law that should help understand the rumination in the rich discussion described above within the

¹⁷² A classic example is the United States' efforts to reinterpret the Treaty on the Limitation of Anti-Ballistic Missile Systems, during the Reagan Administration in 1983–1985, and subsequently with the Bush Administration withdrawal in December 2001 and agreement to the Treaty on Strategic Offensive Reductions of 2002. See DUNOFF ET AL. Casebook, *supra* note 95, at 35. See generally Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., May 26, 1972, 23 U.S.T. 3435; see also Treaty on Strategic Offensive Reductions of 2002, U.S.-Russ., May 24, 2002, 41 I.L.M. 799.

United States, I first draw the attention to the international law obligations of the United States with regard to torture and cruel, inhuman and/or degrading treatment. Next, I look at those obligations in light of the doctrine of "*pacta sunt servanda*" and the doctrine of the inability of internal law extracting a state from its international law obligations.

B. First principles: International law obligations of the United States with regard to torture and cruel, inhuman and degrading treatment.

Many have written about the treaty and customary international law obligations of the United States in this area and its apparent complexity and nuances may be daunting to both the initiated and the uninitiated.¹⁷³ However, we are fortunate to live at a time when an effort of great significance has recently occurred in which foreign relations law and international law scholars from around the world attempted to synthesize the obligations of each nation with regard to the use of armed force and the treatment of detainees. The subject of intense debate over a three month period, the American Society of International Law Centennial Resolution on the Use of Force and Treatment of Detainees ("ASIL Centennial Resolution") was overwhelmingly adopted by the American Society of International Law at its Centennial annual meeting (and also its largest annual meeting in history with 1600 in attendance) on March 30, 2006.

This adoption of a resolution was only the eighth time in the 100 year history of the institution in which such a resolution was passed. Pursuant to Article IX of the Constitution of the Society¹⁷⁴ and a policy statement of the Executive Council adopted

¹⁷³ See generally Paust, *supra* note 27; Mary Ellen O'Connell, *The ASIL Centennial Annual Meeting Adopts a Resolution on the Use of Armed Force and the Treatment of Detainees*, ASIL INSIGHTS, May 19, 2006, <http://www.asil.org/insights/2006/05/insights060519.html>; A. John Radsan, *The Collision Between Common Article Three and the Central Intelligence Agency*, 56 CATH. U. L. REV. 959 (2007); Davis, *supra* note 26. All of the above articles comment on the United States international law obligations.

¹⁷⁴ *Constitution of the American Society of International Law*, ASIL, Mar. 29, 2007, available at <http://www.asil.org/pdfs/ASILConstitution-Regulations.pdf>. Article IX states:

All resolutions relating to the principles of international law or to international relations which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members, be referred to the appropriate committee or the Council, and no vote shall be taken until a re-

in April 1966, there is a reason why such resolutions are rare. Under the policy statement,

The Council in the future will recommend that the Society adopt resolutions urging action by persons outside the Society in only two types of circumstances:

(i) Resolutions relating to technical matters primarily of professional interest to international lawyers and scholars.(note: not of concern to this discussion)

(ii) Resolutions relating to principles of international law or international relations, when all of the following conditions have been satisfied:

(a) The matter is one which is generally considered by members of the Council to involve a matter of truly fundamental importance in promoting the establishment and maintenance of international relations on the basis of law and justice.

(b) The matter is one in respect of which most members of the Society can reasonably be expected to be informed without the preparation of a special committee report.

(c) There is no significant disagreement within the Society as to the desirability of the proposed action.¹⁷⁵

The three criteria of (1) fundamental importance, (2) reasonable information of the diverse members from around the world, and (3) where there is no significant disagreement as to the desirability of the proposed action represent extremely high hurdles to the passage of any resolution. Notwithstanding those high hurdles, the ASIL Centennial Resolution was adopted without dissent as to the content of the resolution and only minimal dissent as to the opportunity of adopting such a resolution. As

port shall have been made thereon. Resolutions may be submitted for consideration by the Executive Council in advance of any meeting of the Society by depositing them with the Executive Director not less than 15 days prior to the meeting.

Id.

¹⁷⁵ Jose E. Alvarez, *Lessons from a Resolution*, PRESIDENT'S COLUMN, May 18, 2006, available at <http://www.asil.org/ilpost/president/pres060518.html>.

the process was described by Jose E. Alvarez, President of the American Society of International Law:

Like many Society members, I learned a great deal from the ASIL forum in which the Ben Davis (and subsequent draft) resolutions were debated. Thanks to the world-wide web, it is now possible to gather – nearly instantaneously – the reactions of many across the planet. The responses that I read resonated with the many discussions that I have had since 9/11 in my travels as President-Elect and previously, as a member of the Society. It became clear to me that some version of the Davis resolution ought to be adopted, not only because the vast majority of our members expected it, but also because the world – including our fellow societies of international law – were also sitting in judgment. On this occasion – when the actions of many governments, including our own, seemed to be testing not only the existence but the value of the most fundamental precepts of international law, including the foundational instruments of the post-war world order – it seemed to me that the Society could best “raise awareness of both the existence and the value of international law” (in [former ASIL President Anne-Marie] Slaughter’s words) by adopting a resolution that affirmed that such instruments remain legally binding and in the national interest. (A particularly galvanizing moment came during the General Meeting when no one responded to the challenge presented by two supporters of the resolution who asked for those who disagreed with its *contents* to indicate their disagreement.) The Society needs to protect its legitimacy as a Society that stands *for* international law and adopting the rare resolution on matters of truly fundamental importance may be essential in this respect.¹⁷⁶

On March 30, 2006 then, a broad consensus was reached on rules of international law by a group that included many, if not all of the greatest publicists of this generation on concerns that are central to the subject of this article.

¹⁷⁶ *Id.*

For purposes of finding the international law that underpins this article we may start with the synthesis of rules of the ASIL Centennial Resolution which states:

The American Society of International Law, at its centennial annual meeting in Washington, DC, on March 30, 2006, Resolves:

1. Resort to armed force is governed by the Charter of the United Nations and other international law (*jus ad bellum*).
2. Conduct of armed conflict and occupation is governed by the Geneva Conventions of August 12, 1949, and other international law (*jus in bello*).
3. Torture and cruel, inhuman, or degrading treatment of any person in the custody or control of a state are prohibited by international law from which no derogation is permitted.
4. Prolonged, secret, incommunicado detention of any person in the custody or control of a state is prohibited by international law.
5. Standards of international law regarding treatment of persons extend to all branches of national governments, to their agents, and to all combatant forces.
6. In some circumstances, commanders (both military and civilian) are personally responsible under international law for the acts of their subordinates.
7. All states should maintain security and liberty in a manner consistent with their international law obligations.¹⁷⁷

Of particular relevance for this article are points 2 through 5 which (1) reaffirm the applicability of the Geneva Conventions but mention also other international law (both treaty and customary international law applicable as international hu-

¹⁷⁷ *Resolution Adopted*, ASIL, Mar. 30, 2006, <http://www.asil.org/events/am06/resolutions.html>.

manitarian law), (2) confirm that torture and cruel, inhuman, or degrading treatment of any person in the custody or control of a state is prohibited by international law, (3) remind all of the contours of the ban on prolonged, secret, incommunicado detention, (4) remind that these international law obligations fall upon a state not just some subdivisions, and, most significantly for this work, (5) highlight individual personal responsibility for commanders (both military and civilian) for the acts of their subordinates. Subsequent to the adoption of the article, an ASIL Insight was prepared by a very distinguished scholar of the law of armed force which explicated the reasoning of the resolution.¹⁷⁸ Professor Mary Ellen O'Connell has explained clearly the relevant international law in her Insight which is annexed to this article (Annex 1) that underpins the ASIL Centennial Resolution. Her analysis as regards the American international obligations is comforted by the work of others,¹⁷⁹ including the decision of the U.S. Supreme Court in *Hamdan*.¹⁸⁰

My task is to focus on two points regarding those international obligations as they relate to the United States – “*pacta sunt servanda*” and “internal law affect on international obligations”

C. First principles: “pacta sunt servanda”

I have been drawn to two of the articles of the authoritative (as treaty or customary international law) Vienna Convention on the Law of Treaties With regard to the United States treaty obligations. First, *Article 26 “Pacta sunt servanda”* states that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”¹⁸¹ Under this provision, the question that continually arises for me with regard to international obligations of the United States with regard to torture and cruel, inhuman or degrading treatment is whether the arguments made over recent years to attempt to extract ourselves from the obligations on all states described by the ASIL

¹⁷⁸ O'Connell, *supra* note 173.

¹⁷⁹ See Paust 3, *supra* note 27; see also Paust 1, *supra* note 27; see also Paust 2, *supra* note 27. All of Professor Paust's three articles echo Mary Ellen O'Connell's work.

¹⁸⁰ 548 U.S. 557 (2006).

¹⁸¹ Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

Centennial Resolution under both treaty and customary international law comport with compliance with our treaty obligations in good faith – including those sections that are considered customary international law such as Common Article 3 of the Geneva Conventions. Independent of any moral arguments that one might seek to make, the “*pacta sunt servanda*” language requires us to look at the arguments that attempt to limit the United States’ obligations to less than those of other states and ask which arguments applied in the War on Terrorism as regards torture and cruel, inhuman or degrading treatment comport with good faith. Those who focus on internal law in critiques of particularly customary international law¹⁸² intentionally disregard the point that it is a settled fact across nations that treaties and customary international law form parts of international law that are binding on states, including the United States. Put more bluntly, international law is an obligation of the United States (as on all other states) whether as a matter of internal law it is considered federal or state law.

The “*pacta sunt servanda*” codified in the Vienna Convention on the Law of Treaties reflects a fundamental rule, but it is not the only one that I have found of assistance in thinking through this issue.

D. First principles: inability of internal law extracting a state from its external law obligations

The second rule is *Article 27 - Internal law and observance of treaties* which states that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”¹⁸³ This second long established rule codified in the Vien-

¹⁸² See John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN L. REV. 1175 (2007) (commenting on the interplay between domestic law and international law).

¹⁸³ See Vienna Convention, *supra* note 181, at art. 27. The article goes on to say, “[t]his rule is without prejudice to article 46.” *Id.* Article 46 refers to internal rules with regard to consent to be bound and states,

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good

na Convention addresses a topic that appears under-analyzed in the discussions presented above. All the mechanisms by Congress, Executive Order, Regulation, court decision, or other manner internal to the United States are not able to extract the United States from its international treaty and customary international law obligations. To the extent these internal rules (including self-execution or non-self-execution of treaties doctrines, Paquete Habana, last in time, Charming Betsey canon, state secrets privilege, political question doctrine, federal officer immunity, public authority defense, scope of employment defenses, and Westfall immunity) are inconsistent with the treaty obligations, they are unable to extract the United States from its international obligations. More forcefully, no combination of Executive, Legislative, or Judicial action other than denouncing a treaty (and provided the treaty does not codify rules of customary international law) overrides the international obligation on the United States as a matter of positive law. And no defenses in domestic law that do not have an analog in international law may override the international obligation upon the United States.

The corollary to the above two rules is that, whether through legislation or conduct, when the United States tortures or cruelly inhumanly or degradingly treats persons, it violates its international law obligations that are frequently described as of the highest order (peremptory norms). Relativists might support such legislation or conduct arguing that it is in the interest of national security. Absolutists might refer to these rules and state we need to be in compliance. Both may allude to moral or utilitarian grounds to argue why the positive law should be followed/not followed. But those arguments from moral or utilitarian bases are of little moment as they speak more to the political will to enforce the law than to the law itself, which is the international legal obligation of the United States.

Much has been written about the analyses of international law made internally in the United States to try to create what has been termed "a legal blackhole" and which has been roundly

faith.

Id. art. 46. It is irrelevant to the discussion at hand.

rejected.¹⁸⁴ These legal opinions – in force a while, some withdrawn, and some still classified – are internal law interpretations of international law that are being made to support previously taken positions, comfort thinking on a position, and/or persuade others to comply by arguing that what is being asked to be done is legal.

In the absence of national or international tribunals holding to task the authors of these internal interpretations, the question that still can be addressed (as we did at the American Society of International Law, March 30, 2007 panel) is whether it is possible to say whether such a legal opinion is simply irresponsible or “out of the ballpark”?¹⁸⁵ My answer is in the affirmative. The national and international community have been making judgments about these legal interpretations as they have been revealed to us. The bureaucratic resistance, that has led to the divulging of some of the more sensitive opinions and debates since the inception of the War on Terrorism, have permitted an early opportunity to examine and comment on the interpretations. I submit that the synthesis of the ASIL Centennial Resolution represented the national and international legal community making a collective judgment in which exotic interpretations that underpin arguments for torture and cruel, inhuman and degrading treatment were roundly rejected.

That being said, there are two aspects of the discussions in the Administration of torture and cruel, inhuman and degrading treatment that I wish to discuss.

Leaving to the side the constitutional debates about Presidential powers, I wish to focus on two key aspects of the debates: (1) the applicability of the Geneva Conventions to the Al-Qaeda and Taliban and (2) the effect of the American Reservations, Un-

¹⁸⁴ See sources cited *supra* note 179.

¹⁸⁵ See Richard Bilder & William H. Taft IV, *Ethics, Legitimacy, and Lawyering: How Do International Lawyers Speak Truth to Power?*, AMERICAN SOCIETY OF INTERNATIONAL LAW ANNUAL MEETING, Mar. 30, 2007, reprinted in 101 ASIL PROC. 325 (2007). The effort in a 1990 report by a Joint Committee of the American Society of International Law and the American Branch of the International Law Association on “The Role of the Legal Adviser of the Department of State” raised, but is considered to not have satisfactorily answered, this question. In a recent Comment that Professor Richard Bilder and Professor Deltev Vagts published in 2004 in the American Journal of International Law, they suggested that, as a practical matter, perhaps the only check in such cases is the *ex post facto* collective judgment of the national and international legal community. *Id.*

derstandings and Declarations to key human rights treaties such as the International Covenant on Civil and Political Rights and the Convention Against Torture and Cruel, Inhuman and Degrading Treatment or Punishment.

E. The applicability of the Geneva Conventions to the Al-Qaeda and Taliban

As we know, on February 7, 2002, the President issued an order (as reiterated in his Executive Order of July 20, 2007¹⁸⁶), determining that the Taliban had waived Geneva Convention rights and that Al-Qaeda (non-state actors) did not have Geneva Convention rights.¹⁸⁷ At the time of that decision, the Department of State Legal Adviser William Taft IV argued forcefully against the United States departing from 60 years of practice and policy with that interpretation.¹⁸⁸ Others in the Administration vigorously argued in favor of the new interpretation, and subsequently, the Department of State Legal Adviser was changed to someone (John B. Bellinger III) who more closely conformed his views to the President's order .

The important point for our discussion is that prior to 9/11 and up until the day the United States denounces the Geneva Conventions in some future, the Geneva Conventions are an international obligation upon the United States.¹⁸⁹ At the time of

¹⁸⁶ See Exec. Order No. 13,440, 72 Fed. Reg. 40, 707 (July 20, 2007) (determining that "members of al Qaeda, the Taliban, and associated forces" are not entitled to the protections afforded to prisoners of war by the Third Geneva Convention); see also Benjamin G. Davis, *Gutting the Geneva Conventions in the 'War on Terror'*, JURIST, July 25, 2007, available at <http://jurist.law.pitt.edu/forumy/2007/07/gutting-geneva-conventions-in-war-on.php> (commenting that President Bush was wrong in his interpretation of Common Article 3 of the Geneva Convention).

¹⁸⁷ See generally Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 COLUM. J. TRANSNAT'L L. 435 (2005) (describing the trend of non-state actors and their international status).

¹⁸⁸ See Memorandum from William H. Taft IV, Legal Adviser, U.S. Dep't of State, to Alberto Gonzales, Counsel to the President (Feb. 2, 2002), reprinted in MARK DANNER, TORTURE AND TRUTH 94 (2004); see also Memorandum from William H. Taft IV, Legal Adviser, U.S. Dep't of State, to John C. Yoo, Deputy Assistant Attorney General, U.S. Dep't of Justice (Jan. 11, 2002), available at http://bp0.blogger.com/_M_OtwEgZgAk/RxmABQbQWII/AAAAAAAAAwQ/soHXNsk4ivo/s1600-h/taftmemo1.jpg. In his memorandums, Taft disagrees with the President's interpretation and argues that the President's interpretation is inconsistent with the Convention.

¹⁸⁹ "For, regardless of the nature of the rights conferred on Hamdan, . . . [the Geneva Conventions] are, as the Government does not dispute, part of the law of war. . . . And

the President's decision on February 7, 2002, the considered opinion of the institutional adviser traditionally charged with providing advice on international law to the President was that the Geneva Conventions covered the Taliban. Since the revelation of that decision-making process, myriad commentators have pointed out the manner in which the opinions upon which the President made his decision were flawed, as was the President's decision.¹⁹⁰ Moreover, in the Hamdan decision in June of 2006, the Court found that at least Common Article 3 of the Geneva Conventions applied to Al-Qaeda.¹⁹¹ Of great significance were the dissents in Hamdan which also did not support the substance of the Presidential order. Justice Scalia sought to persuade that the Detainee Treatment Act of 2005 language had stripped the question from the consideration of the court.¹⁹² Such an argument leaves to the side the central issue of the applicability of the Geneva Conventions to the Taliban and Al-Qaeda in the War on Terrorism. Justice Alito took another tack in arguing that the tribunals foreseen by the President's Military Order met the standard required under Common Article 3 – without accepting the applicability of the Geneva Conventions but still saying the requirement had been met.¹⁹³ Justice Thomas provided a detailed analysis of the American experience of military commissions and the American precedents to arrive at his dissent. When turning to the Geneva Conventions and Common Article 3, it is regrettable that in interpreting the treaty, Justice Thomas chose to apply domestic law rules of interpretation rather than authoritative international law rules of treaty interpretation enshrined in the Vienna Convention on the Law of Treaties. At a minimum, in an exercise of treaty interpretation regarding the laws of war, one would have expected some reference to both U.S. foreign rela-

compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted." *Hamdan v. Rumsfeld*, 548 U.S. 557, 628 (2006).

¹⁹⁰ See sources *infra* note 276.

¹⁹¹ "We need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories." *Hamdan*, 548 U.S. at 629. "[T]he question whether [Hamdan's] potential status as a prisoner of war independently renders illegal his trial by military commission may be reserved." *Id.* at 630 n.61.

¹⁹² *Id.* at 655–79 (Scalia, J., dissenting).

¹⁹³ See *id.* at 730–33 (Alito, J., dissenting) (stating that first, the commissions qualified as courts, and second, they "were [properly] appointed, set up, and established pursuant to an order of the President").

tions law approaches to treaty interpretation and international law approaches to treaty interpretation and why the Justice determined to accept the approach under one or the other.¹⁹⁴ But, most significantly for purposes of this discussion, even in the absence of the use of international law rules of treaty interpretation, Justice Thomas was constrained to recognize that the interpretation of Common Article 3 made by the majority is both plausible and reasonable.¹⁹⁵ His concern with the Court was more with its failure to defer to the President in this setting and, thus, select the President's interpretation.¹⁹⁶ In a setting where the President's approach has been seen as exotic, Justice Thomas' support of deference to the President misses the more fundamental question as to whether the judicial deference applies with the automaticity he argues or is to be tempered by judicial evaluation (implicitly or directly) of the (something like) good faith of the nature of the treaty interpretation by the President. Where the President's treaty interpretation departs substantially from past policy and practice of the United States and is questionable as a matter of international law rules (based on the review of relevant decisions or treaties as was done by Justice Stevens),¹⁹⁷ it would seem that the Court could reasonably resist providing the level of deference that, which might be traditional, was not earned by the President.

Looking from the external point of view, I find the dissenters' attempt to find ways to avoid contradicting the Administration position while also recognizing the majority's reasonableness suggests the forcefulness of the idea that throughout the period (9/11 to June 30, 2006) the Geneva Conventions (or some part of them) applied to Taliban and Al-Qaeda. In the period between

¹⁹⁴ See *id.* at 718–19 (Thomas, J., dissenting). Justice Thomas did look at international experience with regards to whether conspiracy forms part of the laws of war, though, regrettably, he did not take the same approach with the Geneva Convention. See *id.* at 702 n.14.

¹⁹⁵ See *id.* at 719 (Thomas, J., dissenting) (“Instead, the Court, without acknowledging its duty to defer to the President, adopts its own, *admittedly plausible*, reading of Common Article 3.”) (emphasis added).

¹⁹⁶ See *id.* at 718–19 (Thomas, J., dissenting) (“But where, as here, an ambiguous treaty provision . . . is susceptible of two plausible, and reasonable, interpretations, our precedents require us to defer to the Executive’s interpretation.”).

¹⁹⁷ See *id.* at 619–20. Unlike Justice Thomas, Justice Stevens makes extensive reference in footnotes to the commentaries on the Geneva Conventions as a relevant method for interpreting the Conventions’ provisions. *Id.*

prior to 9/11 and the Hamdan decision, the United States had an international obligation under the Geneva Conventions. To put it bluntly, the President has been wrong, with devastating consequences (Abu Ghraib, etc.) for the United States. The key internal act of reinterpreting obligations against our history and practice was the decision of the President of the United States. He was wrong and that decision was repudiated by our Supreme Court at the first opportunity it had to hear the matter. All of these internal to the United States machinations, from the external perspective appear to be a failed effort by the President and those who advise him to extract the United States from its international obligations through artful dodger analysis.¹⁹⁸ After Hamdan, it was patently clear from the initial draft of the Military Commissions Act of 2006 that the effort was to have Congress extract the United States from its international obligations by attempting to reinterpret those international obligations. Senators Graham, Warner and McCain, along with former military such as Colin Powell, resisted that effort and, at a minimum, reduced the Military Commission Act of 2006 to an internal law phenomenon that would not call into question directly the United States commitments to its international obligations. That the at-

¹⁹⁸ The Chief Justice took no part in the consideration of decision of the case in the Supreme Court. *See id.* at 635. Arguably, the majority in the Court of Appeals decision that coincided with the President's view, as a matter of law, should be seen as validation of the President. However, as a matter of international law, the international obligation remained on the United States and the internal court's decision to say the international obligation does not apply in this case is subject to evaluation for its validity on the international plane. One particular weakness with that decision is that the majority included Judge John Roberts (as he then was) who was also at that time being interviewed and vetted as a possible Supreme Court nominee. This is not to say that this was an unseemly *quid pro quo* – as such impropriety would not exist at this level – however, looking at the case from an international perspective and seeing what was at stake for the administration, whatever the rules on disclosures of interest and recusal, it defies logic to think that Judge Roberts would not have considered whether to disclose or recuse himself in that setting. His failure to do either weakens the impact of the Court of Appeals decision, as he failed to remove an appearance of partiality or conflict of interest. Issues of independence are difficult, but in the world of international commercial arbitration, the sense is that the better position is to disclose. Whether the American law on judges reaches that standard is a question for contemplation (particularly in situations where some judges are elected as opposed to appointed and the potential conflicts that can arise). My point is that the failure (of character?) of Justice Roberts taints the appeals court decision. His proper recusal of himself from the Supreme Court case, of course, is without question the right decision and further validates the majority decision in the Supreme Court in *Hamdan* as he did not take part in any deliberations (a different situation from in the court of appeals). *Id.*

tack on the international law obligations through the Military Commissions Act of 2006 was now indirect was the compromise solution that was reached that helped avoid other countries considering the United States in breach of its obligations under the Geneva Conventions.

The President's Executive Order of July 20, 2007 continues an effort within the internal law frame to extract the United States from its obligations under the Geneva Conventions (while professing to be complying) because of the departures from the language of the international obligations under those treaties. This approach is a further manifestation of that will to create or preserve a blackhole at all costs.

F. The effect of the American Reservations, Understandings and Declarations to key human rights treaties such as the International Covenant on Civil and Political Rights and the Convention Against Torture and Cruel, Inhuman and Degrading Treatment or Punishment.

Article 7 of the International Covenant on Civil and Political Rights (from which no derogation is permitted under Article 4(2)) states as follows:

“Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”¹⁹⁹

The United States formulated several RUD's with regard to the ICCPR, but the one on which I wish to focus is the third one, to wit:

“(3) That the United States considers itself bound by article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the

¹⁹⁹ Office of the High Comm'r for Human Rights, *International Covenant on Civil and Political Rights* (Mar. 23, 1976), available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

Constitution of the United States.”²⁰⁰

RUDs that were similar but more detailed were formulated with regard to the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.²⁰¹

Back in the 1990’s, a debate soon developed over the effect of the United States RUDs.²⁰² Whether or not the RUD’s were consistent with the object and purpose of the treaties, of more interest are the arguments in the post-9/11 environment seeking to consider the RUDs Constitutional standard as not only a substantive standard but a limit on the application of either treaty abroad (a geographical limitation).²⁰³ Similar to the arguments as to the applicability of the Geneva Conventions to Al-Qaeda and the Taliban since rejected by the Supreme Court in Hamdan, this effort argued that, as to these other treaties, there was a “jurisdiction loophole” in the United States’ ratification of the treaty that permitted the United States to conduct cruel, inhuman or degrading treatment abroad without even the constitutional standard applying.²⁰⁴ This debate led in turn to the passage of

²⁰⁰ U.N. Treaty Collection, *Declaration and Reservations* (Feb. 5, 2002), available at http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm.

²⁰¹ Office of the High Comm’r for Human Rights, *Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment* (June 26, 1987), available at http://www.unhchr.ch/html/menu3/b/h_cat39.htm; Office of the High Comm’r for Human Rights, *Convention against Torture and Other cruel, Inhuman or Degrading Treatment or Punishment* (Apr. 23, 2004), available at <http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm>.

²⁰² See Human Rights Committee, General Comment 24, vol. I, at 119, U.N. Doc. A/50/40 (1995), reprinted in DUNOFF ET AL. Casebook, *supra* note 95, at 480 (“The number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States Parties.”); see also Paust 1, *supra* note 27, at 372 (“U.S. compliance with prohibitions reflected in the reservation to the CAT will fully ‘satisfy the obligations of the United States with respect to the standards’ in common article 3 of the Geneva Conventions.”); see also Curtis Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399 (2000) (“The RUDs, we argue, reflect a sensible accommodation of competing domestic and international considerations.”).

²⁰³ See Paust 1, *supra* note 27, at 371 n.60 (discussing U.S. obligations under the CAT); see also Shany, *supra* note 36, at 840 (“[T]he sweeping extension of the absolute prohibition ban to all proscribed forms of ill-treatment falling short of torture is unsupported by *lex lata*.”).

²⁰⁴ Alberto Gonzales asserted this argument during his January 2005 confirmation hearings. See Memorandum from Human Rights First, *Issues to be Considered During the Examination of the Second Periodic Report of the United States of America* (Apr. 7, 2006) [hereinafter Human Rights Memorandum], available at <http://www.humanrightsfirst.info/>

the Detainee Treatment Act of 2005 in order to have a federal statute that ostensibly closed this alleged loophole on which policy had been based in the prior period.

Criticism of that "loophole" approach was immediate by the negotiator for the United States of the Convention Against Torture treaty for the United States. It was clear to Abraham Sofaer, former Legal Adviser at the time of the United States' ratification of the Convention Against Torture and other forms of Cruel Inhuman and Degrading Treatment and Punishment, who said by letter of January 21, 2005 to the Senate Judiciary Committee, that the RUDs reference to Constitutional standards were references to substantive standards (not veiled geographical limitations).²⁰⁵

What is most significant and, in many ways more important, than these internal domestic law reinterpretations is the perspective of all the other countries who had acceded to the treaty on the United States' ratification. The new interpretation was not suggesting there was a violation of U.S. internal law in the United States providing its consent to be bound under Article 46 of the Vienna Convention on the Law of Treaties. On the international plane, the RUDs would be interpreted under the normal rules of treaty interpretation. The text of the RUDs speak to substantive standards rather than jurisdictional concepts. With the categorical denials of the principal negotiator coupled with the text of the RUDs, an effort to find a jurisdic-

pdf/06502-etn-hrf-cat-final-submitted.pdf. That arguments opening would permit high-level civilians to organize such treatment. Military Generals subject to the Uniform Code of Military Justice would be unable to avail themselves of that loophole directly, but CIA and other non-uniformed services would operate under that rule. See Radsan, *supra* note 173, at 962; see also Human Rights Memorandum, *supra* note 204.

²⁰⁵The memorandum stated:

Abraham Sofaer, the respected legal scholar and former legal advisor to the State Department, provided the following explanation in his January 21, 2005 letter to the Senate Judiciary Committee concerning the meaning of the U.S. reservation:

'(T)he purpose of the reservation [to CAT] was to prevent any tribunal or state from claiming that the U. S. would have to follow a different and broader meaning of the language of Article 16 than the meaning of those same words in the Eighth Amendment. *The words of the reservation support this understanding, in that they related to the meaning of the terms involved, not to their geographic application.*'

Id.

tional loophole – while clever – smacks of a failure to conform in good faith to our international obligation (whether or not the RUDs are considered inconsistent with the object and purpose of the treaty).

Turning to the more substantive point, whether in fact the internal law constitutional rule formulated by the Supreme Court as “shocks the conscience” would, through the RUDs, be applied in a manner that departs from the international law standard is a practical question. If a matter comes to a court on these points, the question will be whether the court, in applying the “shocks the conscience” standard, will vindicate the international law rule against cruel, inhuman and degrading treatment (whether in treaty or customary international law). If the court does, then the Court will have used an internal rule to meet an international standard. If the court does not apply such a high standard in its estimation of what “shocks the conscience,” then it remains for other nations (particularly those with the right of diplomatic protection over their national detainees) to contest the internal deviation from the international obligation, and the incompatibility of the U.S. RUDs with the object and purpose of the treaty, other treaties, and customary international law. In either event, the international obligation remains on the United States, notwithstanding the machinations of the Executive Branch, the Legislative Branch, and the Judiciary. Even a denunciation of the treaty would be of no moment to the extent customary international law covers the same terrain. Assuming a proper denouncing of the treaty, the United States would still have its customary obligations. In a word, there is international law and the question is whether the organs of the United States will be in compliance with that international law.²⁰⁶

I take the position that the United States’ failure to comply with these international obligations on the United States during the period between 9/11 and into the future is a breach of pe-

²⁰⁶ A final brief comment as regards whether the International Covenant on Civil and Political Rights Article 2 limits its applicability in territory and jurisdiction to the United States. It would seem that even if the acts of concern occur outside of the United States, the decision-making that would occur within the territory and jurisdiction of the United States would be subject to the international obligations of the United States. Taking a step back, even the plotting to be “offshore” to then do the acts in non-compliance with such treaty would be acts in the United States subject to the territory and jurisdiction elements. Again, an international obligation lies upon the United States.

remptory norms and is an illegal act. However, in a situation where the institutional analysis shows the inability of international tribunals to react to said breach, the only other non-domestic manner to enforce compliance would be through horizontal enforcement. However, given the enormous power of the United States in the world, the analysis of horizontal enforcement has to proceed a bit further than usual in discussions of international legitimacy. The reason we need to proceed further is to understand in the international legal process what is at stake in the demeanor reaction of other states to the United States act. At a second level, it also highlights the issues that are present with regard to vertical enforcement of the international obligation inside the United States. I have attempted to simplify the manner of comprehending what is at stake through an elegant equation: illegal act + acquiescence = legitimacy.

G. Illegal Act + Acquiescence = Legitimacy.

As a general matter, a state may be perfectly willing to incur state responsibility for acts that breach international norms - even *jus cogens* or peremptory norms.²⁰⁷ That being said, if the state is able to convince a sufficiently powerful group of other states of the wisdom of its actions, the likelihood of external response to the patently illegal act through some form of horizontal enforcement of the international norm is diminished or even eliminated. It is even possible that, for political or other reasons, there will be cooperation, collaboration, or non-objection by states to the illegal acts. To the extent that this cooperation, collaboration, or non-objection is across many states, we would be faced with international acquiescence by other states in the illegal acts of a given state. That acquiescence in the illegality, in turn, would inevitably give some legitimacy to the illegal act.²⁰⁸

In addition to this type of external acquiescence, there can be internal acquiescence by which the polity acquiesces in the acts done in their name by the leadership, even if illegal as a

²⁰⁷ The Nuremberg Trials were precisely about this type of action by a state.

²⁰⁸ See generally IAN CLARK, INTERNATIONAL LEGITIMACY AND WORLD SOCIETY (2007) (placing historical significance on the concept of world society, while challenging traditional views of international society).

matter of internal law – let alone international law. The lack of external response may bolster the view internally of the legitimacy of the act. Even if the act is illegal as a matter of internal domestic law, the external and internal acquiescence allow the illegal acts to be considered legitimate. The effect is something similar to impunity, but not quite the same because there is a need to foster the acquiescence that engenders the lack of punishment. That need to foster the acquiescence is felt most acutely by the high-level civilian authority and military generals who would have orchestrated the illegal act.

To the extent such high-level persons are able to cause such acquiescence, they are able to fulfill an almost mathematical equation in seeking legitimacy: illegal act + acquiescence = legitimacy.

H. Illegal Act + Resistance²⁰⁹ = Illegitimacy.

The central step to legitimizing the policy in this model is acquiescence.²¹⁰ Acquiescence is not inevitable no matter how persuasive the argument, no matter how powerful the state. Another possible response, for whatever reason, is resistance to the illegal act. Resistance plays the role of preventing acquiescence and in turn preventing legitimacy for the illegal act.

The outcome of the struggles between forces of resistance and acquiescence determines the ultimate legitimacy of the illegal act. If one seeks to ensure that torture is never legitimized

²⁰⁹ I recognize that the word “resistance” might be an odd term in a discussion of criminal law, conjuring notions of resisting arrest etc. The term appeared the most appropriate here as it harks back to the notion of the French who did not submit to the overwhelming power of the Nazis – the *Resistance*. It also reminds me of those non-Japanese or non-Japanese American persons who during World War II protested the internment of their Japanese and Japanese-American neighbors rather than acquiesced. Resistance conjures the idea of pushing back against the very powerful; such as, these high-level civilians and generals.

²¹⁰ Thus, Antonio Cassese view on Kosovo bombing by NATO is not significant because it posits how the intervention could be legitimate but because the positing how the act could be legitimate is actually the acquiescence in the illegal bombing which forges the legitimacy. Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUROPEAN J. INT’L L. 23 (1999); cf. Hans Corell, *Ethics, Legitimacy, and Lawyering: How Do International Lawyers Speak Truth to Power?*, 101 ASIL PROC. 325, 330–31 (Mar. 30, 2007). Asserting a theory from a position of power such as the Office of Legal Counsel is an act of seeking acquiescence in the policy that, if successful, leads to legitimacy of the policy.

(one is an absolutist), then resistance to the illegal act is essential. If one seeks the result that the space for torture legitimizing is reduced or eliminated (i.e. that it operates as an internal norm of the highest order), then criminal prosecution of high-level civilians and military generals may precisely be the type of resistance to torture that is required.

Criminal prosecution of high-level civilians and military generals is a form of aggressive internal resistance to the illegal acts. The focus on aggressive resistance is made to maintain the illegitimacy of such acts by denying the said actors any acquiescence that might legitimize their path of operation. This type of resistance to illegality is an internal mechanism for enforcing the international norm.

One can wonder whether, in the absence of criminal prosecution, the non-criminal prosecution mechanisms within the United States, together with any external mechanisms, are enough to enforce the international norm. For example, with regard to high-level civilians, whether and how to address the risk of criminalization of policy differences is of concern.²¹¹ The logic of this analysis appears to be that policy differences are healthy and thus, the product of the policy formulation process (by its nature done by high-level persons) should not be criminalized. On the other hand, implementation failures may be sanctioned criminally as these failures are the result of incompetence or criminal misapplication of policy at the lowest level. Thus, so the argument runs, persons at the policy making level and higher levels of strategy implementation are appropriately at little risk of prosecution. Put more structurally, this prosecution of a few low-level personnel, with the absence of prosecution (removal or administrative reprimand at most, but no risk of deprivation of liberty) for higher-level military and civilian authority is an optimal solution. For those who believe in international law, the hope is that creative alternatives to deprivation of liberty will have the effect of assuring high-level compliance with interna-

²¹¹ See David Johnston, *The Pardons; Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails 'Cover-Up'*, N.Y. TIMES, Dec. 25, 1992, at A1 (commenting on President Bush granting six full pardons, most notably to former Defense Secretary Caspar W. Weinberger); see also Jack Kemp, *The Right Thing to Do*, TOWNHALL.COM, Apr. 3, 2007, available at http://www.townhall.com/Columnists/JackKemp/2007/04/03/the_right_thing_to_do (pointing out several cases of pardons from Clinton and Bush I).

tional norms. In addition, in order to recruit people willing to take on these high-level positions, it might be optimal not to have them bear any risk of prosecution for their actions in defining policy. This freedom of movement might be viewed as the consideration for their years of loyalty, patriotism or other values that might be highly prized by the President.

I believe that, in circumstances where Congressional acts are sought to be interpreted consistent with international law obligations of the United States and the President seeks to comply with those norms (let us call this Charming Betsy times),²¹² having a high-level group with policy impunity certainty, coupled with another lower-level group bearing some criminal responsibility risk, is problematic and smacks of unfairness, but it is workable. The reason is that from an International Law (IL) compliant perspective, the choices of policies of such a group in Charming Betsy times are more likely to be consistent with well-accepted traditions with regard to international law obligations.²¹³

But, there is the question of the non-Charming Betsy times when new paradigms seduce and departures from the highest norms of international law are considered and enacted. My concern is with situations like the present in which the political branches of United States federal government (Executive and Congress) embark on a policy of war in the name of security, the American public provides at least initially enthusiastic support, and the Judiciary is extraordinarily deferential to Executive prerogatives. When the policy and conduct of the United States begin to appear to foreign and domestic commentators as violating *jus cogens* or peremptory norms, the concern is that we are embarking on acts that are not only violations of high-level norms of

²¹² See *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). See generally Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293 (2005). The effort to interpret, to the extent possible, Congressional action consistent with international law is an internal process. From the external view, the Congressional act either complies with international law obligations of the United States or breaches them.

²¹³ In such times one can imagine a traditional form of international legal analysis being done by the political branches and the Supreme Court in analyzing questions that arise, to wit 1) Is there an international legal obligation?, 2) Has it been breached in a manner attributable to the state?, 3) Is there an excuse for the wrongful act?, 4) What type of remedy should be provided?, and, assuming no agreed procedure is foreseen, 5) What procedure should be used and how can it be put in place?

international law, but violation of norms for which no excuse (necessity, public emergency, and proportionality, for example) is permitted as a matter of positive international law. I seek, as a citizen, ways to harness countervailing forces under our Constitutional structure so that high-level civilian authority and military generals who designed the policy and planned the implementation of that policy can be sent to jail and suffer the gravest consequences commensurate with the gravity of their departure from what might be termed civilized conduct. I seek to resist legitimizing these acts. That we would seek to send such persons to jail is because they have entertained and enacted such gross departures from acceptable activity as a matter of international law, demonstrating the failure of the non-criminal prosecution approaches to countervail their international law violative propensities.

My concern is that, notwithstanding other means of encouraging United States compliance with international law norms, this lack of criminal prosecution of high-level civilians and military generals in the United States domestic courts may be a significant omission from the United States' domestic human rights arsenal. Further, this situation raises a difficulty for the United States and the international community in maintaining absolute bans against barbaric acts.

I thus posit a continuum between times when, as a matter of international law, a breach of an international law obligation may have an excuse (normal times) and when a breach occurs of a high-level international law obligation without the possibility, as a matter of international law, for an excuse (abnormal times). Much like the ubiquitous pendulum swing, criminal prosecution in abnormal times is an extreme reaction to an extreme departure from high-level norms. It would help to temper the worst departures from the most fundamental international norms enshrined in positive international law.

To put this another way, the well-known *Youngstown* trilogy²¹⁴ of the late Justice Robert H. Jackson concurring opinion

²¹⁴ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring opinion). The model discussed in this section about the intersection between U.S. foreign relations law and international law also is apt for those more focused on *Curtiss-Wright* situations where the allegations are that the acts fall within Presidential commander-in-chief powers. *Curtiss-Wright* analysis begs the question of whether the

that seems to guide the courts in these delicate areas of separation of powers has a fundamental flaw when it comes to the reality of international law. The *Youngstown* trilogy is a Constitutional analysis of the first order, but that is also its limit. While the Constitution is the Supreme Law of the Land, it is not the Supreme Law of all the lands or states. Rather, it is the construction through which the United States projects its sovereignty among the other sovereigns of the world. In order to better harness what is at stake, it is therefore necessary to create an intersection between the *Youngstown* trilogy and international law. That intersection however must not be done through a lens of U.S. foreign relations law because the predicate of that type of analysis is the supremacy of the constitutional structure rather than the idea of statehood and state responsibility that derives from the international law sphere.

What occurred to me is that through a form of *dedoublement analytique* or second vision, it is possible to understand the *Youngstown* trilogy within four different international law environments: (1) where the United States is complying with international law; (2) where the United States is breaching an international law obligation but there is a rule of international law that applies which permits an excuse of that breach and the United

President (or for that matter any other organ of the United States federal government alone or in combination with the President or other organs) is above the United States and its obligations freely entered into on the international plane.

As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency -- namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end, and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. . . . That fact was given practical application almost at once. The treaty of peace, made on September 23, 1783, was concluded between his Britannic Majesty and the "United States of America."

U.S. v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 316-17 (1936). Even a king is constrained by the international obligations falling upon his state and him that form the law of nations that apply to all the states and all the kings -- let alone to a President or other organ emanating from the internal law of a given state.

States meets that rule of excuse; (3) where the United States is breaching an international law obligation, there is a rule of international law that applies that would excuse the breach BUT (very important) the United States is not in compliance with the requirements for that excuse to apply; and (4) where the United States is breaching an international law obligation for which international law does not provide a possibility of excuse. I would posit that, as a matter of international law, the *Youngstown* trilogy can operate in all four of these environments with differing consequences occurring for the United States and the world.

In the first setting, where the United States is complying with international law, there is complete harmony as a matter of compliance with international law externally because the United States is in compliance with its international law obligations. The key is that as a state, the United States is in compliance with its international law obligations.²¹⁵

In the second setting, where the United States is breaching an international law obligation but there is a rule of international law that applies which permits an excuse of that breach and the United States meets that rule of excuse, the key point is that externally the breach may be of a lower level norm of international law for which excuses are foreseen (necessity or distress, for example) that will excuse the state's responsibility for the breach. In this setting, while the United States has violated a rule of international law, it has done so in a manner that is consistent with a just as well-recognized rule of excuse of that breach in international law that may reduce the need for a remedy, if a remedy is deemed necessary at all.

In the third setting, where the United States is breaching an international law obligation, there is a rule of international law that applies that would excuse the breach BUT (very important) the United States is not in compliance with the requirements for that excuse to apply, the United States is beginning to

²¹⁵ This setting might be one where a combination of Congressional and Executive decisions has to be tempered by Judicial inventiveness to interpret statutes in a manner that is consistent with the United States' international law obligations. See, e.g., *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1471 (S.D.N.Y. June 29, 2006). The *Hamdan* Court struck down a departure from an international norm in the President's military order that was neither supported by the then language of the Uniform Code of Military Justice nor permitted under the Authorization to Use Military Force. *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

make a departure from its international obligations in a manner that is not excused. This result would mean that one would expect that some type of remedy (restitution, indemnity or satisfaction and reprisals (if permitted), reciprocal measures or retorsion) would be foreseeable if another state were willing to assert in the proper forum such a breach of the international law norm. Here, because the norm was one that did foresee excuse but where even the excuse was not provided, the remedy that would be expected could begin to become substantial for any injured state. The reason is that the American behavior would have departed even from the confines of a rule which contained an excuse. We might call this kind of action a form of petty lawlessness by the United States.²¹⁶

In the fourth setting, where the United States is breaching an international law obligation for which international law does not provide a possibility of excuse, the departure is the most significant from international norms. These types of norms would be considered the peremptory norms from which no derogation is permitted. In this setting, the United States as a sovereign state would be engaging in gross lawlessness with regard to our international law obligations.

It is important to keep in mind that in all four settings above, the separation of powers may act consistent with any of the three levels of *Youngstown*. However, unless the Judiciary is willing to integrate more robustly the external international law vision in the manner the Judiciary conducts itself under the *Youngstown* trilogy as played out in each of the four settings, one can see that the Judiciary can contribute to the United States acting with gross lawlessness with regard to our international law obligations.²¹⁷ Similarly, Congress and the Executive can contribute to the United States acting with gross lawlessness with regard to our international law obligations. *Youngstown* alone does not solve the problem because it fails to capture the

²¹⁶ I recognize that a substantial departure in such a setting could rise to a gross lawlessness as described hereafter. See sources *infra* notes 219–20. The walls are permeable between these settings, but it is a manner that is useful to articulate a series of alternative legal situations in which the *Youngstown* trilogy is called to operate.

²¹⁷ I recognize the judiciary's dilemma in "respon[ding] to military authority in a time of grave national peril." Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons From Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567, 1568 (2004).

international law aspect of the United States obligations. The Constitution merely allocates the powers of the state in our federalism, but that separation of powers does not ensure that the United States will be in compliance with its international law obligations.²¹⁸

I would posit that this is the essential tension between the U.S. foreign relations law vision and the international law vision within the United States.²¹⁹ As a matter of being citizens of the

²¹⁸ I have sometimes thought that one reason for this failure of efficacy on the international plane of Robert H. Jackson's *Youngstown* opinion was that he may have made a distinction between internal threats to the United States for which Constitutional rules would apply and how to treat external threats on the international plane. *Youngstown*, 343 U.S. at 635-36 (Jackson, J., concurring). Having been the prosecutor at Nuremberg, he clearly had the experience of prosecuting international crimes committed by leaders of others states. He also recognized that what he was starting would redound to the benefit or detriment of the United States at a future date. Possibly, he had only a vague sense of what that future would look like. He was acting in an environment where the rules of international human rights and international criminal law (leaving to the side the progress in international humanitarian law) as a whole were much less well defined than today in treaty and custom. At that time, the United States was generally expected to comply with the laws of war. Further, Jackson had lived through a horrendous world war in which the survival of mankind had been in question as had the survival of the United States. In that environment, the manner in which he evaluated an United States' injury to external persons may have been based on a view that the correctives of the *Youngstown* trilogy would be enough because the United States would generally be in compliance with international norms. Or, if the United States departed from an international norm it would be done in a setting where there was a recognized excuse. He may not have imagined the kind of potential petty lawlessness or gross lawlessness by the United States that the four settings of the model above capture, but he could, of course, foresee such petty lawlessness or gross lawlessness, particularly from uncivilized states. He may also have measured external threats in a manner that did not expect as many constraints on the United States as he would have readily expected from a threat that was internal as the price of having a constitutional order. I wonder if this undervaluing of those abroad is a problem that arises today in my country. See generally Jack Goldsmith, *Justice Jackson's Unpublished Opinion in Ex parte Quirin*, 9 GREEN BAG 2D 223 (2006).

²¹⁹ See generally Jack Goldsmith, *Should International Human Rights Law Trump U.S. Domestic Law?*, 1 CHI. J. INT'L L. 327 (2000). The problematic *Youngstown* trilogy interaction with the four settings of international law is not only true in the arena of torture. One can imagine other areas of international law, such as human rights, where the United States engages in petty lawlessness, or even gross lawlessness, with regard to its own citizens or residents. Those who push a United States foreign relations law vision within the *Youngstown* trilogy leave minorities and other disaffected and oppressed persons in the United States to stand on the shifting sands of state and federal statute and constitutional jurisprudence within the whims of the internal political process. For blacks, 350 years of open hostility towards our equality, and fifty-seven years of narrowing the promise of *Brown*, does not presage some utopia in the United States just because of our peculiar form of separation of powers and federalism that is considered, I think in error, the "nirvana" of those seduced by the United States' foreign relations law suspicion of treaty-based or customary international law human rights. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Our common history demonstrates so eloquently that it is not the Constitu-

United States, those of both schools might think of how our system is to operate to prevent the United States from engaging in gross lawlessness, at a minimum, and petty lawlessness as described in the four settings above. I recognize one solution is to change the law (move the goalposts) so that what was once petty or gross lawlessness is now capable of being excused as a matter of international law. The United States does have power to seek to try to change those rules. However, particularly with what would be covered by gross lawlessness, I have a sense that such high-level norms are there for a reason based on human history. These norms are not precatory language but rather speak to something fundamental in determining when humans are civilized or barbarians. Thus, changing the law as regards them merely makes us barbarians. Not foreigners in the Greek sense but in the current sense of uncivilized.

tion, but the commitment of the people of the United States to constitutionally-based civil rights that determines the value of the United States' constitutional structure. In this regard, the international human rights that can come into the United States through a re-equilibrated use of the Judicial power as regards treaties, and back to even the modest *Paquete Habana* approach as to customary international law, provide means to allow the individual citizen to assert civil rights *and* human rights against his state and hostile majorities. That connection with the international plane is a means to change the relations of power for the burdened and downtrodden. That connection reminds the United States' leadership of these international obligations to its own citizens. It is precisely the fear of that international connection that led to the infamous Bricker amendment efforts seeking indirectly to cast out blacks from the protections of international human rights, which would have caused a further reduction in the then second-class citizenship of blacks. Moreover, those who are so quick to dismiss international human rights must have as their primary assumption that the state will never act against them and those who are dear to them. To think in terms of that assumption, one must be at a level of security in the American hierarchy that does not imagine a threat from the state. By definition, that kind of sense of personal security, in a world of profound insecurity, would only be with those of a privileged and powerful elite, or those who were willing to kowtow to such a privileged and powerful elite. I take little comfort from those in such elite positions who argue so strenuously to decouple ordinary citizens from the international connection that serves as a protection. Their protestations leave me cold, as do the images of torture of those external to the United States, such as the one which graces the beginning of this article. The reason is that dissent from the views of the privileged and powerful elite is the lifeblood of change and protection of civil rights in our polity, not acquiescence to a status quo that was perfectly content to keep one always on the bottom. Maybe, over 40 years ago, the idea was most clearly expressed as "...domestic courts must struggle to become their own masters in international law cases." See RICHARD A. FALK, PREFACE, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER xi-xiii (1964); see also BENEDETTO CONFORTI, INTERNATIONAL LAW AND THE ROLE OF DOMESTIC LEGAL SYSTEMS 9, (1993), for the expression of a European vision, particularly on the violation of international law and its consequences.

From the above one can see that an illegal act can derive from several situations in three of the four settings where compliance does not occur with regard to a given international norm. Now, in the absence of protest of the breach, the question that remains is whether persons in a state or those outside of that state acquiesce in that breach. Acquiescence can happen in all three of the settings of breach giving some level of legitimacy to the breach. As one moves to higher norms for which no excuse is available in international law, one also requires the acquiescence to cover what appears to be a greater degree of lawlessness by the breaching state in order to provide the same level of legitimacy. Yet in doing that, the state or person who is acquiescing is trying to formulate some type of political excuse in the absence of a legal excuse. In that sense, the state or person is also encouraging the weakening of the high-level norm whose violation would be considered gross lawlessness. This would seem to be a regression to a less civilized state. Depending on the type of activity involved, we each have to determine whether we are willing to allow our state to regress in that manner. Having seen the pictures as regards torture and cruel inhuman or degrading treatment, a mechanism that aggressively resists legitimizing that barbarity would seem in order. In the internal system of the United States, the method that best seemed to do that would be the criminal prosecution of the high-level civilians and generals who put in place such barbarity. The need for enhanced resistance is present to deprive the actors that made the decisions that cause the illegal act from having any legitimacy in internal or international law. Or, to put it another way, to have them incur individual criminal responsibility for the gross lawlessness that they caused their state to do.

The reasons for invoking this concept of enhanced resistance to the illegal act are not the sole concerns motivating the need for *refluat stercus*. In the next section, using a managerial vision of the policy, planning, and implementation process, I try to highlight the structural concerns that arise in the periods of extreme departure (gross lawlessness) with regard to the government which might also militate for a criminal prosecutive approach to redressing the situation.

I. Modeling why Refluat Stercus

Taking a more managerial view of addressing torture and cruel, inhuman and degrading treatment than an absolutist or relativist approach, below I present a model for understanding my thinking about the need for these high-level prosecutions. I then apply that model in the context of torture to test the model.

1. Theory of Policy/Planning/Implementation²²⁰

While there are many gradations in civilian and military authority, I would submit that there are in essence three tasks that are to be accomplished: policy, planning and implementation (Figure A). Policy development is primarily a civilian task with feedback and assistance from the uniformed military for the Department of Defense and political appointees in other departments, who provide input to help the higher-level policy decisions to be made. Beyond policy determination, there is a need to muster the appropriate resources to meet the policy objectives and that is done through the planning process, which breaks out just how the policy will be implemented. This task would be done at the level of the general officers of the military (with assistance of lower level officers to the extent appropriate but with the ultimate responsibility for the plans lying with the generals) and political appointees with the assistance of some career employees. Finally, the actual task of putting the policy into action, the implementation step, would be done by the lower-level officers and service persons in the military and their equivalent civilian persons in other agencies.²²¹

²²⁰ I received both my J.D. and M.B.A. from Harvard in 1983. Consequently, I think of process in both the legal sense of legal process and the management sense of statistical process flow analysis, such as that of W. E. Deming. It is the fusion of these two views in my training and experience that informs the functional/structuralist realities I am attempting to describe in this section.

²²¹ Even with the advent of civilian contractors, I would submit that the policy and planning tasks design the extent to which civilian contractors will be part of the overall plan that is to be implemented. Thus, unless there is broad delegation by the higher-ups, which may even be illegal in itself, the civilian contractors serve merely as implementers and not as policy makers or planners.

Figure A
Policy/Planning/Implementation
General Stream

| | | |
|-----------|-------------|----------------|
| Policy => | Planning => | Implementation |
|-----------|-------------|----------------|

Whatever policy is set, it will fall on a continuum from full compliance to non-compliance with regard to international law, similar to the four settings described in the previous section. For purposes of this analysis, due to the problem of the number of potential outcomes expanding rapidly, I have divided the four settings described above into two settings: (1) IL compliant: where there is compliance with an international law rule or, if there is a breach of an international law rule, there is a permissible excuse of said breach that is recognized in international law, and (2) IL non-compliant: where there is a breach of an international law rule and the excuses that are permissible are not availing or, alternatively, there is a rule of international law whose breach is never excused as a matter of international law.²²² Whatever the policy and wherever it lies on that scale, the planning as a result of that policy will attempt to implement that policy effectively or not. Whether the planning is effective or not, the implementation of that plan by the lower levels will either be effectuated consistent with the policy and planning or not. To demonstrate this series of relations, see Figure B.

²²² While imperfect, I do believe this model captures the idea of a hierarchy of norms for international law in an elegant manner.

Figure B
Policy/Planning/Implementation
Examples of Options

| | | |
|-------------------------------|----------------------------|--------------------------------|
| IL Compliant Policy =) | Effective Planning =) | Consistent Implementation |
| IL Non-compliant Policy =) | Ineffective Planning =) | Inconsistent Implementation |

The key aspect of this structure is the interactions between the three steps of the process. While recognizing that there can be gradations, for the purposes of this theoretical model, I will focus only on the extreme cases. One can find 8 potential relationships that can occur (Figure C). The likely outcomes from those relationships are described below.

Figure C
Policy/Planning/Implementation
Potential theoretical International Law (IL) outcomes

| Policy | Planning | Implementation | Risk of IL Criminality |
|-----------------------------------|-------------------------|--------------------------------|---------------------------------------|
| IL Compliant Policy | Effective Planning | Consistent Implementation | Very Low Risk of violation |
| IL Compliant Policy | Effective Planning | Inconsistent Implementation | Low Risk of violation |
| IL Compliant Policy | Ineffective Planning | Consistent Implementation | Low to Medium Risk of violation |
| IL Compliant Policy | Ineffective Planning | Inconsistent Implementation | Medium Risk of violation |
| IL Non- compliant Policy | Effective Planning | Consistent Implementation | Very High Risk of violation |
| IL Non- compliant Policy | Effective Planning | Inconsistent Implementation | High Risk of violation |

| | | | |
|-------------------------------|-------------------------|--------------------------------|--|
| IL Non-compliant Policy | Ineffective Planning | Consistent Implementation | Medium to High Risk of violation |
| IL Non-compliant Policy | Ineffective Planning | Inconsistent Implementation | High Risk of violation |

1. **IL Compliant Policy, Effective Planning, Consistent Implementation:** Under this scenario, high-level, mid-level and lower level actors are operating in a consistent pattern to be compliant with IL with the result that the risk of non-compliance would appear to be lower. A few cases of violation would appear possible from the actions of a "few bad apples."
2. **IL Compliant Policy, Effective Planning, Inconsistent Implementation:** Under this scenario, the inconsistent implementation would suggest that lower-level actors are acting in a manner that raises the risk of violations. One would expect that feedback from these inconsistent actions would reach the policy and planning levels to punish the lower level persons for their inconsistent acts. This would bring the lower level back into compliance. In the absence of such feedback mechanisms, there is a risk the low-level errors will expand. That raises the problem of lack of discipline being endemic to force implementation. Thus, there is a low risk of violations.
3. **IL Compliant Policy, Ineffective Planning, Consistent Implementation:** The combination of ineffective planning and consistent implementation appears to raise further the risk of violation simply because the effects of the ineffective planning are magnified by the consistent lower level blind allegiance to those plans.
4. **IL Compliant Policy, Ineffective Planning, Inconsistent Implementation:** Curiously, the inconsistent implementation of ineffective planning raises the prospect of low-level actors complying with policy notwithstanding the mid-level planning step. This could verge on insubor-

dination but appears more to be a situation where the lack of coherence makes for risks of violations to be present. However, there is also the possibility of tempering any detrimental incoherencies coming from the ineffective planning.

5. **IL Non-compliant Policy, Effective Planning, Consistent Implementation:** This is the scenario with the highest risk of international law violating behavior. The entire structure is operating in a manner that leads to violations.
6. **IL Non-compliant Policy, Effective Planning, Inconsistent Implementation:** Similar to scenario 4, the risks of violations remain because of the higher level pressure and effective planning in response to that pressure. However, the inconsistent implementation likely reduces the risk of violations from the very high-level.
7. **IL Non-compliant Policy, Ineffective Planning, Consistent Implementation :** In this setting, the resistance of the planning staff to follow the policy serves as a buffer to the lower level implementing group with the effect that the risk of potential violations are reduced. However, the removal of ineffective planning and replacement by more effective planners can change this situation into a high violation environment.
8. **IL Non-compliant Policy, Ineffective Planning, Inconsistent Implementation:** Verging on indiscipline or revolt, the mid-level to low-level actions that are incoherent with the policy likely reduces the risks of violations at the risk of other goals such as discipline. On the other hand, the IL non-compliant policy causes pressure for violations to rise. One feels one is in a chaotic environment with few parameters for low-level person. Lower-level persons would be guided by their personal ethics as much as the discipline coming down from on top. In situations where there is application of force, the risk is that there would be significant force drift (use of excessive force) increasing the possibility of violations that might override personal ethics. One fears having created an anarchic situation and thus a higher-risk environment.

2. Overlay – Feedback mechanisms and Law as constraint

a) Feedback mechanisms

While the risks of violation of International Law appear dependent on the interaction of the policy, planning and implementation processes, these interactions do not happen in stasis. Thus, adjustments to the policy, planning, and implementation can happen in real time. Higher-level responses can be affected by the feedback from the lower level actions. Those feedback mechanisms are described below.

1) Adjudications or nonjudicial punishments of low level implementing persons: To the extent information in the form of complaints rise about the performance of the lower level staff, the disciplinary proceedings against them are a source of information for the higher ups.

2) Inspector General (or other similar type of) reports: When information arises about what are considered dysfunctions in implementation of the policy and planning, the Inspector General can analyze the behavior and make recommendations to senior staff on what the next step should be to repair what may be construed as a systemic problem.

3) Reporting to Congress/Congressional Oversight: Indirect feedback mechanisms to Congress can trigger more extensive Congressional oversight and result in adjustments.

4) Judicial oversight: actions by private parties injured by the policy (habeas cases for example) can lead to the courts specifying or not the legal obligations of the policymakers, planners, and implementers, so as to identify constraints on them.

5) Vertical enforcement – public opinion: information gathered by non-governmental organizations and the press that is disbursed to the United States public can shift public opinion and influence the direction of the policy. That hydraulic pressure helps reduce secrecy and create debate which may push the key political actors and judi-

ciary towards compliance with the high-level norm.

6) Horizontal enforcement – other states: Information gathered by other states and the diplomatic dialogue between the United States and other states on the policy, planning and/or implementation can influence the movement of the policy. The willingness of other states to prosecute United States citizens also is to be kept in mind, as should be those states' diplomatic protection of their nationals in United States custody.

7) Horizontal enforcement – international and regional organizations: Organizations that play roles on an international plane with regard to the subject matter of the policy may independently evaluate the policy, planning and implementation and provide that information to the United States to encourage adjustments as necessary. Prosecutorial decision by such entities may also influence the United States policy.

Each of these seven potential sources of adjustment in the policy is also subject, however, to countervailing force by the policy makers and their supporters. Thus, in each of these fora, the policymakers can exercise their skill to persuade the adoption or continuation of the policy, whether it is International Law compliant or not. The policymakers, particularly when they include both political branches,²²³ with a deferential Judiciary, can exer-

²²³ See *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) (“Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”); see also *Dames & Moore v. Regan*, 453 U.S. 654, 662 (1981) (discussing the “never-ending tension” between the President’s executive authority to deal with new global challenges and the constraints of the constitutional system of checks and balances); see also *The Paquete Habana*, 175 U.S. 677, 712 (1900) (stating that a declaration of war by Congress followed by a presidential proclamation “clearly manifest[ed] a general policy” of the United States Government); *Ping v. United States*, 130 U.S. 581, 600 (1889) (“By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States [by the President] are both declared to be the supreme law of the land, and no paramount authority is given to one over the other.”); see also *Edye v. Robertson*, 112 U.S. 580, 599 (1884) (declaring that if statutes passed by Congress and treaties made by the President conflict, the law favors acts in which both political branches participate); see also *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1464 (S.D.N.Y. 1988) (“Under our constitutional system, statutes and treaties are both the supreme law of the land, and the Constitution sets forth no order of precedence to differentiate between them.” (citing *Chew Heong v. U.S.*, 112 U.S. 536 (1884)); see also DUNOFF ET AL. Casebook, *supra* note 95, at 267 (“[M]ost international legal questions are resolved in the United States and other domestic legal systems through the interactions of different branches of government.”).

cise great power and influence to shape the understanding of the policy, the planning, and the execution both domestically and internationally. Through op-eds, presentations to international panels, etc., they can attempt to shift the terms of the debate to their favor.

b) Law as constraint

Deviations (through policy, planning, or implementation) in actions from what international law seems to require will raise risks of international law violations. Divergences between the international law rules and the rules considered applicable as a matter of domestic law will also create tensions. Being able to ascertain divergences between the international law rule and the domestic law rule as a person internal to the United States is to have the capacity to do what I have termed *dedoublement analytique*, or second vision. In order to free one to do this analysis, one must take to heart the fundamental rule of international law that “no state may extract itself from its international obligations through its domestic law.”²²⁴ Being able to make this separation helps one to see to what extent the international obligation is vindicated within the domestic law system.

One key tension that arises concerns which persons acting at each level are subject to which law or laws. Thus, the uniformed military are subject to the Uniform Code of Military Justice (as well as federal and state law) in contrast to civilians who are subject to federal and state law.²²⁵ The Uniform Code of Military Justice was written to bring domestic law into compliance with the Geneva Conventions. Other laws of the United States have also been written to comply with international law, but they have been changed in the Military Commissions Act of 2006 (and

²²⁴ See Vienna Convention on the Law of Treaties, *supra* note 181, art. 27 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”).

²²⁵ See Charles H.B. Garraway, *Responsibility of Command – A Poisoned Chalice?*, reprinted in *INT’L HUMANITARIAN LAW AND THE 21ST CENTURY’S CONFLICTS* 117 (Roberta Arnold & Pierre Antoine-Hildbrand eds., 2005) (“Th[e] growing emphasis on leadership personalities mean[s] that there w[ill] be less emphasis on the perpetrators of the crimes and more on those who planned and ordered the attacks.”); cf. Christopher A. Britt, Note, *The Commissioning Oath and the Ethical Obligation of Military Officers to Prevent Subordinates from Committing Acts of Torture*, 19 *GEO. J. LEGAL ETHICS* 551, 558–59 (2006) (discussing the special duty of the military officer to “ensure that [the officer’s] subordinates follow the Constitution” and other bodies of law in the context of the war on terror).

in other legislation) and may be less International Law compliant. Depending on the divergences between those laws and what type of potential defendant one is examining (military or civilian), one's anxiety about being International Law compliant varies.

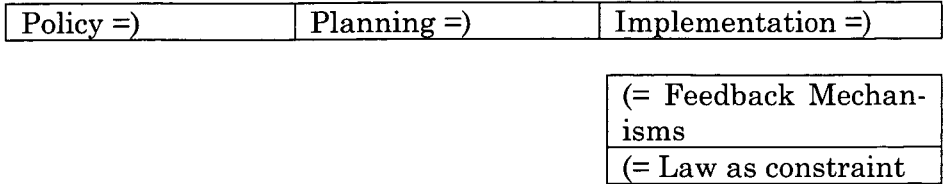
A second aspect is the type of discipline meted out to those who are at the bottom of the hierarchy as compared to higher-level civilian authority or general officers. The strictures of the Uniform Code of Military Justice are not uniformly applied (colloquially referred to as "different spansks for different ranks")²²⁶ nor are federal law and state law applied equally to the high-level civilian authorities. One's sensitivity to International Law compliance may be affected by that reality.

At the policymaking level, we must keep in mind the power of policymakers to change the domestic law (not affecting the international law obligation, however) to have it conform to the type of policy that they seek to put into practice. Thus, if there are concerns about International Law liability by policymakers, they have the power and wherewithal to simply have the law changed at the federal level in order to protect themselves. Whether such changes will lead to judicial hurdles remains a risk – but the policymakers are in a position to shape said modifications in a manner that also attempts to shield them from the possibility of judicial review. For example, a case in point appears to be the Military Commissions Act of 2006, redefining aspects of the War Crimes Act in a retroactive matter, limiting habeas petitions and limiting access to the courts for those with such petitions.

To summarize, then we have two sets of processes operating as demonstrated in figure D – the policy/planning/implementation and the adjustment mechanisms (feedback and law as constraint).

²²⁶ See Smith III, *supra* note 24, at 693 (positing that "there are two systems of military justice: One for enlisted soldiers and another for commissioned officers" and describing this "disparity in military justice based on rank" as "different spansks for different ranks").

Figure D
Dynamic Adjustment
Policy/Planning/Implementation and Adjustment Mechanisms



This dynamic can cause shifts between International Law compliant and International Law non-compliant policy, in the effectiveness of the planning and in the consistency of the implementation.

3. Defense/CIA/State/Justice in the Model

By thinking of some parts of the Federal Government through the lens of the policy/planning/implementation model, one can begin to see how the process and its feedback mechanisms work.

Figure E – Government Department/Essence of Role Process Chart

| Defense | CIA | State | Justice | Essence of Role |
|-----------------|----------------------|----------------------|----------------------|-----------------|
| Civilian | Political Appointees | Political Appointees | Political Appointees | Policy |
| Generals | Senior Staff | Senior Staff | Senior Staff | Planning |
| Lower Uniformed | Lower Level Staff | Lower Level Staff | Lower Level Staff | Implementation |

Taking the Essence of Role Schema from the right column of Figure E and placing it as the starting point of Figure F – one can see how feedback mechanisms that are internal to the department or external to the department can cause problems to rise to the policy making level and lead to adjustments. While it

is possible for each department to have this process occur separately, the feedback mechanism can also operate across departments. The President, especially in the unitary executive vision, is the obvious place to harmonize approaches across departments. Congressional oversight – to the extent it is consistent – can also help to harmonize across departments. Private actions on a piecemeal basis that lead to judicial decisions can also lead to Supreme Court rules that have consequences to encourage harmonization across departments.

Figure F - Integration of the feedback mechanisms

| Essence of Role | Feedback Mechanism | | Disciplinary Mechanism |
|-----------------|--|--|---|
| Policy | Interior Inspector General | Exterior Congressional Oversight Court Decisions President | Criminal Prosecution Retirement Administrative Discipline |
| Planning | | | |
| Implementation | | | |

If we bring back Figure C, we can now compare the situations which raise the highest risk of IL criminality. The highest risk environments are when there is an IL Non-compliant Policy with varying degrees of effectiveness as to planning and consistency as to implementation.

Figure C (again)
Policy/Planning/Implementation

Potential theoretical International Criminal Law (IL) outcomes

| Policy | Planning | Implementation | Risk of IL Criminality |
|---------------------|----------------------|-----------------------------|----------------------------|
| IL Compliant Policy | Effective Planning | Consistent Implementation | Very Low Risk of violation |
| IL Compliant Policy | Effective Planning | Inconsistent Implementation | Low Risk of violation |
| IL Compliant Policy | Ineffective Planning | Consistent Implementation | Low to Medium Risk |

| | | | |
|-------------------------|----------------------|-----------------------------|----------------------------------|
| IL Compliant Policy | Ineffective Planning | Inconsistent Implementation | Medium Risk of violation |
| IL Non-compliant Policy | Effective Planning | Consistent Implementation | Very High Risk of violation |
| IL Non-compliant Policy | Effective Planning | Inconsistent Implementation | High Risk of violation |
| IL Non-compliant Policy | Ineffective Planning | Consistent Implementation | Medium to High Risk of violation |
| IL Non-compliant Policy | Ineffective Planning | Inconsistent Implementation | High Risk of violation |

If we imagine the feedback mechanisms indicating that IL non-compliance is occurring, a deformity occurs simply because the IL non-compliance is precisely what the policy is seeking. Where IL non-compliance is considered irrelevant to other objectives, the feedback mechanisms traditionally present may not be sufficiently countervailing. Depending on how pressure is asserted and where feedback is from, to the extent that there are planners that act inconsistent with the IL non-compliant policy, they may be forced from the process through retirement or some discipline. To the extent that there are low level implementers who violate law, criminal prosecution or disciplinary action occurs as these expendable persons become human bargaining chips in a process of reducing the pressure of the feedback mechanisms without necessarily forcing a change of policy on all the actors. An iterative process of feedback mechanism operates to evolve the policy without necessarily being strong enough to ensure IL compliance. The rogue policy may be self-preserving.

Changes can occur where the external feedback mechanisms (Congress, the President and the Judiciary through private suits) change due to elections or a change of the Supreme Court. Absent the change of Presidents, however, the existing President dampens the impact of any Congressional and Judiciary movement. It is not so much that the mechanism stays broken in a non-IL compliant form, but that the mechanism cycles back in a manner where self-correction is not a major attribute. One pre-

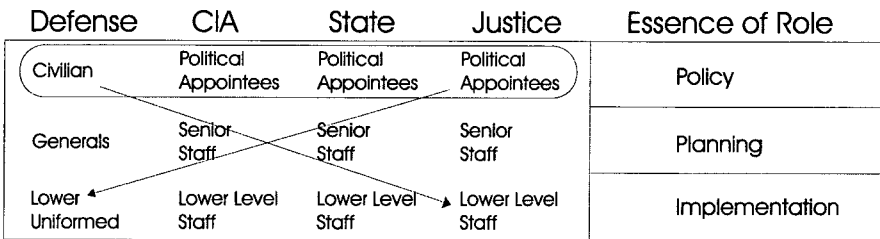
fers to hide the error of the policy rather than change it – thus a greater risk of secrecy and heightened dysfunctionality.

We can note that the individual department feedback mechanisms typically focus within a department – there is an inspector general for the Department of Justice but that inspector general is not also the inspector general for the Department of Defense. Thus, the focus of analysis of such a feedback mechanism will be on the activities of the department. Similarly, when Congress exercises oversight, the committees involved typically have jurisdiction over a specific part of the work of the Executive and are giving feedback on that mechanism. Individual senators or congresspersons who are on a number of committees or subcommittees may be able to amass a range of expertise to be able to “connect the dots” across the departments involved (whether or not they use that knowledge is a separate question).^{227a} However, structurally, that is an ad hoc process dependent on the proclivities of such persons. Turning to civil process by private parties, having such process cover the actions of a number of departments is possible, but the case is likely to be dismissed on standing or other doctrine grounds (Westfall immunity). So this judicial approach would not capture cross-department activities. In a criminal prosecution, the typical question with regard to lower-level persons is whether their hierarchy ordered them to do a given thing. In moving up the hierarchy, the focus would be on those with responsibility for those below (command responsibility as a term of art from the military or other responsibility). Under the logic of a policy level IL-non-compliant policy, it would seem those at the policy level would work to minimize their own liabili-

^{227a} Cf. Walter Pincus, *CIA in 2003 Planned Destruction of Tapes*, WASH. POST, Jan. 4, 2008, at A03, available at <http://www.washingtonpost.com/wpdyn/content/article/2008/01/03/AR2008010303544.html> (describing the February 2003 CIA disclosure to Congress that it planned to destroy videotapes of harsh interrogations as “an account that adds detail to recent CIA statements about the circumstances surrounding the tapes’ destruction”); see also Scott Shane & Mark Mazzetti, *Tapes by CIA Lived and Died to Save Image*, N.Y. TIMES, Dec. 30, 2007, at A1 (stating that CIA officials told members of congressional oversight committees about the CIA’s interest in destroying interrogation tapes for “security reasons,” however members of the House Intelligence Committee thought destroying the tapes would be “legally and politically risky”); see also Benjamin Davis, Op-Ed., *Congress, Torture, and Romain Gary’s ‘Chien Blanc’*, JURIST, Dec. 10, 2007, <http://jurist.law.pitt.edu/forumy/2007/12/congress-torture-and-romain-garys-chien.php> [hereinafter *Chien Blanc*] (“The members of Congress and others who have tut-tutted about the torture done all these years since 9/11 . . . we know now were in fact briefed on what was going on and in fact approved of it and encouraged it.”).

ty for things done below. In order to do that, one solution is to pick persons out of the chain of command in the same department or across departments who are seen to have informal authority to induce the persons at low levels to act consistent with the IL-non-compliant policy. In this idea (as pointed out in Figure G below), the policy level protection is assured since the feedback mechanisms are unable, for jurisdictional reasons, to follow the circuitous routes of the defacto chain of command as the feedback mechanisms concentrate on the dejure chain of command. Thus, the IL-non-compliant policy can be implemented while – at the same time – the policy level persons are able to reduce “blowback” directly upward from any IL-non-compliant events below. The structures of review are out-flanked by the structures of putting in place the IL-non-compliant policy. Only the person at the center (most likely the President or persons close to the President)²²⁷ can see the full picture.

Figure G – De facto interception of De jure Chain of Command



4. Heightened dysfunctionality - torture

When the policy/planning/implementation, feedback mechanisms, and law as constraint fail to move the policy/practice/implementation towards International Law compliance by the United States, what is to be done? The level of power of the United States in the world system is significant and

²²⁷ See e.g., GOLDSMITH, *supra* note 156, at 22. Goldsmith describes the “War Council” as a “secretive five-person group with enormous influence over the administration’s anti-terrorism policies.” *Id.* Further, Goldsmith states that the “War Council” would “plot legal strategy in the war on terrorism . . . sometimes to the exclusion of the interagency process altogether.” *Id.*

unparalleled – American exceptionalism considering itself only marginally constrained by International Law. Other than the mechanisms described above, is the criminal prosecution of high-level civilian and military general officers a possible path to cause IL compliance, notwithstanding this sense of exceptionalism? Let us look at the question of Torture.

a. Torture in Detainee Treatment

i. Policy

As has been reported in a number of places,²²⁸ in the period after September 11, 2001 and up to the Presidential Military Order of February 7, 2002, a policy formulation process went forward within the administration as to what to do with detainees. Subsequent to their revelation, extensive criticism of the decisions not to apply the Geneva Conventions to the Taliban and Al-Qaeda were made. Over the next four years, key decisions of the Supreme Court in Rasul, Hamdi and Padilla clarified detainee rights. In December 2005, with the Detainee Treatment Act, further clarifications as to detainee rights were made. With the Hamdan decision of June 29, 2006, key decisions were made stating that, at a minimum, Common Article 3 of the Geneva Conventions apply to Al-Qaeda pursuant to the construction of the statutory language of the Uniform Code of Military Justice and as a matter of international law. By that decision, the United States Supreme Court confirmed what others had argued that the policy that had been formulated and expressed in the February 7, 2002 Presidential Military Order was IL non-compliant. By the Military Commission Act of 2006, the United States tempered the impact of the Hamdan decision.

ii) Planning

As detailed in press reports, pursuant to the President's Military Order and other policies of the Global War on Terror, planning was done to develop the Guantanamo prison, as well as various military installations in Afghanistan and Iraq at which detainees would be held and interrogated. An extraordinary

²²⁸ See articles cited *infra* note 275. These articles discuss a detailed analysis of the common plan.

rendition program was developed to render individuals captured around the world to third countries or other unidentified places. Negotiations were done to create what has been termed CIA Black Sites. Planning was made to put in place the appropriate assets to conduct all aspects of detention and interrogation consistent with the President's military order.

iii) Implementation

Hard assets as well as persons were put in place who proceeded to detain and interrogate prisoners around the world in accordance with the President's Military Order and other policies of the Global War on Terror.

b. Feedback Mechanisms

With the Abu Ghraib pictures, information came out that low-level uniformed soldiers were acting in an IL non-compliant manner and in violation of the Uniform Code of Military Justice.

- i) Adjudications or nonjudicial punishments of low level implementing persons: Complaints arose from low-level members of the armed forces with regard to treatment of detainees at Abu Ghraib and elsewhere. This culminated in a series of courts-martial, as well as discipline for several persons involved.
- ii) Inspector General (or other similar type of) reports: When information arose from Abu Ghraib, a series of reports were requested at the policy level to examine the systemic issues potentially present in order to adjust detainee treatment.
- iii) Reporting to Congress/Congressional Oversight: Congressional ranking members may have been aware of the detainee policy prior to the Abu Ghraib scandal erupting in the news media. Upon that scandal erupting, a series of hearings occurred and legislation was developed ostensibly to make more clear what could be done with detainees (Detainee Treatment Act of 2005 and the Army Field Manual).

iv) Judicial oversight: habeas corpus petitions filed on behalf of inmates at Guantanamo and elsewhere had the effect under Hamdan of determining that Common Article 3 did apply to Al-Qaeda detainees.

v) Vertical enforcement – public opinion: significant numbers of writings by press and private citizens have inundated all concerned over the past few years to highlight the non-compliance of the detainee treatment policy with domestic law and international law. Although it helped lead to a change in Congress, the feedback can take time.

vi) Horizontal enforcement – other states: Information gathered by other states and the diplomatic dialogue between the United States and other states on the policy, planning and/or implementation in the recent visits by top level American diplomats and the President to key allies has had an influence on the United States actors. Individuals can influence the movement of the policy. Other states decline to go after high-level persons (Germany case) and witnesses who observed violations are also encouraged not to be whistleblowers.

vii) Horizontal enforcement – international and regional organizations: The United Nations Human Rights Committee takes a look at length at what the United States is doing. Organizations that play roles on an international plane with regard to the subject matter of the policy may independently evaluate the policy, planning and implementation and provide that information to the United States to encourage adjustments as necessary. For example, the International Committee of the Red Cross has provided a report on the CIA black sites interrogation that states that the practices are torture.²²⁹

c. Seeking acquiescence to gain legitimacy

Policy level resistance to change of the IL non-compliant policy is heightened by the fact that the IL non-compliant policy

²²⁹ See Mayer, *supra* note 27 (“[T]he Red Cross described the [CIA’s] detention and interrogation methods as tantamount to torture, and declared that American officials responsible for the abusive treatment could have committed serious crimes.”).

was what likely led to the behavior of the low-level implementers. Put another way, the high-level persons are smart enough to understand that at least some of the polity may think they have committed a crime and this makes them vulnerable.²³⁰ However, they cannot change the past so this creates pressure to seek acquiescence from the polity while at the same time not revealing the crime. One aspect of this is the drafting of the Military Commission Act of 2006 to attempt to protect themselves. Another aspect is to prevent any information about the torture from seeing the light of day in any of the court proceedings or military commissions that hear the complaints of detainees. Assuming the policy is that of the President, the Presidential assertion of the importance of the policy creates countervailing forces to those in Congress and the Judiciary who wish to change the policy. Carefully orchestrated participation by the Congressional leadership (or at least the ranking members on key committees) and Judiciary (through the encouragement of deference) helps to blunt reformist efforts at the federal level with regard to the most significant aspects of the IL non-compliant policy. Such acquiescence is helped when all or most branches of government have majorities from the same party. All this orchestration is the effort to have acquiescence to the illegal act – thereby gaining legitimacy.

d. Resistance to ensure illegitimacy

i) Resisting through criminal prosecution of high-level civilians and military generals

The willingness to criminally prosecute high-level civilians and generals for IL non-compliant policy, and therefore the level of resistance to the non-compliance,²³¹ is directly tied to the absoluteness of one's vision of the need for high-level peremptory norm compliance (or, put another way, the need to attack what appears to be gross lawlessness at high-levels). Torture may be

²³⁰ See GOLDSMITH, *supra* note 227, at 151–52 (describing that palpable fear).

²³¹ I am indebted to a discussion at the Ohio Legal Scholars Workshop at Capital Law School on June 23, 2007 for suggesting this path. Breach of a low level norm was described in the sense of a contractual breach whose remedy might be an apology. Breach of a high-level norm, on the other hand, would have the quality of an international crime – repugnant to the international community as a whole.

viewed, to quote the President, as something that the United States does not condone. Under a zero tolerance/scorched earth mentality, the willingness to criminally prosecute persons who put in place such a policy would be the ultimate conduct consistent with the President's words.

ii) Splitting the unitary executive

Given the great difficulty in charging a sitting President or Vice President for a crime, the prosecutors serve at the President's pleasure, the President and Vice-President have to be concerned with being charged with a crime after completing their terms. During their terms, if they have put in place an IL non-compliant policy, they have to wonder whether impeachment is possible. In the absence of a possible impeachment of a sitting President or Vice President and in the absence of a special independent prosecutor, it would seem that the task during a given Presidency is to make the unitary Executive of two minds or splitting the unitary Executive. Prosecutors in the Justice Department Criminal Division and the Defense Department Court-Martial system have to be willing to bring cases against members of the Executive (including prosecution of those outside their department). The President has to tolerate the prosecution of his most loyal present or former appointees who executed his policy in exchange for preserving the President's legacy. This calculus appears essential for the criminal prosecution of these high-level persons to occur in our Constitutional structure.

To get to the point that there is such a prosecution, it appears that civil society must take on a significant role in bringing hard to obtain evidence of the IL non-compliant policy. That effort would seem to include also placing evidence before investigators and prosecutors in such a manner that it makes it politically extremely difficult for the President not to allow some type of investigation and prosecution to take place. This would also entail contacting the relevant convening authorities for courts-martial, as well as civilian prosecutors with regard to non-uniformed persons. It would require an evidence gathering task by those concerned about this subject and communication of this evidence to the Federal Bureau of Investigation, accompanied with pressure

on Congress to assert strict oversight over the pacing of the investigation and prosecutions. The role of the press in keeping the attention on the problem might be important, even in these times of short news cycles. This external evidence gathering task would countervail efforts by the policy making persons to white-wash their actions internally.

The cold calculus for the President would be that the President has to tolerate this effort in exchange for diminishing the likelihood of the President being prosecuted after leaving office. There is a possibility that the President would be tempted to pardon persons at the end of his term. On pardons, it would seem that aggressive prosecution of many high-level policy persons would present the spectre that the President, by the sheer numbers of pardons, was acting in a very unseemly manner. The executive clemency threat could be blunted by the President understanding there is a threat of post-term criminal prosecution of the President if he too freely exerts his Constitutional prerogative. Referring to the President (or Vice President) as an unindicted coconspirator or as a material witness might have an effect of causing the President (or Vice President) to hesitate to block the criminal prosecutions.

J. Summary at this point

In the first part of this section I have attempted to lay out the applicable substantive rules applicable to the laws of war and detainee treatment and have looked at those rules through the lenses of *pacta sunt servanda* and internal law non-effect on international law obligations of positive international law that are under-examined in the debates about torture. Beyond moral or utilitarian visions about the subject matter, I demonstrated there is a positive law obligation of the highest order on the United States that is absolutist in nature. I further demonstrated that the internal processes of separation of powers either work to cause compliance with that international law obligation or leads the United States towards breach of norms for which there is no excuse in international law. With regard to acts which lead towards breaches that cannot be excused or do not meet interna-

tional law excuses, they are illegal acts that are petty lawlessness or gross lawlessness. As illegal acts, the question is whether, internal and external acquiescence will prevail, leading to legitimacy for the illegal act. On the other hand, when resistance is present, there is increased likelihood that the illegal act will remain illegitimate. For the type of illegal act that is the concern of this article, the more aggressive efforts at resistance are suggested, with the criminal prosecution of high-level civilians and generals as precisely that type of effort within the American polity.

In the second part of this section, I looked at the problem from a managerial perspective. I describe a model for mapping: 1) policy, planning, implementation; 2) IL compliant or IL non-compliant outcomes; and 3) feedback mechanisms. Based on that model, I look at the question of torture and show the difficulty of rooting out high-level policy deformations in favor of torture through traditional feedback mechanisms. In line with an aggressive approach to the problem, I suggest why criminal prosecutions of U.S. high-level civilians and generals in U.S. domestic courts is a necessary strategy to countervail those tendencies, even if the same party controls all the departments/branches.

On either positive law or managerial grounds, I demonstrate, with complete indifference to moral or utilitarian arguments, why such criminal prosecutions should be done. In the prior section, I demonstrated why the international tribunals or U.N. Security Council would not be equipped to provide the institutional framework – at this juncture – for such prosecutions in an international tribunal. All that appears left is a criminal prosecution in U.S. domestic courts in order to demonstrate aggressive resistance to what are illegal acts of gross lawlessness. Whatever the rationalizations, these U.S. high-level civilians and generals are to be seen as defendants who organized torture and cruel, inhuman and/or degrading treatment in violation of the law and are to be prosecuted. In the next section, I present how these criminal prosecutions can be done in the United States.

PART III. HOW AND WHERE TO *REFLUAT STERCUS*?A. *Theory of the case or cases – command responsibility is not enough.*

As noted in the prior sections, the United States has not in the past prosecuted U.S. high-level civilians or military generals for violations of international humanitarian law and/or international criminal law in U.S. domestic courts. The method for vindicating such rules in the United States is to find a domestic law equivalent that – more or less – addresses the international obligation. The domestic law rule may meet or exceed the international law standard or may not. If it falls beneath the international law standard, it is the best that we can do in the present set of circumstances to vindicate such a norm within the United States' structure and in the absence of an international criminal tribunal.

On the international plane, terms have developed to address what we are considering. At Nuremberg the terms were “a common plan.” With *Yamashita*, the concern was with “command responsibility.” In the International Criminal Tribunal for Yugoslavia, the term “joint criminal enterprise” has been elaborated. Aiding and abetting type language is a way to introduce the concept of conspiracy as an international crime. Much like the classic linguistic notion, each of these phrases is not the thing – they are imperfect constructs (as are the laws) consistent with the rule of legality to capture individual criminal responsibility for international crimes on the international plane.

Moving to the internal United State plane, the ability to find what vindicates the international rule (which, as described above, can be only an imperfectly articulated word to describe the thing to be prosecuted) requires evaluating the crimes available under U.S. law to see which, alone or in combination, would capture the alleged criminal acts of the high-level civilian and military generals that are the focus of this paper. The danger one faces in examining this problem internally is that one will jump to certain concepts – from domestic or international law – and try to say they reflect each other. Take for example, the term “command responsibility”. In the case of General Yamashita, the

standard of “know or reason to know” was used to establish his criminal liability for war crimes. Yet, in the case of Captain Medina, in internal U.S. law, the standard was adjusted to “know, or if negligent in his command, reason to know,” a very important difference as it permitted his acquittal (as no one contested he had acted as a proper soldier) in contrast to Lieutenant William Calley.²³²

As happens in many cases in the law, turning to latin has helped me in thinking about what is meant by engaging in the types of prosecutions that are to be described here. For another example, the words *respondeat superior* capture part of the notion of holding the higher ups accountable for the things done for them by their lower level agents. However, we might seek to capture both the higher-level and lower-level criminal liability. In such a case, *respondeat superior*, while not precluding it, does not capture all that we seek to do. Conspiracy certainly captures some of the notion of the common plan and has the benefit of being a flexible crime that would be useful in this setting. But one should also keep in mind accessory liability. Also, accomplice liability should be kept in mind. Additionally, the range of crimes for cover-up,^{233a} such as perjury, obstruction of justice, destruction of evidence, and the improper use of classified materials (together with conspiracies for those crimes), would all be ways in domestic law to vindicate the international law rules. Principal liability would also form a part of this analysis. Criminal liability of legal advisors is of interest. For example, advice that is given after a decision has been made, or to dress up a predetermined decision into something that gives the impression of being a deliberative process, may not at all have been relied upon by key high-level persons. Instead, such advice forms part of a plan to persuade others. Where such advice is patently unreasonable, even for the others who might be seen as accessories after the

²³² See the excellent discussion of this point and command responsibility in international law and domestic law in Hansen, *supra* note 79. Justice Stevens spoke with disdain of the Yamashita precedent. *Hamdan v. Rumsfeld*, 548 U.S. 557 619 (2006). He said, “The most notorious exception to the principle of uniformity, then, has been stripped of its precedential value.” *Id.*; see also Michael L. Smidt, *Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155 (2000).

^{233a} Thomas H. Kean & Lee H. Hamilton, Op-Ed., *Stonewalled by the CIA*, N.Y. TIMES, Jan. 2, 2008, at A17.

fact, that advice would be of no effect as a possible “reasonable reliance” defense.

We also need to think about the effect of a decision taken by the President allegedly pursuant to his constitutional or statutory powers. To the extent that the interpretation of the President is one that says the President can order the violation of an international obligation of the highest level, it would seem evident that the President is acting without legal sanction as a matter of international law and is causing the United States to act in violation of its international obligation. The same would be true of such a violative act by Congress or a judicial decision. We need to examine whether the cumulative effect of all those acts is the inability to successfully prosecute internally, notwithstanding the illegality as a matter of international law. This decision, ultimately, would depend on the Judiciary’s willingness to address the intersection of the *Youngstown* trilogy and international law in situations I have termed above as gross lawlessness.

Looking at judicial immunity, in the absence of any *mens rea* and *actus reus* while a sitting judge, with regard to torture and cruel, inhuman and/or degrading treatment, it would seem that judicial immunity would preclude any prosecution of a sitting judge for the acts done as a judge. Acts that might be crimes done by the judge prior to being on the bench or in getting to the bench might however be prosecutable.²³³ As to participation of members of Congress, the situation appears more complex. If members of the Executive Branch in briefing Congress made members of Congress such as the ranking Majority and Minority members of key Committees²³⁴ (or all Committee members) aware of facts during the closed door hearings that amount to vi-

²³³ For example, the non-disclosure of participation in meetings related to detainee treatment if questioned on such a matter under oath during the confirmation hearings leading to a perjury charge might be a case where a sitting judge could be prosecuted for that action in getting on the bench. In addition, if the person had participated in a conspiracy or other acts that were crimes prior to entering the bench, we would expect that they might be prosecuted.

²³⁴ For example, the Senate or House Foreign Affairs, Intelligence, and/or Armed Services Committee hearings or even informal discussions. See *Chien Blanc*, *supra* note 227a; Scott Shane & Mark Mazzetti, *supra* note 227a. I recognize there may be Speech and Debate clause concerns which are beyond the scope of this article. At a minimum, if evidence led to these persons they might be characterized in criminal pleadings as unindicted co-conspirators with the political consequences of such an appellation on the sitting member of Congress.

ulations of criminal law, there would be a confidential record of those disclosures. If the members of Congress apprised of these facts were to demonstrate an enthusiasm and agreement with the Executive persons detailing the illegal conduct, it appears that at some point it might be possible to establish accomplice or conspiracy type criminal liability for those members of Congress as to those acts. Of course, concerns of legislative immunity are present here, but the point is that the contours of that immunity would have to be a subject of careful evaluation. Ultimately, it might be that the members of Congress could be seen as unindicted co-conspirators or material witnesses, and that would be the way their presence would be signaled in such a prosecution without necessarily being in a position to have the member of Congress placed in the docket. Such assertions of immunity might also be sought in the Executive. The key point of such a prosecution, as opposed to a civil action, is that the prosecutor serves as a filter that is part of the state that is seeking to cleanse the state of alleged criminality in a manner that vindicates a background international law rule. As such, it is the sovereign accepting to review itself. Such review, of course, has to be done consistent with the prerogatives that derive from the separation of powers.

Another aspect of this complexity is establishing the facts. The investigatory entities and the substance to be investigated would now act after a period of time when those entities have looked already, at least partially, at the question of facts and guilt of individuals. Inspector Generals and others have done investigations and made reports that are supposed to be definitive. Congressional hearings have occurred in open and closed sessions and under oath with testimony given. Immunities have been given and imperfections in the prior investigatory process have led to persons no-longer being prosecutable (for example, most recently, Lieutenant Colonel Steven Jordan for Abu Ghraib). Low-level persons have been prosecuted for what they were alleged to have done, and some have been court-martialed, convicted and sentenced based on the procedures developed. Those procedures required that a set of facts have been analyzed under a certain legal standard. Given the structured analysis discussed above and the potential for high-level persons to seek

to protect themselves based on history, there is a reasonable possibility that the investigations that have been run by persons under the ultimate control of the high-level civilians or generals at the heart of this analysis are divergent from complete accuracy. The ease of finding links for those at low-levels to violative conduct through their physical actions (we have pictures), as compared to the greater difficulty of finding the trail to higher-ups, may have tended to orient resource limited investigations towards the lower-level persons where the prosecutorial task was easier to document. This point is not to say that the lower-level persons that were convicted were not guilty, but rather that it was easier to convict them than higher-ups. In addition, absent encouragement from above, the internal mechanisms give absolutely no (formal or informal) incentives for an investigator to seek out higher levels in or outside the relevant chain of command. Given that the persons above are our potential defendants, one can see the pressure on prior investigations to not reach too high.

The task we are foreseeing steps out of those concerns and focuses on the higher-level rather than the lower level persons – the hardest cases to crack, so to speak. As with every prosecution, what is needed is a theory of the case that synthesizes the good facts and bad facts into a simple idea (preferably 25 words or less) that the prosecution will refine as it digests the results of its investigations and determines the specific theories of the case for individual prosecutions against particular defendants.²³⁵ While *refluat stercus* is an elegant way to express a simple idea of criminal prosecution of U.S. high-level civilians and generals in U.S. domestic courts, it does not express precisely what would be the overarching theory for such a case. The best overarching theory that has occurred to me would be the following:

“Whatever the rationalizations made, these high-level civilian and military general defendants organized torture and cruel, inhuman and/or degrading treatment in violation of United States law. We will prosecute, convict and sentence them for their crimes. We keep our honor clean when we fight wars.”

²³⁵ I thank Professor Joseph Daly for his insights about constructing the theory of the case.

The “whatever the rationalizations made” phrase of the overarching theory attempts to recognize that various arguments might be made in defense by these defendants in order to avoid conviction. Rather than ignore those difficulties, this theory recognizes there will be creative arguments made by the potential defendants, but those arguments will not prevent the prosecution of these individuals. The “these high-level civilian and military general defendants” phrase points directly at the individuals that are to be indicted. It also shows that the focus is not on finding low-level scapegoats but on the principals, whatever their title, whatever their power. The “organized torture and cruel, inhuman and/or degrading treatment” language places an emphasis not only on the acts and the ordering of acts but also on the organization and marshalling of policy and planning that permitted the acts of torture and cruel inhuman or degrading treatment. The “in violation of United States law” places the emphasis on the fact that the result of the activities of the defendants was to complete prosecutable acts that – under the principal of legality – are violations of U.S. criminal law. The “we will prosecute, convict and sentence them for their crimes” phrase presents the will of the state to bring to criminal justice those who have violated its laws. It also represents the will of the state to open itself up to inspection to prosecute its high-level agents that have violated United States law. Finally, the “We keep our honor clean when we fight wars,” in addition to being a veiled reference to stanzas of the Marine hymn, reminds us of the obligation on a state to comply with law – laws of war or laws of peace – as it confronts enemies, even mortal enemies.

In the following sections, we will look at generic groups of persons who were high-level civilians or generals and their potential prosecution.

B. The President

Putting aside questions of the impeachment of a President as a political process for removal from office without a deprivation of liberty, we first must raise the issue of criminal prosecution of a present or former President as part of the examination of criminal prosecution of high-level civilians or generals in U.S.

domestic courts. In thinking about criminal prosecutions at this level, there is a generic first question as to whether the President should be examined as a principal or accessory to the given crime. It seems that there are two levels of analysis. First, is the question of whether one can develop the indictable offense against the President. Second, assuming one has developed an indictable offense against the President, would one seek to indict the President and, if so, when? For the purposes of this analysis, I think it is simpler to focus first on the question of indictable offenses for all the potential high-level civilians and generals including the President. The reason is that the question of indictment arises only if one thinks the charge can be made. After finding who might be the chargeable group, if the President forms part of the group, it is a secondary question as to what to do with the President. I recognize that the indictment of a President raises several thorny issues, from the jurisprudence in the Nixon and Clinton eras, that point to the difficulty of the courts permitting criminal prosecution (as contrasted with civil proceedings) to proceed against a sitting President.²³⁶ But those issues are more focused on the opportunity and tactics rather than the more primary issue of whether there is an offense that is indictable.

C. Federal Criminal Prosecution

High-level US civilian authority can be charged in federal court by the federal prosecutor (whether appointed by the President or a special prosecutor) for federal crimes or they can be

²³⁶ The Ford pardon suggests that such a prosecution would not be a difficulty for a former President. See *President Gerald R. Ford's Proclamation 4311, Granting a Pardon to Richard Nixon*, Watergate.info, Sept. 8, 1974, <http://www.watergate.info/ford/pardon-proclamation.shtml>. The Proclamation stated,

As a result of such acts or omissions occurring before his resignation from the Office of President, Richard Nixon has become liable to possible indictment and trial for offenses against the United States. Whether or not he shall be so prosecuted depends on findings of the appropriate grand jury and on the discretion of the authorized prosecutor. Should an indictment ensue, the accused shall then be entitled to a fair trial by an impartial jury, as guaranteed to every individual by the Constitution.

charged in state court by state prosecutors for state crimes.²³⁷ In this section we focus on the federal prosecution of such persons for federal crimes or federal assimilated crimes.

1. High-level civilian criminal prosecution in Federal Court

Goldsmith portrayed the senior officials with whom he regularly met as unremittingly fearful of another terrorist attack and determined 'to act aggressively and preemptively.' At the same time, he wrote, they feared that they could one day be prosecuted for engaging in tactics that pushed legal boundaries. The solution was for lawyers 'to find some way to make what [Bush] did legal,' Goldsmith wrote.²³⁸

Whether the defendants are viewed as principals,²³⁹ or accessories after the fact,²⁴⁰ when trying to vindicate international law within U.S. domestic law in the War on Terrorism, the natural first law to examine is the Military Commissions Act of 2006. Retroactive back to 1997 so that it covers the relevant period of concern for this article, the Military Commissions Act of 2006 details a number of crimes that might be of interest to our discussion.

a. Common Article 3 War Crimes (per the Military Commissions Act of 2006)

Looking at the high-level civilians in any department, it is unlikely that these persons would be chargeable with torture, cruel or inhuman treatment, murder, mutilation or maiming, intentionally causing serious bodily injury, rape or sexual assault or abuse, whether as principal or accomplice or for an attempt of one of these acts. However, high-level civilians in any department could be charged with conspiring to commit these offenses. The manner in which such conspiracy might be seen is based

²³⁷ For an effort to look at federal and state crimes to vindicate human rights in U.S. courts, see FRANCISCO FORREST MARTIN, *CHALLENGING HUMAN RIGHTS VIOLATIONS: USING INTERNATIONAL LAW IN U. S. COURTS* (2001).

²³⁸ Dan Eggen & Peter Baker, *New Book Details Cheney Lawyer's Efforts to Expand Executive Power*, WASH. POST, Sept. 5, 2007, at A1, available at <http://www.washingtonpost.com/wpdyn/content/article/2007/09/04/AR2007090402292.html>.

²³⁹ See 18 U.S.C. § 2 (2008) (providing the statutory definition of "Principals").

²⁴⁰ See 18 U.S.C. § 3 (2008) (listing the statutory definition of "Accessory after the fact").

upon an agreement of two or more persons to have others do the offenses. The act by one or more of the initial persons to effect the object of the conspiracy would be, for example, writing an incorrect memo explaining why the Geneva Conventions did not apply, writing an incorrect memo interpreting the terms of the law in a manner that is very narrow as a means of providing what has been termed an “advance pardon,” incorrectly specifying types of interrogation techniques that one wrongly thinks are perfectly permissible under such a narrow standard, writing an incorrect memo that shows why the Convention Against Torture or Other Forms of Cruel, Inhuman or Degrading Treatment does not prevent the extraordinary rendition of people to countries where we know or have reason to know they will be tortured, and other acts of this type might be seen as further means to reach these types of persons for these types of crimes.²⁴¹

b. Non-Common Article 3 War Crimes

If one considers that Common Article 3 is not the only aspect of the four Geneva Conventions that may apply to persons who have been detained (the Hamdan decision concluded only that Common Article 3 applied, at a minimum, to our conflict with Al-Qaeda), 18 U.S.C. § 2441 (c)(1), which is un-amended by the Military Commissions Act of 2006, includes as war crimes grave breaches of the Geneva Conventions.²⁴² Pursuant to Geneva Convention relative to the Treatment of Prisoners of War

²⁴¹ See 18 U.S.C. § 371 (2008) (defining “Conspiracy to commit offense or to defraud United States”); see also 18 U.S.C. § 2441 (2008) (providing the definition of “War crimes”).

²⁴² 18 U.S.C. § 2441(c)(1) does not refer to Common Article 3 alone as does § 2441(c)(3). See *supra* note 170. As used in this section, the term ‘war crime’ means any conduct “(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party . . .” 18 U.S.C. § 2441(c)(1) (emphasis added); see Johannes van Aggelen, *A Response to John C. Yoo, The Status of Soldiers and Terrorists under the Geneva Conventions*, 4 CHINESE J. INT’L L. 167 (2005); see also Benjamin G. Davis, *Keeping Our Honor Clean: A Response to Professor Yoo*, 4 CHINESE J. INT’L L. 167 (2005); but see, John C. Yoo, *The Status of Soldiers and Terrorists under the Geneva Conventions*, 3 CHINESE J. INT’L L. 135 (2004); John C. Yoo and James C. Ho, *The Status of Terrorists*, 44 VA. J. INT’L L. 207 (2003); Georg Schwarzenberger, *Terrorists, Guerrilleros, and Mercenaries*, 1971 TOL. L. REV 71 (1971) for an earlier discussion of the issues in the debate that leans in favor of the responses as did the Supreme Court in *Hamdan*.

(GCIII POW's) Article 130²⁴³ and Geneva Convention relative to the protection of Civilian Persons in Time of War (GCIV Civilians), Article 147,²⁴⁴ torture and inhuman treatment, willfully causing great suffering or injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, are types of grave breaches that are made offenses under 18 U.S.C. § 2441 outside of the Common Article 3 setting. Combining this with the general federal conspiracy statute 18 U.S.C. § 371,²⁴⁵ one can imagine a charge of conspiracy to commit the offense of non-common Article 3 War Crimes by two or more persons. The overt act of the high-level civilian in this setting would be similar to the acts under the Common Article 3 War Crimes above,²⁴⁶ but directed at persons in an armed conflict of an international character under GC III POW's and/or GC IV civilians and security detainees.

²⁴³ Geneva Convention relative to the Treatment of Prisoners of War, art. 130, Aug. 12 1949, 75 U.N.T.S. 135, available at <http://www.unhcr.ch/html/menu3/b/91.htm> ("Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.").

²⁴⁴ Geneva Convention relative to the protection of Civilian Persons in Time of War, art. 147, Aug. 12, 1949, 75 U.N.T.S. 287, available at <http://www.unhcr.ch/html/menu3/b/92.htm>.

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Id.

²⁴⁵ 18 U.S.C. § 371.

²⁴⁶ See *supra* note 242 and accompanying text.

c. Conspiracy or Solicitation to commit a crime of violence
(Section 373) (Common Article 3 Grave breaches or
Non-Common Article 3 Grave Breaches)

Under the federal solicitation statute (18 U.S.C. § 373 (2007)),²⁴⁷ we can look at the Common Article 3 War Crimes and Non-Common Article 3 War Crimes and imagine the high-level civilians doing the kinds of act that amount to solicitation for such offenses through their memos and actions discussed under war crimes above.²⁴⁸ In addition, using the general federal conspiracy statute (18 U.S.C. § 371) with the solicitation statute, one can see how the high-level civilian agreement and overt acts to induce others to follow the path that leads to the types of crimes of violence subject to the solicitation act would be another means by which to charge these high-level civilians.

d. Conspiracy to kill, kidnap, maim, or injure persons or
damage property in a foreign country

High-level civilians could also be subject to 18 U.S.C. § 956 (2007),²⁴⁹ with the overt acts being the authorization, planning memos etc that lead to any of the crimes described. Thus, none of the high-level persons would kill, kidnap, maim, or injure persons or damage property in a foreign country directly. Rather, they would be found guilty of the acts forming a conspiracy to do these offenses through their organization of the torture and cruel, inhuman and degrading treatment described as killing, maiming, and injuring persons in a foreign country.

e. Conspiracy to Kidnap or Kidnapping

With regard to persons held in the United States (Padilla or Hamdi) or protected persons (Khalid Sheikh Mohammed's children being held), there might be a possibility for conspiracy to kidnap under 18 U.S.C. § 1201 (2007).²⁵⁰

²⁴⁷ 18 U.S.C. § 373 (2007).

²⁴⁸ See 18 U.S.C.A. § 2 (2007) (providing the definition of "Principals").

²⁴⁹ 18 U.S.C.A. § 956 (2007).

²⁵⁰ 18 U.S.C.A. § 1201 (2007).

f. Conspiracy to Torture and Torture

To the extent that torture occurred outside the United States, torture or conspiracy to torture might also be chargeable offenses against these high-level civilians under 18 U.S.C. § 2340, et seq.²⁵¹

g. Conspiracy to Assault and Assault

Conspiracy under the general conspiracy statute coupled with assault might be another way to capture these high-level civilians.²⁵²

h. Conspiracy to Maim and Maiming

Conspiracy to Maim would appear to be a further possibility.²⁵³

i. Deprivation of rights under color of law or Conspiracy to deprive of rights under color of law²⁵⁴

Leaving aside the question of willfulness, the questions that will arise are: (1) the nature of the detainee's rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or (2) subjecting such detainee to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens. This statute might be a powerful tool through which to prosecute federal officers provided that the due process concerns of fair warning do not block such prosecution (see the discussion under state prosecutions, below).

j. "Cover-up" type crimes

Alternatively, if it was determined that persons were engaged in a cover-up based on a comparison of what they have

²⁵¹ 18 U.S.C.A. § 2340 (2007).

²⁵² See 18 U.S.C.A. § 113 (2007) (defining "Assaults within maritime and territorial jurisdiction").

²⁵³ See 18 U.S.C.A. § 114 (2007) (providing the definition for "Maiming within maritime and territorial jurisdiction").

²⁵⁴ See 18 U.S.C.A. § 242 (2007) (defining "Deprivation of rights under color of law").

said in prior investigations and what would be examined now, one could imagine crimes relating to a cover-up.²⁵⁵

k. State law crimes incorporation

To the extent the above federal statutes did not provide a basis for prosecution the incorporation of appropriate state law offenses would be another avenue to seek federal prosecution.²⁵⁶

l. Other crimes

A possible but somewhat unlikely crime would be misprision of a felony.²⁵⁷

m. Definitions²⁵⁸

While the geography of the crimes may be external to the United States, between the conspiracy and offense definitions, provided the shape of the conspiracy includes persons and acts happening in the United States, the definitions would not appear to create any impossible hurdles to this type of criminal prosecution in U.S. domestic courts of the high-level civilians.

2. Military General Officers – Federal Court and Uniform Code of Military Justice

Military general officers can be prosecuted in court-martial under the Uniform Code of Military Justice, in federal court for federal crimes by a federal prosecutor, or in state court for state crimes by a state prosecutor. A person could be charged on the same facts for different crimes on both the federal level and state level without raising a problem of double jeopardy. In practice, state and federal courts defer to the military court-martial process.²⁵⁹

²⁵⁵ See 18 U.S.C.S. § 1519 (2007) (providing the definition for cover-up crimes).

²⁵⁶ See 18 U.S.C.S. § 13 (2007) (containing the heading: "Laws of states adopted for areas within Federal jurisdiction").

²⁵⁷ See 18 U.S.C.S. § 4 (2007) (defining "Misprision of felony").

²⁵⁸ See 18 U.S.C.S. § 5 (2007) (providing the definition of "United States"); see also 18 U.S.C.S. § 3261(a) (2007) (containing the heading: "Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States").

As to federal crimes, the crimes described for high-level civilians, described above, might be applied to military general officers who were either no longer on active duty or in a status under which the military justice system could not reach them (for example, retired without a pension).

While there is some discussion about whether the doctrine of command responsibility is properly captured under the punitive provisions of the Uniform Code of Military Justice,²⁶⁰ our effort is to look more broadly than just at command responsibility in the effort to vindicate the international law rules of concern. In this light, several punitive provisions of the Uniform Code of Military Justice could be applied to military general officers to vindicate international law rules, such as: Article 81 – Conspiracy (conspiracy by both uniformed and civilians would be a manner within the Uniform Code of Military Justice to capture some of the crimes that would have been entered with high-level civilians.), Article 93 – Cruelty or Maltreatment, Article 107 - False Official Statements, Article 118 - Murder, Article 119 - Manslaughter, Article 120 - Rape and carnal knowledge, Article 124 - Maiming, Article 125 - Sodomy, Article 128 - Assault, Article 131 - Perjury, Article 133 – Conduct unbecoming an officer and gentleman and Article 134 – General Article. These generals would be treated as Article 77 – Principals or Article 78 – Accessories after the fact.²⁶¹

3. State prosecution of high-level civilians and/or military generals

Given the dearth of such prosecutions, it might appear that political will is not available and that high-level civilian authority and military generals are unlikely to be prosecuted at the federal level. Congressional oversight also may be tame as many members of Congress may have been complicit in the violations (knowledge gained in closed door briefings to the Intelligence and

²⁵⁹ See 18 U.S.C. § 3261(a) (explaining the relation between federal and Uniform Code of Military Justice jurisdiction for uniformed military).

²⁶⁰ Hansen, *supra* note 79; Smith III, *supra* note 24.

²⁶¹ For all of the sections discussed please see Manual for Courts-martial United States, Part IV Punitive Articles (2008), available at <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>.

Armed Services Committees and acquiescence). Is there another possibility in the criminal courts of the fifty states?

At the risk of stating the obvious, state criminal law indictments are brought by state prosecutors under state criminal law, not federal or military law. I am not aware of any state war crime legislation that imitates federal war crime legislation,²⁶² but there may be state crimes that are codified (as opposed to federal crimes that are codified) that capture aspects of what is covered in federal war crime or torture legislation, treaty and customary international law. For example, assault, murder and conspiracy statutes.

In addition, a few states (Florida is one) still recognize common law crimes.²⁶³ While a subject of controversy, one theory of U.S. foreign relations law is that customary international law is part of state common law.²⁶⁴ Thus, bringing state prosecutions for common law crimes in those states against federal officials theoretically could include violations of customary international

²⁶² See generally BRIDGET J. WILSON, A MODEL STATE CODE OF MILITARY JUSTICE FOR THE NATIONAL GUARD NOT IN FEDERAL SERVICE: JUSTICE FOR THE MILITARY'S MINOTAURS (on file with author) (outlining that there are diverse state military justice systems; that members of the National Guard may be subject to state military justice for significant portions of their tenure rather than the Uniform Code of Military Justice; and stating that a model state code of military justice and state manual for courts-martial for the National Guard not in Federal Service has been developed by a National Guard Bureau Working Group).

²⁶³ See WAYNE R. LAFAYE, SUBSTANTIVE CRIMINAL LAW 106–08 (2d ed. 2003). LaFave states that “in recent years a great many states have enacted comprehensive new criminal codes, and in the process they have usually but not always abolished common law crimes.” *Id.* at 107. As to the District of Columbia and state common law crimes in federal areas, it has been noted that:

It has long been settled that there are not federal common law crimes; if Congress has not by statute made certain conduct criminal, it is not a federal crime. In spite of this general proposition, Congress has provided for common law crimes in the District of Columbia and Congress has provided that state criminal law (and this would include state criminal law of the common law variety in the states retaining common law crimes) applies (in the absence of a federal criminal statute) in those “federal enclaves,” or islands of federal territory (e.g., army posts, naval bases), located within states.

Id. at 107–08.

²⁶⁴ See generally Jack L. Goldsmith & Curtis A. Bradley, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT'L L. 265 (2001); Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457 (2004).

humanitarian and/or international criminal law (including torture) under state common law. Another avenue for prosecution of state crimes would be through the Federal Assimilative Crimes Act (state crimes on federal territory prosecuted by federal prosecutors and assimilated as federal crimes to make them federal crimes).²⁶⁵

Once a state prosecutor brings a state prosecution against a federal official, the Federal Officer Removal Act²⁶⁶ can be invoked by the high-level civilian or general to have the matter removed from the state court to the federal court. At that point, however, the Justice Department has to determine whether it will defend the accused (if Justice considers the defendant was operating within the law) or leave the accused to defend him/herself (Justice determines there is a serious question about the legality of what the accused did under state law).

Where high Justice officials are implicated in the torture policy, one can imagine five possibilities: 1) Justice says it will prosecute the person on federal crimes and the federal court might stop the state prosecution under a federalism doctrine, 2) Justice says it will prosecute but due to conflicts, it is constrained to give the matter to an independent counsel that again stops the state proceeding, 3) Justice says it will defend the accused in the federal court as s/he was acting within the law with the state prosecutor bringing the case forward in the federal court, 4) Justice says it will not defend the person and leaves them to defend him/herself in the proceeding in federal court run by the state prosecutor, and 5) if there is no automatic removal, the whole case would go forward in the state court.

In any setting where the state prosecution goes forward, the state prosecutor could attempt to have the accused plead out and provide evidence of wrongdoing of higher ups for further proceedings against them. Assuming Justice seeks to defend the ac-

²⁶⁵ See 18 U.S.C. § 13 (2007) (containing the section heading: "Laws of States adopted for areas within Federal Jurisdiction"); Julian G. Ku, *Structural Conflicts in the Interpretation of Customary International Law*, 45 SANTA CLARA L. REV. 857 (2005) (exploring whether the federal courts have the final authority to interpret customary international law and if so, the consequences of federal courts' usage of customary international law); see also Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380 (2006) (positing that under this system state governors can be preempted, but not commandeered, by federal authorities).

²⁶⁶ 28 U.S.C. § 1442 (2007); 28 U.S.C. § 1442a (2007).

cused, I would imagine motions to delay the criminal proceeding, defenses of immunity, necessity, etc that can be raised by the defendant in all these settings, but the defenses are not the key here. The point of this process is to get the case to a prosecutor who gets it into a court. This process is not necessarily about achieving a guilty verdict but it could be about a plea bargained agreement and receiving cooperation from the accused.

In the real world, enormous federal pressure would be placed on the state prosecutor. However, the state prosecutor angle (particularly elected as opposed to appointed state prosecutors) challenges the monopoly on prosecutorial discretion at the federal level and creates countervailing pressure that reminds me of "subsidiarity" or "vertical federalism" in the European Union. Such state prosecutions would help all understand that the United States Constitutional Founder/Framers provided a structure that would permit the people to be able to have criminal prosecution of alleged Federal gross lawlessness where the separation of powers at the federal level had failed. Those in the federal government who thought they could act with impunity with regard to international humanitarian law and/or international criminal law would find themselves in error.

If the area of state prosecution of a federal officer for alleged criminal conduct is an under-examined area of the law,²⁶⁷ said state prosecution for alleged criminal conduct that violates international law rules on torture and cruel, inhuman or degrading treatment (or other international humanitarian law or international criminal law) poses a particular subset of challenges. From the international law perspective, the allocation of sovereign power between the federal government and the states in our constitutional structure is an issue of internal law, not international law. Each state is free to structure itself internally in the manner that it seeks. But we are seeking to vindicate international law rules within the United States so we are obliged to look further within the structure of United States federalism and its dual (and possibly dueling) sovereigns.

²⁶⁷ See generally Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195 (2003). This article provides an excellent presentation of the issues in a U.S. internal law perspective and hints at the U.S. foreign relations law dimension. I am seeking below to think through some of the ideas expressed in this article.

Recognizing that treaties are federal law (and the constitutional concerns that preclude states entering into treaties), we need to look at customary international law. If customary international law is seen as federal law, then the Supremacy Clause operates to make such law applicable to the states. However, I recognize there is a theory that customary international law is not federal law binding on the states through the Supremacy Clause but state law consistent with the state's Tenth Amendment sovereignty. This approach might lead to some interesting situations. Under the "customary international law is state law" theory, in settings where a treaty to which the United States is a party which has language that codifies customary international law, the logical conclusion would be that said treaty language forming part of a treaty that is federal law that is (or is not) self-executing would also be, as an independent manner, state customary international law. In the setting of said treaty being declared non-self-executing, such as human rights treaties, the logical result of the "customary international law is state law" approach would be that the state would be able to apply the customary international law as state law. In states that recognize common law crimes and include customary international law within the common law, one can imagine those state law crimes would vindicate customary international law obligations that fell on the United States as a matter of international law. Moreover, under the federal Assimilative Crimes Act, said state common law "customary international law" crimes would be federalized in the appropriate locations. Through this mechanism, the language of a non-self-executing treaty would become first state law through state customary international law. Then, in the relevant areas of operation, said state law would be assimilated to federal law.²⁶⁸

²⁶⁸ I imagine the main limit possible on this would be some type of congressional dormant preemption phenomenon since no law had been passed by Congress to implement the treaty. In the cases where the Congress had passed implementing legislation for the treaty, there would still remain the question of whether the treaty language that is also customary international law would still be state customary international law. That state customary international law would be preempted by contrary federal law in the implementing legislation, but if said federal law did not cover aspects of that state customary international law, then one could imagine that the state customary international law would retain some power to prescribe conduct independent of federal law. Of course, then the problem gets very interesting when there is a situation where the federal Assimilated

To bring this question home, what if a federal officer is acting in clear violation of the treaty obligation that is also customary international law (such as Common Article 3 of the Geneva Conventions) or Article 7 of the International Covenant on Civil and Political Rights covering torture and cruel, inhuman or degrading treatment that the United States has declared is non-self-executing (and has filed RUDs as regards the cruel, inhuman and degrading treatment aspect as discussed above)? To answer this question as to a state prosecution, we need to look at (a) federal prosecution and then (b) a state prosecution as the workings of our federalism and federal officer immunity operate on both levels.

a. Federal Prosecution

Leaving to the side the elements of the crime, in a federal prosecution of such a federal officer, one would expect that the prosecution would have to face the due process requirement of fair warning that is sometimes considered coextensive with the idea of qualified immunity as regards federal officer immunity from state prosecution. The essence of such due process requirement of fair warning is notice. In criminal prosecution of high-level civilians and generals for torture and cruel, inhuman and degrading treatment, one aspect of looking at the idea of notice is to view the actions to create novel interpretation of standard international law as a means to confuse matters sufficiently so that lack of notice can be argued. The seduction of asserting new paradigms is not just a question of power or complexity of the situation, but it becomes a means to be able to argue one has not had fair warning of the crime that one is doing.

Crimes Act applies. In such a case, the state customary international law rule would become federal law. The result would be that between the state customary international law assimilated as federal law and the federal law enacted, the actual content of the federal law would be broader than the limiting language of the federal law language implementing the treaty. When we begin to think of treaties as containing customary international law of the highest level, then one can begin to see a glimmer of a manner in which the power of the international law obligation can refract through the state and federal systems. I suspect that these consequences of customary international law being considered state law have not been thoroughly analyzed by those proponents or antagonists to the idea of state customary international law. It would seem some interesting permutations are possible that are not within the scope of this paper.

It would seem that such efforts to escape fair warning concerns can be countered by the prosecutor making the point that exotic interpretation by the protagonists formed part of the common plan (malfeasance) – not that the interpretations were made innocently (misfeasance).^{269a}

Maybe another way of looking at this would be to say that the limit on courts employing novel theories that is at the heart of the fair warning notice requirement is a limit on the court. However, the court itself does not bring the prosecution. The prosecutor does. To the extent the arguments of the prosecutor can be asserted by the defendant to be novel theories, the federal officer heightens his ability to argue a fair warning basis for immunity if prosecuted and, on appeal, if convicted. To be able to do that, the federal officer would have created interpretations of the law as part of the commission of the crime of which he was charged that would change the way we think of the rule under which the prosecution is bringing the charges against the official. Said federal officer would of course be powerful and most likely therefore high-level – without having to be the President. To the extent that the prosecutor might demonstrate the instrumentalization of interpretation of the law (or the acts of lawfare to use a neo-Carl Schmittian term for “total war”) that formed part of the common plan of the high-level civilians or generals, the prosecutor would be able to demonstrate that the charged federal officer’s interpretations are the exotic ones, not the more traditional ones of the prosecutor. In that sense, the fair warning requirement would then be of no avail to the federal officer defendant.

This becomes very important when one begins to think of the federal officer as creating policy and planning in a manner that permits the torture and cruel, inhuman and degrading treatment. Every action should be reviewed to understand whether an effort to create novel interpretations of the law are truly innocent or part of a larger scheme to reduce the risk of prosecution (a “smokescreen” or “fog.”) Such novel interpretations, if accepted, would serve truly as “advanced pardons” only if they are permitted to become a conventional wisdom.

^{269a} Getting to this kind of finding appears to be part of the object, at least indirectly, of the recent suit by Jose Padilla against John Yoo personally. See Complaint, Padilla v. Yoo (N.D. Cal. Jan. 4, 2008), available at <http://howappealing.law.com/PadillaVsYooComplaint.pdf>.

Beyond these concerns of instrumentalization of the law is the issue of the extent of immunity the court would be willing to provide in assessing the action in a color of law analysis. It is beyond the scope of this paper to discuss this at length, but the key point appears to come down to the Youngstown trilogy concerns in the setting of gross lawlessness by the federal official under color of law. The concern is the extent to which the federal court is willing to vindicate the background international law rule in its assessment of the immunity of the federal officer. In the absence of an international law component to that analysis, the U.S. foreign relations law vision would lead to a primacy to the political branches, even if they are participating in gross lawlessness. The devastating consequences on the law of such deference by the Judicial power to such lawlessness would appear at least as great a concern as the effects of the court stepping into an arena that concerns foreign relations in a manner that was more robust than it traditionally has sought to do. At a minimum, if too deferential, from an international law perspective, the Judicial power would be engaged in assisting the other branches in putting the United States in breach of significant international obligations through the manipulation of a judicial doctrine, not even statutory law. It is a troubling possibility for which we must await developments.

b. State Prosecution

If the state prosecutor were to seek to make the prosecution of the federal officer, the federal officer would seek removal similar to what has been discussed at the beginning of this section. The options as to what would happen as regards such removal process are described above. The novelty with state common law crimes being considered state customary international law crimes would be that the intersection of the Judicial power with international law would not now be as a matter of separation of powers concern, but would also be a question of federalism. In that setting, the Judicial power is constrained to ponder again whether the challenge to the alleged federal officer gross lawlessness in violation of an international norm that is coming from the state is something that so steps on federal prerogatives as to need to be squelched at its inception. I do not underesti-

mate the severity of the constitutional concerns that are present in this state/federal tug of war within our system. I think though that the four settings analysis above might assist the Judicial power in measuring the circumstances where doctrines should be understood in a manner that would hinder gross lawlessness, rather than enable it. Again, we must await developments.

4. Investigation concern

A significant hurdle to any of these prosecutions is a proper investigation and gathering of evidence for such a prosecution. For the reasons described in Section III above, the Inspector Generals and other mechanisms are subject to high-level civilian authority who have no interest in having investigations and subsequent prosecutions go forward. But beyond that significant hurdle, the question is how in our United States federalism system such a prosecution can be done. One rich source of potential evidence would be the information coming out of the habeas corpus petitions and the lower level prosecutions of military, government civilians, and civilian contractors. A second source would be to use the distributed network effect of all the civil society concern domestically and internationally to help gather the relevant information in order to come to an understanding of the facts as to which persons were indictable. Together with the traditional means of evidence gathering, this civil society complement also serve the purpose of demonstrating the public will and thus building the political will for the prosecutions to go forward.

In the next section, I list a number of persons of interest who might possibly be considered the accused. In addition, persons not listed with extensive knowledge (William V. Taft IV²⁶⁹ or Alberto Mora²⁷⁰ as examples) might testify as to what they had

²⁶⁹ William V. Taft, IV, Address at the American Society of International Law Proceedings: Ethics, Legitimacy, and Lawyering: How Do International Lawyers Speak Truth to Power? (Mar. 30, 2007), reprinted in 101 ASIL PROC. 325 (2007).

²⁷⁰ See Geoffrey S. Corn, *Pentagon Process Subverted? The Lost Battle of Alberto Mora*, JURIST, Feb. 22, 2006, available at <http://jurist.law.pitt.edu/forumy/2006/02/pentagon-process-subverted-lost-battle.php> (discussing Mora's lost battle within the U.S. Department of Defense); see also Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted*, NEW YORKER, Feb. 27, 2006, available at http://www.newyorker.com/archive/2006/02/07/060227fa_fact (commenting on Mora's efforts against top administration officials challenging their tactics in fighting terrorism); Memorandum for Inspector General, Department of the Navy, *Statement for the Record: Office of General Counsel Involvement in Interrogation Issues* (July 7, 2004), available at

seen occurring. Moreover, some of these persons of interest might be encouraged to provide testimony in exchange for immunity ("flipping" a potential defendant). Finally, lower-level persons might be encouraged to describe how they received orders and knew what to do (explaining how a *defacto* or *dejure* chain of command led to their actions of torture and cruel inhuman and degrading treatment) in exchange for immunity.

PART IV. WHEN TO *REFLUAT STERCUS*?

Other than the President, and provided appropriate investigations have procured the necessary evidence, criminal prosecutions of any of the high-level civilians or military generals in question could occur while they remained in office. They might be forced to resign as a result of the indictment.²⁷¹

As to the situation where the President would be prosecuted, it appears extremely difficult to have such a prosecution ongoing for a sitting President. However, one could imagine the President being considered an un-indicted coconspirator or a material witness to proceedings occurring against other high-level civilians or generals. To the extent the President is implicated in the actions of these other persons, these lower level cases would provide evidence that might be used in an impeachment. The President may be tempted to provide executive clemency under the Plenary pardon power. However, it is important that the prosecutor make it clear that the lack of indictment of the President during the term of the President would not prevent such an indictment from occurring after office. It would seem possible for the prosecutor to receive the assistance of the President in the investigation and prosecution by proposing that in exchange for (1) access to persons and classified materials (getting around the Classified Information Procedure Act concerns), (2) waiver of pri-

http://www.aclu.org/pdfs/safefree/mora_memo_july_2004.pdf ("[I]t became evident to me and my OGC colleagues that the Working Group report being assembled would contain profound mistakes in its legal analysis, in large measure because of its reliance on the flawed (Office of Legal Counsel) memo").

²⁷¹ Lewis "Scooter" Libby, Assistant to the President of the United States, Chief of Staff to the Vice President of the United States, and Assistant to the Vice President for National Security Affairs resigned after he was indicted for Obstruction of Justice, False Statements, and Perjury. Indictment, *United States v. Libby* (4th Cir. Oct. 31, 2003), available at http://www.usdoj.gov/usao/iln/osc/documents/libby_indictment_28102005.pdf.

vilege and immunity defenses that the executive may seek to invoke to complicate the proceedings, and (3) for not pardoning those below, the prosecutor would not prosecute the President. This, of course, is completely unfair, but it may be the practical solution needed to achieve the prosecutions and convictions. At least it would move the level of unfairness up from the current point of low-level persons to the much higher level of the high-level civilians and military generals.

As an example of how the President can facilitate the prosecution by declassification for the purposes of criminal trial, as to establishing the torture, it would be very useful that the United States Government simply released the International Committee of the Red Cross report on the CIA Black Sites.²⁷² From articles in the media, it appears that report condemns the U.S. practices at the black sites as being torture. As such, that report is one piece of evidence that would strongly rebut efforts that might be expected by defendants to attempt to use the same type of narrowing of definitional terms (as regards the approved techniques or other techniques in use at those CIA Black sites) to argue that, in effect, what they were seeking was not torture or cruel, inhuman or degrading treatment.

²⁷² The International Committee of the Red Cross (ICRC) report appears to provide ample evidence of the torture and cruel, inhuman, and degrading treatment. For Iraq, see International Committee of the Red Cross, *Report on the Treatment by Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation*, Feb. 2004, available at http://www.humanrightsfirst.org/Iraq/ICRC_Report.pdf. The report finds that "ill-treatment . . . during interrogation was not systematic" for security detainees in Iraq, and "physical and psychological coercion . . . in some cases, [was tantamount] to torture." *Id.* Status review of detainees, http://www.humanrightsfirst.org/us_law/detainees/status_review_080204.htm. For the CIA Black Sites, the ICRC has provided the United States Government a report that has not, as of the date of this article, been released to the public. The information concerning that report in the press appears to be consistent with torture and cruel, inhuman, and degrading treatment having occurred in those black sites. Finally, we have anecdotal information of persons who have been extraordinarily rendered to other countries such as Syria and Egypt or persons who have brought unsuccessful civil suits in the United States for their treatment in theaters of battle that show a considerable consistency as to the type of torture and cruel, inhuman, and degrading treatment to which they have been subjected. References have been made to the 24 techniques approved for use by the President of which waterboarding has only recently been taken off the list. Waterboarding has been a method of torture for centuries. In addition, the ICRC report about the CIA Black sites where these techniques have been used considers these techniques to amount to torture and cruel, inhuman, and degrading treatment. Mayer, *supra* note 27.

In addition, by Executive Order, the current President or the next President could order the declassification of detainee treatment traffic in the Executive Branch with regard to: (1) the CIA black sites; (2) the extraordinary rendition of detainees around the world; (3) all aspects of the treatment of detainees in areas of armed conflict (War in Afghanistan, War in Iraq); (4) the detainee protocol for persons who have been held as enemy combatants in the United States; and (5) any other places still unknown in which detentions and interrogations are occurring at the instigation of the United States or in association (in the broadest sense of the word) with the United States. This type of 360 degree transparency would help us be able to see the mechanisms that led to the current situation.

Another approach, borrowing from the experiences at the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda, is to propose immunity for persons who are at the equivalent level of a Lieutenant Colonel in the military in exchange for their coming forward with their information about the detentions in which they had participated. By doing this, the guards, the extradition teams for CIA flights, and the other foot-soldiers who implemented the policies under question here can be assured that they will have immunity. At the same time, the higher level perpetrators, the ones who designed and planned the policy, would remain subject to criminal liability for their acts. This source of information might be complimented by evidence drawn from the research of members of civil society or government agencies to try to paint an accurate picture of the responsibility of each person at a high-level, whether civilian or general.

I would suggest that the Attorney General of the United States, like Judge Mukasey in the current Administration, should be confronted with the issue of starting such prosecutions immediately rather than waiting until a new administration. The reason is that the delay comes at a cost. The issue that confronts such an Attorney General is whether s/he is going to act in ways that permit crimes to continue (primarily conspiracy and obstruction of justice but there may be more), and by those actions, become a member of the conspiracy as principal or accomplice, or should they act in ways that exculpate themselves from any criminal enterprise in a manner that would not be ques-

tioned by a future Attorney General. Unless persons such as the Attorney General are placed before the dilemma by a request for them to, they are not forced to determine what they will do, and as a result might be able to obscure for a future Attorney General their own role in perpetuating a criminal violation. In an election year, such pressure should come as early as possible to avoid the traditional hesitancy for the Attorney General to pursue prosecutions of persons prior to an election.

PART V. WHO TO REFLUAT STERCUS ?

Under the crimes described above under federal law, based on the publicly available information about torture and cruel inhuman or degrading treatment of detainees, it would seem that persons of interest would be:

- President George W. Bush,
- Vice President Richard Cheney,
- Attorney General Michael B. Mukasey
- Vice President Chief of Staff David Addington
- Former Attorney General and White House Counsel Alberto Gonzales,
- Former Deputy to the White House Counsel, Timothy E. Flanigan
- Fran Townsend, Former Assistant to the President for Homeland Security and Counter-Terrorism
- L. Paul Bremer III, Former U.S. Administrator of Iraq
- Former Attorney General John Ashcroft
- Former Assistant Attorney General for the Office of Legal Counsel Jack Landsman Goldsmith,
- Former Deputy Assistant Attorney General for the Office of Legal Counsel John Yoo,
- Former Deputy Assistant Attorney General for the Office of Legal Counsel, Patrick Philbin
- Deputy Assistant Attorney General of the Office of Legal Counsel, Stephen Bradbury
- Secretary of State and former National Security Adviser Condoleezza Rice,

- Department of State Legal Adviser and former Chief Counsel of the White House National Security Council, John B. Bellinger III
- Former Secretary of State Colin Powell
- Former Chief of Staff to the Secretary of State Lawrence Wilkerson
- Former Counselor of the Department of State, Philip D. Zelikow
- National Security Adviser Stephen Hadley,
- Secretary of Defense Richard Gates,
- Former Secretary of Defense Donald Rumsfeld,
- Under-Secretary of Defense for Intelligence Stephen Cambone
- Former Undersecretary of Defense for Policy Douglas J. Feith
- Former Assistant Secretary of Defense for Detainee Affairs Matthew Waxman
- General Counsel, Department of Defense, William J. Haynes II
- Judge Jay S. Bybee, United States Court of Appeals for the Ninth Circuit, Former Assistant Attorney General for the Office of Legal Counsel
- Former Director of the Central Intelligence Agency George Tenet,
- Former Director of the Central Intelligence Agency Porter Goss,
- Director of the Central Intelligence Agency, General Michael Hayden
- Former Executive Director of the Central Intelligence Agency, A.B. Krongard
- Former Deputy Director of the Central Intelligence Agency, John C. Gannon
- Former Director of the National Clandestine Service of the Central Intelligence Agency, Jose A. Rodriguez, Jr.
- Inspector General of the Central Intelligence Agency, John L. Helgerson
- Acting General Counsel of the Central Intelligence Agency, John Rizzo

- Former General Counsel of the Central Intelligence Agency, Scott W. Muller
- Secretary of Homeland Security and former head of the Criminal Division, Department of Justice Michael Chertoff
- Director of National Intelligence John Mike McConnell
- Former Director of National Intelligence, John Negroponte
- Former Chairman of the Joint Chiefs of Staff Richard Myers,
- Former Chairman of the Joint Chiefs of Staff Peter Pace
- Former General John Abizaid
- Former Lieutenant General Ricardo Sanchez
- Major General Barbara Fast
- Major General Walter Wojdakowski
- Rear Admiral Jane G. Dalton, USN (Ret.)
- Former Army Major General Geoffrey Miller
- Former Army Brigadier General Janis Karpinski
- U.S. Vice Admiral Lowell Jacoby, Director of the Defense Intelligence Agency of the United States of America

It has been suggested that I present in this section an explanation for each of the persons of interest above as to why I would put them on this list. If I was the prosecutor, I would be required to gather from the variety of investigations and sources that have occurred since the breaking of the Abu Ghraib story, the information that ties these persons into the “common plan” that has been described in great detail by others. I would have to marshal the facts that relate to each crime and present them to a grand jury seeking an indictment. I am not that prosecutor.

I am a citizen calling for an investigator and prosecutor to do that task. I am also calling on persons of goodwill to assist such investigators and prosecutors in developing such a file as was done in the first and second German complaint (the latter of which I participated in through the filing of an affidavit).²⁷³ The

²⁷³ See CTR. FOR CONSTITUTIONAL RIGHTS, GERMAN WAR CRIMES COMPLAINT AGAINST DONALD RUMSFELD, <http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld,-et-al> (last visited Feb. 12, 2008); CTR. FOR CONSTITUTIONAL RIGHTS, AFFIDAVIT OF BENJAMIN G. DAVIS, GERMAN WAR CRIMES COMPLAINT AGAINST DONALD RUMSFELD (2006), *available at* <http://ccrjustice.org/files/>

reasons that I call for that to be done and why I list the persons above is because of the publicly available information that I have seen and read since 2003 on the manner in which detainees have been treated.

The above persons all have been involved as a high-level civilian or military general in some aspect of the policymaking and planning of the detainee treatment for part or all of the period from the inception of the armed conflict in late 2001 that is known as the Global War on Terror until today. The significance of each of their roles no doubt differs. What is clear is that access to the "inside story" is not available to the ordinary citizen. In this regard, I feel much like the descendants of the Koreans at No Gun Ri, who were convinced higher-ups were involved, but had difficulty procuring the proof because it was concealed.²⁷⁴ I am looking for a person like General Peers who would be in a position to look at the internal classified memorandums as well as the publicly available information and determine to what extent any of these persons of interest should be indicted and prosecuted. It would be naïve to think that the detainee treatment we have seen over the years since the start of the War on Terrorism was the result of unfortunate mistakes as the 2001 No Gun Ri review attempted to say about that event.

The suggestion is that the evidence²⁷⁵ gathered through the investigatory methods of the government and the efforts of a con-

Ben%20Davis%20Affidavit.pdf.

²⁷⁴ It has been said that type of secrecy is particularly of concern in the past few years. See generally JOHN W. DEAN, *WORSE THAN WATERGATE: THE SECRET PRESIDENCY OF GEORGE W. BUSH* (2004).

²⁷⁵ For gathering of only some of the facts, see Benjamin G. Davis, *A Citizen Observer's View of the U.S. Approach to the "War on Terrorism"*, 17 IOWA J. TRANSNAT'L L. & CONTEMP. PROBS. 465 (2008). JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (DOUBLEDAY 2008); PHILIPPE SANDS, *THE TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES*, (2008); JORDAN PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR* (2007).

For a detailed analysis of the common plan, see Paust 3, *supra* note 27; see also Paust 1, *supra* note 27; Paust 2, *supra* note 27. For a discussion of C.I.A. black site torture and the recent devastatingly critical International Committee of the Red Cross report on those black sites, see Mayer, *supra* note 27. One of the techniques used on, at least, Khalid Sheikh Mohammed was waterboarding. For a detailed discussion of the history of waterboarding as a method of torture according to the United States Courts, see Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468 (2007). For a stunning critique of the legal bases for the extraordinary

rendition and torture, see Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175 (2006); see also M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389 (2006). For a discussion of the interaction of law and torture, see Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89 (2007). For international research on the C.I.A. Black Sites, see EUR. PARL. DOC. (A6-9999) (2007), available at <http://jurist.law.pitt.edu/pdf/tdipfinalreporttext.doc>; *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations: J. Hearing Before the Subcomm. on International Organizations, Human Rights and Oversight and Subcomm. on Europe of the Comm. on Foreign Affairs H.R.*, 110th Cong. 1 (2007) (statement of Jonathan Evans, MEP); see also Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT'L L. 309 (2006); see also Robert M. Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657 (2006). For a discussion of enhanced interrogation techniques that are considered torture by the International Committee of the Red Cross, see Mayer, *supra* note 27; *Bush: CIA Holds Terror Suspects in Secret Prisons*, CNN.COM, Sept. 7, 2006, available at <http://www.cnn.com/2006/POLITICS/09/06/bush.speech/index.html>; Press Conference, President George W. Bush, *The Creation of Military Commissions to Try Suspected Terrorists* (Sept. 6, 2006), available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>. The President stated, "In addition to the terrorists held at Guantanamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency." *Id.* Moreover, "[t]his program has been subject to multiple legal reviews by the Department of Justice and CIA lawyers; they've determined it complied with our laws. This program has received strict oversight by the CIA's Inspector General." *Id.* The secret prisons remain in operation. Linzer's article states:

An Iraqi man accused of being a key aide to Osama bin Laden and a top leader of al-Qaeda was arrested late last year on his way to Iraq and handed over to the CIA, the Pentagon announced yesterday, in what became the first secret overseas detention since President Bush acknowledged the existence of such a program last September.

Dafne Linzner, *CIA Held Al-Qaeda Suspect Secretly, Officials Disclose Use of Overseas Prisons Resumed*, WASH. POST, Apr. 28, 2007, at A16, available at <http://www.washingtonpost.com/wpdyn/content/article/2007/04/27/AR2007042700729.html>. The United States reporting to the United Nations Office of the High Commission for Human Rights is available at <http://www2.ohchr.org/english/bodies/cat/index.htm>. For regularly updated primary sources, reports, case histories concerning torture and cruel inhuman or degrading treatment in the War on Terror, go to the relevant sections of the websites of the American Civil Liberties Union, www.aclu.org; Human Rights First, <http://www.humanrightsfirst.org>; Human Rights Watch, www.hrw.org; The Center for Constitutional Rights, www.ccrjustice.org; Amnesty International, www.amnesty.org; The Project to Enforce the Geneva Conventions, www.pegc.us. For protagonists discussing their work in the War on Terror in the Bush Administration, see GOLDSMITH, *supra* note 156; see also GEORGE TENET, *AT THE CENTER OF THE STORM: MY YEARS AT THE CIA* (2007); see also JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005); see also JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006). For the story of an Army interrogator in Iraq, see TONY LAGOURANIS & ALLEN MIKAELIAN, *FEAR UP HARSH: AN ARMY INTERROGATOR'S DARK JOURNEY THROUGH IRAQ* (2007). For key documents regarding torture in the War on Terrorism, see KAREN J. GREENBERG & JOSHUA L. DRATEL, *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (2005). For debate on torture, see KAREN J. GREENBERG, *THE TORTURE*

cerned citizenry to support the elements of the crimes should be brought together at appropriate grand juries to determine whether indictments should be handed down for some or all of the persons of interest with them then becoming defendants. If that evidence leads to other crimes than those suggested above and other potential persons of interest²⁷⁶ who are high-level civilians or generals, the above list of persons of interest would be revised. While I am aware of various defenses that high-level civilians might assert (see the Torture memos for example), I prefer to leave in this paper the subject of their defenses to others and/or a further paper.²⁷⁷ I would suggest that in reviewing such

DEBATE IN AMERICA (2005); *see also* SANFORD LEVINSON, *TORTURE: A COLLECTION* (2006); *see also* DANNER, *supra* note 188; *see also* Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641 (2005); *see also* Charles H. Brower II, *The Lives of Animals, the Lives of Prisoners and the Revelations of Abu Ghraib*, 37 VAND. J. TRANSNAT'L L. 1353 (2004); *see also* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005). For a direct attempt to affect customary international humanitarian law, *see* Letter from John Bellinger III, Legal Adviser, U.S. Dep't. of State, and William J. Haynes, General Counsel, U.S. Depart. Of Defense, to Dr. Jakob Kellenberger, President, International Committee of the Red Cross Regarding Customary International Law Study, 46 I.L.M. 514 (2007). For a discussion of numerous aspects of the legal strategy of the United States in the war on terrorism, *see* American Society of International Law, ASIL INSIGHTS, www.asil.org. For United States Government reports of investigations concerning detainee treatment, *see* U.S. Dep't of State, Second Periodic Report of the United States of America to the Committee Against Torture, annex 1 (May 6, 2005), available at <http://www.state.gov/g/drl/rls/45738.htm>; *see also* Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, October 4, 2007, available at http://www.nytimes.com/2007/10/04/washington/04interrogate.html?_r=1&oref=slogin; *see also* David Johnston & Scott Shane, *Congress Seeks Justice Dept. Documents on Interrogation*, N.Y. TIMES, October 4, 2007, available at <http://www.nytimes.com/2007/10/04/washington/14cnd-interrogate.html>; *White House denies relaxing torture ban*, ASSOCIATED PRESS, Oct. 4, 2007, available at <http://ori.msnbc.msn.com/id/21133278>; *see also* David Johnston and Scott Shane, *Debate Erupts on Techniques Used by C.I.A.*, N.Y. TIMES, Oct. 5, 2007, available at <http://www.nytimes.com/2007/10/05/washington/05interrogate.html?hp>; *see also* OVERSEAS JURISDICTION ADVISORY COMM., REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL LAW JURISDICTION OVER CIVILIANS ACCOMPANYING THE ARMED FORCES IN TIME OF ARMED CONFLICT, Pub. L. No. 104-106, § 1151 (1997), available at <http://www.fas.org/irp/doddir/dod/ojac.pdf>; *see also* Mark Mazzetti & Scott Shane, *C.I.A. Watchdog Becomes Subject of C.I.A. Inquiry.*, N.Y. TIMES, Oct. 12, 2007, available at <http://query.nytimes.com/gst/fullpage.html?res=9E06E3DF143FF931A25753C1A9619C8B63&s>; *see also* Stephen Grey, *CIA Rendition: The Smoking Gun Cable*, ABCNEWS, Nov. 6, 2007, <http://blogs.abcnews.com/theblotter/2007/11/cia-rendition-t.html>.

²⁷⁶ For example, doctors, *see* Nancy Sherman, *Holding Doctors Responsible at Guantanamo*, 16 KENNEDY INST. ETHICS J. 199 (2006), available at http://muse.jhu.edu/journals/kennedy_institute_of_ethics_journal/v016/16.2sherman.pdf.

²⁷⁷ I am, however, aware of the likely ones that would be asserted such as immunity, necessity, obeying orders, public authority, "reasonable" reliance on legal advice, constitutional power, "good soldier" defense etc. They do not convince. For example, *see* Michael

defenses, focus be kept on the fact that we are attempting to vindicate the international law obligations of the United States through the domestic law mechanisms. This would appear important so that, to the extent such prosecutions break new ground, we would hope that the ground would be broken in a manner that was consistent with the international law obligations of the United States (under my formula, resistance to the illegal act of gross lawlessness) rather than in a matter that seeks to legitimize, through acquiescence, the illegal acts alleged. As Robert H. Jackson said in his seminal speech of April 13, 1945 to the annual meeting of the American Society of International Law: if the evidence is not there to support a conviction, the individual should be acquitted.²⁷⁸

PART VI. SUMMARY

“The dagger of the assassin was concealed beneath the robe of the jurist.”²⁷⁹

High-level civilians and military generals can be charged for organizing torture and cruel, inhuman or degrading treatment in the War on Terror. Under Federal Law, the Uniform Code of Military Justice, and State Law, it is possible to find crimes that appear to be appropriate bases of indictment based on publicly available facts. It is possible to see how a federal (even if not a special prosecutor), military and/or state prosecutor might be able to introduce procedures with regard to these persons and have such persons convicted of such crimes or plead guilty to such crimes. It appears also unlikely that any of the international criminal law institutions or another nation, through universal jurisdiction, would be willing to take on such prosecutions.

For reasons related to resisting aggressively the legitimizing of the illegal acts suspected with regard to preemptory norms

H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 TUL. L. REV. 191 (2007).

²⁷⁸ Henry T. King Jr., Remarks at the Conference on the International Humanitarian Law Dialogs, (Aug. 29, 2007) (on file with author).

²⁷⁹ U.N. WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 50 (2007), available at <http://www.mazal.org/archive/nmt/03/NMT03-T0985.htm> (last visited Feb. 17, 2008).

that are part of the positive international law, I have argued for such prosecutions in this article. I am trying to meet the extreme prejudice to the United States with a form of extreme repudiation of those who would cause such an extreme prejudice to the United States through violation of positive international law.

CONCLUSION

When one looks at the statutes of the International Criminal Tribunals that have been put in place to address international crimes, those statutes have provided a mandate to look for those with the greatest responsibility or the most serious responsibility. To a person who has been tortured, no doubt, the memory of the torturer is vivid and that person is considered the most responsible. However, when we attempt to look at the injury done to the United States by this torture, we can see that the injury by the torturer in the booth is significant, but that the greatest responsibility is on those who have built the entire edifice and put in place the procedures that have caused that torturer to act. Without the meaningful possibility of having a foreign or international tribunal take on that task for my country, this citizen has attempted to show how we might take on this task for ourselves.

In a sense, this citizen is professing one of the essential slogans of the 1968 Student Riots in Paris: "Be realistic, demand the Impossible."²⁸⁰ Yet, we should keep in mind the comments of Professor David Crane at Chautauqua, New York on August 29, 2007 on the occasion of the announcement of the First Chautauqua Declaration, "No one is above the law. The law is fair, and the rule of law is more powerful than the rule of the gun"²⁸¹ Reminding us of what was at stake 60 years ago at Nuremberg, we can remember what Harold Nickelson, a British journalist later wrote:

²⁸⁰ See *Slogans of May 68*, Wikipedia, http://en.wikipedia.org/w/index.php?title=Slogans_of_May_68&oldid=191810632 (last visited Feb. 19, 2008) (translating the phrase from its original French, "Soyez réaliste, demandez l'Impossible"); see also SEÁN HAND, MICHEL LEIRIS: WRITING THE SELF 183 (2002) (identifying the phrase as "one such famous slogan" inspired from the "graffiti of May 1968").

²⁸¹ Nora Boustany, *War Crime Prosecutors Issue Call for Action*, WASH. POST, Sept. 1, 2007, at A21.

“... in the court room at Nuremberg something more important is happening than the trial of a few captured prisoners. The inhuman is being confronted with the humane, ruthlessness with equity, lawlessness with patient justice, and barbarism with civilization.”²⁸²

Or, maybe even more appropriately, I suggest I leave the last word to Dr. Henry T. King, Jr., one of the prosecutors at Nuremberg:

Much progress has been made, but the United States, which through Jackson created Nuremberg, is fighting a rear-guard action against the advance of the Nuremberg principles. Jackson's position that the Nuremberg principles should be applied in judging the conduct of all nations and their leaders is being disregarded by the United States today. The US has turned its back on the International Criminal Court which would institutionalize Nuremberg, and the US has disregarded the Geneva Conventions of 1949 governing the treatment of prisoners taken in the course of hostilities by holding them without trial and subjecting them to torture. Progress is using our resources to create a better, more just world, not manipulating language and digging for loopholes to lower the minimum standards of decency.

....

The abuse at Abu Ghraib revolted the civilized world just as they did Americans across the country, but the overwhelming response was not a call for America's destruction, but a plea for us to return to our core American values.

What is needed now is a revival of the spirit of Nuremberg.²⁸³

²⁸² FRANCIS BIDDLE, PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY 294 (1947).

²⁸³ King Jr., *supra* note 278. See, e.g., David Crane, *A Day at Chautauqua: Justice for a Better World*, JURIST, Oct. 2, 2007, available at <http://jurist.law.pitt.edu/forumy/2007/10/day-at-chautauqua-justice-for-better.php> (commenting on the “first annual International Humanitarian Law Dialogs”).

In order to keep the faith with this shining legacy of an international tribunal,²⁸⁴ not through force or strength but through the spirit of Nuremberg in U.S. domestic courts, the most appropriate means to demonstrate aggressive resistance to torture and cruel, inhuman and degrading treatment that was and is organized by U.S. high-level civilians and generals is *refluat ster-cus*.

²⁸⁴ Cf. Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777 (expressing criticism of the deterrent effect of ICT prosecution); Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 92 (2003) (arguing that unless "oppressive regimes" join in ratifying the ICC, then it will continue to "simply fail to address the most serious human rights cases"); John D. Altenburg, Jr., *Rhetoric or Reality? Winning the Battle of Ideas*, 7 BARRY L. REV. 145, 162 (2006) (observing that "[i]f we cannot show that we follow our own rules of war, we cannot expect moderate Muslims to have any reason to trust us").

ANNEX 1

ASIL INSIGHT **MAY 19, 2006**
THE ASIL CENTENNIAL ANNUAL MEETING
ADOPTS A RESOLUTION ON THE USE OF **VOLUME 10, ISSUE**
ARMED FORCE AND THE TREATMENT OF **12**
DETAINEES

BY MARY ELLEN O'CONNELL

[Insight Editor's note: This Insight differs from the usual ASIL Insight in that it concerns an action taken by the ASIL itself. The action is significant because the American Society of International Law, a nongovernmental organization with 4,000 members worldwide, rarely takes positions on substantive issues as a body, and because the matters covered in its resolution on the use of armed force and the treatment of detainees are central to the establishment and maintenance of international relations on the basis of law and justice – one of the primary objects of the ASIL. The resolution is accessible on line at www.asil.org/events/am06/resolutions.]

On March 30, 2006, for only the eighth time in its 100-year history, the American Society of International Law adopted a resolution on a subject of international law. The Resolution restates fundamental principles regarding the resort to and conduct of armed force, as well as to the rights of persons in detention. The Resolution received overwhelming support at the Annual General Meeting.

The topic of each paragraph of the Resolution was identified through active discussion over several months on the ASIL electronic Forum, facilitated by Ben Davis of the University of Toledo College of Law. Each topic relates to government action, both in the United States and abroad, that has either violated interna-

tional law or has challenged the validity of a principle. It was to respond to these actions, to provide a clear restatement of the law, that the Resolution was proposed. The Resolution also responds to the implicit charge that international law is endlessly malleable, that its content can hardly be known or is rarely agreed upon, and, therefore, need not be respected. Adoption of the Resolution indicates that members of the American Society stand by these principles in this the Society's hundredth anniversary year.

This *Insight* provides basic legal authority for each paragraph of the Resolution.

1. *Resort to armed force is governed by the Charter of the United Nations and other international law (jus ad bellum).*

One of the greatest accomplishments of the Twentieth Century was the outlawing of the use of force by states as an instrument of national policy. The United Nations Charter is the principal source of legal rules on resort to armed force today. It is a multi-lateral treaty binding currently on 191 states.[1] It has been binding on the United States since 1945. The Charter was drafted largely by the United States following the Second World War to create an institution and a set of principles dedicated to the maintenance of peace and security in the world. The U.S. and its allies succeeded in creating a legal regime on resort to force that has withstood challenges for over 60 years. The Charter's core principle, the general prohibition on the use of force found in Article 2(4),[2] has evolved to the point that in 1986 the International Court of Justice recognized it as a principle of *jus cogens*, a peremptory norm—one not subject to contrary agreement by treaty.[3] The only exceptions to Article 2(4) provided in the Charter are the right to use force in self-defense, per Article 51, and the right to use force with Security Council authorization, as provided in Chapter VII. In September 2005, the vast majority of UN members re-affirmed their commitment to the Charter in general, and the rules on the use of force in particular, at the World Summit held in New York.[4]

In addition to the Charter, certain principles of customary international law and other treaties also contribute to the regulation

of the use of armed force. For example, a state acting in lawful self-defense must use only such force as is necessary to defend itself. In other words, the right to use force even in lawful self-defense is not unlimited.[5] This principle is implicit in the Charter and is an established norm of customary international law. Thus, this paragraph of the Resolution refers to the *jus ad bellum* to incorporate all customary and conventional law that regulates the resort to force.

2. *Conduct of armed conflict and occupation is governed by the Geneva Conventions of August 12, 1949, and other international law (jus in bello).*

The four 1949 Geneva Conventions, like the UN Charter, are multilateral treaties enjoying near-universal state adherence, including by the United States.[6] According to common Article 2 of the four Conventions, they apply in cases of armed conflict and occupation involving parties to the Conventions. Their purpose is to protect the victims of armed conflict,[7] and they are intended to be applied generously with that purpose in mind. The ASIL Resolution cites the 1949 Geneva Conventions because of their importance and centrality to the *jus in bello*, parallel to the importance and centrality of the Charter to the *jus ad bellum*.

In addition to the 1949 Conventions, a number of other treaties and rules of customary international law are relevant to the conduct of armed conflict. These are referenced in the Resolution by the collective designation, the "*jus in bello*." It is well known that such important law as the Hague Regulations of 1907,[8] the 1977 Additional Protocols to the 1949 Conventions,[9] certain arms control conventions,[10] and principles of customary international law[11] are included in the term "*jus in bello*."

The International Court of Justice in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* said the following about the *jus in bello*:

The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses. . . have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles.

These rules indicate the normal conduct and behavior expected of states.[12]

3. Torture and cruel, inhuman, or degrading treatment of any person in the custody or control of a state are prohibited by international law from which no derogation is permitted.

The ASIL Resolution restates that torture, cruelty, inhumanity and degradation against persons in custody are unlawful under international law, whether in situations of armed conflict or peace.[13] Under Article 17 of the Third Geneva Convention (on prisoners of war), "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever." [14] Under Article 31 of the Fourth Geneva Convention (on civilians): "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties." [15] At a minimum, *all* persons detained in an international armed conflict are entitled to the protections of Additional Protocol I, Article 75. Article 75 is part of customary international law, and, therefore, binding on all states. It prohibits torture as well as other violence to the life, health or well-being of persons, and outrages upon personal dignity. In non-international armed conflict, common Article 3 to the four Geneva Conventions also prohibits torture as well as other violence to life and person, including cruel treatment and outrages upon personal dignity. These are absolute prohibitions; there are no exceptions.

Outside of situations of armed conflict, peacetime human rights law regulates interrogation. It, too, prohibits torture, cruelty, inhumanity, and degradation. Article 5 of the Universal Declaration of Human Rights states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." [16] This principle has been reconfirmed, restated and elaborated in a series of important treaties, including the International Covenant on Civil and Political Rights of 1966 (Article 7)(the United States is a party); [17] the American Convention on Human Rights (Article 5), [18] the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3), [19] the Convention Against Torture (Articles 1, 2 and 16)(the United States is a party), [20] and the African (Banjul) Charter on

Human and Peoples' Rights (Article 5).[21] The customary international law of human rights also prohibits torture as well as cruel, inhuman and degrading treatment.[22]

The Convention Against Torture (CAT) disallows necessity and other excuses as defenses to torture. Article 2(2) provides: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." The CAT does not specifically disallow necessity as an excuse for lesser violations of the Convention, i.e., for cruel, inhuman and degrading treatment. The International Covenant on Civil and Political Rights (ICCPR), however, in providing for derogations during emergencies, prohibits derogation from Article 7 as a whole. In addition, the Committee of Ministers of the Council of Europe affirmed in July 2002, that "[t]he use of torture or of inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of . . . terrorist activities, irrespective of the nature of the acts that the person is suspected of. . ."[23] Thus, torture, cruel, inhuman and degrading treatment are all considered non-derogable prohibitions even in times of national emergency.[24]

As part of customary international law, these principles bind states wherever they act. There is in customary international law no geographic restriction on the prohibition on torture or cruel, inhuman, and degrading treatment of persons in custody.

4. *Prolonged, secret, incommunicado detention of any person in the custody or control of a state is prohibited by international law.* Again, the sources of this principle are found principally in the *jus in bello* for armed conflict situations and general human rights law applicable in the absence of armed conflict.[25]

To protect those lawfully detained in armed conflict, the 1949 Geneva Conventions on Prisoners of War and Civilians set out conditions of detention, including, most importantly, the right of Protecting Powers or the International Committee of the Red Cross (ICRC) to visit those detained. There is a provision in the Civilians Convention, Article 143, which allows a brief delay in gaining access to prisoners:

Such visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. Their duration and frequency shall not be restricted. . . .

The ICRC's practice has been to accept no more than a two-week delay for access to individuals under the terms of Article 143's allowance for "imperative military necessity." This practice coincides with Article 136 of the Civilians Convention that requires notifying information bureaus and the ICRC (as the Central Information Agency) of measures taken respecting any protected person "within the shortest period possible." This applies to any person to be detained for more than two weeks.[26] In addition to reporting measures taken against protected persons, Article 136 also requires that a Detaining Power provide information bureaus and the ICRC "promptly with information concerning all changes pertaining to these protected persons, as, for example, transfers, releases, repatriations, escapes, admittances to hospitals, births and deaths." Article 136 contains no exception for military necessity.

In peacetime, persons in detention, again, are covered by the series of human rights treaties discussed above with respect to torture, cruel, inhuman and degrading treatment. The ICCPR allows for derogation from the detention protections found in Article 9 during a national emergency, but formal steps must be taken if derogations are claimed. The United States has not formally derogated from its ICCPR detention obligations.[27] Even when a state derogates, however, derogation is lawful only "to the extent strictly required by the exigencies of the situation." [28] This restriction has led courts to apply a test of proportionality as to the length of time a person may be held in preventive detention. The Inter-American Court of Human Rights decided in 1999 in *Castillo Petruzzi v. Peru* that a 30-day period, 15 days renewable once, of incommunicado preventive detention violated Article 7(5) of the American Convention (requiring that any detained person be brought promptly before a judge) despite Peru's derogation with respect to that article.[29] Other limits on permissible detention even under declared states of emergency are discussed in two advisory opinions of the Inter-American Court: *Habeas Corpus in Emergency Situations* and *Judicial*

Guarantees in States of Emergency.[30]

The European Court of Human Rights has reviewed preventive detention, but not in cases where no judicial remedy was available. In *Brogan* it found that a period of about four days without being brought before a judge was inconsistent with the European Convention on Human Rights, Article 5, even as an anti-terrorism measure.[31] In response to this decision, the UK derogated from Article 5 and ICCPR Article 9. The Court found in a subsequent UK case, *Brannigan*, that a six day period of preventive detention did not violate the Convention, given the proper derogation in place. The UK, however, provided a right of *habeas corpus*. [32] In December 2004, in the *Belmarsh Detentions* case, the United Kingdom House of Lords ruled that indefinite detention pending deportation was disproportionate even in a time of emergency, and, thus violated ICCPR Article 9 (on the rights of those deprived of liberty).[33]

The UN Human Rights Committee, the body that administers the ICCPR, issues General Comments interpreting key provisions of the Covenant. In one of its General Comments it said, “Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature.”[34]

There is a question whether the ICCPR applies to a government’s acts outside its own territory. The Human Rights Committee, however, takes the position that states parties to the Covenant must apply its provisions to anyone within their effective control, even if not situated within their own territory.[35]

5. *Standards of international law regarding treatment of persons extend to all branches of national governments, to their agents, and to all combatant forces.*

The law of state responsibility provides the rules for determining when a state has committed a wrong under international law—whether a human rights violation or other type of wrong. The law of state responsibility makes clear that the acts of the state extend to organs exercising “legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the state.”[36] Acts of state are also those of persons or entities “empowered by law” to exer-

cise elements of governmental authority.[37] And of great importance:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[38]

The case of *Prosecutor v. Tadic* from the International Criminal Tribunal for the former Yugoslavia (ICTY) provides an additional ground for finding the acts of an armed group to be the responsibility of the state:

“[t]he control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the party to the conflict) has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.”[39]

When the United States and United Kingdom held Afghanistan's *de facto* government responsible for the acts of al Qaeda in 2001, the attribution appeared to meet the test in *Tadic*. Few if any states protested the claim of responsibility.

The Resolution also restates that international law applies directly to “all combatant forces.” “Combatant forces” is a broad term that encompasses anyone engaged in an armed conflict.[40] An armed conflict exists when there is significant fighting by organized armed groups and when the armed groups either have a connection to a state or exercise control over territory. The 1998 Statute of the International Criminal Court makes clear that international law, in particular the *jus in bello*, applies to groups engaged in armed conflict.[41]

6. In some circumstances, commanders (both military and civilian) are personally responsible under international law for the acts of their subordinates.

Under the doctrine of command responsibility in international law, leaders may be held criminally liable for the acts of subordinates:

The doctrine encompasses two different forms of liability. The first is direct or active command responsibility—when the leader takes active steps to bring about the crime by, for example, order-

ing his subordinates to do something unlawful. . . .

The second type of command responsibility (and the one to which people usually refer when they speak generally of “command responsibility”), involves “indirect” or “passive” command responsibility. Because direct proof that a commander actually ordered his troops to commit crimes is not always forthcoming, the second type of command responsibility is more significant in both theory and practice as a distinct theory of liability.[42]

At the time of writing, the latest precedent as to the standard of command responsibility under international law is found in a decision of the ICTY, *Prosecutor v. Timor Blaskic*. The case concerned criminal liability for indirect or passive command responsibility during the conflict in the former Yugoslavia.

The Appeals Chamber . . . holds that a person who orders an act or commission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) [of the Statute of the ICTY] pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.[43]

7. *All states should maintain security and liberty in a manner consistent with their international law obligations.*

The International Court of Justice has stated in several cases that international law prevails over the domestic or municipal law of states. It is a “fundamental principle that international law prevails over domestic law.”[44] If a rule of domestic law and a rule of international law are in conflict with each other, a national government might act lawfully under its own domestic law but will still be responsible at the international level for violating any conflicting rule of international law.

About the author

Mary Ellen O’Connell, an ASIL member, holds the Robert and Marion Short Chair in Law at the Notre Dame Law School. She is the author of *International Law and the Use of Force* (2005), co-editor of *Redefining Sovereignty, The Use of Force After the Cold War* (2005), and the author of numerous articles on interna-

tional law and the use of force. She was formerly a Title X professor for the U.S. Department of Defense. She co-chaired the 2002 Annual Meeting of the American Society of International Law. She currently chairs the International Law Association Study Committee on the Use of Force.

She thanks Rich Edwards, José Alvarez and Rick Kirgis for helpful comments.

Footnotes

[1] For the text of the Charter and the current members, see the UN website, www.un.org.

[2] Article 2(4) says, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

[3] *Military and Paramilitary Activities In and Against Nicaragua* 1986 I.C.J. para. 190 (Nicar. v. U.S.) (June 27). In the same paragraph the ICJ referred to citations by the United States in a memorial to the status of Article 2(4) as a rule of *jus cogens*.

[4] 2005 World Summit Outcome, GA Res 60/1, UN GAOR, 60th Sess., UN Doc. A/RES/60/1 (2005) at 2.

[5] *Oil Platforms (Iran v. U.S.)* 2003 I.C.J., (Nov. 6) para. 74, *citing Nicaragua supra* note 3, para. 194. See also, Judith Gardam, *Necessity and Proportionality and the Use of Force by States* (2004) and Christopher Greenwood, *The Relationship between ius ad bellum and ius in bello*, 9 Rev. Int'l Stud. 221, 223 (1983).

[6] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316; and Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516. For the texts of the Conventions and current parties, go to the website of the International

Committee of the Red Cross, www.icrc.org.

[7] Frits Kalshoven, *Constraints on the Waging of War* 40 (1987).

[8] Convention Respecting the Laws and Customs of War on Land (1907 Hague Convention IV), Oct. 18, 1907, Annex, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631.

[9] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, 1125 U.N.T.S. 610. For the texts of the Conventions and current parties, go to the website of the International Committee of the Red Cross, www.icrc.org. As of December 2005 Additional Protocol I had 163 parties; Additional Protocol II had 159 parties. The United States is not a party to either Protocol, but has signed Additional Protocol II and takes the official position that much of Additional Protocol I is customary international law. Michael Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int'l L. & Pol' Y 419-31 (1987); see also Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 Colum. J. Trans'l. L. 811, 818 (2005).

[10] For a thorough discussion of restrictions on weapons and the relationship of these restrictions to other *jus in bello* rules, see the Legality of the Threat of Use of Nuclear Weapons, 1996 I.C.J. (Ad. Op.)(July 8).

[11] See I & II Customary International Humanitarian Law (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

[12] Nuclear Weapons, *supra* note 10, para. 82.

[13] See generally Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 Ohio St. L. J. 1231 (2005).

[14] Prisoners Convention, *supra* note 6, art. 17.

[15] Civilians Convention, *supra* note 6, art. 31.

[16] Universal Declaration on Human Rights, United Nations G.A. Res. 217A(III), 3rd Sess., art. 5, U.N. Doc. A/RES/3/217 (1948).

[17] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[18] American Convention on Human Rights, opened for signature Nov. 22, 1969, 1144 U.N.T.S. 123.

[19] European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature April 11, 1950, 213 U.N.T.S. 222, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

[20] U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

[21] African (Banjul) Charter on Human and Peoples' Rights of June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

[22] *See* Restatement (Third) of the Foreign Relations Law of the United States, sec. 702 (1987), "Customary International Law of Human Rights, A state violates international law if, as a matter of state policy, it practices, encourages or condones. . . (d) torture or other cruel, inhuman or degrading treatment or punishment."

[23] Guidelines on Human Rights and the Fight Against Terrorism, *cited in* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, at 7, n.17, at <http://www.columbia.edu/cu/law/fed-soc/otherfiles/waldron.pdf>.

[24] ICCPR, *supra* note 17, Art. 4.

[25] *See* Frederic Kirgis, *Alleged Secret Detention of Terrorist Suspects*, 10 ASIL Insight, Feb. 14, 2006, at <http://www.asil.org/insights/2006/02/insights060214.html>

[26] *See also*, Civilians Convention, *supra* note 6, Arts. 137-140.

[27] Diane Amman, *Addendum to Frederic Kirgis, Alleged Secret Detention of Terrorist Suspects*, *supra* note 25.

[28] ICCPR, *supra* note 17, art. 4.

[29] Castillo Petruzzi v. Peru, Inter-Am. Ct. H.R. Series C. No. 52 (1999). Paolo Carozza and Douglass Cassel brought this and other cases to my attention. They also provided helpful comments on the question of secret detention, as did Hurst Hannum and John Quigley.

[30] Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights). Inter-Am. Ct. H.R., Advisory Opinion OC-8/87 (1987); Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Inter-Am. Ct. H.R. Advisory Opinion OC-9/87 (1987). *Cited in* Joan Fitzpatrick, *Speaking Law to Power, The War Against Terrorism and Human Rights*, 14 Eur. J. Int'l L. 241 (2003).

[31] Brogan and Others v. United Kingdom, 145-B Eur. Ct. H. R. (ser. A)(1988), at para. 62 (1988).

[32] Brannigan and McBride v. United Kingdom, 258 Eur. Ct. H. R. (ser. A)(1993). See also Human Rights Committee, General Comment No. 29: *States of Emergency*, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001).

[33] A (FC) and others; (X) FC and another v. Secretary of State for the Home Department (Belmarsh), 2004 UKHL 56. See also Sangeeta Shah, *The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish*, 5 Hum. Rts. L. Rev. 403 (2005).

[34] UN Doc. CCPR/C/21/Rev.1/Add. 11, para. 2 (2001).

[35] See Kirgis, *supra* note 25.

[36] Articles on Responsibility of States for International Wrongful Acts, art. 4, adopted by the International Law Commission at its 53rd Sess. (2001); Resolution of the United Nations General Assembly on the Responsibility of States for Internationally Wrongful Acts (Dec. 12, 2001), UN Doc. A/RES/56/83 [hereinafter Articles on State Responsibility]. See also James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002).

[37] Articles on State Responsibility, *supra* note 36, art. 5.

[38] *Id.* at article 8.

[39] Prosecutor v. Tadic, Judgment, No. IT-94-1-A, para. 137 (July 15, 1999), at <http://www.un.org/icty/tadic/appeal/judgment/index.htm>

[40] Some reserve the term “combatant” for lawful combatants, persons with a right to engage in armed conflict such as members of the regular armed forces of a state.

[41] International Criminal Court Statute, Art. 8, July 17, 1998, UN Doc. A/CONF.183/9, 37 ILM 999-1019 (1998). For more on the international law governing combatant forces and other violent non-state actor groups, see European Commission for Democracy Through Law (Venice Commission) On the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Persons, Mar. 17, 2006, Op. no. 363/2005, CDL-AD (2006)009, *citing* Prosecutor v. Tadic (1996) 105 I.L.R. 419, 488 and *quoting*, The Manual of the Law of Armed Conflict, UK Ministry of Defence, Oxford (OUP) 2004, no. 3.5.1 (at p. 31). *See also* Mary Ellen O’Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 Col. J. Trans. L. 435 (2005), and Christopher Greenwood, *War, Terrorism and International Law*, 56 Curr. Leg. Probs. 505, 529 (2004).

[42] Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Cal. L. Rev. 75, 120 (2005).

[43] IT-95-14-A, para. 42, July 29, 2004. Article 7(1) of the ICTY Statute says: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”

[44] Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 12, 34 (Apr. 26). *See also* Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 27, 1155 UNTS 331.

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