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## Bombs over Baghdad: Addressing Criminal Liability of a U.S. President for Acts of War

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# BOMBS OVER BAGHDAD: ADDRESSING CRIMINAL LIABILITY OF A U.S. PRESIDENT FOR ACTS OF WAR\*

## I. INTRODUCTION

### A. *Brief History*

On March 19, 2003, the United States, in cooperation with Great Britain,<sup>1</sup> launched Operation Iraqi Freedom and declared war against Iraq.<sup>2</sup> Although Congress authorized the use of force,<sup>3</sup> both critics within the United States<sup>4</sup> and the international community questioned the legality of such an invasion.<sup>5</sup> Additionally, during the ensuing U.S. occupation of Iraq, various violations of both international and treaty law have been alleged against the United States,<sup>6</sup> including serious allegations of systematic torture of Iraqis in the Abu Ghraib prison.<sup>7</sup>

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1. Official White House Website, *Operation Iraqi Freedom: Coalition Members* (Mar. 21, 2003), <http://www.whitehouse.gov/news/releases/2003/03/20030321-4.html> (last visited Jan. 24, 2005). While the United States and Great Britain composed the majority of the coalition, both in terms of military and financial resources, forty-six other nations were recognized as part of the coalition as of March 21, 2003. These other members provided support ranging from fly-over rights to direct military participation. *Id.*

2. American Friends Service Committee, *Iraq War Timeline*, <http://www.afsc.org/iraq/guide/war-timeline.pdf> (last visited Oct. 23, 2005).

3. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498. This law gave the President the power to

use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant U.N. Security Council resolutions regarding Iraq.

*Id.* See also Authorization for Use of Military Force of 2001, Pub. L. No. 107-40, 115 Stat. 224 (authorizing the President to use all necessary and appropriate force against the nations or organizations who helped plan or execute the September 11, 2001 attacks on America or against any nations that have given harbor to those organizations).

4. Former Pentagon advisor Richard Perle stated, “international law . . . would have required us to leave Saddam Hussein alone . . . [There was] no practical mechanism consistent with the rules of the UN for dealing with Saddam Hussein.” Oliver Burkeman & Julian Borger, *War Critics Astonished as US Hawk Admits Invasion was Illegal*, GUARDIAN UNLIMITED, Nov. 20, 2003, [http://www.guardian.co.uk/uk\\_news/story/0,,1089042,00.html](http://www.guardian.co.uk/uk_news/story/0,,1089042,00.html) (last visited Sept. 21, 2005).

5. U.N. Secretary General Kofi Annan, when asked by reporters whether the war was illegal, replied, “Yes . . . I have indicated it is not in conformity with the UN Charter . . . and from the Charter point of view it was illegal.” U.N. News Service, *Lessons of Iraq War Underscore Importance of UN Charter—Annan* (Sept. 16, 2004), <http://www.un.org/apps/news> (search “News By Date: Advanced Search” hyperlink for September 16, 2004 and Iraq+War+Charter; then follow hyperlink to article) [hereinafter Annan Statement] (last visited Oct. 25, 2005).

6. The Center for Economic and Social Rights lists ten different “categories” of violations of international occupation law committed by U.S. forces, including, *inter alia*, “unlawful detention and

## B. Scope of Discussion

This Note will focus on the potential criminal liability of a U.S. President for illegal acts of war and will do so through the application of relevant law to the actions taken in Iraq by the George W. Bush administration.<sup>8</sup> Any discussion of civil liability under the Alien Tort Claims Act<sup>9</sup> or the Torture Victim Protection Act<sup>10</sup> is beyond this Note's scope, as is any analysis of a potential court-martial<sup>11</sup> of the President in his role as Commander in Chief of the U.S. military.<sup>12</sup>

Further, this Note will discuss liability for violations of the President's constitutional duty,<sup>13</sup> U.S. criminal statutes,<sup>14</sup> treaty law,<sup>15</sup> and customary

torture," "failure to ensure vital services," and "fundamentally changing the economy." CTR. FOR ECON. AND SOC. RTS., *BEYOND TORTURE: U.S. VIOLATIONS OF OCCUPATION LAW IN IRAQ* 4–5 (2004), <http://cesr.org/filestore2/download/730>.

7. Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge*, WASH. POST, May 21, 2004, at A1 (stating that detainees at Abu Ghraib describe abuse that goes well beyond what has been made public, adding allegations of prisoners being ridden like animals, sexually fondled by female soldiers and forced to retrieve their food from toilets). *See generally* MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB AND THE WAR ON TERROR* (New York Review Books 2004) (offering a more detailed look at the Abu Ghraib situation, including background and legal analysis).

This Note will proceed under the assumption that the allegations are true and will turn to the application of laws to such allegations.

8. As such, this Note is more an exercise in the theoretical application of laws that might be used to prosecute a sitting United States President and less an indictment of this specific administration.

9. Alien Tort Claims Act, 28 U.S.C.S. § 1350 (2003) (granting original jurisdiction to the district courts for any action initiated by an alien seeking redress for a tort "in violation of the law of nations or a treaty of the United States").

10. Torture Victim Protection Act of 1991, 28 U.S.C.S. § 1350 (2003) (providing remedy in civil suit against "[a]n individual who, under actual or apparent authority . . . of any foreign nation . . . subjects an individual to torture . . . or . . . extrajudicial killing . . .").

11. *See generally* 10 U.S.C. §§ 801–941 (2000) (codifying the Uniform Code of Military Justice, which is the controlling law for any court-martial action).

12. U.S. CONST. art. II, § 2, cl. 1.

13. *Id.* art. II, § 3, cl. 1 (stating that the President "shall take Care that the Laws be faithfully executed").

14. War Crimes Act of 1996, 18 U.S.C.S. § 2441(a) (Supp. 2005) ("Whoever . . . commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death."); *Id.* § 2340A(a) (explaining that "[w]hoever outside the United States commits or attempts to commit torture" is subject to fine, imprisonment, or, in some cases, the death penalty).

15. U.N. Charter art. 2, paras. 3–5 (stating that all members must settle disputes peacefully, refrain from the "threat or use of force against the territorial integrity" of any state, and assist the U.N. in any actions it undertakes against a state); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 3, 146, 147, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva-Civilian] (delineating basic protections for civilians in a war environment and detailing that which constitutes a "grave breach" of the treaty); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 3, 4, 129–131, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva-POW] (delineating basic protections for prisoners of war and detailing what constitutes a

international law.<sup>16</sup> Additionally, this Note will address these breaches in terms of direct responsibility or, where applicable, through the doctrine of superior responsibility.<sup>17</sup> Such analysis will take place with respect to three different fora: U.S. federal courts, under constitutional or statutory grants of jurisdiction;<sup>18</sup> Iraqi courts, under the laws of the interim government;<sup>19</sup> and a third party state, under universal jurisdiction.<sup>20</sup>

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“grave breach” of the treaty).

16. See generally Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention]. See also Rome Statute for International Criminal Court, arts. 25(3)(b), 27, 28(b)(i-iii), July 17, 1998, [hereinafter Rome Statute], reprinted in JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT 206-21 (Carolina Academic Press 2000); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I], reprinted in PAUST, *supra*, at 124-35. All three are considered codifications of customary international law; thus they pertain even in situations where one or both states in a conflict are not a party to the treaty. See generally Prosecutor v. Dusko Tadic, Case No. IT-94-1-A (1996); The Secretary-General, *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 35, U.N. Doc. S/25704/1993 (May 3, 1993); JEFFERY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESSES 74-75, 535, 544 (2002) (listing the two components of customary international law as state practice and *opinio juris*, stating that over 150 countries are party to Protocol I, and detailing the Final Report to the Prosecutor regarding the NATO bombing campaign against the Former Republic of Yugoslavia in light of the obligations imposed by Protocol I).

17. As it has most recently been applied in the ad hoc tribunals for Rwanda and the former Republic of Yugoslavia, the doctrine of superior responsibility allows for the prosecution of military commanders and civilians for the actions of subordinates, over whom they held effective control, when they knew or had reason to know that their subordinates had committed or were planning to commit violations of the law of war and they failed to prevent or punish such violations. See, e.g., Prosecutor v. Delalic, Mucic, Delic, Landzo, Case No. IT-96-21-A, Judgment (Feb. 20, 2001), available at <http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf> (last visited Oct. 26, 2005); Prosecutor v. Delalic, Mucic, Delic, Landzo, Case No. IT-96-21-T, Judgment (Nov. 16, 1998), available at <http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116.pdf> (last visited Oct. 26, 2005).

For a more in-depth treatment of this doctrine, see Damien S. Donnelly-Cole, Application of the Doctrine of Command Responsibility by the International Criminal Tribunal for the Former Yugoslavia: *Prosecutor v. Delalic* (Dec. 17, 2004) (unpublished seminar paper, Wash. Univ. School of Law) (on file with the author).

18. The Constitution grants jurisdiction to the federal courts in “all Cases . . . arising under the Constitution, the Laws of the United States, and Treaties made . . . under their authority.” U.S. CONST. art. III, § 2, cl. 1. Additionally, “[t]here is jurisdiction over [someone accused of committing torture] where (1) the alleged offender is a national of the United States.” 18 U.S.C. § 2340A (Supp. 2005); as well as jurisdiction where “the person committing such war crime . . . is a national of the United States.” War Crimes Act of 1996, 18 U.S.C.S. § 2441.

19. “Federal courts shall adjudicate matters that arise from the application of federal laws.” LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD [2004] art. 43, § D, entered into force Mar. 8, 2004, available at <http://www.cpa-iraq.org/government/TAL.html> (last visited Sept. 21, 2005) [hereinafter INTERIM CONSTITUTION]. “The judiciary shall enjoy exclusive competence to determine the innocence or guilt of the accused pursuant to law.” *Id.* art. 43, § A.

20. Briefly, universal jurisdiction exists when the crime is of such a nature as to be violative of a *ius cogens* peremptory norm. M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligato Erga Omnes*, 59 LAW & CONTEMP. PROB. 63, 65-67 (1996) [hereinafter *Jus Cogens*]. In a situation

## II. FORUM ONE: U.S. FEDERAL COURTS

The President is under a legal obligation to faithfully execute the laws of the United States.<sup>21</sup> This obligation extends both to treaties made under the Constitution<sup>22</sup> and statutory law.<sup>23</sup> Failure to uphold these laws is prosecutable in U.S. federal courts under jurisdiction granted by the Constitution.<sup>24</sup>

The discussion of prosecution in U.S. federal courts will address potential claims of presidential immunity, violations of Constitutionally-imposed duties and potential violations of statutory law.

### A. *Dealing with Issues of Immunity*

The line of Supreme Court cases concerning presidential immunity from criminal liability has evinced an apparent trend in favor of allowing service and prosecution.<sup>25</sup> In 1974, the Supreme Court addressed President Nixon's claim of immunity in the face of a *subpoena duces tecum*.<sup>26</sup> In *United States v. Nixon*, the Court held that it "is the province and duty of [the Supreme Court] 'to say what the law is' with respect to the claim of privilege."<sup>27</sup> The Court further stated that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all

where such a norm is violated, states have the right and the duty to prosecute or extradite the violators within their borders. *Id.* at 66.

The lack of the International Criminal Court or a U.N.-sanctioned tribunal as a possible forum for prosecution is not an oversight. The International Criminal Court may only exercise jurisdiction over the citizen of a non-State party with consent from the defendant's home state, which the United States would never give in a situation such as this. See Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 78 (stating that "a precondition for the exercise of jurisdiction [is] that either the territorial state or the state of nationality of the accused be parties to the court's statute or give special consent to the ICC's jurisdiction on an ad hoc basis."). Likewise, because the United States has a veto on the U.N. Security Council and any tribunal would have to start in the Security Council, it is unlikely that such a court could ever be created. See U.N. Charter art. 23(1) (naming the United States as one of the permanent members of the Security Council), art. 27(3) (requiring all permanent members to vote affirmatively in all non-procedural matters), and art. 29 (allowing Security Council to create "such subsidiary organs as it deems necessary for the performance of its functions").

21. U.S. CONST. art. II, § 3, cl. 1.

22. See *infra* notes 38–43.

23. See *infra* notes 89–123 and accompanying text.

24. See *infra* note 61 and accompanying text.

25. See *infra* notes 26–36 and accompanying text.

26. *United States v. Nixon*, 418 U.S. 683 (1974).

27. *Id.* at 705 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

circumstances”<sup>28</sup> because such an “absolute, unqualified privilege . . . would plainly conflict with the function of the courts under Art. III.”<sup>29</sup>

Eight years later, the Supreme Court carved out a very limited exception to this rule in *Nixon v. Fitzgerald*.<sup>30</sup> Addressing the issue of civil tort damages, the Court held that “petitioner, as a former President of the United States, is entitled to absolute immunity from *damages liability* predicated on his *official acts*.”<sup>31</sup> This exception should not be read more broadly than its precise language indicates; however, as the Court was careful to reiterate, “[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction.”<sup>32</sup>

A more recent decision—and the one most germane to the discussion in this Note—regarding Presidential immunity was handed down in 1997 in *Clinton v. Jones*.<sup>33</sup> In *Clinton*, the Supreme Court declared, “we have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law.”<sup>34</sup> This decision further eviscerated any exception carved out in *Fitzgerald* by stating “the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office.”<sup>35</sup> The Court was unambiguous as to the broad scope of this ruling, declaring that, “[i]f Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation.”<sup>36</sup> Absent any such congressional action, where the actions are determined by the Supreme Court to be illegal, the immunity granted to a sitting U.S. President does not protect him from service and the prosecution need not be stayed until the President is no longer in office.

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28. *Id.* at 706.

29. *Id.* at 707.

30. 457 U.S. 731 (1982).

31. *Id.* at 749 (emphasis added).

32. *Id.* at 753–54 (citing *United States v. Nixon*, 418 U.S. at 708). The Court was narrowly divided on the issue of allowing absolute immunity even in this strictly defined exception. Three Justices joined Justice White’s dissent, stating that “[a]ttaching absolute immunity to the Office of the President, rather than to particular activities that the President might perform, places the President above the law.” *Id.* at 766 (White, J., dissenting).

33. 520 U.S. 681 (1997).

34. *Clinton*, 520 U.S. at 703.

35. *Id.* at 705–06.

36. *Id.* at 709.

## B. Violation of Constitutional Duty to Faithfully Execute the Laws of the United States

The Constitution places upon the President the duty of ensuring that the laws of the United States be “faithfully executed.”<sup>37</sup> Article VI further states that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the authority of the United States, shall be the supreme Law of the Land.”<sup>38</sup> The Supreme Court has interpreted Article VI, holding on numerous occasions that, where a valid treaty is not repugnant<sup>39</sup> to the Constitution, it carries the same legal strength as the Constitution itself.<sup>40</sup> Based on these principles, both the U.N. Charter, ratified by Congress in 1945,<sup>41</sup> and the Geneva Conventions, ratified in 1955,<sup>42</sup> are on equal legal footing with the U.S. Constitution, at least until Congress acts with the clear intent to supercede one or all of them.<sup>43</sup>

### 1. The Charter of the United Nations

The primary purpose of the United Nations is to “save succeeding generations from the scourge of war”<sup>44</sup> by encouraging member states to “practice tolerance and live together in peace with one another as good neighbours.”<sup>45</sup> To achieve this goal, the Charter of the United Nations (“U.N. Charter” or “Charter”) requires that all member states “shall settle

37. U.S. CONST. art. II, § 3, cl. 1.

38. U.S. CONST. art. VI, § 1, cl. 2.

39. The Cherokee Tobacco Case, 78 U.S. 616 (1870) (explaining “a treaty cannot change the Constitution or be held valid if it be in violation of that instrument”).

40. *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (citing *Baldwin v. Franks*, 120 U.S. 678, 683 (1887) (holding that “that the treaties made by the United States and in force are part of the supreme law of the land, and that they are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States”). See also *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 196 (1876) (quoting *Foster & Elam v. Neilson*, 27 U.S. 253, 314 (1829) (holding that “a treaty is to be regarded, in courts of justice, as equivalent to an act of the legislature”).

41. The United States was one of the original signatories to the U.N. Charter on June 26, 1945. The United States ratified the Charter on July 28, 1945, and the Charter entered into force on October 24, 1945. U.S. Dep’t of State Online, *United Nations*, [http://future.state.gov/when/timeline/1937\\_wwii/united\\_nations.html](http://future.state.gov/when/timeline/1937_wwii/united_nations.html) (last visited Oct. 26, 2005).

42. The United States signed the Geneva Conventions of 12 August 1949 and ratified them on August 2, 1955. ICRC, *States Party to the Geneva Conventions and their Additional Protocols*, available at <http://www.aiipowmia.com/legis/protocoles.pdf> (last visited Sept. 21, 2005).

43. *Cherokee Tobacco*, 78 U.S. at 620 (explaining that “[a] treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty”).

44. U.N. Charter pmbl.

45. *Id.*

their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”<sup>46</sup> Further, “[a]ll 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.”<sup>47</sup> It is difficult to reconcile the actions of the United States toward Iraq with the requirements imposed by the U.N. Charter.

Even under the most liberal interpretation, the demand that Saddam Hussein relinquish power and leave Iraq or face military action<sup>48</sup> was a “threat . . . of force against the . . . political independence” of Iraq.<sup>49</sup> Likewise, the ensuing invasion was inconsistent with the purposes of the United Nations, as it was a use of force that endangered international peace.<sup>50</sup> Such acts are illegal under the Charter.<sup>51</sup>

The most obvious rebuttals to these allegations of illegality are that the U.N. Charter allows for “removal of threats to the peace”<sup>52</sup> and, furthermore, that Article 42 of the Charter allows for the use of force when non-military actions against a country have failed.<sup>53</sup> Additionally, the

46. *Id.* art. 2, para. 3.

47. *Id.* art. 2, para. 4. These “Purposes of the United Nations” are laid out in Article 1 of the Charter and include, *inter alia*,

[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace

and “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination or peoples, and to take other appropriate measures to strengthen universal peace.” U.N. Charter art. 1, paras. 1–2.

48. President George W. Bush, Remarks by the President in Address to the Nation (Mar. 17, 2003) (“Saddam Hussein and his sons must leave Iraq within 48 hours. Their refusal to do so will result in military conflict, commenced at a time of our choosing.”), *available at* <http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html> (last visited Oct. 27, 2005) [hereinafter March 17 Remarks]. *See also* CNN, *Bush Signs Iraq War Resolution* (Oct. 17, 2002) (“[E]ither the Iraqi regime will give up its weapons of mass destruction, or for the sake of peace, the United States will lead a global coalition to disarm that regime.”) [hereinafter *Bush Resolution*], <http://archives.cnn.com/2002/ALLPOLITICS/10/16/bush.resolution/> (last visited Oct. 27, 2005).

49. U.N. Charter art. 2, para. 4.

50. *Id.* art. 1, paras. 1–2. Such an invasion was also not in conformity with the U.N. goal of “develop[ing] friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . .” U.N. Charter art. 1, para. 2.

51. *See* Annan Statement, *supra* note 5; Press Release, Int’l Progress Org., Declaration of the President of the I.P.O. (Mar. 15, 2003) (<http://i-p-o.org/nr-iraq-un-eu-15march03.htm>).

52. U.N. Charter art. 1, para. 1.

53. March 17 Remarks, *supra* note 48. President Bush proclaimed the failure of the Security Council resolutions as follows:



Charter states that it does not “impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . .”<sup>54</sup> It could be argued, therefore, that either Article 41 resolutions failed and the United States acted under Article 42 to remove a serious threat to international peace; or, alternatively, the United States attacked Iraq in self-defense due to either Iraq’s perceived ties to the September 11, 2001 attacks on America or preemptively, to keep Iraq from harming the United States in the future.<sup>55</sup> Yet, neither of these arguments is persuasive.

The duty to determine the existence of a threat to international peace and to decide what measures should be taken under Articles 41 and 42 falls not to an individual Member State, but rather is the exclusive domain of the Security Council.<sup>56</sup> As to a claim of self-defense, the language of the Charter unambiguously requires a direct attack upon the Member State.<sup>57</sup> However, in a speech by the President immediately prior to the war, he makes no mention of the potential military action against Iraq as one of self-defense in retaliation of a direct attack.<sup>58</sup> Although the administration intimated during the build-up to the war that Iraq had some connection to the September 11, 2001 attacks on America by al Qaeda,<sup>59</sup> this claim has been refuted by the findings of the 9/11 Commission, which stated that

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[o]n November 8th, the Security Council unanimously passed Resolution 1441, finding Iraq in material breach of its obligations, and vowing serious consequences if Iraq did not fully and immediately disarm. Today, no nation can possibly claim that Iraq has disarmed. And it will not disarm so long as Saddam Hussein holds power

*Id.* Note, however, that U.N. Charter Articles 41 and 42 lay out a graduated enforcement scheme. Under Article 41, “[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.” U.N. Charter art. 41. Article 42 then states that, “[s]hould the Security Council consider that measures provided for in Article 41 would be inadequate or have proved inadequate, it may take such action . . . as may be necessary to maintain or restore international peace and security.” U.N. Charter art. 42.

54. U.N. Charter art. 51.

55. *Bush Resolution*, *supra* note 48. “The White House says Iraq is stockpiling chemical and biological weapons in violation of U.N. resolutions ending the 1991 Persian Gulf War. It also accuses Iraq of resuming efforts to obtain nuclear weapons, and argues that Iraqi leader Saddam Hussein could give weapons of mass destruction to terrorists.” *Id.*

56. “The Security Council shall determine the existence of any threat to the peace . . . and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” U.N. Charter art. 39.

57. *See* Annan Statement, *supra* note 5.

58. March 17 Remarks, *supra* note 48. The President mentioned a possible future threat to the United States as a reason for the invasion, but did not allege any direct attack by Iraq upon the United States.

59. *See, e.g.,* The Associated Press, *Bush Overstated Iraq Links to al-Qaeda, Former Intelligence Officials Say*, USA TODAY, July 13, 2003, available at [http://www.usatoday.com/news/washington/2003-07-13-bush-alqaeda\\_x.htm](http://www.usatoday.com/news/washington/2003-07-13-bush-alqaeda_x.htm) (last visited Oct. 27, 2005).

Saddam Hussein and Osama bin Laden “do not appear to have [had] a collaborative relationship.”<sup>60</sup>

As such, a claim can be made that the President acted in direct contravention to the requirements imposed by the U.N. Charter. Such contravention would amount to a failure by the President to faithfully execute the laws of the United States, which would then be criminally punishable under Article III of the Constitution, as it arises “under this Constitution . . . and Treaties made.”<sup>61</sup>

## 2. *The Geneva Conventions*

The Geneva Convention Relative to the Treatment of Prisoners of War<sup>62</sup> and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War<sup>63</sup> (collectively, “The Geneva Conventions”) proscribe similar activities against protected persons during an international armed conflict, most notably torture<sup>64</sup> and inhuman treatment.<sup>65</sup> Additionally, both share a common Article 3,<sup>66</sup> outlawing “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture”<sup>67</sup> and “outrages upon personal dignity, in particular, humiliating and degrading treatment.”<sup>68</sup>

The legal requirements imposed by the Geneva Conventions have been violated by the actions of U.S. soldiers at Abu Ghraib prison.<sup>69</sup> In

60. MSNBC, *9/11 Panel Sees No Link Between Iraq, al-Qaida* (June 16, 2004), <http://www.msnbc.msn.com/id/5223932> (last visited Oct. 27, 2005).

Even if some indirect link had been found, the Charter indicates that the self-defense action must be taken directly against the country that launched the armed attack. Thus Iraq would still not be the correct target and would be outside the scope of Article 51. U.N. Charter art. 51.

61. U.S. CONST. art. III, § 2, cl. 1.

62. Geneva-POW, *supra* note 15.

63. Geneva-Civilian, *supra* note 15.

64. Geneva-Civilian, *supra* note 15, art. 31. “No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.” *Id.* “Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation . . . .” Geneva-POW, *supra* note 15, art. 13.

65. *See id.* (“Prisoners of war must at all times be humanely treated.”); Geneva-Civilian, *supra* note 15, art. 27 (“They shall at all times be humanely treated.”).

66. Although it contains the phrase “in the case of an armed conflict not of an international character,” common Article 3 is customary international law providing a minimum set of rights during internal conflict and international armed conflict. *See* Jordan J. Paust, *ASIL Insights: The U.S. as Occupying Power Over Portions of Iraq and Relevant Responsibilities Under the Laws of War*, April 2003, <http://www.asil.org/insights/insigh102.htm> (last visited Oct. 27, 2005).

67. Geneva-POW, *supra* note 15, art. 3(1)(a); Geneva-Civilian, *supra* note 15, art. 3(1)(a).

68. Geneva-POW, *supra* note 15, art. 3(1)(c); Geneva-Civilian, *supra* note 15, art. 3(1)(c).

69. At least eight criminal investigations into the conduct at Abu Ghraib have been launched or will begin in the near future. The report of Major-General Antonio Taguba, focusing on the actions of the 800th Military Police Brigade, found

addressing causes of and responsibility for these “grave breaches,”<sup>70</sup> the Schlesinger Report<sup>71</sup> determined that “[c]ommanding officers and their staffs at various levels failed in their duties and that such failures contributed directly or indirectly to detainee abuse.”<sup>72</sup> The report further stated that “[c]ommand failures were compounded by poor advice provided by staff officers with responsibility for overseeing battlefield functions related to detention and interrogation operations. Military and civilian leaders at the Department of Defense share this burden of responsibility.”<sup>73</sup> Finally, with respect to root causes of the abuse, the report stated that “policy processes were inadequate or deficient in certain respects at various levels”<sup>74</sup> and that the Department of Defense did not do an adequate job of ensuring that more severe interrogation tactics utilized at Guantanamo Bay, Cuba,<sup>75</sup> did not spread to Iraq.<sup>76</sup>

that the intentional abuse of detainees by military police personnel included the following acts:

- a. Punching, slapping, and kicking detainees; jumping on their naked feet; . . .
- c. Forcibly arranging detainees in various sexually explicit positions for photographing;
- d. Forcing detainees to remove their clothing and keeping them naked for several days at a time; . . .
- g. Arranging naked male detainees in a pile and then jumping on them;
- h. Positioning a naked detainee on a MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture;
- i. Writing “I am a Rapist” (sic) on the leg of a detainee alleged to have forcibly raped a 15-year old fellow detainee, and then photographing him naked; . . .

In addition, several detainees also described the following acts of abuse . . .

- a. Breaking chemical lights and pouring the phosphoric liquid on detainees; . . .
- d. Beating detainees with a broom handle and a chair;
- g. Sodomizing a detainee with a chemical light and perhaps a broom stick . . .

Major-General Antonio Taguba, Art. 15-6 Investigation of the 800th Military Police Brigade, 15-18, May 11, 2004, [http://www.cbc.ca/news/background/iraq/pdf/taguba\\_report.pdf](http://www.cbc.ca/news/background/iraq/pdf/taguba_report.pdf) (last visited Oct. 27, 2005).

70. Geneva-Civilian, *supra* note 15, arts. 146–147 and Geneva-POW, *supra* note 15, arts. 129–130 both define “grave breaches” of the provisions as those “involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment . . . willfully causing great suffering or serious injury to body or health.”

71. James R. Schlesinger et al., Final Report of the Independent Panel to Review DOD Detention Operations (2004) [hereinafter Schlesinger Report]. This report was ordered by Defense Secretary Donald Rumsfeld and is the widest in scope of all the reports that focused on interrogation techniques, command structure and a timeline of the awareness of commanders of the abuses.

72. *Id.* at 43.

73. *Id.*

74. *Id.* at 33.

75. These methods included sleep deprivation, removal of all visual and auditory stimuli and inducing stress by use of detainee’s fears, among others. Memorandum from Office of President George W. Bush, to various press agencies (June 22, 2004) (detailing the approved interrogation techniques that were utilized at Guantanamo Bay).

76. Schlesinger Report, *supra* note 71, at 33–38.

That these interrogation tactics, approved by Defense Secretary Donald Rumsfeld, were in opposition to the requirements of the Geneva Conventions should have been clear.<sup>77</sup> However, rather than taking steps to ensure that such methods were limited to Guantanamo, the President issued a statement declaring (with respect to members of al-Qaeda) that he had “the authority under the Constitution to suspend Geneva as between the United States and Afghanistan.”<sup>78</sup> This failure to address an obvious potential crime amounts to nothing more than willful blindness, which has never been held to be a defense.<sup>79</sup>

The strongest rebuttal<sup>80</sup> by the United States to a claim of illegality under the Geneva Conventions is that the acts of torture were not committed under any standing U.S. policy, but rather were the result of

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77. For a detailed look at precisely what was authorized by Secretary of Defense Rumsfeld, see Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, Pentagon Working Group (2003), available at <http://www.washingtonpost.com/wp-srv/nation/documents/040403dad.pdf> (last visited Oct. 27, 2005); Memorandum from Donald Rumsfeld, to Commander of US Southern Command Re: Guantanamo Interrogation Techniques (2003), available at <http://www.washingtonpost.com/wp-srv/nation/documents/041603rumsfeld.pdf> (last visited Oct. 27, 2005) [hereinafter Rumsfeld Memo]; William J. Haynes II Memorandum Re: Counter-Resistance Techniques (2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dod.memos.pdf> (last visited Oct. 27, 2005).

78. Memorandum from President George W. Bush, to the Vice President of the United States et al., (Feb. 7, 2002), available at [http://pegc.no-ip.info/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://pegc.no-ip.info/archive/White_House/bush_memo_20020207_ed.pdf) (regarding “Humane Treatment of Taliban and al Qaeda detainees”).

79. See, e.g., *United States v. Jewell*, 532 F.2d 697, 700-01 (9th Cir. 1976)

The substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable. The textual justification is that in common understanding one “knows” facts of which he is less than absolutely certain. To act “knowingly,” therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, “positive” knowledge is not required.

This is the analysis adopted in the Model Penal Code. Section 2.02(7) states: “When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.” As the Comment to this provision explains, “Paragraph (7) deals with the situation British commentators have denominated ‘wilful blindness’ or ‘connivance,’ the case of the actor who is aware of the probable existence of a material fact but does not satisfy himself that it does not in fact exist.”

*Id.*

80. An additional argument that might be made in support of U.S. actions is that the President as Commander-in-Chief may choose to ignore international legal obligations. John Yoo, *Trends in Global Governance: Do They Threaten American Sovereignty?*, 1 CHI. J. INT’L L. 355 (2000). While an in-depth treatment of Professor Yoo’s arguments is outside the scope of this Note, it should be noted that such arguments are not persuasive here, as even Professor Yoo differentiates between customary international law and international treaty obligations. *Id.* at 371–73. While the universal application of the former might be debatable, the line of Supreme Court cases dealing with the latter illustrates that obligations stemming from valid treaties are binding. See *supra* notes 38–43 and accompanying text.

aberrant individuals, acting on their own.<sup>81</sup> As such, the President would have had no reason to know of or to suspect such acts and therefore could not have been expected to take steps to prevent them.<sup>82</sup>

This defense is tenuous at best. Several people have commented on an atmosphere of extra-legal actions<sup>83</sup> that began with a memorandum from Alberto Gonzales to President Bush.<sup>84</sup> This memo, urging the President to determine that the Geneva Conventions did not apply to the Taliban, stated that a major benefit to such a determination would be to “[reduce] the threat of domestic criminal prosecution under the War Crimes Act.”<sup>85</sup> This statement indicates that Gonzales was cognizant that these interrogation techniques might be declared torture and that he was therefore seeking to protect high-level governmental officials.<sup>86</sup> Furthermore, this statement put the President on notice as to the types of techniques being used in Afghanistan, thus compelling him as Commander in Chief to make certain that such techniques were not being used in Iraq, where the Geneva Conventions undoubtedly would apply.<sup>87</sup>

This breach of the responsibilities required under the Geneva Conventions is another direct failure to faithfully execute the laws of the United States. While this criminal prosecution seemingly requires more evidentiary hurdles than a prosecution under the U.N. Charter, it remains a

81. This is exactly the position first proffered by the administration. Eric Schmitt, *Report Faults Individuals For Abuses in Iraq*, N.Y. TIMES, July 23, 2004, at A9 (describing the administration’s belief in an Army report that blamed the torture at Abu Ghraib on a few individuals).

82. See *supra* note 17 (regarding “knew or had reason to know” standard of command responsibility).

83. See, e.g., Mike Dorning, *Prisoner Abuse Poses Peril for Bush*, CHI. TRIB., July 12, 2004, at C9 (stating “when public statements, policy decisions and internal documents are examined in total, there is strong suggestion of an atmosphere set at the highest levels of government that contributed to mistreatment of detainees . . .”) (emphasis added); Editorial, *Closer to the Truth*, WASH. POST, Aug. 26, 2004, at A22 (declaring “the crimes at Abu Ghraib were, in part, the result of the 2002 decision by the president [sic] and his top aides to set aside the Geneva Conventions as well as standard U.S. doctrines for the treatment of prisoners”).

84. Memorandum of Alberto Gonzales to the President of the United States, Jan. 25, 2004, available at <http://msnbc.msn.com/id/4999148/site/newsweek/> (last visited Oct. 27, 2005) [hereinafter Gonzales Memo]. This memo stated that President Bush had the “authority to determine that [the Geneva Conventions Relative to the Treatment of Prisoners of War] does not apply to the Taliban.” *Id.* It also urged the President to make such a determination in the interests of “preserv[ing] flexibility.” *Id.*

85. *Id.*

86. Michael Isikoff, *Memos Reveal War Crimes Warnings*, NEWSWEEK, May 17, 2004, <http://msnbc.msn.com/id/4999734/> (last visited Feb. 11, 2005).

87. The subsequent statement of President Bush, *supra* note 78, echoing the sentiment of Alberto Gonzales indicates that he read the memo and, thus, should have been apprised of the techniques being used and the possible consequences arising therefrom if such techniques spread to Iraq.

viable avenue nonetheless, with jurisdiction for the federal courts granted by the same provision of Article III of the U.S. Constitution.<sup>88</sup>

### *C. Violation of Statutory Law Proscribing War Crimes*

At least two statutes exist that are applicable with respect to the President's actions toward Iraq and which provide criminal penalties for international crimes. This Note will first address potential violations of the War Crimes Act of 1996<sup>89</sup> and then discuss similar violations of 18 U.S.C. §§ 2340-2340A.<sup>90</sup>

#### *1. War Crimes Act of 1996 (18 U.S.C.S. § 2441)*

Under the War Crimes Act of 1996,<sup>91</sup> anyone who commits a war crime domestically or internationally and is either a member of the armed forces or is a U.S. citizen<sup>92</sup> may be fined, imprisoned, or, in certain circumstances, executed.<sup>93</sup> The statute further defines "war crimes" as

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; . . . [or] (3) which constitutes a violation of common article 3 of the international conventions signed at Geneva, 12 August 1949.<sup>94</sup>

As outlined above<sup>95</sup> and as further evinced by the ongoing trials of soldiers responsible for the torture at Abu Ghraib,<sup>96</sup> the argument can be made that the actions at Abu Ghraib constitute either a "grave breach" under Article

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88. U.S. CONST. art. III, § 2, cl. 1.

89. See *infra* notes 91–109 and accompanying text.

90. See *infra* notes 110–23 and accompanying text.

91. War Crimes Act of 1996, 18 U.S.C.S. § 2441 (Supp. 2005).

92. *Id.* § 2441(b) ("The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States."). Technically, given his role as Commander-in-Chief of the military, the President would qualify under either prong; however, this Note will only address the aspect of the President as a U.S. national.

93. War Crimes Act, 18 U.S.C.S. § 2441(a).

94. *Id.* § 2441(c).

95. See *discussion supra* Part II.B.2 and accompanying notes.

96. See, e.g., Jackie Spinner, *Soldier Gets 1 Year in Abuse of Iraqis*, WASH. POST, May 20, 2004, at A1 (detailing the trial of Specialist Jeremy Sivits); Jackie Spinner, *Soldier Pleads Guilty to Prisoner Abuse*, WASH. POST, Sept. 12, 2004, at A24 (regarding trial of Specialist Armin Cruz); Jackie Spinner, *MP Pleads Guilty to Abuses at Iraq Prison*, WASH. POST, Oct. 21, 2004, at A1 (detailing the trial of Staff Sergeant Ivan Frederick); The Associated Press, *Soldier Charged with Abusing Iraqi Prisoners*, May 7, 2004, available at <http://www.msnbc.msn.com/id/4927273/> (last visited Nov. 14, 2004) (describing charges against and upcoming court-martial of PFC Lynndie England).

130 of the Geneva Convention Relative to the Treatment of Prisoners of War<sup>97</sup> or, at the very least, a breach of common Article 3 of the same.<sup>98</sup> Either of these breaches would be sufficient to trigger the criminal provisions of the War Crimes Act of 1996.

The most likely prosecution of the President under the War Crimes Act of 1996 for the torture at Abu Ghraib would proceed under the doctrine of superior responsibility.<sup>99</sup> Under this doctrine, if a leader “knew or had reason to know” that his subordinates had committed or were committing a war crime, the leader is under a duty to prevent the crime or punish the offenders.<sup>100</sup> As discussed previously,<sup>101</sup> beginning with the memorandum from Alberto Gonzales and continuing throughout the war and occupation of Iraq, there exists an atmosphere of extra-legal and illegal actions with respect to prisoners taken in the war on terror.<sup>102</sup> Despite the pervasive

97. See description of “grave breaches,” *supra* notes 64–68 and accompanying text.

98. Geneva-POW, *supra* note 15, art. 3(1)(a)–(d).

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

[the following acts are prohibited]:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . .

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment.

*Id.*

99. There exist two other potential theories of responsibility: joint criminal enterprise and illegal orders. Both of these theories, however, are beyond the reach of this Note and therefore will not be addressed. For a more detailed discussion of these theories and their applicability, see Patricia M. Wald, *General Radislav Krstic: A War Crimes Case Study*, 16 GEO. J. LEGAL ETHICS 445, 457 (2003) (detailing the definition and applicability of the doctrine of joint criminal enterprise); Anthony D’Amato, *Superior Orders vs. Command Responsibility*, 80 A.J.I.L. 604 (1986) (discussing the various implications of illegal orders).

100. See discussion *supra* note 17. Likewise, although the United States is not a signatory, Protocol I, which is considered to be part of customary international law, states:

[t]he fact that a breach of the Conventions . . . was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility . . . if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Protocol I, *supra* note 16, art. 86(2). The standard applied by U.S. courts when dealing with superior responsibility stems from the Supreme Court decision in *In re Yamashita*, 327 U.S. 1 (1946). The Court created “Yamashita standard” in holding that General Yamashita, as commander of Japanese forces in the Philippines, was under an “affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.” *Id.* at 16. Many cases over the next half century followed this standard, including *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996).

101. See *supra* notes 62–88 and accompanying text.

102. See discussion *supra* notes 84–85 and accompanying text (regarding pervasive atmosphere of extra-legality in detention and interrogation of prisoners).

nature of this atmosphere and the President's awareness of such actions, there is little to suggest that he "[took] all feasible measures within [his] power to prevent or repress the breach."<sup>103</sup>

The only rebuttal to this violation<sup>104</sup> is that the Geneva Conventions do not apply to the prisoners at Abu Ghraib.<sup>105</sup> The defense attorney for Major Clarke Paulus recently raised this defense, "assert[ing] that 'non-state combatants' do not enjoy the guarantee of humane treatment covered by the Geneva Convention."<sup>106</sup> However, even if this defense could be applied to specific prisoners,<sup>107</sup> it cannot be applied to the group as a whole, as many of the prisoners were members of the Army of Iraq and therefore prisoners of war under the Geneva Conventions.<sup>108</sup> More importantly, the War Crimes Act of 1996 does not require that the Geneva Conventions actually apply only that the conduct be of such a nature that it *would* be a breach *if* it occurred under the Geneva Conventions.<sup>109</sup>

In this sense, the statute creates a punishable offense for any violation of a standard defined by the Conventions, not constrained by them. Therefore, under the doctrine of superior responsibility, the war crimes

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103. Protocol I, *supra* note 16, art. 86(2).

104. This Note earlier dismissed potential claims that the incidents were aberrations and were outside of the President's potential control. See discussion *supra* Part II.B.2.

105. See, e.g., HUMAN RIGHTS WATCH, *THE ROAD TO ABU GHRAIB: I. A POLICY TO EVADE INTERNATIONAL LAW* (2004), <http://www.hrw.org/reports/2004/usa0604/2.htm> (last visited Sept. 23, 2005).

Even after the Abu Ghraib scandal broke, Secretary Rumsfeld continued to take a loose view of the applicability of the Geneva Conventions. On May 5, 2004, he told a television interviewer the Geneva Conventions "did not apply precisely" in Iraq but were "basic rules" for handling prisoners. Visiting Abu Ghraib on May 14, Rumsfeld remarked, "Geneva doesn't say what you do when you get up in the morning."

*Id.*

106. Tony Perry, *Lawyer Cites Bush Ruling in Marine Prisoner Abuse Case*, L.A. TIMES, Aug. 18, 2004, at B6. Attorney Keith Higgins claimed to be relying upon decisions by the White House and Department of Defense, that "the Geneva Convention apply only to soldiers and other fighters aligned with a legitimate government." *Id.*

107. This is a tenuous assertion at best, as illustrated by the guilty verdict against Major Clarke Paulus despite this claimed defense. The Associated Press, *Marine Guilty of Lesser Charges in Iraqi's Death*, Nov. 11, 2004, available at <http://www.msnbc.msn.com/id/6456010/> (last visited Sept. 23, 2005).

108. Geneva-POW, *supra* note 15, art. 4(A)(1).

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a party to the conflict, as well as members of militias or volunteer corps forming part of such force.

*Id.*

109. War Crimes Act of 1996, 18 U.S.C.S. § 2441. "[T]he term 'war crime' means any conduct . . . defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949." *Id.*



committed at Abu Ghraib could be attributable to the President and constitute a triable violation of the War Crimes Act of 1996.

## 2. 18 U.S.C.S. §§ 2340-2340A

Under 18 U.S.C.S. § 2340A (“Torture Statute”), criminal liability is imposed upon anyone who commits torture,<sup>110</sup> provided that person is a national of the United States.<sup>111</sup> Much like prosecution under the War Crimes Act of 1996,<sup>112</sup> prosecution of a President under the Torture Statute would most likely require the application of superior responsibility.<sup>113</sup> The same analysis regarding the pervasive atmosphere of illegality would therefore apply to superior responsibility under this statute as well.<sup>114</sup>

There are two possible defenses to a criminal charge under this statute. The first is the claim that the actions at Abu Ghraib do not amount to “torture” under the statute—a defense offered by the Gonzales memo.<sup>115</sup> Yet, despite the nuanced position urged by the memo, a plain language reading of the statute shows no such loophole.<sup>116</sup> Rather, it merely requires that the act be “intended to inflict severe physical or mental pain or suffering.”<sup>117</sup> This degree of pain or suffering is further defined as “the prolonged mental harm caused by or resulting from . . . the intentional infliction or threatened infliction of severe physical pain or suffering.”<sup>118</sup> Given that some prisoners were killed as a result of the acts, the acts seemed to meet the prolonged harm requirement even under the most conservative reading of the Torture Statute.<sup>119</sup>

110. As used in section 2340A, “torture” is defined as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control.” 18 U.S.C.S. § 2340(1).

111. *Id.*

112. *See supra* notes 17 and 100.

113. *See* discussion of joint criminal enterprise and illegal orders, *supra* note 99, for possible alternate theories of liability for torture committed at Abu Ghraib.

114. *See* discussion *supra* Part II.C.1 and accompanying notes.

115. *See* Gonzales Memo, *supra* note 84 (attempting to define the “pain” required for prosecution under section 2340A by stating that it must amount to “serious physical injury, such as organ failure, impairment or bodily function, or even death”).

116. *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.”).

117. 18 U.S.C.S. § 2340(1).

118. *Id.* § 2340(2)(A).

119. The Gonzales memo even states as much. *See* Gonzales Memo, *supra* note 84.

The second possible defense to this allegation is that the Patriot Act<sup>120</sup> severely limited the reach of the Torture Statute. This is the position proffered in the Report on Detainee Interrogations.<sup>121</sup> However, this assertion overlooks the fact that the Patriot Act only limited the Torture Statute with respect to Guantanamo Bay, Cuba.<sup>122</sup> The act served to “clarify jurisdiction over crimes committed against U.S. citizens on U.S. property abroad by extending U.S. criminal jurisdiction over certain crimes committed at its foreign diplomatic, military and other facilities, and by cross-reference excluded those places from the reach of Section 2340A.”<sup>123</sup> However, because Abu Ghraib prison was not U.S. property and because the torture was not committed against U.S. citizens, the Patriot Act leaves the Torture Statute’s application unaltered with respect to Iraq, and thus, fails as a defense to a charge of illegality against the President under the Statute.

### III. FORUM TWO: IRAQI FEDERAL COURTS

The federal courts of Iraq, under three internationally accepted forms of jurisdiction, would have the power to try President Bush for war crimes committed upon Iraqi soil or against Iraqi citizens.<sup>124</sup> In this section, this Note will first discuss potential immunity claims that might be raised.<sup>125</sup> It will then focus on the factual basis for invoking certain types of jurisdiction.<sup>126</sup> Finally, it will turn to the legal arguments for war crimes prosecution.<sup>127</sup>

#### A. *Dealing with Issues of Immunity*

On June 26, 2003, Paul Bremer, as head of the Coalition Provisional Authority (CPA), promulgated Order 17, which granted immunity to the

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120. Pub. L. No. 107-5b, 115 Stat. 272 (2001).

121. DEPT. OF DEFENSE, WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM 7-8 (2003) (explaining the application of the Patriot Act to § 2340A) [hereinafter WORKING GROUP REPORT].

122. *Id.* at 8 (stating “[b]y its terms, the plain language of new subsection 9 includes Guantanamo Bay Naval Station (GTMO) within the definition of the SMTJ, and accordingly makes GTMO within the United States for the purposes of § 2340”).

123. AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES (REPORT ON TORTURE), available at <http://www.cja.org/projects/ABA%20report.htm> (last visited Sept. 23, 2005).

124. *See infra* notes 142–44 and accompanying text.

125. *See infra* notes 128–40 and accompanying text.

126. *See infra* note 145 and accompanying text.

127. *See infra* notes 146–69 and accompanying text.

CPA and Coalition Forces.<sup>128</sup> This immunity from process applied “only with respect to acts or omissions by them during the period of authority of the CPA.”<sup>129</sup>

There seem to be two possible exceptions that would allow service of process against a U.S. President with respect to this immunity agreement. The first is the definition of “CPA Personnel” contained within Order 17, which states that this term is applicable to “all non-Iraqi civilian and military personnel assigned to or under the direction and control of the Administrator of the CPA.”<sup>130</sup> This definition would encompass U.S. soldiers, but not the President, as he was not “under the control of the Administrator of the CPA” within the meaning of Order 17.<sup>131</sup>

The second possible exception would be a nullification or repudiation of the agreement by the new Iraqi government. When the CPA turned over control of Iraq to the interim government on June 30, 2004,<sup>132</sup> a Law of Administration for the State of Iraq (Administrative Law) was also put in place, vesting all foreign relations power in Iraq in the new government.<sup>133</sup>

128. Order 17, Coalition Provisional Authority, CPA/ORD/26 June 2003/17, § 2(1)-2(4), June 26, 2003 [hereinafter CPA Order 17]. The order states

- 1) CPA, Coalition Forces and Foreign Liaison Mission, their property, funds and assets of shall be immune from Iraqi Legal Process.
- 2) All Coalition personnel and Foreign Liaison Mission personnel shall respect the Iraqi laws applicable to those Coalition personnel . . . in the territory of Iraq.
- 3) All Coalition personnel shall be subject to the exclusive jurisdiction of their Parent States and, the shall be immune from local criminal, civil, and administrative jurisdiction and from any form of arrest or detention other than by persons acting on behalf of their Parent States.

*Id.*

129. *Id.* at § 4. This “period of authority” was from May 11, 2003, to June 30, 2004. CONGRESSIONAL RECORD SERVICE, THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES 4–5 (2004), at <http://www.fas.org/man/crs/RL32370.pdf> (last visited Sept. 25, 2004).

130. *Id.* § 1(1).

131. Also, because Order 17 is silent as to superior responsibility, it is unclear whether a superior who is not covered by the immunity agreement could be prosecuted in Iraq while the soldier who commits the violation leading to the superior’s prosecution could not.

132. Press Release, Coalition Provisional Authority, Iraqi Interim Government Announcement Ceremony Press Packet, [http://www.cpa-iraq.org/government/press\\_packet.pdf](http://www.cpa-iraq.org/government/press_packet.pdf) (last visited Sept. 25, 2005).

133. INTERIM CONSTITUTION, *supra* note 19, art. 25(A)–(B).

The Iraqi Transitional Government shall have exclusive competence in the following matters:

- (A) Formulating foreign policy and diplomatic representation; negotiating, signing, and ratifying international treaties and agreements; formulating foreign economic and trade policy and sovereign debt policies;
- (B) Formulating and executing national security policy, including creating and maintaining armed forces to secure, protect, and guarantee the security of the country’s borders and to defend Iraq.

*Id.*

While the Administrative Law further mentions that the laws enacted by the CPA shall remain in force until otherwise abrogated by the Interim Government,<sup>134</sup> Article 3 expressly states that “[a]ny legal provision that conflicts with this Law is null and void.”<sup>135</sup> Should the Interim Government’s Federal Supreme Court decide that the immunity granted by Order 17 created violations of the civil rights of Iraqis enumerated in Article 15,<sup>136</sup> or that Order 17 itself was in violation of Article 43(D),<sup>137</sup> Order 17 would necessarily become null and void.<sup>138</sup> Additionally, if the Order were not declared null, the Interim Government could still repudiate Order 17 either by amending the Administrative Law<sup>139</sup> or by drafting the permanent Constitution in a manner that repudiates all orders enacted by the CPA.<sup>140</sup> The remainder of the analysis will proceed under the assumption that one of these methods of overcoming the immunity granted by Order 17 would be successful.

### *B. Dealing with Issues of Jurisdiction*

“[T]here are five traditional bases of jurisdiction over extra-territorial crimes under international law.” These are territorial, national, protective, universal,<sup>141</sup> and passive-personal jurisdiction. Iraq could arguably

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134. *Id.* art. 26(C) (stating “[t]he laws, regulations, orders, and directives issued by the Coalition Provisional Authority pursuant to its authority under international law shall remain in force until rescinded or amended by legislation duly enacted and having the force of law”).

135. *Id.* art. 3(B).

136. *Id.* art. 15(C) (“No one may be unlawfully arrested or detained, and no one may be detained by reason of political or religious beliefs.”); *Id.* art. 15(J) (“Torture in all its forms, physical or mental, shall be prohibited under all circumstances, as shall be cruel, inhuman, or degrading treatment.”).

137. *Id.* art. 43(D) (“Federal courts shall adjudicate matters that arise from the application of federal laws.”).

138. *Id.* art. 44(C) (“Should the Federal Supreme Court rule that a challenged law, regulation, directive, or measure is inconsistent with this Law, it shall be deemed null and void.”).

139. INTERIM CONSTITUTION OF IRAQ, *supra* note 19, art. 3(A) (“No amendment to this Law may be made except by a three-fourths majority of the members of the National Assembly and the unanimous approval of the Presidency Council.”) The Presidency Council is created when “[t]he National Assembly shall elect a President of the State and two Deputies.” *Id.* art. 36(A).

140. *Id.* art. 60.

The National Assembly shall write a draft of the permanent constitution of Iraq. This Assembly shall carry out this responsibility in part by encouraging debate on the constitution through regular general public meetings in all parts of Iraq and through the media, and receiving proposals from the citizens of Iraq as it writes the constitution.

*Id.* As of this writing, the shape and content of the Iraqi Constitution under the new government is still up in the air, as rival religious factions argue over representation and perceived amounts of power within the new system. *See, e.g.*, Associated Press, *More changes Possible for Iraqi Constitution*, available at <http://www.chron.com/cs/CDA/ssistory.mpl/world/3331024> (last visited Sept. 25, 2005).

141. *United States v. Yunis*, 681 F. Supp. 896, 900 (D.C. Cir. 1988) (stating “jurisdiction is conferred in any forum that obtains physical custody of the perpetrator of certain offenses considered

exercise jurisdiction under the territorial principle, as the crimes occurred in Iraq;<sup>142</sup> the protective principle, assuming Iraq asserted that the health and safety of its citizenry and the sovereignty of its State were viable national interests;<sup>143</sup> and the passive-personality principle, as the victims of any crimes at Abu Ghraib were Iraqi citizens.<sup>144</sup> Practically, territorial jurisdiction would make the most sense, as there is no doubt that the crimes occurred on Iraqi soil.<sup>145</sup>

### C. War Crimes

The Rome Statute for the International Criminal Court<sup>146</sup> (“Rome Statute”) is considered to be the most recent codification of customary international law.<sup>147</sup> As such, the statute contains prohibitions against grave breaches of the Geneva Conventions,<sup>148</sup> “[d]eclaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party,”<sup>149</sup> and “outrages upon personal dignity.”<sup>150</sup>

particularly heinous and harmful to humanity”).

142. *Id.* at 899 (“[J]urisdiction is based on the place where the offense is committed . . .”).

143. *Id.* at 900 (“[J]urisdiction is based on whether the national interest is injured . . .”).

144. *Id.* (“[J]urisdiction is based on the nationality of the victim.”). Also, though unnecessary in this case due to the availability of other, less controversial bases of jurisdiction, Iraq could assert jurisdiction under the universal principle, as torture is generally accepted as a *jus cogens* crime. See generally *Jus Cogens*, *supra* note 20.

145. DUNOFF, *supra* note 16, at 334.

States have claimed a number of bases for the exercise of jurisdiction to prescribe, with varying degrees of international acceptance. The most commonly used and accepted is the “territorial principle,” under which a state has jurisdiction to make law applicable to all persons and property within its territory. As Chief Justice Marshall said in *Schooner Exchange v. McFaddon*, “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible to no limitation not imposed by itself.”

*Id.* (internal citations omitted).

146. Rome Statute, *supra* note 16. Although the United States is not a party to the Rome Statute, it has not challenged the stated laws, but rather the jurisdictional elements of the court. Max Du Plessis, *The Universal Aspirations of the International Criminal Court: A Short Comment on the American Position*, 11 AFR. SECURITY REV. no. 4, 115–16 (2002).

147. Matthew Lippman, *The Evolution and Scope of Command Responsibility*, 13 LEIDEN J. INT’L L. 139 (2000). The Rome Statute is considered “the culmination of almost fifty years of debate, discussion and judicial decisions concerning the principle of command responsibility.” *Id.* at 139. Edoardo Greppi, *The Evolution of Individual Criminal Responsibility Under International Law*, 835 INT’L REV. RED CROSS 531, 553 (Sept. 30, 1999), available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/review?openDocument> (follow “1999-No. 835” hyperlink, then click the name of article). “This great corpus of principles and rules, all this legal heritage has now been codified in an organic way in a single instrument, the Rome Statute of the International Criminal Court (ICC), adopted by a UN diplomatic conference on 17 July 1998.” *Id.*

148. Rome Statute, *supra* note 16, art. 8(2)(a)(i)-(iii),(vi) (prohibiting “wilful killing,” “[t]orture or inhuman treatment,” “wilfully causing great suffering, or serious injury to body or health,” and “unlawful deportation or transfer or unlawful confinement”).

149. *Id.* art. 8(2)(b)(xiv).

The Rome Statute further explains that these laws apply equally to all, without regard for “official capacity as a Head of State or Government.”<sup>151</sup> Moreover, under customary international law, a superior is criminally liable for the acts of subordinates when he knew of the crime, could have prevented it, and failed to take all measures available to him to prevent the crime or prosecute the offenders.<sup>152</sup> Arguably, with respect to the actions in Iraq, the President is in violation of all prohibitions outlined in the Rome Statute.

First, the incidents at Abu Ghraib, if assumed to be part of an “atmosphere” of extra-legal activity towards prisoners of war,<sup>153</sup> were violative of the Geneva Conventions’ provisions against willful killing, torture, causation of suffering, and unlawful confinement.<sup>154</sup> Second, the recent “conclusion” by the administration that the Geneva Conventions do not apply in Iraq<sup>155</sup> would not be in accordance with Article 8 of the Rome Statute’s prohibition on the suspension of the rights of prisoners.<sup>156</sup> Finally, the methods created for interrogation at Guantanamo<sup>157</sup> that were ultimately utilized at Abu Ghraib were not in accordance with the prohibition on degrading treatment of prisoners.<sup>158</sup> Each of these violations rises to the level of war crimes as defined by the Rome Statute and

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150. *Id.* art. 8(2)(b)(xxi) (prohibiting “[c]ommitting outrages upon personal dignity, in particular humiliating and degrading treatment”).

151. *Id.* art. 27(1). “This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government . . . shall in no case exempt a person from criminal responsibility under this Statute. . . .” *Id.*

152. *Id.* art. 28(b)(i)-(iii).

With respect to superior and subordinate relationships not described in paragraph 1 [detailing military superior responsibility], a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (a) The superior either knew, or consciously disregarded information which clearly indicated, that that the subordinates were committing or about to commit such crimes; (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and (c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

*Id.*

153. *See supra* notes 83–84 and accompanying text.

154. *See supra* note 67 and accompanying text.

155. Douglas Jehl, *U.S. Action Bars Rights of Some Captured in Iraq*, N.Y. TIMES, Oct. 26, 2004, at A1 (stating that “the Bush Administration has concluded for the first time that some non-Iraqi prisoners captured by American forces in Iraq are not entitled to the protections of the Geneva Conventions”).

156. *See supra* note 148 and accompanying text.

157. *See* Rumsfeld Memo 1, *supra* note 77.

158. *See supra* note 148 and accompanying text.

customary international law; thus, both direct responsibility and superior responsibility crimes exist within Iraqi court jurisdiction.

Under the superior responsibility doctrine, the crimes at Abu Ghraib could be criminally attributable to the President because he either knew or had reason to know that such methods were approved in some interrogations and might spread to Iraq if not carefully controlled.<sup>159</sup> Because the Administration was in charge of creating the interrogation methods used at Abu Ghraib,<sup>160</sup> President Bush arguably had effective control over the interrogators.<sup>161</sup> Moreover, it seems that no efforts were made to prevent the crimes, as no actions were taken to ensure that Iraqi interrogations were done in accordance with international law.<sup>162</sup>

The President would be able to avoid some criminal responsibility for the acts of torture and degradation if it is shown that he took every available step to ensure proper investigation and prosecution of the perpetrators. However, this showing would only absolve him of the superior responsibility crimes, still leaving him liable for the declaration that Geneva Rights were suspended in Iraq and for his tacit approval of the interrogation methods.

The likely rebuttals to these charges would be immunities claimed under either customary international law or under the immunity agreement between the United States and the Interim Government of Iraq.<sup>163</sup> Under customary international law, it might be asserted that the President is immune from liability for acts done in his official capacity as head of state. However, such a defense ignores the fact that, under *Congo v.*

159. See *supra* notes 17 and 100 (detailing superior responsibility doctrine and “knew or had reason to know” standard).

160. See *supra* note 27.

161. The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) found that the principle of superior responsibility is applicable anywhere a superior has effective control, whether *de facto* or *de jure*, over the persons committing the underlying violations of international humanitarian law. *Delalic*, Case No. IT-96-21-T, Judgment, ¶ 378 (Nov. 16, 1998). “[T]he Trial Chamber accordingly shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.” *Id.* Furthermore, a civilian superior “may possess the *mens rea* required to incur criminal liability where . . . he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offenses by indicating the need for additional investigation . . .” *Id.* ¶ 383. The ICTY ultimately held “that a superior may only be held criminally responsible for failing to take such measures that are within his powers.” *Id.* ¶ 395.

162. See, e.g., Seymour M. Hersch, *The Gray Zone: How a Secret Pentagon Program came to Abu Ghraib*, THE NEW YORKER, May 24, 2004, at 38, available at [http://www.newyorker.com/fact/content/?040524fa\\_fact](http://www.newyorker.com/fact/content/?040524fa_fact) (detailing the administrative failures which led to Guantanamo techniques being used at Abu Ghraib) (last visited Dec. 1, 2004).

163. See *supra* notes 128–29 and accompanying text (discussing language of and immunities stemming from the agreement).

*Belgium*,<sup>164</sup> this immunity extends—at best—to the President’s tenure of office.<sup>165</sup> Once out of office, he may still be punished for illegal activities committed during his tenure.<sup>166</sup> Second, with respect to the immunity agreement,<sup>167</sup> where the crimes being committed are of a *jus cogens* nature,<sup>168</sup> it is generally not possible to treaty out of the obligation not to commit them.<sup>169</sup> Thus, even if the immunity agreement could be overcome as outlined above, the immunity granted to the United States by the Interim Government would not extend to torture and other *jus cogens* violations.<sup>170</sup>

#### IV. FORUM THREE: A THIRD-PARTY STATE

Under the principle of universality, a third-party nation could prosecute the President for crimes that were *jus cogens* in nature.<sup>171</sup> Such universal jurisdiction arguably extends to acts of international aggression.<sup>172</sup> This Note will address prosecution by a third-party nation by discussing the factual and jurisprudential basis for universal jurisdiction.<sup>173</sup> This section will then conclude by detailing aggression as an international crime and the applicability of this crime with respect to the actions in Iraq.<sup>174</sup>

##### A. Dealing with Issues of Jurisdiction

The line of jurisprudence expounding universal jurisdiction as a basis for allowing third-party nations to try those accused of violations of *jus*

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164. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) 2002, I.C.J. No. 121 (Feb. 14) (majority opinion).

165. *Id.* ¶ 54 (stating “the Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability”).

166. *Id.* ¶ 60 (declaring “the Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity”).

167. See CPA Order 17, *supra* note 128.

168. *Jus Cogens*, *supra* note 20, at 68. “[C]ertain crimes affect the interests of the world community as a whole because they threaten the peace and security of humankind and because they shock the conscience of humanity. If both elements are present in a given crime, it can be concluded that it is part of *jus cogens*.” *Id.* at 69 (footnote omitted).

169. *Id.* at 65. “[T]he implications of *jus cogens* are those of a duty and not of optional rights; otherwise *jus cogens* would not constitute a peremptory norm of international law. Consequently, these obligations are non-derogable in times of war as well as peace.” *Id.* (footnote omitted).

170. See *supra* notes 128–40 and accompanying text dealing with Order 17 immunities.

171. See *Princz v. F.R.G.*, 26 F.3d 1166 (D.C. Cir. 1994).

172. See *infra* note 193 and accompanying text.

173. See *infra* Part IV.A and accompanying notes.

174. See *infra* Part IV.B and accompanying notes.



*cogens* norms illustrates both a strong trend in favor of universality<sup>175</sup> and the United States' acceptance of such jurisdiction.<sup>176</sup> This jurisdictional doctrine began to develop in its modern form during the Nuremberg trials following World War II.<sup>177</sup> In *The Trial of the Major War Criminals*, the International Military Tribunal ("IMT") stated "[the Signatory Powers] have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law."<sup>178</sup> This universality was held to apply to three general types of crimes outlined by the Nuremberg Charter—crimes against peace (which included aggression),<sup>179</sup> war crimes,<sup>180</sup> and crimes against humanity.<sup>181</sup> By embracing universal jurisdiction in response to the heinous acts of the Nazi party prior to and during World War II, the IMT illustrated that the importance was not *where* the criminals were tried, but rather *that* they were tried.<sup>182</sup> This principle of universality remains a form of jurisdiction recognized both internationally and domestically to this day.

Internationally, courts have invoked universal jurisdiction in recent years in countries such as Belgium,<sup>183</sup> Australia,<sup>184</sup> and Switzerland.<sup>185</sup>

175. See *infra* notes 176–84.

176. See *infra* notes 185–90.

177. At postwar meetings the victorious Allies agreed on the creation of an International Military Tribunal to punish those responsible for war crimes during World War II. CIAO-Atlas—Germany, [http://www.ciaonet.org/atlas/countries/de\\_data\\_loc.html](http://www.ciaonet.org/atlas/countries/de_data_loc.html) (last visited Nov. 2, 2005).

178. Trial of the Major War Criminals Before the International Military (Nuremberg, Germany 1948).

179. "[N]amely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 286 [hereinafter IMT Charter].

180. "[N]amely, violations of the laws or customs of war. Such violations shall include . . . murder, . . . ill-treatment of prisoners of war . . . , killing of hostages." *Id.*

181. *Id.* Crimes against humanity are generally crimes directed against a civilian population as part of a widespread and/or systemic attack based on some identifiable trait common to the group (i.e. race, gender). Rome Statute, *supra* note 16, art. 7(1)-(3). However, any discussion of such crimes within Iraq is beyond the scope of this Note. Thus, all discussion under universal jurisdiction will be limited to crimes against the peace (aggression) and war crimes.

182. In his opening statement to the IMT, Robert Jackson explained the importance of what was to transpire. *Justice Jackson's Opening Statement for the Prosecution*, The Nuremberg Trials, available at <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/Jackson.html> (last visited Sept. 26, 2005) [hereinafter Jackson].

What makes this inquest significant is that these prisoners represent sinister influences that will lurk in the world long after their bodies have returned to dust. . . . They are symbols of fierce nationalisms and of militarism, of intrigue and war-making . . . Civilization can afford no compromise with the social forces which would gain renewed strength if we deal ambiguously or indecisively with the men in whom those forces now precariously survive.

*Id.*

183. Crim. Chambre du Conseil 22 juillet 1996 (applying universal jurisdiction in the trial of a

Within the United States, federal courts have continued to apply and further define universal jurisdiction. For example, in *Princz v. Federal Republic of Germany*,<sup>186</sup> the court explained the United States' interpretation of the concept, stating "[u]nder the principle of universal jurisdiction, for certain offenses . . . a state can exercise jurisdiction over an offender in custody even if that state has neither a territorial link to the offense nor any connection to the nationality of the victim or offender."<sup>187</sup> The court also described the continued applicability of such jurisdiction, holding "[t]he exercise of jurisdiction over the Nazi officials at Nuremberg was by no means a single aberration in international law."<sup>188</sup>

More recently, in *United States v. Yunis*,<sup>189</sup> the court applied universal jurisdiction as created by a treaty, explaining

under the universal principle, states may proscribe and prosecute "certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism," even absent any special connection between the state and the offense.<sup>190</sup>

Thus, from Nuremberg to the present, the United States has not hesitated to apply universal jurisdiction.<sup>191</sup>

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Rwandese citizen for crimes committed during the conflict and ensuing genocide in Rwanda).

184. *Polyukhovich v. Commonwealth of Australia* (1991), 172 CLR 501, 561–65 (Austl.) (applying universal jurisdiction stemming from war crimes in World War II to former Ukrainian citizen).

185. Tribunal militaire de Cass., 8 juillet 1996 (applying universal jurisdiction in the trial of a Rwandan citizen accused of genocide).

186. 26 F.3d at 1166.

187. *Id.* at 1182 (Wald, J., dissenting).

188. *Id.* The U.S. Supreme Court addressed the issue of universal jurisdiction as recently as July 2004. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

189. 924 F.2d 1086 (D.C. Cir. 1991).

190. *Id.* at 1091 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 404, 423 (1987)).

191. For additional discussion and application of universal jurisdiction, see *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985). "International law recognizes a 'universal jurisdiction' over certain offenses . . . based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people." *Id.* at 582. Though the issue at hand in *Demjanjuk* was a question of extradition treaty interpretation, the court used broad strokes in painting its definition of universal jurisdiction and was in no way limiting the application of such jurisdiction whenever *jus cogens* norms have been violated. The Sixth Circuit stated that, when the crimes are of a *jus cogens* nature, "any nation which has custody of the perpetrators may punish them . . ." *Id.* The court continued, "[w]hen proceeding on that jurisdictional premise, neither the nationality of the accused or the victim(s), nor the location of the crime is significant." *Id.* at 582–83. Rather, "[t]he underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations. This being so, . . . any nation . . . may undertake to

### B. Aggression as an International Crime

According to the IMT, “[t]o initiate a war of aggression . . . is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”<sup>192</sup> Although there is not a single, universally accepted definition of what constitutes aggression,<sup>193</sup> there is support for the idea that aggression constitutes a *jus cogens* crime, to which universal jurisdiction would necessarily apply.<sup>194</sup> Moreover, this lack of a single definition of aggression has not prevented courts from finding or international organizations from recognizing such acts as an international crime.

Domestically, in *Aboitiz & Co. v. Price*,<sup>195</sup> the court stated bluntly “[t]he Japanese occupation was an act of unprovoked aggression. It was an international crime. It was outside and in violation of international law.”<sup>196</sup> More recently, in *Nicaragua v. United States*,<sup>197</sup> the International Court of Justice (“ICJ”) equated aggression to an unprovoked armed attack.<sup>198</sup> While the United States eventually revoked its acceptance of the optional clause giving the ICJ compulsory jurisdiction in such matters, the validity of this judgment remains intact.<sup>199</sup> Similarly, though the drafters were

vindicate the interest of all nations by seeking to punish the perpetrators . . .” *Id.* at 583.

192. International Military Tribunal (Nuremberg), Judgment and Sentences, 41 AM. J. INT’L L. 172, 186 (1947).

193. See generally Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 392 (explaining “the international community has been unable to achieve consensus as to what the elements of the crime of aggression are, and when criminal responsibility for the offense should attach”).

194. See *Jus Cogens*, *supra* note 20, at 68 (stating “[t]he legal literature discloses that the following international crimes are *jus cogens*: aggression”); G.A. Res. 3314, U.N. GAOR, 29th Sess., 2319th plen. mtg. at 3 (arts. 1, 3), U.N. Doc. A/RES/3314 (Dec. 14, 1974) (adopted by the General Assembly to provide a consistent U.N. definition of aggression).

195. 99 F. Supp. 602 (Utah 1951).

196. *Id.* at 612.

197. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

198. *Id.* at 103. The I.C.J. ultimately held

There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to” (*inter alia*) an actual armed attack conducted by regular forces, “or its substantial involvement therein”. This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law.

*Id.*

199. See, e.g., Susan W. Tiefenbrun, *The Role of the World Court in Settling International*

unable to agree on the precise meaning, the Rome Statute for the International Criminal Court includes aggression among the crimes for which it has jurisdiction.<sup>200</sup> All of this suggests that aggression is widely accepted as a *jus cogens* crime, subject to universal jurisdiction.

The U.S. invasion of Iraq rises to the level of aggression. As outlined above,<sup>201</sup> the U.S. attack upon Iraq was not done in self-defense, as the President did not claim it to be in response to September 11th and the 9/11 Commission found no ties between the World Trade Center/Pentagon attacks and Saddam Hussein.<sup>202</sup> As the man ultimately responsible for launching this act of aggression, President Bush would be criminally liable in the national court of any nation that obtained custody of him under universal jurisdiction for violation of a peremptory norm of international conduct.<sup>203</sup> Further, in keeping with the rules set forth at Nuremberg, President Bush's role as head of state would not immunize him from service or prosecution.<sup>204</sup>

The strongest defense to a charge of aggression would be to claim aggression as a crime is too poorly defined to be a valid charge.<sup>205</sup>

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*Disputes: A Recent Assessment*, 20 LOY. L.A. INT'L & COMP. L.J. 1-3 (1997).

200. Sadat & Carden, *supra* note 193, at 392. "Although many fervently argued that omitting aggression from the ICC's jurisdiction would mark a retreat from the Nuremberg principles, others countered that its inclusion could scuttle the Court entirely. Through a clever compromise, the Rome Statute includes aggression, but leaves it undefined and, therefore, unimplemented for the time being." *Id.* "The Statute does not define aggression. Article 5(2) provides that the Court shall exercise jurisdiction over that crime once it has been defined. . . . The definition of aggression must be adopted in accordance with articles 121 and 123 of the Statute, which detail the process of amending the Statute." *Id.* at 405 n.137.

201. *See supra* notes 57-58 and accompanying text.

202. *See supra* notes 59-60 and accompanying text.

203. Mark A. Summers, *The International Court of Justice's Decision in Congo v. Belgium: How Has It Affected the Development of a Principle of Universal Jurisdiction That Would Obligate All States to Prosecute War Criminals?*, 21 B.U. INT'L L.J. 63, 65 (2003). The statutes creating the criminal tribunals for Rwanda and Yugoslavia "presuppose individual responsibility for offenses that are now viewed as crimes against the entire international community. Individuals who commit these crimes are regarded as *hostis humanii generis*, enemies of all mankind, a term once applied only to pirates and slave traders." *Id.*

204. IMT Charter, *supra* note 179, art. 7. Article 7 of the Nuremberg Charter states "[t]he official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment." *Id.* This proclamation has been echoed many times. *See, e.g.,* Regina v. Bartle and the Commissioner of Police for the Metropolis and Others *Ex Parte* Pinochet, Judgment of Hope of Craighead, (H.L. 1998-99) (appeal taken from Q.B. Div'l Ct.) (stating there is no head of state immunity with respect "to acts the prohibition of which has acquired the status under international law of *jus cogens*. This compels all states to refrain from such conduct under any circumstances and imposes an obligation *erga omnes* to punish such conduct.").

205. *See supra* notes 162-69 and accompanying text for a discussion of other possible defenses and the rebuttals to these.

However, as already demonstrated,<sup>206</sup> this is not true, as the President was aware of his potential violations.<sup>207</sup> Aggression is well-defined enough to have been used in multiple cases, from Nuremberg to the present day.<sup>208</sup> Moreover, in prosecuting *jus cogens* crimes, it is important that the lack of a single definition not delay justice, because “even if any specific definition of aggression fails to achieve the status of customary international law, the principle of non-aggression is *jus cogens*, a preemptory norm that binds all nations equally.”<sup>209</sup> Failure to conform to this norm is a crime, regardless of which definition is used.

## V. CONCLUSION

That certain actions taken by the United States during the invasion of Iraq were illegal is beyond question. The only uncertainty that remains is determining who should be punished for these acts. As shown in this Note, strong cases can be made both domestically and internationally for bringing criminal charges against President Bush.<sup>210</sup> Whether through

206. See *supra* notes 191–99 and accompanying text.

207. See, e.g., Torture and International Human Rights: A Roundtable Discussion with Francis Boyle, Michael Mandel, Liz Holtzman, H. Victor Conde, and Mark Levine, Jan. 9, 2005, <http://www.zmag.org/content/showarticle.cfm?SectionID=80&ItemID=6987> (last visited Sept. 26, 2005) (declaring that President Bush knew prior to the attack that such acts were illegal under international law as crimes of aggression). Many international scholars have been blunt in discussing the illegality of these acts of aggression, stating

[t]he President was made aware of this by a great number of international lawyers around the world before the invasion, and even if he claimed ignorance, I'm sure he's heard that ignorance of the law is no excuse. Bush and his administration and the US commanders involved are all guilty of this supreme crime. Since the war was unlawful, the many thousands of deaths predictably resulting from it are also crimes, murder in fact, for which Bush and his officials and commanders are guilty *in flagrante*.

*Id.*

208. See *supra* notes 191–99 and accompanying text.

209. Sadat & Carden, *supra* note 193, at 437 n.341.

210. In reality, however, the likelihood of any of these for actually bringing charges is minute. First, there is not enough of an outcry in the United States to compel the Attorney General to bring such charges, as a failed attempt to prosecute the President would amount to political suicide. Second, as the new Iraqi government is dependent on the United States for monetary and military support for the foreseeable future, they would be foolish to attempt to bring charges—any justice which might be served would likely not outweigh the near certain collapse of the fledgling government. See, e.g., CNN.com, *U.S. Likely to Bear Most of the Cost of Iraq War* (Mar. 19, 2003) at [http://money.cnn.com/2003/03/17/news/economy/war\\_cost/](http://money.cnn.com/2003/03/17/news/economy/war_cost/) (estimating the total cost of the war, occupation and rebuilding of Iraq around \$1.92 trillion) (last visited Feb. 27, 2005); Bradley Graham, *Army Plans to Keep Iraq Troop Level Through 2006*, WASH. POST, Jan. 25, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A33540-2005Jan24.html> (explaining U.S. plans to keep at least 120,000 troops in Iraq through 2006) (last visited Sept. 24, 2005).

Finally, there is no international consensus toward punishing Bush as there was with Augusto Pinochet. *Regina v. Bartle*, judgment of Hope of Craighead. Without such worldwide outcry, it is

direct responsibility for statutory crimes,<sup>211</sup> dereliction of constitutional duties,<sup>212</sup> or the launching of an aggressive war,<sup>213</sup> or under superior responsibility for the acts of torture committed at Abu Ghraib,<sup>214</sup> any of the three fora discussed herein can create a sound legal argument for prosecution. Moreover, every proffered justification for the illegal acts seems unpersuasive. In the face of such illegality,

[t]he common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.<sup>215</sup>

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difficult to conceive of a nation risking unknown reaction by levying such charges or even by attempting to obtain custody.

211. *See supra* Part II.C.1–2 and accompanying notes.

212. *See supra* Part II.B.1–2 and accompanying notes.

213. *See supra* Part IV.B and accompanying notes.

214. *See supra* Part III.C and accompanying notes.

215. Jackson, *supra* note 182, at 98.

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