Der Generalbundesanwalt
beim Bundesgerichtshof
Postfach 27 20

76014 Karlsruhe

# Criminal Indictment

**against**

**United States Secretary of Defense Donald Rumsfeld,**

**Former Director of Central Intelligence of the United State George Tenet,**

**Lieutenant General Ricardo Sanchez**

**and Other United States Officials and Military Personnel for War Crimes Perpetrated Against Iraqi Detainees at Abu Ghraib Detention Center 2003/2004**

**Preliminary Note**

This is a literal translation of the complaint as drafted by local counsel in Germany on the basis of factual and legal material supplied by the Center for Constitutional Rights. It does not include many of the facts which have come to light since the complaint was filed on November 30, 2004. Additional documentation concerning these facts is being submitted to the German Federal Prosecutor, who is prepared to receive it.

With the attached powers of attorney and substitute powers of attorney I hereby give notice that I represent the legal interests of the following organizations and individuals:

1. Center for Constitutional Rights, represented by the President, Michael Ratner, Lawyer and Vice President, Peter Weiss, Lawyer, 666 Broadway, New York, NY 10012, USA,

And the Iraqi citizens:

2. Ahmed Hassan Mahawis Derweesh,
3. Faisal Abdulla Abdullatif
4. Ahmed Salih Nouh
5. Ahmed Shehab

The Center for Constitutional Rights, 1) is a Civil Rights organization which has been working in the USA sine 1966 (www.ccr-ny.org), and which has, since 2002, been representing the detainees at Guantánamo and former prisoners at Abu Ghraib in terms of both civil and criminal law. Michael Ratner, lawyer, is the President of the Center for Constitutional Rights. Peter Weiss, lawyer, is a Vice President of the Center for Constitutional Rights. The individuals listed in 2) to 5) are Iraqi nationals who have been victims of torture and maltreatment at the Abu Ghraib Detention Center and other Iraqi detention facilities in 2003 and 2004.

On behalf of and with the power of attorney of my clients I bring the following charges against those US-American citizens listed below

**War crimes against people, §§ 8, 4, 13 and 14 Criminal Code of Crimes Against International Law (CCIL) and grievous bodily harm, §§ 223, 224 Criminal Code in connection with §§ 1 CCIL, 6 No. 9 Criminal Code and the UN Convention on Torture**

1. The Secretary of Defense, Donald H. Rumsfeld
1400 U.S. Department of Defense, Pentagon, Washington, DC 20301-1000, USA

2. The former Director of Central Intelligence, George Tenet,
CIA Headquarters, Langley, Virginia 23664, USA

3. Lt. Gen. Ricardo S. Sanchez, V Corps, Commanding General and formerly in charge of Combined Joint Task Force 7, Iraq, at present V. Corps Commander, Romestr. 168; D-69126 Heidelberg, Germany

4. Maj. Gen. Wojdakowski, V Corps, Deputy Commanding General, Romestr. 168; D-69126, Heidelberg, Germany

5. Brigadier General Janis Karpinski, at present suspended Commander 800th Military Police Brigade, at present 77th Regional Command, Ft. Totten, New York, 11359 USA

6. Lt. Col. Jerry L. Phillabaum, formerly Commander, 320th Military Police Batallion of the 800th Military Police Brigade, at present 77th Regional Support Command, Ft. Totten, New York, 11359 USA

7. Colonel Thomas M. Pappas Brigade Commander, 205th Military Intelligence Brigade, at present,
Wiesbaden, Germany

8. Lt. Colonel Stephen L. Jordan, 205th Military Intelligence Brigade, Wiesbaden, Germany

9. Maj. Gen. Geoffrey Miller, at present Baghdad, Iraq

10. Stephen Cambone, Undersecretary of Defense for Intelligence at the U.S. Defense Department, Pentagon, Washington DC 20301

and all those known by name and those un-named associated with the crimes described in the following text.

**Contents**

authority

4.2.1. Donald H. Rumsfeld,

4.2.2. George Tenet

4.2.3. Ricardo S. Sanchez,

4.2.4. Walter Wojdakowski,

4.2.5 Janis Karpinski,

4.2.6. Jerry L. Phillabaum,

4.2.7. Thomas M. Pappas,

4.2.8. Stephen L. Jordan,

4.2.9. Geoffrey Miller,

4.2.10. Stephen Cambone.

**5. Application of German Criminal Law**

5.1. Justification of German Penal Power

5.1.1. Principles of International Law, § 1 CCIL

5.1.2. Principles of International Law, § 6 No. 9 StGB in connection with UN-Torture-Convention

5.2. Discretionary Power of the Public Attorney's Office, § 153 f StPO

5.2.1. No primary jurisdiction (USA, Iraq, ICC)

5.2.2. Discretionary Power of the Public Attorney's Office

5.2.3. Initial investigations by the German Criminal Justice Authorities

5.3. Potential obstacles to prosecution in Germany

5.3.1. Immunity

5.3.2. The NATO Statute (Statute of Forces Agreement - SOFA)

**6. Final Note**

## 1. Introduction

A crime is committed. The perpetrators become known. A few of them are punished. Through their testimony, through news reports and through internal investigations it becomes clear that, at least to some extent, they acted on the instructions of their superiors. But their superiors are not punished. An absurd scenario?

In April 2004, when the first pictures appeared in public of the brutality and humiliation inflicted by American military and civilian personnel on detainees at Iraq's Abu Ghraib prison, the world was shocked. The first reaction was one of disbelief that such barbaric practices could be encouraged or countenanced at the beginning of the 21st century. Gradually, as a result of unofficial investigations by the media as well as official investigations undertaken by various military and civilian commissions, it became clear that

1. what was euphemistically being called "abuse" amounted in effect to torture and other grave violations of humanitarian law;
2. the practices involved were not the work of a handful of "rogue" individuals, but were widespread among the United States (US) military and had been and were continuing to be applied in Afghanistan, Guantanamo, Iraq and detention centers located in other countries, both known and secret, and
3. the practices involved were not only directly or indirectly condoned by officials at the highest levels of the US government, but also condoned by incorrect and unlawful legal advice emanating from civilian and military government lawyers.

By studying what led up to the scandal and the events at Abu Ghraib we learn with what methods the war on terror has been carried on since September 11, 2001. The right to war (jus ad bellum) is reformulated and relied on in the Iraq-War, while international law restraints, in particular those of the United Nations Charter, no longer play a role. In

addition, humanitarian law and other legal restraints are increasingly disregarded. A struggle unlimited in time is waged against an enemy difficult to define, with all the means of efficient warfare. The methods of the enemy are used against the very enemy one is fighting. In this conflict, law seems to be giving way permanently to power and political decision-making. The political philosopher of the Counter-Revolution, Carl Schmidt, wrote in his book "Political Theology": "He who decides on the state of emergency is the sovereign". In a time in which a permanent state of emergency is being proclaimed this dictum increasingly determines political everyday life or as the Italian philosopher Giorgio Agamben put it (in Homo Sacer, Frankfurt a.M., 2002, pp.177): "The state of emergency is thus no longer related to an external or temporary situation of factual danger and tends to be confused with the Norm itself". Those who in the face of this phenomenon would use law as a means to regulate societal processes are time and again confronted with arguments based on expediency. It took many decades to arrive at the universal, ethical, theoretical and legal recognition of the prohibition of torture. Nevertheless, torture is still commonplace in dozens of states. The fight against torture, whether in each concrete case or in abstract terms, is thus of crucial significance for the future of a humane and civilized humanity. Fighting against torture means being decisive in acting against its propagation and insisting on the punishment of those directly responsible for torture as well as those who organize the practice of torture. This is the context in which this complaint should be understood. Continuing impunity for those who pulled the strings that led to the war crimes committed at Abu Ghraib and elsewhere would send the wrong signal. The governments of the world would feel emboldened to continue what is unfortunately their all too common practice of torture.

It is precisely this situation which the American Robert Jackson, the Chief Prosecutor at the Nuremberg Trial, had in mind when he said in his opening speech on November 21,1945:

> *Let me make clear that while this law is first applied against German aggressors, the law, if it is to serve a useful purpose, must condemn aggression by any other nations, including those which sit here now in judgment. We are able to do away with domestic tyranny and violence and aggression by those in power against the*

*rights of their own people only when we make all men answerable to the law.*
Thus one of the leading jurists of the last century defines what the present case is about: the equality of all human beings before the law, which is the foundation of justice.

A criminal complaint brought in Germany against the United States of America's Secretary of Defense and other high-ranking military and civilian officials concerning human rights violations committed against Iraqi citizens in Iraq may give rise to certain questions. There will be doubts about the professional seriousness of the undertaking. Those associated with it will be accused of having lost touch with reality. This is hardly surprising as international criminal law has had to deal with such criticisms since its inception. Many people who may readily accept the indictments of present or former high officials for fraud or embezzlement are apt to balk at such indictments for war crimes, particularly if they are brought in a foreign country. But the former Chilean Dictator Pinochet would never have been arrested in London in 1998 if human rights organizations and prosecutors had only been driven by precedent and realism.

However justified such questions may be from non-lawyers, they ignore the explosive development of international criminal law since the establishment by the United Nations' International Criminal Tribunals for the former Yugoslavia and for Rwanda, respectively from 1993 and 1995 and the International Criminal Court (ICC) in The Hague in 2002. In the post Nuremberg era "the torturer, like the pirate of old, has become *hostis humanis generis*, the enemy of all mankind." Those were the words of the US federal appellate judge who in 1980 decided the *Filartiga* case brought by the human rights lawyer Peter Weiss and his colleagues from the Center for Constitutional Rights on behalf of a Paraguayan torture victim. This was the case which laid the foundation for the application of the Alien Tort Claims Act to civil suits brought in the United States by aliens for human rights violations, including those occurring in foreign countries. Since then this outstanding example of universal jurisdiction has been followed by US courts in dozens of other cases.

This is also the basic idea behind the ICC. It is to be found in the Preamble of the ICC Statute, which states that the core crimes of international criminal law are "the most serious crimes of concern to the international community as a whole", (cf. also Gerhard Werle, Völkerstrafrecht, 2003, pp.30). It is not disputed that war crimes, crimes against humanity, genocide and crimes of aggression are international crimes of this type. "It follows from the universal nature of these international crimes that the international community is fundamentally authorized to prosecute and punish such crimes, irrespective of where, by whom or against whom the act was committed." (Werle, op.cit., pp 68) This provides not only the basic legitimacy of the international community and thus of the ICC to prosecute such crimes. Individual states also have this penal jurisdiction. "International crimes are not internal matters." (cf. Werle, op.cit., pp.69) For international crimes the principle of maintaining international law applies. It was for this very reason that both houses of the German Parliament approved by wide margins the Code of Crimes against International Law (CCIL) which came into force on June 30, 2002. The objective of this Code was "to better define crimes against international law than is currently possible under general criminal law" and "in view of the complementarily of the prosecutorial jurisdiction of the International Criminal Court to make it absolutely clear that Germany is always in a position to prosecute for itself those crimes falling under the jurisdiction of the ICC Statute." (cf. Bundestags-Drucksache 14/8524, pp. 11)

Thus in § 1 of the CCIL, the international law principle is specifically prescribed for those crimes against international law defined in the Code, "even where the act was committed abroad and has no correlation to the home country." (§ 1 CCIL) The CCIL is not only for this reason to be seen as one of the first legislative projects in the world to regulate international criminal law after the ICC was enacted. The ICC has, amongst other objectives, "to promote humanitarian international law and to contribute to its acceptance through the creation of a comprehensive set of rules". (Cf. Bundestags-Drucksache 14/8524, pp. 12)

This structure of the CCIL was a compelling reason why the Iraqi plaintiffs, their American lawyers and also the Center for Constitutional Rights brought this complaint in

Germany. It is clear that criminal prosecution of the Abu Ghraib offences is only occurring in a very limited manner in the USA. (more in 5.2.1)

This complaint will first describe the path from September 11, 2001 to the events at Abu Ghraib (see 2.1). A range of similar incidents, particularly concerning the use of methods of interrogation used in Afghanistan and Guantánamo, will be described. This does not mean that these incidents are formally part of this case. However, awareness of them is on the one hand necessary to understand the methods used in Abu Ghraib and also to explain the intent of the accused civil and military persons in positions of authority. Subsequently the individual cases of abuse and torture of prisoners at the Abu Ghraib detention center, based on the official Army Fay/Jones Report of August 2004 will be outlined (2.2). The legal assessment of these incidents provides a clear definition of war crimes within the meaning of § 8 of the CCIL and of the relevant international rules (3). The American Secretary of Defense Donald H. Rumsfeld and the other nine accused have either by commission or by omission committed war crimes. According to the criteria of Responsibility of Those in Authority they are to be prosecuted (4). German Penal Power is justified and the Public Prosecution Office must investigate the circumstances and the culprits as there are no obstacles to criminal prosecution in Germany (5).

## 2. Facts

### 2.1. The Road from 9/11 to Abu Ghraib

The subheading “The Road from 9/11 to Abu Ghraib” has been chosen because the events leading up to the incidents in Abu Ghraib are being discussed in the USA under this motto, and because important publications have also been given this title – namely the book by the journalist Seymour M. Hersh: “Chain of Command. The Road from 9/11 to Abu Ghraib", New York 2004; and the publication in June 2004 of the report issued by the reputable American human rights organization Human Rights Watch: “The Road to Abu Ghraib”. Peter Weiss, vice-president of the Center for Constitutional Rights

summarizes the development as follows:

> The unspeakable horror of the September 11 2001 attack by Al Qaeda on the United States created a climate of fear and revenge in which precious principles of constitutional and international law were cast to the winds. This was nothing new in the history of the world, which has lived with the principle "an eye for an eye" since Biblical times. It was relatively new for the United States of America, which has a long tradition of seeking to rein in the dogs of war and setting limits to what is permitted in the conduct of military operations and the treatment of prisoners of war. As early as 1863, in the midst of the Civil War, President Lincoln promulgated "Instructions for the Government of Armies of the United States in the Field". Drafted by Francis Lieber, a German immigrant, this document, better known as The Lieber Code, became the mother of all subsequent humanitarian law codes and treaties, including The Hague and Geneva Conventions and the Nuremberg Principles, in the formulation of which the United States also played a leading role.
>
> But there has also been a contrary trend in U.S. history, exemplified by the fact that American Presidents of both parties have frequently been heard to say that they are prepared to do whatever is necessary to protect the United States against enemies, real or imagined; that "national security" trumps all other considerations; and that, in serious international conflicts, "all options are open." It is this trend, which runs counter to the adherence to intransgressible principles of international law, including those incorporated in German law

The above mentioned report by Human Rights Watch analyzes the manifestation of this trend in the period after September 11, 2001. The authors come to the conclusion that the violations of human rights, which constitute the subject-matter of this complaint about criminal offenses, are the product of a well-considered plan by the US government administration to extricate itself from the ties of international law:

> Senior administration lawyers in a series of internal memos argued over the objections of career military and State Department counsel that the new war against terrorism rendered ‘obsolete’ long-standing legal restrictions on the treatment and interrogation of detainees.”
>
> Certain coercive methods amounting to torture and other cruel, inhuman and degrading treatment were approved in the hope of obtaining more “actionable intelligence” from the persons being interrogated.
>
> Until the Abu Ghraib pictures became public, the administration pursued a “see no evil, hear no evil” policy, ignoring, inter alia, the complaints submitted by the International Committee of the Red Cross.

These conclusions drawn by Human Rights Watch can be reconstructed from a series of internal memoranda, released in March 2004 under the information policy of the United States. They are attached to this complaint in the form of the three volumes publication “Torture” by New York University’s Center on Law & Security. The internal memoranda are published in the first volume.

It should however be noted that only some of the relevant documents were released, above all only those written between the end of 2001 and the spring of 2003. By this time, the invasion by American troops had just been completed. It could not be predicted that the resistance to occupation would be so violent or last such a long time. The US government’s debates, plans and orders involving how to deal with the Iraqi resistance can thus only be reconstructed to a limited extent. The selective choice of documents has been strongly criticized within the USA. (cf. Katja Gelinsky: The debate on torture in the American government, FAZ, July 9, 2004)

**The Debate in the USA about Torture and Interrogation Methods**

The series of memoranda commences with the report dated January 9, 2002 by John C. Yoo and Robert J. Delahunty, both at the time of the Office of Legal Counsel, Department of Justice. (Yoo is currently professor of jurisprudence at Berkeley University) In this document, they advised William J. Haynes II, the General Counsel of the Department of Defense, to declare that the Geneva Conventions did not apply to members of the Al Qaeda network and the Taliban militia. After the first suspected Al Qaeda and Taliban prisoners arrived at the US military base at Guantanamo Bay in Cuba on January 16, 2002, a heated debate about their treatment flared up. On January 19, 2002 the US Secretary of Defense, Donald H. Rumsfeld (Accused # 1) informed the Chief of staff of the US Armed Forces, Richard B. Meyers, that members of Al Qaeda and the Taliban should not be given POW status in accordance with the Geneva Conventions. The government would generally treat the prisoners "in a manner which approximately complies with the Geneva Conventions, to the extent appropriate."

The 42-page memorandum from John C. Yoo dated January 9, 2002 is marked as a draft, but it was used as a basis for all further decisions about the treatment of the prisoners at Guantanamo Bay. It may be summarized as follows:

> The US law on war crimes dated 1997 only covers the Geneva Conventions and some excerpts from the Hague Conventions.
>
> Members of Al Qaeda are not subject to protection under the US law on war crimes, because Al Qaeda is a non-state actor, the war against Al Qaeda is neither an international war nor a civil war, and members of Al Qaeda are not eligible for treatment as POWs in accordance with the 3rd Geneva Convention.
>
> Members of the Taliban are not subject to protection under the US law on war crimes, because the US President has designated Afghanistan a so-called "failed state", and because members of the Taliban have become indistinguishable from Al Qaeda.

> International customary law is not incorporated in the legal regime of the United States of America.

The memorandum lacks any reference whatsoever to the prohibition of torture and cruel, inhuman and degrading treatment, as prescribed in the Universal Declaration of Human Rights, the International Covenant on Civil & Political Rights, and the CAT.

One of the key text concerns the definition or redefinition of torture in a memorandum written by a working group led by J. S. Bybee, then Assistant Attorney General and now a Federal Judge, and sent to Alberto R. Gonzales, Counsel to the President, on August 1, 2002. Although the content of this document was initially termed irrelevant by the White House, it subsequently emerged that all the legal staff of military and intelligence authorities had cooperated in Bybee's working group. In addition, large sections of the text later appeared in other memoranda drawn up at the Pentagon. As commentators remarked afterwards, the document sounds like instructions from mobster attorneys to their Mafia clients, for it includes deliberations as to how far aggressive interrogation methods can be used before reaching the threshold to torture. An interpretation of the UN CAT is proposed that ignores the obligations laid down in the Vienna Convention on the Law of Treaties, where it is stated that international conventions may not be interpreted in a manner incompatible with the intents and purposes of the convention concerned. The CAT prohibits "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession", and for other motives (Art. 1, CAT).

In Bybee's memo, an extremely restricted definition of torture is proposed. If physical pain is inflicted on the victim, it only counts as torture if it "results in death, in the failure of an organ, or in permanent damage to important bodily functions". Mental suffering "must lead to major psychic impairment of considerable duration, i.e. it must last for months or even years". According to the memo, "only the most extreme forms of physical and mental force" are prohibited under the American law against torture passed by Congress in 1994, and under the CAT to which the USA was a party. Anything below

this threshold merely constitutes “cruel, inhuman or degrading kind of treatment”, which although prohibited under the convention as well, does not constitute a punishable offense. The memo also states that it is unreasonable to declare any method inadmissible; for every attempt to exert legal influence on the US President’s right to decide about the conduct of war is unconstitutional:

“As Commander in Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy.” This authorization applies in particular during a war in which the nation has already been exposed to direct attack; the necessary information for preventing terrorist attacks on the USA and its people may only be obtainable by means of successful interrogation. “Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.” Apart from this, if an interrogating officer were later to be accused of torture, he would have two possibilities for defending himself: he could claim that the torture was required in order to prevent a terrorist attack, or that it was in self-defense.

Against this background and in response to queries made, the Pentagon and its legal advisors developed guidelines between October 2002 and April 2003 concerning the interrogation methods allowed in Guantanamo, and drew up a list of questioning techniques. Government officials said to the Wall Street Journal, “We needed a less cramped idea of what is torture and what isn’t.” In a memorandum dated October 11, 2002 Lieutenant Colonel Jerald Phifer wrote to his superiors: “Problem: the current guidelines for interrogation methods in GTMO restrict the means open to interrogating officers for combating strong resistance.” The military forces’ official code of interrogation rules, known as “Field Manual 34-52”, was at the root of these difficulties, for it opens with an unambiguous prohibition of the use of violence: “Using violence, mental torture, threats, insults, or unpleasant and inhuman treatment of any kind is prohibited by law, and will be neither permitted nor silently tolerated by the government of the USA.” Such actions were invalid, because “the use of violence is not a good

technique, since it leads to unreliable results, can impair efforts to obtain information, and may make the person concerned merely say what the interrogation official wants to hear." A reaction to this document by Phifer is constrained in a letter from Secretary of Defense Donald Rumsfeld (Accused # 1), who states that he discussed the matter with his deputy Paul Wolfowitz, with Under Secretary of Defense Douglas Feith, and with the Chairman of the Joint Chiefs of Staff, Richard Myers. He was prepared to permit all so-called "2nd category" techniques, including compulsory shaving, dogs, substituting hot meals with cold field rations, removing all forms of comfort, taking away copies of the Koran, and ordering stressed positions.

On April 16, 2002, Donald Rumsfeld drew up his revised list of techniques for interrogation officers to break resistance. The new catalog now listed all psychological methods, as well as "negative change of scene – transferring the detainee from the normal interrogation environment to a less pleasant one", and "exerting influence through food", i.e. deprivation of regular meals. The removal of all materials, including the Koran, was to be allowed. Stress positions were not mentioned, but using sleep adjustment was, meaning "altering the prisoner's sleeping times, e.g. shifting the rhythm of sleep cycles from nighttime to daytime".

**Practices Violating Human Rights Used in Afghanistan and at Guantanamo**

Evidence of these techniques being used is provided in a series of testimonies from prisoners detained in Afghanistan and later released. Afghanistan was invaded in the weeks following October 2001. On November 28, 2001 the British citizens Shafiq Rasul, Asif Iqbal and Ruhel Ahmed were arrested in Afghanistan by Afghan troops under the command of the USAUS-led coalition. They described how they were treated inhumanly right from the start. (for details, see: David Rose, Guantanamo Bay, America's War Against Human Rights, Frankfurt am Main 2004) The first publications in the media about what was incorrectly termed the maltreatment or abuse of detainees came out towards the end of 2001. When the young American John Walker Lindh was arrested in

Afghanistan in December 2001, he was stripped naked, tied up, and gagged with duct tape. US soldiers took photos of him which were later circulated in public, threatened to hang him, and told him that the pictures were to be used later to collect money for a Christian organization. From Justice Department, documents which its counsel later published in the USA, it emerges that the commander at the base where John Lindh was kept prisoner had been authorized by the Defense Department's legal advisor to take the gloves off during Lindh's interrogation. (cf. Human Rights Watch, op cit., p. 57, Hersh, op cit., p. 4)

At the end of 2002 and beginning of 2003, Accused # 9, Major-General Miller, introduced a series of methods at Guantanamo for wearing down prisoners to such an extent that useful intelligence could be obtained from them. These included deprivation of sleep, extended isolation, simulated drowning, and being forced to stand and lie in stressed positions. At the subsequent Senate hearings, it became known that Accused # 1, Secretary of Defense Donald Rumsfeld, had permitted Miller to use these tactics, including exposure to extremely hot and cold temperatures, deprivation of sleep, and maintaining stressed positions for long periods. A large number of testimonies from persons detained at Guantanamo have in the meantime become available. They describe degrading treatment, beatings and sexual insults. They were forced to stay in stress positions for up to twelve hours at a time, which caused deep cuts and scarring. The air conditioning was sometimes switched to extremely cold temperatures, with loud music blaring accompanied by strobe lights. Detainees were exposed to extremely hot and cold temperatures to make them suffer. They were kept in cages 24 hours a day, without being given any opportunity to move or clean themselves. They were refused access to medical care and adequate food. They were deprived of sleep, and communication with their friends and families was impossible. They were refused any information about their status. (Center for Constitutional Rights, Report of Former Guantanamo Detainees, http://www.ccr-ny.org/v2/reports/docs/Gitmo-coMpositestamentFINAL23july04.pdf)

One man was sprayed with the Chemical Mace because he refused to let his cell be searched. Cells were sometimes searched while the prisoners were preaching. (cf. Human

Rights Watch, op cit., p. 15-17) Detainees were threatened with dogs, they were forced to strip naked, to let themselves be photographed in this state, and to submit to numerous body searches. Shortly before March 2004, prisoners were taken to a block known as "Romeo". There they were stripped naked. After three days they were given their underwear, after another three days a top, and after a further three days they were promised that they would get their trousers back. Some people only got their underwear back, as punishment for their misconduct. There are reports of two deaths at the hands of US staff in connection with torture and the threat of torture. (letter from Moazzam Begg, dated July 12, 2004, http://www.ccr-ny.org//v2/reports.asp?ObjID=qTpzEKtEPc&Content=446)

**Deaths in Iraq and Afghanistan during US Custody**

More recent statistics published by the US army in September 2004 state that a total of 54 deaths during custody in Afghanistan and Iraq were being investigated. (cf. Eric Schmitt, op cit., and others) There was a whole series of incidents in Iraq during which detainees and persons protected under humanitarian international law died. The following cases are given as examples:

On 06-06-2003 the Iraqi national Nagem Sadoon Hatab died of a crushed larynx at White Horse Camp near to Nasiriya in Iraq, when a Marine grabbed him by the back of the neck and gave him a karate kick in the chest. (cf. Bob Drogin, Abuse Brings Deaths of Captives Into Focus, Los Angeles Times, May 16, 2004; Alex Roth and Jeff McDonald, Iraqi Detainee's Death Hangs Over Marine Unit, The San Diego Union-Tribune, May 30, 2004)

On 06-12-2003 the Iraqi detainee Akheel Abd Al Hussein was shot dead at Camp Cropper when he was trying to crawl through a barbed-wire fence. The Army spoke first of all of a legitimate shooting. In the Taguba Report, it is stated that those in command knew about the escape in advance, and could have prevented it. (cf. Bob Drogin, op cit.)

During a revolt in the night of 06-13-2003, the 22-year old Iraqi Alaa Jasim Hassan was shot dead in Abu Ghraib, although according to several reports he was in his tent. Officially, his shooting was deemed justified. (cf. Bob Drogin, op cit.)

On 06-13-2003 the Iraqi detainee Dilar Dababa died from head wounds near Bagdad whilst he was being held by US troops. Doctors established death by violence, but no further information was provided.

In June 2003, an Iraqi was killed at a detention camp in Baghdad with a hard blow on the head, after he had been held down on a chair for questioning and subjected to mental and physical stress. (cf. Bob Drogin, op cit.)

On 09-11-2003 an Iraqi was shot and killed at the FOB Packhorse Camp when he was throwing stones. (cf. Miles Moffeit, Brutal Interrogation in Iraq, Five Detainees, Death Probed, The Denver Post, May 19, 2004)

On 09-22-2003 an Iraqi was killed at Camp Bucca with a bullet in the chest when he was throwing stones at a guard. The Army termed the killing a justified use of firearms. A Red Cross delegation observed the incident, and stated that the prisoner had at no time been a dangerous threat to the guard. (cf. Bob Drogin, op cit.)

On 11-04-2003, the Iraqi detainee Manadal Al-Jamadi died in Abu Ghraib during questioning by officers from the CIA. His death was caused by a brain hemorrhage, which resulted from injuries he had received when a Marine hit him with the barrel of his shotgun during detention. The picture of his corpse, wrapped in plastic, went all round the world. (cf. Bob Drogin, op cit.)

On 11-24-2003, three Iraqi detainees were killed during a revolt. (cf. Incident # 7 depicted in Item 2.2 below, from the Fay/Jones report; David Johnston and Neil A. Lewis, U. S. Examines Role of CIA and Employees in Iraq)

On 11-26-2003 an imprisoned Iraqi officer called Abid Hamad Mowhoushnach died of a trauma at the Al Qaim Center in western Iraq at the end of two weeks' detention, after he had been questioned by officers from the CIA. (cf. Bob Drogin, op cit.)

On 01-04-2004, an Iraqi detainee died because two soldiers had forced him to jump over a bridge near Samarra. (cf. Bob Drogin, op cit.)

On 01-08-2004, the 63-year old Iraqi detainee Nasef Ibrahim died when he was stripped naked, had cold water poured over him, and was exposed to the winter chill. Official channels said that he had had a heart attack. (cf. Miles Moffeit, op cit.)

On 01-09-2004, the Iraqi detainee Abdul Jaleel was killed by wanton violence while he was tied to the door of his cell. (cf. Bob Frogin, op cit.)

On April 4-5, 2004 the detainee Fashas Muhammed was found dead at the LSA Diamondback Camp near Mosul.

Numerous killings of prisoners in CIA custody have been reported:

Manadel al-Jamadi, an Iraqi prisoner in CIA custody, died in Abu Ghraib on November 4, 2003. He had originally been taken captive by Navy SEALS and hit on the head with shotgun barrels. Two CIA agents then secretly took Jamadi to Abu Ghraib without going through the normal admittance procedure there, which includes a medical examination. The agents placed Jamadi in a shower with a sandbag on his head. Three-quarters of an hour later he was dead. A CIA superior ordered Jamadi's corpse to be left in the prison for another day, saying he would ring Washington. There are photos showing Jamadi's battered corpse in a body-bag filled with ice. (Hersh, Chain of Command, p. 45) The next day US officials secretly removed the man's corpse from the prison, putting him on a stretcher so that it looked as if he were ill and not dead. At least three SEALS have been accused of his maltreatment, but no officer from the CIA has been yet. (Fay/Jones report,

pp. 87, 89, 109, 110, Jamadi is identified in the report as PRISONER 28)

Abdul Wali, a former Afghani military commander who was detained in Asadabad, died on June 21, 2003 after he had been interrogated for two days by David Passaro, a retired Army Special Forces Officer who had been hired as a civilian CIA agent. (Rumsfeld Defends Hiding Prisoner at CIA Urging, The Wall Street Journal, June 18, 2004)

The former chief of the Iraqi air defense, Air Vice-Marshal Abed Hamed Mowhoush alias Abid Hamad Mahalwi, died on November 26, 2003 in a prison near Al Qaim. (Human Rights Watch, op cit., p. 28) He suffocated as a result of maltreatment by military personnel, but according to a Pentagon report he had been questioned about 24-48 hours beforehand by a CIA interrogation official. "It is estimated that Air Vice-Marshal Mowhoush was interrogated at least once a day as long as he was in custody," reads the summary of the investigation. "About 24-48 hours beforehand (Nov. 26), Air Vice-Marshal Mowhoush was questioned (by other members of the government agency), and statements indicate that Air Vice-Marshal Mowhoush was beaten during the interrogation." (Arthur Kane and Miles Moffeit, Carson GI eyed in jail death - Iraqi general died in custody, The Denver Post, May 28, 2004)

Describing further deaths, above all in Afghanistan, is waived here, and in this respect attention is drawn to the materials to which reference has been made. However, it should be emphasized once again that each incident of killing detainees using unjustified violence constitutes a separate war crime pursuant to the CCIL, s. 8 (1) #1 (amongst others).

**Further Suspected War Crimes**

It should just be mentioned briefly that according to estimates made by the International Red Cross, 70-90% of the persons detained in Iraq were mistakenly deprived of their liberty. Of the 43,000 Iraqis who have been detained since occupation, only 600 have

been handed over to the Iraqi authorities for prosecution. (cf. Rajiv Chandrasekaran and Scott Wilson, Mistreatment of Detainees Went beyond Guards Abuse, The Washington Post, May 11, 2004) If these estimates are only somewhere near the truth, this would mean that a huge number of further war crimes has been committed: for illegally detaining persons protected under the Geneva Conventions, and delaying their return home without justification, is a war crime in itself, punishable pursuant to International Criminal Law, s. 8 (1) #1 CCIL.

**Ghost detainees and Rendition of Detainees into Torturing States**

The second accused, George Tenet, asked the first accused, US Secretary of Defense Donald Rumsfeld, in October 2003 to order the secret custody of Hiwa Abdul Rahman Rashul. (Defense Department Regular Briefing, 17. June 2004; Dana Priest, Memo Lets CIA Take Detainees out of Iraq, Washington Post, October 24, 2004) Thus, Tenet requested that the prisoner known as "Triple X" later known to be Rashul, should neither be given an identification number nor be registered with the International Red Cross. For more than seven months, Rashul was imprisoned without being registered and without having any contact to the outside world in Camp Cropper near the Airport of Bagdad. It was planned that the CIA interrogate Rashul. (Hearing of the House Armed Services Committee, Sept. 9, 2004; A Failure of Accountability, The Washington Post, 29. August 2004) At first, the CIA brought Rashul to Afghanistan for an interrogation, but brought him back into Iraq after he was acknowledged as a person protected by the Geneva Convention in a Memorandum of the Department of Justice. During his time in Camp Cropper, however, the authorities lost track of him. (Eric Schmitt and Thom Shanker, Rumsfeld Issued an Order to Hide Detainee in Iraq, The New York Times, June 17, 2004)

Under leadership of the CIA people disappear and are held in unknown places without access to the Red Cross. Their treatment is neither monitored, nor are the families informed and in most cases not even a confirmation is given that they are being held in

custody. Human Rights Watch assumes that 13 prisoners have transferred from Iraq to foreign countries or have disappeared. These are: Abdul Rahim al-Sharqawi, Ibn Al-Shaykh al-Libi, Abd al-Hadi al-Iraqi, Abu Zubaydah, Omar al Faruq, Abu Zubair al-Haili, Ramzi bin al-Shibh, Abd al-Rahim al-Nashiri, Mustafa al-Hawsawi, Khalid Sheikh Mohammed, Waleed Mohammed Bin Attash, Adil al-Jazeeri, und Hambali. (Human Rights Watch, op. cit. at p. 12)

In addition, the CIA has made confidential agreements that allow it to use places overseas which cannot be controlled from outside. (James Risen et al, Harsh CIA Methods Cited in Top Qaeda Interrogations, The New York Times, 13. Mai 2004) These places are Airbases Bagram/ Kabul and other places that are not described in Afghanistan; Camp Cropper near the Airport of Bagdad; Abu Ghraib and Custody Centers at Diego Garcia in the Indian Ocean. (Seymour M. Hersh, op.cit., pp.14, 33; Dana Priest and Barton Gellman, U.S. Decries Abuse but Defends Interrogations, The Washington Post, 26. December 2002)

On this point, General Kern testified: "We guessed that the Central Intelligence Agency brought to and held in Abu Ghraib at least a dozen prisoners, without registering them". This is an offense of national US-Law as well as the Geneva Convention. (House Armed Services Committee Hearing, 9. September 2004) Recordings from Abu Ghraib prove that from October 2003 until January 2004 at least three to ten ghost detainees were held permanently. (White, op.cit., Abu Ghraib Guards Kept a Log) General Taguba called this practice "deceptive, contrary to Army Doctrine, and in violation of international law." (Rumsfeld Defends Hiding Prisoner at CIA Urging, The Wall Street Journal, 18 June 2004) Generals Kern and Fay estimate that there are dozens of Ghost Detainees, possibly up to 100. They stated that they were unable to answer precisely because the CIA had not placed any documents at their disposal. (House Armed Services Committee Hearing, 9. September 2004)

Some of the ghost detainees in Abu Ghraib were kept in sleep interruption programs and interrogated in shower rooms and staircases. (Josh White, Abu Ghraib Guards Kept a Log

of Prison Conditions, Practices, Washington Post, October 25, 2004)

Between April 2003 and March 2004, the CIA moved up to a dozen non-Iraqi prisoners out of Iraq. These transfers were authorized by a draft memorandum of the Department of Justice, written by Jack L. Goldsmith, former Director of the office of Legal Counsel. The draft memorandum was then sent to the legal advisors of the National Security Council, the CIA, State Department and Department of Defense. "We got the green light from the memorandum", a secret service official said. "The CIA used the memorandum to get other people out of Iraq." The Government published neither names nor nationalities of the detainees. It is unclear, whether the prisoners were handed over to allied governments or are detained in secret places under US-control. (cf. Douglas Jehl, Prisoners: U.S. Action Bars Right of Some Captured in Iraq, New York Times, 26 October 2004; Dana Priest, Memo Lets CIA Take Detainees out of Iraq, Washington Post, 24 October 2004)

The CIA interned three Saudi citizens, who had been performing medical services for the coalition in Iraq. Multiple searches, including searches requested by Ambassador Bremer and Secretary of State Powell, did not locate the detainees. Eventually a Joint Intelligence and Debriefing Center (JIDC) official met with the detainees and they were released. (Fay/ Jones- Report, op. cit. at p. 54)

Under the direction of Tenet, the CIA applied techniques of interrogation which included coercion. It is reported that Tenet asked Donald Rumsfeld for approval of coercive interrogation techniques by the White House. (Cruelties Obscure the Truth, Sarasota Herald-Tribune, June 19, 2004) This led the Department of Justice to propose to White House Counsel Alberto R. Gonzalez in August 2002 that torturing Al Qaeda prisoners detained abroad "may be justified." (Dana Priest and R. Jeffrey Smith, Memo Offered Justification for Use of Torture, Washington Post, June 8, 2004) In addition, Department of Justice and CIA approved a number of classified directives for interrogation techniques which were applied to twelve to twenty high-ranking Al Qaeda prisoners. (James Risen et al., Harsh CIA Methods Cited in Top Qaeda Interrogations, The New

York Times, May 13, 2004) These coercive interrogation techniques meant for use in Afghanistan and Iraq infringed the prohibition on cruel, inhuman or degrading treatment and may amount to torture.

As stated by the International Committee of the Red Cross, the poor treatment of prisoners during interrogation did not occur systematically, except for persons whose arrest was connected with alleged offences against national security or who were supposed to be of value for secret service purposes. (ICRC-Report at p. 3) "The methods employed by the CIA are so severe that senior officials of the Federal Bureau of Investigation have directed its agents to stay out of many of the interviews of the high-level detainees…" because they were worried that the techniques could compromise their agents in criminal lawsuits. (Risen et al, Harsh CIA Methods Cited in Top Qaeda Interrogations)

In the case of Khalid Shaik Mohammad, an important prisoner suspected of participating in the planning of the 11 September 2001 attacks, the CIA-interrogation officials applied categorized levels of coercion including a technique known as "water-boarding", in which the detainee is tied up and forced down under water believing he might drown. (Risen op. cit.)

At least one CIA official was penalized for threatening a prisoner with a firearm during interrogation. (CIA Worried about Al-Qaeda Questioning, Pittsburgh Post-Gazette, May 13, 2004)

As indicated by the ICRC, key prisoners at Baghdad International Airport were kept in solitary confinement, in cells without sunlight, nearly 23 hours a day; their continued detention meant a "serious violation of the III and IV Geneva Conventions." (International Committee of the Red Cross op. cit. pp. 17 - 18)

Pain killers were used on Abu Zubaida, an important prisoner, who had suffered a gunshot wound in his loin, to achieve his cooperation. (The CIA's Prisoners, The

Washington Post, July 15, 2004)

Al Qaeda fighters and Taliban commanders were imprisoned in Bagram airbase close to the prisoners' camp in metal transport containers, surrounded by barbed wire mesh. (Priest and Gellman, U.S. Decries Abuse but Defends Interrogations) Coercive interrogation techniques were directed at the detainees. This included prisoners being undressed during interrogation, that they were exposed to extreme heat, cold, noise and light, and having a sacks put over their heads, being deprived of sleep and being firmly positioned in painful positions. (Human Rights Watch, op. cit. at pp. 10, 19-20) Detainees refusing to cooperate, according to a secret service specialist familiar with the interrogation methods of the CIA, "are sometimes forced to remain kneeling down or standing for hours, with black hoods put on their heads or diving goggles. Occasionally, they are tied in unnatural, painful positions and they are deprived of sleep by means of a 24-hour bombardment of light, which is known as the "stress and coercion" technique." Interrogations are often conducted by female officers. (Priest and Gellman, U.S. Decries Abuse but Defends Interrogations)

A so called top prisoner had a sack put over his head, was handcuffed and forced to lie backside up on a hot surface while being transferred to a prisoners' camp. He suffered serious burns which necessitated a three-month recovery in hospital. The detainee had to undergo several skin grafts and his right index finger was amputated. One left hand finger remained permanently immobile. He had been examined by the International Committee of the Red Cross in October 2003, a few months after he was released from hospital. (ICRC Report at pp. 10-11)

The CIA, under the direction of Tenet, conducted so called Forged - Flag operations in which agents put up a flag of a foreign country in the interrogation room or used other techniques in order to mislead the prisoner to think he was imprisoned in a country with a reputation for brutality. (Priest and Gellman, U.S. Decries Abuse but Defends Interrogations)

During the course of the interrogations, CIA agents threatened the relatives of the prisoners. According to reports, the US-Authorities held in custody the seven and nine year old sons of Khalid Shaikh Muhammad to force him to talk. According to an FBI-agent a CIA-agent told the prisoner Ibn al-Shaikh al-Libi when he was arrested, "before you get to (Cairo), I will find your mother and f--- her." (The United States' "Disappeared", pp. 24-25, 37) This kind of threat to relatives seems to be CIA tactics, causing conflicts with FBI personnel, who refused to act accordingly.

President Bush signed Directives at the end of 2001 or at the beginning of 2002, which permit the CIA to be secretly at war against Al Qaeda and to imprison or execute the leaders. For instance, Secretary of Defense Donald Rumsfeld authorized the highly confidential Special Access Program (SAP) with the code name Copper Green which was ultimately supervised by the tenth accused, the Undersecretary of Defense for Intelligence Stephen Cambone." (cf. Jason Vest, Implausible Denial II, The Nation, May 17, 2004) SAP was a program that established teams of special units to capture or kill identified top Al Qaeda members. These include Navy SEALs, members of the Army Delta Force and paramilitary experts at the CIA. SAP also created secret interrogation centers in allied countries, where "harsh" treatments were practiced. SAP-operators brought alleged terrorists inter alia into prisons in Singapore, Thailand and Pakistan. The members of the commando had a prior blanket approval of the CIA to kill or capture and if possible to interrogate top targets. Commandos were allowed to interrogate subjects who were suspected of being terrorists and who were supposed to be too important to transfer them to the military institutions in Guantánamo. The interrogations, sometimes conducted with the aid of foreign secret services – if necessary with the use of force – took place in secret detention centers at various places throughout the world. (Hersh, Chain of Command pp. 16, 20, 49-50)

Detainees in US custody who refused to cooperate were often transferred to foreign secret services. Counterterrorism experts report that prisoners were moved to third countries to be interrogated and executed or tortured (Risen, op. cit.). The CIA often sends questions to be used by foreign interrogators; often the CIA receives a summary of

the interrogation results. CIA agents sometimes observe interrogations of foreign secret services through one-sided mirrors. (Priest and Gellman, U.S. Decries Abuse but Defends Interrogations) According to the CIA operative a series of legal memoranda advise government officials that, if they consider using procedures which violate the Geneva Conventions or American laws prohibiting torture or degrading treatment, they cannot be held responsible if the detainees are formally in the custody of another country. (Risen, op. cit.) Prisoners who were "rendered" have no access to lawyers, courts or appropriate trials. Since September 11, 2001 renditions were no longer a subject of discussion for the US Government.

The countries to which the CIA detainees were rendered are known for using torture and frequently using mind altering drugs. (cf. Hersh, Chain of Command) Prisoners were rendered to Syria, Uzbekistan, Pakistan, Egypt, Jordan, Saudi Arabia and Morocco. (Human Rights Watch, op. cit., pp. 10-11) At the moment in Jordan at least eleven detainees are being held without any connection to the outside world, including Khalid Sheik Mohammed, Aiman al-Zawahiri, Hambali and Abu Zubaydah. Other prisoners who were rendered are Maher Arar, Ahmed Agiza, Muhammed al-Zery and Mohammed Haydar Zammar. (CIA Holds Top Al Qaeda Suspects in Jordan, Reuters, 13. October 2004; Yossi Melman, CIA Holding Al Qaeda Suspects in Secret Jordanian Lockup, Haaretz, 13. October 2004; Human Rights Watch, op. cit., pp. 10-11) Although the State Department has documented the use of torture in Jordan, Syria and Morocco and has questioned the reliability of Saudi-Arabia, the CIA sends detainees to these countries. (Priest and Gellman, U.S. Decries Abuse but Defends Interrogations)

The CIA is known to use extremely harsh methods in connection with these renditions. Thus, on 18 December 2001, when CIA agents transported to Egypt Ahmed Agiza and Muhammed al-Zery, Egyptians who applied for asylum in Sweden, they were captured and restrained in hand and foot cuffs. They were stripped naked, were subjected to suppositories into their anuses; they were dressed again, tied with belts, blindfolded and bags were placed over their heads. In Egypt the detainees were tortured by applying electrodes to the most sensitive parts of their bodies. (Hersh, Chain of Command, pp. 53-

55)

## 2.2. Individual cases of abuses of detainees and torture within the Abu Ghraib Detention Center according to the official Fay/Jones-report

According to the originally classified and later published reports of the torture cases in Abu Ghraib, the incidents were investigated by different US authorities. A number of reports by official authorities was released, the most important of which are attached as exhibits namely the above-mentioned three volumes publication of New York University's Center on Law and Security entitled "Torture". Volumes II and III contend the report of the International Committee of the Red Cross of February 2004; the Taguba report, an internal investigation report of March 2004 concerning incidents involving the 800th military police brigade; the Mikolashek report of July 2004, an internal army report; the Schlesinger report of 2004, a report of a fact-finding commission on behalf of the US Defense Department directed by the former US Defense Secretary James R. Schlesinger; and finally the internal investigation report of the 205th military intelligence Service Brigade dated August 9, 2004, the Fay/Jones Report. The latter report was initially ordered by Lieutenant General Sanchez, the third accused, the commanding general in charge of Combined Joint Task Force 7, as so-called Army Report AR 15-6. (Army Regulation, 381-10, Procedure 15) Major General George R. Fay and Lieutenant General Anthony R. Jones began their investigations on March 31, 2004 and June 24, 2004 respectively. At first, they investigated the behavior of members of the 205$^{th}$ Military Intelligence Brigade, but later also that of other units. The Fay/Jones report is based on the written reports of the commanders of the various units involved as well as 170 interviews. Within this report the different incidents of torture and detainees abuses are described in detail under the heading "Summary of the abuse in Abu Ghraib", the persons involved are named to some extent and coded to some extent by number as prisoners or as soldiers. This part of the Fay/Jones-Report has been translated because it is detailed and because of the fact that it is an official investigation report of a unit of the

US armed forces involved and will be documented in the text which follows. (Translator: Ms. Birgit Kolboske/Berlin)

68

5. Summary of Abuses at Abu Ghraib

a. (U) Several types of detainee abuse were identified in this investigation: physical and sexual abuse; improper use of military working dogs; humiliating and degrading treatments; and improper use of isolation.

(1) (U) Physical Abuse. Several Soldiers reported that they witnessed physical abuse of detainees. Some examples include slapping, kicking, twisting the hands of a detainee who was hand-cuffed to cause pain, throwing balls at restrained internees, placing gloved hand over the nose and mouth of an internee to restrict breathing, "poking" at an internee's injured leg, and forcing an internee to stand while handcuffed in such a way as to dislocate his shoulder. These actions are clearly in violation of applicable laws and regulations.

(2) (U) Use of Dogs. The use of military working dogs in a confinement facility can be effective and permissible under AR 190-12 as a means of controlling the internee population. When dogs are used to threaten and terrify detainees, there is a clear violation of applicable laws and regulations. One such impermissible practice was an alleged contest between the two Army dog handlers to see who could make the internees urinate or defecate in the presence of the dogs. An incident of clearly abusive use of the dogs occurred when a dog was allowed in the cell of two male juveniles and allowed to go "nuts." Both juveniles were screaming and crying with the youngest and smallest trying to hide behind the other juvenile. (Reference Annex B, Appendix 1,SOLDIER-17)

(3) (U) Humiliating and Degrading Treatments. Actions that are intended to degrade or humiliate a detainee are prohibited by GC IV, Army policy and the UCMJ. The following are examples of such behavior that occurred at Abu Ghraib, which violate applicable laws and regulations.

(4) (U) Nakedness. Numerous statements, as well as the ICRC report, discuss the seemingly common practice of keeping detainees in a state of undress. A number of statements indicate that clothing was taken away as a punishment for either not

cooperating with interrogators or with MPs. In addition, male internees were naked in the presence of female Soldiers. Many of the Soldiers who witnessed the nakedness were told that this was an accepted practice. Under the circumstances, however, the nakedness was clearly degrading and humiliating.

(5) (U) Photographs. A multitude of photographs show detainees in various states of undress, often in degrading positions.

69

(6) (U) Simulated Sexual Positions. A number of Soldiers describe incidents where detainees were placed in simulated sexual positions with other internees. Many of these incidents were also photographed.

(7) (U) Improper Use of Isolation. There are some legitimate purposes for the segregation (or isolation) of detainees, specifically to prevent them from sharing interrogation tactics with other detainees or other sensitive information. Article 5 of Geneva Convention IV supports this position by stating that certain individuals can lose their rights of communication, but only when absolute military security requires. The use of isolation at Abu Ghraib was often done as punishment, either for a disciplinary infraction or for failure to cooperate with an interrogation.

These are improper uses of isolation and depending on the circumstances amounted to violation of applicable laws and regulations. Isolation could properly be a sanction for a disciplinary infraction if applied through the proper process set out in AR 190-8 and the Geneva Conventions.

(8) (U) Failure to Safeguard Detainees. The Geneva Conventions and Army Regulations require that detainees be "protected against all acts of violence and threats thereof and against insults and public curiosity." Geneva Convention IV, Article 27 and AR 190-8, paragraph 5-1(a)(2). The duty to protect imposes an obligation on an individual who witnesses an abusive act to intervene and stop the abuse. Failure to do so may be a violation of applicable laws and regulations.

(9) (U) Failure to Report Detainee Abuse. The duty to report detainee abuse is closely tied to the duty to protect. The failure to report an abusive incident could result in additional abuse. Soldiers who witness these offenses have an obligation to report the

violations under the provision of Article 92, UCMJ. Soldiers who are informed of such abuses also have a duty to report violations. Depending on their position and their assigned duties, the failure to report detainee abuse could support a charge of dereliction of duty, a violation of the UCMJ. Civilian contractors employed as interrogators and translators would also have a duty to report such offenses as they are also bound by the Geneva Conventions and are charged with protecting the internees.

(10) (U) Other traditional prison guard issues were far less clear. MPs are responsible for the clothing of detainees; however, MI interrogators started directing nakedness at Abu Ghraib as early as 16 September 2003 to humiliate and break down detainees. MPs would also sometimes discipline detainees by taking away clothing and putting detainees in cells naked. A severe shortage of clothing during the September, October, November 2003, time frame was frequently mentioned as the reason why people were naked. Removal of clothing and nakedness were being used to humiliate detainees at the same time there was a general level of confusion as to what was allowable in terms of MP disciplinary measures and MI interrogation rules, and what

70

clothing was available. This contributed to an environment that would appear to condone depravity and degradation rather than the humane treatment of detainees.

b. (U) The original intent by MI leadership (205 MI BDE) was for Tier 1A to be reserved for MI Holds only. In fact, CPT Wood states in an email dated 7 September 2003, during a visit from MG Miller and BG Karpinski, that BG Karpinski confirmed "we (MI) have all the iso (Isolation) cells in the wing we have been working. We only had 10 cells to begin with but that has grown to the entire wing." LTC Phillabaum also thought that MI had exclusive authority to house MI holds in Tier 1A. The fact is, however, that a number of those cells were often used by the MPs to house disciplinary problems. That fact is supported by the testimony of a large number of people who were there and further supported by the pictures and the detainee records.

In fact, 11 of a total of 25 detainees identified by the CID as victims of abuse were not MI holds and were not being interrogated by MI. The MPs put the problem detainees (detainees who required separation from the general population for disciplinary reasons) in Tier 1A because there was no other place available to isolate them. Neither CPT Wood

nor MAJ Williams appreciated the mixing because it did not allow for a pure MI environment, but the issue never made its way up to either LTC Phillabaum or to BG Karpinski.

c. (U) The "sleep adjustment" technique was used by MI as soon as the Tier 1A block opened. This was another source of confusion and misunderstanding between MPs and MI which contributed to an environment that allowed detainee abuse, as well as its perpetuation for as long as it continued. Sleep adjustment was brought with the 519 MI BN from Afghanistan. It is also a method used at GTMO. (See paragraph 3.b.(5)). At Abu Ghraib, however, the MPs were not trained, nor informed as to how they actually should do the sleep adjustment. The MPs were just told to keep a detainee awake for a time specified by the interrogator. The MPs used their own judgment as to how to keep them awake. Those techniques included taking the detainees out of their cells, stripping them and giving them cold showers. CPT Wood stated she did not know this was going on and thought the detainees were being kept awake by the MPs banging on the cell doors, yelling, and playing loud music. When one MI Soldier inquired about water being thrown on a naked detainee he was told that it was an MP discipline technique.

Again, who was allowed to do what and how exactly they were to do it was totally unclear. Neither of the communities (MI and MP) knew what the other could and could not do.

(Reference Annex B, Appendix 1, WOOD, JOYNER)

d. (U) This investigation found no evidence of confusion regarding actual physical abuse, such as hitting, kicking, slapping, punching, and foot stomping. Everyone we spoke to knew it was prohibited conduct except for one Soldier. (Reference Annex B, Appendix 1, SOLDIER- 29). Physical discomfort from exposure to cold and heat or denial of food and water is not as clear-cut and can become physical or moral coercion at the extreme. Such abuse did occur at Abu Ghraib, such as detainees being left naked in their cells during severe cold weather without

71

blankets. In Tier 1A some of the excesses regarding physical discomfort were being done as directed by MI and some were being done by MPs for reasons not related to interrogation. (See paragraph 5.e.-h.)

e. (U) The physical and sexual abuses of detainees at Abu Ghraib are by far the most serious. The abuses spanned from direct physical assault, such as delivering head blows rendering detainees unconscious, to sexual posing and forced participation in group masturbation. At the extremes were the death of a detainee in OGA custody, an alleged rape committed by a US translator and observed by a female Soldier, and the alleged sexual assault of an unknown female. They were perpetrated or witnessed by individuals or small groups. Such abuse can not be directly tied to a systemic US approach to torture or approved treatment of detainees. The MPs being investigated claim their actions came at the direction of MI. Although self- serving, these claims do have some basis in fact. The climate created at Abu Ghraib provided the opportunity for such abuse to occur and to continue undiscovered by higher authority for a long period of time. What started as undressing and humiliation, stress and physical training (PT), carried over into sexual and physical assaults by a small group of morally corrupt and unsupervised Soldiers and civilians. Twenty-four (24) serious incidents of physical and sexual abuse occurred from 20 September through 13 December 2003. The incidents identified in this investigation include some of the same abuses identified in the MG Taguba investigation; however, this investigation adds several previously unreported events. A direct comparison cannot be made of the abuses cited in the MG Taguba report and this one. (1) (U) Incident #1. On 20 September 2003, two MI Soldiers beat and kicked a passive, cuffed detainee, suspected of involvement in the 20 September 2003 mortar attack on Abu Ghraib that killed two Soldiers. Two Iraqis (male and female) were detained and brought to Abu Ghraib immediately following the attack. MI and the MP Internal Reaction Force (IRF) were notified of the apprehension and dispatched teams to the entry control point to receive the detainees. Upon arrival, the IRF observed two MI Soldiers striking and yelling at the male detainee whom they subsequently "threw" into the back of a High-Mobility Multipurpose Wheeled Vehicle (HMMWV). 1LT Sutton, 320th MP BN IRF intervened to stop the abuse and was told by the MI Soldiers "we are the professionals; we know what we are doing." They refused 1LT Sutton's lawful order to identify themselves. 1LT Sutton and his IRF team (SGT Spiker, SFC Plude) immediately reported this incident, providing sworn statements to MAJ Dinenna, 320 MP BN S3 and LTC Phillabaum, 320 MP BN Commander. 1SG McBride, A/205 MI BN interviewed and took

statements from SGT Lawson, identified as striking the detainee, and each MI person present: SSG Hannifan, SSG Cole, SGT Claus, SGT Presnell. While the MP statements all describe abuse at the hands of an unidentified MI person (SGT Lawson), the MI statements all deny any abuse occurred. LTC Phillabaum subsequently reported the incident to the CID who determined the allegation lacked sufficient basis for prosecution. The detainee was interrogated and released that day (involvement in the mortar attack was unlikely); therefore, no

72

detainee is available to confirm either the MP or MI recollection of events. This incident was not further pursued based on limited data and the absence of additional investigative leads. (Reference Annex B, Appendix 1, DINENNA, LAWSON, MCBRIDE, PHILLABAUM, PLUDE, SPIKER, SUTTON; Annex B, Appendix 2, DINENNA, PHILLABAUM, PLUDE; Annex B, Appendix 3, PLUDE, SPIKER)

(2) (U) Incident #2. On 7 October 2003, three MI personnel allegedly sexually assaulted female DETAINEE-29. CIVILIAN-06 (Titan) was the assigned interpreter, but there is no indication he was present or involved. DETAINEE-29 alleges as follows: First, the group took her out of her cell and escorted her down the cellblock to an empty cell. One unidentified Soldier stayed outside the cell (SOLDIER33, A/519 MI BN); while another held her hands behind her back, and the other forcibly kissed her (SOLDIER32, A/519 MI BN). She was escorted downstairs to another cell where she was shown a naked male detainee and told the same would happen to her if she did not cooperate. She was then taken back to her cell, forced to kneel and raise her arms while one of the Soldiers (SOLDIER31, A/519 MI BN) removed her shirt. She began to cry, and her shirt was given back as the Soldier cursed at her and said they would be back each night. CID conducted an investigation and SOLDIER33, SOLDIER32, and SOLDIER31 invoked their rights and refused to provide any statements. DETAINEE-29 identified the three Soldiers as SOLDIER33, SOLDIER32, and SOLDIER31 as the Soldiers who kissed her and removed her shirt. Checks with the 519 MI BN confirmed no interrogations were scheduled for that evening. No record exists of MI ever conducting an authorized interrogation of her. The CID investigation was closed. SOLDIER33, SOLDIER32, and SOLDIER31 each received non-judicial punishment, Field Grade Article 15's, from the

Commander, 205 MI BDE, for failing to get authorization to interrogate DETAINEE-29. Additionally, COL Pappas removed them from interrogation operations. (Reference Annex B, Appendix 1, PAPPAS; Annex B, Appendix 2, PAPPAS; Annex B, Appendix 3, DETAINEE-29). (3) Incident #3. On 25 October 2003 detainees DETAINEE-31, DETAINEE-30, and DETAINEE-27 were stripped of their clothing, handcuffed together nude, placed on the ground, and forced to lie on each other and simulate sex while photographs were taken. Six photographs depict this abuse. Results of the CID investigation indicate on several occasions over several days, detainees were assaulted, abused and forced to strip off their clothing and perform indecent acts on each other. DETAINEE-27 provided a sworn statement outlining these abuses. Those present and/or participating in the abuse were CPL Graner, 372 MP CO, SSG Frederick, 372 MP CO, SPC England, 372 MP CO, SPC Harman, 372 MP CO, SOLDIER34, 372 MP CO, CIVILIAN-17, Titan Corp., SOLDIER-24, B/325 MI BN, SOLDIER19, 325 MI BN, and SOLDIER10, 325 MI BN. SOLDIER-24 claimed he accompanied SOLDIER10 to the Hard Site the evening of 25 October 2003 to see what was being done to the three detainees suspected of raping a young male detainee. SOLDIER-10 appeared to have foreknowledge of the abuse, possibly from his friendship with SPC Harman, a 372 MP CO MP. SOLDIER-24 did not believe

73

the abuse was directed by MI and these individuals were not interrogation subjects. PFC England, however, claimed “MI Soldiers instructed them (MPs) to rough them up.” When SOLDIER-24 arrived the detainees were naked, being yelled at by an MP through a megaphone. The detainees were forced to crawl on their stomachs and were handcuffed together. SOLDIER-24 observed SOLDIER-10 join in the abuse with CPL Graner and SSG Frederick. All three made the detainees act as though they were having sex. He observed SOLDIER-19 dump water on the detainees from a cup and throw a foam football at them. SOLDIER-24 described what he saw to SOLDIER-25, B/321 MI BN, who reported the incident to SGT Joyner, 372 MP CO.

SGT Joyner advised SOLDIER-25 he would notify his NCOIC and later told SOLDIER-25 “he had taken care of it.” SOLDIER-25 stated that a few days later both she and

SOLDIER24 told SOLDIER-22 of the incident. SOLDIER-22 subsequently failed to report what he was told. SOLDIER-25 did not report the abuse through MI channels because she felt it was an MP matter and would be handled by them.

(U) This is a clear incident of direct MI personnel involvement in detainee abuse; however, it does not appear to be based on MI orders. The three detainees were incarcerated for criminal acts and were not of intelligence interest. This incident was most likely orchestrated by MP personnel (CPL Graner, SSG Frederick, SOLDIER34, SPC Harman, PFC England), with the MI personnel (SOLDIER-19, SOLDIER-10, and SOLDIER-24, CIVILIAN-17, and another unidentified interpreter) joining in and/or observing the abuse. (Reference Annex B, Appendix 1, JOYNER, SOLDIER-19, CIVILIAN-17, SOLDIER-25; Annex B, Appendix 3, SOLDIER34, ENGLAND, HARMAN, DETAINEE-31, DETAINEE-30, DETAINEE-27; Annex I, Appendix 1, Photographs M36-41).

(4) (U) Incident #4. DETAINEE-08, arrived at Abu Ghraib on 27 October 2003 and was subsequently sent to the Hard Site. DETAINEE-08 claims when he was sent to the Hard Site, he was stripped of his clothing for six days. He was then given a blanket and remained with only the blanket for three more days. DETAINEE-08 stated the next evening he was transported by CPL Graner, 372 MP CO MP, to the shower room, which was commonly used for interrogations.

When the interrogation ended, his female interrogator left, and DETAINEE-08 claims CPL Graner and another MP, who meets the description of SSG Fredrick, then threw pepper in DETAINEE-08's face and beat him for half an hour. DETAINEE-08 recalled being beaten with a chair until it broke, hit in the chest, kicked, and choked until he lost consciousness. On other occasions DETAINEE-08 recalled that CPL Graner would throw his food into the toilet and say "go take it and eat it." DETAINEE-08's claims of abuse do not involve his interrogator(s) and appear to have been committed by CPL Graner and SSG Frederick, both MPs. Reviewing the interrogation reports; however, suggests a correlation between this abuse and his interrogations.

DETAINEE-08's interrogator for his first four interrogations was SOLDIER-29, a female, and almost certainly the interrogator he spoke of. Her Analyst was SOLDIER-10. In the first interrogation report they concluded he was lying and recommended a "fear

up" approach if he continued to lie. Following his second interrogation it was recommended DETAINEE-08 be

74

moved to isolation (the Hard Site) as he continued "to be untruthful." Ten days later, a period roughly correlating with DETAINEE-08's claim of being without clothes and/or a blanket for nine days before his beating, was interrogated for a third time. The interrogation report references his placement in "the hole," a small lightless isolation closet, and the "Mutt and Jeff" interrogation technique being employed. Both techniques as they were used here were abusive and unauthorized. According to the report, the interrogators "let the MPs yell at him" and upon their return, "used a fear down," but "he was still holding back." The following day he was interrogated again and the report annotates "use a direct approach with a reminder of the unpleasantness that occurred the last time he lied." Comparing the interrogation reports with DETAINEE-08's recollections, it is likely the abuse he describes occurred between his third and forth interrogations and that his interrogators were aware of the abuse, the "unpleasantness." SGT Adams stated that SOLDIER-29 and SSG Frederick had a close personal relationship and it is plausible she had CPL Graner and SSG Frederick "soften up this detainee" as they have claimed "MI" told them to do on several, unspecified, occasions (Reference Annex B, Appendix 1, ADAMS, SOLDIER-29; Annex B, Appendix 3, DETAINEE-08; Annex I, Appendix 4, DETAINEE-08).

(5) (U) Incident #5. In October 2003, DETAINEE-07, reported alleged multiple incidents of physical abuse while in Abu Ghraib. DETAINEE-07 was an MI Hold and considered of potentially high value. He was interrogated on 8, 21, and 29 October; 4 and 23 November and 5 December 2003. DETAINEE-07's claims of physical abuse (hitting) started on his first day of arrival. He was left naked in his cell for extended periods, cuffed in his cell in stressful positions ("High cuffed"), left with a bag over his head for extended periods, and denied bedding or blankets. DETAINEE-07 described being made to "bark like a dog, being forced to crawl on his stomach while MPs spit and urinated on him, and being struck causing unconsciousness." On another occasion DETAINEE-07 was tied to a window in his cell and forced to wear women's underwear on his head. On yet another occasion, DETAINEE-07 was forced to lie down while MPs jumped onto his

back and legs. He was beaten with a broom and a chemical light was broken and poured over his body. DETAINEE-04 witnessed the abuse with the chem-light.

During this abuse a police stick was used to sodomize DETAINEE-07 and two female MPs were hitting him, throwing a ball at his penis, and taking photographs. This investigation surfaced no photographic evidence of the chemical light abuse or sodomy. DETAINEE-07 also alleged that CIVILIAN-17, MP Interpreter, Titan Corp., hit DETAINEE-07 once, cutting his ear to an extent that required stitches. He told SOLDIER-25, analyst, B/321 MI BN, about this hitting incident during an interrogation. SOLDIER-25 asked the MPs what had happened to the detainee's ear and was told he had fallen in his cell. SOLDIER-25 did not report the detainee's abuse.

SOLDIER-25 claimed the detainee's allegation was made in the presence of CIVILIAN-21, Analyst/Interrogator, CACI, which CIVILIAN-21 denied hearing this report. Two photos taken at 2200 hours, 1 November 2003 depict a detainee with stitches in his ear; however, we could not confirm the photo was DETAINEE-07. Based on the details provided by the detainee and the

75

close correlation to other known MP abuses, it is highly probable DETAINEE-07's allegations are true. SOLDIER-25 failed to report the detainee's allegation of abuse. His statements and available photographs do not point to direct MI involvement. However, MI interest in this detainee, his placement in Tier 1A of the Hard Site, and initiation of the abuse once he arrived there, combine to create a circumstantial connection to MI (knowledge of or implicit tasking of the MPs to "set conditions") which are difficult to ignore. MI should have been aware of what was being done to this detainee based on the frequency of interrogations and high interest in his intelligence value. (Reference Annex B, Appendix 1, SOLDIER-25, CIVILIAN-21; Annex B, Appendix 3, DETAINEE-04, DETAINEE-07; Annex I, Appendix 1, Photographs M54-55).

(6) (U) Incident #6. DETAINEE-10 and DETAINEE-12 claimed that they and "four Iraqi Generals, were abused upon their arrival at the Hard Site. DETAINEE-10 was documented in MP records as receiving a 1.5 inch laceration on his chin, the result of his resisting an MP transfer. His injuries are likely those captured in several photographs of an unidentified detainee with a lacerated chin and bloody clothing which were taken on

14 November, a date coinciding with his transfer. DETAINEE-12 claimed he was slammed to the ground, punched, and forced to crawl naked to his cell with a sandbag over his head. These two detainees as well as the other four (DETAINEE-20, DETAINEE-19, DETAINEE-22, DETAINEE-21) were all high value Iraqi General Officers or senior members of the Iraqi Intelligence Service. MP logs from the Hard Site indicate they attempted to incite a riot in Camp Vigilant while being transferred to the Hard Site. There is no documentation of what occurred at Camp Vigilant or of detainees receiving injuries. When DETAINEE-10 was in-processed into the Hard Site, he was resisting and was pushed against the wall. At that point the MPs noticed blood coming from under his hood and they discovered the laceration on his chin. A medical corpsman was immediately called to suture the detainee's chin. These events are all documented, indicating the injury occurred before the detainee's arrival at the Hard Site and that he received prompt medical attention. When, where, and by whom this detainee suffered his injuries could not be determined nor could an evaluation be made of whether it constituted "reasonable force" in conjunction with a riot. Our interest in this incident stems from MP logs concerning DETAINEE-10 indicating MI provided direction about his treatment. CPL Graner wrote an entry indicating he was told by SFC Joyner, who was in turn told by LTC Jordan, to "Strip them out and PT them." Whether "strip out" meant to remove clothing or to isolate we couldn't determine. Whether "PT them" meant physical stress or abuse can't be determined. The vagueness of this order could, however, have led to any subsequent abuse. The alleged abuse, injury, and harsh treatment correlating with the detainees' transfer to MI hold also suggest MI could have provided direction or MP could have been given the perception they should abuse or "soften up detainees," however, there is no clear proof. (Reference Annex B, Appendix 1, JORDAN, JOYNER; Annex C).

(7) (U) Incident #7. On 4 November 2003, a CIA detainee, DETAINEE-28 died in custody in Tier 1B. Allegedly, a Navy SEAL Team had captured him during a joint TF-121/CIA

76

mission. DETAINEE-28 was suspected of having been involved in an attack against the ICRC and had numerous weapons with him at the time of his apprehension. He was

reportedly resisting arrest, and a SEAL Team member butt-stroked him on the side of the head to suppress the threat he posed. CIA representatives brought DETAINEE-28 into Abu Ghraib sometime around 0430 to 0530 without notifying JIDC Operations, in accordance with a supposed verbal agreement with the CIA. While all the details of DETAINEE-28's death are still not known (CIA, DOJ, and CID have yet to complete and release the results of their investigations), SPC Stevanus, an MP on duty at the Hard Site at the time DETAINEE-28 was brought in, stated that two CIA representatives came in with DETAINEE-28 and he was placed in a shower room (in Tier 1B). About 30 to 45 minutes later, SPC Stevanus was summoned to the shower stall, and when he arrived, DETAINEE-28 appeared to be dead. SPC Stevanus removed the sandbag which was over DETAINEE-28's head and checked for the detainee's pulse. He found none.

He un-cuffed DETAINEE-28 called for medical assistance, and notified his chain of command. LTC Jordan stated that he was informed of the death shortly thereafter, at approximately 0715 hours. LTC Jordan arrived at the Hard Site and talked to CIVILIAN03, an Iraqi prison medical doctor, who informed him DETAINEE-28 was dead. LTC Jordan stated that DETAINEE-28 was in the Tier 1B shower stall, face down, handcuffed with his hands behind his back. LTC Jordan's version of the handcuffs conflicts with SPC Stevanus' account that he un-cuffed DETAINEE-28. This incident remains under CID and CIA investigation.

(U) A CIA representative identified only as "OTHER AGENCY EMPLOYEE-01" was present, along with several MPs and US medical staff. LTC Jordan recalled that it was "OTHER AGENCY EMPLOYEE-01" who uncuffed DETAINEE-28 and the body was turned over. LTC Jordan stated that he did not see any blood anywhere, except for a small spot where DETAINEE-28's head was touching the floor. LTC Jordan notified COL Pappas (205 MI BDE Commander), and "OTHER AGENCY EMPLOYEE-01" said he would notify "OTHER AGENCY EMPLOYEE-02," his CIA supervisor. Once "OTHER AGENCY EMPLOYEE-02" arrived, he stated he would call Washington, and also requested that DETAINEE-28's body be held in the Hard Site until the following day. The body was placed in a body bag, packed in ice, and stored in the shower area. CID was notified and the body was removed from Abu Ghraib the next day on a litter to make it appear as if DETAINEE-28 was only ill, thereby not drawing the attention of the Iraqi

guards and detainees. The body was transported to the morgue at BIAP for an autopsy, which concluded that DETAINEE-28 died of a blood clot in the head, a likely result of injuries he sustained while resisting apprehension. There is no indication or accusations that MI personnel were involved in this incident except for the removal of the body. (Reference Annex B, Appendix 1, JORDAN, PAPPAS, PHILLABAUM, SNIDER, STEVANUS, THOMPSON; Annex I, Appendix 1, Photographs C5-21, D5-11, M65-69).

(8) (U) Incident #8. On 20 October 2003, DETAINEE-03, was allegedly stripped and physically abused for sharpening a toothbrush to make a shank (knife-like weapon).

77

DETAINEE-03 claimed the toothbrush was not his. An MP log book entry by SSG Frederick, 372 MPs, directed DETAINEE-03 to be stripped in his cell for six days. DETAINEE-03 claimed he was told his clothing and mattress would be taken away as punishment. The next day he claims he was cuffed to his cell door for several hours. He claims he was taken to a closed room where he had cold water poured on him and his face was forced into someone's urine.

DETAINEE-03 claimed he was then beaten with a broom and spat upon, and a female Soldier stood on his legs and pressed a broom against his anus. He described getting his clothes during the day from SGT Joyner and having them taken away each night by CPL Graner for the next three days. DETAINEE-03 was an MI Hold but was not interrogated between 16 September and 2 November 2003. It is plausible his interrogators would be unaware of the alleged abuse and DETAINEE-03 made no claim he informed them (Reference Annex B, Appendix 3, DETAINEE-03).

(9) (U) Incident #9. Three photographs taken on 25 October 2003 depicted PFC England, 372 MP CO, holding a leash which was wrapped around an unidentified detainee's neck. Present in the photograph is SPC Ambuhl who was standing to the side watching. PFC England claimed in her initial statement to CID that CPL Graner had placed the tie-down strap around the detainee's neck and then asked her to pose for the photograph. There is no indication of MI involvement or knowledge of this incident (Reference Annex E, CID Report and Reference Annex I, Appendix 1, Photographs M33-35).

(10) (U) Incident #10. Six Photographs of DETAINEE-15, depict him standing on a box with simulated electrical wires attached to his fingers and a hood over his head. These photographs were taken between 2145 and 2315 on 4 November 2003. DETAINEE-15 described a female making him stand on the box, telling him if he fell off he would be electrocuted, and a "tall black man" as putting the wires on his fingers and penis. From the CID investigation into abuse at Abu Ghraib it was determined SGT J. Davis, SPC Harman, CPL Graner, and SSG Frederick, 372 MP CO, were present during this abuse. DETAINEE-15 was not an MI Hold and it is unlikely MI had knowledge of this abuse (Reference Annex B, Appendix 3, DETAINEE-15; Annex I, Appendix 1, Photographs C1-2, D19-21, M64).

(11) (U) Incident #11. Twenty-nine photos taken between 2315 and 0024, on 7 and 8 November 2003 depict seven detainees (DETAINEE-17, DETAINEE-16, DETAINEE-24, DETAINEE-23, DETAINEE-26, DETAINEE-01, DETAINEE-18) who were physically abused, placed in a pile and forced to masturbate. Present in some of these photographs are CPL Graner and SPC Harman. The CID investigation into these abuses identified SSG Frederick, CPL Graner, SGT J. Davis, SPC Ambuhl, SPC Harman, SPC Sivits, and PFC England; all MPs, as involved in the abuses which occurred. There is no evidence to support MI personnel involvement in this incident. CID statements from PFC England, SGT J. Davis, SPC Sivits, SPC Wisdom, SPC Harman, DETAINEE-17, DETAINEE-01, and DETAINEE-16 detail that the

78

detainees were stripped, pushed into a pile, and jumped on by SGT J. Davis, CPL Graner, and SSG Frederick. They were photographed at different times by SPC Harman, SPC Sivits, and SSG Frederick. The detainees were subsequently posed sexually, forced to masturbate, and "ridden like animals." CPL Graner knocked at least one detainee unconscious and SSG Frederick punched one so hard in the chest that he couldn't breath and a medic was summoned. SSG Frederick initiated the masturbation and forced the detainees to hit each other. PFC England stated she observed SSG Frederick strike a detainee in the chest during these abuses. The detainee had difficulty breathing and a medic, SOLDIER-01, was summoned. SOLDIER-01 treated the detainee and while in the

Hard Site observed the "human pyramid" of naked detainees with bags over their heads. SOLDIER-01 failed to report this abuse. These detainees were not MI Holds and MI involvement in this abuse has not been alleged nor is it likely. SOLDIER-29 reported seeing a screen saver for a computer in the Hard Site that depicted several naked detainees stacked in a "pyramid." She also once observed, unrelated to this incident, CPL Graner slap a detainee. She stated that she didn't report the picture of naked detainees to MI because she did not see it again and also did not report the slap because she didn't consider it abuse (Reference Annex B, Appendix 1, SOLDIER-29; Annex B, Appendix 3, DETAINEE-01, DETAINEE-17, DETAINEE-16, ENGLAND, DAVIS, HARMAN,SIVITS, WISDOM; Annex B, Appendix 3, TAB A, SOLDIER-01, and Annex I, Appendix 1, Photographs C24-42, D22-25, M73-77, M87).

(12) (U) Incident #12. A photograph taken circa 27 December 2003, depicts a naked DETAINEE-14, apparently shot with a shotgun in his buttocks. This photograph could not be tied to a specific incident, detainee, or allegation and MI involvement is indeterminate (Reference Annex I, Appendix 1, Photographs D37-38, H2, M111).

(13) (U) Incident #13. Three photographs taken on 29 November 2003, depict an unidentified detainee dressed only in his underwear, standing with each foot on a separate box, and bent over at the waist. This photograph could not be tied to a specific incident, detainee, or allegation and MI involvement is indeterminate. (Reference Annex I, Appendix1, Photographs D37-38, M111)

(14) (U) Incident #14. An 18 November 2003 photograph depicts a detainee dressed in a shirt or blanket lying on the floor with a banana inserted into his anus. This as well as several others show the same detainee covered in feces, with his hands encased in sandbags, or tied in foam and between two stretchers. These are all identified as DETAINEE-25 and were determined by CID investigation to be self-inflicted incidents. Even so, these incidents constitute abuse; a detainee with a known mental condition should not have been provided the banana or photographed. The detainee has a severe mental problem and the restraints depicted in these photographs were allegedly used to prevent the detainee from sodomizing himself and assaulting himself and others with his bodily fluids. He was known for inserting various objects

into his rectum and for consuming and throwing his urine and feces. MI had no association with this detainee (Reference Annex C; Annex E; Annex I, Appendix 1, Photographs, C22-23, D28-36, D39, M97-99, M105-110, M131-133).
(15) (U) Incident #15. On 26 or 27 November 2003, SOLDIER-15, 66 MI GP, observed CIVILIAN-11, a CACI contractor, interrogating an Iraqi policeman. During the interrogation, SSG Frederick, 372 MP CO, alternated between coming into the cell and standing next to the detainee and standing outside the cell. CIVILIAN-11 would ask the policeman a question stating that if he did not answer, he would bring SSG Frederick back into the cell. At one point, SSG Frederick put his hand over the policeman's nose, not allowing him to breathe for a few seconds. At another point SSG Frederick used a collapsible nightstick to push and possibly twist the policeman's arm, causing pain. When SSG Frederick walked out of the cell, he told SOLDIER-15 he knew ways to do this without leaving marks. SOLDIER-15 did not report the incident. The interpreter utilized for this interrogation was CIVILIAN-16. (Reference Annex B, Appendix 1, SOLDIER-15).
(16) (U) Incident #16. On an unknown date, SGT Hernandez, an analyst, observed CIVILIAN-05, a CACI contractor, grab a detainee from the back of a High-Mobility, Multipurpose, Wheeled Vehicle (HMMWV) and drop him on the ground. CIVILIAN-05 then dragged the detainee into an interrogation booth. The detainee was handcuffed the entire time. When the detainee tried to get up to his knees, CIVILIAN-05 would force him to fall. SGT Hernandez reported the incident to CID but did not report it in MI channels. (Reference Annex B, Appendix 1, HERNANDEZ)
(17) (U) Incident #17. A 30 November 2003, MP Log entry described an unidentified detainee found in a cell covered in blood. This detainee had assaulted CPL Graner, 372 MP CO, while they moved him to an isolation cell in Tier 1A. CPL Graner and CPL Kamauf, subdued the detainee, placed restraints on him and put him in an isolation cell. At approximately 0320 hours, 30 November 2003, after hearing banging on the isolation cell door, the cell was checked and the detainee was found in the cell standing by the door covered in blood. This detainee was not an MI Hold and there is no record of MI

association with this incident or detainee. (Reference Annex I, Appendix 1, Photographs M115-129, M134).

(18) (U) Incident #18. On approximately 12 or 13 December 2003, DETAINEE-06 claimed numerous abuse incidents against US Soldiers. DETAINEE-06 was a Syrian foreign fighter and self-proclaimed Jihadist who came to Iraq to kill Coalition troops. DETAINEE-06 stated the Soldiers supposedly retaliated against him when he returned to the Hard Site after being released from the hospital following a shooting incident in which he attempted to kill US Soldiers. DETAINEE-06 had a pistol smuggled into him by an Iraqi Policeman and used that pistol to try to kill US personnel working in the Hard Site on 24 November 2003. An MP

80

returned fire and wounded DETAINEE-06. Once DETAINEE-06 ran out of ammunition, he surrendered and was transported to the hospital. DETAINEE-06 claimed CIVILIAN-21 visited him in the hospital and threatened him with terrible torture upon his return. DETAINEE-06 claimed that upon his return to the Hard Site, he was subjected to various threats and abuses which included Soldiers threatening to torture and kill him, being forced to eat pork and having liquor put in his mouth, having a "very hot" substance put in his nose and on his forehead, having the guards hit his "broken" leg several times with a solid plastic stick, being forced to "curse" his religion, being urinated on, being hung by handcuffs from the cell door for hours, being "smacked" on the back of the head, and "allowing dogs to try to bite" him. This claim was substantiated by a medic, SOLDIER-20, who was called to treat a detainee (DETAINEE-06) who had been complaining of pain. When SOLDIER-20 arrived DETAINEE-06 was cuffed to the upper bunk so that he could not sit down and CPL Graner was poking at his wounded legs with an asp with DETAINEE-06 crying out in pain. SOLDIER-20 provided pain medication and departed. He returned the following day to find DETAINEE-06 again cuffed to the upper bunk and a few days later returned to find him cuffed to the cell door with a dislocated shoulder. SOLDIER-20 failed to either stop or report this abuse. DETAINEE-06 also claimed that prior to the shooting incident, which he described as when "I got shot with several bullets" without mentioning that he ever fired a shot, he was threatened "every one or two hours… with torture and punishment", was subjected to sleep deprivation by

standing up “for hours and hours”, and had a “black man” tell him he would rape DETAINEE-06 on two occasions. Although DETAINEE-06 stated that CPL Graner led “a number of Soldiers” into his cell, he also stated that he had never seen CPL Graner beat a prisoner. These claims are from a detainee who attempted to kill US service members. While it is likely some Soldiers treated DETAINEE-06 harshly upon his return to the Hard Site, DETAINEE-06’s accusations are potentially the exaggerations of a man who hated Americans. (Reference Annex B, Appendix 3, DETAINEE- 06, SOLDIER-20).

(19) (U) Incident #19. SGT Adams, 470 MI GP, stated that sometime between 4 and 13 December 2003, several weeks after the shooting of “a detainee who had a pistol” (DETAINEE- 06), she heard he was back from the hospital, and she went to check on him because he was one of the MI Holds she interrogated. She found DETAINEE-06 without clothes or blanket, his wounds were bleeding and he had a catheter on without a bag. The MPs told her they had no clothes for the detainee. SGT Adams ordered the MPs to get the detainee some clothes and went to the medical site to get the doctor on duty. The doctor (Colonel) asked what SGT Adams wanted and was asked if he was aware the detainee still had a catheter on. The Colonel said he was, the Combat Army Surgical Hospital (CASH) had made a mistake, and he couldn’t remove it because the CASH was responsible for it. SGT Adams told him this was unacceptable, he again refused to remove it and stated the detainee was due to go back to the CASH the following day. SGT Adams asked if he had ever heard of the Geneva Conventions, and the Colonel responded “fine Sergeant, you do what you have to do, I am going back to bed.”

81

(U) It is apparent from this incident that DETAINEE06 did not receive proper medical treatment, clothing or bedding. The “Colonel” has not been identified in this investigation, but efforts continue. LTC Akerson was chief of the medical team for “security holds” at Abu Ghraib from early October to late December 2003. He treated DETAINEE06 following his shooting and upon his return from the hospital. He did not recall such an incident or DETAINEE06 having a catheter. It is possible SGT Adams was taken to a different doctor that evening. She asked and was told the doctor was a Colonel,

not a Lieutenant Colonel and is confident she can identify the Colonel from a photograph. LTC Akerson characterized the medical records as being exceptional at Abu Ghraib, however, the records found by this investigation were poor and in most cases non-existent. (Reference Annex B, Appendix 1, ADAMS, AKERSON; Annex B, Appendix 3, DETAINEE-06).

(20) (U) Incident #20. During the fall of 2003, a detainee stated that another detainee, named DETAINEE-09, was stripped, forced to stand on two boxes, had water poured on him and had his genitals hit with a glove. Additionally, the detainee was handcuffed to his cell door for a half day without food or water. The detainee making the statement did not recall the exact date or participants. Later, "Assad" was identified as DETAINEE-09, who stated that on 5 November 2003 he was stripped naked, beaten, and forced to crawl on the floor. He was forced to stand on a box and was hit in his genitals. The participants in this abuse could not be determined. MI involvement is indeterminate. (Reference Annex B, Appendix 3, DETAINEE-09; Annex I, Appendix 1, Photographs D37-38, M111)

(21) (U) Incident #21. Circa October 2003, CIVILIAN-17, an interpreter of the Titan Corporation, observed the following incident: CPL Graner, 372 MP CO, pushed a detainee, identified as one of the "three stooges" or "three wise men", into a wall, lacerating the detainee's chin. CIVILIAN-17 specifically stated the detainee was pushed into a wall and "busted his chin." A medic, SGT Wallin, stated he was summoned to stitch the detainee and treated a 2.5 inch laceration on the detainee's chin requiring 13 stitches. SGT Wallin did not know how the detainee was injured. Later that evening, CPL Graner took photos of the detainee. CPL Graner was identified in another incident where he stitched an injured detainee in the presence of medics. There is no indication of MI involvement, knowledge, or direction of this abuse. (Reference Annex B, Appendix 1,CIVILIAN-17; Annex B, Appendix 3,CIVILIAN-17, WALLIN, DETAINEE-02; Annex I, Appendix 1, Photographs M88-96).

(22) (U) Incident #22. On an unknown date, an interpreter named "CIVILIAN-01" allegedly raped a 15-18 year old male detainee according to DETAINEE-05. DETAINEE-05 heard screaming and climbed to the top of his cell door to see over a sheet covering the door of the cell where the abuse was occurring. DETAINEE-05

observed CIVILIAN-01, who was wearing a military uniform, raping the detainee. A female Soldier was taking pictures.

82

DETAINEE-05 described CIVILIAN-01 as possibly Egyptian, “not skinny or short,” and effeminate. The date and participants of this alleged rape could not be confirmed. No other reporting supports DETAINEE-05’s allegation, nor have photographs of the rape surfaced. A review of all available records could not identify a translator by the name of CIVILIAN-01. DETAINEE05’s description of the interpreter partially matches CIVILIAN-17, Interpreter, Titan Corp. CIVILIAN-17 is a large man, believed by several witnesses to be homosexual, and of Egyptian extraction. CIVILIAN-17 functioned as an interpreter for a Tactical HUMINT Team at Abu Ghraib, but routinely provided translation for both MI and MP. CID has an open investigation into this allegation. (Reference Annex B, Appendix 3, DETAINEE-05) (23) (U) Incident #23. On 24 November 2003, a US Army officer, CPT Brinson, MP, allegedly beat and kicked a detainee. This is one of three identified abuses associated with the 24 November shooting. A detainee obtained a pistol from Iraqi police guards, shot an MP and was subsequently shot and wounded. During a subsequent search of the Hard Site and interrogation of detainees, SGT Spiker, 229 MP CO, a member of the Abu Ghraib Internal Reaction Force (IRF), observed an Army Captain dragging an unidentified detainee in a choke hold, throwing him against a wall, and kicking him in the mid-section. SPC Polak, 229 MP CO, IRF was also present in the Hard Site and observed the same abuse involving two Soldiers and a detainee. The detainee was lying on his stomach with his hands cuffed behind his back and a bag over his head. One Soldier stood next to him with the barrel of a rifle pressed against the detainee’s head. The other Soldier was kneeling next to the detainee punching him in the back with a closed fist. The Soldier then stood up and kicked the detainee several times. The Soldier inflicting the beating was described as a white male with close cropped blond hair. SPC Polak saw this Soldier a few days later in full uniform, identifying him as a Captain, but could not see his name. Both SPC Polak and SGT Spiker reported this abuse to their supervisors, SFC Plude and 1LT Sutton, 372 MP CO. Photos of company grade officers at Abu Ghraib during this

time were obtained and shown to SPC Polak and SGT Spiker, who positively identified the "Captain" as CPT Brinson. This incident was investigated by CID and the assault was determined to be unfounded; a staged event to protect the fact the detainee was a cooperative MP Source. (Reference Annex B, Appendix 1, PLUDE, POLAK, SPIKER, SUTTON; Annex B, Appendix 3, PLUDE, SUTTON; Annex E, Appendix 5, CID Report of Investigation 0005-04-CID149-83131)

(24) (U) Incident #24. A photograph created circa early December 2003 depicts an unidentified detainee being interrogated by CIVILIAN-11, CACI, Interrogator, and CIVILIAN- 16, Titan, linguist. The detainee is squatting on a chair which is an unauthorized stress position. Having the detainee on a chair which is a potentially unsafe situation, and photographing the detainee are violations of the ICRP. (Reference Annex I, Appendix 2, Photograph "Stress Position").

83

f. (U) Incidents of Detainee Abuse Using Dogs. (U) Abusing detainees with dogs started almost immediately after the dogs arrived at Abu Ghraib on 20 November 2003. By that date, abuses of detainees was already occurring and the addition of dogs was just one more abuse device. Dog Teams were brought to Abu Ghraib as a result of recommendations from MG G. Miller's assessment team from JTF-GTMO. MG G. Miller recommended dogs as beneficial for detainee custody and control issues, especially in instances where there were large numbers of detainees and few guards to help reduce the risk of detainee demonstrations or acts of violence, as at Abu Ghraib. MG G. Miller never recommended, nor were dogs used for interrogations at GTMO. The dog teams were requested by COL Pappas, Commander, 205 MI BDE. COL Pappas never understood the intent as described by MG G. Miller. Interrogations at Abu Ghraib were also influenced by several documents that spoke of exploiting the Arab fear of dogs: a 24 January 2003 "CJTF 180 Interrogation Techniques," an 11 October 2002 JTF 170 Counter-Resistance Strategies," and a 14 September 2003 CJTF-7 ICRP. Once the dogs arrived, there was controversy over who "owned" the dogs. It was ultimately decided that the dogs would be attached to the Internal Reaction Force (IRF). The use of dogs in interrogations to "fear up" detainees was generally unquestioned and stems in part from

the interrogation techniques and counter-resistance policy distributed from Combined Joint Task Force Seven (CJTF) 180, JTF 170 and CJTF-7. It is likely the confusion about using dogs partially stems from the initial request for dog teams by MI, not MPs, and their presence being associated with MG G. Miller's visit. Most military intelligence personnel believed that the use of dogs in interrogations was a "non-standard" technique which required approval, and most also believed that approval rested with COL Pappas. COL Pappas also believed, incorrectly, that he had such authority delegated to him from LTG Sanchez. COL Pappas's belief likely stemmed in part from the changing ICRP. The initial policy was published on 14 September 2003 and allowed the use of dogs subject to approval by LTG Sanchez. On 12
October 2003, these were amended to eliminate several techniques due to CENTCOM objections. After the 12 October 2003 amendment, the ICRP safeguards allowed that dogs present at interrogations were to be muzzled and under the control of a handler. COL Pappas did not recall how he got the authority to employ dogs; just that he had it. (Reference Annex B, Appendix 1, G. MILLER and PAPPAS, and Annex J, Appendix 3)
(U) SFC Plude stated the two Army dog teams never joined the Navy teams as part of the IRF and remained separate and under the direct control of MAJ Dinenna, S3, 320 MP BN. These teams were involved in all documented detainee abuse involving dogs; both MP and MI directed. The Navy dog teams were properly employed because of good training, excellent leadership, personal moral character, and professionalism exhibited by the Navy Dog Handlers, MAI Kimbro, MA1 Clark, and MA2 Pankratz, and IRF personnel. The Army teams apparently agreed to be used in abusive situations by both MPs and MI in contravention to their doctrine, training, and values. In an atmosphere of permissiveness and absence of oversight or leadership the Army dog teams became involved in several incidents of abuse over the following weeks
84
(Reference Annex B, Appendix 1, KIMBRO, PLUDE; Annex B, Appendix 2, PLUDE; Annex B, Appendix 3, PLUDE).
(1) (U) Incident #25. The first documented incident of abuse with dogs occurred on 24 November 2003, just four days after the dogs teams arrived. An Iraqi detainee was smuggled a pistol by an Iraqi Police Guard. While attempting to confiscate the weapon,

an MP was shot and the detainee was subsequently shot and wounded. Following the shooting, LTC Jordan ordered several interrogators to the Hard Site to screen eleven Iraqi Police who were detained following the shooting. The situation at the Hard Site was described by many as "chaos," and no one really appeared to be in charge. The perception was that LTG Sanchez had removed all restrictions that night because of the situation; however, that was not true. No one is able to pin down how that perception was created. A Navy Dog Team entered the Hard Site and was instructed to search for additional weapons and explosives. The dogs searched the cells, no explosives were detected and the Navy Dog Team eventually completed their mission and left. Shortly thereafter, MA1 Kimbro, USN, was recalled when someone "needed" a dog. MA1 Kimbro went to the top floor of Tier 1B, rather than the MI Hold area of Tier 1A. As he and his dog approached a cell door, he heard yelling and screaming and his dog became agitated. Inside the cell were CIVILIAN-11 (CACI contract interrogator), a second unidentified male in civilian clothes who appeared to be an interrogator and CIVILIAN16 (female contract interpreter), all of whom were yelling at a detainee squatting in the back right corner. MA1 Kimbro's dog was barking a lot with all the yelling and commotion. The dog lunged and MA1 Kimbro struggled to regain control of it. At that point, one of the men said words to the effect "You see that dog there, if you don't tell me what I want to know, I'm gonna get that dog on you!" The three began to step out of the cell leaving the detainee inside and MA1 Kimbro backed-up to allow them to exit, but there was not much room on the tier. After they exited, the dog lunged and pulled MA1 Kimbro just inside the cell. He quickly regained control of his dog, and exited the cell. As CIVILIAN-11, CIVILIAN-16, and the other interrogator re-entered the cell, MA1 Kimbro's dog grabbed CIVILIAN-16's forearm in its mouth. It apparently did not bite through her clothes or skin and CIVILIAN-16 stated the dog did not bite her. Realizing he had not been called for an explosives search, MA1 Kimbro departed the area with his dog and as he got to the bottom of the tier stairs, he heard someone calling for the dog again, but he did not return. No record of this interrogation exists, as was the case for the interrogations of Iraqi Police in the hours and days following the shooting incident. The use of dogs in the manner directed by CIVILIAN-11 was clearly abusive and unauthorized (Reference

Annex B, Appendix 1, SOLDIER-11, KIMBRO, PAPPAS, CIVILIAN-11; Annex B, Appendix 2, PAPPAS).

(U) Even with all the apparent confusion over roles, responsibilities and authorities, there were early indications that MP and MI personnel knew the use of dog teams in interrogations was abusive. Following this 24 November 2003, incident the three Navy dog teams concluded that some interrogators might attempt to misuse Navy Dogs to support their

85

interrogations. For all subsequent requests they inquired what the specific purpose of the dog was and when told “for interrogation” they explained that Navy dogs were not intended for interrogations and the request would not be fulfilled. Over the next few weeks, the Navy dog teams received about eight similar calls, none of which were fulfilled. In the later part of December 2003, COL Pappas summoned MA1 Kimbro and wanted to know what the Navy dogs’ capabilities were. MA1 Kimbro explained Navy dog capabilities and provided the Navy Dog Use SOP. COL Pappas never asked if they could be used in interrogations and following that meeting the Navy Dog teams received no additional requests to support interrogations. (2) (U) Incident #26. On or about 8 January 2004, SOLDIER-17 was conducting an interrogation of a Baath Party General Officer in the shower area of Tier 1B of the Hard Site. Tier 1B was the area of the Hard Site dedicated to female and juvenile detainees. Although Tier 1B was not the normal location for interrogations, due to a space shortage in Tier 1A, SOLDIER-17 was using this area. SOLDIER-17 witnessed an MP guard and an MP Dog Handler, whom SOLDIER-17 later identified from photographs as SOLDIER-27, enter Tier 1B with SOLDIER-27’s black dog. The dog was on a leash, but was not muzzled. The MP guard and MP Dog Handler opened a cell in which two juveniles, one known as "Casper," were housed. SOLDIER-27 allowed the dog to enter the cell and “go nuts on the kids,” barking at and scaring them. The juveniles were screaming and the smaller one tried to hide behind "Casper." SOLDIER-27 allowed the dog to get within about one foot of the juveniles. Afterward, SOLDIER-17 overheard SOLDIER-27 say that he had a competition with another handler (likely SOLDIER-08, the only other Army dog handler) to see if they could scare detainees to the point that they would defecate. He mentioned

that they had already made some detainees urinate, so they appeared to be raising the competition. This incident has no direct MI involvement; however, SOLDIER-17 failed to properly report what he observed. He stated that he went to bed and forgot the incident until asked about misuse of dogs during this investigation (Reference Annex B, Appendix 1, SOLDIER-17).

(3) (U) Incident #27. On 12 December 2003, an MI Hold detainee named DETAINEE-11, was recommended by MI (SOLDIER-17) for an extended stay in the Hard Site because he appeared to be mentally unstable. He was bitten by a dog in the Hard Site, but at the time he was not undergoing an interrogation and no MI personnel were present. DETAINEE-11 told SOLDIER-17 that a dog had bitten him and SOLDIER-17 saw dog bite marks on DETAINEE11's thigh. SOLDIER-08, who was the dog handler of the dog that bit DETAINEE-11, stated that in December 2003 his dog bit a detainee and he believed that MPs were the only personnel around when the incident occurred, but he declined to make further statements regarding this incident to either the MG Taguba inquiry or to this inquiry. SOLDIER-27, another Army dog handler, also stated that SOLDIER-08's dog had bitten someone, but did not provide further information. This incident was captured on digital photograph 0178/CG LAPS and appears to be the result of MP harassment and amusement, no MI involvement is suspected 86 (Reference Annex B, Appendix 1,SOLDIER-17; Annex B, Appendix 2, SOLDIER-08, SMITH; Annex I, Appendix 1, Photographs, D45-54, M146-171). (4) (U) Incident #28. In an apparent MI directed use of dogs in detainee abuse, circa 18 December 2003, a photograph depicts a Syrian detainee (DETAINEE-14) kneeling on the floor with his hands bound behind his back. DETAINEE-14 was a "high value" detainee who had arrived at Abu Ghraib in December 2003, from a Navy ship. DETAINEE-14 was suspected to be involved with Al-Qaeda. Military Working Dog Handler SOLDIER-27 is standing in front of DETAINEE-14 with his black dog a few feet from DETAINEE-14's face. The dog is leashed, but not muzzled. SGT Eckroth was DETAINEE-14's interrogator from 18 to 21 December 2003, and CIVILIAN-21, CACI contract interrogator, assumed the lead after SGT Eckroth departed Abu Ghraib on 22 December 2003. SGT Eckroth identified DETAINEE14 as his detainee when shown a photo of the incident. CIVILIAN-21 claimed to know nothing about this incident; however, in

December 2003 he related to SSG Eckroth he was told by MPs that DETAINEE-14's bedding had been ripped apart by dogs. CIVILIAN-21 was characterized by SOLDIER25 as having a close relationship with the MPs, and she was told by SGT Frederick about dogs being used when CIVILIAN-21 was there. It is highly plausible that CIVILIAN-21 used dogs without authorization and directed the abuse in this incident as well as others related to this detainee (Reference Annex B, Appendix 1, ECKROTH, SOLDIER25, CIVILIAN-21; Annex I, Appendix 1, Photographs Z1-6).

(5) (U) Incident #29. On or about 14 - 15 December 2003, dogs were used in an interrogation. SPC Aston, who was the Section Chief of the Special Projects team, stated that on 14 December, one of his interrogation teams requested the use of dogs for a detainee captured in conjunction with the capture of Saddam Hussein on 13 December 2003. SPC Aston verbally requested the use of dogs from COL Pappas, and COL Pappas stated that he would call higher to request permission. This is contrary to COL Pappas's statement that he was given authority to use dogs as long as they were muzzled. About one hour later, SPC Aston received approval. SPC Aston stated that he was standing to the side of the dog handler the entire time the dog was used in the interrogation. The dog never hurt anyone and was always muzzled, about five feet away from the detainee (Reference Annex B, Appendix 1, ASTON, PAPPAS).

(6) (U) Incident #30. On another occasion, SOLDIER-26, an MI Soldier assigned to the S2, 320 MP BN, was present during an interrogation of a detainee and was told the detainee was suspected to have Al Qaeda affiliations. Dogs were requested and approved about three days later. SOLDIER-26 didn't know if the dog had to be muzzled or not, likely telling the dog handler to un-muzzle the dog, in contravention to CJTF-7 policy. The interrogators were CIVILIAN-20, CACI, and CIVILIAN-21 (CACI), SOLDIER-14, Operations Officer, ICE stated that CIVILIAN-21, used a dog during one of his interrogations and this is likely that occasion. According to SOLDIER-14, CIVILIAN-21 had the dog handler maintain control of the dog and

87

did not make any threatening reference to the dog, but apparently "felt just the presence of the dog would be unsettling to the detainee." SOLDIER-14 did not know who approved the procedure, but was verbally notified by SOLDIER-23, who supposedly

received the approval from COL Pappas. CIVILIAN-21 claimed he once requested to use dogs, but it was never approved. Based on the evidence, CIVILIAN-21 was deceitful in his statement (Reference Annex B, Appendix 1, SOLDIER-14, SOLDIER-26, CIVILIAN-21).

(7) (U) Incident #31. In a 14/15 December 2003 interrogation, military working dogs were used but were deemed ineffective because the detainee had little to no response to them. CIVILIAN-11, SOLDIER-05 and SOLDIER-12, all who participated in the interrogation, believed they had authority to use the dogs from COL Pappas or from LTG Sanchez; however, no documentation was found showing CJTF7 approval to use dogs in interrogations. It is probable that approval was granted by COL Pappas without such authority. LTG Sanchez stated he never approved use of dogs. (Reference Annex B, Appendix 1, CIVILIAN-11, SOLDIER-12, SOLDIER-14, PAPPAS, SOLDIER-23, CIVILIAN-21, SANCHEZ).

(8) (U) Incident #32. In yet another instance, SOLDIER-25, an interrogator, stated that when she and SOLDIER15 were interrogating a female detainee in the Hard Site, they heard a dog barking. The female detainee was frightened by dogs, and SOLDIER-25 and SOLDIER-15 returned her to her cell. SOLDIER-25 went to see what was happening with the dog barking and saw a detainee in his underwear on a mattress on the floor of Tier 1A with a dog standing over him. CIVILIAN-21 was upstairs giving directions to SSG Fredrick (372 MP Co), telling him to "take him back home." SOLDIER-25 opined it was "common knowledge that CIVILIAN-21 used dogs while he was on special projects, working directly for COL Pappas after the capture of Saddam on 13 December 2003." SOLDIER25 could not identify anyone else specifically who knew of this "common knowledge." It appeared CIVILIAN-21 was encouraging and even directing the MP abuse with dogs; likely a "softening up" technique for future interrogations. The detainee was one of CIVILIAN-21's. SOLDIER-25 did not see an interpreter in the area, so it is unlikely that CIVILIAN-21 was actually doing an interrogation.

(9) (U) SOLDIER-25 stated that SSG Frederick would come into her office every other day or so and tell her about dogs being used while CIVILIAN-21 was present. SSG Fredrick and other MPs used to refer to "doggy dance" sessions. SOLDIER-25 did not specify what "doggy dance" was (Reference Annex B, Appendix 1, SOLDIER-25), but

the obvious implication is that it referred to an unauthorized use of dogs to intimidate detainees.

g. (U) Incidents of Detainee Abuse Using Humiliation. Removal of clothing was not a technique developed at Abu Ghraib, but rather a technique which was imported and can be traced through Afghanistan and GTMO. The 1987 version of FM 34-52, Interrogation, talked about "controlling all aspects of the interrogation to include… clothing given to the source," while the

88

current 1992 version does not. The 1987 version was, however, cited as the primary reference for CJTF-7 in Iraq, even as late as 9 June 2004. The removal of clothing for both MI and MP objectives was authorized, approved, and employed in Afghanistan and GTMO. At GTMO, the JTF 170 "Counter-Resistance Strategy," documented on 11 October 2002, permitted the removal of clothing, approved by the interrogation officer-in-charge, as an incentive in detention operations and interrogations. The SECDEF granted this authority on 2 December 2002, but it was rescinded six weeks later in January 2003. This technique also surfaced in Afghanistan. The CJTF-180 "Interrogation Techniques," documented on 24 January 2003, highlighted that deprivation of clothing had not historically been included in battlefield interrogations. However, it went on to recommend clothing removal as an effective technique that could potentially raise objections as being degrading or inhumane, but for which no specific written legal prohibition existed. As interrogation operations in Iraq began to take form, it was often the same personnel who had operated and deployed in other theaters and in support of GWOT, who were called upon to establish and conduct interrogation operations in Abu Ghraib. The lines of authority and the prior legal opinions blurred. Soldiers simply carried forward the use of nudity into the Iraqi theater of operations.

(U) Removal of clothing is not a doctrinal or authorized interrogation technique but appears to have been directed and employed at various levels within MI as an "ego down" technique. It was also employed by MPs as a "control" mechanism. Individual observation and/or understanding of the use and approval of clothing removal varied in each interview conducted by this investigation. LTC Jordan was knowledgeable of naked detainees and removal of their clothing. He denied ordering it and blamed it on the MPs.

CPT Wood and SOLDIER14 claimed not to have observed nudity or approved clothing removal. Multiple MPs, interrogators, analysts, and interpreters observed nudity and/or employed clothing removal as an incentive, while an equal number didn't. It is apparent from this investigation that removal of clothing was employed routinely and with the belief it was not abuse. SOLDIER-03, GTMO Tiger Team believed that clothing as an "ego down" technique could be employed. He thought, mistakenly, that GTMO still had that authority. Nudity of detainees throughout the Hard Site was common enough that even during an ICRC visit they noted several detainees without clothing, and CPT Reese, 372 MP CO, stated upon his initial arrival at Abu Ghraib, "There's a lot of nude people here." Some of the nudity was attributed to a lack of clothing and uniforms for the detainees; however, even in these cases we could not determine what happened to the detainee's original clothing. It was routine practice to strip search detainees before their movement to the Hard Site. The use of clothing as an incentive (nudity) is significant in that it likely contributed to an escalating "de-humanization" of the detainees and set the stage for additional and more severe abuses to occur (Reference Annex I, Appendix 1, Photographs D42-43, M5-7, M17-18, M21, M137-141).

89

(1) (U) Incident #33. There is also ample evidence of detainees being forced to wear women's underwear, sometimes on their heads. These cases appear to be a form of humiliation, either for MP control or MI "ego down." DETAINEE-07 and DETAINEE-05 both claimed they were stripped of their clothing and forced to wear women's underwear on their heads. CIVILIAN-15 (CACI) and CIVILIAN-19 (CACI), a CJTF-7 analyst, alleged CIVILIAN-21 bragged and laughed about shaving a detainee and forcing him to wear red women's underwear. Several photographs include unidentified detainees with underwear on their heads. Such photos show abuse and constitute sexual humiliation of detainees (Reference Annex B, Appendix 1, SOLDIER-03, SOLDIER-14, JORDAN, REESE, CIVILIAN-21, WOOD; Annex B, Appendix 3, DETAINEE-05,CIVILIAN-15, CIVILIAN-19, DETAINEE-07; Annex C; Annex G; Annex I, Appendix 1, photographs D12, D14, M11-16).

(2) (U) Incident #34. On 16 September 2003, MI directed the removal of a detainee's clothing. This is the earliest incident we identified at Abu Ghraib. An MP log indicated a

detainee "was stripped down per MI and he is neked (sic) and standing tall in his cell." The following day his interrogators, SPC Webster and SSG Clinscales, arrived at the detainee's cell, and he was unclothed. They were both surprised. An MP asked SSG Clinscales, a female, to stand to the side while the detainee dressed and the detainee appeared to have his clothing in his cell. SSG Clinscales was told by the MP the detainee had voluntarily removed his clothing as a protest and, in the subsequent interrogation, the detainee did not claim any abuse or the forcible removal of his clothing. It does not appear the detainee was stripped at the interrogator's direction, but someone in MI most likely directed it. SPC Webster and SOLDIER-25 provided statements where they opined SPC Claus, in charge of in-processing MI Holds, may have directed removal of detainee clothing on this and other occasions. SPC Claus denies ever giving such orders (Reference Annex B, Appendix 1, CLAUS, CLINSCALES, SOLDIER-25, WEBSTER).

(3) (U) Incident #35. On 19 September 2003, an interrogation "Tiger Team" consisting of SOLDIER-16, SOLDIER-07, and a civilian contract interpreter identified only as "Maher" (female), conducted a late night/early morning interrogation of a 17 year old Syrian foreign fighter. SOLDIER-16 was the lead interrogator. SOLDIER-07 was told by SOLDIER-16 that the detainee they were about to interrogate was naked. SOLDIER-07 was unsure if SOLDIER-16 was simply passing along that fact or had directed the MPs to strip the detainee. The detainee had fashioned an empty "Meals-Ready-to-Eat" (MRE) bag to cover his genital area. SOLDIER-07 couldn't recall who ordered the detainee to raise his hands to his sides, but when he did, the bag fell to the floor exposing him to SOLDIER-07 and the two female interrogation team members. SOLDIER-16 used a direct interrogation approach with the incentive of getting back clothing, and the use of stress positions.

90

(U) There is no record of an Interrogation Plan or any approval documents which would authorize these techniques. The fact these techniques were documented in the Interrogation Report suggests, however, that the interrogators believed they had the authority to use clothing as an incentive, as well as stress positions, and were not attempting to hide their use. Stress positions were permissible with Commander, CJTF-7

approval at that time. It is probable that use of nudity was sanctioned at some level within the chain-of-command. If not, lack of leadership and oversight permitted the nudity to occur. Having a detainee raise his hands to expose himself in front of two females is humiliation and therefore violates the Geneva Conventions (Reference Annex B, Appendix 1, SOLDIER-07, SOLDIER-14, SOLDIER-16, SOLDIER-24, WOOD).

(4) (U) Incident #36. In early October 2003, SOLDIER-19 was conducting an interrogation and ordered a detainee to roll his orange jumpsuit down to his waist, insinuating to the detainee that he would be further stripped if he did not cooperate. SOLDIER-19's interpreter put up his hand, looked away, said that he was not comfortable with the situation, and exited the interrogation booth. SOLDIER-19 was then forced to stop the interrogation due to lack of language support. SOLDIER-11, an analyst from a visiting JTF GTMO Tiger Team, witnessed this incident through the booth's observation window and brought it to the attention of SOLDIER-16, who was SOLDIER-19's Team Chief and first line supervisor. SOLDIER-16 responded that SOLDIER-19 knew what he was doing and did not take any action regarding the matter. SOLDIER-11 reported the same information to SOLDIER-28, his JTF GTMO Tiger Team Chief, who, according to SOLDIER-11, said he would "take care of it." SOLDIER-28 recalled a conversation with SOLDIER-11 concerning an interpreter walking out of an interrogation due to a "cultural difference," but could not remember the incident. This incident has four abuse components: the actual unauthorized stripping of a detainee by SOLDIER-19, the failure of SOLDIER-10 to report the incident he witnessed, the failure of SOLDIER-16 to take corrective action, reporting the incident up the chain of command, and the failure of SOLDIER-28 to report. (Reference Annex B, Appendix 1, SOLDIER-11, SOLDIER-16, SOLDIER-19, SOLDIER-28)

(5) (U) Incident #37. A photograph taken on 17 October 2003 depicts a naked detainee chained to his cell door with a hood on his head. Several other photographs taken on 18 October 2003 depict a hooded detainee cuffed to his cell door. Additional photographs on 19 October 2003 depict a detainee cuffed to his bed with underwear on his head. A review of available documents could not tie these photos to a specific incident, detainee or allegation, but these photos reinforce the reality that humiliation and nudity were being employed routinely enough that photo opportunities occurred on three successive days.

MI involvement in these apparent abuses cannot be confirmed. (Reference Annex I, Appendix 1, Photographs D12, D14, D42-44, M5-7, M17-18, M21, M11-16, M137-141)

91

(6) (U) Incident #38. Eleven photographs of two female detainees arrested for suspected prostitution were obtained. Identified in these photographs are SPC Harman and CPL Graner, both MPs. In some of these photos, a criminal detainee housed in the Hard Site was shown lifting her shirt with both her breasts exposed. There is no evidence to confirm if these acts were consensual or coerced; however in either case sexual exploitation of a person in US custody constitutes abuse. There does not appear to be any direct MI involvement in either of the two incidents above. (Reference Annex I, Appendix 1, Photographs M42-52) (7) (U) Incident #39. On 16 November 2003, SOLDIER-29 decided to strip a detainee in response to what she believed was uncooperative and physically recalcitrant behavior. She had submitted an Interrogation Plan in which she planned to use the "Pride and Ego Down," technique but did not specify that she would strip the detainee as part of that approach. SOLDIER-29 felt the detainee was "arrogant," and when she and her analyst, SOLDIER-10, "placed him against the wall" the detainee pushed SOLDIER-10. SOLDIER-29 warned if he touched SOLDIER-10 again, she would have him remove his shoes. A bizarre tit-for-tat scenario then ensued where SOLDIER-29 would warn the detainee about touching SOLDIER-10, the detainee would "touch" SOLDIER-10, and then had his shirt, blanket, and finally his pants removed. At this point, SOLDIER-29 concluded that the detainee was "completely uncooperative" and terminated the interrogation. While nudity seemed to be acceptable, SOLDIER-29 went further than most when she walked the semi-naked detainee across the camp. SGT Adams, SOLDIER-29's supervisor, commented that walking a semi-naked detainee across the camp could have caused a riot. CIVILIAN-21, a CACI contract interrogator, witnessed SOLDIER-29 and SOLDIER-10 escorting the scantily clad detainee from the Hard Site back to Camp Vigilant, wearing only his underwear and carrying his blanket. CIVILIAN-21 notified SGT Adams, who was SOLDIER-29's section chief, who in turn notified CPT Wood, the ICE OIC. SGT Adams immediately called SOLDIER-29 and SOLDIER-10 into her office, counseled them, and removed

them from interrogation duties. (U) The incident was relatively well known among JIDC personnel and appeared in several statements as second hand information when interviewees were asked if they knew of detainee abuse. LTC Jordan temporarily removed SOLDIER-29 and SOLDIER-10 from interrogation duties. COL Pappas left the issue for LTC Jordan to handle. COL Pappas should have taken sterner action such as an Article 15, UCMJ. His failure to do so did not send a strong enough message to the rest of the JIDC that abuse would not be tolerated. CPT Wood had recommended to LTC Jordan that SOLDIER-29 receive an Article 15 and SFC Johnson, the interrogation NCOIC, recommended she be turned over to her parent unit for the noncompliance. (Reference Annex B, Appendix 1, ADAMS, CIVILIAN-04, JORDAN, PAPPAS, SOLDIER-29, CIVILIAN-21, WOOD; Annex B, Appendix 2, JORDAN).

92

(8) (U) Incident #40. On 24 November 2003, there was a shooting of a detainee at Abu Ghraib in Tier 1A. DETAINEE-06, had obtained a pistol. While the MPs attempted to confiscate the weapon, an MP and DETAINEE-06 were shot. It was alleged that an Iraqi Police Guard had smuggled the pistol to DETAINEE-06 and in the aftermath of the shooting forty-three Iraqi Police were screened and eleven subsequently detained and interrogated. All but three were released following intense questioning. A fourth did not report for work the next day and is still at large. The Iraqi guard detainees admitted smuggling the weapons into the facility hiding them in an inner tube of a tire and several of the Iraqi guards were identified as Fedayeen trainers and members. During the interrogations of the Iraqi Police, harsh and unauthorized techniques were employed to include the use of dogs, discussed earlier in this report, and removal of clothing (See paragraph 5.e(18), above). Once detained, the police were strip-searched, which was a reasonable precaution considering the threat of contraband or weapons. Following such search, however, the police were not returned their clothes before being interrogated. This is an act of humiliation and was unauthorized. It was the general understanding that evening that LTG Sanchez and COL Pappas had authorized all measures to identify those involved, however, that should not have been construed to include abuse. LTC Jordan was the senior officer present at the interrogations and is responsible for the harsh and

humiliating treatment of the police (Reference Annex B, Appendix 1, JORDAN, PAPPAS; Annex B, Appendix 2, JORDAN, PAPPAS, Annex B, Appendix 1, DETAINEE-06).

(9) (U) Incident #41. On 4 December 2003, documentation in the MP Logs indicated that MI leadership was aware of clothing removal. An entry indicated "Spoke with LTC Jordan (205 MI BDE) about MI holds in Tier 1A/B. He stated he would clear up with MI and let MPs run Tiers 1A/B as far as what inmate gets (clothes)." Additionally, in his statement, LTC Phillabaum claims he asked LTC Jordan what the situation was with naked detainees, and LTC Jordan responded with, "It was an interrogation technique." Whether this supports allegations of MI involvement in the clothing and stripping of detainees is uncertain, but it does show that MI at least knew of the practice and was willing to defer decisions to the MPs. Such vague guidance, if later combined with an implied tasking from MI, or perceived tasking by MP, potentially contributed to the subsequent abuse (Reference Annex B, Appendix 2, PHILLABAUM).

h. (U) Incidents of Detainee Abuse Using Isolation. Isolation is a valid interrogation technique which required approval by the CJTF-7 Commander. We identified documentation of four instances where isolation was approved by LTG Sanchez. LTG Sanchez stated he had approved 25 instances of isolation. This investigation, however, found numerous incidents of chronic confusion by both MI and MPs at all levels of command, up through CJTF-7, between the definitions of "isolation" and "segregation." Since these terms were commonly interchanged, we conclude Segregation was used far more often than Isolation. Segregation is a valid procedure to limit collaboration between detainees. This is what was employed most often in Tier 1A (putting a detainee in a cell by himself vice in a communal cell as was common outside

93

the Hard Site) and was sometimes incorrectly referred to as "isolation." Tier 1A did have isolation cells with solid doors which could be closed as well as a small room (closet) which was referred to as the isolation "Hole." Use of these rooms should have been closely controlled and monitored by MI and MP leaders. They were not, however, which subjected the detainees to excessive cold in the winter and heat in the summer. There was obviously poor air quality, no monitoring of time limits, no frequent checks on the

physical condition of the detainee, and no medical screening, all of which added up to detainee abuse. A review of interrogation reports identified ten references to "putting people in the Hole," "taking them out of the Hole," or consideration of isolation. These occurred between 15 September 2003 and 3 January 2004. (Reference Annex B, Appendix 1, SANCHEZ)

(1) (U) Incident #42. On 15 September 2003, at 2150 hours, unidentified MI personnel, using the initials CKD, directed the use of isolation on a unidentified detainee. The detainee in cell #9 was directed to leave his outer cell door open for ventilation and was directed to be taken off the light schedule. The identification of CKD, the MI personnel, or the detainee could not be determined. This information originated from the prison log entry and confirms the use of isolation and sensory deprivation as interrogation techniques. (Reference MP Hard Site log book entry, 15 September 2003).

(2) (U) Incident #43. In early October 2003, SOLDIER-11 was interrogating an unidentified detainee with SOLDIER-19, an interrogator, and an unidentified contract interpreter. About an hour and 45 minutes into the interrogation, SOLDIER-19 turned to SOLDIER-11 and asked if he thought they should place the detainee in solitary confinement for a few hours, apparently because the detainee was not cooperating or answering questions. SOLDIER-11 expressed his misgivings about the tactic, but deferred to SOLDIER-19 as the interrogator. About 15 minutes later, SOLDIER-19 stopped the interrogation, departed the booth, and returned about five minutes later with an MP, SSG Frederick. SSG Frederick jammed a bag over the detainee's head, grabbed the handcuffs restraining him and said something like "come with me piggy", as he led the detainee to solitary confinement in the Hard Site, Tier 1A of Abu Ghraib.

(U) About half an hour later, SOLDIER-19 and SOLDIER-11 went to the Hard Site without their interpreter, although he was available if needed. When they arrived at the detainee's cell, they found him lying on the floor, completely naked except for a hood that covered his head from his upper lip, whimpering, but there were no bruises or marks on him. SSG Frederick then met SOLDIER-19 and SOLDIER-11 at the cell door. He started yelling at the detainee, "You've been moving little piggy, you know you shouldn't move", or words to that effect, and yanked the hood back down over the detainee's head. SOLDIER-19 and SOLDIER-11 instructed other MPs to clothe the detainee, which they

did. SOLDIER-11 then asked SOLDIER-19 if he knew the MPs were going to strip the detainee, and SOLDIER-19 said that he
94
did not. After the detainee was clothed, both SOLDIER-19 and SOLDIER-11 escorted him to the general population and released him without interrogating him again. SSG Frederick made the statement "I want to thank you guys, because up until a week or two ago, I was a good Christian." SOLDIER-11 is uncertain under what context SSG Frederick made this statement. SOLDIER-11 noted that neither the isolation technique, nor the “striping incident” in the cell, was in any “interrogator notes” or “interrogation plan.”

(U) More than likely, SOLDIER-19 knew what SSG Frederick was going to do. Given that the order for isolation appeared to be a spontaneous reaction to the detainee’s recalcitrance and not part of an orchestrated Interrogation Plan; that the “isolation” lasted only approximately half an hour; that SOLDIER-19 chose to re-contact the detainee without an interpreter present; and that SOLDIER-19 was present with SSG Frederick at another incident of detainee abuse; it is possible that SOLDIER-19 had a prearranged agreement with SSG Frederick to “soften up” uncooperative detainees and directed SSG Frederick to strip the detainee in isolation as punishment for being uncooperative, thus providing the detainee an incentive to cooperate during the next interrogation. We believe at a minimum, SOLDIER-19 knew or at least suspected this type of treatment would take place even without specific instructions (Reference Annex B, Appendix 1,SOLDIER-11, SOLDIER-19, PAPPAS, SOLDIER-28).

(3) (U) Incident(s) #44. On 13 November 2003, SOLDIER-29 and SOLDIER-10, MI interrogators, noted that a detainee was unhappy with his stay in isolation and visits to the hole.

(U) On 11, 13, and 14 November 2003, MI interrogators SOLDIER-04, SOLDIER-09, SOLDIER-02, and SOLDIER-23 noted that a detainee was “walked and put in the Hole,” “pulled out of extreme segregation,” “did not seem to be bothered to return to the Hole,” “Kept in the Hole for a long time unless he started to talk,” and “was in good spirits even after three days in the Hole.” (Reference Annex I, Appendix 3, Photo of “the Hole”).

(U) A 5 November 2003 interrogation report indicates in the recommendations/future

approaches paragraph: “Detainee has been recommended for the hole in ISO. Detainee should be treated harshly because friendly treatment has not been productive and because COL Pappas wants fast resolution, or he will turn the detainee over to someone other than the 205th [MI].”

(U) On 12 November 2003, MI interrogators SOLDIER-18 and SOLDIER13 noted that a detainee “feared the isolation Hole, and it made him upset, but not enough to break.”

(U) On 29 November 2003, MI interrogators SOLDIER-18 and SOLDIER-06 told a detainee that “he would go into the Hole if he didn’t start cooperating.”

95

(U) On 8 December 2003, unidentified interrogators told a detainee that he was “recommended for movement to ISO and the Hole - he was told his sun [sunlight] would be taken away, so he better enjoy it now.”

(U) These incidents all indicate the routine and repetitive use of total isolation and light deprivation. Documentation of this technique in the interrogation reports implies those employing it thought it was authorized. The manner it was applied is a violation of the Geneva Conventions, CJTF-7 policy, and Army policy (Reference Annex M, Appendix 2, AR 190-8). Isolation was being employed without proper approval and with little oversight, resulting in abuse (Reference Annex I, Appendix 4, DETAINEE-08).

i. (U) Several alleged abuses were investigated and found to be unsubstantiated. Others turned out to be no more than general rumor or fabrication. This investigation established a threshold below which information on alleged or potential abuse was not included in this report. Fragmentary or difficult to understand allegations or information at times defied our ability to investigate further. One such example is contained in a statement from an alleged abuse victim, DETAINEE-13, who claimed he was always treated well at Abu Ghraib but was abused earlier by his captors. He potentially contradicts that claim by stating his head was hit into a wall. The detainee appears confused concerning the times and locations at which he was abused. Several incidents involved numerous victims and/or occurred during a single “event,” such as the Iraqi Police Interrogations on 24 November 2003. One example receiving some visibility was a report by SOLDIER-22 who overheard a conversation in the “chow hall” between SPC Mitchell and his

unidentified “friends.” SPC Mitchell was alleged to have said: “MPs were using detainees as practice dummies. They would hit the detainees as practice shots. They would apply strikes to their necks and knock them out. One detainee was so scared; the MPs held his head and told him everything would be alright, and then they would strike him. The detainees would plead for mercy and the MPs thought it was all funny.” SPC Mitchell was interviewed and denied having knowledge of any abuse. He admitted that he and his friends would joke about noises they heard in the Hard Site and say things such as “the MPs are doing their thing.” SPC Mitchell never thought anyone would take him seriously. Several associates of SPC Mitchell were interviewed (SPC Griffin, SOLDIER-12, PVT Heidenreich). All claimed their discussions with SPC Mitchell were just rumor, and they didn’t think anyone would take him seriously or construe he had personal knowledge of abuse. SPC Mitchell’s duties also make it unlikely he would have witnessed any abuse. He arrived at Abu Ghraib as an analyst, working the day shift, in late November 2003. Shortly after his arrival, the 24 November “shooting incident” occurred and the following day, he was moved to Camp Victory for three weeks. Upon his return, he was transferred to guard duty at Camp Wood and Camp Steel and never returned to the Hard Site. This alleged abuse is likely an individual’s boastful exaggeration of a rumor which was rampant throughout Abu Ghraib, nothing more (Reference Annex B, Appendix 1, SOLDIER-12, GRIFFIN, HEIDENREICH, MITCHELL, SOLDIER-22).

**2.3 The Punishable Actions Perpetrated against the Plaintiffs (No. 2 – 5).**

Until now four of those injured as the result of prisoner maltreatment in Iraq have engaged the Center for Constitutional Rights, the first plaintiff, represented by attorney Michael Ratner, to prosecute the perpetrators under civil and criminal law. The power of attorney granted also includes the power to bring charges in a criminal proceeding in Germany. In this context, attorney Michael Ratner has granted secondary powers to the undersigned.

Since the investigations are still underway and not all of the victims injured parties have been released, and since contact and communication with them is still extremely difficult, further names, powers of attorney, and testimonies will, if necessary, be submitted at a later time. For some of the victims, fear and humiliation appear to be the reasons they hesitate to take part in a legal proceeding.

Preliminarily, the following names of other abused former detainees are being supplied. After agreement with the undersigned and the plaintiff, the listed persons are ready to testify regarding no. 1:

| | |
|---|---|
| Abdul Hafeeth Sha'lan Hussein | Balad |
| Abdul Kareem Hussein Ma'roof | Balad |
| Abdul Majeed Saleh Al-Jennabi | Falluja |
| Abdul Mutalib Al-Rawi | Baghdad |
| Abdul Qahir Sabri Ubeid Jaber | Baghdad |
| Abdul Razzaq Abdul-Rahman | Baghdad |
| Abid Hamed Jassim | Falluja |
| Ali Abdul Kareem Hussein | Balad |
| Ali Salih Nouh | Hilla |
| Ali Ubeid Khesara-Al-Jubori | Baghdad |
| Buthaina Khalid Mohammed | Baghdad |
| Hamad Oda Mohammed Ahmed | Falluja |
| Hamid Ahmed Khalaf Haraj Al-Zeidi | Abu Ghraib |
| Hassan Abdul Ameir Ubeid | Hilla |
| Ibraheem Jebbar Mustafa | Balad |
| Me'ath Mohammed Aluo | Samarra |
| Meheisin I Khedeier | Baghdad |
| Mithal Kadhum | Najaf |
| Mohammed Hamid Jasim | Falluja |
| Mohammed Mahal H. Al-Hassani | Baghdad |
| Mufeed Abdul Ghafoor Al-Anni | Falluja |

| | |
|---|---|
| Ra'ad Abdul Hussein Al-Jubori | Hilla |
| Saad Abdul Kareem Hussein | Balad |
| Sebah Nouri Juma'a | Dhuloeya |
| Settar Juma Jezzaa | Balad |
| Sumeia Khalid Mohammed | Samarra |
| Twaffeq Ubeid Khessara-Al-Jubori | Baghdad |
| Umar Abdel-Kareem Hussein | Balad |
| Wissam Khedeir Nouh | Hilla |
| Zedan Shenno Habib Mehdi | Samarra |
| Ziyad Abdul Majeed Al-Jennabi | Falluja |

1) The second plaintiff, Ahmed Shehab Ahmed, is an Iraqi citizen from Baghdad born on January 1, 1968. He is a trader by profession and described himself as a politically independent Muslim. He was arrested in his home by personnel of the U.S. Armed Forces. At this time his 80-year-old handicapped father was shot and killed and valuables were stolen from the house. He was at first held at Baghdad International Airport and then brought to Rehidwaniya, an old property of Saddam Hussein. There he was beaten and stripped. He was deprived of sleep and food, and had to survive three days without sanitary facilities. During his detention he was threatened with rape, beaten until unconscious, and forbidden to pray. He was doused with cold water. Soldiers injected his genitalia with unidentified substances. An American officer held a loudspeaker to his ears and shouted at him, so that the plaintiff lost his hearing. During an interrogation with a female translator he was naked and only his head was hooded. In the course of this interrogation the interrogator and interpreter attempted sexual acts with him. As a consequence of this sexual abuse he has become impotent. He was threatened with the rape of his family and children. Upon his release, he was told that they were sorry that they had false information about him and your father.

2) The third plaintiff, Ahmed Hassan Mahawis Derweesh, is an Iraqi citizen from the town of Balad born on July 1, 1956. He is a retired officer, was Baathist but is now an independent Muslim. He was arrested at 2:30 in the morning along with his brothers by

CIA and military personnel. The brothers were hooded, beaten, tied up and insulted, while the American army personnel destroyed and stole several objects in the house, including money and documents. At his first interrogation, an Iraqi-Turcoman interpreter, Mohammed Al-Trucomani, was present. The latter accused him falsely and let the American interrogator hit him. He was insulted, pushed, shouted at and threatened with rape. During his detention in Balad, the third plaintiff was threatened with dogs, sexually harassed and threatened with rape. He was deprived of sleep, doused with cold water and exposed to extreme heat. He was given electrical shocks, was forced to behave like a dog and was kept in stress positions. While nude in cold weather, he had cold water poured on him. As a result he contracted a severe flu, and his extremities became dry and numb. Nevertheless for an entire month he received no medical treatment. During the night he heard female prisoners taken and raped by army personnel. He heard that these women were later killed by their families. He also heard that there were children under 10 years old in the prison, who were likewise raped by Americans and as a result some of these children died. The plaintiff spoke with another prisoner who had been repeatedly raped and whose genitalia were subjected to electric shocks. He had lost all feeling in his genitalia. The third plaintiff was never formally charged.

3) The fourth plaintiff, Faisal Abdulla Abdullatif, is an Iraqi citizen from Baghdad born on September 7, 1958. He was a teacher at a technical institute and a member of the Neighborhood Council in Hay Al-Shaik-Maroof. He is a member of the Iraqi Islamic Party and a Muslim. He was arrested by the U.S. Armed Forces during a meeting of the Neighborhood Council. From there he was brought to his house where soldiers stole money, a computer and equipment. He was then brought to the former Al-Muthana Airport in Baghdad, later transported to the former presidential palace, then to Abu Ghraib and finally to Camp Bucca.

During his detention the forth plaintiff was poorly fed and was denied sleep and sufficient water. He was cursed at and physically mistreated. He was threatened with transfer to Guantánamo. He was exposed to cold temperatures. His genitals were squeezed while he was searched. Several times he was held at gunpoint, hooded, and exposed to cold water. He was prevented from cleansing himself for prayer ceremonies. He was hung up

by his tied hands. The forth plaintiff further witnessed the torture and death of other prison inmates, and heard dogs attacking other detainees. He saw grave physical mistreatment by soldiers of other detainees. From other detainees he heard that they were stripped, physically severely abused, humiliated and raped. In one such instance, a naked male prisoner was forced to serve food to female prisoners. When he tried to cover himself, he was beaten. The forth plaintiff was never charged with a crime or indicted.

4) Ahmed Salih Nouh, fifth plaintiff, is an Iraqi citizen from Hilla born on August 8, 1984. He is a farmer, politically independent and a Muslim. Together with his brother Ali, he was arrested on May 17, 2004 by Polish Coalition Forces personnel. The soldiers entered his house and stopped the women present from wearing their veils and clothing and thus wounded the honor of the family. They stole a gold ring, 200 U.S. dollars in cash, and a pistol. Ahmed Salih Nouh and his brother were hooded, tied up and transported to a place that was called Civil Defense—located in Al-Hashimmiya—and subsequently brought to the Polish base in Hilla. The fifth plaintiff and his brother were beaten, pushed, insulted, and had their arms tied behind their backs. They were given very little food and were partly denied sleep. A riffle was pointed at the fifth plaintiff, who was threatened with dogs. He was obliged to watch his brother's beating. He was interrogated by an American officer and a Kuwaiti interpreter. They insulted him, beat him, withheld food and water and threatened him with rape. The fifth plaintiff was released ten days later and not charged with any crime.

## 3. Legal Assessment of the Abuse of Prisoners Constituting Torture and War Crimes According To § 8 CCIL and International Law

The criminal acts described above committed against people held in Abu Ghraib are to be regarded as torture and war crimes based on German and International Law. Therefore there are sufficient grounds for jurisdiction under section8, I, No. 3, 9 CCIL.

### Connection with an International Armed Conflict

The objective elements of a crime in § 8 CCIL pre-suppose that according to International Humanitarian Law (IHL) persons to be protected in connection with an international armed conflict were abused in both a temporal and geographical context within the meaning of IHL.

The war in Iraq is an international armed conflict. The "Coalition of the Willing", i.e. several States together applied the force of arms directly against Iraqi's territory, which is protected by IHL. (cf. Ibsen, Völkerrecht, 5th Edition 2004, § 66, n. 11)

The status of the abused as prisoners of war would itself suffice to justify a violation of IHL. In addition the abuse occurred within the temporal and geographical context of IHL. The pre-requisite is not necessarily that they occurred at the place of and at the time of armed actions, but that they occurred in functional connection with the armed conflict. (cf. Werle, op. cit., n. 836 f.) It is true that the armed actions between the armies were already over. The functional connection is however that the perpetrators belong to the armed forces of the USA - one of the sides involved in the conflict. (cf. International Criminal Tribunal for the Rwanda (ICTR), Judgment of 21.05.1999, Kayishema and Ruzindana, TC, para. 174 f) The invasion of Iraq and the occupation provided the perpetrators with the opportunity to abuse the detainees. Moreover the abuse was committed to a large extent to make the detainees willing to confess - that is to say for "professional" motives. The legislative history of the CCIL cites the treatment of prisoners of war in the custody of the detaining power as an example of a case in which war crimes can be committed even after the end of the war because in such a case the substantive provisions of IHL are applicable. (Government Draft Code of International Law, BMJ, Referat II A 5 – Sa, December 28, 2001, available in English at: http://www.iuscrim.mpg.de/forsch/legaltext/VStGBengl.pdf, at pp.53)

Detainees are persons protected under IHL within the meaning of § 8 of the CCIL. The inmates of the Abu Ghraib prison are partly prisoners of war in the sense of Art. 4 of the 3rd Geneva Convention, i.e. members of the opposing forces, the militia, the volunteer

corps or civilians who have voluntarily taken up arms and have fallen into the hands of the enemy or persons in the sense of § 8 VI CCIL. They are in part persons protected by other provisions of the Geneva Conventions, particularly civilians who have fallen into the hands of the aggressor in the sense of Art. 4 of the Fourth Geneva Convention.

Several criminal elements in the sense of § 8, I CCIL are thus present. Cruel and inhuman treatment is to be considered here, particularly torture in the sense of § 8 I No. 3, sexual coercion or rape in the sense of No. 4 as is degrading or demeaning treatment in the sense of No. 9.

**Torture**

Torture is not defined in § 8 CCIL. The prohibition of torture is however recognized internationally in various universal and also regional human rights conventions, particularly the UN Convention Against Torture (CAT) of 1984, Art. 7 of the International Covenant on Civil and Political rights (ICCPR) and Art. 3 of the European Convention for the Protection of Human Rights (ECPHR), and, in the meantime, has been recognized as customary law and has acquired the status of binding law, i.e. jus cogens. (UN International Criminal Tribunal for the Former Yugoslavia (ICTY), Delacic and Mucic Judgment of 16.11.1998, Rn.454; Reinhard Marx, Folter: Eine zulässige polizeiliche Präventionsmaßnahme? Kritische Justiz 2004, pp. 278, 280 m.w.N.) In terms of German Law therefore one has to apply these instruments for a definition. The starting point has to be Art. 1 of the CAT, as this is the only convention which contains a definition. According to this definition torture is "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

Additionally, the jurisprudence has to be considered, which reflects the development and the current status of customary law regarding torture as a war crime.

The term "torture" thus contains the following elements: it must be an act attributable to the State, the administering of pain must reach a certain level of intensity, and the act must be committed intentionally and must have a specific purpose. (Reinhard Marx, op. cit.., pp. 278, 283) In this context however the necessity of the first element in terms of war crimes has not yet been conclusively determined. (While the requirement of the attributability to the State in the ICTY Judgments Delacic (op.cit.) and Furundzija (10.12.1998) was still examined as a pre-condition for torture, the Kunarac Judgment (22.02.2001) omitted this pre-condition)

**Responsibility for Acts of Torture**

One must initially consider whether the responsibility of the State for acts of torture is in any way a pre-condition for war crimes in the sense of § 8 CCIL as here - unlike in human rights - it is not a matter of obligation for the State; it is a question of the individual criminal responsibility of the torturers. (ICTY, Kvocha, Judgment of 02.11.2001, para. 139; Kunarac, op.cit., para. 496*)* Abuse of fellow-prisoners etc. is not however to be included. It should suffice, however, that, as in the present case, the act of torture during detention was committed by persons, who merely by dint of their position, e.g. as interpreters, had access to the detainees.

There is therefore a responsibility on the part of the USA for the events in Abu Ghraib. For insofar as the abuses in Abu Ghraib were committed by soldiers they were (e.g. Incidents 2,3,4 etc.) unquestionably members of the Public Sector in the sense of the definition of torture in Art. 1 of the CAT. Insofar as the abuse was committed by civilians working for the US Military (e.g. Incidents 16, 22), then at least by default the USA had the responsibility to protect prisoners from abuse by private persons. For unlike the definition in Art. 1 of the CAT, the prohibition of torture contains the positive obligation

to prevent and stop torture by third parties - at least in the interpretation of the Commission on Human Rights on Art. 7 ICCPR (Dr. Mandred Nowak, ICCPR Commentary, 1993, Art. 7 n. 6 ff*)* and of the European Court for Human Rights (ECHR) on Art. 3 ECPHR (ECHR, D. P. an J. C. v. UK, No. 3719/97, Decision of 10 October 2002, § 109; ECHR, A. O. UK, Reports 1998 – VI, § 22 ECHR, Z. et al v. UK, No. 29392/95, Decision of 10 May 2001, § 73). This broad interpretation must also inform § 8 I No.3 CCIL. In the alternative, one can postulate a separate obligation, derived from the obligation to prevent, prosecute and punish torture. (Art. 2 ff CAT)

**Level of Pain Inflicted**

The European Court of Human Rights (ECHR) sees torture as particularly harsh inhuman treatment, thus differentiating it from inhuman treatment, according to whether there occurs suffering of particular intensity and cruelty. (ECHR, Ireland v. GB, GH 25, 65 European Journal of Fundamental Rights, 1979, 149, 153) Based upon this jurisprudence the ICTY also distinguished between torture and inhuman treatment in terms of the intensity of the pain inflicted (ICTY, Kvocka, op. cit. para. 161); conversely the purpose of the act is also partly used as a criterion, see for instance Art. 8 II a ii 2 of the Statute of Rome which requires that "severe" pain and suffering be inflicted for both torture and also inhuman treatment. In order to assess the intensity of the pain and suffering one has therefore not only to consider the objective harshness of the injury but also, separately, subjective criteria such as the particular physical and mental consequences relating to the circumstances of the individual case, e.g. the length of time involved, the physical and mental consequences and, in some cases, the sex, age and state of health of the victim. (ECHR, Irland v. GB, GH 25, 66f European Journal of Fundamental Rights 1979,149,153; ECHR, Selmouni v. France, Human Rights Law Report 1999, 238; Kvocka, op. cit., para. 143)

In view of the increasingly high standard of human rights protection, the degree of intensity for torture should be taken as given when investigating pain inflicted on the

victim in the context of an investigation. (Reinhard Marx, Folter: Eine zulässige polizeiliche Präventionsmaßnahme? Kritische Justiz 2004, 278, 285) In the human rights jurisprudence blows, sexual violence, sleep-deprivation over long periods, withholding food, access to hygiene facilities and medical care and also threats of torture, rape, death, mock executions and long periods of being forced to stand are regarded as torture. (Kvocka, op. cit. para. 144 et seq.) Although such acts do often lead to long-term health damage for the victim this is not a pre-condition for torture. Physical and mental injuries are however considered when assessing the level of pain and suffering inflicted. (Kvocka op. cit., para. 148 f) Further the interactive effect of several acts of abuse is also relevant. A large number of acts of abuse can lead to events which in themselves do not necessarily count as "serious" pain or suffering being classified as torture. (cf. European Commission for Human Rights, B Ireland v. GB, Yearbook 19, 512, 792)

**Physical Abuse**

According to the above at least all those cases are regarded as torture in the sense of § 8 No.3 CCIL in which the detainees were physically abused. Physical abuse is to be found in cases in which detainees have been seriously beaten (Incidents 1, 6, 20, 23), including with tools (Incidents 4, 8, 18), or lost consciousness (Incidents 4, 5, 11) or in the case in which the detainee died as a result of beating (Incident 7). The same applies to the case in which the detainee was fired at (Incident 12). Cases of Physical abuse also occurred in those cases in which soldiers jumped on a detainee (Incidents 5 and 11) or stood on him (Incident 8) or cut his ear in such a way that it had to be stitched (Incident 5), in cases where detainees were kicked with boots or shoes (Incidents 1,4, 23) or were hurled to the ground (Incidents 1,6, 16) or against a wall (Incidents 20, 23) or where their arms were twisted (Incident 15) etc. In all these incidents the aim was to inflict grievous physical pain on the detainees, which partly led to physical injury. Thus the required degree of intensity for an act of torture is met, particularly as we are dealing here with pre-meditated infliction of pain.

Also detention over long periods of time in stressful and painful positions, such as in Abu Ghraib the practice of handcuffing the detainees to objects, is clearly torture (Incidents 5, 8, 13, 18, 20, 23). It is comparable with having to stand up against a wall for a long period which, as early as 1979, the European Commission for Human Rights, in the Ireland case, regarding as satisfying the definition of torture in terms of the intensity of the pain inflicted. For being kept over a long period in a certain unnatural, stressful position such as being handcuffed to a door, etc., causes considerable physical pain, which was the clear intention here; quite apart from the psychic suffering caused by such a degrading demonstration of power and subjugation.

**Mental Abuse**

According to § 8 CCIL mental abuse, i.e. acts of abuse which do not cause physical suffering but do cause mental suffering, also fall under the definition of torture. This follows from the Geneva Convention relative to the Treatment of Prisoners of War, on which § 8 CCIL is ultimately based and Art. 17 IV Geneva Convention III of which prohibits the mental and physical torture of prisoners of war. The Committee for Human Rights, (Estrella v. Uruguay 74/1980, Report of the Human Rights Committee, supra n. 46, Annex XII, para 1.6.; Nigel S. Rodley, The Treatment of Prisoners under International Law, 1987, S.82) the jurisprudence regarding Art. 3 ECPHR (B Irland v. GB, Yearbook 19, 512, 792) and the ICTY (Kvocka, op. cit., para. 149) have already recognized that physical abuse is not necessarily a pre-requisite for torture.

According to the jurisprudence of the ECHR, mental torture includes forms of pressure which lead to a condition of fear (The Greek Case, Yearbok 12, 461) caused by inflicting mental or psychological suffering or, without impinging directly upon physical integrity, eliminate freewill by causing severe mental and psychological disorders. (B Ireland v. GB, Yearbook 19, 512, 792 ff; Frowein, Art, 3 ECHR, n. 5) In particular, when judging whether the pain inflicted is so serious and cruel that it rises to the degree of intensity qualified as torture, the interaction of physical and mental force must be considered. (cf.

ECHR, Selmouni v. France, Human Rights Law Report 1999, 238; Tyrer v. UK, Serie A 26 § 29-35 (1978)) When assessing the level of pain and suffering one should not limit oneself to examining the physical pain but also consider the mental suffering and injury which those tortured feel through a broken will and the destruction of their dignity. Everything depends on the concrete circumstances and in particular the social and religious context in which the assessment is made.

Therefore the mental abuse practiced at Abu Ghraib represents torture in the sense of § 8 I No. 3 CCIL. In many of the cases referenced here it is in any case difficult to establish whether they only cause mental disorders or whether the loss of orientation, depression and deafness should be viewed as physical abuse.

Here we have punishment in the form of isolation and light-deprivation (Incidents 4, 42, 43, 44) and also forced loss of orientation through the placing of bags on the prisoners` heads without justification, while, forcing them to remain in their cells for long periods (Incidents 5, 43) or to assume demeaning positions (Incidents 6, 37). Such methods of disorientation and sense deprivation are intended to remove the freedom of self-expression which causes severe psychic and mental disorders and through these methods the prisoners are supposed to lose their sense of space and time and thus ultimately become so helpless that they become weak-minded. (Frowein, Art. 3 ECPHR, n. 5; vgl. B Ireland v. GB, Yearbook 19, 512, 794) These methods of disorientation and sense deprivation must therefore be regarded at least as mental torture in the sense of § 8 No.3 CCIL.

Furthermore such methods are to be seen as mental torture intended to break the will of the detainees. Through sleep deprivation for instance (Incidents 5 and 18) one loses the ability to orient oneself and to think after reaching a certain level of fatigue. This is the reason why the detainees were subjected to cold, for instance through cold showers and water (Incidents 3, 8, 20) or the removal of clothing and blankets, sometimes for several days at a time. (Incidents 4, 5 and 8)

This is also the case with "mock-executions" and death threats as the fear of death usually suppresses one's free will. The detainees were on many occasions threatened with death, both expressly (Incidents 18 and 23) and implicitly, for instance when a prisoner was connected to a mock electric cable (Incident 10) or deprived of air (Incident 15) as his mouth and nose were forcibly blocked.

Such methods mean that it is more than likely that torture is taking place, particularly if they are, as in the case of Abu Ghraib, applied not only in isolation but also in conjunction with additional methods.

**Abuse through Destruction of Self-Esteem**

In Abu Ghraib there were many acts intended to degrade and humiliate the detainees, to destroy their self-esteem and self-respect in order to break their will and make them cooperate. In one judgment the ECHR regarded similar actions as torture. (Selmouni v. France, Human Rights Law Report 1999, 238: in this case the plaintiff had been forced to run through a line of police officials and was beaten in the process. He had to kneel in front of a young woman to whom an official said, "Look, you will hear someone singing soon". Another official had shown his penis and threatened: "Look, suck this" and then urinated over his body. He was then threatened with a soldering lamp and a spike) The ECHR specifically referred to the great number of inhuman acts which, irrespective of their violent nature, anyone would regard as disgusting and demeaning. If one considered physical and mental violence in conjunction, then serious pain was inflicted on the plaintiff and it was particularly serious and cruel. Such treatment was to be regarded as torture.

Based on this line of argument the majority of the acts of mistreatment in Abu Ghraib must be regarded as torture. The detainees were forced to commit inhumane acts which were clearly disgusting and demeaning, such as posing in simulated sexual positions with one another (Incidents 3 and 11) or having to wear women's underwear on their heads

(Incidents 5, 33) and partly also being photographed in these circumstances. Thus they were not only humiliated by the compulsion imposed on them, but all the more so by being forced, in the presence of onlookers of both sexes, to commit homosexual acts which run counter to Muslim philosophy. Thus these photographically recorded poses served to permanently destroy the social honor of the prisoners. The case in which a detainee was forced to eat pork and drink wine, thus violating basic religious rules, is to be judged in the same way. Even if no physical injury occurs, the religious honor and self-respect of the detainee is permanently damaged, if not destroyed altogether.

The same applies to those cases in which the detainees clothing was removed (Incidents 4, 8, 20, 34, 35, 36, 39, 40), partly in the presence of women (Incidents 5, 5 and 35). This is perceived as particularly embarrassing and painful for Muslim men. In the same category fall those cases in which detainees were forced to degrade themselves, by having their picture taken while being led around by a female soldier with a collar around the neck (Incident 9), by having to bark like a dog on all fours (Incident 5), having to crawl on their bellies (Incidents 5 and 6), being spat and urinated on by tormentors (Incidents 5, 18), having to form human pyramids, (Incident 11), to place their heads in others' urine (Incident 8), eat from a toilet (Incident 4) or to fight with one another (Incident 11). These are acts which, apart from their coercive nature, are clearly disgusting and humiliating. Such treatment also has the purpose of subjugating, humiliating and emasculating the detainees to destroy their human dignity and to break their will.

Although these acts may have involved little or no violence, they still reach the level of intensity to be regarded as torture. It is clear that victims suffered of considerable mental abuse. Such injuries are not per se to be regarded as less important than physical abuse for they often lead to longer suffering and pain than is the case with physical abuse. Moreover these acts, albeit disgusting and humiliating for anyone, are all the more humiliating and sensitive for Muslims, particularly in terms of emasculation and sexual humiliation. Finally, these actions did not take place in isolation but in tandem with a large number of physical and mental acts of abuse (e.g. Incidents 3, 5, 11, 18 etc). As in

the Selmouni Case (ECHR, op. cit.) the physical and mental force and violence and the suffering and pain must be understood in their entirety and such actions must be regarded as torture.

**Threats**

Threats are another complicated case. The detainees were in some cases expressly threatened with torture, rape and serious bodily harm (Incidents 18, 25), in others only implicitly, including the frequent use of guard dogs, (Incidents 26, 28, 29, 30, 31, 32, 40). Serious threats can usually be regarded as torture, but this can depend on the circumstances. (ICTY, Kvocka, op. cit., para. 144) Where the threats are associated with a perceptible evil in connection with comparable inhuman and degrading acts, the intensity of the pain required to meet the criteria for torture is reached. (Reinhard Marx, op. cit., pp. 286)

**Sexual Coercion and Rape**

There is no doubt that rape (Incident 22) and sexual coercion such as forced masturbation (Incident 11), anal penetration with a police baton (Incidents 5 and 8) and similar cases (Incidents 2, 38) can be regarded as torture as they inflict mental and physical suffering on the detainees. The ICTY ruled that rape and other forms of sexual violence affect the innermost core of human dignity and mental integrity. (ICTY, Delacic, Judgment of 16.11.1998, para. 495 f) With most incidents in Abu Ghraib the psychological suffering of the victims of rape and sexual coercion is intensified by social and cultural circumstances, which means that the mental pain and suffering of Muslim victims can be particularly intense and long-lasting. (cf. ICTY, Delacic, op. cit., para 495) These cases of sexual coercion are also dealt with in § 8 I No. 4 CCIL.

**Premeditation**

Unlike inhuman and degrading acts, torture requires premeditation. It is not difficult to affirm premeditation here as the acts of abuse were knowingly and deliberately carried out. This is clear from the fact that the majority of the acts required a certain degree of preparation and they were committed repeatedly. The soldiers also knew what they were doing. Whether they themselves viewed their actions as torture is immaterial. Even if they partly assumed that the acts were permitted they were still committing preventable mistakes in the sense of § 2 CCIL i. V. m. § 17 Criminal Code. Had they had the necessary knowledge and consciousness required they could easily have seen that these acts were not permissible but violations of the Geneva Convention.

**Purpose of the Abusive Acts**

Only those acts of abuse which are committed in order to achieve a specific goal are regarded as torture. If such a goal is absent then it is merely a case of an inhuman act or punishable offence. In this regard, the CAT names a wide range of possible goals ranging from forcing a confession to intimidation. The ICTY whose judgements reflect the current state of international law has added the goal of humiliation. (ICTY, Furundzija, Judgment of 10.12.1998, para. 162) In view of the special difficulties in separating torture from inhuman treatment in terms of non-physical methods and the level of suffering, nowadays the goal envisioned by abusive acts plays a more important role in assessing the criteria required for torture. The prohibited goal must be either the only or the main purpose of the infliction of suffering. (ICTY, Celebici, para. 470)

From the Report it is clear that the abusive acts mostly took place because the detainee was considered dishonest or uncooperative after interrogation and was to be prepared for the next interrogation (e.g. Incident 4) or because of his previous behavior. (e.g. Incident 18). But also in those cases in which the goal pursued does not expressly stem from the Report, one must assume that the abusive acts took place in the context of pressure from

the White House, the Pentagon and the CIA to gain more and better information from the detainees (John Diamond and Blake Morrison, Pressure at Iraq Prison Detailed, USA Today, http://www.usatoday.cm/news/world/iraq/2004-06-17-prison-cover_x.htm) and thus all followed the dynamic of trying everything in order to meet the requirements of the USA to be able to provide more information though statements and admissions by the detainees. Ultimately the use of torture and inhuman treatment is to be seen against the background of the need prescribed from Washington to Guantánamo and Baghdad and to Abu Ghraib below, for more usable, newsworthy information from the detainees. The detainees were to be made compliant. Those acting "on the ground" understood this order in their own way and put it into practice.

Beyond this it suffices for the qualification as torture that individual acts were solely aimed at intimidating, punishing or humiliating the detainees as according to the current state of customary law, these are prohibited purposes within the concept of torture.

**Cruel and Inhuman Treatment**

Abuse through cruel and inhuman treatment, which is subsidiary to torture, is also applicable. The difference from torture is gradual, i.e. the pre-condition is less intensity of pain and suffering. (ICTY, Kvocka, op. cit., para. 161) Furthermore, cruel and inhuman treatment does not require that the perpetrator is aiming for a specific result. The administration of mental suffering is also included (Werle, op. cit., n. 882 ff) as are serious violations of human dignity. (ICTY, Kvocka, op. cit., para. 159) According to a judgement of the ICTY, mental abuse, humiliation and harassment as well as inhuman prison conditions can cause severe suffering on the part of detainees. (ICTY, Kvocka, op. cit., para. 164)

Therefore the cases listed above which may be described as torture because they - despite the overall picture of the large number of inhuman acts - do not have the required level of intensity for physical or mental pain, do however represent cruel and inhuman treatment.

**Degrading or Humiliating Treatment**

The subordinate acts of degradation and humiliation are also relevant in the sense of § 8 I No. 9 CCIL. Here the subject of protection is the personal dignity of human beings. This includes acts which fundamentally cause serious humiliation and degradation or which in another way can be classified as serious assaults on personal dignity. In addition to the objective assessment of what a "reasonable person" would perceive as humiliating, degrading or abasing, subjective criteria also play a role, including the particular sensibilities of the victim. (ICTY, Aleksovski, Judgment of First Instance, para. 56) Causing ongoing suffering is however not a pre-condition. (ICTY, Kunarac, op. cit., para. 507) The ICTY has recognized for instance public nakedness, permanent fear of abuse and inhuman treatment in prison as demeaning and humiliating treatment. (ICTY, Kvocka op. cit. para.170; Aleksovski op. cit., para.184-210, Kunarac, op. cit., para.766-774, Furundzija, op. cit., para.272)

.

The acts of abuse in Abu Ghraib are, however, degrading and humiliating in the sense of § 8 I No. 9 CCIL, since the dignity of the detainee is violated and his feeling of self-worth is intentionally shaken. Undressing the detainees - partly in the presence of women - (Incidents 4, 5, 13, 8, 20, 34, 35, 36, 39, 40), building human pyramids out of them (Incident 11), leading them on a dog leash (Incident 9) making them bark like a dog (Incident 5) or forcing them to crawl on the ground while being spat upon (Incidents 5 and 6) etc. constitute violations of their dignity and their feeling of self-worth, with the aim of showing the superiority of the Americans. (cf. Kvocka, op. cit., para.173) This was all the more effective as the detainees were forced to perform acts particularly humiliating for Muslims. As the human dignity of the detainees was specially targeted through premeditated subjugation and sexual degradation, then at least § 8 I No. 9 CCIL would come into play, even if the threshold regarding the more particular acts of torture and inhuman treatment according to § 8 I No.3 CCIL were not regarded as having been passed.

In conclusion it can be stated that the incidents described above fulfill several instances of abuse within the meaning of § 8 I CCIL, namely that of cruel and inhuman treatment, particularly torture in the sense of § 8 I No. 3, of sexual coercion or rape in the sense of No. 4 and of degrading or humiliating treatment in the sense of No. 9. The very extensive debate in the USA regarding the use of torture and prohibited methods of interrogation has already been outlined. Finally, in the memoranda published so far, one can detect the author's attempts to narrow down the definition of torture to the point where it runs counter to all current law definitions in international treaties, the jurisprudence of international courts and also the literature of international criminal law. The debate is thus to be assessed as extremely important in political and legal-political terms. The term "torture" as put forward by parts of the US Administration has not been given a legal basis (and hopefully will not be) so that it is not necessary to consider those attempt at redefinition.

The legal qualifications of the incidents at Abu Ghraib are substantiated by almost all the reports of international institutions and Human Rights Organizations. Let us cite only the UN Special Rapporteur on Torture, Theo van Boven, in his report of September 1, 2004 to the UN General Assembly. In his introduction Van Boven makes a point of mentioning inter alia to his visit to Guantanamo and to his press statement concerning Abu Ghraib. He refers to the absolute nature of the prohibition of torture and cruel, inhuman and degrading treatment and punishment, which has not changed despite the current terrorist threat. (Para. 14 of the Report)  No executive, legislative, administrative or legal action could, he claims, justify such acts under international law. Each act of this nature, he avers, falls within the area of accountability of the State which performs them through persons acting in their official capacities. The argument that office holders could perform such acts because lawyers or experts had argued that they were permissible was, in his view, unacceptable. No concrete circumstances could, he said, justify a violation of the prohibition of torture. (Para. 15 of the Report)

The Special Rapporteur has recently received reports on certain methods that were employed in order to obtain information from people suspected of terrorism. Among the methods were: staying in painful positions, veiling, sleep and light deprivation for long periods, being threatened with dogs, the withholding of clothing, stripping, exposure to extreme temperatures, noise and light. The legal practice of international regional human rights courts is unanimous in the assessment of these methods as torture and mistreatment. Already in 1997, the Committee Against Torture has held methods, such as staying in painful positions, veiling under certain circumstances, the playing of loud music for long periods, sleep deprivation for long periods, threats, including threats of death, violent shaking and the use of cold air to chill the person in question, as violations of Art. 16 and as torture in the sense of Art. 1 of the CAT. This conclusion is especially suggested if these methods are employed in combination with interrogation (Para. 17 of the Report). It should be noted that the principle of non-refoulement is anchored in all international human rights pacts, especially in Art. 3 of the CAT. No party to the convention is therefore allowed to turn a person back to, or deport a person to, a country in which he or she would be in serious danger of being tortured. (Para. 26 of the Report)

**4. The Actions of the Defendants and Their Criminal Responsibility as Superiors**

The accused are responsible as perpetrators of (sole perpetrators and indirect perpetrators by dint of their organizational command position), or accomplices in, the above-mentioned war crimes by commission or omission under the directly applicable provisions of the General Part of the Criminal Code, i.e. according to §§ 13, 25 (1,2), 26 and 27. The accused are also responsible according to the newly added elements of crimes of persons in authority in the Code of Crimes Against International Law (CCIL), §§ 4, 13 and 14, which are briefly explained below (4.1) before the facts establishing the culpability of the accused are described in detail (4.2). A more detailed investigation of the individual mode of participation of each indicted person in the 44 cases of prisoner mistreatment described in the Fay/Jones Report alone would go far beyond the space limitations of a complaint. Therefore, as regards the individuals accused, we will indicate,

with appropriate brevity, by means of the already presented material, the role they played in the commission of the war crimes charged. These materials are essentially the official investigation reports of Major General Taguba of March 2004, the Mikolashek Report of July 2004, the Report of the Investigating Commission chaired by former U.S. Secretary of Defense James R. Schlesinger of August 2004, the Fay/Jones Report of August 9, 2004, the report of the International Committee of the Red Cross of February 2004, the reports of the human rights organizations Human Rights Watch and Human Rights First, as well as the relevant press reports on the subject, above all the publications of Seymour M. Hersh. As mentioned above, the exhibits are included, as an attachment, in the indictment. An exhaustive and concrete analysis of these materials with respect to the provisions of the General Part of the Criminal Code has for the most part not been undertaken. Nevertheless, we have entered into the conditions of command responsibility in the CCIL and have briefly elucidated the provisions applicable to each case. The evaluation of the role of the accused is a preliminary one in so far as it can only have recourse to the hitherto published materials and in so far as essential information has until now been withheld from the public.

The complaint is expressly directed against the ten named accused. Beyond this, it is aimed "at all other expressly named and unnamed participants in the crimes depicted in what follows." This is intended to convey that, alongside the named persons, many other persons collaborated in the writing of the memoranda and in the instructions on the use of interrogation techniques defined by the law as war crimes and torture. The plaintiffs' selection of the accused is preliminary and is not to be understood as final. This is so because the investigations undertaken thus far have only uncovered a portion of the memoranda circulating among the various decision-makers and only a fraction of the written or orally communicated orders relevant to the incidents in Abu Ghraib. Thus, for example, we have seen in the last several days an increasing number of indications that Alberto R. Gonzales, the nominee for Attorney General in the new Bush administration, played a much more important role in the incitement of military personnel to torture than he and a portion of the American public are ready to admit. The *Washington Post* reports on November 22, 2004 that American interrogators suspected of mistreatment in Abu

Ghraib assumed that their activity, including the torture of detainees, was legitimized by the Headquarters of the third accused, Lieutenant General Sanchez. The relevant memorandum of Lieutenant General Sanchez's legal advisor bases its arguments above all on the presidential memorandum of February 7, 2002 (see 2.1 above), whose "architect" is considered to be Alberto R. Gonzales. It can therefore be expected that there will be further submissions both in regard to the accused already designated by name and in regard to further persons.

### 4.1. Command Responsibility According to CCIL and International Criminal Law

The responsibility of military and civilian superiors has been recognized according to international customary law since the Nuremberg and Tokyo war crimes trials as well as the work of the United Nations War Crimes Commission. (see Kai Ambos, *Der allgemeine Teil des Völkerstrafrechtes,* pp. 666ff, 97ff. and notes, Werle, op. cit., pp. 178ff.) The doctrine of superior responsibility, formerly designated as "command responsibility" originated in the decision "in re Yamashita." Yamashita was a Japanese commander in the Philippines, who in 1945 was sentenced to death by a U.S. military commission, because he did not intervene to stop numerous crimes committed by his troops. The sentence was affirmed at the time by the U.S. Supreme Court. The principle of superior responsibility has accordingly been affirmed by the international criminal tribunals for Rwanda and former Yugoslavia in numerous cases. (see Werle, op. cit., p. 180 and notes)

In the Rome Statute of the International Criminal Court, this matter is treated as follows in article 28:

> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person 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.

On the basis of the constitutionally defined principle of guilt in German penal law, the CCIL regulates superior responsibility differently from the International Criminal Court statute in respect to three different norms, viz. §4, § 13, and § 14 CCIL. The provision of § 4 CCIL that is most important for the following legal considerations, reads as follows:

"Responsibility of military commanders and other superiors

(1) A military commander or civilian superior who omits to prevent his of her subordinate from committing an offense pursuant to this Act shall be punished in the same way as a perpetrator of the offense committed by that subordinate. Section 13 subsection (2) of the Criminal Code shall not apply in this case.

(2) Any person effectively giving orders or exercising command or control in a unit shall be deemed equivalent to a military commanding officer. Any person effectively exercising command and control in a civil organization or in an enterprise shall be deemed equivalent to a civilian superior."

In each case, culpability according to § 4 CCIL presupposes a superior-subordinate relationship, and an international war crime committed by a subordinate as the result of the failure of oversight, and presupposes the knowledge of this international war crime and finally the superior's failure to take the requisite measures.

The superior-subordinate relationship requires of military commanding officers that they possess powers of command within a military institution. (See Werle, op. cit., pp. 181 ff, Ambos, op. cit., pp. 673 ff.) However, formal powers of command are not decisive. "Categorizing someone as a superior, rather, can always be based on the actual command- and instruction- relationships in a concrete case." (See Werle, op. cit.) For civilians or non-military superiors, the characteristic feature is that they exercise effective

possibilities of control over persons. Ambos speaks of actual leadership power and control.

The condition of the underlined crime is a breach of international criminal law as a result of the superior's omission.

The superior makes himself culpable according to § 4 CCIL when he has failed to take the requisite and appropriate measures. He must have the actual possibilities either of preventing an infraction of international criminal law or of introducing punitive measures. Furthermore, the requisite and appropriate counter-measures must be taken by him. While culpability under Art. 28 ICC only requires that the superior would have had to know of the crimes of his subordinates, § 4 CCIL supposes intention at least in the form of *dolus eventualis* (foreseeable consequences).

In the Additional Protocol of the Geneva Convention of August 12, 1949 on the protection of victims of international armed conflicts (Protocol I), the criminal or disciplinary responsibility of a superior is provided for, in Art. 86, Para. 2, when such persons "knew, or had information which should have enabled him 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."

It is therefore according to international customary law completely unambiguous that superiors make themselves culpable under the above-mentioned conditions, when their subordinates commit war crimes.

**1- Donald Rumsfeld**

Donald Rumsfeld is currently the Secretary of Defense under President George W. Bush. Secretary Rumsfeld was authorized by Presidential Military Order (of November 13, 2001) entitled "Detention, Treatment and Trial of Certain Non-Citizens in

the War Against Terrorism" to "detain individuals under such conditions he may prescribe and to issue related orders and regulations as necessary." [Fay 29-30]

Secretary Rumsfeld is directly responsible for violations of CCIL Section 8, as he ordered, solicited, induced, aided and abetted war crimes. He is also liable under CCIL section 4 as a civilian commander over the military for his control over individuals accused of war crimes in Afghanistan, Guantánamo, and Iraq, as Secretary of Defense he is ultimately responsible for military policy.

**Secretary Rumsfeld is Directly Responsible for War Crimes**

Secretary Rumsfeld created an environment conducive to abuse by demanding "more actionable" intelligence, by creating a confusing and misleading set of standards for interrogation and detention practices relative to the treatment of detainees. The severest abuses at Abu Ghraib occurred in the immediate aftermath of a decision by Rumsfeld to step up the hunt for "actionable intelligence" among Iraqi prisoners. [HRW, *The Road to Abu Ghraib* 3]

**Secretary Rumsfeld ordered war crimes**

In April 2003, Secretary Rumsfeld approved a list of about twenty interrogation techniques for use at Guantánamo Bay that permitted, among other things, reversing the normal sleep patterns of detainees and exposing them to heat, cold and "sensory assault," including loud music and bright lights, according to defense officials. The use of the techniques must be justified as "militarily necessary," and must be accompanied by "appropriate medical monitoring," and requires the approval of senior Pentagon officials, and in some cases, of Rumsfeld. He had approved such treatment for Mohammed Khatani, who in August 2001 allegedly tried unsuccessfully to enter the United States as part of the 9-11 plot. The treatment included reversing Khatani's sleep patterns, cutting off his beard, playing loud music and subjecting him to interrogation sessions lasting up to twenty hours. The head of U.S. Southern Command, General James Hill, whose

responsibilities include Guantánamo Bay, said in June 2004 that Rumsfeld approved unspecified intensive interrogation techniques on two prisoners at Guantánamo. [*The Road to Abu Ghraib* 14-15; HRF, *Getting to Ground Truth* 16, FN 102; *see also*, *News Transcript*, Sec'ty of Defense Interview with David Frost, BBC, 27 June 2004 (hereinafter, *Frost*), page 4; http://www.defenselink.mil/transcripts/2004/tr20040713-secdef1001.html]

Similarly, the White House released a series of memoranda and a slide indicating certain interrogation techniques that had been authorized for use by Secretary Rumsfeld. These techniques are also barred by both international and domestic laws, yet Secretary Rumsfeld was aware that these techniques were used on at least one detainee. [*Getting to Ground Truth* 16]

Army Field Manual 34-52 (FM 34-52), with its list of 17 authorized interrogation methods, has long been the standard source of interrogation doctrine within the Department of Defense. In October 2002, authorities at Guantánamo requested approval of stronger interrogation techniques to counter tenacious resistance by detainees. Secretary Rumsfeld responded with a December 2, 2002 decision authorizing the use of 16 additional techniques at Guantánamo, such as hooding, removal of clothing, use of dogs, and mild, non-injurious contact. [Schlesinger, Appendix E] At the bottom of this memo authorizing the additional techniques, Rumsfeld included a handwritten note, referring to the use of standing as a 'stress position' for up to 4 hours, remarking "However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?" [Memorandum from William J. Haynes II, General Counsel of the Department of Defense, to Secretary of Defense Donald Rumsfeld, Re: Counter-Resistance Techniques, Dec.2, 2002]

On April 16, 2003 Secretary Rumsfeld promulgated a list of approved techniques for use at Guantánamo. This policy remains in force at Guantánamo. Schlesinger noted "It is clear that pressures for additional intelligence and the more aggressive methods sanctioned by the Secretary of Defense memorandum, resulted in stronger interrogation

techniques that were believed to be needed and appropriate in the treatment of detainees defined as "unlawful combatants.'" [Schlesinger, 7-8, 35; See Fay, 23 for a list of some of the techniques which required approval; Memorandum from Secretary of Defense Donald Rumsfeld to the Commander of U.S. Southern Command (April 16, 2003); See also *WOHR* 3]

In August 2003, Secretary Rumsfeld instructed his top intelligence aide, Stephen A. Cambone, to send MG Miller (who oversaw the interrogation efforts at the U.S. military base at Guantánamo Bay, Cuba) to "review current Iraqi Theater ability to rapidly exploit internees for actionable intelligence." [Taguba 7] MG Miller was tasked with "Gitmo-izing" interrogation practices in Iraq, which directly contributed to confusion about interrogation practices. Although the Bush administration acknowledges that the Geneva Conventions are "fully applicable" in Iraq, it has said that they do not apply to Al Qaeda detainees in Guantánamo. [*The Road to Abu Ghraib* 32]

BG Karpinski stated in September 2003 that the classification "security detainee" was created in response to Secretary Rumsfeld's order to categorize detainees, and that a security detainee had fewer rights than an enemy prisoner of war. [*Getting to Ground Truth* FN 21]

Secretary Rumsfeld "[o]rdered military officials in Iraq, in November 2003, to hold a detainee off the prison rolls in order to prevent the International Committee of the Red Cross from monitoring his treatment, in violation of international law. Additionally, prisoners reportedly are being held in at least a dozen facilities which operate in secret, hidden from Red Cross monitoring." [Eric Schmitt and Tom Shanker, *Rumsfeld Issued an Order to Hide Detainee in Iraq,* The New York Times, June 17, 2004; *Rumsfeld, at Tenet's Request, Secretly Held Suspect in Iraq,* Wall Street Journal, June 17, 2004] Tenet requested in October 2003 that Donald Rumsfeld order the secret detention of Hiwa Abdul Rahman Rashul. [Defense Department Regular Briefing, June 17, 2004; Dana Priest, *Memo Lets CIA Take Detainees out of Iraq*, Washington Post, Oct. 24, 2004] The Pentagon itself has acknowledged that Secretary Rumsfeld personally ordered at least one

detainee kept from the ICRC and the Schlesinger report noted that Secretary Rumsfeld publicly declared he directed one detainee be held secretly at the request of the Director of Central Intelligence. [*Getting to Ground Truth* 12; Schlesinger 87]

Secretary Rumsfeld approved a program for the use of force in interrogations, originally a special access program for Al Qaeda suspects, for use against detainees in Iraq. [Seymore Hersh, *The Grey Zone*, The New Yorker, May 25, 2004]

The above facts show Secretary Rumsfeld's direct participation in the commission of war crimes: as head of the Department of Defense, he authorized or ordered techniques and actions which amounted to war crimes.

**Rumsfeld induced, aided and abetted war crimes**

Secretary Rumsfeld labeled the first detainees to arrive at Guantánamo on January 11, 2002 "unlawful combatants," automatically denying them possible status as prisoners of war (POWs). Rumsfeld stated that "Unlawful combatants do not have any rights under the Geneva Convention," overlooking that the Geneva Conventions provide explicit protections to all persons captured in an international armed conflict, even if they are not entitled to POW status. Rumsfeld signaled a casual approach to U.S. compliance with international law by saying that government would "for the most part, treat them in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate." On February 7, Rumsfeld questioned the relevance of the Geneva Conventions to current U.S. military operations: "The reality is the set of facts that exist today with the Al Qaeda and the Taliban were not necessarily the set of facts that were considered when the Geneva Convention was fashioned." [*The Road to Abu Ghraib* 5] Even after the Abu Ghraib scandal broke, Rumsfeld continued to take a loose view of the applicability of the Geneva Conventions.

The Schlesinger Report notes that "it is clear that pressure for additional intelligence and the more aggressive methods sanctioned by the Secretary of Defense

memorandum resulted in stronger interrogation techniques. They did contribute to a belief that stronger interrogation methods were needed and appropriate in their treatment of detainees." [Schlesinger 36]

Secretary Rumsfeld directed Department of Defense General Counsel, William J. Hayes, to establish a working group to study interrogation techniques. [Schlesinger 8] The working group played a significant role in relaxing the definition of torture, enabling Rumsfeld to authorize techniques viewed as impermissible by both military manuals and international law. [*Getting to Ground Truth* 7]

Rumsfeld failed to ensure that techniques approved in Guantánamo, where the Geneva Conventions were said by him not to apply, were not employed in Afghanistan and Iraq, where the Conventions were admitted to apply. As stated above, Rumsfeld sent MG Miller from Guantánamo to "gitmo-ize" Iraq.

The augmented techniques authorized for Guantánamo including the use of dogs, and removal of clothing migrated to Afghanistan and Iraq. [Schlesinger 14, 36; *See* Fay 87-88 for migration of interrogation techniques from Guantánamo and Afghanistan to Abu Ghraib]

According to Representative Abercrombie during the House Armed Services Committee Hearing on military intelligence at Abu Ghraib prison, "the plain fact is, it was well known in the secretary's office and elsewhere that this [memo indicating that the more aggressive interrogation techniques are approved for Guantánamo] was circulating all over the place, and the Schlesinger report says so." MG Fay confirmed that this was indeed the case. [House Armed Services Committee Hearing, 9 September 2004, 28]

DoD Directives 2310.1, DoD Program for Enemy Prisoners of War and Other Detainees, and 5100.77, DoD Law of War Program, require that the US military services comply with the principles, spirit, and intent of international laws of war, that the DoD observes and enforces the US obligations under the laws of war, that personnel know the

laws of war obligations, and that personnel promptly report incidents violating the laws of war and that the incidents be thoroughly investigated. [Fay 20] The interrogation training is certainly inadequate when considered in light of these two DoD Directives. The DoD did not ensure that these directives were followed.

Secretary Rumsfeld himself admitted in his testimony before the House Armed Services Committee on May 7, 2004 that he "failed to recognize how important it was to elevate a matter of such gravity to the highest levels, including the president and the leaders in Congress." [Available at http://www.dod.gov/speeches/2004/sp20040507-secdef0421.html]

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. [*The Road to Abu Ghraib* 7]

The above confusion contributed to abusive interrogation practices at Abu Ghraib. Safeguards to ensure compliance and to protect against abuse also failed due to confusion about the policies and the leadership's failure to monitor operations adequately. [Fay 8-9] Rumsfeld's failure to establish clear policies, his pressure on his subordinates to produce actionable intelligence, and his well-known the Geneva Conventions created an understanding within the military and intelligence community that 'anything goes.' His actions and attitude towards detainees encouraged and allowed war crimes to take place.

**Secretary Rumsfeld had knowledge war crimes were being committed**

Secretary Rumsfeld directly approved unlawful interrogation techniques and was aware that they were being used on detainees.

There were numerous complaints in the press by human rights organizations over conditions at Guantánamo, and the ICRC made repeated efforts to have the

administration address these concerns before more abuses occurred. Rumsfeld was clearly aware of the possibility of abuses going beyond those he specifically approved due to these reports, yet he failed to take action to prevent this from happening.

Secretary Rumsfeld stated he became aware of the abuses at Abu Ghraib in mid-January and that he became aware of the photographs of the abuses at Abu Ghraib "sometime in that period of January, February, March [2004]... The first time I was aware that there were photos connected with the allegations of abuse in the prison, and that would have been sometime between January 16th and the '60 Minutes' show (April 28, 2004)." [Testimony before the House Armed Services Committee on May 7, 2004, 16-17, 36, 41 available at http://www.dod.gov/speeches/2004/sp/20040507-secdef0421.html]

**Rumsfeld Has Responsibility as a Civilian Commander for War Crimes**

As Secretary of Defense, Rumsfeld is the penultimate civilian commander over the military, except for President Bush. There is no doubt Rumsfeld had control over the individuals who committed war crimes, indeed, he ordered the commission of some war crimes, and set the conditions possible for the commission of others.

Secretary Rumsfeld knew of the crimes being committed, as he had specifically authorized certain crimes. He set the conditions favorable for more crimes to occur, and in fact failed to take action to prevent more crimes from occurring. He is therefore directly liable for war crimes under CCIL section 8.

As one of the highest civilian commanders of U.S. Forces, it is Rumsfeld's responsibility to ensure all military and civilian personnel act within the confines of the law. Rumsfeld was aware of the possibility that more crimes beyond those he approved would be committed, and failed to take action to prevent this from happening. The above facts show Rumsfeld must be held liable for war crimes as civilian commander under CCIL section 4.

Additionally, Secretary Rumsfeld failed to properly ensure troops were adequately trained. In addition, his failure to take appropriate action when he first learned of the abuses allowed the crimes to continue. His admitted failure to recognize the magnitude of the scandal does not excuse him from his duty to remain informed, thus rendering him liable under Section 13 for his failure in his duty of supervision.

**There Are No Indication That Criminal Charges Will Be Brought against Secretary Rumsfeld**

Although the Schlesinger Report found that "commanding officers and their staffs at various levels failed in their duties," that "such failures contributed directly or indirectly to detainee abuse," and that "[m]ilitary and civilian leaders at the Department of Defense share this burden of responsibility," and despite Rumsfeld's admitted failures and blatant war crimes violations, no formal charges instituted or disciplinary action has been taken against Secretary Rumsfeld.

**2- George Tenet**

George Tenet was the Director of Central Intelligence (DCI) of the United States, until his resignation in June 2004. Tenet became Acting Director in 1996, and assumed the position of Director in 1997. *[George Tenet resigns as CIA director,* MSNBC, June 3, 2004 *available at* http://www.msnbc.msn.com/id/5129314/] As Director, he was the head of the Central Intelligence Agency (CIA) and was in charge of coordinating the nation's intelligence activities.

Former DCI Tenet is directly responsible for violations of Section 8 of the CCIL because he personally solicited the detention of a ghost detainee, which constitutes a war crime. Tenet authorized programs in which CIA agents would unlawfully imprison, forcibly transfer, torture, and sometimes even kill people. This authorization and ordering of subordinates to engage in these activities constitutes war crimes under Section 8.

Tenet also has responsibility as a civilian superior under Section 4 for the war crimes described above. Tenet had knowledge that war crimes were to be committed by his subordinates, did nothing to prevent those crimes. He also violated Sections 13 and 14 of the CCIL by failing to supervise those under his command and by failing to report crimes of which he was aware to the appropriate agencies. The facts regarding his culpability are set forth below.

Tenet and the CIA failed to comply with requests to produce documentation for the various investigations conducted by the ICRC and by the Department of Defense, presumably because of the crimes these documents would reveal. Thus, evidence of specific abuses is limited.[1] [Fay 78]

**Tenet is Directly Responsible for War Crimes under CCIL section 8**

DCI Tenet requested in October 2003 that Donald Rumsfeld order the secret detention of Hiwa Abdul Rahman Rashul. [Defense Department Regular Briefing, June 17, 2004; Dana Priest, *Memo Lets CIA Take Detainees out of Iraq*, Washington Post, Oct. 24, 2004]

Tenet asked that the prisoner, known as "Triple X," later determined to be Rashul, not be given an identification number nor registered with the ICRC. Rashul was held at Camp Cropper near Baghdad airport for over seven months without being registered and without outside contact. Rashul was to be interrogated by the CIA. [Hearing of the House Armed Services Committee, Sept. 9, 2004; *A Failure of Accountability*, The Washington Post, Aug. 29, 2004] The CIA initially brought Rashul to Afghanistan for interrogation, but returned him to Iraq after a Justice Department memo ruled that he was

[1] General Fay, General Kern, and Schlesinger all made requests for documentation from the CIA. However, the CIA said that they would not provide any documentation; later, CIA officials said that they would conduct their own investigation. *See* Hearing of the Senate Armed Services Committee, Sept. 9, 2004 at 11, 13, 14; *see also* Schlesinger Report, Aug. 24 2004 at 6. "The Panel did not have full access to information involving the role of the Central Intelligence Agency in detention operations…" and could not make any determinations about Ghost detainees. At 70, 87.

a protected person under the Geneva Conventions, but during his time at Camp Cropper, authorities reportedly "lost track" of him. [Eric Schmitt and Thom Shanker, *Rumsfeld Issued an Order to Hide Detainee in Iraq*, The New York Times, June 17, 2004]

Under CIA direction, people have "disappeared" and been detained in undisclosed locations with no access to ICRC, no oversight of their treatment, no notification to families, and in most cases no acknowledgement that they are even being held. Human Rights Watch believes that 13 detainees have been rendered abroad or disappeared. They are: Abdul Rahim al-Sharqawi; Ibn Al-Shaykh al-Libi; Abd al-Hadi al-Iraqi; Abu Zubaydah; Omar al Faruq; Abu Zubair al-Haili; Ramzi bin al-Shibh; Abd al-Rahim al-Nashiri; Mustafa al-Hawsawi; Khalid Sheikh Mohammed; Waleed Mohammed Bin Attash; Adil al-Jazeeri; and Hambali. [*The Road to Abu Ghraib,* 12]

Additionally, the CIA has secret agreements allowing it to use sites overseas without outside scrutiny. [James Risen et al, *Harsh CIA Methods Cited in Top Qaeda Interrogations*, The New York Times*,* May 13, 2004] Sites include Bagram airbase, in Kabul, and at other undisclosed locations in Afghanistan; at Camp Cropper, near the Baghdad airport; at Abu Ghraib; and at detention centers in Diego Garcia in the Indian Ocean. [Seymour M. Hersh, Chain of Command (2004) at 14, 33; Dana Priest and Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, The Washington Post, December 26, 2002]

General Kern has stated, "We suspect there [were] at least dozens [of detainees] who were brought by the intelligence agency, Central Intelligence Agency, to Abu Ghraib, detained, not recorded" and that this is in violation of U.S. procedures and in violation of the Geneva Conventions. [House Armed Services Committee Hearing (HASCH), Sept. 9, 2004] Records at Abu Ghraib show that there were consistently three to ten ghost detainees from mid-October 2003 to January 2004. [White, *Abu Ghraib Guards Kept a Log*] General Taguba called the practice "deceptive, contrary to Army Doctrine, and in violation of international law." [*Rumsfeld Defends Hiding Prisoner at CIA Urging*, The Wall Street Journal, June 18, 2004] Gen. Kern and Gen. Fay estimated

that the number of ghost detainees is somewhere in the dozens, potentially as high as 100. They noted that they could not accurately answer because the CIA did not provide them with any documentation. [HASCH at 9]

Some ghost detainees at Abu Ghraib were put in disruptive sleep programs and interrogated in shower rooms and stairwells. [Josh White, *Abu Ghraib Guards Kept a Log of Prison Conditions, Practices*, Washington Post, October 25, 2004]

The CIA has transported as many as a dozen non-Iraqi detainees out of Iraq between April 2003 and March 2004. The transfers were authorized by a draft DOJ memo dated March 19, 2004, written by Jack L. Goldsmith, the former director of the Office of Legal Counsel. The March 19 is stamped "draft" and was not finalized, said one U.S. official involved in the legal deliberations. However, the memo was sent to the general counsels at the National Security Council, the CIA and the departments of State and Defense. "The memo was a green light," an intelligence official said. "The CIA used the memo to remove other people from Iraq." The government has not released the detainees' names or nationalities, and it is unclear whether the detainees were handed over to friendly governments or kept in secret American-run sites. [Douglas Jehl, *Prisoners: U.S. Action Bars Right of Some Captured in Iraq*, New York Times, October 26, 2004; Dana Priest, *Memo Lets CIA Take Detainees out of Iraq*, Washington Post, Oct. 24, 2004]

The CIA interned three Saudi national medical personnel working for the coalition in Iraq. Multiple searches, including searches by Ambassador Bremer and Secretary of State Powell, did not locate the detainees. Eventually a JIDC official met with the detainees and they were released. [Fay 88]

Under Tenet's direction, the CIA engaged in coercive interrogation techniques of detainees. Reportedly Tenet asked Donald Rumsfeld to get approval for torture interrogation techniques from the White House. [*Cruelties Obscure the Truth*, Sarasota Herald-Tribune, June 19, 2004] This led to the DOJ's advice to White House Counsel

Gonzalez in August 2002 that torturing Al Qaeda detainees in captivity abroad "may be justified." [Dana Priest and R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, Washington Post, June 8, 2004] Additionally, the DOJ and CIA endorsed a set of secret rules for the interrogation techniques to be used for 12 - 20 high-level Al Qaeda prisoners. [James Risen et al, *Harsh CIA Methods Cited in Top Qaeda Interrogation*s, The New York Times, May 13, 2004] These coercive interrogation techniques for use in Afghanistan and Iraq violated the prohibition of cruel, inhuman, or degrading treatment and may amount to torture.

According to the ICRC, "ill-treatment during interrogation was not systematic, *except* with regard to persons arrested in connection with suspected security offenses or deemed to have an 'intelligence' value." [ICRC Report 3 (emphasis added)] "The methods employed by the CIA are so severe that senior officials of the Federal Bureau of Investigation have directed its agents to stay out of many of the interviews of the high-level detainees…" because they were worried that the techniques could compromise their agents in criminal lawsuits. [Risen et al, *Harsh CIA Methods Cited in Top Qaeda Interrogations*]

In the case of Khalid Shaikh Mohammed, a high-level detainee who is believed to have helped plan the attacks of Sept. 11, 2001, C.I.A. interrogators used graduated levels of force, including a technique known as 'water-boarding,' in which a prisoner is strapped down, forcibly pushed under water and made to believe he might drown. [Risen et al, *Harsh CIA Methods Cited in Top Qaeda Interrogations*]

At least one CIA employee has been disciplined for threatening a detainee with a gun during questioning. [*CIA Worried about Al Qaeda Questioning*, Pittsburgh Post-Gazette, May 13, 2004]

The ICRC states that "High Value Detainees" in Baghdad International Airport were held in strict solitary confinement in cells devoid of sunlight for nearly 23 hours a

day, and that their continued confinement for months after their arrest constituted a "serious violation of the Third and Fourth Geneva Conventions." [ICRC Report 4, 17-18]

Pain medication for Abu Zubaida, a high-level detainee who suffered from a gunshot wound in the groin, was manipulated to obtain his cooperation. [*The CIA's Prisoners*, the Washington Post, July 15, 2004]

Captured Al Qaeda operatives and Taliban commanders were held inside a cluster of metal shipping containers with a triple layer of concertina wire at Bagram airbase near the detention center. [Priest and Gellman, *U.S. Decries Abuse but Defends Interrogations*] Coercive interrogation techniques were used against detainees, including stripping detainees during interrogation, subjecting them to extremes of heat, cold, noise, and light, hooding them, depriving them of sleep, and keeping them in painful positions. Practices in Afghanistan include sleep deprivation, sensory deprivation, and forcing detainees to sit or stand in painful positions for extended periods of time. [The Road to Abu Ghraib 10, 19-20] Detainees who refuse to cooperate "are sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles, according to intelligence specialists familiar with CIA interrogation methods. At times they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights – subject to what are known as 'stress and duress' techniques." Interrogations are often conducted by female officers. [Priest and Gellman, *U.S. Decries Abuse but Defends Interrogations*]

One high-value detainee had been hooded, handcuffed, and made to lie face down on a hot surface while being transported to a detention center, causing severe skin burns that required 3 months hospitalization. The prisoner had to undergo several skin grafts, amputation of his right index finger, and suffered the permanent loss of the use of his left fifth finger. He was examined by ICRC in October 2003, a few months after his discharge from the hospital. [ICRC Report 10-11]

Under Tenet's direction, the CIA conducts false flag operations where agents hang the flag of another country in the interrogation room or utilize other techniques in

order to deceive the captive into thinking that he is imprisoned in a country with a reputation for brutality. [Priest and Gellman, *U.S. Decries Abuse but Defends Interrogations*]

CIA agents threaten detainees' family members during their interrogations. U.S. authorities are reportedly holding Khalid Shaikh Muhammad's seven and nine year old sons in detention in order to induce Muhammad to talk. According to an FBI agent, when a CIA agent got custody of Ibn al-Shaikh al-Libi, he told Libi that, "before you get [to Cairo], I'm going to find your mother and I'm going to f--- her." [The United States' "Disappeared" at 24-25, 37] This policy of threatening family members appears to be CIA policy, which has caused conflict with FBI collaborators who do not engage in such tactics.

There have been numerous killings of detainees in CIA custody:

- Manadel al-Jamadi, an Iraqi prisoner in CIA custody died at Abu Ghraib on Nov. 4, 2003. Jamadi was originally captured by Navy SEALs and "butt-stroked" with a gun on the side of the head. Two CIA agents then secretly brought al-Jamadi to Abu Graib without going through normal screening procedures which include a medical examination. The agents placed Jamadi in a shower room with a sandbag on his head. He was dead 45 minutes later. A CIA supervisor requested that Jamadi's corpse be kept at the prison for another day and stated that he would call Washington. There are photographs of al-Jamadi's battered corpse packed in ice in a body bag. [Hersh, Chain of Command 45] The following day, U.S. personnel covertly took his corpse out of the prison on a stretcher to make it look like he was simply sick and not dead. At least three SEALs have been charged relating to their abuse, but thus far no CIA officers. [Fay 87, 89, 109, 110 (Jamadi is identified in the report as DETAINEE-28)]
- Abdul Wali, former Afghan military commander held at Asadabad, died on June 21, 2003 after being interrogated for two days by David Passaro, a retired Army Special Forces officer who was hired as a CIA civilian contractor. [*Rumsfeld Defends Hiding Prisoner at CIA Urging*, The Wall Street Journal, June 18, 2004]

- Former chief of Iraqi air defenses, Maj. Gen. Abed Hamed Mowhoush a.k.a. Abid Hamad Mahalwi, died Nov. 26, 2003 at a detention facility at Al Qaim. [The Road to Abu Ghrain 28] He died of asphyxia because of mistreatment by military personnel, but according to the Pentagon report, he was questioned approximately 24-48 hours prior by CIA interrogators. "'It is estimated that MG Mowhoush was interrogated at least once each day he was in custody,' the investigative summary says. 'Approximately 24 to 48 hours prior to (Nov. 26), MG Mowhoush was questioned by (other governmental agency officials), and statements suggest that MG Mowhoush was beaten during that interrogation.'" [Arthur Kane and Miles Moffeit, *Carson GI eyed in jail death Iraqi general died in custody*, The Denver Post, May 28, 2004].

President Bush signed directives in late 2001 or early 2002 authorizing the CIA to conduct a covert war against Al Qaeda and kill or capture its leaders. The SAP was a highly secretive program that created teams of Special Forces operatives who would snatch or assassinate identified "high value" Al Qaeda operatives. Operatives included Navy SEALs, Army Delta Force members, and CIA paramilitary experts. SAP also set up secret interrogation centers in allied countries where harsh treatments would be meted out. SAP operatives brought suspected terrorists to prison facilities in Singapore, Thailand, and Pakistan, among other countries. Operatives had advance blanket approval from the CIA and NSA to kill or capture and if possible interrogate high value targets. "Commandos… could interrogate terrorism suspects deemed too important for transfer to the military's facilities at Guantánamo. The carried out instant interrogations, often with the help of foreign intelligence services – using force if necessary – at secret C.I.A. detention centers scattered around the world." [Hersh, Chain of Command 16, 20, 49-50]

Detainees in U.S. custody who refuse to cooperate have been rendered to foreign intelligence services. Counterterrorism officials report that detainees have been rendered to third countries to be interrogated and executed or tortured. [Risen et al., *Harsh CIA Methods Cited in Top Qaeda Interrogations*] The CIA often sends a list of questions for foreign interrogators to use and often receives a summary of the results of the

interrogation. CIA agents sometimes observe interrogations by foreign intelligence services through one-way mirrors. [Priest and Gellman, *U.S. Decries Abuse but Defends Interrogations*] "One set of legal memorandums, the [CIA] officials said, advises government officials that if they are contemplating procedures that may put them in violation of American statutes that prohibit torture, degrading treatment or the Geneva Conventions, they will not be responsible if it can be argued that the detainees are formally in the custody of another country." [Risen et al, *Harsh CIA Methods Cited in Top Qaeda Interrogations*] Detainees who have been rendered have no access to attorneys, courts, or due process. The U.S. government will not discuss renditions since September 11, 2001.

The countries where the CIA sends detainees are known to use torture and often to use mind-altering drugs. [Hersh, Chain of Command] Detainees have been rendered to Syria, Uzbekistan, Pakistan, Egypt, Jordan, Saudi Arabia, and Morocco. [The Road to Abu Ghraib 10-11] Currently, at least eleven men are said to be held incommunicado in Jordan, including Khalid Sheik Mohammed, Aiman al-Zawahiri, Hambali, and Abu Zubaydah. Others who have been rendered include Maher Arar, Ahmed Agiza, Muhammed al-Zery, and Mohammed Haydar Zammar. [*CIA Holds Top Al Qaeda Suspects in Jordan*, Reuters, Oct. 13, 2004; Yossi Melman, *CIA Holding Al Qaeda Suspects in Secret Jordanian Lockup*, Haaretz, Oct. 13, 2004; The Road to Abu Ghraib 10-11] The CIA sends these detainees despite the fact that the State Department has documented the use of torture by Jordan, Syria, and Morocco, and has noted questions of Saudi Arabia's reliability. [Priest and Gellman, *U.S. Decries Abuse but Defends Interrogations*]

The CIA is known to use extremely harsh techniques in its renditions. For example, on Dec. 18, 2001, CIA agents rendered Ahmed Agiza and Muhammed al-Zery, Egyptians who had sought asylum in Sweden. Agiza and al-Zery were seized and flown to Cairo in handcuffs and shackles. They were stripped naked, suppositories were inserted into their anuses, and they were dressed, chained to a harness, blindfolded, and

hooded. In Egypt, the prisoners were subjected to torture by electrical shocks with electrodes attached to their most sensitive body parts. [Hersh, Chain of Command 53-55]

The above facts show Tenet's direct responsibility violations under CCIL section 8 because he ordered, solicited, induced, aided and abetted, and clearly condoned the commission of war crimes by his subordinates in the CIA.

## Tenet is Responsible under CCIL Sections 4, 13, and 14

### Tenet Had Effective Command Authority over the Direct Perpetrators of the Abuses

As the Director of Central Intelligence, Tenet had ultimate authority over all of the doings of the CIA and over all of its employees. A "civilian superior" or "any person effectively exercising command and control in a civil organization or in an enterprise" can be held liable under section 4. As the director of the CIA, Tenet exercised command and control over all other CIA officials and agents, rendering him liable as such under sections 4, 13, and 14.

### Tenet had knowledge of war crimes

In addition to ordering war crimes to be committed, Tenet was aware of inhumane conditions for detainees in Guantánamo since the summer of 2002. A CIA agent who visited, with the authority to report directly to Tenet, found prisoners lying in their own feces, elderly prisoners with dementia, and children. The agent filed a classified report which eventually got to Condoleezza Rice and Gen. John A. Gordon, deputy national security adviser for combating terrorism. [Seymour M. Hersh, Chain of Command 2, 6]

Senior CIA officials knew that pentagon encouraged physical coercion and sexual humiliation of Iraqi prisoners. CIA agents and private contractors frequently requested

that guards at Abu Ghraib "set physical and mental conditions for favorable interrogation," meaning that they break the will of the prisoner. [Hersh, Chain of Command 46-47, 29, 59]

The CIA has initiated a number of investigations into these deaths. The CIA referred the case of the Afghan who froze to death to the DOJ, but the DOJ decided not to prosecute. Additionally, the CIA's inspector general was investigating the deaths of Wali, Mahalawi, and an unidentified detainee, likely Jamadi, and had referred them to the DOJ for prosecution. Thus, Tenet was clearly aware of these deaths because of these numerous investigations.

**Tenet Failed To Take Necessary Measures**

Tenet had sufficient awareness of these other violations being committed or the risk that those violations were being committed. He recklessly disregarded that knowledge and those risks, and failed to implement any safeguards to prevent these violations from occurring. While Tenet has instituted investigations into some of the deaths in custody, those investigations have occurred far too late, after Tenet had sufficient awareness of the riskiness of the CIA's interrogation techniques. Tenet also ordered an investigation into the CIA's interrogation techniques, but this order in May 2004 came years after Tenet's knowledge of abuses by CIA agents. Due to these facts, Tenet is liable under section 4 for failing to prevent crimes from being committed, section 13 for failing to exercise his duty of supervision, and section 13 for failing to report the crimes that were committed.

**There Has Been No Disciplinary Action or Criminal Proceeding Against Former DCI Tenet**

Tenet resigned of his own accord in June 2004; however no disciplinary action or criminal proceedings have been instituted against him or are contemplated.

**3- Ricardo Sanchez**

Ricardo Sanchez is a Lieutenant General (LTG) of the United States Army and is currently Commander, Army V Corps Headquartered in Heidelberg, Germany. After the fall of Baghdad in the spring of 2003, LTG Sanchez assumed command of Combined Joint Task Force Seven (CJTF-7), which encompassed all U.S. armed forces in Iraq including those at all of the detention facilities. He held this position from 14 June 2003 until at least 28 June 2004. (see Department of Defense Biography, available at: http://www.vcorps.army.mil/leaders/Biography-SanchezRicardoS.pdf) He and the forces he commanded were responsible for the commission of numerous war crimes during this period that violated the CCIL.

LTG Sanchez is directly responsible for violations of Section 8 of the CCIL because he personally authorized illegal interrogation procedures that constitute war crimes. He also has responsibility as a military commander under Section 4 of the CCIL for the war crimes described above. LTG Sanchez, having knowledge that war crimes were to be committed by his subordinates, failed to prevent the crimes. He violated Sections 13 and 14 of the CCIL by failing to supervise those under his command and by failing to report crimes that he was aware of to the appropriate agencies. The facts regarding his culpability are set forth below.

**A. LTG Sanchez's Approval of Unlawful Interrogation Procedures**

LTG Sanchez directly authorized illegal interrogation methods that during the fall of 2003. The Schlesinger Report states that: "On 14 September 2003 LTG Sanchez signed a memorandum authorizing a dozen interrogation techniques beyond [Army] Field Manual [FM] 34-52 – five beyond those approved for Guantanamo." (Schlesinger Report, at 9) LTG Sanchez's authorization of certain interrogation procedures overstepped standard Army doctrine and violated the Geneva Conventions prohibition of inhuman treatment. The World Organization for Human Rights USA (WOHR)

documented these interrogation techniques. They "included the use of military dogs, temperature extremes, reversed sleep patterns, sensory deprivation, stress positions, shackling, forcing detainees to strip, and manipulation of diets. Seymour M. Hersh, *The GrayZone*, The New Yorker, May 24, 2004; R. Jeffrey Smith and Josh White, *GeneralGranted Latitude at Prison*, Washington Post, June 12, 2004; R. Jeffrey Smith,*General Is Said To Have Urged Use of Dogs*, Washington Post, May 26, 2004."

.

A month later, after Central Command of the Armed Forces had disapproved of the September techniques, LTG Sanchez issued an October 12, 2003 set of interrogation techniques. According to the *New York Times*, classified sections of the Fay Report found that "the procedures approved by General Sanchez on September 14, 2003, and the revisions made when the Central Command found fault with the initial policy, exceeded the Geneva guidelines as well as standard Army doctrines." These procedures included isolation for extended periods and the use of military dogs. (*Army's Report Faults General in Prison Abuse*, the New York Times, August 27, 2004, available at http://www.wilmingtonstar.com/apps/pbcs.dll/article?AID=/20040827/ZNYT/408270390/1010/STATE)

According to Human Rights Watch (HRW), LTG Sanchez's 12 October 2003 memo called for "interrogators at Abu Ghraib to work with military police guards to 'manipulate an internee's emotions and weaknesses' and to assume control over the 'lighting, heating... food, clothing, and shelter of those they were questioning." The HRW report lists a number of rules of engagement. These rules included:

- Change of scenery down (move to a more barren cell)
- Dietary manipulation
- Environmental manipulation
- Sleep adjustment (reverse schedule)
- Isolation for longer than 30 days
- Presence of military working dogs
- Sleep management (72 hours maximum)
- Sensory deprivation (72 hours maximum)

- Stress positions (no longer than 45 minutes)

LTG Sanchez himself acknowledged that "in twenty-five separate instances, he approved holding Iraqi prisoners in isolation for longer than thirty days, one of the methods listed in the posted rules." (Human Rights Watch, *The Road to Abu Ghraib,* June 2004, at 34)

The Schlesinger Report also noted LTG Sanchez's approval of military dog use in interrogations. "Guidance provided by the CJTF-7 directive of 14 September 2003 allowed working dogs to be used as an interrogation technique with the CJTF-7 Commander's approval. This authorization was updated by the October 12, 2003 memorandum, which allowed the presence of dogs during interrogation as long as they were muzzled and under control of the handler at all times but still required approval**.** The Taguba and Jones/Fay investigations identified a number of abuses related to using muzzled and unmuzzled dogs during interrogations." (Schlesinger Report, at 77)

These admitted facts alone regarding unlawful interrogations are sufficient to require an investigation of LTG Sanchez for war crimes. But there is more.

### B. **LTG Sanchez Had Responsibility as a Military Commander Under Section 4, 13 and 14 CCIL for War Crimes**

There is no dispute, as outlined above, that U.S. military personnel under the command of LTG Sanchez committed numerous war crimes. As of August 2004, the Schlesinger report says that there were about 300, of which 155 had been investigated and 55 found to be abuses that occurred in Iraq. (Schlesinger at 12-13). The Taguba Report concluded: that US Army Soldiers had committed egregious acts and grave breaches of international law at Abu Ghraib/BCCF and Camp Bucca, Iraq. The Fay report documents 44 such war crimes. The ICRC report of November 2004 states that the ill treatment by military personnel was not exceptional in Iraq, but was systematic with regard to persons arrested in connection with suspected security offenses or deemed to

have "intelligence" value "and might be considered to be a practice tolerated by the CF." (Coalition Forces) (ICRC Nov. 2004 at para.24 and Executive Summary)

LTG Sanchez knew of the abuses occurring at detention facilities under his command by late summer 2003 as a result of the Ryder report and the ICRC reports. However, he did little, if anything, to stop those abuses or implement the recommendations of these reports. The various government investigative reports make this clear. Well before LTG Sanchez took any remedial action, several incidents of abuse had or should have come to his attention as commander of CJTF-7: "In retrospect, indications and warnings had surfaced at the CJTF-7 level that additional oversight and corrective actions were needed in the handling of detainees from point of capture through the central collection facilities, to include Abu Ghraib**.** Examples of these indications and warnings include: the investigation of an incident at Camp Cropper, the ICRC reports on handling of detainees in subordinate units, ICRC reports on Abu Ghraib detainee conditions and treatment, CID investigations and disciplinary actions being taken by commanders, the death of an OGA detainee at Abu Ghraib, the lack of an adequate system for identification and accountability of detainees, and division commander's continual concerns that intelligence information was not returning to the tactical level once detainees were evacuated to the central holding facility." (Fay Report, at 12, paragraph 6.a)

LTG Sanchez also made several visits to Abu Ghraib in 2003 and had the opportunity to learn of its conditions firsthand: "With the active insurgency in Iraq, pressure was placed on the interrogators to produce "actionable" intelligence. With lives at stake, senior leaders expressed, forcibly at times, their needs for better intelligence. A number of visits by high-level officials to Abu Ghraib undoubtedly contributed to this perceived pressure. Both the CJTF-7 commander [Sanchez] and his intelligence officer, CJTF-7 C2, visited the prison on several occasions." (Schlesinger Report, at 65) LTG Sanchez was also allegedly present during some interrogations and/or incidents of prisoner abuse. Scott Higham, Joe Stephens, and Josh White, *Prison Visits by General*

*Reported inHearing: Alleged Presence of Sanchez Cited by Lawyer*, Washington Post, May 23, 2004.

Despite LTG Sanchez knowledge of the abuses and his responsibility for command staff oversight within the CJTF-7 Area of Operations (AOR), he did not take action to stop the abuses. The Schlesinger Report attributes these abuses to the senior military leadership: "They [the abuses] represent deviant behavior and a failure of military leadership and discipline. The abuses were not just the failure of some individuals to follow known standards, and they are more than the failure of a few leaders to enforce proper discipline. There is both institutional and personal responsibility at higher levels." (Schlesinger Report, at 5) In addition, the CJTF-7 Commander [Sanchez] and Deputy Commander failed to ensure proper staff oversight of detention and interrogation operations. Finally, CJTF-7 staff elements reacted inadequately to earlier indications and warnings that problems existed at Abu Ghraib. (Jones Report, at 4, paragraph d.1) "We believe LTG Sanchez should have taken strong action in November when he realized the extent of the leadership problems at Abu Ghraib. We concur with the Jones findings that LTG Sanchez and MG Wojdakowski failed to ensure proper staff oversight of detention and interrogation operations." (Schlesinger Report, at 15)

The official military investigations fault LTG Sanchez for not taking action to improve the situation at Abu Ghraib: Responsible leaders who could have set in motion the development of a more effective alternative course of action extend up the command chain (and staff), to include... Commander CJTF-7 [LTG Sanchez]... the Chairman of the Joint Chiefs of Staff [General Richard Meyers]; and the Office of the Secretary of Defense [Donald Rumsfeld]. (Schlesinger Report, at 47)

**C. There Has Been No Disciplinary Action or Criminal Proceeding Taken Against LTG Sanchez**

Rather then take disciplinary or criminal action against LTG Sanchez he was rotated back to Heidelberg, Germany, and is in command of the Army V Corps. The author of the Schlesinger Report hopes he will not be promoted: James Schlesinger, a

former Secretary of Defense, told a recent Congressional hearing: "Sanchez likely would be getting his fourth star and now is unlikely to get his fourth star. That is a kind of comment on failed responsibility." (Vince Crawley and Nicole Gaudiano, MarineTimes.com, September 27, 2004, available at: http://www.marinetimes.com/story.php?f=1-MARINEPAPER-354556.php). But Secretary of Defense Donald Rumsfeld and the Pentagon seem to have other ideas and plan to give him the fourth star after the election. [John Hendren, *Officer Who Oversaw Iraq Prisons May Be Promoted,* Los Angeles Times Oct. 15, 2004]

**4- Defendant Walter Wojdakowski**

Walter Wojdakowski is a Major General (MG) of the U.S. Army, the Deputy Commanding General (DCG) of Army Corps V (United States Army Europe) and of Combined Joint Task Force Seven (CJTF-7), which encompasses all U.S. armed forces in Iraq, including those at all of the detention facilities. MG Wojdakowski's CJTF-7 responsibility was primarily focused on the support of facilities (a "C4 responsibility") and "MG Wojdakoswki also had direct responsibility and oversight of the separate brigades assigned or TACON [Tactical Control] to CJTF-7. [Jones, 14] What's more, LTG Sanchez, who assumed command of the CJTF-7, "delegated responsibility for detention operations to his Deputy, MG Wojdakowski." [Schlesinger, 45]

MG Wojdakowski and the forces he commanded were responsible for the commission of numerous war crimes that violated the CCIL. MG Wojdakowski bears a direct responsibility under Sections 7 and 8 for approving illegal interrogation techniques amounting to crimes under these two sections. He also has responsibility as a military commander. Having knowledge that his subordinates were committing such crimes, MG Wojdakowski failed to prevent them. He violated Sections 4, 13 and 14 of the CCIL by failing to prevent the crimes (Section 4), to supervise those under his command to avoid crimes from being committed (Section 13) and by failing to report crimes that he was aware of to the appropriate agencies or to his superiors (Section 14). The facts regarding his criminal responsibility are set forth below and will provide the German Prosecutor

sufficient evidence as to MG Wojdakowski's liability under the CCIL, and need to investigate his case.

**MG Wojdakowski Is Responsible under Sections 7 and 8 of the CCIL**

MG Wojdakowski directly authorized illegal interrogation techniques. The Washington Post ascertained that fact. It revealed in May 2004: "Pappas said, among other things, that interrogation plans involving the use of dogs, shackling, 'making detainees strip down,' or similar aggressive measures followed Sanchez's policy, but were often approved by Sanchez's deputy, Maj. Gen. Walter Wojdakowski, or by Pappas himself." ["General is said to have urged use of dogs," R. Jeffrey Smith, *Washington Post*, 26 May 2004] MG Wojdakowski's approval of certain interrogation procedures overstepped standard Army doctrine and violated the Geneva Conventions prohibition of inhuman treatment, and, as demonstrated above in this complaint, amounted to crimes punished by the CCIL.

Such approvals trigger a direct responsibility for soliciting, inducing, or aiding and abetting the commission of war crimes of Section 8 of the CCIL, and require an investigation of MG Wojdakowski's direct responsibility under these sections.

**MG Wojdakowski Is Responsible under Sections 4, 13 and 14 of the CCIL**

**MG Wojdakowski Had Effective Command Authority over the Direct Perpetrators of the Abuses**

As the Deputy Commanding General of CJTF-7 with direct responsibility over the 205th MI Brigade and Col. Pappas, MG Wojdakowski's general responsibility over all U.S. armed forces in Iraq and over commanders of these forces cannot be questioned. The Fay report states that MG Wojdakowski was the rater for Col. Pappas, commander of the 205th MI Brigade. [Fay, 31] BG Karpinski testified that she believed she was being rated by MG Wojdakowski and "it was he she received her direction from the entire time

she was in Iraq." [Fay, 110] As Col. Pappas and BG Karpinski, who were directly responsible for the forces who have committed the crimes, reported to MG Wojdakowski there is no doubt that the perpetrators of the abuses were subordinates of MG Wojdakowski.

**MG Wojdakowski Knew that Abuses Were Being Committed**

MG Wojdakowski knew of the abuses that occurred at different facilities under his command.

MG Wojdakowski had notice of the abuses by at least November 2003 when he became aware of the content of the ICRC report. The International Herald Tribune established that "Karpinski said his top deputy, Major General Walter Wojdakowski, was present at a meeting in late November at which there was extensive discussion of a Red Cross report that cited specific cases of abuse." [Douglas Jehl and Eric Schmitt "Officer cites bar on talk over abuses," International Herald Tribune, 25 May 2004] Furthermore, the New York Times affirmed that fact and maintained that "several senior Army officers knew by last November [2003] that the Red Cross had complained about problems at the prison, including forced nudity and physical and verbal abuse of prisoners. (…) Among those aware of the concerns were General Sanchez's top deputy, Maj. Gen. Walter Wojdakowski." ["U.S. Rules on Prisoners Seen as a Back and Forth of Mixed Messages to G.I.'s," Douglas Jehl, *New York Times*, 22 June 2004]

In addition, if MG Wojdakowski did approve aggressive interrogation measures (as established above). He therefore obviously knew that such abuses would be taking place at any time soon.

**MG Wojdakowski Failed to Prevent and Report the Abuses, and He Failed to Exercise His Duty of Supervision**

MG Wojdakowski was responsible for the perpetrators and clearly was in a position to prevent the abuses. However, he did not do so. All reports are in agreement regarding the leadership failures of MG Wojdakowski, while he was obviously aware of the pattern of abuses committed by his subordinates. Not only did he fail to prevent the on-going commission of crimes, but he did not report them, and clearly failed in his duty of general supervision of his subordinates.

The Schlesinger report notably stressed the defendant's failure of leadership and supervision that led to the abuses and states: "The Panel finds [that] the CJTF-7 Deputy Commander [MG Mojdakowski] failed to initiate action to request additional military police for detention operations after it became clear that there were insufficient assets in Iraq." [Schlesinger, 47] "MG Wojdakowski and the staff should have seen that urgent demands were placed to higher headquarters for additional assets. (…) MG Wojdakowski failed to ensure proper staff oversight of detention and interrogation operations." [Schlesinger, 15; see also Jones, 24]

Section 14 of the CCIL holds a military commander liable who fails to immediately report a subordinate's crime under the CCIL to the appropriate authority. If we believe that Sanchez did not become aware of the abuses until mid-January 2004 while Wojdakowski knew about them as early as late November 2003, then we can infer that he failed to inform his immediate supervisor of the on-going abuses.

The Schlesinger, Jones and Taguba reports, as well as General Kern's testimony before the House Armed Services Committee, have all underlined MG Wojdakowski's failure to provide proper guidance, supervision and oversight over detention operations and staff. Such recurring failure did consequently led to the repetitive commission of the crimes that violate sections 7 and 8 of the CCIL. MG Wojdakowski's responsibility under sections 4, 13 and 14 of the CCIL providing for the responsibility of the superiors for the commission of crimes by their subordinates, and the case should be investigated.

**There Are No Indication That Criminal or Disciplinary Action Will Be Brought against MG Wojdakowski**

There is no indication that any disciplinary action or criminal proceedings have been taken against MG Wojdakowski, or ever will be.

**5- Defendant Janis L. Karpinski**

Janis Karpinski is a Brigadier General (BG) of the United States Army. She was Commander (TPU) [Transient Personnel Unit] of the 800th Military Police Brigade from June 20, 2003 to May 24, 2004[2] (she was promoted to BG on November 7, 2003). She had authority over the U.S. prison facilities in Iraq where numerous war crimes were committed. According to BG Karpinski, the 800th MP Brigade was "responsible for the entire theater, the entire country of Iraq, and 17 different prison facilities." [Interviewed by the media in South Carolina on June 29, 2004 http://www.scvhistory.com/scvhistory/signal/iraq/sg070404.htm, SCV History] The 800th MP Brigade is comprised of eight MP battalions in the Iraqi theatre: 115th MP Battalion, 310th MP Battalion, 320th MP Battalion, 324th MP Battalion, 400th MP Battalion, 530th MP Battalion, 724th MP Battalion, and 744th MP Battalion. [Taguba, 20] "The 800th MP Brigade was designated the responsible unit for the Abu Ghraib detention facility and for securing and safeguarding the detainees. The 320th MP battalion was the unit specifically charged with operating the Abu Ghraib detainee facility by the 800th MP Brigade." [Jones, 10]

During the time BG Karpinski was commander of the 800th MP Brigade, the forces she commanded committed numerous abuses amounting to war crimes under the CCIL. BG Karpinski has responsibility as a military commander under the CCIL for the crimes described above. Having knowledge that her subordinates were committing such crimes, BG Karpinski failed to prevent them. She violated Sections 4, 13 and 14 of the CCIL by failing to prevent the crimes (Section 4), to supervise those under her command

[2] See http://www.globalsecurity.org/intell/world/iraq/abu-ghurayb-chronology.htm.

to avoid crimes from being committed (Section 13) and by failing to report crimes that she was aware of to the appropriate agencies (Section 14). The facts regarding her responsibility are set forth below will provide the German Prosecutor sufficient evidence as to BG Karpinski's liability under the three sections of the CCIL.

## BG Janis L. Karpinski Is Responsible under Sections 4, 13 and 14 of the CCIL

### BG Janis L. Karpinski Had Effective Command Authority over the Direct Perpetrators of the Abuses

BG Karpinski's authority as a commander over the 800th MP Brigade from June 2003 until July 2004 was well established. The fact that BG Karpinski claimed that COL Pappas, commander of the 205th MI Brigade, assumed control over Abu Ghraib on 19 November 2003 pursuant to FRAGO 1108 (Fragmentary Order)[3], does not question her effective authority over the 800th Brigade there afterwards, while in any case, the abuses were well underway before the issuance of the FRAGO. The Taguba Report states that after the issuance of FRAGO 1108, BG Karpinski continued to behave as a superior responsible for the detainees. It states: "It is clear from a comprehensive review of witness statements and personal interviews that the 320th MP Battalion and 800th MP Brigade continued to function as if they were responsible for the security, health and welfare, and overall security of detainees within Abu Ghraib (BCCF) prison. Both BG Karpinski and COL Pappas clearly behaved as if this were still the case." [Taguba, 21] Her authority over the MP at the prisons (whether de jure or de facto) was effective and cannot be questioned.

### BG Janis L. Karpinski Knew that Abuses Were Being Committed

BG Karpinski knew of the abuses that occurred at different facilities under her command during the time she had authority over them all.

[3] A FRAGO is an abbreviated form of an operation order (verbal, written or digital) usually issued on a day-to-day basis that eliminates the need for restarting information contained in a basic operation order. Schlesinger, 98.

She was aware of these abuses even before she took office, since she supported, in May 2003, a general court martial recommendation from LTG Gentry for four soldiers accused of abusing a detainee at Camp Bucca, Iraq. However, she did not take any measures to ensure that MP Soldiers in the 800th MP Brigade knew, understood, and adhered to the protections afforded to detainees in the Geneva Conventions The Taguba report noted that "following the abuse of several detainees at Camp Bucca in May 2003, I could find no evidence that BG Karpinski ever directed corrective training for her soldiers or ensured that MP Soldiers throughout Iraq clearly understood the requirements of the Geneva Conventions relating to the treatment of detainees." [Taguba, 24; see also Jones, 5 and 17-18]

Furthermore, BG Karpinski was put on notice of the on-going abuses by the ICRC Reports. After their October 2003 visit, the ICRC team relayed their concerns with LTC Chew, who discussed the allegations with, among others, BG Karpinski. LTC Jordan claimed that after the ICRC visit, BG Karpinski, among others, received the final report. [Fay, 67] The Fay report further states that ""throughout 2003, all ICRC reports were addressed to the commander or subordinate commanders of the 800 MP BDE [Brigade] [Note: BG Karpinski was the commander of the 800th Brigade]. The OSJA [Office of the Staff Judge Advocate] received a copy of the reports. MAJ O'Kane prepared an analysis of the report on 25 November 2003 and the draft was sent to CJTF- 7 C2 and the 800 MP BDE for review. On 4 December 2003, a meeting was held at Abu Ghraib, attended by MP, MI, and legal personnel, in order to discuss the report. In mid-December, the draft response was sent by OSJA to the 800 MP BDE for review and coordination. BG Karpinski signed the response, dated 24 December 2003." [Fay, 65]

The Hearing of the Senate Armed Services Committee put forward that Colonel Warren, the staff judge advocate for General Sanchez, had information in November 2003 regarding potential Geneva Convention violations, which he informed BG Karpinski about. Also, Lieutenant Colonel Chew, an acting battalion commander at Abu Ghraib, had an "out-brief by ICRC" as early as October. According to testimony given at

the Senate Armed Services Committee, Chew was within Karpinski's chain of command. [Transcript of the Hearing of the Senate Armed Services Committee regarding the Investigation of the 205th Military Intelligence Brigade at Abu Ghraib Prison, Iraq; September 9, 2004; page 43]

BG Karpinski was obviously on constructive notice even earlier since she visited the prison of Abu Ghraib as much as three times a week before the November 19th issuance of the FRAGO 1108, and about once a week afterwards. From her frequent visit and the ICRC report, BG Karpinski should have been able to discern the commission of the abuses.

**BG Janis L. Karpinski Failed to Prevent and Report the Abuses, and She Failed to Exercise Her Duty of Supervision**

The Taguba, Jones and Schlesinger reports are in agreement regarding the leadership failures of BG Karpinski: although she clearly was aware of the pattern of abuses committed by her subordinates, she failed to implement measures that would have prevented the abuses such as training her subordinates, ensuring that the soldiers knew and understood the Geneva Conventions and their application to the detainees. She failed to immediately report to the relevant agencies the crimes committed, and she generally failed in her duty of supervision of her subordinates, which means she did not take the measures that should have prevented the commission of the crimes.

"Neither the leadership nor the organization of Military Intelligence at Abu Ghraib was up to the mission….Leadership was also lacking, from the Commander of the 800th MP Brigade [BG Karpinski] in charge of Abu Ghraib, who failed to ensure that soldiers had appropriate SOPs [standard operating procedures] for dealing with detainees…" [Schlesinger, 67]

The 800th Brigade was not adequately trained for a mission that included operating a prison or penal institution at Abu Ghraib Prison Complex; it did not receive

corrections-specific training during mobilization period; it did not receive pinpoint assignments and thus was not train for specific missions; training was conducted with little or no direction or supervision at the Battalion and Brigade levels. There was "no evidence that the Command, although aware of this deficiency, ever requested training" for those under Karpinski's command. [Taguba, 20]

BG Karpinski also failed to take appropriate action regarding the ineffectiveness of a subordinate Commander, LTC Jerry Phillabaum and other members of her Brigade Staff. "Despite his proven deficiencies as both a commander and leader, BG Karpinski allowed LTC Phillabaum to remain in command of her most troubled battalion guarding, by far, the largest number of detainees in the 800th MP Brigade. LTC Phillabaum was suspended from his duties by LTG Sanchez, CJTF-7 [Combined Joint Task Force] Commander on 17 January 2004." [Taguba, 22]

"Numerous witnesses stated that the 800th MP Brigade S-1, MAJ [Major] Hinzman and S-4, MAJ Green, were essentially dysfunctional, but that despite numerous complaints, these officers were not replaced. This had a detrimental effect on the Brigade Staff's effectiveness and morale." [Taguba, 22]

In conclusion, Karpinski's obvious lack of effective leadership clearly led to the commission and repetition of the abuses against the detainees. The Taguba report noted that "LTG Sanchez found that the performance of the 800$^{th}$ MP Brigade had not met the standards set by the Army or by CJTF-7. He found that incidents in the preceding six months had occurred that reflected a lack of clear standards, proficiency and leadership within the Brigade. LTG Sanchez also cited the recent detainee abuse at Abu Ghraib (BCCF) as the most recent example of a poor leadership climate that 'permeates the Brigade.' I totally concur with LTG Sanchez' opinion regarding the performance of BG Karpinski and the 800th MP Brigade." [Taguba, 24 and 22-23]

The Schlesinger report concurred with these views and found "that the weak and ineffectual leadership of the Commanding General of the 800th MP Brigade [BG

Karpinski] and the Commanding Officer of the 205th MI Brigade allowed the abuses at Abu Ghraib. There were serious lapses of leadership in both units from junior non-commissioned officers to battalion and brigade levels. The commanders of both brigades either knew, or should have known, abuses were taking place and taken measures to prevent them." [Schlesinger, 43]

"The Independent Panel finds that BG Karpinski's leadership failure helped set the conditions at the prison which led to the abuses, including her failure to establish appropriate standard operating procedures (SOPs) and to ensure the relevant Geneva Conventions protections were afforded prisoners, as well as her failure to take appropriate actions regarding ineffective commanders and staff officers." [Schlesinger, 44]

All these facts are clear evidence of the valid basis justifying a prosecution of BG Karpinski under the German CCIL's Sections 4, 13 and 14.

**There Are No Indication That Criminal Charges Will Be Brought against BG Janis L. Karpinski**

On 17 January 2004 BG Karpinski was formally admonished in writing by LTG Sanchez regarding the serious deficiencies in her Brigade, [Taguba, 24 and 22-23] and according to General Taguba's testimony before the Senate Armed Services Committee hearing on September 9, 2004, she was relieved for cause and is "still under suspension from command." He also indicated that there are other investigations "being meted out with regards to her status." [Transcript of the Hearing of the Senate Armed Services Committee regarding the Investigation of the 205th Military Intelligence Brigade at Abu Ghraib Prison, Iraq; September 9, 2004; page 11] However, there are no indication that criminal proceedings might be taken against BG Karpinski for her command responsibility in the commission of war crimes that were repeatedly committed by her subordinates.

**6- Defendant Jerry L. Phillabaum**

Jerry L. Phillabaum is a Lieutenant Colonel of the U.S. Army Reserves and was, from February 2003 until January 17, 2004, commander of the 320th Military Police Battalion (320 MP BN) in Iraq. The 320 MP BN is responsible for the Guard Force of Camp Ganci, Camp Vigilant, & Cellblock 1 of Forward Operating Base (FOB) Abu Ghraib. [Taguba 16] The 320 MP BN advance party arrived at Abu Ghraib on 24 July 2003; the rest of the 320 MP BN Headquarters, commanded by LTC Phillabaum, arrived on 28 July 2003. [Fay 40]

LTC Phillabaum and the forces he commanded were responsible for the commission of numerous war crimes that violated the CCIL. Having knowledge that his subordinates were committing such crimes, LTC Phillabaum did not act in order to prevent them. He violated Sections 4, 13 and 14 of the CCIL by failing to prevent the crimes (Section 4), to supervise those under his command to avoid crimes from being committed (Section 13) and by failing to report crimes that he was aware of to the appropriate agencies or to his superiors (Section 14). The facts regarding his criminal responsibility are set forth below and provide the German Prosecutor sufficient evidence as to LTC Phillabaum's liability under the CCIL, and as to the need to investigate his case.

## LTC Phillabaum Is Responsible under Sections 4, 13 and 14 of the CCIL

### LTC Phillabaum Had Effective Command Authority over the Direct Perpetrators of the Abuses

LTC Phillabaum was commander of the Guard Force of Camp Ganci, Camp Vigilant, & Cellblock 1 of Forward Operating Base (FOB) Abu Ghraib, where soldiers, his subordinates, committed numerous abuses as set forth above.

According to the Taguba Report, the 320 MP functioned "as if they were responsible for the security, health and welfare, and overall security of detainees within

Abu Ghraib prison." [Taguba 38] The Fay Report states that COL Pappas was only FOB Commander for Force Protection and did not have control over the MP force and that LTC Phillabaum was still responsible for running the prison, and over the soldiers who committed the abuses. [Fay 55-56] FRAGO 1108 did provide 205th MI BDE with the authority to assign missions and tasks to the 320th MP BN, but it did not change the command relationship or responsibilities of LTC Phillabaum in command oversight, leadership, discipline and training of 320th MP BN and its companies, including 372nd MP Company.

**LTC Phillabaum Knew that Abuses Were Being Committed**

LTC Phillabaum clearly knew of the abuses that occurred at different facilities under his command. He stated: "the cooperative efforts to obtain actionable information that I was aware of, as directed by MI, included withholding of clothing for some prisoners, rationing of cigarettes and limiting sleep to four hours in a 24-hour period" and regarding Tier 1 of Abu Ghraib, he said: "The purpose of that wing of the prison was to isolate prisoners with intelligence, so that they would provide [intelligence] during MI interrogations." [Sewell Chan and Thomas E. Ricks, *Iraq Prison Supervisors Face Army Reprimand; Probe of Interrogations May Bring More Charges*, Washington Post, May 4, 2004, at A1]

On May 12, 2003, four soldiers from the 320 MP BN, subordinates of LTC Phillabaum, kicked and beat several detainees being processed at Camp Bucca and were charged under the Uniform Code of Military Justice as LTC Gentry conducted an Article-32 Investigation. [Taguba, 7] This constituted a clear warning to the defendants that abuses were going on, but despite this instance of documented abuse, LTC Phillabaum did nothing to ensure that the rest of his Battalion was trained on proper detainee treatment.

He was also made aware of other incidents. For instance, as the Fay report stated: "On 20 September 2003, two MI Soldiers beat and kicked a passive, cuffed detainee,

suspected of involvement in the 20 September 2003 mortar attack on Abu Ghraib that killed two Soldiers. (…) LT Sutton and his IRF team (…) immediately reported this incident, providing sworn statements to MAJ Dinenna, 320 MP BN S3 and LTC Phillabaum, 320 MP BN Commander." [Fay 71-72]

Multiple instances of detainee escapes and shootings occurred under the watch of the 320 MP BN at Abu Ghraib. [Taguba 27-32] Especially from October to December 2003, members of the MP Guard Force (372nd MP Company and 320 MP BN) inflicted "sadistic, blatant, and wanton criminal abuses" on several detainees in Tier 1-A of Abu Ghraib (see the list of incidents above). [Taguba 27-32] Mostly, the death of detainee al-Jamadi on November 4, 2003 in Abu Ghraib in Tier 1B should have seriously alerted Phillabaum as to the nature of the abusive treatment of detainees by his direct subordinates, and shows he could not be unaware of the on-going abuses.

Furthermore, the ICRC visited Abu Ghraib 9-12 and 21-23 October 2003. The ICRC identified abuses to the Abu Ghraib commander, but their allegations were neither believed nor adequately investigated. Phillabaum stated that he was told about naked detainees by the ICRC and immediately contacted LTC Jordan. LTC Phillabaum further claimed that LTC Jordan acknowledged that it was common practice to keep some of the detainees naked in their cells. [Fay 64-65] Ultimately LTC Phillabaum did nothing about the naked detainees. The Fay Report found that ICRC recommendations were ignored by MI, MP and CJTF-7 personnel. According to the Report, "neither the leadership, nor CJTF-7 made any attempt to verify the allegations." [Fay 119] Given his knowledge of the treatment of detainees, Phillabaum should have initiated some kind of preliminary investigation. Specifically, he was in charge of CPL Graner, SSG Frederick, SGT Davis, PFC England, SPC Harman, SPC Sivits and SPC Ambuhl, all of whom are currently charged with detainee abuse.

**LTC Phillabaum Failed to Prevent and Report the Abuses, and He Failed to Exercise His Duty of Supervision**

LTC Phillabaum was responsible for the perpetrators and clearly was in a position to prevent the abuses. However, he did not do so. All the reports are in agreement regarding the leadership failures of LTC Phillabaum, while he was obviously aware of the pattern of abuses committed by his subordinates. Major General Taguba found LTC Phillabaum to be "an extremely ineffective commander and leader." [Taguba 39] His soldiers also had little contact with him. The Schlesinger report makes the same conclusion, calling LTC Phillabaum a weak and ineffective leader for failure to "ensure [his] subordinates were properly trained and supervised."[Schlesinger 75]

The Schlesinger report also stressed the failure of the defendant's leadership "The Independent Panel concurs with the findings of MG Taguba regarding the Commander of the 320th MP Battalion at Abu Ghraib [LTC Phillabaum]. Specifically, the Panel finds that he failed to ensure that his subordinates were properly trained and supervised and that he failed to establish and enforce basic soldier standards, proficiency and accountability. He was not able to organize tasks to accomplish his mission in an appropriate manner. By not communicating standards, policies and plans to soldiers, he conveyed a sense of tacit approval of abuse behavior towards prisoners and a lax and dysfunctional command climate took hold." [Schlesinger 44]

LTC Phillabaum allowed severe lapse of accountability of detainees at Abu Ghraib. No indication that any immediate corrective action was taken to deal with accounting errors, loss of detainees, and breakdown of standards. In general, accountability Standard Operating Procedures (SOPs) and Tactical Standard Operating Procedures (TACSOPs) were ignored or not disseminated to the lowest level. [Taguba 14-15]

The 320 MP BN hid 6-8 "ghost detainees" that they were holding for Other U.S. Government Agencies from a visiting ICRC survey team. This deceptive maneuver was contrary to Army Doctrine and violated international law. [Taguba 27] (See analysis above) As Commander of 320 MP BN, LTC Phillabaum should have ensured that his Soldiers were adhering to Army Doctrine and international law.

Staff Sergeant Ivan L. Frederick II told his family that he at one point pulled aside his superior officer, LTC Phillabaum, and asked about the mistreatment of prisoners. LTC Phillabaum's reply according to Frederick was "Don't worry about it." [Seymour M. Hersh, *Torture at Abu Ghraib; American soldiers brutalize Iraqis*, The New Yorker, May 10, 2004, at 42]

MG Taguba recommends that LTC Phillabaum be removed from the Colonel/O-6 Promotion List, citing the following findings: [Taguba 45]

a. Failing to properly ensure the results, recommendations, and After Action Reports from numerous reports on escapes and shootings over a period of several months were properly disseminated to, and understood by, subordinates.
b. Failing to implement the appropriate recommendations from various 15-6 Investigations as specifically directed by BG Karpinski.
c. Failing to ensure that Soldiers under his direct command were properly trained in Internment and Resettlement Operations.
d. Failing to ensure that Soldiers under his direct command knew and understood the protections afforded to detainees in the Geneva Convention Relative to the Treatment of Prisoners of War.
e. Failing to properly supervise his soldiers working and "visiting" Tier 1 of the Hard-Site at Abu Ghraib (BCCF).
f. Failing to properly establish and enforce basic soldier standards, proficiency, and accountability.
g. Failure to conduct an appropriate Mission Analysis and to task organize to accomplish his mission.

LTC Phillabaum could have prevented the "imminent commission" of detainee abuse had he properly supervised his military police personnel working in Abu Ghraib's Hard-site. Review of MP logs, examination of computer files, questioning of soldiers and inspection of facilities would have reviewed to him the high level of misconduct of his MPs.

Despite his knowledge about some of the incidents at Abu Ghraib, LTC Phillabaum did not take any steps to prevent detainee mistreatment or to seek out and punish those responsible. For the most part, he simply accepted that deprivation of clothing and sleep were part of interrogation procedures and did not seek to learn what exactly was happening in Abu Ghraib. Numerous witness statements report that LTC Phillabaum was rarely seen. Given that some of the direct perpetrators of detainee abuse were members of 320 MP BN and that LTC Phillabaum failed to prevent these abuses when he knew about certain instances of mistreatment and had enough information to know of the others, LTC Phillabaum should be held legally responsible and investigated under the doctrine of command responsibility for the unlawful acts committed by his subordinates, according to sections 4, 13 and 14 of the CCIL.

**There Are No Indication That Criminal Charges Will Be Brought against LTC Phillabaum**

Despite his obvious responsibility for the occurrence of the pattern of abuses by his subordinates, the only actions taken against LTG Phillabaum remained merely disciplinary. He received a General Officer Memorandum of Reprimand (GOMOR) from BG Karpinski on November 2003, for lack of leadership and for failing to take corrective security measures as ordered by the Brigade Commander. [Taguba 41] Later, on January 17, 2004 BG Karpinski suspended LTC Phillabaum from his duties as commander of the 320 MP BN for dereliction of duty. [Taguba 41]

But clearly, no criminal charges have been brought against this defendant despite the strong evidence of his criminal responsibility for the abuses and none are contemplated.

## 7- Defendant Thomas Pappas

Thomas Pappas is a Colonel of the U.S. Army. Since July 1, 2003, he has been the Commander of the 205th Military Intelligence Brigade (MI Brigade) deployed in Iraq. From November 19, 2003 until February 6, 2004 COL Pappas was designated by the Combined Joint Task Force Seven (CJFT-7) as the Commander for Force Protection and Security of Detainees of Forward Operating Base (FOB) Abu Ghraib and thus took Tactical Control (TACON) of the prison of Abu Ghraib during that time. [Fay, 31, 37; Taguba, 15-16]

COL Pappas and the forces he commanded were responsible for the commission of numerous war crimes that violated international law and the CCIL. COL Pappas bears a direct responsibility under Sections 7 and 8 for approving and ordering illegal interrogation techniques amounting to crimes. He is also liable as a military commander under the CCIL. Having knowledge that his subordinates were committing such crimes, COL Pappas violated Sections 4, 13 and 14 of the CCIL by failing to prevent the crimes (Section 4), to supervise those under his command to avoid crimes from being committed or repeated (Section 13) and by failing to report crimes that he was aware of to the appropriate agencies or to his superiors (Section 14). The facts regarding his criminal responsibility are set forth below and provide the German Prosecutor sufficient evidence as to COL Pappas' liability under the CCIL, and as to the need to investigate his case.

**COL Pappas Is Responsible under Sections 7 and 8 of the CCIL**

Misuse of dogs to support interrogations to "fear up" detainees was authorized and ordered by COL Pappas. He said that MG Miller told him that dogs were acceptable for use during interrogations; that the use of military dogs had proved to be effective at Guantanamo in setting the atmosphere for the interrogations. COL Pappas requested the use of NAVY dogs in order to intimidate the detainees, also based on the authority that he thought he had from LTG Sanchez to do so. [Fay, 58, 83: "The dog teams were requested by COL Pappas, Commander, 205 MI BDE", 87]

Such requests trigger a direct responsibility for ordering, inducing, or aiding and abetting the commission of war crimes, and require an investigation of COL Pappas' direct responsibility under these sections, when it is also highly probable that he ordered or induced his subordinates into using other illegal interrogation techniques.

## COL Pappas Is Responsible under Sections 4, 13 and 14 of the CCIL

### COL Pappas Had Effective Command Authority over the Direct Perpetrators of the Abuses

As Commander of the 205th MI Brigade and Commander of Abu Ghraib from November 2003 until February 2004, COL Pappas' general responsibility over these armed forces who did commit abuses cannot be questioned. Many persons who have been directly involved in the abuses belonged to the 800th Military Police Brigade. The Fragmentary Order 1108 (FRAGO[4] 1108) issued on Nov. 19, 2003 placed the 800th MP under the control of the 205th MI brigade, so COL Pappas was authorized to give them legal orders. COL Pappas had effective authority over all these troops and was therefore responsible for the acts of all his subordinates, especially because he knew that war crimes were taking place at Abu Ghraib. [Taguba, 38-39] [See also General Kimmit, Coalition Provisional Authority Briefing (May 12, 2004), http://www.globalsecurity.org/military/library/news/2004/05/mil-040512-dod01.htm]

### COL Pappas Knew that Abuses Were Being Committed

Evidence has been established as to COL Pappas' knowledge of the pattern of abuses committed by his subordinates.

First of all, COL Pappas progressively increased the number of weekly visits he was making to Abu Ghraib, even occasionally staying overnight in September 2003,

[4] A FRAGO is an abbreviated form of an operation order (verbal, written or digital) usually issued on a day-to-day basis that eliminates the need for restarting information contained in a basic operation order. Schlesinger, 98.

corresponding with the increasing emphasis on interrogation, and as of 16 November 2003, he took up residence at Abu Ghraib. [Fay, 55]

COL Pappas also saw the ICRC report documenting of maltreatment at Abu Ghraib, and he twice refused to allow the ICRC teams access to specified detainees. In addition, he received the ICRC's final report documenting abuses. [Fay, 66-67]

COL Pappas told MG Taguba that intelligence officers sometimes instructed Military Polices to strip detainees naked and to shackle them in preparation for interrogation when there was a good reason to do so, [*The Road to Abu Ghraib*, p. 27, Human Rights Watch, June 2004] which shows his awareness of the events.

A detainee's death caused by mistreatment was witnessed by COL Pappas himself. On Nov. 4, 2003, Iraqi detainee Al-Jamadi died at Abu Ghraib while being questioned by a CIA officer and Navy Seal soldiers face down and handcuffed. The autopsy showed the death was as a result of a blood clot caused by injuries sustained during apprehension. [Fay, 53] "Capt. Donald J. Reese, commander of the 372nd Military Police Company, said he was summoned to a shower room in a cellblock at the prison one night in November, where he discovered a group of intelligence personnel standing around the body of a bloodied detainee discussing what to do. He said Col. Thomas M. Pappas, commander of military intelligence at the prison, was among those who were there. Reese testified that he heard Pappas say, "I'm not going down for this alone." Reese said no medics were called, and the detainee's identification was never logged." [*Details of Cover-Up in Detainee's Death Emerge*, Jackie Spinner, The Agonist, June 24, 2004, http://scoop.agonist.org/story/2004/6/24/13850/9563]

**COL Pappas Failed to Prevent and Report the Abuses, and He Failed to Exercise His Duty of Supervision**

The Taguba, Fay, Jones and Schlesinger reports are all in accordance in their findings as to COL Pappas' weak and ineffectual leadership, which did lead to the repetition of abuses.

The Fay report, at page 120, finds the following as to COL Pappas's failure of leadership and duty of supervision:

"- Failed to insure that the JIDC performed its mission to its full capabilities, within the applicable rules, regulations and appropriate procedures

- Failed to properly organize the JIDC

- Failed to put the necessary checks and balances in place to prevent and detect abuses.

- Failed to ensure that his Soldiers and civilians were properly trained for the mission

- Showed poor judgment by leaving LTC Jordan in charge of the JIDC during the critical early stages of the JIDC.

- Showed poor judgment by leaving LTC Jordan in charge during the aftermath of a shooting incident known as the Iraqi Police Roundup (IP Roundup)

- Improperly authorized the use of dogs during interrogations. Failed to properly supervise the use of dogs to make sure they were muzzled after he improperly permitted their use.

- Failed to take appropriate action regarding the ICRC reports of abuse.

- Failed to take aggressive action against Soldiers who violated the ICRP, the CJTF-7 interrogation and Counter-Resistance Policy and the Geneva Conventions.

- Failed to properly communicate to Higher Headquarters when his Brigade would be unable to accomplish its mission due to lack of manpower and/or resources. Allowed his Soldiers and civilians at the JIDC to be subjected to inordinate pressure from Higher Headquarters.

- Failed to establish appropriate MI and MP coordination at the brigade level which would have alleviated much of the confusion that contributed to the abusive environment at Abu Ghraib."

Likewise, the Taguba report states that COL Pappas "Failed to ensure that Soldiers under his direct command were properly trained in and followed the

Interrogation Rules of Engagement; Failed to ensure that Soldiers under his direct command knew, understood, and followed the protections afforded to detainees in the Geneva Convention relative to the Treatment of Prisoners of War; Failed to properly supervise his soldiers working and "visiting" Tier 1 of the Hard-Site at Abu Ghraib." [Taguba, at 45]

The Jones report revealed that COL Pappas "did not assign a specific subordinate unit to be responsible for interrogations at Abu Ghraib and did not ensure that a Military Intelligence chain of command at Abu Ghraib was established. The absence of effective leadership was a factor in not sooner discovering and taking actions to prevent both the violent/sexual abuse incidents and the misinterpretation/confusion incidents." [Jones, 5, 17]

At one point, "a female soldier decided to strip a male detainee as punishment for uncooperative behavior – every time the detainee touched one of the soldiers, an article of clothing was removed. (…) The soldier then forced the detainee to walk that way across camp. Pappas left the issue for Jordan to handle and took no action against the female soldier". [Fay, 91]

The Schlesinger report said it concurred with all of these findings as to COL Pappas. [Schlesinger, 15]

Such recurring failure did lead to the repetitive commission of war crimes that violated sections 7 and 8 of the CCIL. COL Pappas' responsibility under sections 4, 13 and 14 of the CCIL providing for the responsibility of the superiors for the commission of crimes by their subordinates cannot be questioned and should be investigated.

**There Are No Indication That Criminal Charges Will Be Brought against COL Pappas**

Although there is no doubt that COL Pappas played a key role in the abuses at Abu Ghraib, no disciplinary action, and most importantly no criminal charges have been brought against him. He still is Commander of the 205th MI Brigade.

## 8- Defendant Stephen L. Jordan

Stephen L. Jordan is a Lieutenant Colonel (LTC) of the U.S. Army, and is the former Director of the Joint Intelligence and Debriefing Center (JIDC) in Iraq which included all of the interrogators at Abu Ghraib, as well as the Liaison Officer of 205th Military Intelligence Brigade (MI Brigade). [Taguba, 45, Fay, 43]

LTC Jordan and the forces he commanded were responsible for the commission of numerous war crimes that violated international law and the CCIL. He is liable as a military commander under the CCIL. Having knowledge that his subordinates were committing such crimes, LTC Jordan violated Sections 4, 13 and 14 of the CCIL by failing to prevent the crimes (Section 4), to supervise those under his command to avoid crimes from being committed or repeated (Section 13) and by failing to report crimes that he was aware of to the appropriate agencies or to his superiors (Section 14). The facts regarding his criminal responsibility are set forth below and will provide the German Prosecutor sufficient evidence as to Stephen Jordan's liability under the CCIL, and as to the need to investigate his case.

## LTC Jordan Is Responsible under Sections 4, 13 and 14 of the CCIL

### LTC Jordan Had Effective Command Authority over the Direct Perpetrators of the Abuses

LTC Jordan clearly had authority of command over the JIDC at Abu Ghraib. He was first assigned to the JIDC when in September 2003, COL Pappas requested COL Boltz provide him with a Lieutenant Colonel to run the JIDC that was being established. "Since LTC Jordan was available, COL Boltz assigned him to Abu Ghraib to run the

JIDC. (…) [Fay, 42-43] The testimony of Col. Pappas, Col. Boltz, Maj. William, and Maj. Potter all were adamant that LTC Jordan was the commander of the JIDC. LTC Jordan also acted as if he was in charge, and LTC Phillabaum, in charge of Military Police at Abu Ghraib, believed LTC Jordan was in charge and dealt directly with him. [Fay, at 43]

He officially became the deputy director of the JIDC on November 19, 2003. [Jones, 12]

**LTC Jordan Knew that Abuses Were Being Committed**

Evidence has established LTC Jordan's knowledge of the pattern of abuses committed by his subordinates at Abu Ghraib. Documents and testimonies show that he personally witnessed and therefore knew of the on-going abuses.

Captain Reese, the warden of Abu Ghraib, remarked that "LTC Jordan was very involved in the interrogation process and the day to day activity that occurred." Captain Donald J. Reese's sworn statement and interview on Jan.18.2004. (Appendix toTaguba report http://usnews.com/usnews/news/articles/040709/Pappas.pdf )

A detainee's death as a result of injuries was witnessed by LTC Jordan. On Nov. 4, 2003, Iraqi detainee Al-Jamadi died at Abu Ghraib while being questioned by a CIA officer and Navy Seal soldiers face down and handcuffed. The autopsy showed the death was as a result of a blood clot caused by injuries sustained during apprehension. LTC Jordan's presence at the incident, in the shower stall, has been established by the Fay report. [Fay, 53] Furthermore, he was also implicated in the covering up of this detainee's death. Captain Reese testified at a legal hearing that LTC Jordan ordered that the body be placed on ice. [Jackie Spinner, "MP Captain Tells of Efforts to Hide Details of Detainee's Death", Washington Post, http://www.washingtonpost.com/wp-dyn/articles/A2755-2004Jun24.html] The detainee's dead body was later removed on a

litter as if he were ill, while LTC Jordan was present, and therefore clearly involved. [Fay, at 53]

On November 24, 2003, after a shootout involving Military Police, LTC Jordan was left in charge of what became known as the Iraqi Police (IP) roundup. LTC Jordan proceeded to order interrogators to screen the Iraqi police. [Fay, at 84] The Iraqi police became detainees and were subjected to strip-searching by MPs in the hallway, with female soldiers and a female interpreter present. The Iraqi police were kept in various stages of undress, including nakedness, for prolonged periods as they were interrogated. Military working dogs were used to intimidate the Iraqi police during interrogation without authorization. These incidents occurred under the personal and direct supervision of LTC Jordan.

What's more, LTC Jordan was notified of abuses and Geneva Conventions violations by October-November of 2003 when he received a copy of the ICRC report. He even helped craft a response to the ICRC memo. [Fay, 65] His complete knowledge of the abuses cannot be contested.

**LTC Jordan Failed to Prevent and Report the Abuses, and He Failed to Exercise His Duty of Supervision**

The Taguba, Fay, Jones and Schlesinger reports are all in accordance in their findings as to LTC Jordan's weak and ineffectual leadership, which lead to the pattern of abuses.

Regarding the MP roundup incident mentioned above, the Fay report stated that LTC Jordan should have controlled the situation and taken steps to reinforce the proper standards, which he did not do. The report concludes: "LTC Jordan is responsible for allowing the chaotic situation, the unauthorized nakedness and resultant humiliation, and the military dog abuses that occurred that night. LTC Jordan should have obtained any authorizations to suspend the [Interrogation and Counter-Resistance Policies] in writing,

via email, if by no other means. The tone and the environment that occurred that night, with the tacit approval of LTC Jordan, can be pointed as the causative factor that set the stage for the abuses that followed for days afterward related to the shooting and the IP Roundup." [Fay, at 56]

LTC Jordan was also aware of a situation where two soldiers walked a nude detainee across the camp. Sgt. Adams, the soldiers' supervisor, commented that walking a semi nude detainee across the camp could have caused a riot. LTC Jordan only temporarily removed these soldiers from interrogation duties. General Fay determined that the failure to do more did not send a message that more abuse would not be tolerated. [Fay, at 91]

LTC Jordan also allowed other governmental agencies (OGA) (almost exclusively the CIA) [Fay, 118], to conduct interrogations without the presence of Army personnel. [Fay, 44] Prior to his approval, JIDC policy was that an Army interrogator had to accompany OGA if they were interrogating one of the detainees that Military Intelligence was also interrogating. [Fay, at 44] Allowing OGA activity, including the "Ghost Detainees", eroded the necessity for the following of Army Rules in the minds of Soldiers and civilians. [Fay, at 44-45] This continued even after LTC Jordan found a "ghost" detainee dead in a shower stall, face down, handcuffed with his hands tied behind his back. [Fay, at 53]

The Fay report's final findings include that LTC Jordan "failed to establish the necessary checks and balances to prevent and detect abuses; Was derelict in his duties by failing to establish order and enforce proper use of Interrogation and Counter-Resistance Policies (ICRP) during the IP Roundup, which contributed to a chaotic situation in which detainees were abused; Failed to prevent the unauthorized use of dogs and the humiliation of detainees who were kept naked for no acceptable purpose while he was the senior officer in charge; Failed to accurately and timely relay critical information to his superior officer about the International Committee of the Red Cross report." [Fay, 121]

The Schlesinger report found that leadership problems by LTC Jordan allowed the abuses to occur at Abu Ghraib. [Schlesinger, 15] LTC Jordan was a weak and ineffective leader who did not have experience in interrogation operations. [Schlesinger, 67-68, 75; Fay, 44]

LTC Jordan failed to provide appropriate training and supervision to personnel assigned to the JIDC, and failed to establish the basic standards and accountability and ensure prisoners were afforded the protections under the relevant Geneva Conventions. A proper training and supervision could have prevented the abuses at Abu Ghraib. [Fay, 121, Schlesinger, 68, 75] By not communicating standards, policies, and plans to soldiers, LTC Jordan conveyed a message of tacit approval of abusive behaviors towards prisoners. [Schlesinger, 75] LTC Jordan did not establish or enforce standards of behavior, causing a lax and dysfunctional command climate to take hold. [Schlesinger, 75] General Taguba further even implied that LTC Jordan was either directly or indirectly responsible for the abuses at Abu Ghraib. [Taguba, 48]

The Jones report found that LTC Jordan failed to execute his responsibilities as chief of the JIDC. LTC Jordan did not enforce Military Police and Military Intelligence requirements that soldiers and units obey the rules of land warfare and the Geneva Conventions. LTC Jordan allowed the delineation between Military Police and Military Intelligence to blur when Military Police Soldiers, untrained in interrogation operations, were used to "enable interrogations," by using isolation, sleep deprivation, and other ways to humiliate prisoners. [Jones, 13]

In addition, the Taguba report cites LTC Jordan for making material misrepresentations to the Investigating team, [Taguba, 45] and the Fay report found that he was deceitful. [Fay, 121] The Fay report also states that his recollection of facts, statements, and incidents were always recounted to avoid blame or responsibility, and that his version of events frequently diverged from others. [Fay, 121]

Such recurring failure did lead to the repetitive commission of crimes that violated sections 7 and 8 of the CCIL. LTC Jordan's responsibility under sections 4, 13 and 14 of the CCIL providing for the responsibility of the superiors for the commission of crimes by their subordinates cannot be questioned and should be investigated.

**There Are No Indication That Criminal Charges Will Be Brought against LTC Jordan**

Although it has been clearly established that LTC Jordan played a major role in the abuses at Abu Ghraib, no disciplinary action, and most importantly no criminal charges have been brought against him.

**9- Defendant Geoffrey Miller**

Geoffrey Miller is a Major General (MG) with the United States Army. He was commander of Joint Task Force-Guantánamo (JTF- Guantánamo) from November 2002 until April 2004, when became Deputy Commanding General of Detention Operations in Iraq, the position he currently holds.[Department of Defense News Release, September 20, 2002, available at http://www.defenselink.mil/releases/2002/b09202002_bt479-02.html, Kathleen T. Rhem, *Bush Shows 'Deep Disgust' for Apparent Treatment of Iraqi Prisoners,* American Forces Press Service, April 30, 2004] As commander of JTF-Guantánamo, MG Miller oversaw both Military Intelligence and Military Police functions. In Iraq, Miller is responsible for all detainee operations, interrogation operations, and legal operations for Multinational Forces in Iraq. [Jim Garamone, *General 'Guarantees' Protection Under Geneva* Conventions, American Forces Press Service, May 8, 2004] At both his posts in Guantánamo and Iraq, MG Miller is liable for violations of CCIL.

MG Miller is directly responsible for violations of Section 8 because he personally authorized illegal interrogation techniques, as well as induced, aided and abetted his subordinates in the commission of war crimes. He is also liable as a military

commander under section 4 of the CCIL for failure to prevent crimes which he knew were being or about to be committed, described above. MG Miller is also liable for violations under sections 13 and 14 for failure to supervise those under his command and to report crimes he was aware of to the appropriate agencies.

## MG Miller's Direct Responsibility for War Crimes

### Guantánamo

MG Miller's mission at Guantánamo was "to integrate both the detention and intelligence function to produce actionable intelligence for the nation… operational and strategic intelligence to help the [United States] win the global war on terror." [Testimony of General Miller to Sen. Ben Nelson at Senate Armed Forces Committee Hearing, May 19, 2004] MG Miller unified the command over Military Intelligence units and Military Police units, and had them work together to 'soften up' detainees for interrogation.

At MG Miller's direction, detainees at Guantánamo were held incommunicado, with journalists getting access to detainees only after they had been released.

On December 2, 2002, shortly after MG Miller took over at Guantánamo, Secretary Rumsfeld approved additional interrogation techniques beyond the Army Field Manual, such as hooding, stress positions, removal of clothing, forced grooming, exploiting individual phobias (e.g., dogs), isolation for up to 30 days, mild non-injurious physical contact (e.g., grabbing, poking or light pushing), and removal of all comfort items, including religious items. [Schlesinger Report, at Appendences E, F] Subsequently, MG Miller introduced a number of techniques designed to 'soften up' detainees so they would provide actionable intelligence, including sleep deprivation, extended isolation, simulated drowning, forcing detainees to stand or crouch in 'stress positions,' and exposure to extremes of heat and cold. [Trevor Royle, *Rumsfeld's Soulmate at the Heart of Culture of Brutality,* Sunday Herald (May 16, 2004), Hersh, at

14] Secretary Rumsfeld rescinded permission for the more controversial techniques on January 15, 2003, but under MG Miller's reign at Guantánamo, these techniques were supposedly used on only two detainees. [Schlesinger Report at 8]

Accounts of released detainees tell a different story. Released detainees describe being short shackled in painful "stress positions" for many hours at a time, causing deep flesh wounds and permanent scarring; threats with unmuzzled dogs; forced stripping; being photographed naked; being subjected to repeated forced body cavity searches; intentionally subjected to extremes of heat and cold for the purpose of causing suffering; being kept in filthy cages for 24 hours per day with no exercise or sanitation; denial of access to necessary medical care; deprivation of adequate food, sleep, communication with family and friends, and of information about their status; and violent beatings by the Extreme Reaction Force.[5] [Center for Constitutional Rights, *Report of Former Guantánamo Detainees*, available at http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf (Aug. 4, 2004)]

An internal investigation into allegations of torture initiated by Secretary Rumsfeld found 8 instances of abuse. The investigating officer did not interview any detainees for his investigation. [Human Rights Watch, *The Road to Abu Ghraib* at 19] The released detainees have said closed circuit cameras, photographs, and videotapes exist of the interrogations confirming the abuses, as they were regularly filmed. [HRW, *The Road to Abu Ghraib* at 19]

[5] For example on how the Extreme Reaction Force operated: National Guardsman Sean Baker was abused by the Extreme Reaction Force (ERF, also known as the Internal Reaction Force) in November 2002 while posing undercover as a detainee. Baker was told to put on an orange jumpsuit and crawl under a bunk in a cell. "They [ERF members] grabbed my arms, my legs, twisted me up and unfortunately one of the individuals got up on my back from behind and put pressure down on me while I was facedown. Then he – the same individual – reached around and began to choke me and press my head down against the steel floor. After several seconds, twenty to thirty seconds, it seemed like an eternity because I couldn't breathe, I began to panic…" Baker was evacuated to a hospital in Virginia, and was later sent to an Army hospital for treatment of traumatic brain injury, where he stayed for forty-eight days. He has been plagued by seizures ever since. [David Rose, GUANTÁNAMO 72-74, 2004; "Report Details Guantánamo Abuses," Associated Press, Nov. 4, 2004]

The above facts show MG Miller is directly liable for ordering, inducing, and aiding and abetting war crimes.

**Iraq**

MG Miller was sent to Iraq in August 2003, by the Joint Chiefs of Staff to "review Iraqi Theater ability to ability to rapidly exploit internees for actionable intelligence." It was shortly after this visit by MG Miller which the most serious abuses at Abu Ghraib occurred.

MG Miller's report to LTG Sanchez focused on intelligence integration, synchronization, and fusion; interrogation operations; and detention procedures and interrogation authorities as baselines in Iraq. [Article 15-6 Investigation of the 800th Military Police Brigade (Taguba Report) at 8] He brought to Iraq Secretary Rumsfeld's April 16, 2003 policy guidelines for Guantánamo and gave this policy to CJTF-7 as a possible model for the command-wide policy that he recommended be established and called for strong, command-wide interrogation policies. [Schlesinger Report at 9]

Taguba's report criticized many of MG Miller's recommendations. MG Miller's team used Guantánamo operational procedures and interrogation authorities as baselines for its observations and recommendations in Iraq; Taguba correctly pointed out that the intelligence value of those at Guantánamo is different than those in Iraq- there are Iraqi criminals being held at Abu Ghraib who are not believed to be international terrorists or members of Al Qaeda, Anser Al Isalm, Taliban. Taguba noted the recommendations of MG Miller's team that "the 'guard force' be actively engaged in setting the conditions for successful exploitation of the internees appears to be in conflict with… Army Regulation (AR 190-8) 'that military police do not participate in military intelligence supervised interrogation sessions,'" and concluded "Military Police should not be involved with setting favorable conditions for subsequent interviews. These actions… clearly run counter to the smooth operation of a detention facility." [Taguba Report at 8]

COL Pappas, then commander of the forward operating base at Abu Ghraib, stated that MG Miller told him at Guantánamo, they used military working dogs, and that dogs were effective in setting the atmosphere for interrogations. He also said Miller had indicated the use of the dogs "with or without a muzzle" was "okay" in booths where prisoners were taken for interrogation. [R. Jeffrey Smith, *General Is Said to Have Urged Use of Dogs,* Washington Post, May 26, 2004] In a Feb. 11 written statement, COL Pappas said "policies and procedures established by the [Abu Ghraib] Joint Interrogation and Debriefing Center relative to detainee operations were enacted as a specific result of a visit" by MG Miller. [*Id*] According to MG Miller, his team recommended a strategy to work the operational schedule of the dog teams so the dogs were present when the detainees were awake, not when they are sleeping. [Army Regulation Investigation of the Abu Ghraib Prison, (still partly classified known as the *Fay Report*) at 58 available at http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf (August 2004)]

MG Miller allegedly told BG Karpinski that detainees should be treated like dogs. [*Abu Ghraib General Says Told Prisoners 'Like Dog',* Reuters, June 15, 2004]

MG Miller is directly liable for war crimes under CCIL Section 8 for soliciting, inducing, aiding and abetting the above war crimes.

**MG Miller's Responsibility as a Military Commander Under Sections 4, 13, and 14 of the CCIL**

**MG Miller Had Effective Command Authority over the Perpetrators of Abuse**

As Commander of Guantánamo, MG Miller had actual authority over all military personnel subordinates at Guantánamo from November 2002 until April 2004.

**Miller had knowledge of crimes being committed or about to be committed**

Before MG Miller arrived at Guantánamo, the ICRC had made several visits and complaints about the conditions there. On April 15, 2002, Amnesty International (AI) sent the U.S. a 62 page memorandum of its complaints regarding the treatment of detainees at Guantánamo, including its concerns regarding the denial of access to detainees and the conditions of detention. [Katharine Seelye, *A Nation Challenged: Prisoners; U.S. Treatment of War Captives is Criticized*, New York Times, April 15, 2002] An Army Reserve lawyer stated that he and another lawyer had written a detailed memorandum to the senior officers at Guantánamo in late 2002 about on going violations of the Geneva Conventions and the federal anti-torture statute, but they received no response. [Hersh at 7] Additionally, the incident with National Guardsman Sean Baker had just occurred, putting MG Miller on notice that excessive force was being used at Guantánamo during his first few months there.

On October 10, 2003, the Red Cross (ICRC) conducted more than 500 interviews at Guantánamo before meeting with MG Miller and his top aides. The ICRC voiced its concern regarding the lack of a legal system for the detainees, the continued use of steel cages, the 'excessive use of isolation' and the lack of repatriation for the detainees. The ICRC felt that the interrogators had "too much control over the basic needs of detainees… the interrogators have total control over the level of isolation sin which detainees were kept; the level of comfort items detainees can receive; and the access to basic needs of the detainees." MG Miller bristled at the comment and told the ICRC that interrogation techniques were none of their concern. The ICRC told MG Miller that those methods and the lengths of interrogations were coercive and having a 'cumulative effect' on the mental health of the detainees and that the steel cages coupled with the maximum security nature of the facility and the isolation techniques, constituted harsh treatment. [Scott Higham, *A Look Behind the 'Wire' at Guantánamo; Defense Memos Raise Questions About Detainee Treatment as Red Cross Sought Changes*, Washington Post (June 13, 2004)] The next day, October 11, 2003, Chief of the ICRC for U.S. and Canada, in an act rare for the ICRC, publicly criticized MG Miller's failure to repatriate detainees due to the unproductive nature of ICRC's negotiations with the Bush Administration. [Hersh at 13] As a matter of policy, "at all levels of a given chain of

command, the ICRC expects to receive responses to the concerns it raises – either orally or in writing, and in the form of concrete changes in the places of detention the ICRC visits.

In cases where the ICRC comes to the conclusion that its recommendations are repeatedly not taken into account and where the conditions and treatment fail to improve despite its reports, it reserves the right, as a last resort, to publicly denounce violations of the relevant legal provisions by the authorities in question." [ICRC response to Schlesinger Report, available at http://www.icrc.org/Web/Eng/siteeng0.nsf/html/64MHS7?OpenDocument]

MG Miller's awareness that a violations of section 8 were being committed or about to be committed is confirmed by the circumstances surrounding his command of Guantánamo, and specifically by the techniques he approved for use in interrogations and treatment of the detainees, and by the meeting between Miller and the ICRC in October of 2003. The ICRC alerted MG Miller that the use of numerous techniques in combination with one another or right after one another was having a detrimental effect on the mental health of the detainees. MG Miller made it clear that it was his policy to allow MP to 'soften up' detainees for interrogation, and that interrogation tactics were none of the ICRC's concern. Indeed, soldiers at Guantánamo under MG Miller's command report that they used heavy handed tactics to scare the detainees and use "mind-control," and it was understood that it was permissible to abuse the detainees as long as the news media did not see.

**MG Miller Failed to Prevent and Report the Abuses, and He Failed to Exercise His Duty of Supervision**

The above facts show, MG Miller was on notice of general abuses and the fact that conditions were ripe for abuse, yet he failed to take measures to ensure that abuses would not occur. Subsequent to his meeting with the ICRC, there is no indication that he directed any orders to his subordinates to address ICRC's concerns or to take any action

to address the risk that standards of decent behavior may be violated. He was in fact hostile to the ICRC and its requests, and responded by limiting the access the ICRC had to certain detainees. As MG Miller encouraged the 'softening up' of detainees, he authorized the abuses to take place, and when they did, he failed to take appropriate action by reporting these abuses to the proper authority. This led to a culture of abuse, as his subordinates recognized they would not be punished for abusing prisoners and this behavior was therefore condoned.

The above facts show MG Miller is liable for violations of sections 4, 13, and 14 of the CCIL.

**10- Steven Cambone**

Dr. Stephen Cambone is the Undersecretary of Defense for Intelligence and has been since March 7, 2003. This position was created by Secretary of Defense Donald Rumsfeld in his restructuring of the Department of Defense. Cambone reports directly to Secretary Rumsfeld and is responsible for DoD intelligence activities. [Seymore Hersh, *The Grey Zone,* The New Yorker, May 15, 2004]

His office duties include: coordinating DoD intelligence and intelligence-related policy, plans, programs, requirements, and resource allocations; overseeing provision of intelligence support and involvement in information operations, focused on assessments in support of operations." [Jason Vest, *Implausible Denial*, The Nation, May 14, 2004]

There is evidence that Cambone played a central role in the creation of secret interrogation operations that violate the war crimes statutes of the German CCIL. Since he is purportedly in charge of DoD intelligence activities, he is liable directly for aiding and abetting and inducing violations of CCIL Section 8, and for command responsibility under Section 4. Further, Cambone failed to prevent interrogation abuses by subordinates under Section 13 of the CCIL.

**Cambone Is Directly Liable for War Crimes**

"Although no direct links have been found between the documented abuses and orders from Washington, Pentagon officials who spoke on the condition that they not be named say that the hunt for data on these two topics was coordinated during this period by Defense Undersecretary Stephen A. Cambone, the top U.S. military intelligence official and long one of the closest aides to Secretary of Defense Donald H. Rumsfeld." [R. Jeffrey Smith, "Knowledge of Abusive Tactics May Go Higher," Washington Post, May 16, 2004]

When the abuse of Iraqi prisoners at Abu Ghraib was revealed, Cambone was central to the bureaucratic chain of command that oversaw the interrogations. The interrogations "were part of a highly classified Special Access Program (SAP) code-named Copper Green, authorized by Defense Secretary Donald Rumsfeld and ultimately overseen by Under Secretary of Defense for Intelligence Stephen Cambone."[Jason Vest, *Implausible Denial II,* The Nation, May 17, 2004] Seymour Hersh revealed that while Copper Green had started out in Afghanistan as using trained Special Operations personnel, in Iraq it evolved use intelligence officers and other personnel not trained for the role. After the CIA withdrew from the program Cambone reportedly assigned MG Miller, the former Guantánamo Bay interrogations chief to oversee Iraq's prison system. [Seymore Hersh, *Chain of Command,* The New Yorker, May 17, 2004] It was after MG Miller's visit to Abu Ghriab that the most serious abuses occurred.

The solution to the growing insurgency in Iraq, endorsed by Rumsfeld and carried out by Cambone, was to "get tough with those Iraqis in the Army prison system who were suspected of being insurgents." A Pentagon consultant who spent much of his career directly involved with special-access programs stated 'The White House subcontracted this to the Pentagon, and the Pentagon subcontracted it to Cambone,' he said. 'This is Cambone's deal, but Rumsfeld and Myers approved the program.' When it came to the interrogation operation at Abu Ghraib, he said, Rumsfeld left the details to Cambone. [Seymour Hersh, "The Gray Zone," The New Yorker, May 15, 2004]

The above facts show that Cambone not only ordered actions that constitute war crimes, but also actively encouraged, aided and abetted by setting the conditions necessary for further war crimes to occur. This renders him directly liable for war crimes under CCIL section 8.

**Cambone Has Responsibility as a Civilian Commander for War Crimes**

Cambone effectively had actual authority and control, as he was directly responsible to the Secretary of Defense for intelligence operations. Cambone was in a position to exert control over military commanders in charge of units that committed war crimes. Cambone obviously satisfied this aspect for the purposes of CCIL sections 4 and 13.

**Cambone Had Knowledge of the Crimes**

Cambone had knowledge that crimes were being committed because he authorized certain crimes. Further, he knew that more crimes beyond what he had authorized were likely to be committed as it was completely foreseeable, and he failed to take preventative action.

**Cambone Failed to Take Necessary Steps to Prevent War Crimes**

As demonstrated by the facts above, Cambone not only actively encouraged war crimes, but also failed to take action within his power to prevent war crimes from being committed. As everyone else in the Department of Defense, Cambone had access to the ICRC reports and the numerous complaints in the media about detainee conditions. Yet he failed in his duty to investigate further and failed to take action to halt impending war crimes. These failures render him liable under CCIL Sections 4 and 13.

**There Has Been No Disciplinary Action Taken Against Cambone**

Cambone currently holds his position as Undersecretary of Defense for Intelligence, and no disciplinary action has been taken against him and no criminal investigation is contemplated.

## 5. Application of German Criminal Law

### 5.1 German Jurisdiction

#### 5.1.1. International Law Principle, § 1 CCIL

The competence of German justice for the criminal prosecution of the war crimes committed in Abu Ghraib follows from the CCIL. According to § 1 CCIL, the international law principle – i.e. Germany, according to the legality principle in § 152 (ii) Code Criminal Procedure (CCP) is legally bound to prosecute crimes, even if the deed was committed, as is the case here, by foreigners against foreigners on foreign soil – holds for the crimes against international criminal law itemized in the CCIL. In regard to war crimes (§ 8 CCIL), Germany thereby fulfills its obligation under Art. 146 of the Fourth Geneva Convention, and under Art. 85 of Additional Protocol I, by virtue of which there is even an obligatory universal jurisdiction in the case of war crimes on the basis of the principle *aut dedere aut iudicare*. A domestic connection is no longer required in order to exercise German penal jurisdiction.

The wording of § 1 CCIL leaves no doubt as regards the acts perpetrated after June 30, 2002: The CCIL applies to the crimes in question here, those of genocide and crimes against humanity, “even if the act was committed abroad and has no domestic connection.” German jurisdiction over these acts is therefore unproblematically established. (see Gesetzesbegündung, BT Drucksache 14 8527, op. cit.; Löwe-Rosenberg-Beulke, Strafprozeßordnung, Nachlieferung, n. 1 of § 153 c, n. 2 of § 153 f).

### 5.1.2. Principle of International Law, § 6, No. 9 German Criminal Code in Connection with U.N. Convention against Torture

In regard to the indicated acts in the range designated above (3.), there is sufficient suspicion of culpability according to § 6, No. 9 Criminal Code in connection with Art. 5 1984 United Nations Convention against Torture (CAT). According to § 6, No. 9 Criminal Code, German criminal jurisdiction covers acts committed on foreign soil, which on the basis of one of the international agreements binding for the Federal Republic are to be prosecuted even if they were committed on foreign soil. This is so in the case of torture. The CAT has been in effect in the Federal Republic since October 31, 1990. According to Art. 5, II CAT, the Federal Republic is obligated to establish its jurisdiction over torture even for crimes committed abroad if the suspect is located in one of the sovereign territories under the control of the Federal Republic, provided Germany does not extradite the suspect. Since the events in Abu Ghraib constitute torture, criminal proceedings in regard to third, fourth and seventh accused must be introduced, since the suspects are on sovereign German territory.

Prior to the coming into force of CCIL there existed, with respect to torture, the view that as a result of the Convention Against Torture and Other Inhumane or Degrading Treatment or Punishment (CAT) of 10-12-1984, in any case after the coming into force of the implementation law of 06-04-1990 (Civil Code 1990 II, 246) German penal law was applicable, provided the requirement of a domestic connection was fulfilled. (see BGH, Decision of February 21, 2001 – 3 Penal Law 372/00, p. 8f., Schönke / Schröder-Eser, Criminal Code 26th edition, § 6 Rd 11, in each case with further annotations).

According to the unambiguous wording of § 6 Criminal Code, old version, the principle of international law obtained for the acts catalogued in § 6, independently of the citizenship of the perpetrator, of the law in effect at the site in which the deed was committed, and of the site of the deed. Nevertheless, the jurisprudence developed, as an

unwritten condition, the requirement of the so-called "legitimizing domestic link," which is to say that in each case – indeed for the establishment of German penal power – a direct relation of the penal prosecution to internal affairs has to exist. In view of the great number of acts listed in § 6 Criminal Code, this jurisdiction may have a certain justification in the case of some of the offenses listed there. As regards international crimes, jurisdiction before the establishment of the International Criminal Code was severely criticized (see, as an example, Merkel, "Universale Jurisdiktion bei völkerrechtlichen Verbrechen"; see also "Ein Beitrag zur Kritik des § 6 StGB," in Lüderssen, ed., Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse? 1998, Vol. 3, 273 pp.) In any case, the prevailing conception in the literature rejected this requirement in the case of international crimes. (See esp. Eser, in Eser et al., eds., Festschrift für Meyer-Goßner, 2001, pp. 3 ff.; Werle, JZ 1999, p. 1181, 1182; JZ 2000, 755, 759) Ultimately, this jurisdiction became relevant with respect to international crimes especially in the evaluation of Balkan war crimes. In this respect, the Federal Constitutional Court finally left the question open (Judgment of December 12, 2000 – 2 BvR 1290/99, p. 22) as to whether an additional legitimizing domestic link is required at all. In its above-cited decision (op. cit., p. 20), the Federal Supreme Court indeed directly referred to domestic penal prosecution by dint of the ongoing residence of the accused in Germany, although it tended, in any case as regards § 6 No. 9 Criminal Code, to demand "no legitimizing links in individual cases beyond the wording of § 6 No. 9 Criminal Code." The coming into effect of CCIL and of § 153 f Code of Criminal Procedure has intensified this problem or rather has deflected it from the search for German criminal jurisdiction to the discretion of the Federal Prosecutor. This unambiguous legislative innovation, unanimously commented by the literature as a "clarification" and not as a departure from Federal Supreme Court's apparently abandoned jurisdiction (see Legislative history, BT Drucksache 14 8527, op. cit.; Löwe-Rosenberg-Beulke, Strafprozessordnung, Supplement, Rn. 1 to § 153 c, Rn. 2 to § 153 f) must, in interpreting § 6 I No.1 and 9 Criminal Code, be regarded as no longer requiring a domestic link, even for old cases. (Beulke, op. cit. considers the question "unsettled," citing Zimmermann ZRP 2002, 97, 100.)

German jurisdiction is therefore established for the individual acts of torture, precisely because of the unambiguous wording of § 6 Criminal Code and also because of the prevailing opinion in the literature. Even if one were to follow the older jurisdiction that has apparently in the meanwhile been abandoned, one would come to the same conclusion due to the many domestic links for criminal prosecution in the Federal Republic of Germany, which will be illustrated in what follows.

## 5.2. Prosecutory Discretion of the Federal Prosecutor, § 153 f Code of Criminal Procedure

### 5.2.1. No Exercise of Primary Jurisdiction (USA, Iraq, International Criminal Court)

**In the military and penal proceedings regarding Abu Ghraib currently taking place in the United States the criminal responsibility of those accused here has not been investigated.**

The complaint filed in Germany is expressly directed not only against military and civilian superiors due to the incidents in Abu Ghraib. This is so because until now the only military and civilian penal investigations and proceedings that have taken place have been those against lower-ranking military personnel who were directly involved in the incidents of torture. In detail, the following proceedings have been undertaken until the present.

According to the Taguba Report, 27 members of the intelligence unit in Abu Ghraib participated as perpetrators in the mistreatment of detainees. In addition there were 10 military prison guards and 4 civilian contract workers who were directly involved in the incidents. Apart from the direct involvement of Colonel Pappas, the seventh accused, and Lieutenant Colonel Steven Jordan, the eighth accused, who are involved in the death of a

detainee, no soldier above the rank of Staff Sergeant was accused of taking part in prisoner mistreatment.

Eight soldiers were charged with prisoner mistreatment in Abu Ghraib. Seven of them belonged to the 372nd Military Police Battalion of the Army and one to the 325th Intelligence Battalion. Some of the indicted pleaded guilty and testified against the other accused, thereby considerably reduceing their punishments.

> - Staff Sergeant Ivan Frederick, the highest-ranking accused, pleaded guilty to eight counts of prisoner mistreatment and inhumane treatment of detainees under U.S. custody. He was sentenced to eight years in prison. His military rank was reduced. His salary was suspended and he was dishonorably discharged (see Jackie Spinner, "MP Gets 8 Years for Iraq Abuse," *Washington Post*, October 21, 2004). The counts of the indictment under the Uniform Code of Military Justice – conspiracy to maltreat detainees, dereliction of duty for negligently failing to protect detainees from abuse, cruelty and maltreatment; maltreating detainees by photographing them naked, posing for a photograph with a maltreated detainee; ordering detainees to strike each other; strike and assault detainees; and committing indecent acts.
> (http://news.findlaw.com/wp/docs/iraq/ifred32004chrg.html).
>
> - Spec. Jeremy C. Sivits pleaded guilty. On May 2004 he was sentenced to one year of imprisonment. The charges were conspiracy to maltreat detainees, and dereliction of duty for negligently failing to protect detainees from abuse, cruelty and maltreatment.
> (http://news.findlaw.com/hdocs/docs/iraq/sivits50504chrg.html).
>
> - Spec. Megan Ambuhl pleaded guilty to one count of dereliction of duty and reached an agreement with the prosecutors. The latter dropped additional indictment charges of conspiracy, maltreatment of prisoners and other acts. Ambuhl was demoted from Specialist to lance-corporal and received no pay for

one and a half month. (Josh White, "Abu Ghraib Prison MP Pleads Guilty to Reduced Charged," Nov. 3, 2004)

- Corporal Charles Graner was charged under the Uniform Code of Military Justice with conspiracy to maltreat detainees; dereliction of duty for willfully failing to protect detainees from abuse, cruelty and maltreatment; maltreatment of detainees; assaulting detainees; and obstruction of justice. (http://news.findlaw.com/hdocs/docs/iraq/graner51404chrg.html). His trial will take place in Texas on January 7, 2005. (Times Wire Service, "GI Trial Dates Set in Abuse Case," *Los Angeles Times*, Oct. 23, 2004)

- Sergeant Javal Davis was charged under the Uniform Code of Military Justice with conspiracy to maltreat detainees; dereliction of duty for willfully failing to protect detainees from abuse, cruelty and maltreatment; maltreatment of detainees; assaulting detainees; obstruction of justice. (http://news.findlaw.com/hdocs/docs/iraq/davis42804chrg.html). Davis's trial will take place in Texas on February 1, 2005. ("GI Trial Dates Set in Abuse Cases")

- Lance Corporal Lynndie England, who was seen very frequently in photos, was charged with similar counts under the Uniform Code of Military Justice. She is awaiting her trial in Fort Bragg, North Carolina in January 2005. She was relocated there after she had become pregnant. (Kate Zernike, "Trails of G. I.'s at Abu Ghraib to be Moved to the U.S.," *The New York Times*, Nov 12, 2004) She has in the meanwhile given birth to a son whose father is assumed to be the already-mentioned Charles Graner.

- Private Sabrina Harman was charged for similar offenses and is awaiting her trial in Fort Hood, Texas.

- Private Armin J. Cruz of the 325th Intelligence Battalion pleaded guilty in September 2004 and was sentenced to eight months of imprisonment (Spinner, "MP Gets 8 Years").

Further criminal investigations are taking place regarding the case of death already mentioned and other cases of death.

In the case of two Afghan detainees who died in the Air Force Base at Bagram, Afghanistan in December 2002, an army investigation found 28 American soldiers guilty of their murder. The soldiers, among them reservists, could be sentenced for manslaughter, mistreatment, violent assault, mutilation and conspiracy. The army command must decide whether trials are to take place against 27 soldiers not known by name. One soldier, Private James Boland, has already been charged with dereliction of duty and with aggravated assault. (Nick Meo, "U.S. Investigation Finds 28 Soldiers Guilty Over Deaths of Two Taliban Suspects in Afghanistan," *The Independent* (London), Oct. 16, 2004) It is noteworthy that Boland was not charged with homicide. Marine Reservist Gary Pittman and Major Clarke Paulus are now awaiting trial in Camp Pendleton. They were accused of bearing responsibility for the death of Iraqi detainee Hatab in June 2003 in Camp Whitehorse, Iraq. The first 8 marine personnel are facing charges related to Hatab's death. The charges against 6 others were dropped, and the most serious charges against both Pittman and Paulus have likewise been dropped. Paulus had command of Camp Whitehorse. He has been charged with mistreatment of prisoners and dereliction of duty. Pittman was on watch duty and is charged with aggravated assault and dereliction of duty. Both accuse the NAVY, and their attorneys claim that the detainee died of natural causes, in this instance from an attack of asthma. The prosecuting authorities maintain that his windpipe was crushed.
Paulus is facing 5½, and Pittman 3, years of imprisonment in a military prison. (Alex Roth and Jeff McDonald, "Iraqi Detainee's Death Hangs over Marine Unit," *The San Diego Union-Tribune*, May 30, 2004)

David Passaro, a 37-year-old CIA employee, is accused of four counts of assault, and assault with a dangerous weapon, of Abdul Wali who died in June 2003 in U.S. custody. In June 2004, the judge denied Passaro's request for a writ of habeas corpus and ordered his continued detention. (Anna Griffin, "Man in Jail until Trial for Prisoner Abuse," *Saint Paul Pioneer Press* (Minnesota), June 26, 2004)

On May 16, 2004, the *Los Angeles Times* reported that a U.S. soldier was convicted of excessive use of weapons in the incident of a detainee shot on September 11, 2003 in Iraq. The detainee had thrown a stone at a sentinel. A trial is to take place in Texas on February 1, 2005 against a soldier named David. ("GI Trial Dates Set in Abuse Deaths of Captives into Focus," *Los Angeles Times*, May 16, 2004)

The two officers Lewis Welshofer and Jeff Williams are charged with manslaughter and involuntary murder in the case of Colonel General Mowhoush. The incidents took place on November 26 2003 in Qaim, Iraq. They were reprimanded and forbidden to conduct interrogations in the future (Arthur Kane to Miles Moffeit. "Carson GI Eyed in Jail Death. Iraqi General Died in Custody," *The Denver Post*, May 28, 2004)

In September 2004 the NAVY announced that three commandos were accused of beating prisoners. The Fashed Muhammad case was that of an Iraqi who died in Diamondback in Iraq in 2004. The Al-Jamadi case was that of an Iraqi detainee who died in Abu Ghraib in 2003. Neither of the accused was indicted for the murders. A NAVY officer justified this on September 24, 2004 based on insufficient evidence. (Eric Schmitt, "3 Commandos Charged With Beating of Prisoners," *New York Times*, September 25, 2004)

For the legal representation of the victims in the U.S.A. the problem is that, in contrast to the German procedure, criminal proceedings can indeed be proposed but are not mandatory. Initiating an investigation lies within the exclusive discretion of the prosecutors. The fact that no criminal proceedings have been initiated against high-ranking superiors, based on the documented and publicly known cases of war crimes in Guantánamo, Afghanistan and Iraq, speaks for itself. The victims' attorneys are therefore

attempting other ways of obtaining justice for their clients, specifically through civil proceedings. Thus, a comprehensive proceeding concerning prisoner mistreatment in Abu Ghraib is pending in the United States District Court for the Northern District of California on the basis of a November 4, 2004 complaint of 10 hitherto unnamed, and further hitherto unnamed, victims of the civilian security firms Titan Corporation and CACI International Inc., whose employees are under suspicion of prisoner mistreatment.

To recapitulate, we can show that, despite the continuing criticism of a part of the American press as well as of human and civil rights organizations both in the torture incidents in Abu Ghraib and in the incidents of death, no investigations of higher ranking officers are taking place, not to mention of the highest civilian and military superiors.

One can discern an almost contrary tendency: The first accused, Rumsfeld, is, according to press reports, to continue as Secretary of Defense under George W. Bush. Alberto R. Gonzales, who as the author of the above-cited memoranda played an important, probably criminally relevant, role that should be further investigated, although he is not accused here, is the President's nominee for the office of Attorney General. J. S. Bybee, who has likewise appeared as a coauthor of one of the decisive memoranda, namely that of August 1, 2002, has since become a federal judge. The third accused, Lieutenant General Ricardo Sanchez, is to be promoted, according to press reports. Even the relocation of the ninth accused, Geoffrey Miller, from Iraq is, according to current newspaper reports, not based on dissatisfaction with his performance but is part of a routine rotation. As a whole, therefore, one has the impression that the superiors charged here have been rewarded for their actions rather than subjected to criminal prosecution.

**War crimes of members of the U.S. Armed Forces have not been prosecuted in Iraq**

After the invasion of U.S. and coalition forces in Iraq in March 2003 and the occupation of Iraq, the U.S. Department of Defense installed an occupation government from March 2003 to June 2004. Paul Bremer functioned as the leader of the provisional coalition authority. The latter exercised juridical power from May 2003 to June 2004. The

authority's first decree, May 16, 2003, indicated that all laws in effect in Iraq on April 16, 2003 remain valid as long as they do not hinder the occupation authority in the exercise of its functions or do not stand in the way of the decrees or orders of the occupation power. (Regulation 1, Section 3 (1), http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf)

Order No 7, issued on June 10, 2003, forbade torture and cruel, degrading and inhumane treatment or punishment. Since Regulation 1 explicitly related commands of the occupation authority to the Iraqi people, it can be argued that Order No. 7, and other orders, cannot be applied to U.S. citizens in Iraq.

This interpretation is supported by Order No. 13, which established the central criminal court of Iraq in Baghdad. (http://www.iraqcoalition.org/regulations/0040422_CPAORD_13_Revised_Amended.pdf)

According to this order, members of foreign military forces are expressly excluded from the jurisdiction of the central court. (Order No. 13, § 17 Paragr. 2)

It corresponds to Order No. 18, December 10, 2003, which established the statute of the Special Tribunal of Iraq for the prosecution of cases of genocide, crimes against humanity, war crimes and breaches of Iraqi laws. The jurisdiction of this special court is explicitly limited to Iraqi citizens and residents of Iraq. (Order No. 48, Section 1(1) at: http://www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf; *see also* Article 10, Statute of the Iraqi Special Tribunal, *available at:* http://www.cpa-iraq.org/human_rights/Statute.htm). For the rest, the statute refers to acts between July 17, 1968 and May 1, 2003. (See Statute of the Special Tribunal of Iraq http://www.cpa-iraq.org/human_rights/Statute.htm) In the still valid 1969 Iraqi Criminal Code, no elements of war crimes and crimes against humanity are provided for. Moreover, § 11 of the Iraqi Criminal Code stipulates that the

provisions are not applicable to offenses and crimes that have been committed in Iraq by persons who enjoy protected status according to international or national law as well as international agreements. Since the decrees and orders issued by the occupation force explicitly except the members of the coalition armed forces from the jurisdiction of Iraqi justice, one must assume that such persons are not subject to Iraqi justice.

Moreover, at the present moment, the system of justice in Iraq is in no way in a position to prosecute war crimes or similar offenses in a manner befitting the rule of law. As is well known, the whole country is unstable at present. In a whole series of regions, attacks sharply limit the exercise of any kind of governmental power. The Iraqi justice system as well as the judges and officials of the justice ministry are a particular target of violence. (See Gunmen Shoot Dead Top Iraqi Judge, BBC News, Dec. 23, 2003, http://news.bbc.co.uk/2/hi/middle_east/3343195.stm; Iraqi Judges Reluctant to Lead War Crimes Trials of Baathists: Fear Reprisals, *National Post*, Jan. 6, 2004, 2004 WL 57226564; 21 shot dead in Iraq police station massacre, AFP, Nov. 7, 2004, http://story.news.yahoo.com/news?tMpl=story&u=/afp/20041107/wl_mideast_afp/iraq_unrest_041107113613&e=3, last accessed Nov. 11, 2004)

It must be noted that at the handing over of power in June 2004 to the Provisional Iraqi Government, the Iraqi system of justice was not even operating at the pre-war level. In this regard, human rights organizations critically observed how the Iraqi Special Tribunal established for the prosecution of war crimes was administered. With great concern, they note that the statute leaves out of consideration fundamental international guarantees of due process and moreover does not appear to assume any special experience for judges and prosecutors. Therefore worry has been expressed that if these grievances are not remedied the court will not be given sufficient recognition and legitimacy. (See http://hrw.org/english/docs/2004/09/28/iraq9410.htm)

To recapitulate, we can therefore establish that until now not a single proceeding against members of the U.S. Armed Forces has been brought before the Iraqi justice system.

According to the legal regulations in effect, this group of persons is freed from Iraqi jurisdiction, especially in consideration of the orders of the occupation force.

**No criminal prosecution by the International Criminal Court**

Neither the U.S.A. nor Iraq is a contracting party to the Rome Statute of the International Criminal Court (ICC). For that reason, the ICC cannot exercise its jurisdiction regarding the war crimes committed in Iraq in 2003/2004. According to Art. 13 of the Statute, the possibilities in which the court can exercise its jurisdiction are, for one thing, restricted. Further, none of the specified possibilities appears probable as of now. Initiation of a procedure on the basis of a decision of the Security Council according to Chapter VII of the United Nations Charter is in fact excluded, since the U.S.A. would exercise its veto power. The other possibilities have until now not been used and are therefore improbable. To recapitulate, we can therefore establish that the persons charged with the stated crimes will be criminally prosecuted neither in the place they were committed, Iraq, nor in the U.S.A., the country of origin of the perpetrators.

The International Criminal Court has likewise not become operative in the cases of war crimes in Abu Ghraib, Iraq, and it is not to be expected that it will become active.

### 5.2.2. Prosecutorial Discretion of the Federal Prosecutor

According to new law, the standard of § 153 f Code of Criminal Procedure is to be observed. This procedural law is to "surround" the international law principle stipulated in § 1 CCIL and structure the discretion of the prosecutor who, according to new law, not only has competence but also a prosecutorial duty (see Werle/Jessberger, *JZ* 2002, 725, 732 f.). Thus, CCIL occupies a position friendly to international criminal law.

According to the analyses above, one of the conditions of § 153 f Para. 1 Code of Criminal Procedure is at least partially fulfilled, specifically that some of the suspects

reside in this country and some others, at least in so far as they belong to the top level of government, can certainly be expected to set foot in this country. In this respect a transit journey suffices (see Werle/Jessberger, op. cit). Three of the ten accused, Sanchez, Wojdakowski and Pappas, are living in Germany regularly for official reasons. In the case of the other accused, regular German visits are likewise probable. This is the case, at least for the civilian superiors, like the first accused, U.S. Secretary of Defense Rumsfeld, the second accused, former CIA chief Tenet and the tenth accused as a high-ranking Pentagon staff.

In what follows certain considerations will be listed, which speak for a domestic connection and which must be taken into account with respect to procedural discretion.

Through its deployment of federal army units with 1,250 soldiers in the "International Security Assistance Forces" (ISAF) and in other ways, the Federal Republic of Germany is involved in Afghanistan. It is true that Germany has not been directly involved in the Iraq War through deployments of its own troops. However, U.S. military air fields in Germany are the hub for air traffic between the U.S.A. and the Near East. The military infrastructure of the USA in Germany performs important functions in relation to the warfare taking place in the Near East. As an example we can mention the health system. Germany has permitted the United States' overflight rights as well as the use of the whole military infrastructure found on German soil. This applies both to the storage and the onward transport of war material as well as to the transport of troops and their stopovers in Germany. The U.S. Command facilities, such as US-EUCOM in Stuttgart-Vaihingen, have been, along with all communication and infrastructure facilities, used in the conduct of the Iraq War and are still being used in combating the uprising in Iraq. However, most significantly, there are approximately 2,600 Federal Army soldiers deployed daily in guarding more than 50 properties of the U.S. Army. As a result, reserves of U.S. soldiers are freed up directly to take part in war activities. A training command of the Federal Army is now in the United Arab Emirates for the purpose of training 140 military personnel to be drivers and mechanics. Leaving direct involvement aside, Germany is therefore active in manifold ways in the conduct of the war on the side of the coalition

forces under the leadership of the U.S.A. From this follows the responsibility in the ongoing events of war to pay attention to compliance with the humanitarian laws of armed conflict in the unfolding of the war with respect to war-related events, and this also according to the requirements of German substantive and procedural criminal law.

Finally, there have been and there are residents of the Federal Republic of Germany, even if not, so far as is known, citizens, in U.S. custody in the prison camp of Guantánamo on the island of Cuba.

For the rest, the ruling of § 153 f CCP clarifies that the office of public prosecutor indeed *can* abstain from the prosecution of specific acts and in this respect structures and limits discretion according to § 153 f CCP. However, if the conditions named in § 153 f CCP do not exist, the public prosecutor must not refrain from acting. Further, the use of the word "especially" (*insbesondere*) in Para. 2 makes clear that other conditions, which constitute domestic pertinence, also reduce prosecutorial discretion. Therefore the domestic links mentioned in the previous section come into play here. Additionally, the rationale for § 153 f Para. 2 CCP (BT-Drucksache 14/8524, p. 38) makes it clear that the legal norm, namely the application of the international law principle according to § 1 CCIL, is only put aside if the domestic connection is totally lacking "and moreover [if] no international criminal court or directly involved state – in the framework of a juridical proceeding – has taken over the prosecution of the deed." In that case, criminal prosecution in Germany is to be abandoned, according to the principle of subsidiarity. The legal principle remains, however, unaffected if either the domestic connection is missing or prosecution abroad has been initiated. Both of these preconditions are missing here: there is neither a lack of domestic connection, nor have criminal prosecutorial measures been initiated by directly affected states.

Therefore the principle of international law obtains; its goal, preventing the impunity of human rights infractions, must be promoted. As correctly stated in the legal rationale: even if "the deed exhibits no domestic connection, … but no prior jurisdiction has begun investigations, the international law principle demands that German prosecutorial

authorities in any case undertake the investigatory such investigatory efforts as they can in order to prepare a later prosecution (whether in Germany or abroad)."

The two essential factors which could support abstention (see in this respect Beulke, op. cit., R. 41) are the already initiated prosecutorial activities of a state with prior competence, or of an international authority, and the complete lack of substance of the cases. Neither obtains in the present case. As has already been explained above (under 4.1), the military and penal proceedings initiated by the U.S.A. are limited to lower-ranking persons who were directly involved. In the U.S.A., no penal investigatory procedure has been initiated against any of the accused named here. In Iraq investigations of U.S. citizens have not been undertaken for the reasons identified here. Likewise, no proceeding has been initiated before the International Criminal Court.

### 5.2.3. Investigatory Methods Available to German Prosecutorial Authorities

Furthermore, there is a multitude of promising investigatory methods which German prosecutorial authorities can use.

First of all, an evaluation of all investigation reports freely available on the Internet and in other publications, memoranda and media, can be undertaken and thus the above compilation and evaluation of penal responsibility of the accused can be reconstructed.

Interrogation of the affected witnesses, the plaintiffs formerly detained in Abu Ghraib (Nos. 2 – 5), is an obvious possibility. They can on their part name numerous other affected witnesses. The witnesses are ready to testify in the framework of a penal proceeding before German prosecutorial authorities, either in the context of consular hearings in the German embassies in Baghdad, Iraq or in Amman, Jordan, or in the framework of prosecutorial or criminal-police hearings. The witnesses can be reached through the office of the undersigned and the first plaintiff. Moreover, the above-named

(under 2.3.) 31 persons and aggrieved individuals are ready to testify as witnesses before German prosecutorial authorities concerning the mistreatment suffered.

The testimony can be taken from the accused stationed in Germany, Sanchez, Wojdakowski and Pappas, and of all other accused, as soon as they travel to Germany.

Moreover, testimony relating to the incidents could be taken from personnel of the V Corps in Heidelberg as well as of the 205th Military Intelligence Brigade.

The V Corps of the U.S. Army took part in Operation Iraqi Freedom. Many of its members witnessed prisoner mistreatment, occurring in the various prison facilities in Iraq. The headquarters of the V Army Corps is at Römerstraße 168, D-69126 Heidelberg, Germany – see the official website http://www.vcorps.army.mil/default.htm. German prosecutorial authorities could therefore immediately request to speak with soldiers and officers in order to obtain further information on, and witnesses of, the incidents included in the indictment.

The 205th Military Intelligence Brigade, a part of the V Army Corps took part in Operation Iraqi Freedom. Many of its members are named in the indictment. The unit is stationed at the Wiesbaden Army Airfield (see the official website http://www.205mi.wiesbaden.army.mil/default.htm). The unit's leadership includes Colonel Pappas, the seventh accused, Lieutenant Colonel Antony J. McDonald, and Bruce E. Brown.

Subordinate units of the 205th Military Intelligence Brigade, namely the 165th and the 302nd Military Intelligence Battalions were involved in the incidents in Iraq. Both battalions are likewise stationed in Wiesbaden at the Army Air Base. (See the official website http://www.205mi.wiesbaden.army.mil/default.htm)

There are several written depositions of members of the brigades stationed in Germany, which could be evaluated. Their authors could be interrogated, for instance.

According to the Taguba Report, the civilian interpreter Adel. L. Nakhla, attached to the 205th military intelligence brigade, who was identified as a suspect (op. cit., p. 17) also the contracted employee Torin S. Nelson who, like the aforesaid, was employed by the Titan firm and is attached to the 205th military intelligence brigade. He is identified as a suspect in the Taguba Report (op. cit., p. 17). Extensive testimony was also given according to the Taguba Report and relevant press reports by Sergeant Samuel Jefferson Provance, a member of the 302nd military intelligence battalion. Witness Provance commented extensively to German, British and American media on the incidents.

The investigation team for the Taguba Report personally recorded the following witness testimony by people who belong to the 205th military intelligence brigade – Colonel Thomas Pappas, the commander of the brigade and the seventh accused, Lieutenant Colonel Robert P. Walters Jr., commander of the 165th military intelligence battalion, SW2 Edward J. Rivas, 205th military intelligence brigade, the civilian interrogator Steven Stephanowitz, employed by the CACI firm at the 205th military intelligence brigade, as well as John Israel, interpreter, employed by the Titan firm, attached to the 205th military intelligence brigade.

In the Taguba Report, both the seventh accused, Thomas Pappas, as well as the above-named Stephanowitz and Israel, were expressly identified as being either directly or indirectly responsible for the mistreatments in Abu Ghraib. (See Taguba Report, p. 48) In addition, a certain Fitch, who was employed in the 205th military intelligence brigade, was involved in the incidents. In September 2003, he was legal adviser to the command and devised, together with other military lawyers, a series of interrogation rules, which were later used in the interrogation of detainees in Iraq. (See Fay/Jones Report, p. 25 and Fay/Jones Report Annex B Appendix 1 Fitch Kazimer)

The Fay/Jones Report names a total of four members of the 302nd military intelligence battalion as witnesses to the incidents. However, their names were not given; they were only identified as soldiers 6, 9, 12, and 22. Their real names would be ascertainable from

the commander of the 302nd military intelligence battalion, Lieutenant Colonel James E. Norwood, and from Officer Robert B. Fast III.

Furthermore, German prosecutorial bodies can obtain information from the International Committee of the Red Cross (ICRC) in Geneva in support of prosecutorial measures on their part, to the extent that this would be compatible with ICRC's mission. This can be sought in particular cases. It is also expected that many documents can be seen there. It is also probable that the delegates of the International Committee of the Red Cross, who visited prisoner of war camps or detention facilities in Afghanistan, Guantánamo and Iraq, especially in Abu Ghraib, and have reported both internally and publicly on their visit, are ready to give testimony in Geneva or in Germany. The preparation and presentation of Red Cross reports is a part of the standard procedure of the International Committee. The report on Iraqi prisons contained observations and recommendations from visits that took place between March and November 2003. The report itself was officially passed on to the Coalition Forces in February 2004. Delegates and members of the ICRC would presumably be able to point German prosecutorial authorities to further leads for investigations and, as the case may be, to other direct witnesses. Notably, the President of the ICRC, Jakob Kellenberger, the editor of its magazine, Jean-François Berger, the press secretary and spokesperson for Iraq, Nada Doumani, and the head of Iraqi operations, Pierre Krähenbühl could be contacted. The headquarters of the ICRC is at Avenue de la Paix 19, CH-1202 Geneva, Switzerland.

In view of all these factors, there is no justification under § 153 f CPP for abstaining from going forward with the case.

### 5.3. Other Potential Obstacles to Prosecution in Germany

#### 5.3.1. Immunity as an Obstacle?

Sovereign immunity rests on two basic concepts, namely that of sovereign equality of all states and that of the maintenance of the operational capacity of international relations. Two kinds of immunity are distinguished, immunity *ratione materiae* and immunity *ratione personae.* (Ipsen, op.cit., § 26 Rn. 35 ff; Antonio Cassese, "When May Senior State Officials be Tried for International Crimes? Some Comments on The Congo v. Belgium Case," p.11 ff)

Immunity *ratione materiae* obtains for official acts of office holders in their official capacity. The official acts are thereby imputed only to the state, i.e. it is the state that is exclusively responsible in terms of international law, not the acting official. Therefore, in terms of substantive law, immunity *ratione materiae* negates individual (penal) responsibility, i.e. the official who acted in his official capacity cannot be held personally responsible even after he or she leaves office. Immunity *ratione materiae* is thus objectively circumscribed – it only applies to official acts in an official capacity – but not temporally circumscribed.

On the other hand, immunity *ratione personae* is granted to specific persons, who represent the state, for the duration of their period of office and for all their acts. It prevents judicial proceedings against the representatives of the state during their period of office, in order to guarantee the functioning of the state itself. Immunity *ratione personae* is thus temporally circumscribed – i.e. to the period of office – but is absolute, i.e. it applies to acts committed before and during the period of office in an official or private capacity. Immunity *ratione personae* is only granted to a limited group of persons, viz. heads of state, diplomats (Art. 31 Vienna Convention on Diplomatic Law), heads of government and foreign ministers (Democratic Republic of the Congo v. Belgium Case, Decision of February 14, 2002, n. 51). These persons are naturally also benefited by immunity *ratione materiae* for their acts in official capacity, i.e. in the case of a penal prosecution after the period of office has ended, the question of whether the action occurred in an official or private capacity is decisive. (Cassese, op. cit., p. 13)

In respect to members of a government, personal immunity has until now only been recognized for the head of government and the foreign minister, because they represent the state almost to the degree that the head of state does and because their official duties include many journeys abroad (Democratic Republic of the Congo v. Belgium Case, Decision of February 14, 2002, n. 53 ff.). Therefore, for the very maintenance of the state's functioning it is indispensable that these persons are not deterred from performing their official duty by arrest warrants, etc. issued abroad. On the other hand, no immunity *ratione personae* should be recognized in the case of the first accused, Secretary of Defense Rumsfeld, because journeys abroad are not among the primary tasks of a Secretary of Defense, so that he cannot be put on a par with a foreign minister in this respect. Furthermore, both the head of government and the foreign minister fundamentally represent the state abroad. The focus of the activities of a defense minister is oversight of the national armed forces and of national (military) policy. Therefore, the regular functioning of the state as such would not be inhibited if the defense minister could not travel to certain states because of a foreign arrest warrant. Furthermore, during official foreign visits the defense minister is as a rule allowed the status of a member of a special mission, i.e. he is treated as an ad hoc diplomat (Ipsen, op. cit., § 26, n. 36), so that he is not exposed to the danger of arrest in his travels in an official capacity. Immunity *ratione personae* for a Secretary of Defense is thus not essential for the functioning of the state itself and therefore is not recognized.

As Secretary of Defense, the first accused, Rumsfeld, is nevertheless invested with the attribute of sovereignty and enjoys (in principle) immunity *ratione materiae*, in so far as he acted in his official capacity. His breach of oversight duties must be seen as an act in his official capacity, because as defense minister he has oversight over the military. It is only his official status that allows him to prevent, permit or encourage international crimes. He is thereby fundamentally immune in respect to these deeds, and this holds true even after his period of office, because an infraction of international law in official capacity is involved.

However, in recent times an exception to immunity *ratione materiae* has developed in international customary law for war crimes, crimes against humanity and genocide. (Cassese, op. cit., p. 20; idem in *International Criminal Law*, 2003, p. 267; Werle, op. cit., n. 451; also Ipsen, op. cit., § 26 n. 37 ff.) The emergence of such a rule of international customary law by *opinio iuris* and state practice is shown by national cases (See Eichmann Case, Judgment of the Israeli Court of 5/ 29/1962, 36 *ILR*, 277 ff; Barbie Case, 78 *ILR*, 125 ff, 100 *ILR*, 331 ff; Kappler Case, Judgment of the Italian Supreme Military Court of 10/25/1952, 36 *Rivista di diritto internazionale* (1953),193 ff; Priebke Case, Judgment of the Roman Military Court of Appeals of 3/7/1998, *L'Indice Pénale* (1999), 959 ff; Rauter Case, Judgment of 1/12/1949, *Annual Digest* 1949, 526 ff; Albrecht Case, Judgment of 4/11/1949, *Nederlands Jurisprudentie* 1949, 747 ff; Bouterse Case, Judgment of the Amsterdam Court of Appeals of 11/202000, http://www.icj.org/objectives/decision.html; von Lewiski, *Annual Digest* 1949, 523 f; Kesserling, *Law Reports of Trials of War Criminals* (1949), vol.8, at 9 ff; Pinochet Case, Judgment of the House of Lords of 3/24/1999, (1999) 2 All E.R. 97 ff; Yamashita Case, Judgment of the US Supreme Court, L. Friedman, *The Law of War, A Documentary History*, vol.II, (1972) 1599 ff; Buhler Case, Decision of the Polish Supreme Court, *Annual Digest* 1948, 682; Miguel Cavallo Case, Mexican extradition decision of 1/12/2001, http://www.derechos.org/nizkor/arg/espana/mex.html). International court decisions also substantiate the development of this juridical principle (see Karadzic Case and others, ICTY, Trial Chamber I, Decision of 5/16/1995, para 24; Furundzija, ICTY, Trial Chamber II, Decision of 12/10/1998, para 140; Slobodan Milosevic Case, ICTY, Trial Chamber III, Decision of 11/8/2001, Para 26 ff). In fact, most of the national decisions have dealt with the immunity of members of the military. Since members of the military are also office holders and thus benefit from immunity *ratione materiae*, it is not apparent why something else should apply to a defense minister, because, as shown above, the latter is only granted immunity *ratione materiae*.

The basis of this customary law exception is subject to some dispute: On the one hand it is argued that international crimes are always "private acts," while others say that the necessary reconciliation of interests between the protection of individuals and collective

sovereignty would, in view of the growing significance of human rights, lead to a restriction of immunity. (Bothe, "Die strafrechtliche Immunität fremder Staatsorgane," *ZaöRV* 31 (1971), 246 ff; Bröhmer, *State Immunity and the Violation of Human Rights*, 1997) A further approach is the recognition of fundamental human rights as *jus cogens*, whose violation can be dealt with by denial of immunity or by the forfeiture of sovereignty rights (Kokott, "Missbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen," *FS Bernhardt*, 1995, 135 ff; Ambos, "Der Fall Pinochet und das anwendbare Recht," *JZ* 1999, p. 16, 22, with further annotations.). This legal point of view is especially reflected in the frequently mentioned pre-eminence of human rights over state sovereignty (as also seen with respect to humanitarian interventions). The principle of individual responsibility for international crimes strengthens the rule of international law in cases of breaches of international law, for if immunity for ex-officio crimes were to continue, the principle of international law would largely wither. Finally, the deployment of the state apparatus for the commission of most elements of an international crime is unavoidable – it is hardly possible that genocide can be committed without the cover of the state – so that criminal prosecution would always be excluded due to immunity *ratione materiae* that is not temporally circumscribed.

According to this exception in customary law exception to the principle of material immunity, the fact that the perpetrators acted in their official capacity leaves intact their individual responsibility before international and national courts under international criminal law. In respect to international crimes committed in an official capacity there is thus a competing responsibility between the state and the office holder him- or herself. Therefore, nothing speaks against the prosecution in German courts of Rumsfeld's actions performed in his official capacity.

### 5.3.2. The NATO Statute (Status of Forces Agreement – SOFA)

The NATO Statute (Status of Forces Agreement – SOFA) is not an impediment to prosecution of the accused persons in Germany for two reasons. According to present

knowledge, only four of the accused would in any case be affected. The more fundamental argument is that SOFA is only applicable to crimes committed in the receiving state and not to crimes committed in third states. Even if one did not follow this reasoning, the second argument would apply: since the United States is not exercising its prior jurisdiction in the case of the accused persons, which it is entitled to do according to SOFA, Germany can take over the prosecution without violating SOFA.

According to one interpretation, SOFA is not applicable in the present case, because the statute applies only to crimes committed in the receiving state by members of the armed forces of the sending state that sent them. Since the crimes in question were committed in Iraq, SOFA neither restricts German jurisdiction nor grants immunity to members of the U.S. armed forces, to whom it would otherwise be applicable.

The meaning and aim of SOFA was to regulate the problem of the permanent stationing of foreign troops in sovereign states in time of peace, since this could otherwise be regarded as an act of occupation. The U.S.A. tried to negotiate legal areas such as customs law, labor law, tax law and national criminal prosecution with the receiving states. (Colonel Richard J. Erickson, "Status of Forces Agreements: A Sharing of Sovereign Prerogative," *37 A.F.L. Rev.* 137, 139 (1994)) From the beginning, international criminal prosecution was not part of the negotiations. The contracting parties to SOFA wanted to regulate national criminal prosecution in relation to the stationed soldiers, since international law fundamentally provides that in peace time the receiving state has full jurisdiction over all crimes within its borders. (see Erickson, op. cit.) Amnesty International states:

> Contemporary existing SOFAs are designed to allocate *primary* responsibility for investigating and prosecuting crimes among states with concurrent jurisdiction, not to give impunity to nationals of sending state for crimes committed in receiving state by vesting *exclusive* jurisdiction in US courts. They were originally drafted to govern the allocation of such primary responsibilities for US forces stationed in NATO countries to ensure that US military courts-martial would try members of US armed forces for

> military disciplinary offences committed in receiving states, to ensure that members of US armed forces would be investigated and tried by courts with familiar procedures and applying familiar law, to ensure that members of US armed forces would receive what was then considered greater fair trial protections than in foreign courts and to ensure that crimes committed by members of US armed forces against US nationals were investigated and tried, since it was perceived that these crimes would be of lower priority for foreign courts. (International Criminal Court, US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes, Amnesty International, http://www.amnesty.org.il/reports/US2.html.)

One should moreover take into account that according to the well established jurisprudence of the Supreme Court of the U.S.A. a sovereign state exercises exclusive jurisdiction in respect to violations of law, committed within its own borders; at least, in so far as jurisdiction has not explicitly or implicitly been transferred. (Wilson v. Girard, 354 U.S. 524, 529, 77 S.Ct. 1409, 1411, 1 L.Ed. 1544 (1956)) According to another decision, the jurisdiction of a nation within its own territory is necessarily exclusive and absolute. Nothing can restrict it. (The Schooner Exchange v. M'Faddon, 7 Cranch 116, 136, 3 L. Ed. 287 (1812)). Precisely because of these general rules there is a long tradition in U.S. policy of finding remedy in mechanisms like the NATO statute (see Erickson, op. cit.). However, in the SOFA text there is no provision explicitly excluding the exercise, recognized under international law, of extra-territorial jurisdiction by German courts. In the Introduction of SOFA it is stated that the statute's aim is to regulate the status of armed forces while they are resident in the territory of another party. This statement has to be interpreted to mean that SOFA only accords prior jurisdiction to the sending state dispatching the troops in the case of certain crimes committed within the territory of the receiving state. If SOFA were interpreted such that the crimes committed in third states were also covered, Germany would be barred from exercising its jurisdiction in the case of the passive personality's principle. This would bar the prosecution of crimes committed by members of the U.S. Armed Forces in third countries against a German citizen. Amnesty International states in this regard that the structure of

Art. VII SOFA makes clear, both in its original meaning and its ensuing practice, that SOFA was not intended to guarantee criminal impunity to the members of the armed forces of the sending state but rather wanted to ensure the transfer of competence for the investigation and prosecution of crimes. (Amnesty International, op. cit.)

This interpretation of SOFA is in accord moreover with the attitude of the German Federal Government in negotiations concerning the granting of immunity to members of the U.S. Armed Forces before the International Criminal Court. Germany was one of three states that abstained in the Security Council's vote on the extension of immunity. ("U. S. Granted ICC Immunity," *The Globe and Mail*, June 13, 2003, http://foi.missouri.edu/icc/usgranted.html.). Furthermore, Germany has publicly stated that it would defy any agreement suggested by the U.S.A. for the purpose of guaranteeing immunity from criminal prosecution to members of its armed forces before the ICC for War Crimes. (Thomas Fuller, "EU Deal Could Give U. S. Troops Immunity," *International Herald Tribune*, October 1, 2002, http://www.iht.com/articles/72280.html.). If Germany or the U.S.A. believed that SOFA granted immunity for human rights crimes, such public statements would not be necessary. (See "International Criminal Court, US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes," Amnesty International, http://www.amnesty.org.il/reports/US2.html.).

Even if one were not to follow this interpretation, in analyzing SOFA one nevertheless still must come to the conclusion that there is no obstacle to criminal prosecution against the persons in question for their alleged crimes.

German jurisdiction is not based solely on SOFA. According to Art. VII No. 1 b SOFA, the receiving state of foreign NATO troops is entitled to jurisdiction in respect of their acts committed on its territory. The acts were partly committed by American NATO soldiers stationed in Germany, but they were not committed on Germany territory.

Actually, jurisdiction existing in other ways is not excluded by SOFA. Art. VII No. 1 b SOFA does not constitute a decisive division of competence between the sending and the

receiving state in respect to NATO stationed troops. One cannot draw the opposite conclusion – that otherwise existing German jurisdiction, specifically here according to §§ 1, 8 CCIL is excluded - from this provision. Art. VII SOFA only defines the distribution of competence between the jurisdiction of the receiving state according to the territoriality principle and the jurisdiction of the sending state according to the active personality principle, because between these two principles conflicts of competence typically arise in the case of troops stationed abroad. Art. VII No. 1 SOFA is a of a purely declaratory provision. Both the sending state and the receiving state are entitled to jurisdiction by international customary law.

Its very wording shows that Art. VII No. 1 SOFA does not refer to mutually exclusive entitlements. Had the contracting parties of SOFA wanted to bar all other entitlements, they could have made this exclusive character known, and would have been obliged to do so through the word "only" or "exclusive." Indeed, in interpreting SOFA its historical context should also be taken into account. For example, the developments in international law mentioned above only occurred after the conclusion of SOFA. Consequently, at that point in time there was still no need to rule out universal jurisdiction. However, even then criminal jurisdiction was recognized in terms of international customary law on the basis of other principles than the principle of territoriality and the active personality principle, e.g. on the basis of the passive personality principle (jurisdiction for the state of whom the crime victim is a citizen) or the protection principle (jurisdiction for the state whose specific interests were violated by the deed, e.g. forgery of money). In this respect, at the conclusion of SOFA it would not have been superfluous to clarify an intended conclusive character of Art. VII No. 1. This intention existed however neither according to the wording nor according to the travaux préparatoires in which no indication is found that the SOFA was to define jurisdiction (J. H. Rouse, G. B. Baldwin, "The Exercise of Criminal Jurisdiction under the NATO Status of Forces Agreement," *American Journal of International Law*, vol. 512, 1957, p. 29, 34).

According to Art. VII No. 3 a ii SOFA, the subordinate competing jurisdiction of the receiving state is excluded if the act or omission in question is that of a NATO soldier in

his or her official capacity. The main issues therefore are whether the mistreatment of the prisoner constitutes an official or a private act and who decides this question.

According to the travaux préparatoires, the military authorities of the sending state may decide if the act was committed in the exercise of an official function. (A. Ciampi, see below, who refers to Joseph M. Snee & A. Kenneth Pye, "Status of Forces Agreements and Criminal Jurisdiction," 46-54 and Serge Lazareff, *Status of Military Forces Under Current International Law*, Leiden, Sijthoff, 1971; R. R. Baxter, "Criminal Jurisdiction in the NATO Status Force Agreement," *International Comparative Law Quarterly*, vol. 7, 1958, S. 72, 78). This corresponds to the U.S. position and is in part established by the similarity to diplomatic immunity, in which it is also the sending state that determines who is a diplomat and therefore enjoys diplomatic immunity (J.H. House, G.B. Baldwin, op. cit., p. 41). Against this it is argued that according to state practice the court of the receiving state must decide this question. (D.S. Wijewardane, "Criminal Jurisdiction Over Visiting Forces with Special Reference to International Forces," *British Yearbook of International Law*, vol. 41, 1965-66, p. 122, 143). In accord with more recent state practice (Public Prosecutor v. Ashby. Judgment No. 161/98. Court of Trent, Italy, Decision of July 13, 1998) it is to be assumed that German courts would be authorized to decide.

Some of the perpetrators maintain that they acted on the basis of superior orders. Supposing this to be true, it would refer to acts in the exercise of official functions. Then the perpetrators would be acting in their official capacity, specifically as soldiers carrying out military orders, and not as private persons. The carrying out of superior orders is precisely the task of a soldier. Without the existence of an explicit order, the perpetrators committed their actions exclusively in their official capacities as soldiers and prison guards in the occupation zone. Even without an express instruction, they were under enormous pressure to induce the prisoners to give information by any means necessary. The acts of torture are therefore in direct relationship with the tasks assigned to the perpetrators.

It is questionable whether one can accept that an *ultra vires* violation of the Geneva Conventions always suspends the chain of accountability (leading to the superiors) because, according to this argument, an international crime can never be the tasks of a state and of NATO soldiers (similarly in respect to violation of the orders on flight altitude: A. Ciampi, "Public Prosecutor v. Ashby. Judgment No. 161/98. Court of Trent, Italy, July 13, 1998", American Journal of International Law, vol. 934, 1999, 219, 221.). In favor of this view, it can be argued that Art. VII SOFA must be interpreted as an exception to the general regulation of entitlements, i.e. prior jurisdiction according to no. 3 a ii can only exist if the act occurred in the carrying out of a task provided for in the NATO Treaty (A. Ciampi, op. cit., p. 221). The problem with this argument is that Art. VII No. 3 a ii SOFA would largely collapse because it is intrinsically to be assumed that the tasks provided for in the NATO Treaty do not constitute criminal violations. Additionally, there is no such urgent need of an exception for violations of international law as there is in the case of immunity, since the attribution of the acts to the official functions of the soldiers in fact does not entail their impunity but rather establishes the prior jurisdiction of the sending state. It is difficult to cite the principle of personal responsibility in the context of crimes against international law and the growing significance of human rights for the disruption of the accountability context. For this reason a prior entitlement of the U.S.A. arguably exists due to Art. VII No. 3 a ii SOFA.

Indeed, in such a case, according to Art. VII No. 3 c SOFA, the subsidiary jurisdiction of the receiving state can also be exercised if the state with prior entitlement – here thus the U.S.A. – firstly, itself exercises no jurisdiction and, secondly, waives its own entitlement. In addition, the recipient state is not barred from the exercise of its subsidiary jurisdiction if the primarily entitled state either does not exercise its primary jurisdiction at all or restricts itself to disciplinary measures against its soldiers (A. Ciampi, op. cit., p. 223; this, however, in contrast to the Italian court). A disciplinary proceeding cannot be regarded as comparable to a judicial proceeding, so that the *ne bis in idem* principle of Art. VII No. 8 SOFA does not interfere. In the case of another interpretation, Art. VII No. 3 SOFA would indeed not only stipulate a prior, but also an exclusive, jurisdiction, which would have to be so designated. In such a case, the U.S.A. would arguably have to be

entreated to yield its primary jurisdiction, in so far as the U.S.A. had already exercised this conclusively in the form of disciplinary measures.

**6. Final Remark**

On the basis of the very voluminous facts of the case and of the factual and legal problems linked to it, not all aspects could be comprehensively treated in the present complaint without exceeding its scope. Some of the problems may become clear from the attachments. In any case, we are expressly soliciting the opportunity to submit additional opinions, reports and documents, in the event that the Federal Prosecutor's Office intends not to initiate an investigatory procedure itself or intends not to take over the investigations. Before a conclusive decision is reached the undersigned requests access to the files and requests their transmission to his office address.

If the Federal Prosecutor's Office should, for whatever reasons, reject the opening of an investigation into war crimes according to CCIL, we request, in view of a possible appeal to the Federal Supreme Court, a determination considering the above-mentioned cases of torture, according to § 13 a CCP in connection with § 6 No. 9 Criminal Code.

In our view, such a determination would not be necessary once an investigation into war crimes according to CCIL is commenced. In that case the culpable acts of torture would become annexed criminal acts in the sense of the well-known jurisprudence of the Federal Courts of Appeal (in the Yugoslav cases, cf. BGH NStZ 1999, p. 396 ff.), and the Office of the Federal Prosecutor would remain competent in this respect.

Finally, we request a short initial consideration of the complaint and transmission of the file number.

Kaleck
Attorney

**Glossary of Acronyms**

CAT: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCIL: Code of Crimes against International Law
CCP: Code of Criminal Procedure
CCR: Center for Constitutional Rights
CIA: Central Intelligence Agency
CJTF: Combined Joint Task Force Seven
DCG: Deputy Commanding General
DOD: Department of Defense
DOJ: Department of Justice
ECPHR: European Convention for the Protection of Human Rights and Fundamental Freedoms
ECHR: European Court of Human Rights
FBI: Federal Bureau of Investigation
HRW: Human Rights Watch
ICC: International Criminal Court
ICCPR: International Covenant on Civil and Political Rights
ICRC: International Committee of the Red Cross
ICTR: International Criminal Tribunal for Rwanda
ICTY: International Criminal Tribunal for the former Yugoslavia
JIDC: Joint Interrogation and Debriefing Center
MI: Military Intelligence
MP: Military Police
NATO: North Atlantic Treaty Organization
SOFA: Status of Forces Agreement
UN: United Nations