

2006

## The International Criminal Court: Defining Complementarity and Diving Implications for the United States

Julie B. Martin

*United States Court of Appeals for the Armed Forces*

Follow this and additional works at: <http://lawcommons.luc.edu/lucilr>



Part of the [International Law Commons](#)

---

### Recommended Citation

Julie B. Martin *The International Criminal Court: Defining Complementarity and Diving Implications for the United States*, 4 Loy. U. Chi. Int'l L. Rev. 107 (2006).

Available at: <http://lawcommons.luc.edu/lucilr/vol4/iss1/7>

This Feature Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago International Law Review by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

# THE INTERNATIONAL CRIMINAL COURT: DEFINING COMPLEMENTARITY AND DIVINING IMPLICATIONS FOR THE UNITED STATES

Julie B. Martin<sup>†</sup>

## I. Introduction

The United States has consistently objected to potential International Criminal Court (“ICC”) jurisdiction over U.S. citizens, citing concerns that the ICC could be used as a tool for political prosecutions<sup>1</sup> and that its jurisdiction would extend to the president and other government officials.<sup>2</sup> Although the ICC operates under the principle of complementarity, by which it will assert jurisdiction only if a state is unwilling or unable to investigate or prosecute an alleged crime itself,<sup>3</sup> the concerns of the United States remain strong.

This article addresses the validity of these concerns by examining complementarity in the context of two current events: the ICC investigation in the Sudan and the allegations of detainee abuse in Iraq. Part II reviews the ICC Office of the Prosecutor’s treatment of complementarity in its investigation of war crimes and crimes against humanity in the Darfur region of the Sudan. Part III attempts to apply this working definition of complementarity to the allegations of detainee abuse by U.S. forces in Iraq and the ICC’s potential jurisdiction over the government and military officials responsible for command of those forces. In so doing, this article analyzes whether the protections of complementarity are sufficient to allay U.S. concerns over the possibility of its officials falling within the Court’s jurisdiction. It concludes that while the risk of ICC intervention in the immediate controversy over detainee abuse is negligible, an ICC determination that the United States is unable or unwilling genuinely to investigate or prosecute high-ranking government and military officials is theoretically possible and potentially warranted should the U.S. government not conduct its own thorough and independent investigation that reaches all levels of command.

## II. Complementarity and the International Criminal Court

The ICC is the first and only permanent international criminal tribunal. The Court is empowered to prosecute crimes of genocide, crimes against humanity,

---

<sup>†</sup> Adjunct Professor of Scholarly Writing, The George Washington University Law School; Law Clerk, United States Court of Appeals for the Armed Forces. The ideas and comments expressed herein are solely those of the author and do not represent the views of the United States Court of Appeals for the Armed Forces. The author extends sincere appreciation to Professor Sean D. Murphy of The George Washington University Law School for his advice and comment in crafting this article.

<sup>1</sup> President’s Statement on the Rome Treaty on the International Criminal Court, 37 WEEKLY COMP. PRES. DOC. 4 ¶¶ 4, 6 (Dec. 31, 2000).

<sup>2</sup> 22 U.S.C. § 7421(9) (2004).

<sup>3</sup> Rome Statute of the International Criminal Court arts. 1, 17, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

## The International Criminal Court

war crimes, and the yet to be defined crime of aggression.<sup>4</sup> Though the ICC was only recently established in 2002, one hundred countries are State Parties to its implementing treaty, the Rome Statute,<sup>5</sup> and states have widely accepted its definitions of crimes as codification of existing customary law.<sup>6</sup> This section provides a brief overview of provisions of the Rome Statute relevant to the Court's functions and the role of complementarity. It then focuses on the ICC Office of the Prosecutor's application of the complementarity principle to the conflicts in the Sudan's Darfur region.

### A. Key Provisions of the Rome Statute

Articles of the Rome Statute relevant to this inquiry relate to jurisdiction, complementarity, and admissibility. Components of all three provisions must be satisfied before the ICC can hear a particular matter. A case can be brought before the Court through one of three procedures: referral by a State Party;<sup>7</sup> initiation of an investigation by the Office of the Prosecutor ("OTP");<sup>8</sup> and referral by the United Nations Security Council.<sup>9</sup> To establish jurisdiction over a case referred by a State Party or initiated by the OTP, the state in whose territory the alleged crime was committed or the state of the alleged offender's nationality must be party to the Rome Statute or must have agreed to jurisdiction in the particular case.<sup>10</sup> There is no such requirement for a case referred by the Security Council.<sup>11</sup>

Complementarity is the central component of the ICC's operation. This principle awards primacy of jurisdiction to a state's national courts unless the ICC determines the state "unwilling or unable genuinely to prosecute."<sup>12</sup> Comple-

---

<sup>4</sup> *Id.* art. 5.

<sup>5</sup> International Criminal Court: About the Court, <http://www.icc-cpi.int/about.html> (last visited Mar. 27, 2006).

<sup>6</sup> Antonio Cassese, *Crimes Against Humanity, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 356, 373-74 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

<sup>7</sup> Rome Statute, *supra* note 3, arts. 13(a), 14.

<sup>8</sup> *Id.* arts. 13(c), 15.

<sup>9</sup> *Id.* art. 13(b).

<sup>10</sup> *Id.* art. 12.

<sup>11</sup> *Id.* art. 13(b).

<sup>12</sup> *Id.* art. 17(2).

In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; [or] (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

*Id.* art. 17(3).

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to

## The International Criminal Court

mentarity is recognized in the Preamble to the Rome Statute, and Article 1 explicitly states that the Court's jurisdiction shall be complementary to that of national jurisdictions.<sup>13</sup> The OTP has described the ICC as a "last resort court" which will only intervene where no national investigation or prosecution has been or is being conducted, or where such national investigation or prosecution is "vitiating by an unwillingness or inability."<sup>14</sup>

Admissibility before the ICC based on inability or unwillingness is determined on a case-by-case basis.<sup>15</sup> The ICC's aim is to ensure that the most egregious crimes are punished, and its investigations center on identifying and prosecuting those who bear the greatest responsibility for those crimes. Thus, the ICC does not recognize sovereign immunity for officials<sup>16</sup> and provides that charges may arise from breach of command responsibility.<sup>17</sup> Crimes punishable under the Rome Statute are not restricted by a statute of limitations.<sup>18</sup>

These provisions significantly narrow the ICC's ability to hear cases. However, once a situation is deemed admissible, the Court's investigatory powers are quite broad. The OTP's investigation of crimes in Darfur offers a glimpse into the prosecutor's application of complementarity to find that the Sudan is unable or unwilling to investigate and potentially prosecute those most responsible for the atrocities in Darfur.

### B. Application of the Complementarity Principle to the Investigation in Darfur

On March 31, 2005, the Security Council referred the situation in Darfur to the ICC, marking the first exercise of its power of referral.<sup>19</sup> Darfur has been an international concern since late 2002, when a conflict began between government-sponsored militias and resistance groups.<sup>20</sup> Primarily a dispute between the African farmers who possess land in the Darfur region and the government and Arabic nomadic tribes, including a government-sponsored militia called the Janjaweed who seek control over that land, the conflict in Darfur has cost

---

obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

*Id.* art. 17(3).

<sup>13</sup> *Id.* art. 1.

<sup>14</sup> LUIS MORENO-OCAMPO, REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE SECURITY COUNCIL PURSUANT TO S.C. RES. 1593, at 3 (June 29, 2005) [hereinafter FIRST REPORT]. Referencing the ICC's complementary jurisdiction, ICC Judge Hans-Peter Kaul has stated that "[t]he lack of criminal proceedings before the ICC, if it results from the effective functioning of national systems, should be seen as a major success." Hans-Peter Kaul, *Construction Site For More Justice: The International Criminal Court After Two Years*, 99 AM. J. INT'L L. 370, 374 (2005).

<sup>15</sup> FIRST REPORT, *supra* note 14, at 4.

<sup>16</sup> Rome Statute, *supra* note 3, art. 27.

<sup>17</sup> *Id.* art. 28.

<sup>18</sup> *Id.* art. 53(4).

<sup>19</sup> S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

<sup>20</sup> International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur, delivered to the Security Council pursuant to S.C. Res., 1564*, U.N. Doc. S/2005/60 of 18 Sep. 2004, at 22–23 (Jan. 25, 2005) [hereinafter Commission Report].

## The International Criminal Court

thousands of lives and has displaced over 200,000 refugees.<sup>21</sup> Allegations of crimes committed during this continuing conflict are quite serious: both sides are accused of the targeted killing of civilians, torture, and systematic rape of women and girls.<sup>22</sup>

Upon receiving the Security Council's referral, the OTP, led by Prosecutor Luis Moreno-Ocampo, quickly commenced an investigation into the alleged atrocities.<sup>23</sup> By the time of his June 29, 2005 report to the Security Council, the prosecutor was able to conclude that there exists "a significant amount of credible information disclosing the commission of grave crimes within the jurisdiction of the Court" as war crimes or crimes against humanity.<sup>24</sup> Next, the OTP examined whether any of the identified crimes would be admissible before the ICC under the complementarity principle.<sup>25</sup> It concluded that cases against individuals bearing the greatest responsibility for the atrocities would likely be admissible before the ICC.<sup>26</sup>

Because the OTP investigators have thus far been unable to conduct independent investigations on the ground in Darfur, they necessarily based their conclusions on secondary sources. There is no public record of the materials the OTP reviewed in its admissibility assessment. Thus, this section considers other public accounts of the conflict in Darfur in its attempt to identify factors that were pertinent in the OTP's assessment. As indicated in Prosecutor Moreno-Ocampo's report to the Security Council, the OTP appears to have focused on three particular factors: (i) structure of and access to the national judicial system; (ii) independent and impartial investigation or national prosecution with regard to particular crimes or suspects; and (iii) status of the alleged offender.<sup>27</sup> The first two factors are somewhat intertwined as they apply to findings of ability and willingness. While recognizing their interrelated nature, this article attempts to clarify the functionality of the national judicial system as a critical aspect of ability and the existence of independent and impartial national investigations and prosecutions as a function of willingness.

### *1. Ability: Structure of and Access to the National Judicial System*

The first factor of importance in the OTP's admissibility review is the structure of the national judicial system and access to that system as a means of redress or punishment. The Rome Statute provides that a state may be deemed

---

<sup>21</sup> Estimates indicate that between 70,000 and 400,000 people have died during the conflict. Colum Lynch, *Lack of Access Muddies Death Toll in Darfur*, WASH. POST, Feb. 8, 2005, at A20, available at <http://www.washingtonpost.com/wp-dyn/articles/A6186-2005Feb7.html>; HUMAN RIGHTS WATCH, ENTRENCHING IMPUNITY: GOVERNMENT RESPONSIBILITY FOR INTERNATIONAL CRIMES IN DARFUR n.3 (2005), <http://hrw.org/reports/2005/darfur1205/darfur1205text.pdf> (last visited Nov. 9, 2006) [hereinafter ENTRENCHING IMPUNITY].

<sup>22</sup> Commission Report, *supra* note 20, at 3.

<sup>23</sup> ENTRENCHING IMPUNITY, *supra* note 21, at 56.

<sup>24</sup> *Id.*

<sup>25</sup> See Rome Statute, *supra* note 3, art. 53(1)(b).

<sup>26</sup> FIRST REPORT, *supra* note 14, at 3-4.

<sup>27</sup> *Id.*

## The International Criminal Court

unable to investigate or prosecute alleged crimes when “due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”<sup>28</sup>

Though its constitution established the judiciary as an autonomous entity, Sudan’s judicial system has at best been marginalized by the government, if not made totally ineffective in the years leading up to the current conflict.<sup>29</sup> The constitution provides a detailed organizational structure for the Sudanese court system that gives enormous power to the chief justice of the Supreme Court.<sup>30</sup> For instance, the chief justice is empowered to create and define the jurisdiction of the lower public courts and town courts.<sup>31</sup> Yet, despite the constitutional allocation of this power to the chief justice, President Omar Hassan El-Bashir has established his own temporary tribunals to hear specific cases stemming from the Darfur conflict.<sup>32</sup> With regard to the cases that remain in the constitutionally established judicial system, reports that judges who disagree with the government are often harassed and dismissed from their positions illustrate the government’s efforts to hamper the courts’ ability to function independently and objectively.<sup>33</sup> President El-Bashir has also issued decrees denying citizens their due process rights, such as access to counsel and the right to be present at trial, thereby further vitiating the ability of the traditional courts to conduct proceedings that comport with international standards.<sup>34</sup>

Thus, under this first factor, the structure of the Sudanese judicial system is riddled with problems that could create ICC jurisdiction. The president’s control over the judiciary and the government’s responsibility for authorizing and committing serious offenses against its citizens in Darfur create an environment in which the judiciary is unable to operate independently and effectively, rendering it unavailable to most victims of government-sponsored crimes. There is, therefore, a strong factual basis for the OTP’s finding that complementarity does not bar its investigation of high-ranking government, militia, and rebel leaders due to an inability of the national courts to hear such cases.<sup>35</sup>

---

<sup>28</sup> Rome Statute, *supra* note 3, art. 17(3).

<sup>29</sup> Commission Report, *supra* note 20, at 111 (referencing the Sudan’s constitution of 1998).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 112.

<sup>33</sup> *Id.* at 111.

<sup>34</sup> *Id.* at 113–14 (discussing in particular the 1991 Criminal Procedure Code and the Security Forces Act of 1999).

<sup>35</sup> LUIS MORENO-OCAMPO, SECOND REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE SECURITY COUNCIL TO S.C. RES. 1593, at 4–6 (Dec. 13, 2005) [hereinafter SECOND REPORT].

2. *Willingness: Independent and Impartial Investigation or National Prosecution with Regard to Particular Crimes or Suspects*

In addition to the judicial system's inability to exercise its full powers, the government may be found unwilling to investigate and prosecute crimes on a case-by-case basis.<sup>36</sup> Under the Rome Statute, unwillingness to genuinely investigate or prosecute occurs in the following situations: a state fails to conduct proceedings or proceedings are conducted for the purpose of shielding individuals from prosecution by other tribunals; proceedings lack independence and impartiality, and are otherwise inconsistent with bringing an offender to justice; or there is an unjustified delay in the proceedings evidencing a lack of intent to bring an offender to justice.<sup>37</sup>

a. *National Investigations*

The Sudanese government conducted one national investigation that warrants discussion in terms of its genuine willingness to investigate and, if necessary, prosecute offenders. The National Commission of Inquiry ("National Commission") was established by President El-Bashir in May 2004 to investigate five specified crimes: "bombing civilians in the context of the Geneva Conventions; killings [in combat]; extrajudicial killings; rape as a crime against humanity; and forcible transfer and ethnic cleansing."<sup>38</sup> The National Commission examined a large amount of evidence pointing to grave human rights abuses from a wide variety of sources, including personal interviews, reports of the United Nations and human rights organizations, and findings of other governments.<sup>39</sup> Thus, in the words of the UN-appointed International Commission of Inquiry on Darfur ("UN Commission"), which reported on the situation in Darfur to the Security Council, the National Commission "was fully aware of the serious allegations of the crimes committed in Darfur."<sup>40</sup> Yet, with clear evidence to the contrary, the National Commission concluded that any crimes committed in Darfur were the result of tribal conflicts and rebel activities, and that they were not grave enough or sufficiently widespread or systematic to qualify as crimes of international concern under the Rome Statute.<sup>41</sup>

In rejecting these findings, the UN Commission stated that:

[T]he report attempts to justify the violations rather than seeking effective measures to address them . . . . [T]he National Commission was under enormous pressure to present a view close to the Government's version of events. The report of the National Commission provides a glaring exam-

---

<sup>36</sup> *Id.*

<sup>37</sup> Rome Statute, *supra* note 3, art. 17(2).

<sup>38</sup> Commission Report, *supra* note 20, at 115.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 118. Under the Rome Statute, an act must be widespread or systematic to qualify as a crime against humanity. Rome Statute, *supra* note 3, art. 7.

## The International Criminal Court

ple of why it is impossible under the current circumstances in the Sudan for a national body to provide an impartial account of the situation in Darfur, let alone recommend effective measures.<sup>42</sup>

The UN Commission dismissed the National Commission's conclusions as questionable because of its lack of independence from, and lack of impartiality toward, the Sudanese government, a component of willingness specifically set forth in the Rome Statute.<sup>43</sup> In making its admissibility assessment with regard to particular cases, the OTP weighed independence and impartiality carefully,<sup>44</sup> though it is by no means clear that the OTP used the UN Commission Report as a source for its conclusions. However, using the UN Commission Report as an illustration of a reasonable assessment of the Sudan's willingness to investigate establishes a potential basis for the OTP's conclusion that the Sudan is unwilling to genuinely investigate.

### b. National Prosecutions

In addition to grounds for finding fault with the Sudanese national investigation, the OTP also found a sufficient basis on which to conclude that national courts are unwilling genuinely to prosecute those who have committed grave offenses in Darfur.<sup>45</sup> In addition to the president's tribunals discussed in the previous section, in 2003, the chief justice of Sudan's Supreme Court established a system of specialized courts to hear cases stemming from the Darfur conflict that are of interest to the government.<sup>46</sup> These specialized courts have jurisdiction over only a small number of criminal offenses, such as robbery, banditry, crimes against the state, and possession of unlicensed firearms.<sup>47</sup> Although they are intended to address crimes committed in the Darfur conflict, the specialized courts do not hear cases concerning physical assault, enforced disappearances and displacement, and rape—the most serious charges consistently alleged against government and Janjaweed forces.<sup>48</sup>

Further, prosecutors rarely bring allegations of misconduct by the nomadic tribes operating in conjunction with government forces,<sup>49</sup> and there are allegations that the government is using these specialized courts as tools against citizens suspected of being members of the rebel opposition groups.<sup>50</sup> The UN Commission witnessed and recorded statements of significant due process violations in the specialized courts, such as the failure to ensure that confessions made

---

<sup>42</sup> Commission Report, *supra* note 20, at 118.

<sup>43</sup> Rome Statute, *supra* note 3, art. 17(2).

<sup>44</sup> FIRST REPORT, *supra* note 14, at 4.

<sup>45</sup> SECOND REPORT, *supra* note 35, at 4–6.

<sup>46</sup> Commission Report, *supra* note 20, at 118.

<sup>47</sup> *Id.* at 112.

<sup>48</sup> *Id.* at 3.

<sup>49</sup> *Id.*

<sup>50</sup> AMNESTY INTERNATIONAL, SUDAN: THE SPECIALISED CRIMINAL COURTS IN DARFUR (2004), <http://web.amnesty.org/library/index/ENGAFR541542004> (last visited Nov. 9, 2006).



## The International Criminal Court

under torture or duress are excluded from proceedings and denial of the right to counsel.<sup>51</sup> Because these courts lack fundamental safeguards and because trials are conducted summarily and primarily against only the Africans, the UN Commission concluded that the specialized courts are incapable of providing adequate trial protections to the accused and redress to victims.<sup>52</sup> In its recommendation that the Security Council refer the Darfur conflict to the ICC, the UN Commission also recommended closure of the specialized courts.<sup>53</sup>

In examining the OTP's complementarity assessment in light of the findings of the UN Commission, it is clear that some cases could be admissible in the ICC due to the unwillingness of the Sudanese government and judiciary to provide redress for crimes that come within the ICC's jurisdiction.<sup>54</sup> Because the OTP evaluates complementarity with regard to each individual it contemplates prosecuting, the status of the alleged offender is an important final consideration in determining whether the state is able or willing to investigate and prosecute.

### 3. *The Status of the Alleged Offender*

The ICC was established to ensure that the most culpable perpetrators of egregious crimes are brought to justice. As with other international tribunals, the ICC may rely on national courts to try lesser perpetrators.<sup>55</sup> This system of operation is reflected in the OTP's July 2005 address to the Security Council, wherein Prosecutor Moreno-Ocampo stated that the purpose of the investigation is "twin tracked."<sup>56</sup> First, the OTP would focus on investigating individuals who bear the greatest responsibility for crimes committed in Darfur.<sup>57</sup> Second, the Sudanese courts and courts of other states with jurisdiction would be encouraged to assist in bringing other offenders to justice.<sup>58</sup>

In making its complementarity assessment concerning particular cases, the OTP must consider whether each potential defendant could successfully be investigated and potentially prosecuted in national courts.<sup>59</sup> Because the Sudanese national courts are not investigating or prosecuting high-level government officials or Janjaweed militia leaders, the activity of the national courts is not a bar to

---

<sup>51</sup> Commission Report, *supra* note 20, at 112. The Commission reasoned that "[t]he fact that the specialized courts apply principally to the Darfur States and Kordofan, rather than to the whole of Sudan, calls into question the credibility and reliability of these courts. The purpose of the courts is too glaring to miss." *Id.* at 113.

<sup>52</sup> *Id.* at 145.

<sup>53</sup> *Id.* at 113, 145.

<sup>54</sup> In his Second Report to the United Nations, Prosecutor Moreno-Ocampo concluded that the Special Court investigations do not "suggest that cases likely to be prosecuted before the International Criminal Court would be inadmissible . . . ." SECOND REPORT, *supra* note 35, at 6.

<sup>55</sup> See generally Statute of the International Criminal Tribunal for the former Yugoslavia art. 9, May 3, 1993, 32 I.L.M. 1159; Statute of the International Criminal Tribunal for Rwanda art. 8, Nov. 8, 1994, 33 I.L.M. 1598.

<sup>56</sup> FIRST REPORT, *supra* note 14, at 10.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Rome Statute, *supra* note 3, art. 17(3).

## The International Criminal Court

ICC jurisdiction.<sup>60</sup> In making this assessment, the OTP stated that “[i]t is important to emphasize that this decision [finding admissibility] does not represent a determination on the Sudanese legal system as such, but is essentially a result of the absence of criminal proceedings relating to the cases on which the OTP is likely to focus.”<sup>61</sup>

Based on an analysis of complementarity seemingly focused on ability, willingness, and status of the offender, Prosecutor Moreno-Ocampo concluded that some cases would be admissible in the ICC.<sup>62</sup> At the very least, the OTP views the Sudan as unable or unwilling genuinely to prosecute the most egregious offenders in the Darfur conflict—offenders who most likely are high-ranking government officials. The OTP’s determination should be of concern to the United States because it illustrates the ICC’s ability to assert jurisdiction in a situation in which outside involvement is unwanted and actively opposed.

### III. Implications for Future Investigations: Does the United States Have Cause for Alarm?

The United States is not a State Party to the Rome Statute.<sup>63</sup> Although the United States participated in drafting the Rome Statute, it has not become a State Party due to its concerns that the ICC’s jurisdiction extends to nationals of non-parties and encompasses senior government officials.<sup>64</sup> The United States enacted the American Servicemembers’ Protection Act (“ASPA”) to address and help remedy its concern that U.S. citizens could involuntarily be subject to ICC jurisdiction.<sup>65</sup> ASPA requires countries desiring U.S. aid or military assistance to

---

<sup>60</sup> See ENTRENCHING IMPUNITY, *supra* note 21, at 56; SECOND REPORT, *supra* note 35, at 6. Importantly, this report also notes that since establishing the Special National Criminal Court on Darfur as “a substitute to the International Criminal Court” the government has extended increased immunity protections to soldiers and continues to avoid prosecution of offenses amounting to war crimes. ENTRENCHING IMPUNITY, *supra* note 21, at 57.

<sup>61</sup> FIRST REPORT, *supra* note 14, at 4.

<sup>62</sup> *Id.*

<sup>63</sup> Press Statement, U.S. Dep’t of State, International Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002), <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>.

<sup>64</sup> President’s Statement on the Rome Treaty on the International Criminal Court, *supra* note 1, at 6. President Clinton signed the Rome Statute but stated that he would not send it to the Senate until concerns over the ICC’s jurisdiction were addressed. *Id.* The Bush administration subsequently revoked the United States’ signature. Press Statement, U.S. Dep’t of State, International Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002), <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>.

<sup>65</sup> American Servicemembers’ Protection Act, 22 U.S.C. §§ 7401–7433 (2006). In setting forth its reasons for enacting the ASPA, Congress stated that:

In addition to exposing members of the Armed Forces of the United States to the risk of international criminal prosecution, the Rome Statute creates a risk that the President and other senior elected and appointed officials of the United States Government may be prosecuted by the International Criminal Court . . . . No less than members of the Armed Forces of the United States, senior officials of the United States Government should be free from the risk of prosecution by the International Criminal Court, especially with respect to official actions taken by them to protect the national interests of the United States.

See *id.* § 7421(9) (2006); see also Rome Statute, *supra* note 3, art. 98. Article 98 prohibits the ICC from proceeding with a request for surrender of individuals to ICC custody if the request would require a state to act in a manner inconsistent with an international agreement requiring the sending state’s consent. *Id.* Such agreements are commonly called Article 98 or Bilateral Immunity Agreements (“BIAs”).

## The International Criminal Court

sign waivers of ICC jurisdiction under Article 98 of the Rome Statute unless they fall within a narrow class of specified exemptions.<sup>66</sup>

The United States has executed over one hundred Article 98 agreements, also called Bilateral Immunity Agreements (“BIAs”).<sup>67</sup> Thus, because ICC jurisdiction applies only if the state of territoriality or nationality is a State Party to the Rome Statute,<sup>68</sup> the UN Security Council refers a situation to the ICC,<sup>69</sup> or the prosecutor initiates an investigation,<sup>70</sup> and because all investigations are subject to an order of deferral by the Security Council,<sup>71</sup> significant protections are available to U.S. citizens abroad.

There are three main reasons for these protections. First, BIA’s require most, if not all, territorial states to which the United States sends diplomatic and military personnel to refuse ICC requests for surrender of U.S. citizens.<sup>72</sup> Second, the United States, as the state of nationality, would not voluntarily submit to the Court’s jurisdiction.<sup>73</sup> Third, the United States, as a permanent member of the Security Council, could veto any proposed resolution to grant the ICC jurisdiction over its nationals and could urge the Security Council to defer any investigation the prosecutor commences independently.<sup>74</sup> Therefore, BIAs, in combination with the U.S. role as a permanent member of the Security Council, provide significant protection against ICC jurisdiction.

### A. Potential Avenues for ICC Jurisdiction over U.S. Nationals

There are, however, three situations in which U.S. citizens could potentially come within the ICC’s jurisdiction. First, a State Party that has not executed a BIA with the United States could refer crimes committed on its territory to the ICC.<sup>75</sup> However, this is unlikely considering that Congress has severely restricted the deployment of U.S. military and peacekeeping forces to countries without BIAs.<sup>76</sup> Second, a non-State Party without a BIA and on whose territory a crime has been committed could accept the Court’s jurisdiction by submitting a

---

<sup>66</sup> 22 U.S.C. § 7426 (2006). Countries exempted from BIA requirements are: NATO allies; major non-NATO allies, specifically including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand, and Taiwan. *See id.* § 7426(d). The president may also make an exception for a country otherwise not exempt when he finds it in the national interest to do so. *See id.* § 7426(b).

<sup>67</sup> The American Non-Governmental Organizations Coalition for the International Criminal Court, Bilateral Immunity Agreements, [http://www.amicc.org/usinfo/administration\\_policy\\_BIAs.html](http://www.amicc.org/usinfo/administration_policy_BIAs.html) (last visited Oct. 27, 2006) (figure last updated May 2, 2005) [hereinafter AMICC].

<sup>68</sup> Rome Statute, *supra* note 3, art. 12.

<sup>69</sup> *Id.* art. 13(b).

<sup>70</sup> *Id.* art. 13(c).

<sup>71</sup> *Id.* art. 16 (stating that R. 1.5(a)(i) under Chapter VII of the UN Charter, the Security Council may issue a resolution ordering the ICC to defer prosecution for a period of one year and may renew the resolution indefinitely).

<sup>72</sup> AMICC, *supra* note 64, at 1.

<sup>73</sup> *See id.* at 2.

<sup>74</sup> *See* Rome Statute, *supra* note 3, art. 16.

<sup>75</sup> *See* Rome Statute, *supra* note 3, art. 12(2).

<sup>76</sup> *See* 22 U.S.C. § 7426 (2006).

## The International Criminal Court

declaration to the Court's Registrar.<sup>77</sup> Iraq is such a country.<sup>78</sup> Third, a State Party that has executed a BIA and on whose territory a crime may have been committed, such as Afghanistan,<sup>79</sup> could suspend or terminate the agreement on grounds of invalidity, asserting that it violates the object and purpose of the Rome Statute.<sup>80</sup> Yet, even if one of these somewhat remote possibilities were to come to fruition, and presuming that the United States claimed its jurisdiction as the state of nationality, the ICC could not assert jurisdiction over U.S. nationals unless it found the United States unable or unwilling genuinely to investigate or prosecute under the Rome Statute.<sup>81</sup> With this framework in mind—particularly Iraq's ability to submit to ICC jurisdiction—the next section provides a factual account of the Department of Defense interrogation policies employed at the Abu Ghraib prison as a basis for examining whether complementarity would be a bar to ICC jurisdiction over U.S. officials for the abuses committed in Iraq.

### B. Authorized Interrogation Procedures and Detainee Abuse at the Abu Ghraib Prison in Iraq

Where the documentation of atrocities in the Sudan is obtained from non-state actors and organizations, much of the information on the interrogation policies of the United States and how those policies evolved into practice is available from the U.S. government itself. Because statements made by government officials are highly probative evidence in international courts,<sup>82</sup> the information concerning U.S. interrogation policy and detainee treatment may be particularly signifi-

---

<sup>77</sup> Rome Statute, *supra* note 3, art. 12(3).

<sup>78</sup> Iraq is not a party to the Rome Statute and has not executed a BIA with the United States. International Criminal Court, Assembly of State Parties, <http://www.icc-cpi.int/asp/statesparties.html> (last visited Oct. 29, 2006); AMICC, *supra* note 67.

<sup>79</sup> Afghanistan acceded to the Rome Statute on February 10, 2003. International Criminal Court, Assembly of State Parties: Afghanistan, <http://www.iccpi.int/asp/statesparties/coutry&id=41.html> (last visited Oct. 13, 2006). It executed a BIA with the United States on September 20, 2002. AMICC, *supra* note 67.

<sup>80</sup> See James Crawford, Philippe Sands & Ralph Wilde, In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute 24 (2003), [http://www.amicc.org/docs/Art98\\_14une03FINAL.pdf](http://www.amicc.org/docs/Art98_14une03FINAL.pdf) (last visited Oct. 29, 2006) (reasoning that an important object and purpose of the Rome Statute is to avoid impunity, so to the extent that the United States would not investigate or prosecute individuals protected by BIAs, upholding such agreements may cause State Parties to violate the object and purpose of the Statute). See generally Eric M. Meyer, *International Law: The Compatibility of the Rome Statute of the International Criminal Court with the U.S. Bilateral Immunity Agreements Included in the American Servicemembers' Protection Act*, 58 OKLA. L. REV. 97, 116–30 (2005) (discussing concerns with the broad scope of BIAs and their lack of language providing that U.S. nationals would be investigated and potentially prosecuted by the U.S. government).

<sup>81</sup> See Rome Statute, *supra* note 3, art. 17(1)(a).

<sup>82</sup> *Military and Paramilitary Activities In and Around Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 41 (June 27). In this opinion, the International Court of Justice reasoned that:

The material before the Court also includes statements by representatives of States, sometimes at the highest political level . . . . [S]tatements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable [sic] to the State represented by the person who made them. They may then be construed as a form of admission.

*Id.*

## The International Criminal Court

cant to a potential complementarity assessment. This section reviews documentation of the U.S. government's policies and procedures pertaining to interrogation and torture to illustrate the lack of clear guidelines and boundaries for servicemembers in Iraq. It argues that this lack of clear policy guidelines ultimately led to a situation ripe for abuse at Abu Ghraib.<sup>83</sup> The next section explores the possibility that the ICC could make a finding of unwillingness or inability on the part of the United States in the context of detainee abuse at Abu Ghraib.

### *1. Authorization of Alternative Interrogation Techniques at Guantanamo Bay*

In early 2002, Secretary of Defense Donald Rumsfeld directed that, pursuant to a presidential determination, members of Al Qaeda and the Taliban were not entitled to prisoner-of-war ("POW") status under the 1949 Geneva Conventions.<sup>84</sup> Thus, when captured, such individuals were to be treated "humanely" and "to the extent appropriate and consistent with military necessity, in a manner consistent" with the Geneva Conventions,<sup>85</sup> rather than explicitly in accordance with them.

On December 2, 2002, Secretary Rumsfeld authorized several new procedures for interrogation at the request of Major General Michael Dunlavey, Commander of the Joint Task Force at Guantanamo Bay, Cuba, who voiced concern that the existing tactics provided in the Army Field Manual were yielding insufficient intelligence.<sup>86</sup> These new procedures included: using stress positions such as standing in uncomfortable positions for up to four hours; solitary confinement for up to thirty days; deprivation of light and sound; twenty-four hour interrogations; removal of clothing; using detainees' individual phobias to induce stress; and "mild non-injurious physical contact, such as grabbing, poking in the chest with the finger, and light pushing."<sup>87</sup> These new techniques, although surpassing the conduct allowed under the Geneva Conventions and the Army Field Manual, were consistent with the U.S. Department of Justice Office of Legal Counsel's ("OLC") narrow definition of torture as "intense pain or suffering of the kind that

---

<sup>83</sup> For a comprehensive account of the development of U.S. policy regarding the status and treatment of detainees, see Sean D. Murphy, *Contemporary Practice of the United States*, 98 AM. J. INT'L L. 820 (2004).

<sup>84</sup> Memorandum from Donald H. Rumsfeld, Sec'y of Def., to the Chairman of the Joint Chiefs of Staff 1 (Jan. 19, 2002), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.19.pdf> [hereinafter Rumsfeld Memorandum]; Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Richard B. Cheney, Vice President, Colin Powell, Sec'y of State, Donald H. Rumsfeld, Sec'y of Def., John Ashcroft, Attorney Gen., and Other Officials 1 (Feb. 7, 2002), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/020207.pdf>.

<sup>85</sup> Rumsfeld Memorandum, *supra* note 84.

<sup>86</sup> Memorandum from William J. Haynes II, Dep't of Def. Gen. Counsel, to Donald H. Rumsfeld, Sec'y of Def. 1 (Nov. 27, 2002), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf> [hereinafter Haynes Memorandum] (bearing Secretary of Defense Rumsfeld's signature in approval on December 2, 2002); Memorandum from Michael Dunlavey, Major Gen., to Commander of U.S. S. Command 1 (Oct. 11, 2002), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.10.11.pdf> [hereinafter Dunlavey Memorandum].

<sup>87</sup> Haynes Memorandum, *supra* note 86, at 1.

## The International Criminal Court

is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result.”<sup>88</sup>

Secretary Rumsfeld later repealed this authorization due to concerns raised over its legality<sup>89</sup> and approved twenty-four additional interrogation techniques for use at Guantanamo Bay three months later.<sup>90</sup> The vast majority of the new techniques did not set forth specific acts, but consisted of vague terms such as “Emotional Love: Playing on the love a detainee has for a particular individual or group” and “Fear Up Harsh: Significantly increasing the fear level in a detainee.”<sup>91</sup> The use of vague terms rather than specific descriptions of permissible conduct fostered wide latitude in interpretation, leaving individual interrogators to question what techniques were authorized and allowing them to determine such guidelines themselves.

### 2. Migration of Alternative Interrogation Techniques to the Abu Ghraib Prison in Iraq

Though the techniques were approved only for Guantanamo Bay, Major General Geoffrey Miller later brought them to Iraq and recommended them as a po-

---

<sup>88</sup> Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzalez, White House Counsel, Regarding Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A, 13 (Aug. 1, 2002), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf> [hereinafter Bybee Memorandum].

<sup>89</sup> Memorandum from Donald H. Rumsfeld, Sec’y of Def., to Commander of U.S. S. Command 1 (Jan. 15, 2003), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.01.15.pdf>; Murphy, *supra* note 83, at 826.

<sup>90</sup> Memorandum from Donald H. Rumsfeld, Sec’y of Def., to Commander of U.S. S. Command, Regarding Counter-resistance Techniques in the War on Terrorism, Tab A, 1–3 (Apr. 16, 2003), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf> [hereinafter Southern Command Letter]; *Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations* 6–8 (Apr. 4, 2003), <http://www.truth.org/cgi-bin/artman/exec/view.cgi/4/4811>. The Working Group’s analysis argues in essence that the only protections against torture are found in the Constitution and that, because the Constitution does not apply extra-territorially to non-citizens, foreigners interrogated abroad (including at Guantanamo Bay) have no right to be free from torture. *Id.* This analysis turns a blind eye to international law and U.S. treaty obligations under the Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 24 I.L.M. 535. Treaty claims aside, the prohibition against torture is established as a norm of customary international law. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). Torture and cruel, inhuman, and degrading treatment can also constitute war crimes and crimes against humanity. See Rome Statute, *supra* note 3, arts. 7–8.

<sup>91</sup> Southern Command Letter, *supra* note 90, Tab A, at 1–3. Some techniques included equally vague disclaimers, such as:

Pride and Ego Down: Attacking or insulting the ego of a detainee, not beyond the limits that would apply to a POW. [Caution: Article 17 of provides, “Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.” Other nations that believe that detainees are entitled to POW protections may consider this technique inconsistent with the provisions of Geneva. Although the provisions of Geneva are not applicable to interrogations of unlawful combatants, consideration should be given to these views prior to application of the technique.]

*Id.* Tab A, at 2. These instructions, however, provide no information as to what the limits that apply to prisoners of war might be or what degree of consideration should be given to the views of countries that apply the Geneva Conventions. *Id.* Tab A, at 1–3.

## The International Criminal Court

tential model for procedures there.<sup>92</sup> Lieutenant General Ricardo Sanchez, the highest-ranking officer in Iraq at that time, accordingly adopted the Guantanamo Bay techniques for use at Abu Ghraib,<sup>93</sup> although the Geneva Conventions clearly applied in Iraq and most of the Iraqi detainees were criminals not suspected of having ties to the Taliban or al Qaeda that would, in the view of the Bush administration, remove them from protections afforded by the Geneva Conventions.<sup>94</sup> The Guantanamo Bay techniques were not the only interrogation procedures used in Iraq. An investigatory government report states that military authorities altered interrogation policies so frequently that by October 2003, the policies had changed three times in less than thirty days.<sup>95</sup>

The migration of servicemembers and ever-changing interrogation policies from Guantanamo Bay to Iraq, coupled with the sometimes difficult determination of civilian from enemy combatant, created an environment at Abu Ghraib in which abuse could easily occur within a presumable grant of authority. It is useful here to recall the OLC's definition of torture as pain akin to that associated with "death, organ failure, or permanent damage resulting in a loss of significant body function," and to note that the OLC further interpreted torture to be a specific intent crime.<sup>96</sup> Accordingly, if an interrogator was motivated by a desire to obtain information rather than an intent to cause severe pain, mistreatment could not be classified as torture.<sup>97</sup> Because this interpretation of torture is highly controversial, administration officials retreated from this stance shortly after the OLC opinion became public in mid-2004.<sup>98</sup>

The Rome Statute's definition of torture as a war crime encompasses a broader scope of maltreatment than does the Bush administration's extremely narrow definition.<sup>99</sup> Thus, the type conduct authorized by the U.S. government could poten-

---

<sup>92</sup> *Final Report of the Independent Panel to Review DoD Detention Operations* 9–10 (Aug. 24, 2004), <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> [hereinafter Schlesinger Report]; Major General Antonio Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade* 8 (Mar. 12, 2004), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/Taguba%20Report.pdf> [hereinafter Taguba Report].

<sup>93</sup> Schlesinger Report, *supra* note 92, at 9–10.

<sup>94</sup> *Id.*; Taguba Report, *supra* note 92, at 8.

<sup>95</sup> Major General Fay, Investigating Officer, *AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade* 28 (Aug. 25, 2004), <http://fil.findlaw.com/news.finlaw.com.hdocs/docs/dod/fay82504rpt.pdf> [hereinafter Fay Report].

<sup>96</sup> Bybee Memorandum, *supra* note 88, at 3–4, 13.

<sup>97</sup> *Id.*

<sup>98</sup> Mike Allen & Susan Schmidt, *Memo on Interrogation Tactics Is Disavowed*, WASH. POST, June 27, 2004, at A1; Chronology of Abu Ghraib, <http://www.washingtonpost.com/wpsrv/world/iraq/abughraib/timeline.html> (last visited Oct. 29, 2006).

<sup>99</sup> Rome Statute, *supra* note 3, art. 8(2)(a)(ii). Torture under the Rome Statute is defined as: "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to lawful sanction." *Id.* art. 7(2)(e). Of note, torture under the Rome Statute is not a specific intent crime, encompasses severe mental pain and suffering, does not require physical pain or suffering to be of the degree associated with organ-failure, and applies to all persons in the custody or under the control of the accused, without exception for persons such as U.S. designated unlawful enemy combatants. The Rome Statute also punishes "inhuman treatment" as a war crime. *Id.*

## The International Criminal Court

tially be considered within the ICC's jurisdiction.<sup>100</sup> With the context of the inquiry now established, this article considers the complementarity assessment necessary if the OTP were to pursue charges against U.S. government and military officials.

### C. Application of the Office of the Prosecutor's Admissibility Assessment in Darfur to U.S. Torture Allegations

Under the Rome Statute, a state may be deemed unable to genuinely investigate or prosecute when it cannot obtain the accused, evidence, or testimony, or is otherwise unable to carry out the proceedings due to a "total or substantial collapse or unavailability of its national judicial system."<sup>101</sup> A state may be considered unwilling to genuinely investigate or prosecute when its investigations appear to have been undertaken in an attempt to shield the accused from criminal responsibility, there is an unjustified delay in the proceedings which is deemed inconsistent with the intent to bring the accused to justice, the proceedings are not independent or impartial, or they are not being conducted consistent with an intent to bring the accused to justice.<sup>102</sup> This section considers the United States' ability and willingness to investigate allegations of detainee abuse at high levels of command. The next section focuses on the status of the offender specifically as a factor of the OTP admissibility assessment.

#### 1. Ability: Structure of and Access to the National Judicial System

In the United States, high-level military and government officials are only infrequently investigated or prosecuted for official acts through civilian and military courts.<sup>103</sup> Such individuals are instead investigated through more specialized procedures such as internal military and government agency investigations<sup>104</sup> and congressional inquiries.<sup>105</sup> Thus, for purposes of an admissibility assessment, this section briefly discusses the military court-martial process. It then evaluates the procedures for reviewing the acts of senior military officers by the Department of the Army Inspector General ("DAIG") and the effectiveness

---

<sup>100</sup> Whether the OTP would construe the abuses at Abu Ghraib as war crimes is outside the scope of this article. However, Prosecutor Moreno-Ocampo has stated that such a finding is unlikely given the disparity in gravity of the offenses between the Abu Ghraib incidents and the conflicts in Darfur, Northern Uganda, and the Democratic Republic of the Congo. Luis Moreno-Ocampo, Iraq Response, 8-10 (Feb. 9, 2006), [http://www.icc-cpi.int/library/organs/otp/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf) (last visited Dec. 11, 2006) [hereinafter Iraq Response]. Due to this conclusion, the prosecutor found it unnecessary to reach a conclusion on complementarity. *Id.* at 9.

<sup>101</sup> *Id.* art. 17(3).

<sup>102</sup> *Id.* art. 17(2).

<sup>103</sup> Lieutenant Colonel Victor M. Hansen, *Walking on Unfamiliar Ground: A Primer For Defense Counsel Representing Clients in an Inspector General Investigation*, ARMY LAW., Mar. 2005, at 1, 4 (noting that it is Army policy to forward all allegations of impropriety or misconduct to the Department of the Army Inspector General's Office).

<sup>104</sup> *Id.*

<sup>105</sup> See generally Michael J. Davidson, *Congressional Investigations and Their Effect on Subsequent Military Prosecutions*, 14 J.L. & POL. 281 (2006).



## The International Criminal Court

of internal military and executive agency investigations. It also discusses the ability of the legislative branch to act as a check on executive and military actions. The following section explores the willingness of these entities to conduct genuine investigations into the alleged abuse and to prosecute to the extent that they are able to do so.

### *a. Court-martial Proceedings*

The U.S. military chiefly prosecutes criminal conduct through its process of court-martial proceedings, which are akin to civilian criminal trials.<sup>106</sup> Courts-martial are not held in permanent courts, but are established on an ad hoc basis whenever a report of misconduct is made to the convening authority.<sup>107</sup> The rank required of the convening authority depends on the type of offense alleged.<sup>108</sup> It also depends on the rank of the accused because the convening authority must be at a higher level of command in order to instigate the charges.<sup>109</sup> Trials are conducted before a military judge, and the accused may elect to be tried by the judge as opposed to a panel of his peers.<sup>110</sup> Once a verdict is rendered, the convening authority has discretion to downgrade a finding of guilt or a sentence.<sup>111</sup> Because the convening authority selects potential panel members for voir dire, and may also be the commander of members of the panel, detailed guidelines have been created to avoid improper command influence.<sup>112</sup>

There is an automatic appeals process for all cases in which a verdict of death, dismissal, or confinement for one year or more is imposed.<sup>113</sup> Other appeals are discretionary.<sup>114</sup> Cases are first appealed to the Court of Criminal Appeals for the appropriate division of the military, and then to the United States Court of Appeals for the Armed Forces.<sup>115</sup> Decisions made by the United States Court of

---

<sup>106</sup> See Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. §§ 816–20 (2000).

<sup>107</sup> *Id.* § 822. A convening authority is any authorized officer superior to an accused. Rule for Courts-Martial (R.C.M.) 601(b), Discussion.

<sup>108</sup> General courts-martial are convened for the most serious offenses, and must be enacted by the president of the United States, the Secretary of Defense, the commanding officer of an Army division, brigade, or fleet, or any other commander authorized by the President or the Secretary of Defense. UCMJ art. 22, 10 U.S.C. § 822 (2000). Special courts-martial are convened for other serious offenses punishable by confinement of up to six months and may be ordered by a greater array of commanders. UCMJ art. 23, 10 U.S.C. § 823 (2000). Summary courts-martial are convened for offenses punishable by confinement of up to one month and may be ordered by an even greater array of commanders. UCMJ art. 24, 10 U.S.C. § 824 (2000). Officers cannot be tried in summary courts-martial. *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> 10 U.S.C. §§ 825–26.

<sup>111</sup> R.C.M. 1107(d)(1) ("The convening authority may for any or no reason disprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased").

<sup>112</sup> UCMJ art. 37, 10 U.S.C. § 837 (2000); Rule for Courts-Martial (R.C.M. 104).

<sup>113</sup> UCMJ arts. 66–67, 10 U.S.C. §§ 866–67(2000).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

## The International Criminal Court

Appeals for the Armed Forces may be reviewed by the United States Supreme Court by grant of certiorari.<sup>116</sup>

### *b. Alternative Investigations*

Unlike the convening authority in a court-martial, the DIAG is an investigatory unit outside the chain of command.<sup>117</sup> The DAIG investigates senior officials, defined as general officers, brigadier general selects, and senior civilian officers.<sup>118</sup> Army policy requires that “any and all allegations of impropriety and misconduct” by these classes of officials be referred to the DAIG for investigation.<sup>119</sup> When an individual becomes the subject of a DIAG investigation, any collateral criminal investigation must cease and the command is required to submit the collateral matter to DIAG.<sup>120</sup>

The most common sanction following a DAIG investigation is a General Officer Memorandum of Reprimand (“GOMOR”).<sup>121</sup> Issuance of a GOMOR likely will have significant effects on an official’s career, including an inability to be promoted and the possibility of retirement at a lower rank.<sup>122</sup> A DAIG investigation may also serve as the basis for a referral to court-martial proceedings.<sup>123</sup> However, “[i]n the case of senior officers, any adverse administrative actions will usually be taken [by other means].”<sup>124</sup>

Additionally, government and military officials may establish internal investigations to review allegations of misconduct. The Secretary of Defense is empowered to create investigatory panels as a means of independent investigation into military policy and procedure.<sup>125</sup> Most recently, Secretary Rumsfeld commissioned an Independent Panel to Review DoD Detention Operations.<sup>126</sup> The resulting report of this review is commonly referred to as the Schlesinger Report, after the name of the chief investigating officer, former Secretary of Defense James Schlesinger.<sup>127</sup> Senior military officials may also commission reports.<sup>128</sup> For instance, the Army internal report by Major General Antonio Taguba, discussed at length in the following section, was requested by Lieutenant General

---

<sup>116</sup> UCMJ art. 67(a), 10 U.S.C. § 867(a)(2000).

<sup>117</sup> Hansen, *supra* note 103, at 4.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* (internal quotation omitted).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 16.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Schlesinger Report, *supra* note 91, at 21.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Taguba Report, *supra* note 92, at 6.

## The International Criminal Court

Sanchez to investigate the activities of the 800th Military Police Brigade at Abu Ghraib.<sup>129</sup>

### *c. Congressional Investigation*

Apart from the military's internal review, Congress may also serve as a check on the conduct of senior military and administration officials through its reporting and oversight functions.<sup>130</sup> Although congressional investigations do not directly result in criminal investigations or punishment, Congress' power to investigate executive conduct can "precipitate removal or resignation through the discomfort of oversight and investigation."<sup>131</sup> Congress may also sanction executive conduct through rare exercises of its impeachment power or pass resolutions that urge the president to remove an individual.<sup>132</sup>

Thus, while the Sudanese courts have been severely handicapped, U.S. channels of investigation remain independent from outside influence and have not suffered structural changes that impede their effectiveness. The court-martial process in the military judicial system is fully functional. Also, the DAIG remains an unencumbered resource for investigation into conduct by military officials and internal investigation procedures have been utilized. Lastly, Congress is able to monitor the conduct of civilian officials through its oversight power.

Because the applicable national judicial system and administrative procedures remains available, and because Congress is also unencumbered in its ability to review the actions of senior officials, it is unlikely that the OTP would have a basis on which to conclude that the United States is unable genuinely to investigate or prosecute allegations of detainee abuse for purposes of complementarity.<sup>133</sup> The complementarity test, however, is disjunctive, requiring a finding of either inability or unwillingness.<sup>134</sup> Therefore, the next section discusses the willingness of the United States to investigate and prosecute detainee abuse regardless of the finding that its ability to do so is not compromised.

### *2. Willingness: Independent and Impartial Investigation or National Prosecution with Regard to Particular Crimes or Suspects*

This section discusses the United States' willingness genuinely to investigate and prosecute wrongdoing at upper levels of authority. First, this section dis-

---

<sup>129</sup> *Id.* Lieutenant General Sanchez requested the investigation under Army Regulation 381-10, Procedure 15-6, which governs matters relating to intelligence. See Paul M. Peterson, *Civilian Demonstrations Near the Military Installation: Restraints on Military Surveillance and Other Intelligence Activities*, 140 MIL. L. REV. 113, 122-23 (1993).

<sup>130</sup> U.S. CONST. art. I §§ 1, 8. Though an investigatory function is not textually explicit, it is largely recognized as a necessary component of Congress' lawmaking powers. See generally Sam Nunn, *The Impact of the Senate Permanent Subcommittee on Investigations on Federal Policy*, 21 GA. L. REV. 17, 18-19 (1986).

<sup>131</sup> L. Anthony Sutin, *Check Please: Constitutional Dimensions of Halting the Pay of Public Officials*, 26 J. LEGIS. 221, 223 (2000).

<sup>132</sup> *Id.*

<sup>133</sup> Rome Statute, *supra* note 3, art. 17(3).

<sup>134</sup> *Id.* art. 17.

## The International Criminal Court

cusses national investigations, which consist of internal military and agency inquiries conducted by current and former officials. Next, this section explores the paucity of national prosecutions, looking to arguments made in courts-martial of enlisted servicemembers to support the conclusion that, although investigation of officials is warranted, the United States has not demonstrated a willingness genuinely to investigate or prosecute.

### a. National Investigations

To date, ten internal investigations have been conducted by various executive branch and military departments, yet only one investigator, former Secretary of Defense James Schlesinger, was authorized to examine the chain of command extending to Secretary Rumsfeld.<sup>135</sup> The remaining investigations were mostly led by officials in current command charged with investigating their subordinates through informal procedures and lacking authority to critique their superiors.<sup>136</sup> None are truly independent and, although a few GOMORs have been issued following informal investigations, it is unclear whether the DAIG has initiated any investigations of military officials.<sup>137</sup> Although several reports have indicated that Central Intelligence Agency (“CIA”) officers committed acts of severe detainee abuse,<sup>138</sup> there has been no independent investigation into such activity.<sup>139</sup> Conversely, efforts have been made to remove implications of CIA involvement from official records.<sup>140</sup> Further, the Department of Justice has denied requests to appoint an independent prosecutor to investigate allegations of detainee

---

<sup>135</sup> KENNETH ROTH, HUMAN RIGHTS WATCH, DARFUR AND ABU GHRAIB 8, <http://www.hrw.org/wr2k5/darfurandabughraib/darfurandabughraib.pdf> (last visited Oct. 29, 2006).

<sup>136</sup> *Id.*; Army Regulation 15-6: Procedure for Investigating Officers and Boards of Officers 1, available at [http://www.usapa.army.mil/pdffiles/r15\\_6.pdf](http://www.usapa.army.mil/pdffiles/r15_6.pdf) (last visited Oct. 29, 2006).

<sup>137</sup> ROTH, *supra* note 135, at 8.

<sup>138</sup> See, e.g., Fay Report, *supra* note 95, at 9 (concluding that “[T]he CIA’s detention and interrogation practices contributed to a loss of accountability and abuse at Abu Ghraib.”); *Homicide Unpunished*, WASH. POST, Feb. 28, 2006, at A14; HUMAN RIGHTS WATCH, LEADERSHIP FAILURE: FIRSTHAND ACCOUNTS OF TORTURE OF IRAQI DETAINEES BY THE U.S. ARMY’S 82ND AIRBORNE DIVISION 7 (Sept. 2005); HUMAN RIGHTS WATCH, WORLD REPORT 2006 at 506 (2006).

<sup>139</sup> *A Future Investigation*, WASH. POST, Oct. 16, 2005, at B06. The CIA Inspector General is reportedly investigating allegations of CIA involvement in the torture and illegal detention of detainees, but because there is no outside oversight of the investigation and its results (unless leaked) will not be released to the public, it is impossible to evaluate the adequacy of any such investigation. R. Jeffrey Smith & Dafna Lizner, *CIA Officer’s Job Made Any Leaks More Delicate*, WASH. POST, Apr. 23, 2006, at A01.

<sup>140</sup> Josh White, *Documents Tell of Brutal Improvisation by GIs*, WASH. POST, Aug. 3, 2005, at A01 (noting the difficulty in determining the full circumstances of the death of a suffocated detainee because “the circumstances are listed as ‘classified’ on his official autopsy [and] court records have been censored to hide the CIA’s involvement in his questioning”).

## The International Criminal Court

abuse,<sup>141</sup> and the investigation by the Senate Armed Services Committee has made no ascertainable progress in the past year.<sup>142</sup>

Two investigative reports in particular—those authored by Major General Taguba and former Secretary of Defense Schlesinger—illustrate the lack of willingness to investigate higher ranks of command. On March 12, 2004, Major General Taguba released the confidential findings of his Department of Defense investigation into the abuse at Abu Ghraib.<sup>143</sup> Taguba's investigation was requested by Lieutenant General Sanchez, the highest ranking officer at Abu Ghraib at that time.<sup>144</sup> Lieutenant General Sanchez specifically asked that Taguba investigate the 800th Military Police Brigade, the unit responsible for the acts depicted in the now infamous Abu Ghraib photographs.<sup>145</sup>

The abuse that Major General Taguba documented included: jumping on detainees' naked feet; forcing nudity for extended periods of time; videotaping and photographing naked detainees; using dogs without muzzles to intimidate detainees; positioning a naked detainee on a box "with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture"; pouring phosphoric liquid from chemical lights on detainees; pouring cold water on naked detainees; threatening detainees with rape; and actual instances of sexual abuse or rape.<sup>146</sup> Major General Taguba also found that despite such horrific abuse, there was no evidence that Brigadier General Karpinski, commander of the brigade, or Colonel Thomas Pappas, the commanding officer at Abu Ghraib, took steps to stop the abuse.<sup>147</sup> He therefore recommended that they be issued GOMORs.<sup>148</sup> Despite Taguba's conclusion that "numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees," he also concluded that "[t]his systemic and illegal abuse of detainees was intentionally perpetrated by several members of the military police guard force" and was not indicative of a higher-level breach of procedure.<sup>149</sup>

This conclusion is alarming, especially because no action was recommended against the most immediate officials implicated in the scandal—Major General Miller, who brought the controversial Guantanamo interrogation methods to Iraq, and Lieutenant General Sanchez, who authorized the use of the Guantanamo methods at Abu Ghraib—notwithstanding Taguba's own finding that most of the

---

<sup>141</sup> See HUMAN RIGHTS WATCH, *GETTING AWAY WITH TORTURE?: COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES* 82 (Apr. 2005), available at <http://www.hrw.org/reports/2005/us0405/us0405.pdf>; *A Future Investigation*, *supra* note 139.

<sup>142</sup> *Hearing Schedule: Investigation Into FBI Allegations of Detainee Abuse at the Guantanamo Bay, Cuba Detention Facility Before Committee on Armed Services of the Senate*, 109th Cong. (2005), available at [http://armed-services.senate.gov/e\\_witnesslist.cfm?id=1574](http://armed-services.senate.gov/e_witnesslist.cfm?id=1574) (last visited Nov. 9, 2006).

<sup>143</sup> Taguba Report, *supra* note 92.

<sup>144</sup> *Id.* at 6.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 16–18.

<sup>147</sup> *Id.* at 20, 44–45.

<sup>148</sup> *Id.* at 44–45.

<sup>149</sup> *Id.* at 16.

## The International Criminal Court

detainees at Abu Ghraib were civilian criminals rather than enemy combatants.<sup>150</sup> As civilians held in combat, the Geneva conventions clearly applied to the treatment of most, if not all, detainees at Abu Ghraib and the application of Geneva protections for such persons was not contested by President Bush.<sup>151</sup> The report specifically recognized that Miller's recommendation that military guards should set "the conditions for successful exploitation of the internees" was in conflict with army manual guidelines prohibiting military police officers from participating in intelligence interrogations.<sup>152</sup>

One reason for Taguba's failure to recommend action against Miller could be that they were both two-star generals at the time of the investigation. Although generals of the same rank can investigate each other, according to Deputy Department of Defense spokesman Bryan Whitman, "it isn't practical."<sup>153</sup> Taguba could not investigate Sanchez because Sanchez was a three-star general.<sup>154</sup>

Sanchez, who also requested an investigation into whether interrogators instructed the military police to rough up detainees in preparation for interrogation, later removed himself from that investigation so a higher-ranked general could oversee it and instruct the new investigator, who was also to be higher in rank, to question Sanchez.<sup>155</sup> That investigation culminated in the Fay-Jones Report, which adopted General Taguba's findings.<sup>156</sup> Although it concluded that Sanchez "failed to ensure proper staff oversight of detention and interrogation operations," it did not recommend that Sanchez be reprimanded.<sup>157</sup> The Fay-Jones Report's conclusion that Miller "did not introduce 'harsh techniques' into the Abu Ghraib detention operation," appears to contradict its earlier recognition that Miller "introduced written GTMO documentation" as procedures recommended for use at Abu Ghraib.<sup>158</sup> The report did not recommend any further investigation of Miller's conduct.<sup>159</sup>

Former Secretary of Defense Schlesinger's report of his investigation into Department of Defense general detention operations is slightly more balanced than

---

<sup>150</sup> *Id.* at 8.

<sup>151</sup> Geneva Convention (Third) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, arts. 3, 130; Geneva Convention (Fourth) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, arts. 3, 147; Rumsfeld Memorandum, *supra* note 84.

<sup>152</sup> *Id.* at 8-9.

<sup>153</sup> Leon Worden, *Abuse Inquiry Heading Higher*, SIGNAL CITY, June 11, 2004, available at <http://www.scvhistory.com/scvhistory/signal/iraq/sg061104c.htm>.

<sup>154</sup> Michael Hirsh & John Berry, *The Abu Ghraib Scandal Cover Up?*, NEWSWEEK, June 7, 2004.

<sup>155</sup> Leon Worden, *Army Adds Stars to Intelligence Inquiry*, SIGNAL CITY, June 18, 2004, available at <http://www.scvhistory.com/scvhistory/signal/iraq/sg061804.htm>. Lieutenant General Anthony Jones, a three-star general technically senior to Sanchez because he has held the rank longer, was appointed to oversee the investigation and continue to work with General Fay. HUMAN RIGHTS WATCH, *MILITARY INVESTIGATIONS INTO TREATMENT OF DETAINEES IN U.S. CUSTODY*, July 16, 2004, available at <http://www.hrw.org/campaigns/torture/071604investigations.pdf>.

<sup>156</sup> See generally Fay Report, *supra* note 95.

<sup>157</sup> *Id.* at 30.

<sup>158</sup> *Id.* at 24-25, 58, 117.

<sup>159</sup> *Id.* at 117.

## The International Criminal Court

Taguba's, and Schlesinger, as a former Secretary of Defense, had greater authority to conduct his investigation. However, the investigation still raises questions of independence and impartiality. Schlesinger's report tracks the migration of interrogators and techniques authorized for Guantanamo Bay, Afghanistan, and Iraq,<sup>160</sup> noting in particular Major General Miller's contribution of Guantanamo Bay interrogation guidelines.<sup>161</sup> The report further records that in the month following Miller's visit, Lieutenant General Sanchez approved a policy on interrogation containing a dozen techniques borrowed from Guantanamo and five beyond those approved for Guantanamo.<sup>162</sup> Lieutenant General Sanchez cited President Bush's determination that "unlawful combatants" are outside all applicable Geneva Convention protections as a basis for his belief that use of measures not authorized in the Army Field Manual was permissible.<sup>163</sup> Sanchez reportedly justified this deviation with his belief that "tougher measures were warranted because there were unlawful combatants 'mixed in' with Enemy Prisoners of War and civilian and criminal detainees."<sup>164</sup> To the contrary, an internal Army report found that "the overwhelming evidence . . . shows that all 'detainees' at Abu Ghraib were civilian internees."<sup>165</sup>

Though Schlesinger did not find a "policy of abuse" orchestrated by government officials, his report concluded that "the abuses were not just a 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."<sup>166</sup> Schlesinger found that the most serious instances of abuse at Abu Ghraib were caused by the "aberrant behavior" of a few soldiers. Yet he also noted that:

[c]ommanding officers and their staffs at various levels failed in their duties and . . . such failures contributed directly or indirectly to detainee abuse. Commanders are responsible for all their units do or fail to do, and should be held accountable for their action or inaction . . . Military and civilian leaders at the Department of Defense share this responsibility.<sup>167</sup>

Specifically, Schlesinger criticized Secretary Rumsfeld for not utilizing "a wider range of legal opinions and more robust debate regarding detainee policies

---

<sup>160</sup> See Schlesinger Report, *supra* note 92, at 9–10.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 9.

<sup>163</sup> *Id.* at 10. Specifically, the Schlesinger Report cites a presidential memorandum accepting the Department of Justice's conclusion that Taliban detainees are unlawful combatants. *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Fay Report, *supra* note 95, at 12. Civilian internees are defined as "someone who is interned during armed conflict or occupation for security reasons or protection or because he has committed an offense against the detaining power." *Id.*

<sup>166</sup> Schlesinger Report, *supra* note 92, at 5.

<sup>167</sup> *Id.* at 43. Major General George R. Fay's report reaches the same conclusion, stating that: "[l]ooking beyond personal responsibility, leader responsibility and command responsibility, systemic problems and issues also contributed to the volatile environment in which the abuse occurred" including lack of a clear interrogation policy for Iraq. Fay Report, *supra* note 95, at 8.

## The International Criminal Court

and operations” while forming his policies, ostensibly referring to Rumsfeld’s lack of consultation with other agencies before relying on the OLC memorandum’s definition of torture as a basis for authorizing new interrogation procedures.<sup>168</sup> In fact, many have criticized Secretary Rumsfeld and his advisors for consulting only with those administration attorneys and military officials already known to share their beliefs.<sup>169</sup> Yet when asked if Rumsfeld should resign, Schlesinger commented that the loss of Secretary Rumsfeld would be a “boon for all of America’s enemies.”<sup>170</sup>

Despite strong evidence of failures to provide clear guidelines and prevent abuse, the Army has decided not to charge any military officials in Iraq.<sup>171</sup> Of those directly in the chain of command, only Brigadier General Karpinski and Colonel Pappas were reprimanded,<sup>172</sup> and Brigadier General Karpinski was later demoted to Colonel.<sup>173</sup> Rather than reprimand him or express disapproval, Secretary Rumsfeld made clear his intention to promote General Sanchez to a four-star general.<sup>174</sup> President Bush repeatedly praised Secretary Rumsfeld,<sup>175</sup> and twice rejected Rumsfeld’s offer to resign during the height of the Abu Ghraib scandal.<sup>176</sup>

The lack of independence and impartiality in the existing investigations—findings strikingly similar to the criticisms of the Sudanese government’s investigation—points in favor of an ICC determination of admissibility. In particular, the lack of focus on determining the culpability of military and administration officials would likely be of concern to the OTP. Thus, there is a tenable argument that the United States could be deemed unwilling genuinely to investigate allegations of misconduct at the higher levels of command.

---

<sup>168</sup> Schlesinger Report, *supra* note 92, at 8.

<sup>169</sup> Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted*, NEW YORKER, Feb. 27, 2006, at 36.

<sup>170</sup> Eric Schmitt, *Iraq Abuse Trial Is Again Limited to Lower Ranks*, N.Y. TIMES, Mar. 23, 2006, at A1.

<sup>171</sup> Josh White, *Senior Army Officers Cleared in Abuse Cases*, WASH. POST, Apr. 23, 2005.

<sup>172</sup> Taguba Report, *supra* note 92, at 44; R. Jeffrey Smith, *Abu Ghraib Officer Gets Reprimand: Non-Court-Martial Punishment for Dereliction of Duty Includes Fine*, WASH. POST, May 12, 2005, at A16.

<sup>173</sup> CNN, *Bush Demotes Officer In Charge of Abu Ghraib*, May 5, 2005, <http://www.cnn.com/2005/US/05/05/abu.ghraib/index.html>.

<sup>174</sup> Chris Shumway, *Pentagon Rewards Generals, Corporations Tied to Abu Ghraib Scandal*, NEW STANDARD, Oct. 17, 2004, <http://newstandardnews.net/content/index.cfm/items/1125>.

<sup>175</sup> CBS News, *Bush Heaps Praise on Rumsfeld*, May 10, 2004, <http://www.cbsnews.com/stories/2004/05/10/iraq/main616681.shtml>. At one news conference, President Bush told Rumsfeld: “You are courageously leading our nation in the war on terrorism. You are doing a superb job.” *Id.* More recently, President Bush responded to criticisms of Rumsfeld’s plans for a post-war Iraq, stating that “I’m the decider and I decide what’s best. And what’s best is for Don Rumsfeld to remain as the secretary of defense.” Liz Sidoti, *Rumsfeld Critics Must Grin and Bear It*, ASSOCIATED PRESS, Apr. 27, 2006, available at <http://www.washingtonpost.com/wpdyn/content/article/2006/04/27/AR2006042700181.html>.

<sup>176</sup> CNN, *Rumsfeld Twice Offered to Resign During Abu Ghraib Scandal*, Feb. 5, 2005, <http://www.cnn.com/2005/ALLPOLITICS/02/03/rumsfeld.resign/index.html>.



## The International Criminal Court

### *b. National Prosecutions*

The relative lack of national prosecutions also raises concerns over the willingness of the United States to bring any resolution to the serious allegations of detainee abuse. A small number of lower-ranking soldiers and reservists have been tried in courts-martial proceedings.<sup>177</sup> Many of these soldiers have asserted a defense of obedience to orders, a doctrine by which an accused is excused from unlawful conduct if undertaken pursuant to orders that an ordinary person would not have known to be unlawful.<sup>178</sup> Charles Graner and Lynndie England, reservists in the 800th Military Police Brigade—the unit responsible for the now infamous pictures of abuse at Abu Ghraib—both argued that they were following orders when they engaged in acts of detainee abuse, as did the most recently convicted servicemen, Chief Warrant Officer Lewis Welshofer<sup>179</sup> and dog handler Sergeant Michael Smith.<sup>180</sup>

At trial, defense teams for both Graner and England sought to subpoena Secretary Rumsfeld and Lieutenant General Sanchez to support their defenses that harsh treatment of detainees was authorized and that they thought they were acting within the set guidelines.<sup>181</sup> Yet these requests were denied on grounds that any actions by Rumsfeld or Sanchez had no direct bearing on Graner and England's conduct.<sup>182</sup>

At Welshofer's preliminary hearing, Colonel David Teeple, who had commanded Welshofer's unit, testified that the "claustrophobic technique" Welshofer used to suffocate a detainee was both "approved and effective."<sup>183</sup> Colonel Teeple has not been investigated for his connection to the detainee's death.

Major General Miller was subpoenaed to testify at Sergeant Smith's trial to bolster the defense that Smith was obeying orders to use his dog to frighten detainees—orders that originated with Miller.<sup>184</sup> Choosing not to testify, Miller invoked his right to remain silent under Article 31 of the Uniform Code of Mili-

---

<sup>177</sup> John Sifton, *The United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps*, 42 HARV. J. ON LEGIS. 487, 489–90 (2006) (noting that although the military claims to have investigated over 600 claims of detainee abuse, Human Rights Watch has uncovered evidence of only approximately 210 investigations. Human Rights Watch also reports that sixty-three cases proceeded to courts-martial, and in only ten of those cases was a sentence of more than one year imposed).

<sup>178</sup> R.C.M. 916(d).

<sup>179</sup> CNN, *No Jail Time for Soldier in Death of Iraqi*, Jan. 24, 2006, <http://www.cnn.com/2006/LAW/01/23/suffocation.case.ap/index.html>; USA TODAY, *Officer to Serve No Jail Time For Iraqi General's Death*, Jan. 24, 2006, [http://www.usatoday.com/news/nation/2006-01-23-iraqi-death\\_x.htm?csp=34](http://www.usatoday.com/news/nation/2006-01-23-iraqi-death_x.htm?csp=34); *Homicide Unpunished*, *supra* note 138. Welshofer, who was convicted of negligent homicide for wrapping a detainee with broken ribs in a sleeping bag, tying the bag with electrical cord, and sitting on the detainee's chest until he asphyxiated, received a sentence of house arrest for sixty days with limited leave. *Id.* at A14.

<sup>180</sup> Schmitt, *supra* note 170, at A1. Smith was convicted of abusing detainees with his belgian shepherd. He was sentenced to six months confinement. *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> White, *supra* note 140, at A01.

<sup>184</sup> Arnaud de Borchgrave, *Torture Blame Game*, WASH. TIMES, Mar. 27, 2006, at A01.

## The International Criminal Court

tary Justice (“UCMJ”), the military equivalent of the Fifth Amendment protection against self-incrimination.<sup>185</sup> In a bizarre twist on the usual process, Colonel Thomas Pappas, the commanding officer at Abu Ghraib whom General Taguba recommended reprimanding with a GOMOR, was granted immunity for testifying that he authorized the use of dogs to intimidate prisoners.<sup>186</sup> Why Pappas was immunized to testify against a subordinate, rather than immunizing the subordinate to try Pappas—and then possibly Miller, who Pappas also says authorized the use of dogs<sup>187</sup>—is unclear. A convening authority later decided not to pursue a court-martial against Colonel Pappas, choosing instead to follow General Taguba’s recommendation of issuing a GOMOR for two counts of dereliction of duty in failing to prevent abuse at Abu Ghraib.<sup>188</sup> Under the terms of the reprimand, Pappas will forfeit half his pay for two months and will not be considered for future promotions.<sup>189</sup> He retains his rank of colonel and is currently the commander of the 205th Military Intelligence Brigade in Wiesbaden, Germany.<sup>190</sup>

The lack of independent and impartial national inquiry into responsibility at higher levels of authority discussed in terms of national investigations and illustrated in this subsection indicates a refusal to deal with the allegations objectively and impartially.<sup>191</sup> Thus, the OTP could conclude that the United States has not demonstrated a sufficient willingness to investigate or prosecute allegations of detainee abuse due to an absence of impartial and independent investigations and prosecutions at high levels of command, including top administration officials.

### 3. *Status of the Alleged Offender*

In accordance with its mandate to prevent impunity, the OTP aims to prosecute those bearing the greatest amount of responsibility for crimes within its jurisdiction.<sup>192</sup> If the OTP were to take the administration and military internal documents as evidence that the abuse at Abu Ghraib was committed pursuant to a policy originating within the upper levels of the Bush administration, it would examine the ability and willingness of the United States to investigate or prose-

---

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Smith, *supra* note 172.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Recent legislation demonstrates the United States’ unwillingness to investigate issues of detainee abuse. The Military Commission Act of 2006, passed on October 17, 2006, declares that the Geneva Conventions may not be invoked as a cause of action in a U.S. court against the United States or an individual acting in an official capacity. Pub. L. No. 109-366, § 5(a), 120 Stat. 2600 (Oct. 17, 2006) [hereinafter MCA]. The MCA also applies the Detainee Treatment Act’s mistake of law defense retroactively to September 11, 2001. *Id.* § 8(b). Under the Detainee Treatment Act, it is a defense to allegations of torture or cruel treatment that a U.S. person involved in detainee detention and interrogation did not know that authorized interrogation practices were unlawful. Detainee Treatment Act of 2005, 10 U.S.C. § 1004.

<sup>192</sup> *Id.*

## The International Criminal Court

cute the particular officials it thought to be most responsible for detainee abuse.<sup>193</sup>

Given the paucity of independent U.S. investigations at this level, it is likely that the OTP would have a strong basis on which to conclude that no national investigation precludes ICC jurisdiction under the principle of complementarity. For instance, although many of the government reports and allegations discussed in the previous section implicate Major General Miller and Lieutenant General Sanchez, the United States has not commenced any serious investigation into their suspected roles fostering or allowing detainee abuse. Aside from the Schlesinger Report, there has been no investigation of Secretary Rumsfeld's culpability, though he knowingly authorized interrogation techniques that may constitute grave breaches of the Geneva Conventions and war crimes under the Rome Statute.<sup>194</sup> Because Schlesinger was appointed to investigate the Department of Defense's conduct by Rumsfeld himself, the OTP could conclude that his report lacks sufficient independence and impartiality to constitute a bar to ICC jurisdiction.<sup>195</sup>

Thus, under the complementarity test used in the Darfur conflict, were the OTP to investigate the United States for detainee abuse at Abu Ghraib with a view toward holding government and high-ranking military officials responsible for ordering or being complicit in the abuse, it would likely have a sufficient basis on which to conclude that the United States is unwilling genuinely to investigate or prosecute individuals at these levels of command, although it is sufficiently able to do so.

There is, however, no readily apparent way for the ICC to assert jurisdiction over potential crimes at Abu Ghraib. Because Iraq is not a State Party to the Rome Statute,<sup>196</sup> it could not refer U.S. treatment of detainees to the ICC unless it requested the Court's jurisdiction by filing a declaration with the Registrar.<sup>197</sup> Yet, such an action could be interpreted as a transparent political move, thus confirming U.S. fears that the ICC would be used for politically motivated reasons.<sup>198</sup> In the current climate, accepting jurisdiction under these circumstances would be dangerous for a fledgling body seeking to prove its legitimacy. Further, the newly-elected Iraqi government is heavily dependent on the United States for military security and economic aid.<sup>199</sup> It is highly doubtful that it would risk causing discord in its relationship with the United States in order to

---

<sup>193</sup> Rome Statute, *supra* note 3, arts. 1, 17(3).

<sup>194</sup> *Id.* arts. 8(2)(a)(ii)-(iii) (classifying torture, inhuman treatment, and willfully causing great suffering or serious bodily injury as war crimes); *see also* Iraq Response, *supra* note 100, at 8-10.

<sup>195</sup> *Id.* arts. 17(1)(b), (2)(c).

<sup>196</sup> International Criminal Court, Assembly of State Parties, <http://www.icc-cpi.int/asp/statesparties.html> (last visited Nov. 11, 2006).

<sup>197</sup> Rome Statute, *supra* note 3, art. 12(3).

<sup>198</sup> Kaul, *supra* note 14, at 380.

<sup>199</sup> Anthony Shadid & Steve Fainaru, *Building Iraq's Army: Mission Improbable*, WASH. POST FOREIGN SERV., June 10, 2005, at A01; Ron Askew, *Iraqis' Economic Woes Add to Desperation*, REUTERS, Mar. 21, 2006, [http://today.reuters.co.uk/news/newsArticle.aspx?type=ReutersEdge&storyID=2006-03-21T090100Z\\_01\\_NOA132418\\_RTRUKOC\\_0\\_ANALYSIS-IRAQ-ECONOMY.xml](http://today.reuters.co.uk/news/newsArticle.aspx?type=ReutersEdge&storyID=2006-03-21T090100Z_01_NOA132418_RTRUKOC_0_ANALYSIS-IRAQ-ECONOMY.xml).

## The International Criminal Court

seek out ICC jurisdiction and seeking investigation of detainee abuse is hardly a priority for the heavily-burdened Iraqi government. Thus, although there is a colorable claim that the ICC could apply its admissibility criteria to find in favor of asserting its jurisdiction over officials allegedly responsible for abuse at Abu Ghraib, it is highly unlikely that it will ever do so.

### IV. Conclusion

Using the admissibility criteria garnered from the OTP's investigation in the Sudan, this assessment of the U.S. interrogation policies created by administration officials and implemented by high ranking military officers reveals that the ICC could theoretically assert its jurisdiction over the resulting allegations of detainee abuse notwithstanding the protections of complementarity. Although the national investigatory systems are functionally unimpeded and procedures exist with which to investigate at all levels of authority, the United States is unwilling to investigate up the chain of command. Because there has not been any clearly objective attempt to investigate or prosecute high-ranking military and government officials, the ICC could conclude that existing national efforts do not bar it from establishing jurisdiction.

Notwithstanding this particular analysis, complementarity remains a high bar to surpass. The United States could easily avoid ICC jurisdiction by conducting an earnest, independent review of the abuse that occurred at Abu Ghraib that includes an investigation into military and administration officials. Even if no high-level prosecutions were to result from such a review, the ICC could only seek to conduct its own investigation if the U.S. effort was found to be inconsistent with the aim of bringing offenders to justice or if the ICC determined that the national investigation was conducted for the sole purpose of shielding offenders from its jurisdiction.<sup>200</sup> In a future case where crimes clearly fall within the ICC's jurisdiction, U.S. fears of international prosecution could still only be realized by an internal failure to uphold the country's international obligations.

---

<sup>200</sup> Rome Statute, *supra* note 3, art. 17(2).