

AFFIDAVIT OF BENJAMIN G. DAVIS

BEFORE ME, the undersigned authority, on this day personally appeared *Benjamin G Davis* known to me to be the person whose name is subscribed to the following instrument and, having been duly sworn, upon his oath, deposes and states the following:

I, BENJAMIN G. DAVIS, hereby declare and state that the following Affidavit is true and correct to the best of my knowledge, based on my knowledge, education, training, and professional experience:

I am Associate Professor of Law at the University of Toledo College of Law. I graduated from Harvard College *cum laude* in 1977, Harvard Business School in 1983, and Harvard Law School in 1983 where I was Articles Editor of the Harvard International Law Journal. I am a member of the New York Bar since 1984.

I was a development consultant in Africa with Louis Berger and Company (1983-1984), then a strategic management consultant with Mars and Company in Paris, France (1984-1986). I was Legal Counsel in the Secretariat of the International Court of Arbitration of the International Chamber of Commerce in Paris, France (1986-1996) and Manager, Institute of World Business Law and Director, Conference Programmes for the International Chamber of Commerce (1997-1999). I was an independent consultant in Paris (1999-2000).

I was named an Associate Professor of Law at Texas Wesleyan University School of Law in Fort Worth, Texas in 2000. In 2003 I was named an Associate Professor of Law at the University of Toledo College of Law in Toledo, Ohio where I currently teach.

I teach public international law, international and domestic arbitration, and contracts and have taught alternative dispute resolution and international business transactions. I have written extensively and spoken around the world over the past 25 years on topics in public and private international law and international dispute resolution.

I am a member of the American Society of International Law since 2005. I am Co-chair of the Teaching International Law Interest Group of the American Society of International Law. I led the effort to have the American Society of International Law overwhelmingly adopt the Centennial Resolution on the Laws of Armed Conflict and Treatment of Detainees at its March 30, 2006 Centennial meeting – the largest annual meeting in the history of the American Society of International Law. Only the eighth resolution adopted in the 100 year history of the organization and the first on the laws of armed conflict, this resolution states in relevant part:

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

1. Resort to armed force is governed by the Charter of the United Nations and other international law (*jus ad bellum*).
2. Conduct of armed conflict and occupation is governed by the Geneva Conventions of August 12, 1949, and other international law (*jus in bello*).
3. Torture and cruel, inhuman, or degrading treatment of any person in the custody or control of a state are prohibited by international law from which no derogation is permitted.
4. Prolonged, secret, incommunicado detention of any person in the custody or control of a state is prohibited by international law.
5. Standards of international law regarding treatment of persons extend to all branches of national governments, to their agents, and to all combatant

forces.

6. In some circumstances, commanders (both military and civilian) are personally responsible under international law for the acts of their subordinates.
7. All states should maintain security and liberty in a manner consistent with their international law obligations.¹

Since April 2005, I have been conducting research on the problem of criminal prosecution in United States domestic courts of high-level U.S. civilian authority and military general officers (“generals”) for violations of international humanitarian law and/or international criminal law. This work focuses on what are the mechanisms for prosecution of high-level U.S. civilian authority and generals within the United States and whether these mechanisms are effective.

Through discussion of the specific topic of criminal prosecution in U.S. domestic courts of high level U.S. civilian authority and generals for violations of international humanitarian law and/or international criminal law I hope to address the question whether it is at all likely that there will be criminal prosecutions in the United States of President Bush, Secretary of Defense Donald Rumsfeld², and various other higher-level members or past members of the Bush administration or military generals for alleged authorizations or abetments of violations of the 1949 Geneva Conventions and other treaty-based and customary international law concerning unlawful treatment of detainees and secret detention and rendition of detainees.

¹ <http://www.asil.org/events/am06/resolutions.html> and related websites noted at that page. This resolution has been adopted also by the Association of the Bar of the City of New York this past August (see <http://www.asil.org/events/am06/resolution%20by%20nyc%20bar%20%20060708.pdf>)

² A few minutes ago, there was a press announcement that Secretary of Defense Donald Rumsfeld resigned his position.

In theory, criminal prosecutions of such persons could go forward in three fora (courts-martial, federal courts, and/or state courts as explained below).³ In practice, such criminal prosecutions are extremely unlikely for generals and inexistent for high-level U.S. civilian authority.

The only United States general court-martialed for what might be considered violations of the laws of war in over 100 years was Brigadier General Jacob H. Smith in 1902⁴ as regards the Philippines campaign during the Spanish-American War. Anecdotal and statistical evidence suggest that general officers at worst receive reprimand, demotion, or more likely retirement⁵ rather than court-martial.⁶

³ First, current United States military generals (one star up to four star military generals) and some former military generals who are retired are subject to the Uniform Code of Military Justice ("UCMJ") and may be court-martialed under relevant punitive articles of the UCMJ. Second, present and former United States high-level civilian authority and military generals may be prosecuted in United States Federal Courts. Third, present and former United States high-level civilian authority and military generals may be prosecuted under state law in a state court.

⁴ Stuart Creighton Miller, *Benevolent Assimilation: The American Conquest of the Philippines, 1899-1903*, (1982).

⁵ "Army General Retires, Blames Abu Ghraib" *Washington Post*, November 2, 2006 discussing Lieutenant General Ricardo Sanchez, <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/02/AR2006110200088.html>

⁶ "No Air Force general officer has ever been taken to court-martial for any offense." "The leadership has a reputation of protecting its own." Nicole Gaudiano, *Times Staff Writer*, "One-star faces administrative punishment; Female subordinates said general asked to rub their feet, sources say", *Air Force Times*, December 5, 2005 "Prosecuting Leaders", *Opinion*, *Air Force Times*, February 20, 2006. See generally, Elizabeth L. Hillman, *Defending America: Military Culture and the Cold War Court-Martial (Politics and Society in Twentieth Century America)* (2005). For example, there is "the case of General Joseph W. Ralston, who withdrew his nomination to be chairman of the Joint Chiefs of Staff in 1997 after admitting he had had an affair 13 years earlier. Ralston moved on to become the head of U.S. European Command and supreme allied commander Europe, NATO, and retired as a four-star general in March 2003. That was the same month Air Force 1st Lieutenant Philip Perez, a financial officer, was court-martialed at Ellsworth Air Force Base, South Dakota, for relationships with two women.

As to present or former high-level U.S. civilian authority, criminal prosecution for violations of international humanitarian law and/or international criminal law does not happen in U.S. domestic courts⁷.

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

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

Perez ultimately was found guilty of adultery and fraternization and conduct unbecoming. He was sentenced to dismissal. The case remains on appeal.” Nicole Gaudiano, Times Staff Writer, *Illegal Affairs; The Service’s Top Lawyer Didn’t Follow His Own Rules*, Air Force Times, January 3, 2005. “Of 244 cases since 1999 involving unprofessional relationships, adultery, fraternization and sodomy, the majority – 89 per cent – were disposed of with nonjudicial punishment. All of the 27 who ended up with a court-martial were men, mostly first lieutenants and captains.” *Id.*

⁷ Other types of prosecutions have occurred under laws such as the obstruction of justice statute (see on going case against Scooter Libby, Iran-Contragate during the Reagan Administration, and Watergate during the Nixon Administration) but none of these are even remotely related to violations of international humanitarian law and/or international criminal law.

because they are "good soldiers" implementing the policy of the Secretary of Defense is an obvious structural dilemma.

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

Provided a nexus with a state was found, state prosecutors might bring such a case against high level U.S. civilian authority or generals under general state law (whether statutory or when international law might be considered state law) that might be compatible with the international obligations. However, such prosecution appears problematic due to the possible invocation of federal government friendly doctrines such as federal officer immunity, state secrets⁸ and essentially automatic federal officer removal of the case from state court to federal court.

Given the lack of such prosecutions, criminal prosecution by a future administration of present or former high level U.S. civilian authority and generals of a

⁸ "U.S. Seeks Silence on CIA Prisons, Court Is Asked to Bar Detainees From Talking About Interrogations <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/03/AR2006110301793.html>

past administration for violations of international humanitarian law and/or international criminal law is extremely remote.

IV. Conclusion.

The United States mechanisms are inadequate for addressing criminal prosecution of high level U.S. civilian authority and/or generals for violations of international humanitarian law and/or international criminal law.⁹

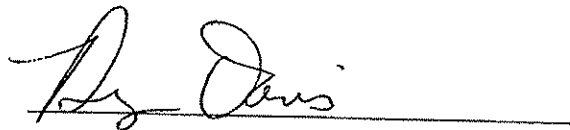
While I continue to explore how these types of criminal prosecutions could be done in the United States, based on the practice and the structural constraints described

⁹ It is revealing to explain what this research is not about to assist in understanding the subject of this affidavit. First, this research does not focus on the jurisprudence of international tribunals that the United States might have assisted in setting up such as the Nuremberg trials, the International Criminal Tribunal for Yugoslavia, the International Criminal Tribunal for Rwanda, the International Criminal Court and the Iraqi Special Tribunal. This research concerns only United States domestic courts. Secondly, this research does not focus on cases brought by vanquished external/internal enemies of the United States that have been prosecuted by military commissions sometimes for violations that approach the levels of international criminal law or international humanitarian law (In re Yamashita and the Civil War court martial of Captain Wirz, but not Eisentrager or In re Quirin). My concern is solely with criminal prosecutions of persons who are present or former high level U.S. civilian authority or military generals. Thirdly, my research does not focus on foreigners or U.S. domestic corporations who have allegedly violated international law abroad being the subject of civil process under the Alien Tort Claims Act or the Victims of Torture Act. These are civil cases brought by private individuals, not criminal prosecutions. Fourthly, this research does not focus on the criminal prosecution in United States domestic courts of Al-Qaeda suspects (Moussaoui, Lackawanna Cell, Lindh, and Padilla). None of these persons are present or former high-level U.S. civilian authority or military generals. Fifthly, this research does not focus on the efforts of detainees to contest their detention in the War on Terror (Hamdan v/ Rumsfeld, Hamdi, Rasul and Padilla and other lower court cases). These cases are not criminal prosecutions of high-level U.S. civilian authority or military generals. Sixthly, this research does not focus on the United States relationship to the International Criminal Court including the bilateral immunity agreements to prevent United States Citizens from being brought before that court. This research focuses on a particular subset of potential criminal prosecutions for violations of international law - the criminal prosecutions of the high level U.S. civilian authority or military generals in the United States domestic courts.⁷

above, in my opinion the United States is unable to criminally prosecute high level U.S. civilian authority and/or generals in U.S. domestic courts for violations of international humanitarian law and/or international criminal law.


For the reasons explained above, I support recourse being made to Germany's justice system to initiate investigation of the command responsibility of high-level U.S. civilian authority and generals. In the present state of United States law and practice, this recourse to Germany's justice system is necessary in order to assure victims receive justice and affirm fundamental rules of international law.

Respectfully submitted,



Benjamin G. Davis

Subscribed and sworn to before me by the said Benjamin G. Davis on
this 8 day of November, 2006

VALERIE LYNN PARRA
Notary Public - State of Ohio
My Commission Expires Feb. 25, 2007