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An den
Herrn Generalbundesanwalt
Beim Bundesgerichtshof
Postfach 27 20
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Betr: Strafanzeige gegen den US-Verteidigungsminister Donald Rumsfeld, u.a.

Expert Report of Scott Horton

1. **Professional Qualifications.** I am an attorney at law admitted to practice in the courts of the State of New York since 1982, and an adjunct professor of law at Columbia University in the City of New York, where I lecture in international law and international humanitarian law, and currently conduct the seminar on the treatment of detainees under international humanitarian law. I also chair the Committee on International Law of the Association of the Bar of the City of New York (the "Association") and have previously chaired two other committees. I am a former officer and current director of the International Law Association. My other qualifications are found on the attached curriculum vitae.

2. **Issue Presented.** I am advised that the Bundesanwaltschaft is studying the present *Strafanzeige* and will consider, among other matters, whether principal jurisdiction with respect to the matters alleged therein lies with the prosecutorial authorities and in the courts of the United States. I am asked to render an opinion on whether in fact a proper criminal investigation of the matters covered in the criminal complaint would be conducted in the United States so that a reasonable basis would exist to defer action so as to allow United States authorities to act.

Opinion

3. I have formed the opinion that no such criminal investigation or prosecution would occur in the near future in the United States for the reason that the criminal investigative and prosecutorial functions are currently controlled by individuals who are involved in the conspiracy to commit war crimes. My opinion rests on the following particular points:

3.1. The criminal investigatory functions of the Department of Defense ("DOD") rest on command and control principles under which the Secretary of Defense ("Rumsfeld"), principal defendant here, exercises ultimate authority as "convening authority" and hence effective immunity.

3.2. The criminal investigations hitherto undertaken pursuant to Army Regulation 15-6 are required to look only *down* the chain of command and not up, thus eliminating the possibility of any meaningful inquiry into the criminal misconduct of the defendants.

3.3. The criminal investigations undertaken were clearly influenced from above with the intention of producing a "whitewash" exculpating those in higher command.

3.4 Existing criminal prosecutions of low-ranking figures in Abu Ghraib and other detention facilities evidence a continuing scheme in corruption of the military criminal justice system designed to obscure the involvement of those up the chain of command.

3.5 While the American Constitution vests the legislative branch with oversight authority, those responsibilities have been abdicated, particularly as has been demonstrated by the conduct of the Senate Armed Services Committee.

3.6 Prosecutorial discretion under the War Crimes Act rests in the Attorney General and the United States Attorneys. The Attorney General, John Ashcroft, and his immediate subordinates have, in accordance with the allegations of the *Strafanzeige*, been complicit in a scheme for the commission of war crimes and accordingly will not undertake a criminal investigation. The Attorney General-designate, Alberto Gonzales, is a principal author of the scheme to undertake war crimes, having expressly noted in his January 25, 2002 memorandum that he was motivated by a well-founded fear of war crimes prosecution, which he sought to evade for the benefit of himself and others in the Administration.

3.7 Conduct of the Department of Justice ("DOJ")¹ demonstrates its refusal to address the question of war crimes culpability. Conscientious officers of the DOJ who have raised such issues have been disciplined, reprimanded, and subjected to a malicious campaign of harassment.

3.8 The legal profession in the United States, acting through the American Bar Association ("ABA"), has expressed its concern over the handling of this matter, the obvious inconsistency with law of pronouncements of the government on questions relating to the law of armed conflict and the failure of the Government to act in accordance with the law. The ABA resolution calls for appointment of a special commission of inquiry to investigate these matters, expressing a total lack of confidence in the current Government to do so. This is a predicate to the creation or appointment of an independent counsel to prosecute these matters. However, with the expiration of the Independent Counsel Act, no vehicle exists under American law by which these grave crimes could be investigated and prosecuted by independent counsel.

Background

4. In my capacity as a committee chair of the Association, I was visited by a significant delegation of very senior uniformed military lawyers in May 2003. The visitors advised me at that time that important policy decisions had been taken in the office of secretary of defense ("OSD") which were calculated to, and would, lead to the abuse of detainees held in the Global War on Terror ("GWOT"). They cited a number of specific decisions concerning the involvement of civilian contractors in the interrogation process, as well as the disengagement of military lawyers from a "watchdog" role in the interrogation facilities. These decisions, they said, "served no legitimate policy purpose." It was clear at the time that there were other decisions, probably reflected in secret or classified documents, which caused severe concern but which the officers were not at liberty to discuss. They further noted that military lawyers were being continuously circumvented in the process of policy analysis, presumably because they had consistently raised objection to initiatives of Rumsfeld on grounds that they were inconsistent with, or would violate, the law of armed conflict. The visitors sought the engagement of the organs of the legal profession with these issues with the hope that the Administration would resume the observance of standards firmly dictated by law and common

¹ DOJ comprises functions which in the Federal Republic of Germany are lodged in the following ministries or agencies: Bundesinnenministerium, Bundesjustizministerium and Bundesanwaltschaft.

decency. At the urging of our military colleagues, the Association became actively engaged in issues concerning the interrogation of detainees, raising concerns directly with the DOD, Central Intelligence Agency (“CIA”), the National Security Council, and oversight organs of the Congress. The Association’s work is documented in its report *LEGAL STANDARDS GOVERNING U.S. INTERROGATION OF DETAINEES* and supplements thereto and has been the subject of much reporting in the press. These issues were raised by the Association with other bar associations as well, including the ABA.

5. From this time forward, I was in periodic contact with numerous senior military officers based at various locations in the United States and around the world. My informants were and are engaged in policy formation issues.

U.S. Military Doctrine Concerning the Treatment of Detainees

6. By order issued by George Washington, as commander-in-chief of the Continental Army, on Dec. 25, 1776, American armed forces were directed to treat detainees in combat with dignity and respect, and not to allow them to suffer abuse or torture in any form. This “Order at Trenton” belongs with the Declaration of Independence to the oldest of American legal relics, antedating even the formation of the American republic. It was issued for the specific benefit of several regiments of German mercenaries who were captured by Washington in the Battle of Trenton. It became a standing order. The “Order at Trenton” was subsequently carried forward into the first U.S. codification of the law of armed conflict, crafted by Francis (Franz) Lieber, a German émigré. Lieber’s accounts of his own experiences of mistreatment as a prisoner in the Napoleonic Wars moved President Abraham Lincoln to commission him to draft a code of conduct to protect prisoners, which Lincoln then promulgated. Lieber was the first lecturer in international humanitarian law at Columbia University.

7. The Lieber Code, in turn, provided considerable inspiration for the initial articulations of the Geneva Convention, and, indeed, it is among the most-frequently cited authorities in the Pictet commentary. See JEAN S. PICTET, *COMMENTARY ON THE GENEVA CONVENTIONS* (1958). Accordingly, the United States embrace of successive iterations of the Geneva Convention, and the historically significant Hague Convention of 1907 (in connection with which the United States was represented by a delegation consisting of officers of the Association) was never controversial in any respect. These underlying rules have been most recently stated in the Department of the Army’s *FIELD MANUAL 34-52* (1992), which contains a correct, complete and accurate statement of the law with respect to the interrogation of detainees.

8. Rather than viewing this cherished legacy with respect, Rumsfeld and his political subordinates generally viewed all legal limitations on their dealings with detainees, and particularly restrictions affecting the interrogation process, with contempt and ridicule. They worked consistently to undermine and render inoperative the implementation of these rules in regulations binding on the armed forces. Principal actors in this process were Undersecretary of Defense for Policy Douglas J. Feith, Rumsfeld, and DOD General Counsel William J. Haynes.

U.S. Military Criminal Justice System

9. The American military utilizes a criminal justice system embracing certain command and control norms. The substantive law applied is focused in the Uniform Code of Military Justice (“UCMJ”), enacted by Congress, 10 U.S.C. ch. 47. The administration of this system vests in the military command structure, with Rumsfeld sitting as the ultimate “convening authority” for practical purposes. Under this system, special criminal investigations may be

undertaken by command authority, with one or more officers being appointed to conduct them. Army Reg. 15-6. It is a cardinal rule with respect to such investigations that they may look *down* the chain of command from the perspective of the officer appointed, but not later-ally or up the chain of command.

10. It is notable in the present case that a substantial number of investigations were commissioned, each with fairly narrowly tailored terms of reference. This approach assured several things: (1) the involvement in this process of civilians and senior policy formulators was insulated from scrutiny; (2) as the terms of reference did not overlap, interstices were consciously created as to which investigation was precluded; (3) security classifications could be, and were, used to shield certain individuals and operations in which they were involved from review; (4) during the pendency of the investigations, soldiers and officers could be, and were, placed under orders not to discuss the events at Abu Ghraib with anyone other than the investigators (a press embargo).

11. Further, my study of the conduct of the most important of these investigations, that led initially by MG George R. Fay, led to a conclusion that this was designed to obscure, rather than disclose, the true sources of the abuse at the Abu Ghraib facility. I believe that MG Fay was selected to conduct this investigation because of one particular qualification: his political fidelity to the Bush Administration. MG Fay, previously an officer of the CHUBB group of insurance companies, was well known as a successful fund-raiser for the Republican Party, and an enthusiastic political retainer of the Bush Administration. Walter Pincus, *Prison Investigator's Army Experience Questioned*, WASHINGTON POST, May 26, 2004.

12. In May 2004, I had occasion to interview several soldiers stationed at various locations in the German *Länder* of Hessen and Baden-Württemberg, who were attached to military intelligence units under the U.S. Army's V Corps, and who were previously stationed at, or who visited, Abu Ghraib. I conducted my interview for purposes of understanding how MG Fay was proceeding with his investigation. The accounts I received were all consistent and were highly revealing of MG Fay's intent. MG Fay held group meetings with soldiers in the presence of their group commanding officers. At these meetings, he reminded them that any soldier who had observed the abuse of detainees at Abu Ghraib and other sites and who had failed to report it contemporaneously was guilty of an infraction and could be brought up on charges. He stated that any non-commissioned officer who observed the abuse of detainees at Abu Ghraib and other sites and who failed to intervene or stop it was guilty of an infraction and could be brought up on charges. He then asked if anyone had observed any incidents they wished to discuss with him. The result of such a process is entirely predictable. MG Fay worked hard to limit the number of accounts of abuse in order to sustain a preconceived theory that the abuse at Abu Ghraib was the result of a handful of "rotten apples" rather than systematic instructions rendered through the chain of command. The soldiers with whom I spoke all felt that anyone providing evidence of abuse would be the target of certain retaliation in the form of (i) criminal charges; (ii) hazing and harassment or (iii) potential exposure and "friendly fire" death on the field of battle in Iraq. One specifically inquired about the possibility of securing political asylum in Germany, and I arranged for this soldier to obtain U.S. and German legal counsel on that issue. Soldiers who raised issues about detainee abuse in Iraq were subject to ridicule and threat; one notorious case involved a soldier who, after registering a report of severe abuse, was ordered to be found "mentally deranged," was strapped to a gurney and was flown out of Iraq.²

² The case involved Aidan Delgado; see David Debatto, *Whitewashing Torture?*, www.salon.com, December 8, 2004.

13. Through interviews I conducted of military personnel who interacted with MG Fay, I was also able to document and establish cases of abuse and mistreatment which were duly reported to MG Fay and which he failed to note or take account of in any way in the report he ultimately issued. I passed some of this information to staff members of the Armed Forces Committee of the United States Senate for use when MG Fay appeared to testify before the Committee.

14. I am reliably informed that at the end of May 2004, MG Fay presented his draft report to LTG Ricardo Sanchez, commander of CJTF-7, for Sanchez' review and approval. LTG Sanchez reacted that the report was such a whitewash of the role of military intelligence personnel that it stood no chance of gaining acceptance and would only subject the Army to further ridicule. LTG Sanchez refused to accept the report. Misleading accounts were subsequently given to the press to the effect that LTG Sanchez desired to be interviewed in connection with the report, and that because MG Fay was inferior in rank, he could not conduct such an interview. This provided a pretext for the appointment of a new investigating officer and the preparation of a new report.

15. Subsequently LTG Anthony R. Jones was appointed to conduct the investigation, and the report was broadly rewritten. The Fay/Jones report ultimately released in July 2004 bears little similarity to the original draft Fay report and reflects a notably more professional attempt to address the issue of liability *down the chain of command*. Characteristically, the more revealing and significant passages of this report which note the involvement of LTG Sanchez and senior figures in his command in decisions which contributed to the abuse at Abu Ghraib are in classified portions of the report, kept out of the public reach. Still, as noted to me by senior officers, certain senior figures whose conduct in this affair bears close scrutiny, were explicitly "protected" or "shielded" by withholding information from investigators or by providing security classifications which made such investigation possible. The individuals "shielded," I was informed, included MG Geoffrey Miller, MG Barbara Fast, COL Marc Warren, COL Steven Bolz, LTG Sanchez and LTG William ("Jerry") Boykin. In each case, the fact that these individuals possessed information on Rumsfeld's involvement was essential to the decision to "shield" them.

16. A particularly revealing example of "shielding" relates directly to Rumsfeld, and one of his principal deputies, the Undersecretary of Defense for Intelligence, Stephen A. Cambone. At an intelligence briefing conducted in the summer of 2003 in the Pentagon for the benefit of Rumsfeld, and with the attendance of Cambone, Boykin and other senior officers, Rumsfeld complained loudly about the quality of the intelligence which was being gathered from detainees in Iraq. He contrasted it with the intelligence which was being produced from detainees at Guantánamo following the institution there of new "extreme" interrogation practices. Expressing anger and frustration over the application of Geneva Convention rules in Iraq, Rumsfeld gave an oral order to dispatch MG Miller to Iraq to "Gitmoize" the intelligence gathering operations there. Cambone and Boykin were directed to oversee this process. Consequently, the decision to introduce the Guantánamo techniques (or "Gitmoize")—consciously crafted in evasion of the requirements of the Geneva Conventions—and to introduce them to Iraq, where the Conventions clearly applied, rested on the express and unlawful order of Rumsfeld. However, this simple fact, well known to many senior officers involved in the process, is consciously suppressed in all official reports issued by DOD. For instance the Fay/Jones account states that the visit of MG Miller was requested by CJTF-7, a statement which is technically correct and consciously misleading.

17. Notably, the military criminal justice system applies to uniformed members of the United States armed forces. The application of the UCMJ and other military law to United

States citizens who are civilians is probably unconstitutional. The issue has never been resolved definitively in the United States courts, but military prosecutors have acted on the assumption of absence of authority over civilians for several decades now. Accordingly, the military criminal justice system would in no event provide a basis for actions against Rumsfeld, Cambone, Feith or possibly Boykin (who, although a uniformed officer, currently holds a civilian subcabinet appointment).

18. Certain prosecutions are being carried forward by the military, the most significant of which are now proceeding at Ft. Hood, Texas through court martial. I have conversed with attorneys involved in these cases, have examined transcripts of the proceedings and have studied other accounts. I express no view as to the guilt or innocence of the individuals involved in those cases. Nevertheless, I consider it noteworthy that the highest profile cases in which the severest sanctions are sought consistently involve those soldiers who through neglect or oversight permitted photographic evidence of the crimes at Abu Ghraib to become public knowledge. Several soldiers I interviewed told me that they had a clear understanding from this process, that it wasn't the abuse of prisoners which was being punished, but the fact that the military, and particularly Rumsfeld, has been embarrassed by these matters becoming public. The conduct and staging of these prosecutions lends certain credence to this perception.

19. The Ft. Hood prosecutions are further marked by a conscious obstruction of efforts by the defense to prove that they were acting in reliance upon orders up the chain of command. Defense counsel requested that certain senior officers be immunized so as to compel their testimony (notwithstanding their right against self-incrimination under the U.S. Constitution). The presiding judge, COL James L. Pohl, declined all such requests. It appears quite clear that COL Pohl's motivations in making such rulings included, prominently, protection of the reputation of the armed forces and the integrity of the chain of command.

Congressional Oversight

20. The U.S. Constitution adopts a tri-partite theory of governance under which specific functions are divided among the executive, the legislative and the judiciary branch. A notion of "checks and balances" underlies this system, whereby the Congress conducts oversight of the executive's management of the government, holding officers of the executive to account for the discharge of their duties. With respect to the question of abuse of detainees, this constitutional process of oversight has been rendered inoperative through intimidation and political manipulation.

21. With respect to military affairs, the senior congressional oversight organ is the Senate Armed Services Committee ("SASC"). Following the first media reports of the prisoner abuse scandal, the SASC convened a series of hearings. On behalf of the Association, I communicated with SASC staff suggesting potentially useful lines of inquiry in preparation for their hearings of DOD representatives, including Rumsfeld, Cambone, and the authors of various reports. In particular, the Association also identified witnesses and documents which could be examined in order to gain a better understanding of the full dimensions of the issue, and particular of the policy decisions which directly triggered it.

22. The SASC chair, Senator John Warner, at first signaled his full intention to conduct serious hearings which would reveal what had gone wrong. However, after a series of meetings with Republican congressional leaders, Senator Warner suddenly began to sound quite different notes, expressing concerns that any investigation might undermine the nation's war effort. Pauline Jelinek, *Senator Calls for Investigation of New Cases of Prisoner Abuse*, Associated Press, July 15, 2004. I have been informed and believe that Senator Warner was threatened

with sharp political retaliation by leadership figures in the Republican Party if he carried through with his plan to conduct real hearings. I note that the journalist Seymour Hersh has written in a similar vein. *The Coming Wars*, THE NEW YORKER, January 24 & 31, 2005.

23. When I proposed a number of potential witnesses to be interviewed by SASC staff, I was told by a committee staffer that "Senator Warner has assured Rumsfeld that the Committee will conduct no independent investigation of these matters." Hence, I was told, no interviews would be conducted. Similarly, although SASC requested documents, it failed to follow aggressively in securing such documents and at times accepted totally absurd explanations as to DOD's failure to produce documents (including, at one point, a contention by DOD that it has "lost or misplaced" its correspondence with the International Committee of the Red Cross ("ICRC")) and that dealings with ICRC were "secret" or "privileged."

24. While some senators did exhibit diligence and care in pursuing the matter, nevertheless, the format of the inquiry and the failure to conduct independent inquiry or to secure critical documents left the SASC incapable of performing its oversight role in any meaningful way.

Criminal Prosecution under the War Crimes Act

25. In addition to UCMJ, the other principal bodies of criminal law under which war crimes may be charged are the War Crimes Act of 1996, 18 U.S.C. sec. 2441, and the Anti-Torture Act of 1996, 18 U.S.C. sec. 2340. Enforcement of these acts is committed to the Department of Justice and particularly to the Attorney General and the various United States Attorneys.

26. In the present case, it is clear that policy decisions underlying the abuse of prisoners in the GWOT were reached on the specific advice of DOJ, with the knowledge and support of the Attorney General. In particular, these include the following:

26.1 A determination that the Geneva Conventions did not apply to GWOT, or that the prosecution of war crimes arising under the Geneva Conventions could be avoided by the president making determinations concerning the inapplicability of the Geneva Conventions;

26.2 A determination that the Convention Against Torture, Cruel, Inhuman and Degrading Treatment ("CAT") confers no protections on detainees in the GWOT;

26.3 The redefinition of "torture" under American criminal law, so that acts which clearly constitute "torture" are not included, and so that those acting under color of law or authority of the U.S. Government are exempted from its provisions;

26.4 A determination that aliens outside the United States have no protection against "cruel, inhuman and degrading" treatment;

26.5 A determination that the president, in the exercise of his commander-in-chief authorities and in dealing with detainees in GWOT is entitled to disregard any law, whether given by Congress, international convention, treaty or international customary law, and pursue those policies and practices he deems best;

26.6 A denial of any recourse to courts in any nation for the purpose of enforcement of any rights that detainees in the GWOT may have, including in particular, a denial of the Great Writ (*habeas corpus*).

27. This policy guidance is reflected in numerous memoranda issued by DOJ and in particular by the Office of Legal Counsel ("OLC"). Many of these memoranda have subsequently become public knowledge, including in particular a memorandum dated February 7, 2002 by Jay Bybee of DOJ OLC (which I believe actually to have been authored by John Yoo) to Alberto Gonzales, counsel to the president (the "torture memorandum"). The torture memorandum was subsequently provided by Gonzales to DOD and CIA as substantive advice for the incorporation of practices which constitute torture and/or cruel, inhuman and degrading treatment in authorized interrogation procedures. The torture memorandum was subsequently repudiated by the DOJ and replaced with a new memorandum dated December 30, 2004. That memorandum nevertheless wrongfully and unlawfully maintains the legality of action taken in reliance on the torture memorandum. Moreover, I am informed and believe that a Working Group Report dated April 4, 2003 completed in the DOD continues in effect, and recapitulates the essence of the torture memorandum.

28. Accordingly, senior lawyers at DOJ, acting with the knowledge and support of the Attorney General, were complicit in the scheme to introduce torture and other abusive practices into authorized regimes of treatment for detainees in GWOT. It is therefore clear that DOJ will not act on its responsibility to initiate criminal investigations or undertake prosecutions of the conspirators and implementers of this scheme.

29. Moreover, recent news reports show that a DOJ employee who correctly advised on ethical constraints binding on attorneys of the DOJ in connection with a U.S. citizen who was subject to torture after being detained in Afghanistan was subjected to acts of intimidation; received a negative performance evaluation because she gave correct advice; was fired from her position; was the target of a vicious harassment campaign evidently undertaken on the authority of senior figures at DOJ. These actions were clearly designed to intimidate DOJ lawyers from questioning the legality or ethical underpinnings of wildly illegal and unethical conduct undertaken by senior political figures at DOJ.³

30. The nomination of Alberto Gonzales to serve as Attorney General provides further evidence of a conscious intention to block or frustrate any effort to commence a criminal investigation of war crimes which are the gravamen of the *Strafanzeige*. According to widely circulated press reports, which Gonzales was unable to contradict in his sworn testimony, Gonzales was the conductor of the efforts in the Administration to avoid the protections of the Geneva Conventions, the CAT and other legal protections for detainees. In his testimony, Gonzales continued to assert preposterous interpretations of the Geneva Conventions, the CAT and other legal authorities in support of his view that "extreme" interrogation techniques could be used on detainees. It is accordingly clear that any serious criminal investigation and prosecution would certainly involve Gonzales as a focal actor in the scheme.

31. Finally, the United States previously possessed a legal vehicle for the prosecution of crimes as to which the Attorney General or those close to him had a perceived conflict of in-

³ See *Jesselyn Radack v. U.S. Department of Justice*. Jesselyn Radack, former attorney in the Justice Department's Professional Responsibility Advisory Office during the John Walker Lindh case, raised legal and ethical objections over the questioning of Lindh in Afghanistan without his lawyer and revealed misconduct by Department of Justice officials. Her memos were purged and not turned over to a criminal court. She was then pushed out of her job at the Justice Department, fired from her next job, put under criminal investigation and put on the no-fly list. Jane Mayer, *Lost in the Jihad, Why did the government's case against John Walker Lindh collapse?*, THE NEW YORKER, March 10, 2003; Douglas McCollam, *The Trials of Jesselyn Radack*, THE AMERICAN LAWYER, July 14, 2003; *Whistleblower Charges Justice Dept. with Misconduct in Chertoff's Prosecution of John Walker Lindh*, Democracy Now Press Release, January 13, 2005; Eric Lichtblau, *Nomination May Revisit Case of Citizen Seized in Afghanistan*, NEW YORK TIMES, January 13, 2005.

terest, the Independent Counsel Act, 28 U.S.C. sec. 591 (expired 1999). This act provided a mechanism under which the appointment of an independent counsel by a special judicial panel could be compelled. The act expired and has not been renewed.

32. In Senate hearings on his nomination, Gonzales declined to give assurances that he would recuse himself from any investigation of detainee abuse matters. His intention is transparently to preclude any such investigation from occurring.

Assessment of the Legal Profession

33. These developments continue to be matters of gravest concern within the organized legal profession in the United States. A broad consensus exists that grave breaches of the Geneva Conventions have been committed in the name of the United States in a systematic fashion. The nature of these breaches parallels closely the criminal conduct openly contemplated and justified in certain policy memoranda crafted at the highest levels of the Government. Under principles articulated at Nuremberg and applied in prosecutions there and in the International Tribunals Courts for Rwanda and the Former Yugoslavia, these facts alone would establish a basis for a war crimes investigation targeting those involved in the formulation and implementation of the suspect policies. However, for the reasons noted above it is clear that no such investigation or prosecution will occur under the current Administration, and that the Congress will not discharge its oversight responsibilities.

34. Accordingly, in the days leading up to the annual meeting of the ABA in Atlanta, Georgia, the leadership of the legal profession took the extraordinary step of issuing a public declaration (**LAWYERS' STATEMENT ON THE BUSH ADMINISTRATION'S TORTURE MEMOS**).⁴ This declaration summarized the conclusions made by the DOJ and DOD which are highlighted above and repudiated them. "These memoranda and others like them seek to circumvent long established and universally acknowledged principles of law and common decency." It continues "[t]he lawyers who prepared and approved these memoranda have failed to meet their professional obligations. . . [including the obligation to] uphold the law." The declaration called for "appropriate inquiry into how and why such memoranda were prepared and by whom they were approved and whether there is any connection between the memoranda and the shameful abuses that have been exposed and are being investigated in Abu Ghraib prison in Baghdad and at other military prisons." Notwithstanding this historically unprecedented public appeal, no action was taken by the DOJ or by the Congress to compel criminal investigation and prosecution.

35. At the annual meeting of the ABA on August 5, 2004, the House of Delegates, the highest governance organ of the organized legal profession in the United States, adopted a series of resolutions on the motion of the Association and eleven other member bar associations. The ABA condemned the use of torture by the United States Government and demanded that the United States Government resume compliance with and respect for the Geneva Conventions, the CAT, the International Covenant on Civil and Political Rights and related international customary law. Significantly, the ABA also called for the creation of a special commission, with plenary subpoena power, to conduct an investigation of the abuse of detainees and the connection between this abuse and the policy decisions identified above. This resolution is historically unprecedented and reflects the judgment of the organized legal profession in the United States that the DOJ has abdicated its responsibility to conduct a proper criminal inquiry and act thereon.

36. Notwithstanding this appeal by the legal profession, no action was taken by the DOJ to investigate or act on the involvement of senior political figures in these war crimes. There is every reason to expect that this opposition will be firmer once Gonzales takes office.

⁴ Signatories of the declaration include the eight living former presidents of the ABA, numerous retired judges, retired attorneys general, deans of law schools, law professors, attorneys and prosecutors. The declaration is found at www.afj.org/spotlight/0804Statement.pdf

The foregoing constitutes my report, prepared to the best of my ability, and with respect to factual statements, it reflects facts as to which I have personal knowledge, or where I do not, views formed upon information and belief.

Dated: New York, New York
January 28, 2005

Scott Horton

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