

**[ENGLISH TRANSLATION OF SECTION 5.2.3 OF THE COMPLAINT TO THE
GERMAN FEDERAL PROSECUTOR]**

**5.2.3. The Legal Architecture of the Torture Program: The Criminal Liability of
John Yoo and Jay Bybee as Authors of the Torture Memorandum**

5.2.3.1. Facts

1. Introduction

In March 2004, the U.S. government published a series of legal opinions upon which the torture practices here discussed were based. These included a statement by the Office of Legal Counsel (OLC) on August 1, 2002, written by John Yoo and Jay Bybee and commonly known as the “Torture Memorandum.” This Torture Memorandum laid the groundwork for the justification of the legalization of torture during interrogations desired by the administration.

The August 1, 2002 Torture Memorandum, written by John Yoo, was signed by Jay Bybee, at the time Assistant Attorney General and head of the Office of Legal Counsel in the U.S. government. Bybee forwarded it to the client, former General Counsel to the U.S. President and the current U.S. Attorney General, defendant Alberto R. Gonzales. Bybee also advocated the legal position asserted in the Torture Memorandum in a working group on interrogation techniques¹ later created by the U.S. Defense Department during the “Global War on Terrorism” declared by the second Bush Administration. In its “Working Group Report” of April 4, 2003, the legal provisions of the Torture Memorandum were transformed into practical guidelines for torture during interrogations.

¹ “Working group within the Department of Defense to Assess the Legal, Policy, and Operational Issues Relating to the Interrogation of Detainees Held by the United States Armed Forces in the War on Terrorism.”

Jay Bybee was appointed to the office of Assistant Attorney General by President Bush in the year 2001. He is currently a judge on the Ninth Circuit U.S. Court of Appeals.

In various memoranda from the Office of Legal Counsel beginning in 2001, John Yoo advocated the legal position adopted by the White House, the concept of “Alien Unlawful Combatants,” which maintained that the treatment of captured Taliban fighters and Al Qaeda members in Iraq, Afghanistan and Guantanamo was not covered by the Geneva Conventions or other international humanitarian law. In a letter to “Dear Judge Gonzales” and addressed to “The Honorable Alberto R. Gonzales” on August 1, 2002, he explicitly referred to the Torture Memorandum he had co-authored the same day, and further indicated that the torture during interrogations therein described violated neither the U.S. Constitution nor international law, and that no measures by international courts should be feared. Yoo later wrote the memorandum “Military Interrogation of Alien Unlawful Combatants” on March 14, 2003, for a working group on interrogation techniques created by the U.S. Defense Department. In it, he repeated his positions in the Torture Memorandum.²

John Yoo was Deputy Assistant Attorney General from 2001 to 2003 and is now Professor of Law at Boalt Hall School of Law, University of California at Berkeley.

The Office of Legal Counsel (OLC) is an independent agency in the U.S. Justice Department and is, among other things, responsible for providing legal advice to the President and the U.S. Administration. Legal opinions are binding Executive legal positions and, under the Judiciary Act of 1789, are binding on all ministries and agencies, including the Department of Defense and the Central Intelligence Agency (CIA). The OLC provides the Executive with legal advice in the form of memoranda, especially on constitutional issues and other complex or controversial legal matters.³ Such memoranda are called “opinions” by the OLC, but they have great practical significance and are binding in nature. They are not academic information on the legal situation, but rather—

² Michael Isikoff, Torture: Bush's Nominee May be DOA, Newsweek, March 21, 2005 (<http://www.msnbc.msn.com/id/7169452/site/newsweek>).

³ <http://www.usdoj.gov/olc>.

as international law expert Ruth Wedgwood has expressed it—present the Executive’s authoritative interpretation of constitutional law.⁴ OLC memoranda accepted by the President or the Attorney General are viewed as binding within the Executive Branch⁵ and have the same significance as court decisions.⁶

The first document described as the Torture Memorandum is the “Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense,” on the subject of “Application of Treaties and Laws to al Qaeda and Taliban Detainees,” published by the Office of Legal Counsel and dated January 22, 2002.⁷ It comprises 37 pages. A four-page appendix lists 19 summaries of U.S. court decisions in which violations of the prohibition on torture were found. Two court decisions are included in which torture was not found.

The Torture Memorandum’s key finding is that the harsh interrogation methods desired by the Executive do not meet the definition of torture in the relevant provisions of U.S. international criminal law (18 U.S.C. Sec. 2340-2340A⁸) and therefore have no criminal

⁴ Frank Davies, “Probe urged over ‘torture’ memos,” *The Miami Herald*, August 6, 2004.

⁵ Harris, in: *Journal of National Security Law & Policy*, Vol. 1 [2006], p. 409 (424); Jane Mayer, *THE MEMO*. How an internal effort to ban the abuse and torture of detainees was thwarted (http://www.newyorker.com/fact/content/articles/060227fa_fact).

⁶ David Luban, *Legal Ethics and Human Dignity*, Cambridge University Press, forthcoming, Chapter 6, 59; Scott Horton, *Military Necessity, Torture and the Criminality of Lawyers*, in: Kaleck, Ratner, Singlenstein, Weiss (eds.), *International Prosecution of Human Rights*, Berlin 2006.

⁷ Reprinted in *The Torture Papers. The Road to Abu Ghraib*. Eds. Karen J. Greenberg and Joshua L. Drahtel, Cambridge 2005, Memo 14, 172 et seq.

⁸ Section 2340. Definitions

As used in this chapter -

(1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from -

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and

consequences for members of the U.S. armed forces and the staff of U.S. agencies. Three justifications for this were provided, specifically that the definition of torture under 18 U.S.C. 2340-2340A included only specifically intended “extreme acts” involving infliction of massive pain, so that even cruel, inhuman or degrading treatment would not constitute prohibited torture. Torture during interrogations, protected by the President’s decision-making powers as commander-in-chief, was deemed immune from criminal prosecution, and U.S. interrogators could also rely individually on the United States’ right to self-defense against aggressive war.

The Torture Memorandum of August 1, 2002 starts with the accurate premise that torture represents an intensification of degrading treatment. But by greatly stretching the meanings of words, and without any reflection or discussion of other views, it then maintains that simple infliction of pain and suffering is not enough to fall within the proscription of torture, which requires an intensity equal to the most severe physical injury. The pain inflicted must be equivalent to that of death or injuries that could lead to organ failure or loss of significant body function. Pain or suffering of a psychological nature must cause long-term mental harm. Under U.S. law, the memo maintains, torture is only punishable if such pain is inflicted with specific intent. Degrading, cruel and inhuman treatment per se, in contrast, is not torture. The memo ignores the fact that

(3) "United States" includes all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title and section 46501(2) of title 49 Section 2340A. Torture

(a) Offense. - Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction. - There is jurisdiction over the activity prohibited in subsection

(a) if –

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy. - A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

international law and American law both explicitly prohibit degrading, cruel and inhuman treatment.

To further ground the Torture Memorandum, the President's power as commander-in-chief is interpreted to mean that he can take opponents into custody, detain and interrogate them, based on his own unlimited authority, in order to gain information about the enemy's military plans. The President is not bound by law in this function. Congress, which is responsible for legislation, may no more interfere in the interrogation of enemy combatants than it may dictate to the President his strategic and tactical decisions on the battlefield. Just as laws requiring the President to make war in a specific way or for a specific purpose would be unconstitutional, so would be laws aimed at preventing the President from gaining information through specific interrogation techniques he believes necessary for warfare. The proscription against torture in the international criminal law of U.S.C. 18 Sec. 2340A thus cannot limit the President's powers as commander-in-chief.

Finally, just in case, but without any basis for this crude thesis, the memo derives from the United States' right to self-defense in the terror war begun by al Qaeda a subjective (self-defense) right to torture on the part of interrogators, and proposes this argument for the individual defense of torturers in a (not entirely inconceivable) criminal procedure.

2. The Situation Before the Torture Memorandum

After September 11, and especially in the course of the Afghanistan war, the CIA took into custody a large number of people whom they took to be al Qaeda's top leaders. However, the CIA officials charged with interrogating these prisoners were unable to fulfill the expectations placed on these interrogations, particularly by political leaders. When even Abu Zubaydah, the heretofore cooperative high-ranking al Qaeda official, refused to continue cooperating with the CIA, the political leadership demanded more

results and the use of harsher interrogation methods.⁹ The background to this request was a fear among CIA members that they could be prosecuted for violating national and international law if they applied harsher interrogation methods, and their refusal to continue using certain interrogation methods. Vice President Dick Cheney and Defendant David S. Addington were in close contact with CIA legal advisor Scott W. Muller regarding the structuring of effective interrogation methods for so-called high value detainees. The U.S. Defense Department was also included in this discussion, because members of the U.S. Armed Forces were also involved in the use of torture in interrogations. Muller told Vice-President Cheney, to Cheney's annoyance, about the CIA interrogators' legal concerns, particularly regarding the UN Torture Convention. Cheney instructed his legal advisor, Addington, to clarify the matter.¹⁰

In this way, the political purpose was defined as making torture legally unassailable and implementing it politically and practically within the security apparatus, even against the opposition of CIA interrogators. At a meeting in summer 2002 between the Defense Department's General Counsel, Defendant William Haynes, the White House Counsel at the time, Defendant Gonzales, and Defendant Addington, as advisor to the Vice President, harsher interrogation techniques were already discussed, and methods such as "water boarding" and threats to continue the interrogation with foreign and more brutal interrogators were considered acceptable.¹¹

At this point, the second Bush Administration had already achieved its first goal with an OLC memorandum of January 22, 2002, authored by John Yoo and signed by Jay Bybee. Its invented concept of the "Alien Unlawful Combatant" made the claim, which was accepted within the Executive, that the Geneva Conventions, especially the Third Convention on the protection of prisoners of war, were not applicable to the treatment of Taliban fighters and al Qaeda members. The road to torture in the course of the declared

⁹ See Kathleen Clarke, *Journal of National Security Law & Policy*, Vol 1, p. 455 (456 et seq.).

¹⁰ Johnston Risen, *Aides Say Memo Backed Coercion for Qaeda Cases*, *New York Times*, June 27, 2004.

¹¹ Michael Hirsch et al., *A Tortured Debate*, *Newsweek*, June 21, 2004 (<http://www.msnbc.msn.com/id/5197853/site/newsweek/>).

Global War on Terrorism was already paved by this legally untenable, internationally criticized, and methodologically quite bizarrely grounded concept of “Alien Unlawful Combatants.”

3. The Authorization to Issue the Torture Memorandum of August 1, 2002

To further protect the interrogation practices of the U.S. military and the CIA, the Defendant Addington in summer 2002 authorized the Office of Legal Counsel to issue a corresponding memorandum for the President, to the attention of his legal advisor Gonzales. The assignment already envisaged the solution to the problem, that is, the limitation of the prohibition on torture to the infliction of the most severe pain or suffering with specific intent to torture.

4. Emergence of the Torture Memorandum

The head of the Office of Legal Counsel, Defendant Jay Bybee, assigned John Yoo, the Deputy Assistant Attorney General at the time, to author the Torture Memorandum. Yoo had been in office since 2001 and had already taken positions in numerous memoranda on the powers of the President in his declared “Global War on Terror.” He had, among other things, coined the concept, also utilized politically, that captured Taliban fighters and al Qaeda members had no rights.¹² In this memorandum, he also maintained that international law had no significance for the U.S. Executive and the U.S. President.

John Yoo, who assumed that his memorandum would be particularly binding on the U.S. Executive,¹³ was familiar with the discussion on unsuccessful interrogation methods and knew that the Executive and the political leadership wanted harsher interrogation methods to be put in place.

¹² See the memorandum of January 22, 2002 on the Application of Treaties and Laws to al Qaeda and Taliban Detainees.

¹³ John Yoo, Robert J. Delahunty, Memorandum for William H. Taft IV of January 14, 2002, p. 1 (<http://www.cartoonbank.com/newyorker/slideshows/02YooTaft.pdf>).

In the Torture Memorandum, which was ultimately signed for the OLC by Bybee, Yoo did not even attempt to gauge such harsh interrogation methods according to international law or to clarify international legal opinion on the questions posed. Instead, he proceeded to subject the words of the torture definition in Sections 2340-2340A of Title 18 of the U.S. Code to his own historical and lexical interpretation. In answering the questions brought to the OLC, he came to the conclusion that the criminal provisions on prosecution of torture under 18 U.S.C. Sec. 2340-2340A were not applicable to the harsher interrogation methods under consideration because they could not be viewed as torture within the meaning of the law. He never mentioned the prohibition on cruel, inhuman and degrading treatment that is anchored in customary law.

Interestingly, in a personal letter to Presidential advisor Gonzales that accompanied the August 1, 2002, Torture Memorandum, Yoo went beyond the questions dealt with in the memorandum to address the international, and especially international legal, legitimacy of harsh interrogation methods and the risks of criminal prosecution. In the process, he also addressed the torture definition in Article 1(1) of the UN Torture Convention (“CAT”), but nevertheless reached the same conclusion as in the Torture Memorandum.

5. The Use of the Torture Memorandum

Following its appearance in August 2002, the Torture Memorandum’s arguments would determine the political and administrative implementation of torture by the White House, the Defense Department and the CIA, as described above, generally, and in the description of the al Qahtani case.

Evidence of the administrative significance of the Torture Memorandum can be found within the U.S. Defense Department and the U.S. Military, where the Torture Memorandum had a direct effect on military specifications on carrying out interrogations.

The Torture Memorandum, originally prepared for the White House at the request of the CIA, was forwarded to the Pentagon, where it was viewed as the solution to the

“frustration” of military interrogators.¹⁴ In January 2002, resulting in part from internal pressure by military lawyers who disagreed with the legal views expressed in the Torture Memorandum, the General Counsel in the Defense Department, Defendant William Haynes, set up a working group on the instructions of Donald Rumsfeld that included military lawyers and representatives of all branches of the U.S. military. The working group’s mandate was to develop guidelines for the use of interrogation techniques in Guantanamo, Afghanistan and Iraq. The “Working Group Report,”¹⁵ published on April 4, 2003, by the Defense Department working group, included a 60-page survey and at the end listed interrogation methods that would be permissible in the future, based on the Torture Memorandum.¹⁶ It first listed 26 interrogation methods of lower intensity, some of which are described in greater detail in the military rulebook for interrogations.¹⁷ The Report then listed as numbers 27 to 35 “more aggressive counter-resistance techniques,” which required prior specialized training and written authorization for the protection of all concerned (probably referring to the interrogators). Such counter-resistance techniques were described as: isolation; continuous interrogation for 20 hours a day; forced shaving; so-called non-stress standing in normal positions for up to 4 of 24 hours; sleep deprivation for up to 4 consecutive days; forced stress through 15 minutes of endurance sport within 2 hours; rapid slaps to the face and stomach not causing pain or injury; forced undressing and forced nakedness; and fear scenarios (such as faked attacks by dogs).

The working group was originally supposed to undertake its own legal analysis. However, under pressure from General Counsel Haynes in the U.S. Defense Department, the members of the working group were pressed to accept the views of Yoo and Bybee, which Yoo formulated on March 14, 2003, in an extra memorandum compiled for the working group that has not yet been published, entitled “Military Interrogation of Alien Unlawful Combatants.” This new Yoo memorandum repeated the positions in the Torture

¹⁴ Lisa Hajjar, Torture and the Lawless “New Paradigm,” Middle East Report Online, December 9, 2005 (www.merip.org/mero/mero120905.html).

¹⁵ “Working Group Report on Detainee Interrogations in the Global War against Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations,” available at <http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf>.

¹⁶ *Id.*, p. 61 et seq.

¹⁷ Known as Field Manual 34-52.

Memorandum.¹⁸ In its Report, the working group referred explicitly to the legal analysis in the Torture Memorandum¹⁹ and used it as the basis for the Report.²⁰ Central parts of the Report were thus built upon the Torture Memorandum and incorporated its substantive conclusions almost entirely and nearly word-for-word, including the definition of the specific intent to torture, the definition of severe pain and suffering, the limitation to long-term mental harm, the discussion of the extent of the President's power as commander-in-chief, and finally, the discussion of the application of the justifications of self-defense and necessity.²¹

In addition, the Torture Memorandum was used as the basis for the redefinition of the Defense Department's interrogation guidelines.²²

The Working Group Report and the Torture Memorandum became the official basis for the Defense Department's interrogation policies, at least during the period from March to December 2003.²³ The Memorandum guided the behavior of Defendant Major General Miller, the commandant of Guantanamo, and of General James Hill, the head of the Southern Command.²⁴ Four months after Miller received the Report, he was sent to Iraq by order of the Pentagon, together with other interrogation specialists from Guantanamo, to inform the interrogators there about the methods used at Guantanamo.²⁵

¹⁸ Michael Isikoff, Torture: Bush's Nominee may be DOA, Newsweek, March 21, 2003 (<http://www.msnbc.msn.com/id/7169452/site/newsweek>).

¹⁹ Page 65 of the report states:

“Any decision whether to authorize a technique is essentially a risk benefit analysis that generally takes into account the expected utility of the technique, the likelihood that any technique will be in violation of domestic or international law, and various policy decisions. Generally, the legal analysis that was applied is that understood to comport with the views of the Department of Justice.”

²⁰ See Lederman, Silver Linings (or, the Strange but True Fate of the Second (or was it the Third?) OLC Torture Memo), Balkinization, September 21, 2005 (<http://balkin.blogspot.com/2005/09/silver-linings-or-strange-but-true.html>).

²¹ See die comparison in Kathleen Clarke, op. cit., p. 472.

²² See Kathleen Clarke, op. cit., p. 470

²³ See the letter from Daniel Levin to William J. Haynes II von February 4, 2005 (<http://balkin.blogspot.com/Levin.Haynes.205.pdf>).

²⁴ Jane Mayer, THE MEMO. How an internal effort to ban the abuse and torture of detainees was thwarted (http://www.newyorker.com/fact/content/articles/060227fa_fact).

²⁵ Jane Mayer, THE MEMO. How an internal effort to ban the abuse and torture of detainees was thwarted (http://www.newyorker.com/fact/content/articles/060227fa_fact).

6. Legal and Political Assessments of the Torture Memorandum

David Luban, a respected law professor at Georgetown University, has reported a general view among scholars in the field that the legal analysis in the Torture Memorandum is “bizarre.”²⁶

Indeed, the Memorandum is viewed by many American lawyers as incompatible with the Constitution and with existing law.²⁷ An example is the declaration known as the “Lawyer’s Statement on the Bush Administration’s Torture Memos,” signed by 106 lawyers, including 12 former judges and five former members of Congress. It alleges that “the Administration’s memoranda . . . ignore and misinterpret the U.S. Constitution and law, international treaties and rules of international law” and that “the lawyers who prepared and approved these memoranda have failed to meet their professional obligations” and “their high obligation to defend the constitution.”²⁸

Professor Harold Koh, Dean of Yale Law School, found in his assessment of the Torture Memorandum that:²⁹

The August 1 OLC memorandum cannot be justified as a case of lawyers doing their job and setting out options for their client. If a client asks a lawyer how to break the law and escape liability, the lawyer’s ethical duty is to say no. A lawyer has no obligation to aid, support, or justify the commission of an illegal act . . . In sum, the August 1, 2002 Bybee Opinion is a stain upon our law and our national reputation. A legal opinion that is so lacking in historical context, that offers a definition of torture so narrow that it would have exculpated Saddam Hussein, that reads the Commander-in-Chief power so as to remove Congress as a check against torture, that turns Nuremberg on its head, and that gives government officials a license for cruelty can only be described--as my predecessor, Dean Eugene Rostow of Yale Law School, described the Japanese internment cases--as a ‘disaster.’

²⁶ “The near consensus in the legal community was that the legal analysis in the Bybee Memo was bizarre.”

²⁷ See references in Harris, in: *Journal of National Security Law & Policy*, Vol. 1 , 2006, p. 409, 416, Fn. 27.

²⁸ <http://www.afj.org/spotlight/0804statement.pdf>.

²⁹ Koh, 43 *Colum. J. Transnational L. S.* 654.

In the American legal community, the Torture Memorandum is now seen as a stage-managed license to permit the use of as much force as possible in interrogations.³⁰ It is believed that the Torture Memorandum was never meant to be legal advice, but rather a means of protecting CIA members from prosecution for torture.³¹

In the view of military lawyers, the Working Group Report represented a “calculated effort to create an atmosphere of legal ambiguity.”³²

The Torture Memorandum itself was replaced by the OLC’s “Levin Memorandum,” published on December 30, 2004, which added little that was new to the issue aside from a more or less openly formulated criticism of the methodology and legal quality of the Torture Memorandum. It addressed neither the prohibition of cruel, inhuman or degrading treatment under the UN Torture Convention, nor the prohibition of inhuman treatment under the Geneva Conventions. The Working Group Report—and thus also the Torture Memorandum of August 1, 2002—were classified in March 2005 as “historical documents,” and thus no longer binding.³³

7. Relationship Between the Torture Memorandum and the Crimes Described Thus Far by Other Defendants

³⁰ “What Bush Wants to Hear: A Consideration of John Yoo’s *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*,” David Cole, *New York Review of Books*, November 17, 2005. Clark, 1 *J. National Security Law & Policy* at 462: “The memorandum apparently became the basis for the CIA’s use of extreme interrogation methods, including ‘waterboarding,’ and shaped Defense Department interrogation policy. In fact, much of the memorandum was used verbatim in an April 2003 Defense Department Working Group report on interrogation methods, which then became the basis for Defense Department policy.”

³¹ Clark, 1 *J. Nat’l Security L. & Pol’y* at 468, see also David Luban, *Liberalism, Torture, and the Ticking Time Bomb*, in *The Torture Debate in America* (Karen J. Greenberg ed., 2006) 55.

³² See Kreiner, *Torture Lite*, in *Journal of National Security Law & Policy*, Vol. 1 (2006), p. 187 (193 f.) with additional notes.

³³ See letter from Haynes to Judge Advocates General and the Staff Judge Advocate to The Commandant, March 17, 2005 (<http://balkin.blogspot.com/Haynes.Jag.305.pdf>).

Defendant Rumsfeld first used the concept of the so-called illegal combatant devised by Defendant Yoo. He publicly announced that the prisoners would be “for the most part, [treated] in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate.” Immediately before the appearance of the Torture Memorandum, that is, on February 7, 2002, he once again qualified the importance of the Geneva Conventions, declaring, “The reality is the set of facts that exist today with the al-Qaeda and the Taliban were not necessarily the set of facts that were considered when the Geneva Convention was fashioned.”³⁴

According to Representative Abercrombie during a House Armed Services Committee hearing on military findings at Abu Ghraib prison, it is a fact that the Torture Memorandum was known in the office of U.S. Defense Secretary Rumsfeld and elsewhere, and was circulated widely. This was also described in the Schlesinger Report and confirmed by Major General Fay.³⁵

Equipped with the arguments in the Torture Memorandum, Defendant Rumsfeld was directly involved in developing torture for interrogations, and in December 2002 he approved sixteen additional interrogation techniques, including hooding, undressing, the use of dogs, and so-called “mild, non-injurious physical contact.”³⁶ Rumsfeld’s involvement is indicated especially by his now generally known handwritten note on the December memorandum that permitted forcing prisoners to stand in stress positions for up to four hours: “I stand for eight to ten hours a day. Why is standing limited to four hours?” This has also been shown at length elsewhere, see discussion of Defendant Rumsfeld below.

³⁴ Human Rights Watch, “The Road to Abu Ghraib,” p. 5, available at <http://hrw.org/reports/2004/usa0604/>.

³⁵ House Armed Services Committee Hearing, September 9, 2004, p. 28.

³⁶ See Schlesinger Report, *op. cit.*, Appendix E.

The Working Group Report was based on a directive by Defendant Rumsfeld, on the basis of which the General Counsel in the Defense Department, William J. Haynes, created the Working Group to investigate additional interrogation methods and influenced its results so they would agree with the Torture Memorandum.³⁷

In a memorandum dated April 16, 2003, the Defense Secretary approved the interrogation techniques recommended by the Working Group Report for use at Guantanamo.

The head of the U.S. Southern Command, General James Hill, whose area of responsibility included Guantanamo Bay, said in June 2004 that Rumsfeld had agreed to unspecified intensive interrogation methods for two prisoners at Guantanamo.³⁸

And the Schlesinger Report provided evidence that pressure from the Defense Department to gain additional information from interrogations, on the one hand, and the permission to use harsher interrogation methods contained in the Defense Secretary's December memorandum, on the other, led to the use of harsher interrogation techniques against so-called unlawful combatants.³⁹

In August 2003, Defendant Rumsfeld arranged to have Major General Miller, who had until then overseen interrogations at Guantanamo Bay, sent to Iraq to "review current Iraqi Theater ability to rapidly exploit internees for actionable intelligence."⁴⁰ Major General Miller was concretely authorized to make interrogation practices in Iraq conform with those at Guantanamo.

³⁷ See Schlesinger Report, *op. cit.*, p. 8.

³⁸ Human Rights Watch, *op. cit.*, pp. 14-16, Fn. 102; see also News Transcript, Secretary of Defense, Interview with David Frost, BBC, June 27, 2004, p. 4, <http://www.defenselink.mil/transcripts/2004/tr20040713-secdef1001.html>.

³⁹ See Schlesinger Report, *op. cit.*, pp. 7-8, 35; Fay/ Jones Report, p. 23 on a list with a selection of techniques that require authorization; Memorandum from Defense Secretary Donald Rumsfeld to the commander of the U.S. Southern Command (April 16, 2003); See also WOHR 3.

⁴⁰ See Taguba Report, p. 7.

In this way, the special techniques originally mandated for the “unlawful combatants” at Guantanamo were exported to Iraq and Afghanistan.⁴¹ Rumsfeld also decided to keep these measures secret from Congress.⁴²

5.2.3.2. Legal Assessment

1. Preliminary Remarks

The complaint is directed at torture that is initiated, organized and implemented by a state that is constituted as a democracy under the rule of law. The torture used in interrogations by the United States of America was not an oversight, a borderline case, a secret campaign. Torture was an Executive measure, with all its administrative and legal components.

The complaint thus refers to government criminality committed under cover of self-created legality. This is the connection to John Yoo and Jay Bybee, who, in their Torture Memorandum, claimed the “legality” of torture and pursued its legalization by the Executive.

Such government criminality is defined in criminological literature – going back to Jäger⁴³ – as macrocriminality, in which the individual act can only be understood as a part of the consistent behavior of large organized collectives. The presentation so far has shown that the torture addressed here could only establish itself in practice under the conditions created by White House

⁴¹ See Schlesinger Report, op cit., p. 14, 36; Fay/Jones Report, pp. 87-88 on the spread of interrogation techniques from Guantánamo to Afghanistan und Abu Ghraib. Seymore Hersh, *The Grey Zone*, *The New Yorker*, May 25, 2004

⁴² See article by Bart Gelman in *der Washington Post*, January 2005

⁴³ Jäger, *Makrocriminalität. Studien zur Kriminologie kollektiver Gewalt*, 1989; Jäger, *StV* 1988, 172 et seq.; Jäger, *MschrKrim* 1980, 358 et seq. and *Makroverbrechen als Gegenstand des Völkerstrafrechts. Kriminalpolitisch-kriminologische Aspekte*, in: *Strafgerichte gegen Menschheitsverbrechen. Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen*, Gerd Henkel et al. (eds), 1995, p. 325 et seq.

policies surrounding the “Global War on Terror” declared by the U.S. President.

The Federal Republic of Germany, whose justice system is involved through this complaint, provides a legal space for consideration of the legal consequences of such government criminality.

At the Nuremberg Trials, the International Military Tribunal for the first time undertook not only to seek criminal responsibility on the part of those immediately involved in committing the acts, that is, not only at the end of the hierarchical chain of a criminal apparatus of power, but also to prosecute those behind the scenes, the armchair perpetrators, those who gave the orders, the leaders of the organizations and those with political responsibility. In this context, we should briefly consider the case of *The United States of America v. Josef Altstötter et al.*, part of the Nuremberg Justice Case, which has often been mentioned in the American discussion of the torture papers.⁴⁴ The trial of Altstötter et al. concluded with a judgment by U.S. Military Tribunal No. III on December 3, 1947, in Nuremberg. Those defendants who were convicted were sentenced to from five years’ to life imprisonment. The repeated charge against the prosecuted lawyers was “the conscious participation in a system of cruelty and injustice, spread across the entire country and organized by the government, and the violation of the laws of war and of humanity, committed in the name of law under the authority of the Ministry of Justice with the help of the courts.”⁴⁵ Possibly the most frequent quotation from the trial is “The murderer’s dagger was hidden beneath the robes of justice.”⁴⁶ The chief defendant, the former Minister of Justice Schlegelberger, was accused of taking over the “dirty work which the leaders of the State demanded, and employed the Ministry of Justice as a means for

⁴⁴ See Harton, *op cit.*, 18. et seq.

⁴⁵ Quoted from the final statement of Kubuschek in Ostendorf/ter Veen, *Das Nürnberger Juristenurteil*, Frankfurt/New York 1985, 241

⁴⁶ See Peschel-Gutzeit, *op cit.*, 66

exterminating the Jewish and Polish populations, terrorizing the inhabitants of occupied countries, and wiping out political opposition at home. . . . The prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes.”⁴⁷

As serious as the accusations against the defendants raised in this complaint may be, it must be stated here explicitly that the Nuremberg Justice Case, referred to by American colleagues, is only mentioned here because it plays a role in the American discussion and because it particularly emphasizes that lawyers are war criminals if they consciously provide false opinions on the laws of armed conflict and these predictably lead to the death or inhuman treatment of prisoners, and that they can be punished as capital criminals. The mass crimes committed by the Nazis are of course unique and cannot in any way be qualified or compared to war crimes committed within the framework of the Global War on Terror.

Further prosecution of Nazi crimes occurred under Control Council Law No. 10, which defined a perpetrator as anyone who served in the apparatus of power. German courts then applied ad hoc criminal law to systematic macro crimes, using the strictly subjective perpetrator theory (following Heine⁴⁸), and turned Nazi crimes at the level of those following orders into the acts of accomplices.⁴⁹

The Federal Supreme Court’s Staschinski decision,⁵⁰ reached in the context of the Cold War, on assassination attempts made in the Soviet Union “on a government basis,” continued to use the strictly subjective theory, and found

⁴⁷ Id., p. 143 et seq.

⁴⁸ Heine, Täterschaft und Teilnahme in staatlichen Machtapparaten, JZ 2000, 920, 922.

⁴⁹ BGHSt 8, 393 et seq.; BGH DRiZ 1966, 59 (the only intent to commit a crime in the deportation and murder of 300,000 Jews from the Warsaw Ghetto in the Treblinka extermination camp lay with Himmler, not with the accused SS General Wolff. For a very critical response, see the Kommission des Deutschen Juristentags JZ 1966, 714 et seq.).

⁵⁰ BGHSt 18, 87 et seq.

responsibility for perpetration not with the accused assassin Staschinski, but with the unreachable people behind him in the Soviet KGB.

In dealing with East German crimes, and especially the cases of the shootings at the Berlin Wall, the concept of organizational control [*Organisationsherrschaft*] created an instrument at the level of responsibility that would allow people to be punished as perpetrators if they controlled the apparatus of power and their decisions inevitably caused subordinates to commit crimes.⁵¹

The criminal responsibility of the defendants discussed so far was influenced by this context of “social perpetration in organizational apparatuses of power.”⁵² Their criminal responsibility can be tied to their decision-making or active functions within the Executive branch.

John Yoo and Jay Bybee are two people who in any case operated officially outside the relevant lines of command and hierarchy. Organizationally located in the Office of Legal Counsel, they provided, in the so-called Torture Memorandum, merely the form of legal advice, without any executive power of their own.

The issue in regard to them is therefore not one of transferring criminal responsibility up a chain of hierarchy or command. John Yoo and Jay Bybee are subjects of this complaint because, through their Torture Memorandum, they maintained the typical legal unassailability necessary for macro- or government criminality.

As legal advisors, they supplied the responsible executive power with the legal interpretation for the systematic criminal government practice of torture

⁵¹ BGHSt 40, 218 et seq.; BGHSt 45, 270 et seq. The legal concept developed there is now also applied to economic power structures, BGH StV 1998, 416 et seq.

⁵² See Schlösser, *Soziale Tatherrschaft*, 2004

during interrogations. The behavior included in the complaint must therefore be considered criminal from the point of view of professional conduct, legal advice, and inclusion in government action.

This should be based in the doctrine of the General Part of the Criminal Code. Under Sec. 2 of the Code of Crimes against International Law, the General Part of the Criminal Code must be applied to the extent that no special provisions are made in Sections 1, 3, 4 and 5 of the CCAIL. There is no provision here for the problem of responsibility posed by the facts under consideration. Article 28 of the ICC Statute, which covers the responsibility of military commanders for the crimes of subordinates, and Article 25 of the ICC Statute, which contains provisions on indirect perpetrators, were not adopted into the CCAIL.⁵³ Instead, Section 4 of the CCAIL covers the responsibility of commanders and superiors, though only in the case of omissions.

Thus the questions of responsibility raised here must be judged in accordance with the general provisions of the Criminal Code, especially those concerning perpetration and participation.

2. Criminal Complicity

Based on the facts stated here, the complaint charges complicity on the part of John Yoo and Jay Bybee, especially in the above-discussed primary crimes of then-U.S. Defense Minister Donald Rumsfeld.

a. The Main Crime

⁵³ Weigend, Zur Frage eines “internationalen” Allgemeinen Teils, in: FS für Roxin, p. 1395 et seq.; Referentenentwurf zum VStGB Begründung zu § 2 -S. 36f.- und zu § 5 -S. 41-.

For Defendant Rumsfeld, it was found above that he is directly responsible for violations of Sec. 8 of the CCAIL, since he ordered, committed, caused, supported, and abetted war crimes. Under Sec. 4 of the CCAIL, he is responsible, as civilian commander of the military, for the acts of third parties, and he is liable for war crimes during torture in interrogations in Afghanistan, Guantanamo and Iraq because they were committed in his sphere of responsibility. For crimes committed before June 30, 2002, the date the CCAIL entered into force, responsibility under the provisions of the General Part of the Criminal Code may be found, in particular the provisions on bodily harm, Sections 223 et seq., deprivation of freedom, Sections 239 et seq., and killing, Sections 211 et seq. of the Criminal Code. It has already been shown above that there are no problems in terms of application of penal sanction (see Chapter 3).

Defendant Donald Rumsfeld is criminally liable for war crimes against persons as an indirect perpetrator through organizational control under Section 8 of the CCAIL and Section 25(1)(2) of the Criminal Code, in that he, inter alia, on December 2, 2002 ordered the use of illegal interrogation methods on prisoners at Guantanamo and personally and constantly supervised the cruel and inhuman treatment of the injured party al Qahtani. This is presented in detail above (5.3.2).

Defendant Donald Rumsfeld is also liable for war crimes against persons as an indirect perpetrator through organizational control under Section 8 of the CCAIL and Section 25(1)(2) of the Criminal Code in that, as Secretary of Defense, he was responsible for the fact that the illegal interrogation methods practiced at Guantanamo were also applied to interrogations of prisoners of war held in the Iraqi prison at Abu Ghraib.

Defendant Donald Rumsfeld directly and personally, as commander of the U.S. military, as a superior indirect perpetrator, and with responsibility for his

subordinates, through omission, committed war crimes under international law and under the CCAIL.

As U.S. Secretary of Defense, Rumsfeld was the second-highest civilian commander of the U.S. Military after President Bush. He could both generally and in concrete individual cases issue specific and binding instructions on arrest, interrogation, and finally, torture. In consistent fashion, Rumsfeld introduced behavior that can be classified as war crimes into the methods used by the military and intelligence agencies, and not only did not forbid these, as the civilian commander, but actively promoted and, in individual cases, personally ordered and monitored them.

Rumsfeld was aware that these techniques, which are illegal both internationally and domestically, were being used on prisoners.

Defendant Rumsfeld based his conduct in office on the Torture Memorandum and implemented the definition of torture it provided in the practice of torture in Iraq and Afghanistan.

This is the reference point for the alleged complicity of John Yoo and Jay Bybee. The war crimes committed by former U.S. Defense Secretary Rumsfeld are the primary crimes in which Yoo and Bybee took part.

b. Not Typically Neutral Legal Advice

The Torture Memorandum written by Yoo and Bybee and for which they are responsible will first of all be treated here as legal advice, regardless of the above-mentioned view that it was not objective legal advice, but in fact legalization of criminal torture. The Torture Memorandum of August 1, 2002, was written for the White House. The request was made by Presidential advisor Gonzales and directed to the Office of Legal Counsel in the U.S. Department of Justice, which is responsible for such legal opinions.

John Yoo and Jay Bybee thus were not giving their own personal opinions in the Torture Memorandum, but were acting as assigned staff members of the OLC. The text of the Torture Memorandum was not presented as binding prescriptions or instructions for action, but as “the office’s view,” the view of the OLC. Support for the view that it was legal advice is also provided by John Yoo’s words at the end of his letter to White House Counsel Gonzales, written on OLC letterhead, in which he guaranteed the OLC a careful analysis of decisions on international law and refused to predict the behavior of international institutions.

Professional advice is privileged for purposes of criminal prosecution.⁵⁴ The assumption holds that its purpose is to supply information and that it does not promote the crimes of others. The main purpose of legal advice is to provide the client with a comprehensive clarification of all legal issues connected to the factual situation he describes. Particularly when one advocates a legal position different from the prevailing view, it is necessary to point out differing views to the client. Therefore, the form and substance of the Torture Memorandum are extremely significant.

The Torture Memorandum of August 1, 2002, satisfies in neither form nor substance the requirements of qualified, objective legal advice that would allow the client to weigh the legal aspects of political and military measures. The Torture Memorandum is in fact superficial, shortsighted and manipulative.

The Torture Memorandum is technically far below the OLC’s usual standards. Even the Guantanamo Memorandum of December 28, 2001,⁵⁵ presented not only the opinion that American courts lacked jurisdiction over the Guantanamo detainees, but also the opposing view. In addition, it pointed out the risks that might arise if American courts affirmed their jurisdiction over Guantanamo. The Torture Memorandum, in contrast,

⁵⁴ RGSt 37, 321ff; BGH NSTZ 1993, 43; BGH NSTZ 2000, 34; OLG Stuttgart NJW 1987, 2883; see generally Kudlich, Die Unterstützung fremder Straftaten durch berufsbedingtes Verhalten, 2004, 43 et seq., 476 et seq.; Wolff-Reseke, Berufsbedingtes Verhalten als Problem mittelbarer Erfolgsverursachung, 1995, 24, 41 et seq..

⁵⁵ Available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/01.12.28.pdf>

lacks any divergent views. The authors' subjective view is presented as though it were the objective state of the law.⁵⁶ The authors present their legal positions, arrived at through highly dubious methodological approaches, as though they were valid law.

The authors fail, for example, to use the Torture Victims Protection Act (TVPA) in their legal definition of torture, although this would have suggested itself.⁵⁷ Instead, torture is derived from medical guidelines that determine the circumstances under which hospitals must supply emergency medical care. It is incomprehensible that these guidelines needed to be used to reach a definition of torture. These guidelines have no legal or other relationship to torture and are entirely unsuited to reaching such a definition. For this reason, this view is categorically rejected in the so-called Levin Memorandum of December 2004, which also comes from the OLC.⁵⁸

It is one of the duties of legal advisors to present views that run counter to their own in cases where such views exist, so that the client seeking advice is also aware of the risks that can arise from following the legal advice. The means of presentation chosen in the Memorandum so blatantly violates this principle that one is forced to believe that the authors were interested in presenting not existing law, but what they wanted to see as law.⁵⁹

An example of this is the incorrect reference to the decision of the European Court of Human Rights (ECHR) in *Ireland v. the United Kingdom* (Judgment of January 18, 1978), with which the authors attempt to prove that their interpretation of the concept of torture conforms to the interpretation of torture in Article 3 of the European Human Rights Convention (EHRC). In this 1978 judgment, the ECHR did in fact decide that the cumulative use of specific interrogation methods (standing against the wall, hooding, noise, sleep deprivation, reduction in rations) were not torture as defined in Article 3 of

⁵⁶ See Harris, in: *Journal of National Security Law & Policy*, Vol. 1 [2006], p. 409 (418 et seq.)

⁵⁷ See Harris, in: *Journal of National Security Law & Policy*, Vol. 1 [2006], p. 409 (435)

⁵⁸ Memorandum Levin-Comey December 30, 2004 Memo Re: Legal Standards applicable under 18 U.S.C. Sec. 2340-2340 A. Also cited in Harris, in: *Journal of National Security Law & Policy*, Vol. 1 [2006], p. 409 (434).

⁵⁹ Kathleen Clarke, *op. cit.*, p. 456 et seq.

the EHRC. Yoo and Bybee discuss this decision in detail, but without placing it in context or discussing the further development of the definition of torture by the ECHR. Not only do they omit the criticism of this decision in the literature,⁶⁰ they fail to mention essential developments significant to the current understanding of the concept of torture.

The legal situation upon which that decision was based has changed significantly in the interim. On December 10, 1984, six years after the ECHR judgment they quote so thoroughly, the United Nations adopted the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. In Article 1 of this UN Torture Convention, which the U.S. also joined, the concept of torture was newly defined. Since then, torture is not defined by its effects, but by the act of torture, and it has led to an internationally binding, much stricter prohibition on torture. Thus the jurisprudence cited by Yoo and Bybee is outdated. It has historical significance, but does not reflect the Court's current understanding of torture.

Thus in 1999, the ECHR expressly noted, in *Selmouni v. France*, that the Convention must be seen as a "living instrument which must be interpreted in the light of present-day conditions," so that treatment that had in previous cases been classified only as inhuman or degrading treatment could be seen as torture in future jurisprudence. The Court continued:

[The Court] takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.⁶¹

In this context, Gollwitzer has pointed out that psychological techniques, in particular, such as sensory deprivation or disorientation methods, can be seen as torture if they are sufficiently severe and long lasting.⁶² As a result, given current understandings, any intentional torment can be classed as torture (Gollwitzer, op. cit.).

⁶⁰ See Frowein/Peukert Europäische Menschenrechtskonvention Art. 3 Rn. 5 with additional notes.

⁶¹ *Selmouni v. France* ECHR, judgment of July 28, 1999 – 25803/94, Para.101.

⁶² In: Menschenrechte im Strafverfahren, MRK und IPBPR, Art. 3 MRK, Art 7 IPBPR marginal no. 18.

With their citation of an outdated ECHR judgment, Yoo and Bybee manipulated the description of the supposed current legal situation. The Torture Memorandum thus does not have the substance of legal advice, but rather counts only as a document to legally immunize those wishing to utilize torture or similar methods during interrogations.⁶³

The result of the Memorandum is also so incomplete that its legal advice is virtually incorrect in content. Bybee and Yoo fail to mention that inhuman and cruel interrogation methods can also constitute other crimes. These include, in addition to assault, bodily harm, and defamation, specific military crimes such as those under the Uniform Code of Military Justice (UCMJ), Articles 77-134, according to which maltreatment of prisoners is punishable, or the War Crimes Act of 1996 (18 U.S.C. section 2441), which criminalizes violations of the Geneva Conventions. Thus, possible criminal prosecution is not limited to Section 2340A, as the Torture Memorandum suggests.

In addition, the Torture Memorandum omits the limitations set by Supreme Court jurisprudence on the powers of the President and the position of Congress in cases of war and crisis. The leading Supreme Court case, *Youngstown Sheet & Tube Co. v. Sawyer*, is not even mentioned, although it is the precedent for determining the scope of Presidential power in wartime. In that opinion, the judges came to a completely different conclusion regarding the legal situation than did the authors of the Torture Memorandum.

The views presented in the Memorandum violate the U.S. Constitution, since under the provisions of the Constitution, the President is bound to uphold and execute existing law, which includes international treaties and customary law.⁶⁴ The UN Convention Against Torture provides in Articles 2-4 that no exceptional circumstances, whether war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. Nor may an order from a superior or public authority be invoked

⁶³ See David Luban, in: Greenberg, *The Torture Debate in America*, pp. 57-59.

⁶⁴ Memorandum by Sinan Kalayoglu of 6-26-06, p. 13.

as a justification of torture. This universally binding, well-known legal norm is not mentioned at all in the Memorandum, let alone discussed.⁶⁵

The Torture Memorandum dealt only with the interpretation of the definition of torture in 18 U.S.C. Secs. 2340-2340A, that is, with U.S. domestic law. But the question in the original request cannot be reduced to liability under U.S. criminal law under 18 Sec. 2340-2340A; it referred generally to criminal responsibility for torture. The fact that Yoo, at least, realized this is shown by the content of his accompanying letter on the Torture Memorandum that he sent to Gonzales on August 1, 2002, in which the scope of advice is broader and he refers to the general, including international, risk of prosecution. But even in this broader context, the Torture Memorandum's superficiality of form and substance is not corrected, but rather continued. In analyzing the existing definition of torture under Article 1 of the UN Torture Convention ("CAT"), it would have been necessary to present the latest jurisprudence and the generally unanimous legal view that disagreed with the Torture Memorandum in order to provide "the best reading of international law on the merits," as Yoo himself promised at the end of his letter to Gonzales.

Finally, it is a generally recognized national and international standard that torture and cruel, inhuman and degrading treatment is absolutely not subject to exceptions, since the prohibition is intended not only for normal cases, but especially for exceptional cases. For this reason alone, the state's right of self-defense against aggressive war under the law of nations cannot serve as a loophole for gutting the prohibition on torture. Thus, we do not even reach the methodologically dubious derivation of an individual defense of necessity or self-defense from the state's right to self-defense.

All this shows that we are not simply dealing with the usual legal advice by the appropriate officials in the appropriate agency, but with a bad legal effort aimed at portraying the legal situation in distorted, false fashion.

c. Aiding and Abetting

⁶⁵ See also Harris, in: *Journal of National Security Law & Policy*, Vol. 1 [2006], p. 409 (440).

According to the criteria of established German Supreme Court jurisprudence, assistance is not criminally neutral if the advisor shows solidarity with the client who desires to commit the act.⁶⁶ The bounds of legal privilege are crossed if professional acts lose their neutral “everyday character.” This is the case if it is clear to the advisor that the legal advice assists the client who is “inclined to act”⁶⁷ in committing the crime.

In assessing the circumstances of which the Defendants Yoo and Bybee were aware and the formal and substantive errors in the Torture Memorandum, the above requirements are fulfilled. With their one-sided, interest-based Torture Memorandum, Bybee and Yoo left their roles as institutionally-based legal advisors and took the position of defense lawyers.⁶⁸ They thus overstepped the bounds of professional behavior within the framework of the OLC.

Yoo and Bybee intentionally gave incorrect legal advice, because only this fit the administrative and political concept for the use of torture, of which they were aware. The Torture Memorandum served not to provide objective information on the legal situation, but to offer the governing Bush administration, virtually independently of the state of the law, a chain of arguments that an Executive Branch inclined in that direction could adopt as its own.

The Torture Memorandum first of all provided a legal gloss on the use of specific methods of torture or other inhuman and cruel interrogation methods, in that the authors interpreted the scope of the criminal provisions against torture narrowly. In addition, it constructed justifications methods that in fact do not exist for the use of essentially criminal torture. The Torture Memorandum thus fulfilled the expectations of those who requested it, formulating a virtually absurd legal license that would allow torturers in the CIA and the military to go unpunished no matter what harsh interrogation methods they ordered or used.

⁶⁶ BGHNStZ 2000, 34.

⁶⁷ BGH NJW 2001, 2410

⁶⁸ See Harris, in: Journal of National Security Law & Policy, Vol. 1 [2006], p. 409 (431 f.)

When an official government opinion, and the guidelines based upon it for the use of interrogation techniques, maintains that inhuman, degrading and cruel treatment of prisoners is not punishable, the logical consequence is that those who work in the interrogation centers will use these techniques.⁶⁹ Yoo and Bybee thus facilitated and encouraged the commission of war crimes and crimes against humanity. Under the German Supreme Court's theory of encouragement, this is an act of criminal abetting.

Because it would not have been possible for the Executive, without the Torture Memorandum, to overcome the reservations within the CIA about torture during interrogations, a causal connection between the act of abetting and the primary crime can even be determined. In any case, the primary crime was encouraged.

This conclusion does not change if, instead of the doctrine of the General Part of the Criminal Code, we apply the jurisprudence and literature on international criminal law.

According to Werle's commentary,⁷⁰ it is sufficient if the aid facilitates the primary crime, or the abetting act has another substantive effect on the primary crime. Simply encouraging the main perpetrator or providing other moral support can suffice. This is the case here, as the torture Memorandum conveyed to the perpetrators the sense that their behavior was legal.

Ambos⁷¹ looks for a substantive, perceptible effect on the primary crime to constitute abetting under international criminal law. This looks at consequences and requires some sort of causal connection between the act of abetting and the primary crime. The Torture Memorandum was adopted by the Working Group Report, in some cases word-for-word

⁶⁹ See also Harold Koh, law professor and dean of Yale Law School, in his statement at the hearing before the Senate Judiciary Committee regarding the nomination of Alberto Gonzalez as Attorney General of the United States on January 7, 2005.

⁷⁰ Werle, *Völkerstrafrecht*, 2003, p. 161 marginal no. 414 et seq.

⁷¹ *Der Allgemeine Teil des Völkerstrafrechts*, p. 619, with notes from case law.

(see above), which specified the permissibility of concrete interrogation techniques and thus became the basis for their use in Iraq.⁷² Causation is thus proven.

d. Intent

Yoo and Bybee also acted with the necessary intent to abet. They acted with the awareness that they were supporting the commission of the primary crime through their acts and that they would at least facilitate torture during interrogations. They also had intent regarding the illegality of the primary crime, since they knew that the legal position presented in the Torture Memorandum was not compatible with international and domestic law.

The authors of the Torture Memorandum realized that the U.S. Administration aimed to use interrogation methods that fell under the prohibition on torture. They knew what Vice President Cheney and his advisor Defendant Addington were demanding. This is shown especially in a discussion among Alberto Gonzales, Jay Bybee, John Yoo and others in July 2002, published in Newsweek in December 2004, in which Alberto Gonzales—referring to the main theme, how far the CIA could go in interrogating prisoners suspected of terrorism—said, “Are we forward-leaning enough on this?”⁷³ This clearly reflects the purpose of the Torture Memorandum in regard to the use of interrogation methods. A further indication of intentionality is provided by the fact that the Torture Memorandum lists justifications and defenses, and that Yoo, in his letter to Gonzales, expressly discusses the risk of prosecution and is careful and doubtful in his prognosis.

Finally, the relevant suspicions are justified by the substantive and formal superficiality, the hair-splitting argumentation, and the ignoring of obvious aspects. Yoo and Bybee were highly qualified lawyers with specialized knowledge of the legal areas addressed in the Torture Memorandum. They could call upon the OLC’s extraordinarily good material and personal resources. The absurd-seeming abbreviations and errors in the use of the

⁷² See letter from Daniel Levin to William J. Haynes II, February 4, 2005, (<http://balkin.blogspot.com/Levin.Haynes.205.pdf>).

⁷³ Cited in Harris, in: *Journal of National Security Law & Policy*, Vol. 1 [2006], p. 409 (442).

simplest legal methodology lead to the inevitable conclusion that they could have done better, but did not want to. Given that they also suppressed a legal opinion that had already been published in the relevant context and which affirmed the absolute prohibition on torture,⁷⁴ there is sufficient evidence that Yoo and Bybee acted with intent. But even if we take the position that one cannot assume that the authors had certain knowledge of the motives of those who had requested the Torture Memorandum, the high risk should have been apparent to Yoo and Bybee that the recipients of the Memorandum would use it as the basis for the administrative implementation of torture.

Yoo and Bybee were also aware that the Memorandum would lead to the commission of crimes under the CCAIL. They knew that the CIA had asked to be able to use harsher interrogation measures. They were thus also aware that, under these circumstances, a legal opinion, binding on the Executive, on impunity for inhuman, cruel and degrading torture would lead to just this type of torture. John Yoo, in particular, publicly emphasized his support for “harsher” interrogation measures,⁷⁵ for example when he announced his view that the President has the power to order torture as an interrogation technique.⁷⁶

e. Not a Mistake of Law

Even if, on the level of Sections 17 and 35 of the Criminal Code and Section 3 of the CCAIL, we assume in Yoo and Bybee’s favor that they were part of a hierarchical system of power, this would not change the criminal nature of their acts. Neither was part of the military chain of command (Section 2 (1) CCAIL), and even if they felt obligated by orders of the same binding nature, they must have known, with their excellent legal

⁷⁴ See Harris, in: *Journal of National Security Law & Policy*, Vol. 1 [2006], p. 409 (418, 440 et seq.).

⁷⁵ See Interview with Frontline, PBS, July 19, 2005.

⁷⁶ See Jane Mayer, *THE MEMO*. How an internal effort to ban the abuse and torture of detainees was thwarted, *The New Yorker*, 27.02.2006 (http://www.newyorker.com/fact/content/articles/060227fa_fact); Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, *The New Yorker*, February 14, 2005.

abilities, that the request directed at them was illegal. Therefore, a mistake of law is also ruled out.

3. Possible Perpetrators

This criminal complaint starts with definite findings and can provide proof of the crime of abetting that has been described, according to which John Yoo and Jay Bybee are guilty of abetting even if their behavior is understood as external legal advice that went completely out of control.

In addition, however, there is certainly reason to imagine the role of Yoo and Bybee very differently within the overall context of the government criminality described above. They may have been active and formative parts of a sophisticated plan, a conspiracy at the highest levels of the Executive branch to mislead the public and the responsible interrogators about the legal context.

Whether the Torture Memorandum can be judged as professionally determined behavior through the provision of legal advice cannot in fact be determined only by external forms; it poses the question whether Yoo and Bybee did not in fact provide legal *assistance*. While legal advice would precede later Executive action, legal assistance directly affects the bureaucracy and helps to form the Executive. Such “Executive assistance through law” would have to be judged, from a criminal perspective, no differently than the acts of the Executive itself.

If further investigation strengthens the existing indications that John Yoo and Jay Bybee wanted and were expected, through their Torture Memorandum, to do their part to implement torture in interrogations right from the beginning – that is, that they were not external advisors, but from the start acted from the inside and were part of the larger whole – their role could no longer be properly described as subordinate participation in the acts of others. In that case, Yoo and Bybee would join the ranks of those who, along

with the Executive, share the responsibility as perpetrators for systematic torture during interrogations, committed as government criminality.