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ESSAY

Can Lawyers Be War Criminals?

MILAN MARKOVIC*

INTRODUCTION

On August 1, 2002, in response to a request from White House Counsel Alberto Gonzales, the Office of Legal Counsel (OLC) issued a memorandum entitled *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2430(A)*, now commonly known as the “Torture Memo.”¹ The memorandum, drafted by John Yoo and OLC head Jay S. Bybee, provoked outrage and disgust among legal professionals and the public-at-large.² Harold Koh, a professor of international law and the Dean of Yale Law School, informed the Senate Judiciary Committee that it was the most erroneous legal opinion he had ever read.³ A law professor at the University of Virginia claimed that the memo “was less ‘lawyering as usual’ than the work of some bizarre literary deconstructionist.”⁴ In December 2004, the Department of Justice repudiated the Torture Memo,⁵ although John Yoo continues to stand by the analysis.⁶

The August 1 memorandum was not merely an intellectual exercise. After September 11, 2001, the Bush Administration was determined to stop Al Qaeda, but the United States lacked human intelligence—spies inside the terrorist

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1. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to President (Aug. 1, 2002) [hereinafter Bybee Memo], in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172, 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *THE TORTURE PAPERS*].

2. See generally David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1455-56 (2005). Jay Bybee is now a judge on the Ninth Circuit while John Yoo is a professor of law at the University of California at Berkeley. See Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1684-85 (2005).

3. *Confirmation Hearing Before the Subcomm. on the Judiciary on the Nomination of Alberto R. Gonzales to be Attorney General of the United States*, 109th Cong. 1 (2005) (statement of Dean Harold Koh).

4. Peter Brooks, *The Plain Meaning of Torture?*, SLATE, Feb. 9, 2005, <http://www.slate.com/id/2113314>.

5. See Memorandum from Daniel Levin, Acting Assistant Attorney Gen., U.S. Dept. of Justice Office of Legal Counsel, to James B. Comey, Deputy Attorney Gen. (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/dagmemo.pdf> [hereinafter Levin Memo].

6. See Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 228 (2006).

organization.⁷ Officials within the government reasoned that their best hope for gathering intelligence was by questioning captured terrorist suspects.⁸ In particular, the White House wanted to know how much pressure CIA interrogators could exert on uncooperative Al Qaeda detainees like Abu Zubaydah.⁹

It is against this backdrop that then White House Counsel Alberto Gonzales asked Yoo and Bybee to provide their construction of the Convention Against Torture And Other Cruel, Inhuman, Or Degrading Treatment, as implemented in U.S. law.¹⁰ Yoo and Bybee explicitly state in the first paragraph of the Memo that they understood this question to have “arisen in the context of interrogations outside the United States.”¹¹

The Torture Memo’s impact cannot be overstated. It was the basis for coercive techniques used against several high-ranking detainees.¹² In January 2003, then-Secretary of Defense Donald Rumsfeld formed a working group to study interrogation techniques. The group’s analysis relied heavily on the Torture Memo, incorporating much of the language verbatim into its own report.¹³ Rumsfeld subsequently promulgated a list of aggressive interrogation procedures to be used at Guantanamo Bay that eventually migrated to Iraq.¹⁴ When stories of systematic abuse, mistreatment, and torture at U.S. detention facilities came to light,¹⁵ many saw a direct connection between the Torture Memo and these crimes.¹⁶

There can be no doubt that the Torture Memo was horribly flawed legal analysis. Legal ethics experts have claimed that the authors of the Torture Memo

7. Anthony Lewis, Introduction, in *THE TORTURE PAPERS*, *supra* note 1, at xiii.

8. *See id.*

9. *See* Vischer, *supra* note 6, at 235.

10. Bybee Memo, *supra* note 1, at 172.

11. *Id.*

12. *See* David Johnston & James Risen, *Aides Say Memo Backed Coercion Already in Use*, N.Y. TIMES, June 27, 2004, at A1, *cited in* Vischer, *supra* note 6, at 235.

13. *See* Luban, *supra* note 2, at 1454; *see also* Final Report of Independent Panel to Review DoD Detention Operations (August 2004) [hereinafter Schlesinger Report], in *THE TORTURE PAPERS*, *supra* note 1, at 911.

14. Schelinsger Report, *supra* note 13, at 911.

15. *See, e.g.*, Schlesinger Report, *supra* note 13, at 914 (confirming sixty-six incidents of substantial abuse of detainees); Mark Danner, *We Are All Torturers Now*, N.Y. TIMES, Jan. 6, 2005, at A27; Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogation: ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Overseas Facilities*, WASH. POST., Dec. 26, 2002, at A01; Human Rights Watch, *Getting Away with Torture: Command Responsibility for the U.S. Abuse of Detainees* (April 2005), available at <http://hrw.org/reports/2005/us0405> (“[I]t has become clear that torture and abuse have taken place not solely at Abu Ghraib but rather in dozens of U.S. detention facilities worldwide, that in many cases the abuse resulted in death or severe trauma, and that a good number of the victims were civilians with no connection to al-Qaeda or terrorism.”).

16. *See, e.g.*, Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L. L. 689, 691 (2004); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT’L L. 811, 836 (2005); Marcy Strauss, *The Lessons of Abu Ghraib*, 66 OHIO ST. L.J. 1269, 1291 (2005) (arguing that Abu Ghraib teaches us that torture should never be sanctioned).

violated their professional duties.¹⁷ Anthony Lewis equated the OLC's analysis of torture to "the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison."¹⁸ Some have gone further still, suggesting that the memo exposes its authors to criminal liability.¹⁹

This Essay will use the Torture Memo to illustrate how lawyers might find themselves implicated in war crimes. I will explore the contention that the Torture Memo²⁰ is not only flawed legal advice but potential evidence of criminal conduct.

In Part I, I will address the flawed and reckless reasoning employed in the Torture Memo. I argue that whether or not Yoo and Bybee wrote the memorandum in good faith, the enterprise in which they were involved—providing legal cover for the abuse of detainees—was morally hazardous. I argue that there are some ends toward which lawyers should not direct their talents or energies, and sanctioning the mistreatment of human beings is one such end. When lawyers facilitate the degradation and torture of detainees, they can justifiably be held accountable .

In Part II, I will demonstrate that lawyers are potentially complicit in war crimes when they "materially contribute" to the commission of crimes like torture. Writing a memorandum can qualify as a "material contribution," and precedents before the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the Nuremberg Tribunals suggest that lawyers can be held liable as accomplices if their legal advice facilitated or encouraged the commission of illegal acts.

In Part III, I will turn to potential venues for criminal prosecution of lawyers like Yoo and Bybee and the sources of law that may be used to prosecute them. American lawyers like Yoo and Bybee can potentially be prosecuted as war criminals under the statute of the International Criminal Court ("ICC")²¹ or in the court of any party to the Convention Against Torture ("CAT").²² As I will explain, it is irrelevant that the United States is not a party to the ICC because nationality

17. See, e.g., Stephen Gillers, *Tortured Reasoning*, AM. LAW., July 1, 2004, at 65; Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1 (2006); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 98 (2005). For a defense of the Torture Memo, see Eric Posner & Adrian Vermeule, *A 'Torture' Memo and Its Tortuous Critics*, WALL ST. J., July 6, 2004, at A22.

18. Anthony Lewis, *Making Torture Legal*, N.Y. REV. BOOKS, July 15, 2004, <http://www.nybooks.com/articles/17230>.

19. See Philippe Sands, *Policymakers on Torture—Take Note—Remember Pinochet*, SAN FRAN. GATE, NOV. 13, 2005, at E1.

20. My analysis focuses solely on the Torture Memo. For a broader argument that the Bush Administration's lawyers have been complicit in the systematic violation of the Geneva Conventions, see Paust, *supra* note 16, at 811.

21. See Rome Statute of the International Criminal Court, art. 25, ¶3(d), July 1, 2002, 2187 U.N.T.S. 90, available at <http://www.un.org/law/icc/statute/romefra.htm> [hereinafter ICC Statute].

22. See Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT].

is only one basis for the court's jurisdiction,²³ and the CAT prohibits complicity in torture—whether by a lawyer or any other agent—irrespective of domestic law. I also argue in this Part that Yoo and Bybee could be investigated and charged in the United States, but the United States has been reluctant to examine the role of policy-makers in the abuse and torture of detainees. The Supreme Court's recognition that enemy combatants have rights under Article 3 of the Geneva Conventions in *Hamdan v. Rumsfeld*,²⁴ seemed to open the door for such a prosecution,²⁵ but the passing of the Military Commissions Act of 2006 seems to make such a prosecution not only unlikely but perhaps impossible.²⁶

Commenting on the Torture Memo controversy, George Terwilliger, a former Deputy Solicitor General, expressed skepticism that legal opinions have ever hurt anyone.²⁷ I disagree. Lawyers must always consider the likely real world consequences of their legal advice. While the exact influence of the Torture Memo is unclear, Yoo and Bybee were in effect asked by the White House how far interrogations could go, and their response was essentially “as far as you would like.”²⁸ In crafting the Torture Memo in the manner they did, Yoo and Bybee made the abuse and degrading treatment of detainees appear legally permissible. As the analysis in this Essay suggests, Yoo and Bybee—and perhaps other lawyers who have or will engage in similar activities—can and should be held criminally accountable.

I. THE TORTURE MEMO: FAULTY AND RECKLESS

Numerous legal scholars have systematically deconstructed the shoddy

23. See generally *id.* art. 12.

24. 126 S. Ct. 2749, 2796 (2006) (noting that common article 3 of the Geneva Conventions protects Hamdan and other enemy combatants).

25. Implicit in *Hamdan* is the notion that since the United States ratified the Geneva Conventions, enemy combatants enjoy rights under the Conventions as a matter of U.S. law. See *id.* at 2794. To violate these rights therefore would be a violation not only of the Geneva Conventions but U.S. law. Moreover, the War Crimes Act, 18 U.S.C. § 2441, prohibits “grave breaches” of Geneva, and anyone involved in such breaches can be prosecuted for war crimes. See generally Rosa Brooks, *Did Bush Commit War Crimes?*, L.A. TIMES, June 30, 2006, available at <http://www.latimes.com/news/opinion/commentary/la-oe-brooks30jun30,0,339573.column?coll=la-home-commentary>.

26. The Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006). The Act specifically defines what activities would constitute a war crime under 18 U.S.C. § 2441. “Outrages upon personal dignity” and “humiliating and degrading treatment”—conduct prohibited under common article 3 of the Geneva Conventions—are not listed in the Act. See also John Sifton, *Criminal Immunize Thyself*, SLATE, Aug. 11, 2006, <http://www.slate.com/id/2147585/>.

27. See Vanessa Blum, *Culture of Yes: Signing off on a Strategy*, LEGAL TIMES, June 14, 2004, at 1.

28. See Vischer, *supra* note 6, at 236. Following the reasoning of the memo, the Constitution empowers the president to give blanket authorization for yanking fingernails, branding genitals with red hot poker, or holding suspects under water almost to the point of drowning. Stuart Taylor, Jr., *It's Not Really Torture If . . . The President's Lawyers Warp the Law*, LEGAL TIMES, June 14, 2004, at 68; see also *infra* Part I.

reasoning of the Torture Memo.²⁹ I will not restate their analyses. I will instead focus on the sections of the Torture Memo where Yoo and Bybee's advice appears to be reckless³⁰ given the end to which it was to be used. Before doing so, however, I will explain the nature of the task in which Yoo and Bybee were engaged.

The Torture Memo begins by analyzing the definition of torture as implemented in 18 U.S.C. § 2340(A).³¹ To violate section 2340(A), the statute requires that (1) the torture occurred outside the United States; (2) the defendant acted under the color of law; (3) the victim was within the defendant's custody or control; (4) the defendant specifically intended to cause severe physical or mental pain or suffering; and (5) the act inflicted severe physical or mental pain or suffering.³² Yoo and Bybee were asked by the White House to focus on the fourth and fifth elements.³³

Yoo and Bybee first define "specific intent" very narrowly. They write, "In order for a defendant to have acted with specific intent, he must expressly intend to achieve the forbidden act . . . [K]nowledge alone that a particular result is certain to occur does not constitute specific intent."³⁴ Their definition presents a gross simplification of a complex issue. As the Levin memo—which ultimately superseded the work of Yoo and Bybee—notes, "[i]t is well recognized that the term specific intent is ambiguous and that the courts do not use it consistently."³⁵ The prevailing view among criminal law practitioners is that a person acts with specific intent when he either desires the result of his conduct or the result is practically certain to follow from his conduct.³⁶ In the Torture Memo, however, Yoo and Bybee equate specific intent with "purpose,"³⁷ without even acknowledging that their position could be perceived as legally controversial.

To be sure, lawyers can reasonably disagree about the meaning of "specific intent." More important is that in response to a request for guidance on interrogation procedures from the White House, Yoo and Bybee advised that "[e]ven if the defendant knows that severe pain will result from his actions, if

29. See, e.g., Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 AM. U. INT'L L. REV. 9 (2005); Waldron, *supra* note 2, at 1703-09; Brooks, *supra* note 4.

30. "A person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk." MODEL PENAL CODE § 2.02 2(c) (1962).

31. Bybee Memo, *supra* note 1, at 172.

32. See *id.* at 174.

33. *Id.*

34. *Id.*

35. Levin Memo, *supra* note 5, at 16. The Levin Memo was produced by the White House's Office of Legal Counsel in February 2005 to guide interrogations going forward; it explicitly rejected the Torture Memo's interpretation of 18 U.S.C. 2340(a). *Id.* at 1.

36. See Levin Memo, *supra* note 5, at 16 (citing 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.2(a), at 341 (2d ed. 2003)). Yoo and Bybee refer to the same theorist (in the context of larceny) to support their view of "specific intent." See Bybee memo, *supra* note 1, at 175.

37. See MODEL PENAL CODE § 2.02 2(a) (1962).

causing such harm is not his objective, he lacks the requisite *mens rea*.”³⁸ In fact, Yoo and Bybee seemed to favor the infliction of pain on detainees when they note that information gained from suspected Al Qaeda personnel could prevent attacks equal or greater in magnitude to September 11th.³⁹ Their implication is clear: because the Bush administration’s goal is the security of the United States and not cruelty for cruelty’s sake, good faith actions by interrogators to stop future terrorist attacks cannot be prosecuted as torture.⁴⁰ Yoo and Bybee knew that their work would be used to shape interrogation policy, and yet they were indifferent as to how their legal advice would be applied in the real world by the Bush administration. The Pentagon ultimately relied on this advice to sanction extreme interrogation tactics including the use of deprivation of light, hooding, and even exposure to cold weather and water-boarding at Guantanamo Bay.⁴¹

Yoo and Bybee engage in more “ends-justify-the means” lawyering at the end of the Torture Memo when they suggest that there might be defenses to a prosecution under 18 U.S.C. § 2430(A).⁴² The authors write, “Standard criminal law defenses of necessity and self-defense could justify interrogation methods needed to elicit information.”⁴³ There is nothing “standard” about this argument. 18 U.S.C. § 2340 mentions no defenses, and the Convention Against Torture specifically states, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”⁴⁴ A lawyer who gives a client advice intended to provide a road map for the client in violating the law may be held complicit in the client’s criminal conduct,⁴⁵ and Yoo and Bybee, by their own admission, invoke these defenses so that interrogators can evade criminal liability in the event of future prosecution.⁴⁶ If one follows the Torture Memo’s reasoning, whatever is done to a specific detainee (who may be detained by mistake or simply have no information) can be justified by reference to the general threat posed by Al Qaeda. As Professor Wendel suggests, “by talking loosely and generally about necessity, [Yoo and Bybee] invite interrogators to conclude that their conduct may be justified.”⁴⁷

38. Bybee Memo, *supra* note 1, at 175.

39. *See id.* at 202.

40. The Levin Memo repudiated this analysis. *See Levin Memo, supra* note 5, at 17.

41. *See* Department of Defense, Legal Brief on Proposed Counter-Resistance Strategies (Oct. 11, 2002) [hereinafter DOD Legal Brief] in THE TORTURE PAPERS, *supra* note 1, at 234-35. The Pentagon’s work closely tracks the legal analysis of Yoo and Bybee: “The use of a wet towel to induce the misperception of suffocation would also be permissible if not done *with the specific intent* to cause *prolonged mental harm*” (emphasis added). *Id.* at 235.

42. Bybee Memo, *supra* note 1, at 207-213.

43. *Id.*

44. CAT, *supra* note 22, art. 2(2).

45. *See Bilder, supra* note 16, at 694.

46. Bybee Memo, *supra* note 1, at 207.

47. Wendel, *supra* note 17, at 84.

The analysis of “severe pain” as a predicate for torture under 18 U.S.C. § 2340 is another example of lawyerly recklessness. Yoo and Bybee quickly move from a dictionary definition of “severe pain” that is presumably too broad and indeterminate for their purposes to a far narrower meaning.⁴⁸ They do this by locating the term “severe pain” in the United States Code in statutes that deal with emergency medical conditions and the provision of medical benefits.⁴⁹ Because severe pain is an indicator of an emergency medical condition under these statutes, and an emergency medical condition is one that is likely to result in permanent and serious physical damage or organ failure, the authors argue that an act is torture only if it produces pain that rises to “the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions.”⁵⁰

Attempting to define “severe pain” in the context of torture by reference to the definition used in a statute regarding medical benefits is both bizarre and duplicitous. As Peter Brooks notes,

One might ask whether the use of “severe pain” in the context of medical emergency is in fact more ‘significant’ than any number of other uses of severe, in statutes and in ordinary usage. But this slide into medical usage allows Bybee to come up with his interpretation of choice . . . He’s by now got us well out of common English usage and into the emergency room.⁵¹

Even if one presumes a good faith analysis by Yoo and Bybee, their interpretation of “severe pain” is shoddy textualism.⁵² What makes this advice arguably criminal, however, is not so much that it is wrong but that the analysis turns the prohibition against torture into something akin to “a speed limit which we are entitled to push up against as closely as we can . . .”⁵³ In response to a question about the conduct of interrogations, Yoo and Bybee informed the White House that an act is torture only if it brings about the pain that normally accompanies death or organ failure. Under the standard advanced, interrogation techniques such as water-boarding and exposure to cold weather approved of by the Pentagon⁵⁴ and used at Guantanamo Bay and Abu Ghraib seem relatively tame.

48. See Bybee Memo, *supra* note 1, at 176.

49. *Id.* (citations omitted).

50. *Id.*

51. Brooks, *supra* note 4.

52. Several commentators have noted that Yoo and Bybee blatantly misinterpreted the emergency medical benefit statutes because the statutes do not purport to define “severe pain.” Rather, the medical benefit statutes note that severe pain is one type of symptom that would lead a person to believe he had an emergency medical condition, where an emergency condition is one in which someone’s health is in serious jeopardy, her bodily functions might be impaired, or she is experiencing organ failure. In other words, the Torture Memo improperly used the definition of emergency medical condition to define severe pain. See, e.g., Waldron, *supra* note 2, at 1708; Wendel, *supra* note 17, at 81.

53. Waldron, *supra* note 2, at 1703.

54. See DOD Legal Brief, *supra* note 41 at 235.

The Convention Against Torture (“CAT”) prohibits both “cruel, degrading, and inhuman treatment” as well as full-blown “torture.”⁵⁵ Yoo and Bybee recognize this but insist on drawing a line between the two acts. They indicate that “certain acts may be cruel, inhuman, or degrading, but still not produce enough pain and suffering of the requisite intensity to fall within section 2430(A)’s proscription against torture.”⁵⁶ Why do Yoo and Bybee place so much emphasis on this distinction? They note that the United States attached a reservation when signing the CAT that cruel, inhuman, or degrading treatment means actions that violate the Fifth, Eighth or Fourteenth Amendments.⁵⁷ The Bush administration has long believed that CAT’s prohibition against cruel, inhuman, or degrading treatment does not bind U.S. interrogators abroad because the constitutional amendments cited in the reservation do not apply extraterritorially.⁵⁸ Thus, in narrowing the definition of torture so that it only reaches “the most egregious conduct,”⁵⁹ Through their strained analysis, Yoo and Bybee stripped the CAT—the one instrument that protects detainees—of much of its efficacy.⁶⁰

In summary, according to the Torture Memo, for an act to be “torture” the interrogator must purposely intend to inflict “severe pain.” Inflicting some pain is acceptable, however, and is not “torture” as long as the interrogator stays away from “the most heinous acts.”⁶¹ And, even if an interrogator commits both the egregious act of torture (an act that must produce pain equivalent to that of organ failure or severe bodily impairment) with the intent to purposely inflict pain (as opposed to intending only to obtain valuable information), the Torture Memo suggests that there are viable defenses in the event of criminal prosecution.

Although lawyers are entitled to a certain amount of creativity when interpreting statutes, given its strained reasoning and dangerous implications, the Torture Memo is best understood not as standard lawyering, but rather as legal reassurance that interrogators can do as they please without fear of criminal liability. Professor Waldron is undeniably correct in observing that the fact that lawyers would provide legal justification for the degradation of fellow human beings is a source of shame to the profession.⁶² More than this, however, Yoo and

55. CAT, *supra* note 18, arts. 1(1), 16(1).

56. Bybee Memo, *supra* note 1, at 172.

57. *See id.* at 187 (interpreting Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. Exec. Rep. No. 101-30, at 8, 25 (1990)).

58. *See* Luban, *supra* note 2, at 1458-59 (criticizing the Bush Administration’s interpretation of the reservation); *see generally* Marty Lederman, *Administration Confirms Its View that CIA May Engage in ‘Cruel, Inhuman and Degrading’ Treatment*, BALKINIZATION (Jan. 12, 2005), <http://balkin.blogspot.com/2005/01/administration-confirms-its-view-that.html>.

59. Bybee Memo, *supra* note 1, at 191.

60. The Bush Administration had concluded previously that the Geneva Conventions did not apply to unlawful combatants. *See* Memorandum of President George Bush, *Humane Treatment of Al Qaeda and Taliban Detainees* (Feb. 7, 2002) [hereinafter President Bush Memo], *in* THE TORTURE PAPERS, *supra* note 1, at 135.

61. *See* Bybee Memo, *supra* note 1, at 191.

62. *See* Waldron, *supra* note 2, at 1687.

Bybee knew that their advice would be relied upon to shape interrogation policies.⁶³ Thus, they had a duty, not only as lawyers but also as moral agents, to discharge their duties responsibly given the important use to which their efforts were being directed.

Moral considerations are by no means foreign to the practice of law. Rule 2.1 of the *Model Rules of Professional Conduct* specifically provides that “[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”⁶⁴ The *Model Rules* also prohibit lawyers from using their talents to assist clients in engaging in criminal or fraudulent conduct.⁶⁵ Simply put, lawyers can offer moral advice and most certainly cannot ignore what their clients are going to do with their legal advice.

But whether or not Yoo and Bybee violated the legal profession’s specific rules of conduct in writing the Torture Memo, I think they most certainly failed to discharge their duties as moral agents when they did so. Even if their legal analysis was technically correct and the United States is legally justified in employing dark interrogation methods on detainees that fall short of the “most heinous” acts, the Torture Memo was a dangerous document.⁶⁶ The notion that interrogators can stop themselves at “mere” cruel, inhuman, or degrading treatment and not graduate to full-blown torture is foolhardy, and Yoo and Bybee would have realized as much.⁶⁷

Lawyers are obviously permitted to consult with a client over the scope or application of various laws.⁶⁸ But when a lawyer recognizes (or should recognize) that his/her legal advice is going to lead to the abuse of detainees, it is fair to ask why he/she—as a moral agent—has agreed to provide the advice or, at the very least, what he/she has done to minimize the negative consequences of the advice. As T.M. Scanlon has argued, an individual acts in a morally impermissible manner when he/she either follows a course of action in a full awareness of the countervailing negative considerations or fails to notice that his/her action entails a serious risk of harm to others.⁶⁹ If Yoo and Bybee are not blameworthy in the first sense, they are certainly blameworthy in the second.

Yoo and Bybee knew the White House wanted to formulate new interrogation

63. Bybee Memo, *supra* note 1, at 172.

64. MODEL RULES OF PROFESSIONAL CONDUCT R. 2.1 (2004) [hereinafter MODEL RULES].

65. MODEL RULES R. 1.2(d).

66. Waldron, *supra* note 2, at 1745 (“[W]e must not become so jaded that the phrase ‘cruel, inhuman, and degrading treatment’ simply trips off the tongue as something much less taboo than torture To treat a person inhumanly is to treat him in the way that that no human should ever be treated.”).

67. See Strauss, *supra* note 16, at 1280 (“[T]he Administration . . . sent conflicting signals, creating a belief that abusive behavior towards the ‘evildoers’ was acceptable. And policies adopted by the Administration at least opened the door to utilizing torture in certain interrogation contexts. The end result . . . condoned aggressive interrogation practices, and ultimately, torture.”).

68. MODEL RULES R. 1.2(d).

69. See T.M. SCANLON, WHAT WE OWE TO EACH OTHER 268-69 (2000).

procedures for detainees. They also knew that, in the administration's view, the Convention Against Torture was the only instrument that prevented interrogators from engaging in coercive kinds of conduct.⁷⁰ By narrowly interpreting the Convention Against Torture and also suggesting possible defenses in the event of persecution, Yoo and Bybee allowed the Bush Administration to adopt harsh new standards for interrogations. In light of this, we would expect a modicum of concern in the Memo for the well-being of the detainees or some consideration of whether American personnel should be engaged in the business of using cruel, inhuman, or degrading treatment on detainees. As argued, the *Model Rules* contemplate that lawyers will offer moral advice to their clients,⁷¹ and Yoo and Bybee did not restrict themselves solely to legal arguments in the Torture Memo.⁷² The only conclusion to draw from the failure of Yoo and Bybee to raise any moral qualms about their extreme construction of the torture statute is they simply did not care what happened to detainees in U.S. custody.

Arguably there are occasions when a lawyer's duties qua lawyer will trump his duties as an individual moral agent. Confidentiality rules, for example, generally prevent a lawyer from divulging the criminal conduct of his/her client,⁷³ even if the lawyer believes that the world would be better served if the client's misdeeds were to come to light. But Yoo and Bybee did not find themselves torn between their professional duties and the dictates of morality. They could have given some consideration to the impact their advice would have on men in U.S. custody even if they believed ultimately the United States was justified in adopting harsh new interrogative tactics. Yoo and Bybee failed to voice any concern for the detainees, not because their professional duties did not allow for it, but because they believed that whatever happened to terrorist suspects was justified by relation to the threat the U.S. was facing. In other words, they wrote the Torture Memo from a particular moral framework, one that disregarded the consequences of undermining the prohibitions against torture and cruel, inhuman, or degrading treatment in both U.S. and international law. The stance of Yoo and Bybee foreseeably led to a policy where detainees would be abused and tortured. For their role in the mistreatment of terror suspects, Yoo and Bybee can and should be held accountable.

II. ACCOMPLICE LIABILITY AND WORLD WAR II PRECEDENTS

Although Yoo and Bybee—and other lawyers like them—promulgated policies in the War on Terror, they did not directly inflict torture or cruel and

70. *See id.* at 9.

71. MODEL RULES R. 2.1.

72. *See* Bybee Memo, *supra* note 1, at 202 (noting that aggressive interrogations are needed to prevent future attacks against the United States).

73. MODEL RULES R.1.6(a).

degrading treatment on detainees. Yoo and Bybee can only be held liable to the extent they aided and abetted interrogators in committing war crimes. But can a lawyer who merely writes a memo be implicated as an accomplice to the war crime of torture?⁷⁴ I believe that he can.

Under international law, any act that materially contributes to the perpetration of a war crime can make the actor an accomplice if the act is performed with the requisite intent.⁷⁵ Yoo and Bybee may not have intended for acts of torture and cruel, inhuman, or degrading treatment to take place, but they were at minimum reckless as to the commission of such acts.⁷⁶ Yoo and Bybee's recklessness in this regard appears to meet the intent requirement for aiding and abetting war crimes under international law.⁷⁷ As the International Criminal Tribunal for Yugoslavia ("ICTY") expressed in *Prosecutor v. Kvočka*,⁷⁸ "[t]he aider and abettor must . . . at least have accepted that such a commission of a crime would be a possible and foreseeable consequence of his conduct [I]t is not necessary that the aider or abettor know the precise crime that was intended or which was actually committed."

The precise level of contribution required for accomplice liability to attach to one's actions is a more difficult question. The trials at Nuremberg required only that an accomplice be "connected" to war crimes and crimes against humanity.⁷⁹ Conversely, the ICTY has held that the participation must have had a direct and substantial effect on the commission of the offense.⁸⁰ The ICTY has interpreted this to mean that "the criminal act would not have occurred in the same way had not someone acted in the role that the accused in fact assumed."⁸¹ The International Criminal Court's statute is less restrictive, stating that a person is an accomplice if he or she "aids, abets or otherwise assists in [a crime's] commission or its attempted commission" or "[i]n any other way contributes to the commission or attempted commission of such a crime."⁸²

The ICTY has held that under international law even omissions can constitute

74. "The term war crime is the technical expression for violations of the laws of warfare, whether committed by members of the armed forces or by civilians." Paust, *supra* note 16, at n.3. Torture is a grave breach of the Geneva Conventions and is therefore a war crime. See Geneva Convention Relative to the Treatment of Prisoners of War, art.130, Aug. 12, 1949, 47 Stat. 2021, 6 U.S.T. 3316 [hereinafter Geneva Convention].

75. See William A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 83 INT'L REV. RED CROSS 446 (2001).

76. See *supra* Part I.

77. See Schabas, *supra* note 75, at 447 ("[T]he accomplice must have intended that the crime be committed or may have been reckless as to its commission.") (emphasis added).

78. Case No. IT-98-39, Judgment, ¶ 255 (Nov. 2, 2001). Kvočka involved the abuse of men and women at Serb-run detention camps in Bosnia. *Id.* ¶ 8.

79. Schabas, *supra* note 75, at 442.

80. *Prosecutor v. Tadic*, Case No. IT-94010A, Judgment, ¶¶ 691-92 (July 15, 1999).

81. *Id.* at ¶ 688.

82. ICC Statute, *supra* note 21, art. 25(3)(c)-(d).

material contribution.⁸³ In *Prosecutor v. Aleksovski*, the Croatian commander of a prison during the Bosnian War was found complicit in “outrages upon personal dignity” for aiding and abetting the abuse and mistreatment of detainees.⁸⁴ Although the commander did not mistreat prisoners directly and ran the prison reasonably well given the dire circumstances,⁸⁵ he was present during interrogations and remained silent when detainees were mistreated, facilitating the misconduct.⁸⁶ The ICTY Trial Chamber wrote, “By being present during the mistreatment, and yet not objecting . . . the accused was necessarily aware that such tacit approval would be construed as a sign of his support and encouragement.”⁸⁷

Ordinarily we would not expect lawyers to be present when their clients commit criminal acts, and Yoo and Bybee were not present during any interrogations of suspected terrorist detainees. Moreover, it is doubtful that any interrogators actually read their memorandum. The *Aleksovski* court indicates that these facts are not determinative, writing, “the act contributing to the commission and the act of commission itself can be geographically and temporally distanced.”⁸⁸ Similar to the prison commander in *Aleksovski*, Yoo and Bybee appeared to encourage the cruel and degrading treatment of detainees. They did not stay silent as the administration contemplated aggressive interrogation procedures. Rather, by drafting the Terror Memo, Yoo and Bybee invited the Bush administration to push up against the torture prohibition as closely as it could⁸⁹ and suggested possible defenses in the event interrogators were prosecuted for war crimes like torture.

In trying to distinguish *Aleksovski*, one could argue that the prison commander was in a position of authority, whereas Yoo and Bybee were mere lawyers without any real control over the decisions of others, including interrogators. However, this argument is belied by the fact that the Torture Memo was written in response to a specific question from the White House on interrogation procedures. The Pentagon may have formulated new interrogation procedures without the assistance of Yoo and Bybee, but it is doubtful the procedures would have been as extreme. Under international law, Yoo and Bybee are accomplices because without their involvement, interrogation policies would not have been

83. See, e.g., *Prosecutor v. Kvočka*, Case No. IT-98-39, ¶ 251 (Nov. 2, 2001) (“The *actus reus* required for committing a crime is that the accused participated, physically or otherwise directly . . . through positive acts or omissions, whether individually or jointly with others.”).

84. *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment, ¶ 29 (June 25, 1999).

85. *Id.* ¶ 235.

86. See *id.* ¶¶ 87-88.

87. *Id.* ¶ 87.

88. *Id.* ¶ 62 (quoting *Prosecutor v. Tadic*, Case No. IT-94010A, Judgment, ¶ 698 (July 15, 1999)).

89. See Waldron, *supra* note 2, at 1703.

implemented in quite the same way.⁹⁰ And, as World War II precedents show, when the actions of lawyers directly impact how their clients' crimes are perpetrated, then lawyers can be held liable as accomplices.

Courts have held that individuals can be complicit in war-time conduct to the extent that they attempt to provide legal cover for illegal acts.⁹¹ Joachim Von Ribbentrop was the former German Ambassador to England⁹² who was charged with crimes against the peace and other offenses before the International Military Tribunal ("IMT").⁹³ His defense was that he could not be held accountable for Nazi Germany's aggressive actions against its neighbors because Hitler misled him into believing that he was committed to peace.⁹⁴ The IMT rejected this argument, noting that Von Ribbentrop had written the Foreign Office Memoranda justifying Nazi preemptive strikes against Norway, Denmark, and other countries in 1940.⁹⁵ The IMT indicated that Von Ribbentrop could not distance himself from the very actions he had so aggressively supported.⁹⁶ Similarly, Yoo and Bybee advanced arguments in the Torture Memo that sought to aid interrogators in circumventing both U.S. and international law by reclassifying what was previously regarded as torture to 'merely' cruel, inhuman, or degrading treatment, as well as suggesting defenses to torture.⁹⁷

Von Ribbentrop was not a lawyer, but numerous lawyers were implicated in international crimes during World War II.⁹⁸ Franz Schlegelberger was a distinguished jurist and head of the Reich Ministry of Justice.⁹⁹ He participated in the enactment and enforcement of laws that persecuted Jewish and Polish populations in German-occupied territories.¹⁰⁰ Although he was never a great admirer of Hitler and eventually resigned his position, Schlegelberger was found guilty of both war crimes and crimes against humanity by the Nuremberg Tribunal.¹⁰¹ The tribunal noted that the persecution of people under the guise of the law was an enterprise in which neither Schlegelberger nor any of his colleagues should have been involved.¹⁰² He was convicted even though the court found that the legal system would have been worse off if another

90. See *Tadic*, ¶¶ 691-92 ("[T]he criminal act would not have occurred in the same way had not someone acted in the role that the accused in fact assumed.").

91. See generally Bilder, *supra* note 16, at 694.

92. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 14 NOVEMBER 1945-1 OCTOBER 1946, at 285 (1947).

93. See *id.* at 285-88.

94. *Id.* at 287.

95. *Id.* at 286-87.

96. See *id.* at 287-88.

97. See *supra* Part I; see also Waldron, *supra* note 2, at 1745.

98. See Paust, *supra* note 16, at 811.

99. See 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 1081-82 (1951).

100. See *id.* at 1086.

101. See *id.* at 1086-87.

102. *Id.* at 1086.

jurist—one whose views more closely tracked that of Hitler’s—had been in his place.¹⁰³

The ultimate lesson of the Schlegelberger trial is that there are some ends to which lawyers should not direct their talents; participating in the persecution of ‘undesirables’—even if such persecution is consistent with domestic law—is one example. Providing the legal justification for the abuse and brutalization of detainees—even if the goal is to aid national security—may be another.

In a different case tried in post-World War II Germany, a lawyer was convicted for his involvement with the Nazi Schutzstaffel (the “SS”).¹⁰⁴ The lawyer, Joseph Alstoetter, was not aware of many of the activities of the SS or of the horrific occurrences at concentration camps.¹⁰⁵ Nor did he write or enact any of the Nazi regime’s discriminatory laws.¹⁰⁶ Rather, Alstoetter’s efforts were largely directed at interpreting the laws the Nazis had passed. For example, he formulated rules and procedures for the administration of hereditary biological courts that determined whether certain Jews could be considered ethnically German.¹⁰⁷ The Nuremberg Military Tribunal convicted him without considering whether he approved of the Nazi persecution of Jews, saying

As a lawyer [Alstoetter] knew that in October of 1940 the SS was placed beyond the reach of the law. As a lawyer he certainly knew . . . the Jews were turned over to the police and so finally deprived of the scanty legal protection they had theretofore had . . . [H]e gave his name as a soldier and a jurist of note and so helped to cloak the shameful deeds of that organization from the eyes of the German people.¹⁰⁸

After the Alstoetter case, the argument that a lawyer cannot be punished for merely interpreting and implementing domestic law—no matter how morally repulsive the law at issue is—is simply not credible. Yoo and Bybee used their legal talents to deprive detainees of the protection of the Torture Convention, the only instrument that, in the administration’s view, had any bearing on the interrogation of detainees abroad. Even if their intent was not to facilitate acts of torture and cruel, inhuman, or degrading treatment, they, like Alstoetter, appeared to play a vital role in lending credibility to the misdeeds of their superiors. This being so, a court could certainly find that Yoo and Bybee “materially contributed” to the commission of acts of abuse. While the unspeakable crimes of World War II cannot and should not be equated with the reported incidents of torture and cruel, inhuman, or degrading treatment of detainees captured in the War on Terror, ICTY and WWII precedents suggest that Yoo and Bybee can be held

103. *Id.*

104. *See id.* at 25, 1176-77.

105. *Id.* at 1176.

106. *See id.* at 1175.

107. *See id.* at 1176.

108. *Id.* at 1176-77.

legally accountable for the Torture Memo.

III. SOURCES OF LAW AND VENUES FOR PROSECUTION

Thus far in this Essay, I have attempted to demonstrate that lawyers can be held responsible for their involvement in denying individuals legal protections, as well as for providing legal cover and legitimacy for illegal and immoral acts. The argument can be made that, by writing the Torture Memo, Yoo and Bybee were indifferent, if not encouraging of, the commission of acts of torture and cruel, inhuman, or degrading treatment. The Torture Memo might qualify as a material contribution¹⁰⁹ to the commission of these acts, making Yoo and Bybee complicit in their commission. This leads to the question of what a prosecution of Yoo and Bybee for war crimes might look like. Where could they be tried and under what law could they be prosecuted?

A. INTERNATIONAL TRIBUNALS: THE ICC

The International Criminal Court (“ICC”) was established by the Rome Statute of the International Criminal Court (“ICC Statute”) on July 17, 1998 and is currently in the process of beginning operations.¹¹⁰ The United States is not a party to the ICC, having revoked its signature on May 6th, 2002.¹¹¹ Nevertheless, the ICC still has the potential to exercise jurisdiction over U.S. nationals like Yoo and Bybee. According to Article 12 of the ICC Statute, the ICC can exercise jurisdiction over crimes that occur on the territory of any one of the state-parties to the court.¹¹² Even if a state is not a state-party to the ICC Statute, it can allow the ICC to exercise jurisdiction with respect to specific crimes committed within its territory.¹¹³ For this reason, American lawyers should be mindful that the ICC may have jurisdiction over their actions that have an impact abroad. While Yoo and Bybee’s actions took place within the United States, the crimes for which they might bear complicity occurred abroad, meaning that they are not immune from the ICC’s jurisdiction.

With regards to the War on Terror, the United States is conducting interrogations in Iraq, Afghanistan, and Guantanamo Bay, as well as certain “black sites” in Eastern Europe.¹¹⁴ Afghanistan is a party to the ICC, whereas Iraq and Cuba

109. Schabas, *supra* note 75, at 446.

110. See Historical Introduction to the International Criminal Court, <http://www.icc-cpi.int/about/ataglance/history.html> (last visited Feb. 21, 2007).

111. See BBC News, US Renounces World Court Treaty, May 6, 2002, <http://news.bbc.co.uk/1/hi/world/americas/1970312.stm>.

112. ICC Statute, *supra* note 21, art. 12(2)(a).

113. *Id.* art. 12(3).

114. See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A01.

are not.¹¹⁵ Since the War on Terror began, there have been credible stories of detainees being abused and tortured in Bagram and other parts of Afghanistan.¹¹⁶ The ICC could attempt to hold Yoo and Bybee accountable for these acts, as the court would have jurisdiction over the crimes. Although the United States has a so-called Article 98 Agreement¹¹⁷ in place with Afghanistan,¹¹⁸ the Agreement only prevents Afghanistan from turning U.S. nationals over to the ICC; it does not prevent a third state from turning over U.S. nationals found within its territory who aided and abetted crimes committed in Afghanistan. Another possibility is for the ICC to obtain consent from Iraq and/or Cuba to exercise jurisdiction over crimes committed by U.S. nationals within their respective territories. Such consent would probably not be given by Iraq which is currently an ally of the United States. However, Cuba—which retains ultimate sovereignty over Guantanamo Bay¹¹⁹—could, if it chose, allow the ICC to exercise jurisdiction. Under such circumstances, if Yoo and Bybee were present in any country that is a party to the ICC and has not signed an Article 98 Agreement, the lawyers could be transferred to the Hague to answer charges related to the mistreatment of detainees in Cuba.

Americans would undoubtedly be less-than-enthused if an international court attempted to prosecute Yoo, Bybee, or indeed any U.S. national. Given that the ICC is supposed to exercise jurisdiction over the “most serious crimes of international concern,”¹²⁰ it would be within a prosecutor’s discretion not to focus on the actions of individuals like Yoo and Bybee. Nevertheless, the ICC is by no means precluded from prosecuting crimes related to the mistreatment and torture of detainees or from exercising jurisdiction over U.S. nationals.

The ICC regards torture as both a crime against humanity and a war crime,¹²¹ and the ICC Statute criminalizes the commission of “other inhumane acts . . . causing great suffering, or serious injury to body or to mental or physical health” as a crime against humanity and “outrages upon personal dignity, in particular

115. See generally Press Release, International Criminal Court, Fourth Session of the Assembly of States Parties Opens 28 November 2005 (Nov. 27, 2005), available at <http://www.icc-cpi.int/press/pressreleases/123.html>.

116. See, e.g., Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, available at <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html?ex=1145937600&en=6ee16c06af3b11cf&ei=5070>; Josh White, *New Reports Surface About Detainee Abuse*, WASH. POST, Sept. 24, 2005, at A01.

117. See ICC Statute, *supra* note 21, art. 98(2).

118. U.S. Dept. of State, *Countries Who Have Signed Article 98 Agreements with the United States*, June 12, 2003, available at <http://www.state.gov/r/pa/prs/ps/2003/21539.htm>. Article 98 Agreements prevent the transfer of U.S. personnel to the Hague or any other international tribunal. *Id.*

119. The United States occupies Guantanamo under a lease that recognizes Cuba’s ultimate sovereignty, but gives the United States control for so long as it does not abandon the leased areas. See *Rasul v. Bush*, 542 U.S. 466, 471 (2004).

120. See ICC Statute, *supra* note 21, art. 1.

121. See *id.* arts. 17, 7(1)(f), 8(2)(a)(ii).

humiliating and degrading treatment” as war crimes.¹²² Responsibility extends not only to principals, but also to anyone who, “[f]or the purpose of facilitating such a crime, aids, abets or otherwise assists in its commission or attempted commission”¹²³ or “[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.”¹²⁴ The ICC Statute, therefore, clearly criminalizes both acts of torture and of cruel and degrading treatment,¹²⁵ and liability under the ICC Statute extends not only to those who directly commit the acts, but also to accomplices and facilitators, including lawyers.

The ICC Statute does have some requirements for an action to be either a “crime against humanity” or a war crime. Under the ICC Statute, to rise to the level of a “crime against humanity,” an act must have been committed as part of “a widespread and systematic attack on a civilian population.”¹²⁶ Furthermore, the ICC Statute defines “attack directed against a civilian population” as a “course of conduct involving the multiple commission of acts [such as murder, rape and torture] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such an attack.”¹²⁷ Although the United States is engaged in combat operations in Iraq and Afghanistan, U.S. military forces are not targeting civilians or engaging in a “widespread and systematic” attack on a civilian population. And because the cruel and degrading treatment and torture of detainees is not part of an effort to terrorize the civilian populations of Afghanistan and Iraq (let alone in Cuba), Yoo and Bybee could not be implicated in crimes against humanity—at least not before the ICC.

Conversely, war crimes like torture and “outrages upon personal dignity” need only to be associated with an international armed conflict.¹²⁸ This element is clearly met, as the interrogations of enemy combatants are taking place against the backdrop of a transnational war with Al Qaeda—as the Bybee memo makes clear.¹²⁹ Under the ICC Statute, to be an accomplice to either the war crime of torture or to “outrages upon personal dignity,” Yoo and Bybee would also have to

122. *See id.* arts. 7(1)(k), 8(2)(b)(xxi).

123. *Id.* art. 25(3)(c).

124. *Id.* art. 25 (3)(d).

125. For ICC purposes, this would trump Yoo and Bybee’s claim that the U.S. forces have a right to use cruel and degrading treatment under the Torture Convention.

126. ICC Statute, *supra* note 21, art. 7(2)(a).

127. *Id.*

128. *See* Preparatory Comm’n for the Int’l Crim. Ct., Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2001/1/Add.2, art. art. 8(2)(a)(II)-I, 8(2)(b)(xxi) (2000) [hereinafter Elements], available at <http://daccessdds.un.org/doc/UNDOC/GEN/N00/724/27/PDF/N0072427.pdf?OpenElement>. The ICC Statute also covers these crimes if they are committed as a part of an armed conflict *not* of an international character. *See id.* art. 8(2)(c)(i)-(iv).

129. *See* Bybee Memo, *supra* note 1, at 200; *see also* President Bush Memo, *supra* note 60, at 135 (“[T]he relevant conflicts are international in scope.”).

have acted with the purpose of facilitating these crimes¹³⁰ or contributed to the commission of these crimes with the knowledge that the administration's intention was to commit them.¹³¹

Presumably Yoo and Bybee would respond that their purpose in writing the Memo was not to facilitate torture but rather to give the Bush administration as much flexibility as possible in crafting aggressive interrogation procedures.¹³² Yoo and Bybee can further defend themselves by claiming that while they suggested possible defenses to prosecution under 18 U.S.C. § 2430(A), they did not know that the administration was in fact "planning" to commit the egregious conduct of torture.¹³³ The ICC prosecutor would therefore have to prove that the administration did plan to torture detainees and that Yoo and Bybee either wrote the Torture Memo in order to facilitate such conduct or that they had knowledge that the administration would likely commit torture. Most commentators have noted that torture was a foreseeable consequence of the administration's policy: Yoo and Bybee must have known that some interrogators would graduate from the use of "mere" cruel, inhuman, or degrading treatment to full-blown torture.¹³⁴

In any case, at a minimum, Yoo and Bybee purposely facilitated the commission of the war crime of "outrages upon personal dignity."¹³⁵ The Bush administration's position has been that the Convention Against Torture does not prevent the cruel and degrading treatment of aliens held overseas.¹³⁶ This explains, for example, why detainees captured in the War on Terror have been held at Guantanamo Bay in Cuba and not within the United States proper, and why the administration sought Yoo and Bybee's exact construction of the torture statute. Thus, the administration planned to inflict *some* cruel, inhuman, or degrading treatment on detainees, and by redefining much of what would normally be considered torture as cruel, inhuman, or degrading treatment,¹³⁷ Yoo and Bybee gave the administration as much latitude as possible in conducting interrogations. Giving the administration leeway to use aggressive interrogation techniques was a specific goal of Yoo and Bybee because they believed that extreme tactics were necessary to prevent a repeat of September 11th.¹³⁸ And, even if they did not purposely encourage the use of such tactics, at the very least they wrote the Torture Memo with the knowledge that the Administration was likely to authorize their use by CIA interrogators. Indeed, the ICC Statute defines

130. See ICC Statute, *supra* note 21, art. 25(3)(c).

131. See *id.* art. 25(3)(d).

132. See *id.* art. 25(3)(c).

133. See *id.* art. 25(3)(d).

134. See, e.g., Luban, *supra* note 2, at 1449 ("Without clear lines, the tyranny innate in the interrogator's job has nothing to hold it in check."); Strauss, *supra* note 16, at 1290-91.

135. See ICC Statute, *supra* note 21, art 8(2)(b)(xxi).

136. See Luban, *supra* note 2, at 1458-59.

137. See Waldron, *supra* note 2, at 1744-45.

138. See Bybee Memo, *supra* note 1, at 202.

knowledge as “awareness that a circumstance exists or a consequence will occur in the ordinary course of events,”¹³⁹ and because the Memo was written to help CIA interrogators with extracting information from otherwise uncooperative detainees like Abu Zubaydah,¹⁴⁰ Yoo and Bybee would be hard-pressed to argue that they did not expect the administration to make use of the full arsenal of cruel, inhuman, or degrading tactics deemed permissible in the Torture Memo.

Under the ICC Statute, therefore, Yoo and Bybee could be tried as accomplices to outrages upon personal dignity and perhaps for torture. I doubt very much that Yoo and Bybee expected that their actions ran afoul of the ICC Statute when they wrote the Memo but, as I have attempted to show in this Essay, the notion of accomplice liability under the ICC Statute allows for the potential prosecution of U.S. lawyers insofar as they are implicated in war crimes.

B. PROSECUTIONS BY STATE PARTIES TO THE CAT

The Convention Against Torture also allows for the prosecution of lawyers as accomplices to war crimes. Article 4 of the CAT prohibits “complicity in torture,” and Article 5(2) demands that “[e]ach State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.”¹⁴¹ In *Ex parte Pinochet Ugarte*, Spain attempted to secure the extradition of August Pinochet, the former Chilean dictator. To extradite Mr. Pinochet, the British courts had to first determine whether Mr. Pinochet was complicit in war crimes.¹⁴² In its decision, the House of Lords determined that Mr. Pinochet was complicit in torture and stated, “If . . . states do not choose to seek extradition or to prosecute the offender, other states must do so. The purpose of the Convention was to introduce the principle *aut dedere aut punire*—either you extradite or you punish.”¹⁴³ The CAT treats torture as a crime of universal jurisdiction, and by seeking Pinochet’s extradition from England for crimes he committed in Chile, the Spanish government was acting pursuant to its obligation to prosecute torture wherever it occurs.¹⁴⁴

The CAT does not prohibit complicity in cruel, inhuman, and degrading treatment. Article 16 mandates that states “shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.”¹⁴⁵ Under its domestic law,

139. ICC Statute, *supra* note 21, art. 30(3).

140. See Vischer, *supra* note 6, at 235.

141. CAT, *supra* note 18, arts. 4, 5(2).

142. See *Ex parte Pinochet Ugarte* (No.3), [2000] 1 AC 147, 200 (H.L. 1999) (appeal taken from Spain), 22 [hereinafter *Pinochet 3*].

143. *Id.*

144. See *id.* at 201.

145. CAT, *supra* note 22, art. 16(1).

therefore, a state may choose to prosecute not only those who commit acts of cruel, inhuman, or degrading treatment but those who aid and abet these acts. However, there is no universal jurisdiction for cruel, inhuman, or degrading treatment. In other words, under the CAT, states are not required to prosecute or extradite for cruel, inhuman, or degrading treatment, whereas extradition or prosecution is mandatory for torture.¹⁴⁶

Because of this, Yoo and Bybee can only be prosecuted under the CAT to the extent that their crimes rise to the level of complicity or participation in torture, not in cruel, inhuman, or degrading treatment.¹⁴⁷ To be prosecuted for cruel, inhuman, and degrading treatment, Yoo and Bybee—or other lawyers like them—would have to be physically present in the territory of a country where the crimes were actually committed, and the state's domestic law would have to go beyond what the CAT requires. The country's domestic law would have to explicitly criminalize complicity in cruel, inhuman, or degrading treatment.

Yoo and Bybee would be liable for complicity or participation in torture¹⁴⁸ if the Torture Memo is read to endorse torture. A court would likely have to conclude that the Memo's discussion of defenses like necessity and self-defense—as well as Yoo and Bybee's attempt to re-categorize acts of torture as 'mere' cruel, inhuman, or degrading treatment—led to the commission of acts of torture. Moreover, the court prosecuting Yoo and Bybee would have to conclude that the lawyers had the requisite *mens rea*. Of course, countries will have different legal standards and burdens of proof for determining *mens rea*. However, it still might be easier to mount a prosecution under the CAT than one under the ICC Statute. This is because the *mens rea* required for complicity is not specified in the CAT; rather, its determination is left to domestic courts. The ICC Statute, as I have noted in this Essay, does not have a separate crime of complicity in torture, and the *mens rea* required for accomplice liability is purpose or knowledge.¹⁴⁹ Therefore, many state-parties to the CAT would likely hold Yoo and Bybee liable as long as the lawyers disregarded the possibility that the Torture Memo would lead individual interrogators to commit acts of torture.¹⁵⁰ What is most important, however, is that American lawyers could be prosecuted *even if* their actions were perfectly consistent with U.S. law.

The Pinochet precedent, as Philippe Sands has suggested,¹⁵¹ is highly relevant on this point. General Pinochet was charged by the Spanish government with complicity in torture and other war crimes.¹⁵² Chile, where most of the alleged

146. See *id.* art. 5 (noting that art. 5 does not apply to acts of cruel, inhuman, or degrading treatment).

147. See *id.* art. 4(1).

148. See *id.*

149. See *supra* Part III.A.

150. See Schabas, *supra* note 75, at 447.

151. See Sands, *supra* note 19.

152. *Pinochet 3*, *supra* note 142, at 190-91.

acts occurred, did not believe that the General should be prosecuted and fought his extradition to Spain.¹⁵³ Indeed, under Chilean law, General Pinochet enjoyed complete immunity pursuant to a general amnesty.¹⁵⁴ General Pinochet was arrested in London pursuant to the Spanish warrant, and the question for the House of Lords was whether the United Kingdom was bound by Chilean law and required to afford the General immunity from both prosecution and extradition. The House concluded that it was not, noting that “[m]unicipal law cannot be decisive . . . If it were a determining factor, the most abhorrent municipal laws might be said to enlarge the functions of a head of state.”¹⁵⁵ The House further noted that, regardless of what domestic law said about the powers and liabilities of General Pinochet, “international law has made plain that certain types of conduct, including torture . . . are not acceptable conduct on the part of anyone. This applies as much to heads of state . . . as it does to everyone else; the contrary conclusion would make a mockery of international law.”¹⁵⁶

The Pinochet case demonstrates that even if Yoo and Bybee were correct that, as a matter of domestic U.S. law, torture applies only to the most egregious abusive conduct,¹⁵⁷ and that there are defenses for interrogators charged with torture, none of this shields those who violate international norms against torture from liability in foreign courts. In signing the CAT, the United States “assented to the imposition of an obligation on foreign national courts to take and exercise criminal jurisdiction in respect of the official use of torture.”¹⁵⁸ A foreign court would therefore be free to make its own judgment about where the line between torture and cruel, inhuman, and degrading treatment lies and whether it has in fact been crossed. A foreign court would certainly question the claim made by Yoo and Bybee that international law does not view interrogation techniques like wall standing, hooding, subjection to noise, sleep deprivation, and deprivation of food and water as torture.¹⁵⁹ It would similarly question the notion that an act is not torture if it is motivated by the desire to obtain information. Given that there recently has been a great deal of international law on the CAT—all of which was utterly ignored by Yoo and Bybee—a court might conclude that their analysis was conducted in bad faith and that Yoo and Bybee wished to see detainees tortured for the sole purpose of obtaining valuable information. American lawyers are not solely responsible for complying with American law, and they should expect that their actions that have an impact abroad would be inquired into

153. *See id.* at 17; *see also Ex Parte Pinochet Ugarte* (No.2), [2000] 1 AC 61 (H.L. 1998) (appeal taken from Spain), 26 [hereinafter *Pinochet 2*].

154. *Pinochet 3*, *supra* note 142, at 17.

155. *Id.* at 10.

156. *Id.* at 6.

157. *Id.* at 191.

158. *See Pinochet 3*, *supra* note 142, at 277-78.

159. *See Bybee Memo*, *supra* note 1, at 197; *see also Rouillard*, *supra* note 29, at 34-36 (criticizing Yoo and Bybee for basing their analysis on only two outdated cases).

by foreign courts.

Yoo and Bybee could be prosecuted under 18 U.S.C. § 2340(C) for conspiracy in torture and perhaps even for war crimes under 18 U.S.C. § 2441.¹⁶⁰ Domestic prosecution would involve many of the same issues that have been discussed in the context of international trials. To Yoo and Bybee, the prospect of a domestic investigation, let alone prosecution, is probably too remote to consider. Yoo and Bybee should not take much solace, however. For, as this Essay has proven, the ICC and individual state-parties to the CAT could attempt to hold them responsible for their role in the abuse, mistreatment, and torture of detainees captured and interrogated in the War on Terror. American lawyers like Yoo and Bybee who have contributed to or who continue to contribute to the commission of war crimes against detainees need not fear prosecution only so long as they remain within United States.

CONCLUSION

The prohibitions against torture and cruel, inhuman, or degrading treatment are among the most fundamental legal principles of the international community that cannot and should not be evaded.¹⁶¹ When lawyers seek to undermine or flout these prohibitions, as this Essay has attempted to show, they can be held accountable.

As flawed as the legal reasoning of the Torture Memo was, it is the context in which the Memo was written that makes it arguably criminal. Yoo and Bybee knew that their work would be used as a guide to develop detainee interrogation procedures. In spite of this knowledge, they produced a Memo that authorized the brutalization of detainees, narrowed the prohibition against torture, and suggested that an interrogator who tortures for the purpose of eliciting information that might be useful to fight the War on Terror lacks the specific intent required for their actions to constitute torture. Yoo and Bybee also argued that interrogators accused of torture had viable defenses in the event of prosecution. At a minimum, Yoo and Bybee were reckless as to the commission of acts of torture and appeared to outright encourage the cruel, inhuman, or degrading treatment of detainees by U.S. interrogators. Without their work, the Bush Administration would not have felt legally entitled to adopt harsh new interrogation procedures. As the trials in post-World War II Germany clearly indicate, there are some things lawyers should refuse to do for their clients, and when lawyers are involved in the

160. Yoo and Bybee would have to have committed a "grave breach" of the Geneva Conventions under 18 U.S.C. §2441; complicity in torture is not defined by the conventions as such. *Compare* 18 U.S.C. § 2441 (c)(1), (c)(3) (2000), with Geneva Convention, *supra* note 74, arts. 3, 130. Paust has suggested the conspiring to deny individuals the legal protections is a war crime under the Geneva Conventions that can be prosecuted domestically in either a court or military tribunal. *See* Paust *supra* note 16 at 861-63.

161. *See Pinochet 3, supra* note 142; *see also* *Nuru v. Gonzales*, 404 F.3d 1207, 1222 (9th Cir. 2005) ("[The] absolute prohibition on torture could not be clearer Even in war, torture is not authorized.").

persecution and mistreatment of others, they can be held legally accountable.

The International Criminal Court could assume jurisdiction over U.S. crimes and is not prevented from prosecuting lawyers like Yoo and Bybee. It is irrelevant that the United States is not a party to the ICC Statute because, as discussed, the court has other means of obtaining jurisdiction. Prosecution is also possible under the CAT because torture is a crime of universal jurisdiction, and other nations are not only able, but obligated, to hold lawyers accountable to the extent that they are complicit in torture. The argument that U.S. lawyers only need to be concerned about potential prosecution under U.S. law is therefore both dangerous and erroneous.

If we hold lawyers like Yoo and Bybee liable for the legal advice they give, is there a risk that lawyers may be chilled from performing the vital task of interpreting the law as they see it? I do not think so. As this Essay has argued, Yoo and Bybee did not merely interpret the law. Rather, in response to a request for guidance about detainee interrogation procedures, they argued that it was legally permissible for the United States government to mistreat detainees and perhaps even torture them. Yoo and Bybee did not consider weaknesses in their arguments or suggest the dangers that might result if their guidance was in fact implemented. As moral agents, lawyers must always be cognizant of the real world consequences of their actions and offer responsible legal advice to their clients. A law degree does not entitle one to aid in the abuse, degradation, or torture of detainees, just as it does not allow one to assist in the legal persecution of minority populations.¹⁶² If the individuals who execute illegal orders can be held responsible for their actions, then surely so can the lawyers who helped formulate the orders upon which those individuals relied.

162. See *supra* Part II (discussing the prosecutions of Schlegelberger and Alstoetter).

