Office of the City Manager

SUPPLEMENTAL AGENDA MATERIAL

Meeting Date: **December 8, 2008**

Item Number: **23**

Item Description: **John Yoo: Bush Administration Torture Memos**

The attached materials are provided as a supplement by the Peace & Justice Commission to the Item # 23 Action Report and Attachment in the Agenda Packet, including the following:

a) *White Paper on the law of torture and holding accountable those who are complicit in approving torture of persons in U.S. custody*, by the National Lawyers Guild, International Association of Democratic Lawyers; and

b) *Under U.S. Law Torture is Always Illegal*, by Majorie Cohn.

Thank you.

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WHITE PAPER ON THE LAW OF TORTURE AND HOLDING ACCOUNTABLE THOSE WHO ARE COMPLICIT IN APPROVING TORTURE OF PERSONS IN U.S. CUSTODY

National Lawyers Guild
International Association of Democratic Lawyers

This paper provides the background to the legal issues underpinning the call by the National Lawyers Guild (NLG) to prosecute and dismiss from their jobs people like then Deputy Assistant Attorney General John Choon Yoo,[1] then Assistant Attorney General Jay Bybee[2] and others who participated in the drafting of memoranda claimed to be based on sound legal precedent that purported to authorize the commitment of acts of torture or other cruel, inhuman or degrading treatment[3] on behalf of the U.S. government. The memoranda were written at the request of high ranking U.S. officials in order to insulate them from the risk of future prosecution for subjecting detainees in U.S. custody to torture. By logical extension, this paper explains why all those who approved the use of torture and committed it—whether ordering it, approving it or giving purported legal advice to justify it—are subject to prosecution under international and U.S. domestic law.

The prohibition of torture is a *jus cogens* norm (these are principles of international law so fundamental that no nation may ignore them or attempt to contract out of them through treaties). The United States has consistently prohibited the use of torture through its Constitution, laws, executive statements and judicial decisions and by ratifying international treaties that prohibit it. The prohibition against torture applies to all persons in U.S. custody in times of peace, armed conflict, or state of emergency. In other words, the prohibition is absolute. However, the legal memoranda drafted by government lawyers purposely or recklessly misconstrued and/or ignored *jus cogens*, customary international law, and various U.S. treaty obligations in order to justify the unjustifiable, claiming that clearly unlawful interrogation "techniques" were lawful.

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[1] Yoo is currently a Professor of Law at the Boalt Hall School of Law, University of California, Berkeley. The NLG is not advocating that Yoo be dismissed for engaging in lawful First Amendment Speech as a Professor of Law. On the contrary, the Guild is calling for Yoo's prosecution, disbarment, and dismissal for his actions as Deputy Assistant Attorney General.

[2] Bybee is currently a federal judge on the United States Court of Appeals for the Ninth Circuit.

[3] What is commonly referred to as the Convention Against Torture, as well as other treaties to which the U.S. is a party, in fact prohibits torture and other cruel, inhuman or degrading treatment or punishment. The term "torture" will be generally used in this paper, but no discussion of the prohibitions should be limited to it.

I. THE PROHIBITION AGAINST TORTURE IS A *JUS COGENS* NORM.

The prohibition against torture is a *jus cogens* norm.[4] *Jus cogens* are defined as norms "accepted and recognized by the international community of states as a whole ... from which no derogation is permitted..."[5] In international criminal law, the legal duties that arise in connection with crimes designated as violations of *jus cogens* norms include the duty to prosecute or extradite, the non-applicability of statutes of limitations, the non-applicability of any immunities up to and including those enjoyed by Heads of State, the non-applicability of the defense of "obedience to superior orders" and universal jurisdiction over perpetrators of such crimes. Other *jus cogens* norms include the prohibitions against slavery, genocide, and wars of aggression. *Jus cogens* norms, like customary international law norms, are legally binding. No affirmative executive act may undercut the force of these prohibitions nor may a legislature legalize crimes designated as violating *jus cogens* norms or immunizing from prosecution those responsible. *Jus cogens* norms differ from norms which have attained the status of customary international law by dint of their universal and non-derogable character and the fact that *jus cogens* norms are peremptory, that is, they trump any other inconsistent international law.

While legal scholars often differ as to what specific acts can be defined as being subject to *jus cogens* norms, it is beyond dispute that the prohibition against torture has attained that status.[6] The right to be free from torture and other cruel and inhuman treatment was recognized in Article 5 of the Universal Declaration of Human Rights (1948). It is contained in Article 7 of the International Covenant on Civil and Political Rights and Article 5(2) of the American Convention on Human Rights. Torture is also outlawed under the Rome Statute which created the International Criminal Court (ICC). The U.S. Army Field Manual 34-52 makes clear that techniques of interrogation are to be established under the rules laid out by The Hague and Geneva Conventions. Field Manual 34-52 is unambiguous in its prohibition on the use of torture and any other force in interrogation of prisoners.

Article 17 of the 1949 Geneva Convention III prohibits physical or mental torture and any other coercive action against prisoners of war, and Article 130 classifies violation of Article 17 as a grave breach of the Geneva Conventions. The Fourth Geneva Convention prohibits an occupying

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[4] *See, e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992); *Regina v. Bow Street Metro. Stipendiary Magistrate* Ex Parte Pinochet Ugarte (No. 3), [2000] 1 AC 147, 198; *see also* Restatement (Third) of Foreign Relations Law of the United States § 702(d) ("torture or other cruel, inhuman, or degrading treatment or punishment") reporters' note 5.

[5] Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 8 I.L.M. 679, 698-99 (1969).

[6] *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) ("The right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of jus cogens.") ; Restatement, *supra* note 4; Human Rights Committee (of the ICCPR), General Comment No. 24, para. 8, U.N. Doc. CCPR/c/21/REV.1/add.6 (1994) (also noting that attempted reservations to the ICCPR that would permit torture or cruel, inhuman or degrading treatment are void as a matter of law).

power from torturing protected persons (Article 32) or engaging in all other "measures of brutality" (Article 283). Common Article 3 (that is, Article 3 in each of the conventions) prohibits torture as well as the separate crimes of inhuman, humiliating and degrading treatment against those who are taking no active part in hostilities, members of armed forces who have laid down their arms, or those who are *hors de combat*.

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention or CAT) codified the prohibitions against torture into specific rules. The Convention "prohibits torture and other acts of cruel, inhuman, or degrading treatment or punishment." It criminalizes torture and seeks to end impunity for any torturer by denying him all possible refuge. The Convention is categorical: "No exceptional circumstances whatsoever, whether a state of war, or a threat or war, internal political instability or any other public emergency, may be invoked as a justification for torture."

The prohibition against torture has attained *jus cogens* status. This means we must examine the actions of Yoo and the others who sought to provide legal cover for acts in violation of the prohibition through a lens which acknowledges that they violated a norm which the world has universally declared to be part of the highest and most compelling law. Because it is a *jus cogens* norm, no world leader has the right to resort to torture, nor may a legislature attempt to legalize it, nor may an official of the government use it. Indeed, if the rule of law is to have real meaning, it demands severe consequences for anyone who transgresses.

II. THE CONVENTION AGAINST TORTURE, THE TORTURE STATUTE, AND THE WAR CRIMES ACT

As noted above, one of the processes which helped confer *jus cogens* status on torture was the ratification by the U.S. of the International Covenant on Civil and Political Rights (ICCPR)[7] and the Torture Convention.[8] The U.N. General Assembly adopted the CAT in 1984 to strengthen existing prohibitions against torture and other cruel, inhuman, or degrading treatment.[9] On October 21, 1994, the United States ratified Convention, which expressly prohibits torture under

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[7] International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 (ratified by the United States on June 8, 1992)

[8] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 8, S. Treaty Doc. No. 100-20, (1988), 1465 U.N.T.S. 85 G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), reprinted in 23 I.L.M. 1027 (1984).

[9] *See* J. Herman Burgers & Hans Danelius, A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1 (1988).

all circumstances. The 1999 decision by the House of Lords to extradite Augusto Pinochet for prosecution for promoting and condoning acts of torture committed during his regime was based in part on the existence of the Convention and its contribution to the recognition of torture as a *jus cogens* norm.[10]

Torture is defined in Article 1 of the Convention as:

> 1. Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
>
> 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.
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> Under Article 2:
>
> 1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
>
> 2. 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.
>
> 3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

As a ratified convention, the CAT is a treaty which, through Article VI, Section 2 of the United States Constitution (Supremacy clause), is "the Supreme Law of the Land" in domestic U.S. law. Pursuant to the dictates of the CAT, Congress criminalized torture for actions outside the United States.[11] The language of the Torture Statute tracks to a large degree the language of the Torture

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[10] *Regina v. Bartle*, 2 W.L.R. 827 (H.L.) (March 24, 1999).

[11] 18 U.S.C. §§ 2340-2340A. §2340 provides in full:

As used in this chapter--

Convention and punishes conspiracy to commit torture as well as torture itself. While the U.S. included various "understandings[12] along with its ratification of the Convention, international law does not permit such "understandings" to undercut the force and language of the Convention.[13] While the Torture Statute covers acts committed outside the United States (as

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(1) "torture" means an act committed by a person acting under 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;

§2340A provides in full:

(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.

[12] "The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) 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; (3) the threat of imminent death; or (4) 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." S. Exec. Rep. No. 101-30, at 36 (1990).

[13] "Understandings" differ from "reservations." An "understanding" cannot change an international legal obligation under the Convention. Under international law, where there is conflict between international obligation and domestic law, international law will govern. *See* P. Sands, *Lawless World: America and the Making and Breaking of Global Rules - From FDR's Atlantic Charter to George W. Bush's Illegal War*, p. 213, Penguin Books (2006). While Yoo in his Commentary in UC Berkeley Point of View dated January 5, 2005, claimed that the Senate in ratification narrowed the definition of torture in the convention in these "understandings" and the criminal statutes, this is not true. Section 2 of Article 1 of the CAT does not prohibit national legislation which would give wider protection. It is clear that the Convention would not tolerate national legislation which would give less protection. *See* Jordan J. Paust, Beyond the Law: The Bush Administration's Unlawful Responses in the "War" on Terror 33-34, 189-91 nn.59, 63.

opposed to the CAT, which is not site specific as to the place the torture occurs), the opinions sought from Yoo and the others in 2002 address actions taken by U.S. officials outside the United States, in the various "black sites" as well as bases in Afghanistan and Guantánamo. At that time, the administration argued that Guantánamo was outside of the United States and beyond the reach of any U.S. court.[14]

III. THE UNITED STATES PROHIBITS TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT

The U.S. Court of Appeals for the Second Circuit declared more than 25 years ago that the prohibition against torture is universal, obligatory, specific, and definable.[15] Since then, every U.S. circuit court has held that torture violates universal and well-established customary international law, with the Eleventh Circuit finding that official torture is now prohibited by the law of nations, including U.S. law.[16]

Moreover, "understandings" that violate the object and purpose of a treaty are void, according to the Article 19(2) of the Vienna Convention on the Law of Treaties. The claim that treatment of prisoners that would amount to torture under CAT does not constitute torture under the U.S. "understanding" violates the object and purpose of CAT, which is to ensure that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

[14] Actions taken by military personnel or any other person, who commit or have committed torture, would be covered by the War Crimes Act, 18 U.S.C. §2441 et seq. which states: "Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death. Subsection (b) provides that the circumstances are that "the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States." In 18 U.S.C. §2441(b) "war crime" is defined as follows:

As used in this section the term 'war crime' means any conduct-

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict ....

[15] *Filartiga v. Peña-Irala*, 630 F. 2d 876 (2nd Cir. 1980).

[16] *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996). *See also* e.g. *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) (noting that torture is prohibited by "universally accepted norms of international law") (quoting

In 2004, Congress declared that "the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody of the United States" here or abroad. Congress also affirmed the requirement that "no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States." Congress reiterated "the policy of the United States to . . . investigate and prosecute, as appropriate, all alleged instances of unlawful treatment of detainees in a manner consistent with the international obligations, laws, or policies of the United States."[17]

IV. BUSH'S ORDER AND THE TORTURE MEMOS

"A common plan to violate customary and treaty-based international law concerning the treatment and interrogation of so-called terrorist and enemy combatant detainees and their supporters captured during the U.S. war in Afghanistan emerged within the Bush administration in 2002."[18]

On February 7, 2002, President Bush announced that Geneva's Common Article 3 did not apply to alleged Taliban and Al Qaeda members. Bush said, however, "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, *to the extent appropriate and consistent with military necessity,* in a manner consistent with the principles of Geneva." But the Torture Convention and *jus cogens* absolutely prohibit torture in *all* circumstances.

Filartiga); Hilao v. Marcos: In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994) (declaring that torture is a specific, universal, and obligatory norm of international law); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) ("[I]t would be unthinkable to conclude other than that acts of official torture violate customary international law. And while not all customary international law carries with it the force of a *jus cogens* norm, the prohibition against official torture has attained that status."); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (holding that torture is a well-recognized violation of customary international law and U.S. law), overruled on other grounds by *Aldana v. Del Monte Fresh Produce*, N.A., Inc., 416 F.3d 1242 (11th Cir. 2005); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998) (declaring that international and U.S. law prohibit torture); *Doe v. Unocal*, 963 F. Supp. 880, 890 (C.D. Cal. 1997) (recognizing that international and U.S. law prohibit torture); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass.1995) (declaring that torture is a well-recognized violation of customary international and U.S. law); *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994) (imposing civil liability for acts of torture).

[17] Sense of Congress and Policy Concerning Persons Detained by the United States, Pub. L. No. 108-375, 118 Stat. 1811, § 1091 (a)(1)(6), (a)(8), (b)(2) (Oct. 28, 2004).

[18] Paust, *supra* note 13, at 1.

In the summer of 2002, the Pentagon sought advice on whether the army was bound by the Field Manual in interrogating prisoners at Guantánamo. An advisory memo written by Colonel Diane Beaver, a U.S. Army lawyer, tried to find a way around the Field Manual constraints on interrogation.[19] Before issuing her opinion, Colonel Beaver was visited by lawyers from Washington D.C. including David Addington, Jim Haynes, and others who made it clear that those at the top of the administration sought an outcome which would permit deviation from the strictures of the field manual.[20]

Her advisory opinion concluded that international obligations are irrelevant and that because the detainees were not prisoners of war the Geneva Conventions did not apply. Before Colonel Beaver issued her opinion, the Justice Department was providing advice on whether interrogation techniques which were assumed to be legal under U.S. law could nonetheless expose the U.S. to prosecution at the ICC[21] or violate the CAT.[22]

There are many lawyers in the Office of Legal Counsel, the Justice Department and elsewhere cognizant of the legal – indeed, constitutional – obligations the U.S. has under ratified treaties. The administration, however, turned to political appointees, including then Deputy Assistant Attorney General John Yoo and then Assistant Attorney General Jay Bybee for these opinions.

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[19] Colonel Beaver was relying on Bush's executive order of February 7, 2002, which stated that the detainees at Guantánamo were not prisoners of war and therefore allegedly not covered under the Geneva Conventions.

[20] The importance of this meeting, which occurred in Guantanamo, is to contradict the administration's original story that requests for permission to use torture, euphemistically referred to as enhanced interrogation techniques, came from the bottom up. The new book by Philippe Sands, entitled Torture Team, shows the decision to seek to use these methods came from the very top and that significant pressure was placed on Beaver to write an opinion that provided justification for what Addington and others wanted to do.

[21] Although the United States has not ratified the Rome Statute, violations of the statute in countries which have ratified it could subject persons within the territory to prosecution.

[22] It is now known from the chronology provided by Philippe Sands in his recent *Vanity Fair* article entitled "Green Light" that the lawyers for the president, vice president and secretary of defense, to wit: Addington, Haynes, Gonzales, Yoo and Bybee, met in Guantánamo to discuss the use of various interrogation techniques which were being proposed to be used on various detainees. It is also now known from recent news reports that there were meetings at the White House in which the specific interrogation/torture techniques to be applied to various detainees were discussed and approved.

ABC News reported last month that Dick Cheney, Condoleezza Rice, Donald Rumsfeld, Colin Powell, George Tenet, and John Ashcroft met in the White House and micromanaged the torture of terrorism suspects by approving specific torture techniques such as waterboarding. When asked, Bush admitted, "yes, I'm aware our national security team met on this issue. And I approved."

On January 9, 2002, Yoo submitted a memorandum opinion titled "Application of Treaties and Laws to al Qaeda and Taliban Detainees." Co-authored with Special Counsel Robert J. Delahunty, the memo purported to address "the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan."

This memo argued that the president was not bound by international laws in the war on terror. It stated that "any customary international law of armed conflict in no way binds, as a legal matter, the president or the U.S. Armed Forces concerning the detention or trial of members of al-Qaeda and the Taliban." The memo found it proper to deny the protections of international laws to detainees and to exempt from liability those who denied such protections.

Yoo also authored a memorandum opinion dated August 1, 2002, titled "Standards of Conduct for Interrogation under 18 U.S.C. ss. 2340-2340A." This opinion was addressed to Alberto Gonzales from Jay Bybee, but was in fact drafted by Yoo.

In the August 1, 2002 memo, Yoo/Bybee changed the definition of torture contained in U.S. law and the CAT, limiting it to those acts inflicting pain of equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. This definition is much narrower than our laws provide in the CAT and the Torture Statute.

Recently, a March 14, 2003 Yoo memorandum opinion has surfaced titled "Military Interrogation of Alien Unlawful Combatants Held Outside the United States." This 81-page memo again reiterates that the president is not bound by federal laws. "Such criminal statutes, if they were misconstrued to apply to the interrogation of enemy combatants, would conflict with the Constitution's grant of the Commander in Chief power solely to the president." Yoo states that the president is not bound by laws that prohibit torture, assault, maiming, stalking, and war crimes. The opinion applies the restrictions imposed by treaties against torture to circumstances leading to death.

The memo does not recognize the prohibition of torture as a *jus cogens* norm, but wrongly declares that customary international law is not federal law and that the president is free to override it at his discretion. Yet more than a century ago, in *Paquete Habana*, the Supreme Court held that customary international law is part of the laws of the United States that must be ascertained and applied by the judiciary.[23] In 1984, Justice O'Connor wrote that power

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[23] 175 U.S. 677 (1900).

"delegated by Congress to the Executive Branch" and a relevant congressional-Executive "arrangement" must not be "exercised in a manner inconsistent with . . . international law."[24]

And finally, the memo suggests several defenses (military necessity and self defense) for those brought up on criminal charges for violating laws during interrogations, notwithstanding the *jus cogens* norm, the Geneva Conventions' clear command that military necessity does not justify treatment Geneva prohibits, and CAT's absolute prohibition on torture.

V. THE AUGUST 2002 TORTURE MEMO IS WITHDRAWN

Many scholars have opined on the legal deficiencies of Yoo's and others' "torture memos."[25] Referring to the discussion of *jus cogens* above, there is no legal basis for the claim that the president is not bound by the law against torture. No one, not a lawyer or Congress, has the authority to re-write the definition of torture contained in the CAT to allow for interrogation techniques which clearly would amount to torture under the CAT's definition. The "war on terror" does not give the executive branch the ability to disregard the Geneva Conventions and commit war crimes.[26]

After the exposure of the atrocities at Abu Ghraib, and the existence of the August 1, 2002 memo was revealed, the Department of Justice knew that the Yoo memos could not be legally defended. The August 2002 memorandum opinion was withdrawn as of June 1, 2004. A new opinion was written. This memo, authored by Daniel Levin, Acting Assistant Attorney General Office of Legal Counsel, is dated December 30, 2004. It specifically rejects Yoo's definition of torture, stating: "Under the language adopted by Congress in sections 2340-2340A, to constitute 'torture,' the conduct in question must have been 'specifically intended to inflict severe physical or mental pain or suffering.'" The memo separately considers the components of this key phrase: (1) the meaning of "severe;"[27] (2) the meaning of "severe physical pain or suffering;" (3) the meaning of "severe mental pain or suffering;" and (4) the meaning of "specifically intended."

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[24] *TransWorldAirlines v. Franklin Mint Corp.*, 466 U.S. 243, 261 (1984)(O'Connor, J.). Every relevant federal case has recognized that the President is bound by the laws of war. *See, e.g.*, Paust, *supra* note 13, at 20-22, and cases cited.

[25] *See e.g.* Sands, Lawless World, supra, n. 13; M. Cohn, Cowboy Republic: Six Ways the Bush Gang Has Defied the Law, PoliPointPress (2007); Paust, *supra* note 13, at 9-11, 19-20, 29-30, 146, 148-49. In addition, both Steven Gillers of NYU Law School and Scott Horton, adjunct professor at Columbia University Law School, have provided various commentaries.

[26] Indeed, the UN Convention on Suppression of Terrorist Bombings of 1997 treats "terrorists" as criminals, whose punishments are subject to criminal law of the country at issue.

[27] It cites cases where treatment was considered severe enough to qualify as torture: *Hilao v. Estate of Marcos*, 103 F.3d 789, 790-91, 795 (9th Cir. 1996); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1332-40, 1345-46 (N.D. Ga.

With respect to "specific intent" to torture, the Levin memo does concur with LaFave, *Substantive Criminal Law*, § 5.2(a), at 341 (footnote omitted) who states: "With crimes which require that the defendant intentionally cause a specific result, what is meant by an "intention" to cause that result? Although the theorists have not always been in agreement . . . , the traditional view is that a person who acts . . . intends a result of his act . . . under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.

VI. HAMDAN V. RUMSFELD

On June 29, 2006 the U.S. Supreme Court ruled in *Hamdan v. Rumsfeld*,[28] that Guantánamo detainees were entitled to the protections provided under Geneva's Common Article 3. The Court invoked the legal precedents that had been sidestepped by Yoo and others. Justice Anthony Kennedy, joining the majority, pointedly observed that "violations of Common Article 3 are considered 'war crimes.'"

Four months after *Hamdan*, President Bush signed into law the Military Commissions Act[29] which was passed to address the restrictions imposed on the administration by *Hamdan*, and also attempted to create a new legal defense against lawsuits for misconduct arising from the "detention and interrogation of aliens" between September 11, 2001 and December 30, 2005.[30]

2002); *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22-23 (D.D.C. 2001); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 64-66 (D.D.C. 1998).

[28] 548 U.S. 557,126 S. Ct. 2749 (2006).

[29] Pub. L. No. 109-326, 120 Stat. 2600 (10/17/06)

[30] While we would argue that attempts to immunize those complicit in torture from civil or criminal liability is not permitted in the context of the violation of a *jus cogens* norm, the language in the Military Commissions Act creating this legal defense is not a blanket grant of immunity, as pointed out by Houston Law Center Professor Jordan Paust. §8(b) provides that: "[e]xcept as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note)" the reach of 42 U.S.C. § 2000dd-1 with respect to a defense in civil actions and criminal prosecutions is revised where, under § 2000dd-1, the "officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person ... did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful." It does not "provide immunity from prosecution for any criminal offense by the proper authorities." The "would not know" appears to be related to the international legal "should not have known" test, which rests on a negligence standard. *See, e.g.*, J. Paust, et al., International Criminal Law: Cases and Materials, 3rd Ed. at 51-78, 100-114, Carolina Academic Press (2007).

VII. CAN ANY OF THOSE WHO WERE INVOLVED IN ANY WAY IN DECIDING TO TORTURE AVOID PROSECUTION?

Professor Philippe Sands, an eminent international lawyer, in his book, *Lawless World*, stated: "What do you do as an international lawyer when your client asks you to advise on the international rules prohibiting torture? Do you start with the rules and ask how an international court – or your allies – might address the issue and reach a balanced conclusion? Or do you focus on the narrower issues of the relevance, applicability, and enforceability of the international rules in the national context, and reach a conclusion that you know – if you ask yourself the question – no international court would accept? Let me put it another way. Do you advise, or do you provide legal cover?"[31]

The National Lawyers Guild agrees with Sands's conclusion that giving political cover makes a lawyer complicit in the decision to torture.[32] It is the Guild's view that there can be no two opinions on whether those who are involved in the decision to torture must be held accountable, both under the War Crimes Act and the Torture Statute. 18 U.S.C. §2340A specifically applies to those who conspire to commit torture. Yoo and other lawyers who were involved in providing the opinions used to justify the use of torture are just as complicit as those who authorized and carried out the torture itself and must be held equally accountable.

The Yoo/Bybee memos were either prospective, for the purpose of advising the executive of the limits (or lack thereof) of its authority, or retrospective, for the purpose of addressing already approved of actions. Although they purport to be the former, it now appears they were written after the program of what the Bush administration euphemistically refers to as "enhanced interrogation techniques" began. Regardless, there are only two conclusions one can draw from the memos. The first is that their purpose was not to give the client (assuming for the sake of argument that the Justice Department's client is the president and not the people) a full understanding of the legal issues, but to give legal cover to an already decided upon, potentially criminal, policy. The second is that the drafters did their best to present all possible conclusions and consequences, in which case the advice given fell so far below the requisite standard of care as to constitute legal malpractice. No one, and certainly not the NLG, has accused Yoo of being that incompetent.

Yoo, Bybee and others counseled that there were no laws which protected from torture the detainees held at black sites, in prisons in Afghanistan or the Guantánamo concentration camp.

Furthermore, there can be no immunity, including Head of State immunity, for violation of a *jus cogens* norm. There is no statute of limitations for a *jus cogens* crime and there is universal jurisdiction over those accused of violating *jus cogens* norms.

[31] Sands, *supra*, n. 13, p. 205.

[32] *Id.*, p. 208.

They defined torture as only those actions which caused sufficient pain as to cause organ failure and/or death. These memos "green lighted" torture and many detainees were subjected to these techniques including, it has been estimated, more than 100 who died at the hands of their captors. They knew, or should have known, that a direct result of their counsel would be the use of interrogation techniques against certain allegedly recalcitrant detainees which would amount to torture. Or they knew it was already going on and they were doing their best to justify it. Regardless, they are part of the conspiracy to commit torture. The "torture memos" written by the DOJ lawyers, and "presidential and other authorizations, directives, and findings substantially facilitated the effectuation of a common, unifying plan to use coercive interrogation and that use of authorized coercive interrogation tactics were either known or substantially foreseeable consequences."[33] John Yoo admitted that the coercive interrogation "policies were part of a common, unifying approach to the war on terrorism."[34]

Some have criticized the National Lawyers Guild for targeting lawyers who were "merely fulfilling their duty by giving advice." It should be emphasized that the Guild is not only targeting the lawyers. It has called for the impeachment of the president and vice president and has continually called for prosecution of all those (not just the few lower-ranking enlisted people who deserved punishment but who have been scapegoats for administration policy) responsible for these crimes. However, the lawyers cannot be permitted to hide under the cover of fulfilling their professional responsibilities.

Nor does the attorney-client privilege extend to keeping silent about planned criminal action. Even conceding Yoo and his co-conspirators actually believed their position was correct, no competent lawyer could have believed it unassailable. Giving real advice necessarily meant advising of the risks as well as the arguments favoring torture.[35] And, it should be noted, their incredibly narrow definition of torture completely ignored the prohibition against other cruel, inhuman or degrading treatment or punishment, which would be obvious to anyone who chose to read even the full name of the CAT. It is impossible to believe this was the result of incompetence, leaving only the conclusion that they were willing participants in a conspiracy to violate a *jus cogens* norm. Professor Yoo and Judge Bybee, as well as the other lawyers who provided cover for illegal torture, are not protected by their right to free speech or academic freedom. They were not expressing their unsupportable legal opinions in scholarly journals or in classrooms. They were asked to justify what the administration wanted to do and they willingly did it, knowing the inevitable results.

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[33] J. Paust, International Crimes Within the White House, 10 N.Y. City L. Rev. 339, 345 (2007).

[34] *Id.* at 344.

[35] The very phrase "arguments favoring torture" indicates how completely unjustifiable the Yoo/Bybee memos were.

The prosecution of Josef Altstoetter and fifteen other lawyers who were tried in Germany before a U.S. military tribunal – many of whom were convicted of committing international crimes through the performance of their legal functions established the principle that lawyers and judges in Nazi Germany bore a particular responsibility for the regime's crimes. But it is not just that case that should expose Yoo and his cohorts to liability for his advice. Their memos were not written for the purpose of advocacy. If they were defending the president in an impeachment case, or before the International Criminal Court, they would be free to argue, however vainly, their novel positions. But they cannot divorce themselves from the consequences of their advice and cannot be permitted immunity or impunity. The loss of their professional status would be a small price to pay for the commission of war crimes.

Why John Yoo and Other Top Administration Lawyers Should be Investigated for War Crimes

Under U.S. Law Torture is Always Illegal

By MARJORIE COHN

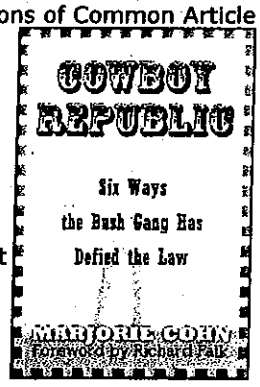
What does torture have in common with genocide, slavery, and wars of aggression? They are all *jus cogens. Jus cogens* is Latin for "higher law" or "compelling law." This means that no country can ever pass a law that allows torture. There can be no immunity from criminal liability for violation of a jus cogens prohibition.

The United States has always prohibited the use of torture in our Constitution, laws executive statements and judicial decisions. We have ratified three treaties that all outlaw torture and cruel, inhuman or degrading treatment or punishment. When the United States ratifies a treaty, it becomes part of the Supreme Law of the Land under the Supremacy Clause of the Constitution.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, says, "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 for torture."

Whether someone is a POW or not, he must always be treated humanely; there are no gaps in the Geneva Conventions. He must be protected against torture, mutilation, cruel treatment, and outrages upon personal dignity, particularly humiliating and degrading treatment under, Common Article 3.

In *Hamdan v. Rumsfeld,* the Supreme Court rejected the Bush administration's argument that Common Article 3 doesn't cover the prisoners at Guantánamo. Justice Kennedy wrote that violations of Common Article 3 are war crimes.



We have federal laws that criminalize torture.

The War Crimes Act punishes any grave breach of the Geneva Conventions, as well as any violation of Common Article 3. That includes torture, willfully causing great suffering or serious injury to body or health, and inhuman, humiliating or degrading treatment.

The Torture Statute provides for life in prison, or even the death penalty if the victim dies, for anyone who commits, attempts, or conspires to commit torture outside the United States.

The U.S. Army Field Manual's provisions governing intelligence interrogations prohibit the "use of force,

mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind." Brainwashing, mental torture, or any other form of mental coercion, including the use of drugs, are also prohibited. Military personnel who mistreat prisoners can be prosecuted by court-martial under provisions of the Uniform Code of Military Justice. These include conspiracy, cruelty and maltreatment, murder, manslaughter, maiming, sodomy, and assault.

In *Filartiga v. Peña-Irala*, the Second Circuit declared the prohibition against torture is universal, obligatory, specific and definable. Since then, every U.S. circuit court has reaffirmed that torture violates universal and customary international law. In the *Paquete Habana*, the Supreme Court held that customary international law is part of U.S. law.

The Constitution gives Congress the power to make the laws and the President the duty to carry them out. Yet on February 7, 2002, President Bush, relying on memos by lawyers including John Yoo, announced that the Geneva Conventions did not apply to alleged Taliban and Al Qaeda members. Bush said, however,

> "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."

But torture is never allowed under our laws.

Lawyers in the Department of Justice's Office of Legal Counsel wrote memos at the request of high-ranking government officials in order to insulate them from future prosecution for subjecting detainees to torture. In memos dated August 1, 2002 and March 18, 2003, former Deputy Assistant Attorney General John Yoo (Jay Bybee, now a federal judge, signed the 2002 memo), advised the Bush administration that the Department of Justice would not enforce the U.S. criminal laws against torture, assault, maiming and stalking, in the detention and interrogation of enemy combatants.

The federal maiming statute makes it a crime for someone "with the intent to torture, maim, or disfigure" to "cut, bite, or slit the nose, ear or lip, or cut out or disable the tongue, or put out or destroy an eye, or cut off or disable a limb or any member of another person." It further prohibits individuals from "throwing or pouring upon another person any scalding water, corrosive acid, or caustic substance" with like intent.

Yoo said in an interview in Esquire that "just because the statute says -- that doesn't mean you have to do it." In a debate with Notre Dame Professor Doug Cassell, Yoo said there is no treaty that prohibits the President from torturing someone by crushing the testicles of the person's child. In Yoo's view, it depends on the President's motive, notwithstanding the absolute prohibition against torture in all circumstances.

The Torture Convention defines torture as the intentional infliction of severe physical or mental pain or suffering. The U.S. attached an "understanding" to its ratification of the Torture Convention, which added the requirement that the torturer "specifically" intend to

requirement that the torturer "specifically" intend to inflict the severe physical or mental pain or suffering. This is a distinction without a difference for three reasons.

First, under well-established principles of criminal law, a person specifically intends to cause a result when he either consciously desires that result or when he knows the result is practically certain to follow.

Second, unlike a "reservation" to a treaty provision, an "understanding" cannot change an international legal obligation.

Third, under the Vienna Convention on the Law of Treaties, an "understanding" that violates the object and purpose of a treaty is void. The claim that treatment of prisoners which would amount to torture under the Torture Convention does not constitute torture under the U.S. "understanding" violates the object and purpose of the Convention, which is to ensure that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The U.S. "understanding" that adds the specific intent requirement is embodied in the U.S. Torture Statute.

Nevertheless, Yoo twisted the law and redefined torture much more narrowly than the definitions in the Convention Against Torture and the Torture Statute. Under Yoo's definition, the victim must experience intense pain or suffering equivalent to pain associated with serious physical injury so severe that death, organ failure or permanent damage resulting in loss of significant body functions will likely result.

Yoo wrote that self-defense or necessity could be used as a defense to war crimes prosecutions for torture, notwithstanding the Torture Convention's absolute prohibition against torture in all circumstances. There can be no justification for torture.

After the exposure of the atrocities at Abu Ghraib and the publication of the August 1, 2002 memo, the Department of Justice knew the memo could not be legally defended. That memo was withdrawn as of June 1, 2004. A new opinion, authored by Daniel Levin, Acting Assistant Attorney General Office of Legal Counsel, is dated December 30, 2004. It specifically rejects Yoo's definition of torture, and admits that a defendant's motives to protect national security will not shield him from a torture prosecution. The rescission of the August 2002 memo constitutes an admission by the Justice Department that the legal reasoning in that memo was wrong. But for 22 months, it was in effect, which sanctioned and led to the torture of prisoners in U.S. custody.

John Yoo admitted the coercive interrogation "policies were part of a common, unifying approach to the war on terrorism." Yoo and other Department of Justice lawyers, including Jay Bybee, David Addington, William Haynes and Alberto Gonzalez, were part of a common plan to violate U.S. and international laws outlawing torture. It was reasonably foreseeable that the advice they gave would result in great physical or mental harm or death to many detainees. Indeed, more than 100 have died, many from torture.

ABC News reported last month that the National Security Council Principals Committee consisting of Dick

Security Council Principals Committee consisting of Dick Cheney, Condoleezza Rice, Donald Rumsfeld, Colin Powell, George Tenet, and John Ashcroft met in the White House and micromanaged the torture of terrorism suspects by approving specific torture techniques such as waterboarding. Bush admitted, "Yes, I'm aware our national security team met on this issue. And I approved."

These top U.S. officials are liable for war crimes under the U.S. War Crimes Act and torture under the Torture Statute. They ordered the torture that was carried out by the interrogators. Under the doctrine of command responsibility, used at Nuremberg and enshrined in the Army Field Manual, commanders, all the way up the chain of command to the commander in chief, can be liable for war crimes if they knew or should have known their subordinates would commit them, and they did nothing to stop or prevent it. The Bush officials ordered the torture after seeking legal cover from their lawyers.

But Yoo and the other Justice Department lawyers who wrote the enabling memos are also liable for the same offenses. They were an integral part of a criminal conspiracy to violate our criminal laws. Yoo admitted in an *Esquire* interview last month that he knew interrogators would take action based on what he advised.

The President can no more order the commission of torture than he can order the commission of genocide, or establish a system of slavery, or wage a war of aggression.

A Select Committee of Congress should launch an immediate and thorough investigation of the circumstances under which torture was authorized and rationalized. The high officials of our government and their lawyers who advised them should be investigated and prosecuted by a Special Prosecutor, independent of the Justice Department, for their crimes.

John Yoo, Jay Byee, and David Addington should be subjected to particular scrutiny because of the seriousness of their roles in misusing the rule of law and legal analysis to justify torture and other crimes in flagrant violation of domestic and international law.

This essay is adapted from Marjorie Cohn's testimony before the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the House Judiciary Committee.

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