

**THE INTERNATIONAL CRIMINAL LIABILITY OF
UNITED STATES GOVERNMENT LAWYERS
AUTHORIZING TORTURE**

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INTRODUCTION

In a matter of weeks, the International Criminal Court (ICC) is expected to open a full-fledged investigation into the “war crimes of torture and related ill-treatment, by United States military forces deployed to Afghanistan and in secret detention facilities operated by the Central Intelligence Agency.”¹ Pursuant to the principle of complementarity, the ICC cannot take the case if the United States has conducted its own investigation and decided against prosecution “unless the decision resulted from the unwillingness or inability of the State

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1. The Office of the Prosecutor for The International Criminal Court, *Report on Preliminary Examination Activities*, ¶¶ 219–22 (Nov. 14, 2016) [hereinafter ICC Report], https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf; Somini Sengupta & Marlise Simons, *U.S. Forces May Have Committed War Crimes in Afghanistan, Prosecutor Says*, N.Y. TIMES (Nov. 14, 2016), http://mobile.nytimes.com/2016/11/15/world/asia/united-states-torture-afghanistan-international-criminal-court.html?ref=world&_r=0&referer=https://t.co/HbDfP6edJf.

genuinely to prosecute.”² A recent report from the Court’s Office of the Prosecutor made clear that Prosecutor Fatou Bensouda is unimpressed with the genuineness and vigor of the United States’ investigatory and prosecutorial efforts to date.³

As Prosecutor Bensouda noted, there have been a few American investigations and even trials by United States military courts, but the proceedings have been limited in scope, lacked transparency and failed to result in any non-military prosecutions.⁴ The most comprehensive effort was a two-year review (August 2009 to June 2011) by the Department of Justice (DOJ) of alleged detainee abuses by the Central Intelligence Agency (CIA). In his official statement about those proceedings, then Attorney General Eric Holder stated outright that the DOJ “would not prosecute anyone who acted in good faith and *within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees.*”⁵ Prosecutor Bensouda made a point of quoting this statement in her recent report.

Prosecutor Bensouda likely seized upon this language because there has been no meaningful criminal investigation into the propriety or lawfulness of the Office of Legal Counsel’s legal guidance. The DOJ’s Office of Professional Responsibility did conduct a rather toothless review of the Office of Legal Counsel; however, the review was not a criminal investigation and resulted in the conclusion that—although the lawyers were found to have committed “intentional professional misconduct”—they should not be prosecuted.⁶ The lack of

2. Rome Statute of the International Criminal Court, art. 17(1)(b), July 17, 1998, U.N. Doc. A/CONF. 183/9 [hereinafter Rome Statute]. “In order to determine unwillingness in a particular case, the Court shall consider . . . whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.” *Id.* at art. 17(2).

3. See ICC Report, *supra* note 1, ¶¶ 220–22; Sengupta, *supra* note 1.

4. See ICC Report, *supra* note 1, ¶¶ 220.

5. U.S. Department of Justice, Office of Public Affairs, *Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees*, Aug. 30, 2012, <https://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees> (emphasis added). The Attorney General only conducted full criminal investigations for two detainees who had died in CIA custody. Neither investigation resulted in any indictments or prosecutions. *Id.*

6. U.S. DEPARTMENT OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING

criminal scrutiny of the analysis and opinion provided by the Office of Legal Counsel is troubling, particularly given that the advice was the standard by which the Attorney General assessed the conduct of all other governmental actors.

Meanwhile, members of the Trump Administration, including newly-confirmed Attorney General Jeff Sessions, have indicated that they deem torture a viable option in the treatment of detained terrorist suspects.⁷ Indeed, the provision of legal cover for torture by government attorneys may be a recurrent problem in years to come.

This article examines the potential criminal liability under international law of the government attorneys (“OLC Lawyers”⁸) who authorized the use of “enhanced interrogation” techniques, presumably amounting to torture⁹ in the “war on terror.”¹⁰ For, as one scholar has

ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS (July 29, 2009), <http://nsarchive.gwu.edu/news/20100312/OPRFinalReport090729.pdf> [<https://perma.cc/FC43-UN52>]. In fact, the Office of Professional Responsibility’s original finding of misconduct was overruled by the Associate Deputy Attorney, preventing further action. See Memorandum from U.S. Deputy Attorney Gen. David Margolis to the U.S. Attorney Gen. Eric Holder, *Decision Re: the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists* (January 5, 2010), <http://graphics8.nytimes.com/packages/pdf/politics/20100220JUSTICE/20100220JUSTICE-DAGMargolisMemo.pdf> [<https://perma.cc/J94J-HWFJ>].

7. See Heather Digby Parton, *President Trump, Torture Fan: New Documents on CIA’s Secret Program Hint at a Dark Future*, SALON (Jan. 20, 2017), <http://www.salon.com/2017/01/20/president-trump-torture-fan-new-documents-on-cias-secret-program-hint-at-a-dark-future/> [<https://perma.cc/MX72-WMD6>]; *The Next Attorney-general Opposes Immigration and Has Defended Torture*, ECONOMIST (Nov. 26, 2016), <http://www.economist.com/news/untied-states/21710814-campaigns-have-consequences-next-attorney-general-opposes-immigration-and-has-defended> [<https://perma.cc/9GF5-A2K4>]; Chip Gibbons, *What Does Jeff Sessions Mean for Civil Liberties?*, BILL OF RIGHTS DEFENSE COMMITTEE AND DEFENDING DISSENT FOUNDATION (Nov. 29, 2016), <http://bordc.org/news/what-does-jeff-sessions-mean-for-civil-liberties/> [<https://perma.cc/HLB8-2ZPK>]; ALFRED W. MCCOY, *TORTURE AND IMPUNITY: THE U.S. DOCTRINE OF COERCIVE INTERROGATION* 240 (Madison: The University of Wisconsin Press, 2012); *But see* Steven T. Dennis & Chris Strohm, *Sessions Seeks to Reassure Senators on Race, Torture, Clinton*, BLOOMBERG (Jan. 10, 2017), <https://www.bloomberg.com/politics/articles/2017-01-10/sessions-cites-crime-rebutts-racism-in-u-s-attorney-general-bid> [<https://perma.cc/8YBM-BHX2>].

8. Notwithstanding this collective term, the Bush Administration lawyers involved with the memos did not all work in the Office of Legal Counsel; they also worked as White House Counsel and at various government departments and agencies.

9. Used herein, the term “torture” includes other forms of cruel, inhuman or degrading treatment, about which the OLC Lawyers were also obligated to raise legal concerns. See U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 16, Dec. 10, 1984, S. Treaty Doc. No. 100-

observed, “[n]ot since the Nazi era have so many lawyers been so clearly involved in international crimes concerning the treatment and interrogation of persons detained during war.”¹¹ This analysis may be used to correct the widespread assumption that government attorneys are somehow immunized from criminal liability and refute opponents of prosecution who argue that holding lawyers criminally liable for giving opinions on violations of international law has no precedent.

II. THE TORTURE MEMOS

In the wake of the events of September 11, 2001, and over the next several years, the OLC Lawyers authored or signed memoranda that purported to expand executive authority, and to redefine the concepts of torture, cruel, inhuman and degrading treatment, the scope of the Geneva Conventions and other long-standing doctrines of international human rights and humanitarian law (“Torture Memos”). For example, a memo written by John Yoo and signed by Jay Bybee analyzed the legality of particular interrogation techniques under the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment, as well as various other laws. Relying on inapposite legal authorities, the authors concluded that to constitute torture, a technique must cause physical pain of an “intensity akin to that which accompanies serious physical injury such as death or organ failure” or long lasting psychological harm “such as seen in mental disorders like post-traumatic stress disorder.”¹²

Many legal scholars have criticized the memos’ legal reasoning and conclusions as antithetical to well-established interpretations of

20 (1988) [hereinafter CAT]. This Article does not scrutinize whether the use of the “enhanced interrogation” techniques at issue constitute torture, but rather assumes that they do for purposes of assessing the consequent liability of the OLC Lawyers.

10. This Article is not an exhaustive analysis of the OLC Lawyer’s liability; rather, this Article provides an overview of potential avenues of international criminal liability.

11. Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT’L L. 811, 811 (2005).

12. Memorandum from Office of the Assistant Attorney Gen. to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf> [<https://perma.cc/PX4D-9GV8>]. See also Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT’L L.J. 193, 214 (2010) (pointing out that in this memo “the definition of severe pain was inferred from a statute that used the terms in the context of a regulation establishing eligibility for health benefits. As a heuristic device, the argument is flawed because the health benefits statute did not even define ‘severe pain’—the phrase was used in a definition of the phrase ‘emergency medical condition.’”).

domestic and international laws related to torture.¹³ They point out that the memos erred in *inter alia* ignoring on-point legal authority finding certain techniques (including waterboarding) to be torture, as well as other contrary authorities.¹⁴ Moreover, they argue that the circumstances surrounding the drafting of the memos indicate a predetermined policy that was essentially “reverse engineered” and given legal cover by the OLC lawyers.¹⁵ There is substantial evidence that United States officials and interrogators relied on the memos when designing interrogation schemes for certain alleged high-value suspects.¹⁶

The government lawyers involved in the drafting and approval of the Torture Memos include John Yoo, formerly of the Office of Legal Counsel; Alberto Gonzales, former White House Counsel and Attorney General; Douglas Feith, former Undersecretary of Defense for Policy; William Haynes II, former General Counsel for the Department of Defense; Judge Jay Bybee, formerly of the Office of Legal Counsel; Steven Bradbury, formerly of the Office of Legal Counsel; and David Addington, former Chief of Staff for Vice President Dick Cheney.¹⁷

The Torture Memos were not released to the public until 2009, after President Obama took office. Also in 2009, President Obama issued Executive Order 13491, which—along with banning torture and cruel, inhuman or degrading treatment—declared that United States personnel “may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation . . . issued by the Department of Justice between September 11, 2001, and January 20, 2009.”¹⁸ In late 2015, the National Defense Authorization Act for Fiscal Year 2016 became law, codifying several key provisions of

13. See, e.g., PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES* 75–77 (2008).

14. See, e.g., Ohlin, *supra* note 12, at 255 (“The torture lawyers should have informed their superiors that torture violated both federal and international law and that there was substantial precedent that waterboarding was torture. They should never have argued that severe pain and suffering was limited to situations capable of producing organ failure and death.”).

15. See, e.g., Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U.L. REV. 1535, 1562–67 (2009).

16. See SANDS, *supra* note 13, at 75–78.

17. This list is non-exhaustive. Many, if not all, of the OLC Lawyers served not only as attorneys, but also in non-legal capacities (as policy-makers, supervisors, etc.) through which they may also have liability for the torture that took place.

18. Exec. Order No. 13491, 3 C.F.R. § 13491 (Jan. 22, 2009), <https://www.gpo.gov/fdsys/pkg/CFR-2010-title3-vol1/pdf/CFR-2010-title3-vol1-eo13491.pdf> [<https://perma.cc/5W7Q-RCUR>].

Executive Order 13491.¹⁹ President Trump has vowed to revoke many of President Obama's executive orders and his Administration could work to repeal this law.²⁰

III. APPLICABLE THEORIES OF INTERNATIONAL CRIMINAL LIABILITY

Contrary to popular belief, there is nothing about functioning in a legal capacity that immunizes lawyers from prosecution for their participation in crimes.²¹ In fact, as many scholars have emphasized, "an OLC attorney giving advice has even greater responsibility than a private attorney to do justice to all sides of a question."²² Accordingly, as the government's chief legal advisors, the OLC Lawyers had a duty "to state the best view of the law – and not solely to state the best case for the client's position."²³

Notwithstanding this heightened duty, very few international cases have held government lawyers criminally liable for their legal opinions. A panoply of legal sources, however, establish international criminal liability for both aiding and abetting and participating in a joint criminal enterprise.²⁴ These theories of liability may provide bases of accountability for the drafting and authorization of the Torture Memos by the OLC Lawyers.

19. See National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 92, 129 Stat. 726 (2015), <https://www.gpo.gov/fdsys/pkg/PLAW-114publ92/pdf/PLAW-114publ92.pdf> [<https://perma.cc/6WMS-MGJY>].

20. See Jennifer Williams, *From Torture to Drone Strikes: The Disturbing Legal Legacy Obama Is Leaving For Trump*, VOX (Jan. 10, 2017), <http://www.vox.com/policy-and-politics/2016/11/14/13577464/president-donald-trump-torture-drone-strikes-nsa-surveillance> [<https://perma.cc/TRN9-2VWT>]; Jeremy Diamond, *Donald Trump touts waterboarding, stokes immigration fears in border state*, CNN (Oct. 31, 2016), <http://www.cnn.com/2016/10/30/politics/donald-trump-hillary-clinton-immigration-criticism/index.html> [<https://perma.cc/7NRC-RQDX>].

21. Allen S. Weiner, *The Torture Memos and Accountability*, 13:6 ASIL INSIGHTS (May 15, 2009), <https://www.asil.org/insights/volume/13/issue/6/torture-memos-and-accountability> [<https://perma.cc/QS47-694Q>].

22. See, e.g., FREDERICK A. O. SCHWARZ & AZIZ Z. HUG, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 189 (2007).

23. *Id.* at 187.

24. See, e.g., Rome Statute, *supra* note 2, art. 25(c)(3); Control Council Law No. 10, art. II(2)(b), Dec. 20, 1945, *reprinted in* TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NURNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 (1949), <http://avalon.law.yale.edu/imt/imt10.asp> [<https://perma.cc/6WAE-9MR2>]; Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(1), Rep. of the Secretary-General pursuant to S.C. Res. 808, para. 2 at 38, U.N. Doc. S/25704, *adopted by* S.C. Res. 827 (1993); Statute of the International Criminal Tribunal of Rwanda, S.C. Res. 955, art. 6(1) (Nov. 8, 1994); CAT, *supra* note 9, art. 4(1).

A. Aiding and Abetting Under International Law

International criminal tribunals have held that under customary international law aiding and abetting liability requires that the accused must (1) provide practical assistance (2) that has a substantial effect on the perpetration of a crime (3) with knowledge of the perpetration of the crime.²⁵ An aider and abettor is criminally liable for all the harms that naturally result from his acts and omissions.²⁶

The assistance given by the accused may occur through an omission or failure to act.²⁷ Also, the assistance may be geographically remote from the commission of the crime and may occur before, during or after the commission of the crime.²⁸

As the *ad hoc* tribunals have found, “[t]he position under customary international law seems therefore to be best reflected in the proposition that the assistance must have a substantial effect on the commission of the crime.”²⁹ The tribunals have further noted that the assistance given need not have a causal effect on the commission of the crime.³⁰

25. *Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60-A, Appeal Judgment, ¶ 127 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007), http://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf [<https://perma.cc/K7JN-DQX3>]; *Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Chamber Opinion and Judgment, ¶ 666 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> [<https://perma.cc/T3XD-HTA4>]; *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 257 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf> [<https://perma.cc/GFJ6-RBBJ>].

26. *Tadic*, Case No. IT-94-1-T at ¶ 692. See Charter of the International Military Tribunal, Annex of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, Aug. 8, 1945, 82 U.N.T.S. 279.

27. *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Trial Chamber Judgment, ¶ 284 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf> [<https://perma.cc/3RAM-22SC>].

28. *Id.* ¶ 285; *Blagojevic*, Case No. IT-02-60-A at ¶ 127.

29. *Furundzija*, Case No. IT-95-17/1-T at ¶ 234. See *Blagojevic*, Case No. IT-02-60-A at ¶ 127; *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Chamber Judgment, ¶ 33 (Int'l Crim. Trib. for Rwanda June 7, 2001), <https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/00206690-00206697.pdf> [<https://perma.cc/78UJ-LLGU>]. *But see Tadic*, Case No. IT-94-1-T at ¶ 691 (arguably requiring a “direct and substantial” effect).

30. *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Trial Chamber Judgment, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002), <http://www.icty.org/x/cases/vasiljevic/tjug/en/vas021129.pdf> [<https://perma.cc/X3KB-SJ4X>]; *Blaskic*, Case No. IT-95-14-T at ¶ 285.

The accused only needs to have knowledge, not criminal intent, and need not know that the conduct of the principal is unlawful.³¹ However, “the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of [his/her] conduct.”³² The requisite knowledge “is examined on an objective level and factually can be implied from the circumstances.”³³

There are very few international cases in which lawyers have been found guilty of aiding and abetting international crimes. Two prominent examples are found in the jurisprudence of the United States military trials at Nuremberg.

1. APPLICABLE UNITED STATES MILITARY TRIBUNALS AT NUREMBERG CASE LAW

Two cases from the United States military tribunals at Nuremberg, *The Ministries Case* and *The Justice Case*, inform the issue of aiding and abetting liability for the OLC Lawyers. Although the Nuremberg tribunals were staffed with American prosecutors and American judges, international criminal law was applied and these cases both reflect and form part of international criminal law. In fact, the *ad hoc* international tribunals and the Rome Statute have used this precedent as an important source of guidance, and Nuremberg case law is widely considered to be customary international law.

31. See Paust, *supra* note 15, at 1544–45; *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-A, Appeals Chamber Judgment, ¶ 311 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004), http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf [<https://perma.cc/JEP2-EL8D>]; Guenael Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT’L L.J. 237, 297 n.323 (2002). There is some controversy over the applicable *mens rea* standard. See *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber Judgment, ¶ 414 (Special Court for Sierra Leone Sept. 26, 2013) (clarifying that the requisite *mens rea* standard is that “the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator”) (quoting *Brima et al.*, Case No. SCSL-2004-16-A at ¶ 242)). *But see* Rome Statute, *supra* note 2, at art. 25(3) (possibly limiting aiding and abetting liability to cases in which a defendant acts “for the purpose of facilitating the commission of such a crime”). Also, because torture is a specific intent crime, an aider and abettor may need to have knowledge of “the principal perpetrator’s specific intent.” *Blagojevic*, Case No. IT-02-60-A at ¶ 127.

32. *Blaskic*, Case No. IT-95-14-T at ¶ 286.

33. *Tadic*, Case No. IT-94-1-T at ¶ 657.

a. The Ministries Case

The case of *U.S. v. von Weizsaecker*, widely referred to as “*The Ministries Case*,” involved Nazi government officials who were found guilty of aiding and abetting international crimes by failing to object to unlawful conduct.³⁴ The two critical defendants were von Weizsacker, State Secretary in the Foreign Office, and Woermann, Undersecretary of State and head of the Political Department in the Foreign Office. Von Weizsacker and Woermann were responsible for advising the Nazi government of the legal and political implications of foreign policy decisions. In this regard, they were called upon to consult on legal issues; however, neither defendant was technically a lawyer. When asked to approve the deportation of 6,000 Jews from France to Auschwitz in 1942, these defendants replied that they had “no objections” without providing explanation or qualification.³⁵ They were both found to have known, at the time, the fate of the prisoners and that the deportations violated the Hague Convention and other international laws. As the tribunal observed, “[n]either claims that there was any legal justification for this deportation or suggests it was other than a flagrant violation of international law and of the provisions of the Hague Convention The defendant Woerman . . . knew that it was in violation of every principle of international law and in direct contradiction of the Hague Convention.”³⁶

The tribunal decided that the defendants were liable for aiding and abetting crimes against humanity, making clear that it was holding the defendants to the standard of lawyers as they were responsible for providing international legal advice.³⁷ The tribunal explained that because the defendants knew that the deportations violated international law, they had an absolute duty as the Nazi regime’s legal advisers to object to the deportations when asked to assess their legality.³⁸ The tribunal further found that the fact that the Nazi officials would have

34. United States v. von Weizsaecker et al., in 12–14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1951) [hereinafter *The Ministries Case*], https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XIV.pdf [<https://perma.cc/K57L-Y8KV>].

35. *Id.* at 496. See Ohlin, *supra* note 12, at 252–55.

36. *The Ministries Case*, *supra* note 34, at 496–97.

37. *Id.* at 959 (“If the program was in violation of international law the duty was absolute to so inform the inquiring branch of the government.”); Ohlin, *supra* note 12, at 254 (“The legal implications of the proposed action were squarely within both the *de jure* and *de facto* obligations of the Foreign Office, and both von Weizsaecker and Woermann were legally and morally obligated to properly advise the government in this regard.”).

38. *The Ministries Case*, *supra* note 34, at 496–98.

proceeded with the deportation irrespective of their objections did not matter, stating:

We have no doubt that Hitler and the Nazi police organizations had planned and desired to do what was finally done, namely to deport these unfortunate Jews from France to their death in the East. This does not negative the importance of the fact that before the act was committed inquiry was made of the department of the Reich, whose duty it was to pass and advise upon questions of international law, as to whether or not it had any objection to the proposal.³⁹

The Ministries Case stands for the proposition that aiding and abetting liability can arise from legal opinions (or perhaps even the lack thereof) for government actions that violate international law.⁴⁰ The case therefore provides support for holding the OLC Lawyers liable for aiding and abetting the commission of torture by drafting and approving the Torture Memos. In fact, the case against the OLC Lawyers is even stronger as they provided legal cover for illegal actions, while the *Ministries* defendants merely failed to object to unlawful conduct.

b. *The Justice Case*

By contrast, the defendants in *U.S. v. Altstoetter*, monikered “*The Justice Case*,” participated more directly in unlawful conduct than the OLC Lawyers did. The *Justice* defendants were lawyers, judges and officials who proactively used the law and their positions of authority to facilitate crimes against humanity through the *Nacht und Nebel* (“Night and Fog”) program. In this program,

“[o]pponents of the Nazi regime were rounded up by secret police and tried quickly before special courts, often receiving death sentences. . . . The trials were secret, with no public announcements of executions; the bodies were given to the State police for burial. Judicial officials were also involved in providing legal cover for the transfer of inmates to concentration camps.”⁴¹

39. *Id.* at 959. “While admittedly it could not compel the government or Hitler to follow its advice, both von Weizsaecker and Woermann had both the duty and the responsibility of advising truthfully and accurately.” *Id.* at 958.

40. *See id.* at 958–59; Ohlin, *supra* note 12, at 252, 255.

41. Ohlin, *supra* note 12, at 249 (citation omitted). *See U.S. v. Altstoetter, in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER*

The *Justice* defendants were more than legal advisors; they directed policy and managed the implementation and operation of *Nacht und Nebel*. For example, although he was an official in the Justice Ministry, Defendant Mettgenberg “exercised wide discretion and had extensive authority over the entire plan from the time the [*Nacht und Nebel*] prisoner was arrested in occupied territory and continuously after his transfer to Germany, his trial, and execution or imprisonment.”⁴² And Defendant Joel acted as the public prosecutor for many of the of the *Nacht und Nebel* cases and was highly responsible for their predetermined outcomes.⁴³

The tribunal held that the trials, inhumane treatment and executions of the *Nacht und Nebel* program constituted war crimes and crimes against humanity, and that the defendants were guilty of *inter alia* aiding and abetting these crimes.⁴⁴ The tribunal found that the defendants “seized control of Germany’s judicial machinery and turned it into a fearsome weapon”⁴⁵

Ultimately, *The Justice Case* provides some support for the general proposition that government lawyers can be guilty of aiding and abetting international crimes. However, this case has limited precedential value for prosecuting the OLC Lawyers, as the *Justice* defendants had a much higher level of participation than the drafting and approval of legal opinions. Nothing in this case, however, forecloses or undermines the concept that legal opinions can form the basis of aiding and abetting liability.

2. AIDING AND ABETTING LIABILITY FOR THE OLC LAWYERS

With respect to the OLC Lawyers, a compelling case can be made that they aided and abetted the commission of torture. Torture, of course, is a well-established crime under international law.⁴⁶

First, the act of authoring or approving the memos likely satisfies the element of practical assistance. Like the *Ministries* defendants who

CONTROL COUNCIL LAW NO. 10 (1951) [hereinafter *The Justice Case*], https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-III.pdf [<https://perma.cc/TQ27-S8DG>].

42. *The Justice Case*, *supra* note 41, at 1128.

43. *Id.* at 1137–38.

44. *Id.* at 1032–34.

45. *Id.* at 1040.

46. *See, e.g.*, CAT, *supra* note 9, art. 2; *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶¶ 153–57 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (recognizing that the prohibition of torture is a *jus cogens* norm).

failed to object to the deportation request, the OLC Lawyers failed to raise legal issues with the use of torture. In addition, they actively provided legal cover for such acts both before and after their commission.

Second, the Torture Memos probably had a substantial effect on the perpetration of a crime (namely, torture). The memos permitted the torture of detainees with the pretense of legality and bureaucratic due diligence, similar to the perfunctory approval of the Foreign Office in *Ministries*. In their defense, the OLC Lawyers could argue that the memos did not actually cause the torture to occur, and that officials would have proceeded with their torture protocols and practices regardless of the content or existence of the memos. However, this argument is unlikely to be successful given that there need not be a causal connection between the act of assistance and the commission of the crime under international law. Indeed, the *Ministries* tribunal rejected the argument that Nazi officials would have deported the Jews to Auschwitz even if the defendants had raised legal objections.

Third, the OLC Lawyers seem to have possessed the requisite knowledge that their actions could at least facilitate (if not encourage) the commission of torture. The lawyers held positions of authority and influence, and were in or had access to the Bush Administration inner circle that allegedly devised the torture policies. It does not seem plausible that the lawyers did not surpass the standard of “accept[ing] that such assistance would be a possible and foreseeable consequence of [their] conduct.”⁴⁷

The OLC Lawyers, however, could argue that *their belief* that administration officials would proceed with their torture policies irrespective of the memos shows that, notwithstanding their authority and influence, they did not know the memos would provide any assistance. This is a colorable argument, but likely insufficient given the low standard for knowledge.

The OLC Lawyers may also argue that they did not know that the “enhanced interrogation” techniques discussed in the memos were illegal, and try to distinguish *The Ministries Case* on the ground that the Foreign Office workers knew that the deportations violated international law. However, an aider and abettor need not know that the assisted conduct is unlawful, so any type of “good faith” defense is unlikely to succeed.⁴⁸ Moreover, the legality of the assisted conduct was the subject of the Torture Memos and, purportedly, the lawyers’

47. Prosecutor v. Blaskic, Case No. IT-95-14-T, Trial Chamber Judgment, ¶ 286 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

48. See, e.g., Paust, *supra* note 15, at 1544.

area of expertise, so they were undoubtedly aware of all prominent legal authorities criminalizing the “enhanced interrogation” techniques.

The relevant international jurisprudence indicates that the OLC Lawyers likely aided and abetted the commission of torture.⁴⁹ If they did, then their criminal liability extends to all harm stemming from their actions.

B. *Joint Criminal Enterprise Under International Law*

The OLC Lawyers may also be criminally liable under a theory of joint criminal enterprise (JCE). JCE requires: (1) the existence of a common plan, design or purpose that amounts to or involves the commission of a crime; (2) the involvement of more than one actor in the plan; and (3) the accused’s participation in the common plan.⁵⁰ The common plan need not be an express one and may even materialize extemporaneously.⁵¹ The accused must intend to carry out the plan, but this intent may be inferred from knowing participation.⁵² The requisite level of participation in a JCE is significant, but may be met if the accused has considerable authority and knowingly fails to protest criminal activity.⁵³ Furthermore, an accused can be charged with aiding

49. See Jordan J. Paust, *Prosecuting the President and His Entourage*, 14 ILSA J. INT’L & COMP. L. 539, 542 (2008) (concluding that the OLC Lawyers meet the standards for aiding and abetting liability under international law, relying on *The Justice Case* alone).

50. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 227 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> [<https://perma.cc/4R9B-D6ZH>]. See Rome Statute, *supra* note 2, at art. 25(3) (stating that an individual is responsible for a crime if he/she in any way “contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose”).

51. *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Trial Chamber Judgment, ¶ 66 (“The arrangement or understanding need not be express, and it may be inferred from all the circumstances. The fact that two or more persons are participating together in the commission of a particular crime may itself establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that particular criminal act.”); *Tadic*, Case No. IT-94-1-A at ¶ 227.

52. *Prosecutor v. Kvočka*, Case No. IT-98-30/1, Trial Chamber Judgment, ¶¶ 271, 284 (Int’l Crim. Trib. For the Former Yugoslavia Nov. 2, 2001) (“[A] co-perpetrator of a joint criminal enterprise shares the intent to carry out the joint criminal enterprise The shared intent may, and often will, be inferred from knowledge of the plan and participation in its advancement.”), <http://www.icty.org/x/cases/kvočka/tjug/en/kvo-tj011002e.pdf> [<https://perma.cc/8S4U-W36V>].

53. *Id.* ¶ 309 (“The participation in the enterprise must be significant. By significant, the Trial Chamber means an act or omission that makes an enterprise efficient or effective; e.g., a participation that enables the system to run more smoothly

and abetting a JCE by knowingly assisting a crime committed by a JCE.⁵⁴

There do not seem to be international law cases involving JCEs directly analogous to the facts pertaining to the OLC Lawyers. However, in light of the established international law standards for JCEs, it does seem as though the OLC Lawyers might be liable. First, the Bush Administration's torture policies (which involved the commission of torture) could be characterized as a common plan, especially because JCE plans need not be express or premeditated. Second, there was certainly more than one actor involved in the creation and approval of the torture policies. Third, the OLC Lawyers seemed to have participated in the plan by providing legal cover for implementation of the torture policies and not raising objections regarding their legality. However, the OLC Lawyers will likely argue that they did not intend to carry out the Bush Administration's policies, but rather acted as objective advisors on the state of the law. This argument may not prevail, given the unorthodox legal reasoning used to conclude that certain "enhanced interrogation" techniques were lawful.

Although this analysis suggests that the OLC Lawyers could face JCE liability, additional facts are needed to make this determination with any degree of confidence. There may be a stronger case for holding the OLC Lawyers liable for aiding and abetting a JCE, in light of the lower level of intent required for aiding and abetting.

CONCLUSION

Despite the historical rarity of imposing international criminal liability on government lawyers, there do seem to be applicable legal theories and international precedents pursuant to which the OLC Lawyers may be held criminally liable. The OLC Lawyers could face criminal liability under a theory of aiding and abetting or joint criminal enterprise, although the former seems more likely. And *The Ministries Case* and *The Justice Case*, both deemed to constitute customary international law, provide compelling authority for liability. Importantly, in these cases, "never was the fact that the defendants acted in a legal and official capacity considered as an obstacle in

or without disruption It may be that a person with significant authority or influence who knowingly fails to complain or protest automatically provides substantial assistance or support to criminal activity by their approving silence, particularly if present at the scene of criminal activity.")

54. See *Kvočka*, Case No. IT-98-30/1 at ¶ 284.

holding them to account;” rather, their legal roles were “central to establishing their degree of responsibility.”⁵⁵

Time will tell if the ICC pursues charges against the United States—and perhaps even the OLC Lawyers—for detainee abuses. However, the views on torture of President Trump’s cabinet appointees, including Attorney General Sessions, suggest that this issue could be revisited in the next four years.

55. Center for Constitutional Rights & European Center for Constitutional and Human Rights, *Joint Expert Opinion: Liability of the Six Defendants*, In the Central Court for Preliminary Criminal Proceeding No. 6, Madrid, Spain, Jan. 4, 2011, at 3.