

"Do you know how to swim?" said L-, bending over me. "We're going to teach you. Take him to the tap!"

Together they picked up the plank to which I was still attached [after electric shock torture] and carried me into the kitchen. Once there, they rested the top of the plank, where my head was, against the sink. Two or three Paras held the other end. The kitchen was lit only by a weak light from the corridor. In the gloom, I could just make out the faces of S-, C- and Captain D-, who seemed to have taken over the direction of these operations. L- fixed a rubber tube to the metal tap which shone just above my face. He wrapped my head in a rag, while D- said: "Put a wedge in his mouth."

With the rag already over my face, L- held my nose. He tried to jam a piece of wood between my lips in such a way that I could not close my mouth or spit out the tube. When everything was ready, he said to me: "When you want to talk, all you have to do is move your fingers." And he turned on the tap. The rag was soaked rapidly. Water flowed everywhere: in my mouth, in my nose, all over my face. But for a while I could still breathe in some small gulps of air. I tried, by contracting my throat, to take in as little water as possible and to resist suffocation by keeping air in my lungs for as long as I could. But I couldn't hold on for more than a few moments. I had the impression of drowning, and a terrible agony, that of death itself, took possession of me. In spite of myself, all the muscles of my body struggled uselessly to save me from suffocation. In spite of myself, the fingers of both my hands shook uncontrollably. "That's it! He's going to talk," said a voice.

The water stopped running and they took away the rag. I was able to breathe. In the gloom, I saw the lieutenants and the captain, who, with a cigarette between his lips, was hitting my stomach with his fist to make me throw out the water I had swallowed. Befuddled by the air I was breathing, I hardly felt the blows. "Well, then?" I remained silent. "He's playing games with us! Put his head under again!"

This time I clenched my fists, forcing the nails into my palm. I had decided I was not going to move my fingers again. It was better to die of asphyxiation right away. I feared to undergo again that terrible moment when I had felt myself losing consciousness, while at the same time I was fighting with all my might not to die. I did not move my hands, but three times I again experienced this insupportable agony. In

extremis, they let me get my breath back while I threw up the water.

The last time, I lost consciousness.

– From: Alleg, Henri, "The Question," pp. 48-50, University of Nebraska Press, Lincoln: 2006; original French edition copyright © 1958 by Editions de Minuit; translation copyright © 1958 by John Calder Ltd.

I. Introduction

1. War against terror versus rule of law

It seems that rule of law mechanisms no longer work when it comes to war and fighting terrorism. This complaint is meant to be part of numerous attempts by globally active lawyers and human rights organizations as well as to a lesser extent by state authorities and supranational institutions to fight for the upholding of universal human rights even in war time and in the fight against terrorism.

Criminal complaints, civil complaints, writs of habeas corpus and the defense against indictments based on secret service information, which is extracted by the use of torture, as well as numerous other formal and informal legal instruments should be named in this context.

The war of the U.S.-led coalition against and in Iraq itself, begun under a false pretext and contrary to international law, has alone led to 10,000 deaths and would offer plenty of reasons for legal action on both sides of the Atlantic.

Up to this point, not a single one of the military commanders or civilian superiors has been made legally responsible, although the violation of the prohibition of violence in the UN Charter and the application of certain methods of warfare would be appropriate objects of legal arguments – especially of criminal proceedings against the responsible persons.

Traditionally, however, the acts of governments in and around war would be seen as the domain of politics, which according to its protagonists must be decided independently of legal provisions, by political criteria alone. The human rights violations in the war against terror that has been going on since 9/11/2001, whose goals are as little defined as its end, remain also almost completely unpunished.

This complaint starts above all with the almost total impunity of those responsible for the crimes of torture at Abu Ghraib. Almost the entire world was shaken by the pictures published in April 2004 of the U.S.-led prison in Abu Ghraib. Public opinion, just as much as legal statements, saw in the maltreatment of Iraqi prisoners a heinous crime. But in contrast to other crimes, the police, the public prosecutors and courts did not begin to comprehensively investigate the events, take victims' testimony, and define the role of the immediate perpetrators as well as those further responsible in order to bring them to justice.

The reason for this is simple: the perpetrators are members of U.S. troops; their superiors are government politicians and high-ranking military personnel of the biggest military power in the world, against which applicable national and mandatory international law can only be enforced in a limited fashion.

The biggest empire in the world is currently governed by a president and administration that reacted to the events of Abu Ghraib propagandistically: the "rotten apples" theory was used in order to punish a few military police for the several hundred crimes of torture in Abu Ghraib. The agents of the military secret service and the CIA, employees of private security enterprises and the military commanders in Baghdad and in Washington were entirely spared criminal prosecution and investigation. This is occurring, even though a look at relevant human rights reports, newspaper articles, and investigative reports from American and international institutions shows that the maltreatment was massively and systematically ordered above all from the top of the military and the Defense Department in all of the U.S.-led detention centers in Afghanistan, Guantanamo, and Iraq as well as in many other countries.

2. The practice of torture

The complaint is targeted at torture that is initiated, organized and executed by the government of a state that is constituted as a democratic rule-of-law state. The interrogational torture applied by the United States was not an accident, not a mistake, not a secret action. The torture methods used during the interrogations were executive measures with all their administrative and legal components.

The complaint refers to crimes by a government that were committed under the disguise of self-instituted rule of law. This is the connection to the former assistant attorneys general John Yoo and Jay Bybee, who in this complaint are for the first time accused of criminal actions, and who, with their torture memorandum of 08.01.2002 claimed the “legality” of torture and created a legal justification for the actions of those who execute torture.

This kind of governmental criminality is described by criminologists as “macrocriminality,” in which the individual act can only be understood as a part of the concurring acts of large organized collectives. It has been shown that the interrogation torture could only be practically established under White House policy based on the U.S. president’s call for a “global war against terror.” The implementation of torture and prohibited interrogational methods was accomplished in several stages. During the conflicts and in the aftermath of these conflicts in Afghanistan many people were arrested. As later became known, these people were detained in different ways.

Some of them were later brought to foreign secret prisons. Others were brought to other countries to be interrogated (“extraordinary rendition”). Almost all prisoners were tortured and methods such as the so-called “water boarding” and other prohibited interrogation measures were applied.

Because CIA interrogators especially refused to continue applying certain illegal interrogation techniques, the government defined the political goal of making the interrogation torture legally untouchable and thus to accomplish the torture politically and practically within the security apparatus.

Meanwhile, the internal governmental memoranda in the so-called Torture Papers were partially made public. From these papers it can be seen that the high-ranking federal jurists hereby accused argued—against the resistance of high-ranking military personnel and State Department advisers—that the new “War on Terror” had suspended legal restrictions on the treatment and interrogation of detainees.

The abovementioned jurists argued, as their contractors wanted them to, and against current national and international law as well as legal convictions current in the USA, that

- any attempt at legal influence on the right of the president of the United States to decide on the style of warfare would be unconstitutional and that international customary law is not part of the legal system of the United States; and

- Al Qaida members and other detainees are not considered to be protected by the Geneva Conventions on the Protection of Prisoners of War and other Protected Persons, because Al Qaida is not a state actor, Afghanistan is considered a so-called failed state, and the war against Al Qaida is neither an international war nor a civil war.

Consequently, on January 19, 2002, the accused U.S. Secretary of Defense, Donald H. Rumsfeld, informed the chief of the U.S. military, Richard B. Meyers, that the detained Al Qaida and Taliban members would not be granted prisoner of war status according to the Geneva Conventions.

The government would “mostly treat [the prisoners] in a way somewhat in accordance with the Geneva Conventions, namely, to the extent appropriate.” The fatal consequences of this fundamental turning point were that many prisoners were tortured, treated cruelly and humiliated.

The first phase, the implementation of the torture program, was above all determined in that the CIA, represented by their legal advisor, Scott W. Muller, no longer wanted to apply certain techniques because they feared a criminal prosecution; and in that the Bush administration reacted in January/February 2002 with the first series of memoranda and their implementation. In the second phase, it was about the implementation of certain even more aggressive treatment and interrogation principles, whose application was above all in Guantanamo highly contested.

In order to further safeguard the interrogation practices of the U.S. military and the CIA, in the summer of 2002 the accused David S. Addington asked the Office of Legal Counsel (OLC) to produce a corresponding memorandum for the president for the attention of his legal advisor, the accused Alberto R. Gonzales. With the mandate the solution was presented, namely the limiting of the prohibition of torture to the application of worst pain or suffering and specific intent to torture.

In John Yoo and Jay Bybee's memorandum of August 1, 2002, the legal definition of torture was extremely narrowly interpreted. If the victim was caused bodily pain, it would only constitute torture if it led to "death, organ failure or to a permanent damage to an important bodily function." Psychic pain "must lead to significant psychic damage of considerable duration, i.e. it must last for months or even years."

The memorandum nowhere mentions the prohibition of inhuman, cruel and degrading treatment by international law. Thereby, common torture techniques such as "water boarding," sleep and food deprivation as well as stress techniques such as sexual and religious humiliation were described as not punishable, because they do not fall under the U.S. war crime laws of 1987. Of course, the UN Convention Against Torture prohibits these techniques, but whoever were to commit such acts would not be punishable.

Probably the most important single case of the new complaint is that of the Saudi Arabian citizen Mohammed al Qahtani. He has joined the complaint as a plaintiff through his lawyer in spite of an almost total contact ban in order to bring attention to his fate and to demand justice.

In the case of al Qahtani it is possible to study the planned and systematic execution of an interrogation plan that also includes torture. The accused former U.S. defense secretary Donald Rumsfeld was directly involved in the interrogations. The case was documented in an interrogation logbook kept by the government that has since been made public.

Al Qahtani was kept in isolation in a tiny cell lit only by artificial light for 160 days. He was interrogated on 48 out of 160 days for 18 to 20 hours. He was undressed, made to stand with spread legs in front of female guards and mocked (so-called "invasion of space by a female"). He was forced to wear women's underwear on his head and to put on a bra; he was threatened by dogs and led on a leash; his mother was called a whore.

In December 2002, al Qahtani was the target of a faked abduction and rendition. He was kept in the cold, given substances intravenously without access to a toilet and deprived of sleep for three days. At one point his heart rate fell to 35 beats per minute, because of which he was connected to a heart monitor.

Rumsfeld was, according to government reports, in many ways personally involved in these crimes. He signed a memorandum on December 2, 2002 that allowed 16 additional techniques, including face covering, undressing, use of dogs and so-called mild, non-injurious contact.

At the end of this memorandum about the allowance of additional techniques there is a note handwritten by Rumsfeld, which referred to the fact that prisoners were left standing in stress positions for up to four hours. In the note he wrote: "I stand 8 to 10 hours a day. Why is it limited to 4 hours?" In the case of Al Qahtani, Rumsfeld and Major General Geoffrey Miller personally ordered practices which aimed to keep Al Qahtani awake more than 20 hours per day for at least two months, but probably longer.

After the U.S.-led invasion in Iraq in the spring of 2003, the question of how the prisoners of war and the so-called "illegal fighters" should be treated came up, whereas the main point of interest, as already in Guantánamo Bay, was to quickly get "useful information" out of the prisoners.

This led to the export of illegal interrogation methods from Washington and Guantánamo into Iraq and their targeted use in the military prison of Abu Ghraib and other detention centers. This export was accomplished by a series of memoranda and instructions, in whose production and implementation, according to the Schlesinger report, the entire military chain of command was involved. It stretches from the accused Lieutenant General Ricardo Sanchez and Major General Geoffrey Miller to the office of U.S. Secretary of Defense Donald H. Rumsfeld.

3. Impunity of those primarily responsible for the maltreatment of prisoners

For professional watchers of U.S. politics, by the summer of 2004 it was already foreseeable that out of the many government and investigational reports, the meaningful facts with respect to the prisoner abuse determined, that there were absolutely no legal consequences for the human rights violations of Abu Ghraib for the criminally responsible superiors.

Several organizations, such as Human Rights Watch, advocated for an internal congressional investigation commission. Others used civil law routes. The Center for Constitutional Rights, for example, sued the civilian military contractors Titan Corp. and CACI International for damages for the abuse; Human Rights First and the ACLU sought damages from Rumsfeld and others in the victims' names.

None of these political and legal efforts showed legal success. The Bush administration, and above all U.S. Secretary of Defense Donald Rumsfeld and the current Attorney General Alberto Gonzales, both personally responsible, always had the situation firmly in hand. Criminal proceedings against just a dozen interrogators from the civilian contract firms were dropped without further explanation. Criminal proceedings against those responsible at the top were not even introduced. In the military court proceedings against a dozen military police, high-ranking witnesses were not questioned, although they—for example, the former general Janis Karpinski—expressly declared themselves willing to testify.

The legal expert report of professors Jordan Paust of Houston and Ben Davies of Toledo – produced solely for this proceeding – proves the total unwillingness of the administration to charge and bring to justice former high-ranking members of government for their participation in the systematic torturing of prisoners. At the end of a two-year legal debate, there is an almost total lack of punishment of the highest civilian and military officials for systematic torture and prison abuse. In 2004, this finding led the U.S.-based human rights organization the Center for Constitutional Rights to work out a charge against Donald Rumsfeld and others in a several-month project. The reasons for taking this step were obvious:

Those who in the face of this phenomenon would use law as a means to regulate societal processes are time and again confronted with arguments based on expediency. It took many decades to arrive at the universal, ethical, theoretical and legal recognition of the prohibition of torture. Nevertheless, torture is still commonplace in dozens of states.

The fight against torture, whether in each concrete case or in abstract terms, is of crucial significance for the future of a humane and civilized society. Fighting against torture means being decisive in acting against its propagation and insisting on the punishment of those directly responsible for torture as well as those who organize the practice of torture. This is

the context in which this complaint should be understood. Continuing impunity for those who pulled the strings that led to the war crimes committed at Abu Ghraib and elsewhere would send the wrong signal. Other governments of the world would feel emboldened to continue what is unfortunately their all too common practice of torture.

It is precisely this situation which the American Robert Jackson, the Chief Prosecutor at the Nuremberg Trial, had in mind when he said in his opening speech on November 21, 1945:

Let me make clear that while this law is first applied against German aggressors, the law, if it is to serve a useful purpose, must condemn aggression by any other nations, including those which sit here now in judgment. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law.

4. Criminal prosecution according to the German International Criminal Code

The structure of the German International Criminal Code, in addition to the stationing of many U.S. army units in Germany – including some of those primarily responsible for the crimes in this complaint – was the main reason why the Center for Constitutional Rights launched the criminal complaint in Germany. The explosive development of international criminal law since the establishment by the United Nations' International Criminal Tribunals for the former Yugoslavia and for Rwanda, respectively from 1993 and 1995, and the International Criminal Court (ICC) in The Hague in 2002 led to the creation of the CCIL. In the post-Nuremberg era “the torturer, like the pirate of old, has become *hostis humanis generis*, the enemy of all mankind.”

Since then this outstanding example of universal jurisdiction has been followed by U.S. courts in dozens of other cases.

This is also the basic idea behind the ICC. It is to be found in the Preamble of the ICC Statute, which states that the core crimes of international criminal law are “the most serious crimes of concern to the international community as a whole.” (cf. also Gerhard Werle, *Völkerstrafrecht*, 2003, pp.30) It is not disputed that war crimes, crimes against humanity, genocide and crimes of aggression are international crimes of this type.

“It follows from the universal nature of these international crimes that the international community is fundamentally authorized to prosecute and punish such crimes, irrespective of where, by whom or against whom the act was committed.” (Werle, *op.cit.*, pp 68) This provides not only the basic legitimacy of the international community and thus of the ICC to prosecute such crimes, individual states also have this penal jurisdiction. “International crimes are not internal matters.” (cf. Werle, *op.cit.*, pp.69) For international crimes the principle of universal jurisdiction applies.

Incidentally, the obligation for law enforcement on the part of nation-states arose out of relevant international treaties such as the Geneva Conventions and the UN Convention Against Torture, which will be gone into more detail below.

It was for this very reason that both houses of the German Parliament approved by wide margins the Code of Crimes against International Law (CCIL), which came into force on June 30, 2002. The objective of this Code was “to better define crimes against international law than is currently possible under general criminal law” and “in view of the complementarity of the prosecutorial jurisdiction of the International Criminal Court to make it absolutely clear that Germany is always in a position to prosecute for itself those crimes falling under the jurisdiction of the ICC Statute.” (cf. Bundestags-Drucksache 14/8524, pp. 11)

Thus in § 1 of the CCIL, the principle of universal jurisdiction is specifically prescribed for those crimes against international law defined in the Code, “even where the act was committed abroad and has no correlation to the home country.” The CCIL may be seen as one of the first legislative projects in the world to regulate international criminal law after the ICC was enacted. The ICC has, amongst other objectives, “to promote humanitarian international law and to contribute to its acceptance through the creation of a comprehensive set of rules.” (Cf. Bundestags-Drucksache 14/8524, pp. 12)

5. The criminal proceedings against the U.S. Secretary of Defense Donald Rumsfeld and others in 2004/2005

The complaint filed on November 30, 2004, was indeed reviewed by the public prosecution office, but with its decision 3 ART 207/04-2 the public prosecution office ruled on 10 February 2005 that no investigation would need to be opened: the universal jurisdiction based in § 1 CCIL would not legitimize unrestricted criminal prosecution, rather, the law’s objective

would be to close gaps of punishability and criminal prosecution respecting the principle of noninterference in the home affairs of foreign states.

The principle of subsidiarity means that in the first place the state in which the criminal act was committed and the home state of the perpetrator and victim as well as the responsible international court are appointed for prosecution.

Accordingly, the German investigation authorities responsible for criminal prosecution would have only complementary jurisdiction. Contrary to the reasoning of the plaintiffs and contrary to the findings of the expert opinion submitted by Prof. Scott Horton, and without mentioning the latter at all, let alone assessing it, the public prosecution office explained:

“Here there are no indications that the U.S. authorities and courts avoided or would avoid taking action concerning the violations delineated in the complaint.

There have already been several proceedings against the perpetrators of the Abu Ghraib events, including members of the 800th brigade of the military police.

It is up to the legal authorities of the United States to decide by which means and at what point in time the investigation against possible suspects in the context of the delineated violations should take place.”

Because the public prosecution office closed the proceedings the day before the beginning of the Munich Security Conference, on February 11, 2005, the plaintiffs lodged another complaint. They presented a complaint to the Special Rapporteur on the Independence of Judges and Lawyers, the Argentinian Leandro Despouy, in which they argued in particular that the United States had violated the universally recognized principle of the independence of prosecutors.

High-ranking U.S. government authorities, especially the accused Rumsfeld himself, had complained to the German government about the threatened criminal prosecution against U.S. citizens. Rumsfeld himself predicated his participation in the Munich Security Conference on the condition that there be no criminal proceedings against him.

The plaintiffs filed a motion against the decision of the public prosecution office to close the proceedings in an attempt to get a court decision to force the public prosecution office to indict those previously accused, or at least to order more investigations. The motion was defeated by the Stuttgart High Court on September 13, 2005. The court dismissed the motion, ruling that the public prosecution office's decision pursuant to the German law § 153 f GCPC is subject to the principle of Discretion and that therefore the forced public prosecution would not be admissible. In addition, according to the Stuttgart court, the public prosecution office's decision could not be dismissed due to lack of discretion or due to arbitrariness. Both decisions, that of the public prosecution office and that of the Stuttgart court, were criticized by legal scholars. This will be treated in further depth later on.

6. The new criminal complaint against the U.S. Secretary of Defense Rumsfeld and others

The plaintiffs are still proceeding from the assumption that even at the time of the first complaint, the public prosecution office had the obligation to initiate legal proceedings. But apart from that, it has become obvious during the last two years that the U.S. justice system closed the Abu Ghraib investigation by convicting only the “dirty dozen” military police officers.

Not a single investigation has been or will be initiated against the responsible personnel of the military secret service or the CIA, or the high commanders of the U.S. Army or the Pentagon as the abovementioned expert reports from Prof. Paust and Prof. Davis impressively prove.

Therefore, the situation that the public prosecution office described in its decision of February 10 as a condition for the application of the CCIL has come to pass: Neither the home state of the perpetrators or victims, nor the state in which the crime was committed, nor any international court has implemented investigations against the perpetrators in question. In explicit terms, the German authorities, working complementarily, not only can initiate an investigation, but must initiate an investigation in order to stop the unbearable situation of impunity in the case of the worst war crimes.

So far, many witnesses – and in particular almost all of the aggrieved parties – have not given testimony about the Abu Ghraib events to any criminal prosecution authority in any state of the world. As it is possible for German authorities to take such testimony without great effort,

especially by means of consular hearings, there are enough indications for the German criminal prosecution authorities. Formerly involved parties, such as the former Brigadier General Karpinski, the former commander of 17 U.S.-led detention centers, have declared their willingness to present their knowledge to German criminal justice authorities.

Initiating an investigative proceeding is not only legally required, but sensible and useful as well. In order to enforce the victims' right to criminal prosecution in Germany, the plaintiffs and other U.S. and international organizations have decided to re-file the charges.

7. The structure of the complaint

In this complaint, the abovementioned thesis – that the war crimes committed at Abu Ghraib remain mostly unpunished in the USA – will be thoroughly presented. (2.) Next, the problem of to what extent German criminal prosecution authorities are competent and responsible for the prosecution of crimes committed by Americans in Iraq against Iraqis will be discussed, a question that all jurists will answer in the affirmative. Further, the question – and this will be probably be the most controversial question – of whether indeed a criminal procedure pursuant to the reasoning in § 153 f StPO can and must take place will be discussed (3).

Then, the essential facts will be very briefly outlined (4.). Several dozen individual cases of prisoner maltreatment have already been thoroughly described in the complaint of November 30, 2004 (and will only be referred to here). In addition to those cases, other cases of prisoner maltreatment in other detention centers have come to light, including nearly 100 deaths.

In the next chapter (5.1.), the reported maltreatment and killings will be subsumed under the Criminal Code of Crimes Against International Law (CCIL) and the relevant international criminal law. They will be classified as torture and war crimes pursuant to § 8 CCIL and international law.

In the following, detailed chapter (5.2.), the acts of the accused parties will be explicitly described and evaluated in legal terms. Special attention will be paid to the four accused jurists, John Yoo, Jay Bybee, Alberto Gonzales, and William Haynes. They all worked in various governmental authorities writing memoranda intended to provide a legal basis for withholding the protection of the four Geneva Conventions, and declaring forbidden methods of taking testimony legally sustainable. This reasoning conflicts with current U.S. law as well

as international law, but its application made the system of organized maltreatment of prisoners – established first in Afghanistan and Guantánamo and later exported to Iraq and therefore to Abu Ghraib – possible.

In a final chapter (6.), possible obstacles to the prosecution, such as immunity and the NATO-SOFA Statute, will be discussed.