BOOK REVIEW


I  INTRODUCTION

In 1999 my father bought me a hardback copy of Geoffrey Robertson’s Crimes against Humanity.1 He inscribed it with the following words, taken from Martin Luther King, Jr: ‘Injustice anywhere is a threat to justice everywhere’.2 Around the time the book was published, General Pinochet was denied immunity in the United Kingdom;3 President Milošević was indicted for the commission of war crimes, crimes against humanity and genocide in the former Yugoslavia;⁴ numerous perpetrators of genocide were being indicted in Rwanda;⁵ and the international community had resolved to create a permanent International Criminal Court.⁶ It seemed we were entering an era that would witness the end of impunity for the commission of gross human rights violations. Justice everywhere would be strengthened.

Fast-forward a little to 2005 and I am teaching my first year law students the principle of the rule of law, how fragile and vulnerable it can be, and the devastating consequences that can flow from its demise. Our case study is the detention of prisoners at Guantánamo Bay — including Australian citizens — by an Australian ally and global advocate of democracy. The war in Iraq forms a backdrop. As a record of the United States Government’s recent retreat from the rule of law, The Torture Papers: The Road to Abu Ghraib⁷ delivers a crushing blow to my naïve belief in the beginning of the end of impunity.

The Torture Papers is a weighty tome. Given its subject matter, this is an unhappy fact. A paper trail of more than 1000 pages documents a retreat from the rule of law and from justice in relation to non-citizens taken captive by the US in the course of the so-called ‘war on terror’. From Afghanistan to...

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2 Letter from Martin Luther King, Jr to Bishop C C J Carpenter, Bishop Joseph Durick, Rabbi Hilton Graffman, Bishop Paul Hardin, Bishop Holan Harmon, the Reverend George Murray, the Reverend Edward Ramage and the Reverend Earl Stallings, 16 April 1963, as reproduced in Martin Luther King, Jr, Why We Can’t Wait (1964) 73, 79.
3 R v Bow Street Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 3] [2000] 1 AC 147.
4 Prosecutor v Milošević, Milutinović, Sainović, Ojdanić, Stojiljković (Decision on Review of Indictment and Application for Consequential Orders), Case No IT–99–37 (24 May 1999); Prosecutor v Milošević (Decision on Preliminary Motions), Case No IT–01–50–I (8 November 2001); Prosecutor v Milošević (Decision on Review of Indictment), Case No IT–01–51–I (22 November 2001).
5 See, eg, Prosecutor v Akayesu (Trial Chamber Judgment), Case No ICTR–96–4–T (2 September 1998).
7 Karen Greenberg and Joshua Dratel (eds), The Torture Papers: The Road to Abu Ghraib (2005).
Guantánamo Bay (via Egypt at times)\(^8\) and on to Iraq, a tale of calculated cruelty and perversion of the law is told through a seemingly innocuous collection of government memoranda. To read it is a sobering experience. It certainly tested my faith in democracy, in human nature. And when I closed the book’s heavy covers, the question that had refused to leave my head since the invasion of Afghanistan resonated once more: what price freedom?

The book is a collection of now publicly available documents, many of which were brought to light by journalists working at The Washington Post and Newsweek, in conjunction with the American Civil Liberties Union.\(^9\) As is often the case with publications compiling public documents, some may question the value of The Torture Papers. Given the sheer volume of material, however, there is a certain utility in having all the memoranda and reports compiled together. The editors — Karen Greenberg, Executive Director of the Center on Law and Security, New York University School of Law, and Joshua Dratel, President of the New York State Association of Criminal Defense Lawyers and lead defence counsel for David Hicks — have enhanced the collection with incisive editorial remarks, a very useful timeline of key events and brief biographical information on the main players. The detailed index assists greatly in navigating the key themes raised by the documents.

The Torture Papers also contains 28 memoranda whose authors include US President George W Bush, US Secretary of Defense Donald Rumsfeld, former US Secretary of State Colin Powell, former US Attorney-General John Ashcroft, former Counsel to the President Alberto Gonzales (now US Attorney-General), and legal advisers from the US Departments of State and Defense (many of whom have since received promotions). As Dratel notes:

> The memoranda … follow a logical sequence: (1) find a location secure not only from attack and infiltration, but also, and perhaps more importantly … from intervention by the courts; (2) rescind the US’s agreement to abide by the proscriptions of the Geneva Convention [III] with respect to the treatment of persons captured during armed conflict; and (3) provide an interpretation of the law that protects policy makers and their instruments in the field from potential war crimes prosecution for their acts.\(^10\)

The Torture Papers documents the decision-making process that rendered inevitable the abuse of unchecked power. It is implicit from the subtitle of the book that the editors believe that the serious abuse of prisoners that occurred at Abu Ghraib in Iraq was not the consequence of a few ‘bad eggs’. With ‘arrogant rectitude’,\(^11\) the US Administration pursued its belief that ‘the end, fighting terrorism, justified whatever means were chosen’.\(^12\) In his introduction to the book, former New York Times columnist Anthony Lewis notes that the collection

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\(^9\) Karen Greenberg, ‘From Fear to Torture’ in Karen Greenberg and Joshua Dratel (eds), The Torture Papers: The Road to Abu Ghraib (2005) xxvi, xxvii.


\(^11\) Ibid.

\(^12\) Anthony Lewis, ‘Introduction’ in Karen Greenberg and Joshua Dratel (eds), The Torture Papers: The Road to Abu Ghraib (2005) xiii, xiv.
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of legal memoranda is ‘an extraordinary paper trail to mortal and political disaster: to an episode that will soil the image of the United States in the eyes of the world for years to come’.13

Nine detailed reports are also included in the volume. These range from an International Committee of the Red Cross report on the treatment of prisoners of war (‘POWs’) in Iraq,14 to the initially secret ‘Taguba Report’ on the detention and interrogation operations of military police in Iraq,15 and finally to the report of the Independent Panel to Review Department of Defense Detention Operations in response to the abuse of prisoners held at Abu Ghraib.16

In addition, the book contains a short list of four ‘missing’ documents which are known to exist — they are referred to in other documents in the volume — but have not yet been declassified or were otherwise unobtainable at the time of publication. Aside from these, The Torture Papers appears to be a complete record of high-level US consideration of the issues of status of detainees and ‘acceptable’ coercive interrogation practices from 14 September 2001 to mid-2004.

The Afterword to the book notes that ‘[a]s this volume goes to press, additional materials on Abu Ghraib and new materials on Guantánamo are daily finding their way into the public arena’.17 A selection of some of these documents, uncovered by the American Civil Liberties Union, is included at the end. This includes reports on, and discussions of, detainee mistreatment and abuse by the Federal Bureau of Investigation, the Department of Defense and the White House. The final document is an affidavit from David Hicks outlining ‘the abuse and mistreatment I have received, witnessed and/or heard about since I have been detained by the United States … from December 2001 until present’.18

As the editors note, with what one assumes to be incredulity, ‘Hicks is an Australian citizen’.19

It is impossible in a short review to cover all the material contained in this lengthy collection of memoranda and reports. Overall, it is the memoranda which are most intriguing as they give a rare insight into the contemporary decision-making processes of the world’s lone superpower. Many of the declassified documents would, ordinarily, not be available to the public for up to 30 years. The memoranda essentially deal with three main issues — enhancing

13 Ibid xiii.
the scope of the President’s executive power; the decision not to grant POW status to non-citizens detained by the US; and ‘coercive interrogation techniques’ (doublespeak for torture or cruel, inhuman or degrading treatment).

II ENHANCED EXECUTIVE POWER

The first tranche of memoranda were drafted shortly after the attacks of 11 September 2001 and set the tone for the remainder of The Torture Papers. Building on the Presidential Proclamation declaring a national emergency on 14 September 2001, Memorandum 1 advises that the President has the constitutional power to ‘deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11’. Thus, as a matter of US constitutional law, the legal advice given was that President Bush was empowered to attack anyone, anywhere, suspected of being involved in or supporting a terrorist organisation, even where there was no material link between that organisation’s activities and the US.

Memorandum 1, drafted by US Deputy Assistant Attorney-General John Yoo (a recurring character in The Torture Papers), contended that laws passed by the US Congress such as the War Powers Resolution and the Authorization for Use of Military Force Joint Resolution cannot rightly place any limits on the President’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing and nature of the response. These decisions under our Constitution are for the President alone to make.

This ‘amped-up view of executive power’ effectively meant that Chechnyan separatists in Russia, Tamil Tigers in Sri Lanka, and Hezbollah in Lebanon could now all legitimately be attacked by the US, at the sole discretion of the President. There is no discussion in the Memorandum of the possible restraints placed on retaliatory or pre-emptive conduct by international law. Evidently, the terrible attacks of September 11 meant that the US executive was now a law unto itself.

Nevertheless, the memoranda on enhancing executive power implicitly reveal a degree of insecurity about the legality and constitutionality of the President’s ‘amped-up’ powers; the next step was to ensure that the consequences of the exercise of that power would not be reviewable in any court. Courts are meddlesome creatures, it would seem, particularly when it comes to determining the proper limits of executive power. Dratel observes, in relation to this group of

21 John Yoo, ‘Memorandum for Timothy Flanigan, the Deputy Counsel for the President: The President’s Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them’ (25 September 2001) in Karen Greenberg and Joshua Dratel (eds), The Torture Papers: The Road to Abu Ghraib (2005) 3, 3 (emphasis added).
memoranda, that ‘[r]arely, if ever, has such a guilty governmental conscience been so starkly illuminated in advance’.26

In relation to individuals captured in the course of the war on terror (initially in Afghanistan) and detained under US control at Guantánamo Bay and other places, the exclusive power asserted by the US Executive was extensive. The Presidential Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism27 attempts to suspend many of the ordinary constitutional and judicial protections afforded to individuals under US control: the place and duration of detention of terror suspects would be at the sole discretion of the Secretary of Defense; the trial of terror suspects would be before military commissions, not courts; the ‘principles of law and rules of evidence generally recognized in the trial of criminal cases’ in the US would be suspended (including trial by jury, the right to due process, etc); and no individual detained pursuant to the Presidential Order would be able to seek any remedy in any court of the US, any court of any other nation, or any international tribunal.28 The US President was attempting to assert power over the legal systems of every other nation in the world, as well as the international legal system.

Confirmation of the nonavailability of judicial review in US courts of the status and entitlements of detainees by writ of habeas corpus was sought, and was provided in a memorandum from the Deputy Assistant Attorneys-General to the General Counsel, Department of Defense.29 Relying heavily on the 1950 US Supreme Court decision in Johnson v Eisentrager,30 the memorandum concludes that a habeas corpus application from an enemy alien detained at Guantánamo Bay could not properly be entertained by US courts. In Eisentrager, the Supreme Court held that federal courts did not have jurisdiction to hear habeas corpus applications filed by an ‘enemy alien’ held at all relevant times outside US territory. The Court concluded that where an applicant for habeas corpus relief is both beyond the territorial sovereignty of the US and outside the territorial jurisdiction of any US court, that relief is not available.31

The possibility that Guantánamo Bay might be characterised as beyond the territory, but not beyond the jurisdiction, of US courts is flagged as an issue that ‘has not yet been definitively resolved’.32 The likelihood of success is reasoned away, partially on the basis that

a federal district court ought to be reluctant to extend habeas jurisdiction to [Guantánamo Bay] … if doing so would interfere with matters solely within the

26 Dratel, ‘The Legal Narrative’, above n 10, xxi.
30 339 US 763 (1950) (‘Eisentrager’).
discretion of the political branches of government ... a court should defer to the
executive branch’s activities and decisions in prosecuting the war.33

The nonavailability of judicial review was the linchpin in the US policy of
unfettered executive discretion in the prosecution of the war on terror. The early
memorandums represent ‘a carefully constructed anticipation of objections at the
domestic and international levels’.34 The Administration was acutely aware of
the need to keep the detainees away from the courts, and vice versa:

If a federal district court were to take jurisdiction over a habeas petition, it could
review the constitutionality of the detention and the use of a military commission,
the application of certain treaty provisions, and perhaps even the legal status of
al Qaeda and Taliban members.35

Obviously, this was a situation best avoided.

The clear view of the US Administration was that the war on terror dispensed
with the need for either the separation of powers or judicial oversight of
executive action — a view with which the Supreme Court has taken issue. In
June 2004, in the case of Rasul v Bush, President of the United States,36 the
Supreme Court held by a 6:3 majority that a District Court has jurisdiction to
hear habeas challenges brought under the US Code. The Code authorises district
courts, ‘within their respective jurisdictions’, to entertain habeas applications by
persons claiming to be held ‘in custody in violation of the … laws … of the
United States’.37 The Supreme Court held that such jurisdiction extends to aliens
held in a territory over which the US exercises plenary and exclusive
jurisdiction; ‘ultimate sovereignty’ is not required to invoke the exercise of
habeas jurisdiction.38

At this stage in the proceedings, the Supreme Court was concerned only with
the availability of habeas corpus to the detainees at Guantánamo Bay to
challenge the lawfulness of their detention, not with the question of whether their
detention was, in fact, lawful: ‘What is presently at stake is only whether the
federal courts have jurisdiction to determine the legality of the Executive’s
temporally indefinite detention of individuals who claim to be wholly innocent of
wrongdoing’.39 Regardless, Rasul v Bush constituted a blow to the US
Administration’s carefully constructed extraterritorial detention regime, to which
nonavailability of judicial review was central. As Dratel notes, it is likely that
‘the successive conclusions built upon that premise will, like the corrupted
dominoes they are, tumble in due course’.40

III STATUS OF DETAINEES

The US Supreme Court decision in Rasul v Bush also served as a timely
reminder that in a democratic society governed by the rule of law, a ‘government
cannot pick and choose what rights to afford itself, and what lesser privileges it confers on its captives, and still make any valid claim to fairness and due process’. In the early days of the war on terror, the most controversial decision of the Bush Administration was the non-applicability of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949 to detainees captured in the course of the war. As the memoranda dealing with this issue make plain, the status of detainees issue proved itself to be a classic example of a government engaged in a legal picking and choosing exercise.

On 19 January 2002, US Secretary of Defense Donald Rumsfeld advised Combatant Commanders that ‘[t]he United States [Bush] has determined that Al Qaeda and Taliban individuals under the control of the Department of Defense are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949’. Shortly after this determination was made, US Secretary of State Colin Powell requested that the President reconsider his decision.

In part, the Presidential decision appears to have been based on rather ‘inaccurate’ legal advice from the Office of the Attorney-General, which claimed that it was within the scope of the discretion of the President to suspend the Geneva Conventions in relation to the conflict in Afghanistan, on the basis that Afghanistan was a ‘failed state’. As Powell later noted, this conclusion is contrary to the official position of the US and the international community that has held Afghanistan (under the Taliban) to its treaty obligations and identified it as a party to the Geneva Conventions. The advice also concluded that those principles in the Geneva Conventions holding the status of customary international law (and therefore incapable of suspension), have ‘no binding legal

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41 Ibid xxi.
42 Opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (‘Geneva Convention III’).
43 Donald Rumsfeld, ‘Memorandum for Chairman of the Joint Chiefs of Staff’ (19 January 2002) in Karen Greenberg and Joshua Dratel (eds), The Torture Papers: The Road to Abu Ghraib (2005) 80, 80.
47 Gonzales, above n 44, 118.
48 Powell, above n 45, 124.
effect on either the President or the military because … [they are] not federal law’.49

The overall gist of the advice was that the President had the discretion to pick and choose from the laws of war, or even invent them if he so desired; which he did in creating the hitherto unknown category of ‘unlawful combatant’. It is possibly this kind of advice to which Dratel refers when he notes ‘the “corporatization” of government lawyering: a wholly results-oriented system in which policy makers start with an objective and work backward … reduce[ing] the lawyer’s function to that of a gold-plated rubber stamp’.50

The status of detainees debate essentially became a choice between two options: (1) determine that Geneva Convention III on the treatment of POWs did not apply to the conflict in Afghanistan on the basis of it being a ‘failed state’ or some other equivalent basis; or (2) determine that Geneva Convention III did apply to the conflict in Afghanistan but that ‘members of al Qaeda as a group and the Taliban individually or as a group [were] not entitled to prisoner of war status under the Convention’.51 Under either option, detainees were to be treated humanely and, ‘to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions of 1949’ 52

One of the main practical differences between the two was that the second option would require case-by-case determinations of POW status to be undertaken, and this was inconsistent with the Administration’s general strategy of holding all non-US citizens away from any form of scrutiny or review.

Powell urged the Administration to reconsider its decision about the non-applicability of the Geneva Conventions and adopt the second option, as it ‘provides the strongest legal foundation for what we actually intend to do’.53 The advantages of applying the Geneva Conventions in Afghanistan were manifold. It would ensure maximum protection for US troops deployed around the world, avoid negative foreign policy consequences, foster support amongst key allies, facilitate future military and legal cooperation and provide protection from prosecution for troops and officials. In prescient fashion, Powell emphasised that determining that the Geneva Conventions do not apply ‘deprives us of a winning argument to oppose habeas corpus actions in US courts’ as Geneva Convention III ‘permits long-term detention without criminal charges’.54

Powell gained support from his Legal Advisor, William H Taft IV. In a thinly disguised swipe at the Administration, Taft argued that a decision that the Geneva Conventions do apply to the conflict in Afghanistan would demonstrate that the US ‘bases its conduct not just on its policy preferences but on its

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50 Dratel, ‘The Legal Narrative’, above n 10, xxii.
51 Powell, above n 45, 122.
52 Rumsfeld, ‘Memorandum for Chairman of the Joint Chiefs of Staff’, above n 43, 80.
53 Powell, above n 45, 123.
54 Ibid.
international legal obligations’. In supporting his appeal to the rule of law, Taft noted that applying the Geneva Conventions is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years. It is consistent with the advice of [Department of State] lawyers and, as far as is known, the position of every other party to the Conventions. It is consistent with UN Security Council Resolution 1193. Taft also reiterated that, if it was determined that the Geneva Conventions applied to any part of the US’s conflict in Afghanistan, their provisions are [prima facie] applicable to all persons involved in that conflict — al Qaeda, Taliban, Northern Alliance, US troops, civilians, etc. If the Conventions do not apply to the conflict, no one involved in it will enjoy the benefit of their protections.

Together, Powell and Taft constructed a compelling legal case with positive policy implications on the question of the applicability of the Geneva Conventions. Their protestations were destined to fall on deaf ears, or, in the words of Greenberg, to be nothing more than ‘a virtual cry in the dark’. The least likely to heed the Department of State’s warnings was Alberto Gonzales, Counsel to the President, who advised President Bush that the new ‘paradigm’ of the war on terror rendered the Geneva Conventions ‘quaint’. Powell’s protestations did provoke a rather vigorous response from Attorney-General John Ashcroft, who personally wrote to the President on the matter. Ashcroft heavily recommended that the President not change his mind, as the chosen option would ‘provide the United States with the highest level of legal certainty available under American law’. On 7 February 2002, President Bush adopted a slightly compromised position. He determined that ‘none of the provisions of Geneva [Convention III] apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva’. Thus, al Qaeda detainees were not entitled to POW status.


56 Taft, above n 55, 129.

57 Ibid.

58 Greenberg, ‘From Fear to Torture’, above n 9, xix.

59 Gonzales, above n 44, 119.

60 Ashcroft, above n 55, 127.

President Bush also determined that common art 3 of the Geneva Conventions did not apply to either al Qaeda or Taliban detainees because the relevant conflicts in which they were apprehended were not internal armed conflicts. It was further determined that even though he had authority to suspend the operation of the Geneva Conventions as between the US and Afghanistan, he would not do so — to the extent applicable, the Geneva Conventions would apply to the conflict with the Taliban. However, Taliban detainees were designated as ‘unlawful combatants’ and therefore did not qualify as POWs under art 4 of Geneva Convention III. Despite denying POW status to detainees, President Bush noted that ‘[o]f course, our values as a Nation … call for us to treat detainees humanely, including those who are not legally entitled to such treatment’. US forces were therefore directed to ‘continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva’.

In a memorandum dated the same day as President Bush’s determination, Assistant Attorney-General Jay Bybee advised that ‘the President has reasonable factual grounds to determine that no members of the Taliban militia are entitled to prisoner of war status’. Article 5 of Geneva Convention III provides:

> Should any doubt arise as to whether persons … belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

As the President was advised that he would hold no ‘doubt’ as to the nonavailability of POW status, it was determined that an art 5 status review tribunal would not be required.

The Torture Papers does not cover subsequent developments, including the further change of decision on arts 4 and 5. On 7 July 2004, in an attempt to be seen to be applying the Geneva Conventions, the US belatedly created a widely criticised Combatant Status Review Panel to review the decision not to extend POW status to detainees.
IV COERCIVE INTERROGATION TECHNIQUES

From roughly August 2002, advice was sought about the legality, under international law, of interrogation methods used during the war on terror. The US is a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and its international obligations are, in part, domestically implemented in §§ 2340–2340A of the US Code. Section 2340 sets a high benchmark as it defines torture as ‘an act … specifically intended to inflict severe physical or mental pain or suffering … upon a person within his custody or physical control’. Memorandum 20 claims that this standard will not be reached ‘so long as any of the proposed strategies are not specifically intended to cause severe physical pain or suffering or prolonged mental harm’.

This then raises the issue of responsibility for conduct that falls short of torture as defined under US law, but that nevertheless constitutes cruel, inhuman or degrading treatment or punishment, which is prohibited under the Convention against Torture and by the US Constitution. On ratification, the US entered a reservation to the Convention against Torture to the effect that it would prevent cruel, inhuman or degrading treatment only to the extent that it was obliged to under the US Constitution. As Memorandum 20 notes, the Eighth Amendment to the US Constitution proscribes the infliction of cruel or unusual punishment. However, under US domestic law, it is a complete defence to an alleged infringement of the Eighth Amendment if the perpetrator, in inflicting the cruel or unusual punishment, had a good faith legitimate governmental interest and did not act maliciously and sadistically for the very purpose of causing harm.

Furthermore, according to Memorandum 14, ‘[b]ecause the acts inflicting torture are extreme, there is [a] significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture’.

The advice in Memorandum 14 left a rather wide margin of appreciation in determining legally available interrogation techniques. In Memorandum 19, drafted on 11 October 2002, it was claimed that the available interrogation

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68 Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (‘Convention against Torture’).
71 Convention against Torture, above n 68, art 1(1); US Constitution amend VIII (‘Eighth Amendment’).
73 Beaver, above n 70, 250.
74 Ibid 233.
techniques limited ‘the ability of interrogators to counter advanced resistance’ amongst the detainees held at Guantánamo Bay. The memorandum proposed a new interrogation plan, containing three categories of interrogation techniques. Category I covered the initial interrogation, during which time ‘the detainee should be provided a chair and the environment should be generally comfortable … The use of rewards like cookies or cigarettes may be helpful’. Where the detainee was deemed uncooperative, the interrogator could yell at the detainee or use certain techniques of deception, including pretending to be an interrogator from a country with a reputation for harsh treatment of detainees.

Category II methods were to be introduced if Category I was unsuccessful. This included: the use of stress positions (like standing) for up to four hours, use of falsified documents, isolation for up to 30 days (extendable with approval of the Commanding General), deprivation of light and auditory stimuli, hooding the detainee, using 20 hour interrogations, removal of all comfort items (including religious items), removal of clothing, forced grooming such as shaving of facial hair and using individual phobias (such as fear of dogs) to induce stress.

Category III techniques were to be used ‘for the very small percentage of the most uncooperative detainees’ and only with approval of the Commanding General. They included the use of scenarios designed to convince the detainee that death or severely painful consequences were imminent for them and/or their family; exposure to cold weather or water; use of a wet towel and dripping water to induce the misperception of suffocation; and the use of ‘mild, non-injurious physical contact such as grabbing, poking … and light pushing’. A note accompanying the Category III techniques provided that ‘[a]ny of these techniques that require more than light grabbing, poking or pushing, will be administered only by individuals specifically trained in their safe application’, implying the use of more serious forms of physical contact.

The Commanding General sought approval of the new counter-resistance techniques, in order to ‘provide … interrogators with as many legally permissible tools as possible’. In approving the use of all Category II techniques (some of which are undoubtedly in violation of international law), and the Category III technique of ‘mild, non-injurious contact’, Rumsfeld noted: ‘I stand for 8–10 hours a day. Why is standing limited to 4 hours?’ Six weeks later, on 15 January 2003, Rumsfeld revoked the general permission, with Category II and III techniques only to be used on a case-by-case basis. A working group to assess interrogation practices was also convened. The ‘Working Group Report on

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77 Ibid.
78 Ibid.
80 Ibid.
81 Ibid.
Detainee Interrogations in the Global War on Terrorism’ in both draft form and final version is included in The Torture Papers.84 Memorandum 14 of The Torture Papers, on ‘Standards of Conduct for Interrogation’, suggests that action in ‘good faith’ is a complete defence to a charge of torture.85 Thus, even if an interrogator commits an act of torture, under US domestic law that interrogator is not guilty of torture if s/he can show a good faith belief that his or her actions would not result in severe physical or mental pain or suffering. This constitutes a significant deviation from accepted international practice — international law knows of no such defence to torture as it is a non-derogable prohibition with no limitation.86 The prohibition against torture in international law serves to delegitimise any national act which purports to authorise torture. Memorandum 14 may reflect the legal position on torture at a domestic level, but it says nothing about the culpability of the interrogator at international law. Where national measures exist authorising, condoning or absolving the perpetrators of torture, the perpetrator may ‘nevertheless be held criminally responsible for committing torture whether in a foreign state or in their own state under a subsequent regime’.87 Thus, any US interrogator acting on the legal advice provided in the memoranda on acceptable coercive interrogation techniques may find themselves exposed to international criminal responsibility for their actions if they are found to breach accepted international standards.

In a rather blatant act of defiance, Deputy Assistant Attorney-General John Yoo noted that, even if the US interpretations are wrong,

there is no international court to review the conduct of the United States … the United States refused to accept the jurisdiction of the ICJ (which, in any event, could hear only a case brought by another state, not by an individual) to adjudicate cases …88

He further argued that the Committee against Torture ‘can only conduct studies and has no enforcement powers’.89 In addition, ‘even if an interrogation method might violate … [the US Code], necessity or self-defence could provide justification that would eliminate any criminal liability’.90 It appears that a Deputy Assistant Attorney-General of the US was advising that immunity from

85 Bybee, ‘Memorandum to Alberto Gonzales, Counsel to the President’, above n 75, 175.
87 Prosecutor v Furundžija (Trial Chamber II Judgment), Case No IT–95–17/1–T (10 December 1998) [155].
88 Letter from John Yoo, Deputy Assistant Attorney-General, to Alberto Gonzales, Counsel to the President, 1 August 2002, in Karen Greenberg and Joshua Dratel (eds), The Torture Papers: The Road to Abu Ghraib (2005) 218, 220–1.
89 Ibid 221.
90 Bybee, ‘Memorandum to Alberto Gonzales, Counsel to the President’, above n 75, 214.
prosecution for torture for US personnel was, in effect, assured. Like much of the advice contained in the *Torture Papers*, the postulated irrelevance of international legal standards to US domestic law may need reconsideration in light of *Roper v Simmons*, the recent US Supreme Court decision on the imposition of the death penalty on juveniles. In that case the Court remarked that ‘[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation of our own conclusions’.

In establishing acceptable coercive interrogation techniques, the US Administration pushed the limits of legal interpretation in order to provide interrogators with ‘as many [legally permissible] options as possible’. It was determined that torture only covers ‘extreme acts … of an intensity akin to that which accompanies serious physical injury such as death or organ failure’, the commission of which was not to be authorised. Anything falling short of such ‘extreme acts’ would possibly constitute cruel, inhuman or degrading treatment or punishment, contrary to the *Eighth Amendment*, however immunity from criminal responsibility was ensured by the ‘good faith legitimate purpose’ defence in US domestic law. Inconsistencies between US domestic law and international law standards were expressly acknowledged and dismissed as being of no consequence in the absence of a mechanism at the international level that could effectively condemn US action. As Raimond Gaita recently noted, ‘[n]ot long ago, no one would have dreamt of publicly defending torture. It is now up for (admittedly muted) discussion’. In the process of discussing what was once morally unthinkable, but which we are now told is necessary for ‘our’ protection, Gaita notes that there is always a risk that people will ‘abandon their belief that torture is an evil that no circumstances could justify’. Instead, society may choose to replace one of its ‘deepest moral commitments’ with a belief that ‘when it is rational, morality is an adaptable set of rules or principles that serve a purpose’. One clear and regrettable consequence of the ‘coercive interrogation techniques’ debate is that ‘[t]he word *torture*, long an outcast from the discourse of democracy, is now in frequent usage’.

V CONCLUSION

As Karen Greenberg concludes, ‘[f]ear is an irrefutable catalyst’. In ‘uninflected bureaucratic prose’, the documents collected in this volume are a powerful illustration of the need for leaders who ‘flinch less from fear than from

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92 Ibid 1200.
93 Hill, above n 82, 223.
94 Bybee, ‘Memorandum to Alberto Gonzales, Counsel to the President’, above n 75, 213–14.
95 Letter from John Yoo to Alberto Gonzales, above n 88, 218–22.
96 Ibid 220.
97 Raimond Gaita, ‘Done in our Name’, *The Age* (Melbourne, Australia), 18 December 2004, Review 1.
98 Ibid.
99 Ibid.
100 Greenberg, ‘From Fear to Torture’, above n 10, xvii (emphasis in original).
101 Ibid xx.
102 Kakutani, above n 25, E1.
the loss of respect for one another'. The Torture Papers forces its reader to face the unfortunate legacy of the road to Abu Ghraib; that the abuse of power in the name of freedom and protection makes no one safe and leaves us all vulnerable.

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103 Greenberg, 'From Fear to Torture', above n 10, xx.

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