

# TORTURE TEAM: THE RESPONSIBILITY OF LAWYERS FOR ABUSIVE INTERROGATION

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Simple murders and atrocities do not constitute the gravamen of the charges in this indictment. Rather, the charge is that of conscious participation in a nationwide, government-organised system of cruelty and injustice in violation of every moral and legal principle known to all civilised nations. ...

The real complaining party at the bar in this courtroom is civilisation. But the tribunal does say that the men in the dock are responsible for their actions. Men who sat in black robes in judgement on other men. Men who took part in the enactment of laws and decrees, the purpose of which was the extermination of human beings. Men who, in executive positions, actively participated in the enforcement of these laws, illegal even under German law. The principle of criminal law in every civilised society has this in common: any person who sways another to commit murder, any person who furnishes the lethal weapon for the purpose of the crime, any person who is an accessory to the crime, is guilty. ...

How easily it can happen. There are those in our own country, too, who today speak of the protection of country, of survival. A decision must be made in the life of every nation at the very moment when the grasp of the enemy is at its throat. Then it seems that the only way to survive is to use the means of the enemy, to rest survival upon what is expedient, to look the other way. Well, the answer to that is: survival as what? A country isn’t a rock. It’s not an extension of

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one's self. It's what it stands for. It's what it stands for when standing for something is the most difficult.

Before the people of the world, let it now be noted that here, in our decision, this is what we stand for: justice, truth and the value of a single human being.<sup>1</sup>

## I INTRODUCTION

Many of you will recognise the closing scene from the 1961 Oscar-winning movie *Judgment at Nuremberg*, starring Spencer Tracey as Judge Dan Haywood handing down the judgment of a United States military tribunal in a trial against Nazi lawyers. The principle underlying the judgment was simple but significant: any person who furnishes the lethal weapon for the purpose of the crime may be guilty of the crime, and that can include the lawyer who furnishes legal advice.

The film was largely based on a real series of trials held in 1947 under the auspices of the US military tribunal in Nuremberg, known as the '*Justice Trials*'.<sup>2</sup> The case of *US v Altstoetter* was later made into a film, in which the chief consultant to the writer, Abby Mann, was none other than Telford Taylor, who was the chief prosecutor in the *Justice Trials* and later Professor of Constitutional Law at Columbia Law School. To be sure, and this is to be stressed, it would be entirely wrong to draw a substantive analogy between what happened in Germany in the 1930s and 1940s and what has been happening more recently in the prosecution of the 'war on terror'. What is pertinent, however, is to consider the underlying principle: in what circumstances might a lawyer cross the line that separates bad legal advice from unprofessional (or unethical) legal advice, or the line that separates unprofessional advice from advice that may give rise to criminal responsibility?

Against the background of detainee abuse at Guantánamo Bay, watching *Judgment at Nuremberg* again after a gap of many years prompted a number of questions. What had motivated Telford Taylor and his colleagues — ironically enough in the US military — to go down the path of trying to make an example of the lawyers that the US military considered to be most responsible for the heinous crimes that had taken place? Could the principle apply to the most senior Administration lawyers who had drawn up, approved and overseen the application of new interrogation techniques that violated international laws?

## II THE PROSCRIPTION ON TORTURE AND THE MEMO OF 2 DECEMBER 2002

In 2005, I published a book entitled *Lawless World*.<sup>3</sup> It described how the Bush Administration, often assisted by the Blair Government in Britain, had systematically undermined a great many rules of international law that the US had done so much to put in place. One chapter of that book addressed

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<sup>1</sup> Judge Dan Haywood in Stanley Kramer (dir), *Judgment at Nuremberg* (1961) (author's transcription).

<sup>2</sup> *US v Altstoetter et al*, reported in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Order No 10: Nuernberg, October 1946–April 1949* (1951) vol III, 3 ('*Justice Trials*').

<sup>3</sup> Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2005).

Guantánamo Bay, how the Administration had led the US military into an embrace of cruelty in the name of military necessity. In so doing, the Administration abandoned President Lincoln's notable determination, made in 1863, that 'military necessity does not admit of cruelty'.<sup>4</sup> This is reflected in a memo dated 27 November 2002, written by William 'Jim' Haynes II, the General Counsel to the US Secretary of Defense, and addressed to Mr Rumsfeld. Entitled 'Counter-Resistance Techniques', Mr Haynes recommended that the Secretary of Defense should authorise 15 new techniques of interrogation.<sup>5</sup> A few days later, on 2 December 2002, Mr Rumsfeld approved that recommendation. Alongside his signature he wrote: 'I stand for 8–10 hours a day, why is standing limited to 4 hours?'<sup>6</sup> This scrawled response to one of the recommended interrogation techniques — the use of 'stress positions', standing for periods of up to four hours — has given the memo a certain notoriety.

My new book, *Torture Team*,<sup>7</sup> tells the real story behind that memo, and I will address some of the key issues raised by the memo. What were the true circumstances in which it was prepared? What was the real role of the senior lawyers in the Administration? And what might be the true nature and extent of their responsibility for the abuse that followed?

After the Second World War, the US led the world in creating a new system of international rules. The United Nations was created and, with it, new norms of international law to protect the fundamental rights of all persons. The *Nuremberg Charter*<sup>8</sup> contributed to the development of international criminal law, followed shortly by the progressive development of international humanitarian law through the *Geneva Conventions*.<sup>9</sup> Common art 3 of those Conventions outlaws the use of techniques of interrogation which amount to cruelty, or abuses against

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<sup>4</sup> See *Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War (Lieber Code)* (1863) art 16.

<sup>5</sup> William J Haynes II, 'Memo 21: Counter-Resistance Techniques' (27 November 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 236 ('Rumsfeld Memo').

<sup>6</sup> *Ibid.*

<sup>7</sup> Philippe Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (2008) ('*Torture Team*').

<sup>8</sup> *Charter of the International Military Tribunal*, annexed to the *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 UNTS 280 (signed and entered into force 8 August 1945).

<sup>9</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively, '*Geneva Conventions*').

human dignity, or torture. In 1984, the UN adopted the *Torture Convention*,<sup>10</sup> criminalising torture and complicity and participation in torture, and putting in place an elaborate system of universal criminal jurisdiction designed to snuff out the places of refuge that may be available to the torturer and their aides. That Convention caused the House of Lords to rule that Senator Pinochet was not entitled to claim immunity from the jurisdiction of the English courts in relation to acts of torture committed during his time as Head of State of Chile.<sup>11</sup> It opened the door to more widespread enforcement of international criminal laws.

This is an impressive body of international rules, one which had coalesced by the mid-1980s into an absolute prohibition on torture in *all* circumstances. Nevertheless, the events of 11 September 2001 have undermined the broad acceptance of that general prohibition. They have opened the door to a new path, as reflected in the Rumsfeld Memo. On their face, the techniques approved that day are plainly incompatible with common art 3 of the *Geneva Conventions* and with the *Torture Convention*, giving rise to the claim that war crimes have been committed. The list of requested techniques was divided into three categories, ranging from Category 1 (shouting) to Category 2 (nudity, forced grooming, use of dogs and so on), right up to Category 3 (showing, poking and the use of water to create the misperception of suffocation, more commonly nowadays known as waterboarding).<sup>12</sup> These techniques had, until that moment, been prohibited by the *US Army Field Manual* FM 34–52,<sup>13</sup> as clearly in violation of the *Geneva Conventions*. Yet the Rumsfeld Memo stated:

I have discussed this with the Deputy [Mr Wolfowitz], Doug Feith [Undersecretary of Defense for Policy] and with General Meyers [Chairman of the Joint Chiefs of Staff]. I believe that all join in my recommendation that, as a matter of policy, you authorize the Commander of USSOUTHCOM to employ, in his discretion, only categories I and II and the fourth technique listed in category III ('Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing').<sup>14</sup>

The remaining three techniques, including waterboarding, were not authorised for blanket use, although they were left open for subsequent use on a case-by-case basis.<sup>15</sup> How did this document emerge? It was first made public on 22 June 2004.<sup>16</sup> The context was the effort of the Administration to respond to the scandal that was engulfing it following publication of the images of abuse at Abu Ghraib in Iraq. The document was presented at a press conference by two of

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<sup>10</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 39/46, UN GAOR, 39<sup>th</sup> sess, 93<sup>rd</sup> mtg, UN Doc A/RES/39/46 (10 December 1984), adopting the text of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*Torture Convention*').

<sup>11</sup> *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147.

<sup>12</sup> See Jerald Phifer, 'Memo 19: Request for Approval of Counter-Resistance Strategies' (11 October 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 227.

<sup>13</sup> *US Army Field Manual* FM 34–52 (1992), ch 1 (Prohibition against the Use of Force).

<sup>14</sup> Haynes, Rumsfeld Memo, above n 5, 237.

<sup>15</sup> *Ibid.*

<sup>16</sup> Alberto Gonzales et al (Press Briefing, 22 June 2004) <<http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>> at 23 September 2008.

the most senior lawyers in the Administration, Jim Haynes (author of the Rumsfeld Memo) and Alberto Gonzales (who was at that time the White House Counsel to President Bush and later became Attorney General).

Along with the Rumsfeld Memo, a number of other documents were also released for the first time. The documents of significance can be grouped into three categories. The first constituted a set of documents attached to the Rumsfeld Memo. Aside from the list of techniques, they comprised: a legal opinion from the Staff Judge Advocate at Guantánamo Bay, Diane Beaver, signing off on the new techniques;<sup>17</sup> the formal request from the Commander of Joint Task Force 170 at Guantánamo Bay, Major General Mike Dunlavey, a judge and two-star Reserve intelligence officer, appointed by Mr Rumsfeld to head the interrogations at Guantánamo Bay;<sup>18</sup> and a document requesting further legal review of these techniques by the Commander of the US Southern Command, General James T Hill.<sup>19</sup>

The second category constituted a document containing the full text of President Bush's decision of 7 February 2002, determining that none of the detainees at Guantánamo Bay could claim rights under any of the *Geneva Conventions*, including under common art 3.<sup>20</sup>

The third category was comprised the now-infamous Torture Memo, the legal opinion written on 1 August 2002 and signed by Jay S Bybee, head of the Office of Legal Counsel of the Department of Justice, but largely written by his deputy, John Yoo, on leave from Berkeley Law School (to which he has now returned).<sup>21</sup>

### III THE ADMINISTRATION'S NARRATIVE

When Haynes and Gonzales stood before the press on 22 June 2004 in the Old Executive Office building next to the White House, they presented a narrative which described the circumstances in which the Administration had authorised these new techniques of interrogation. First, the Administration had acted reasonably, with care and with deliberation, and always within the law. The second element of the Administration's narrative concerned the sources of the new techniques of interrogation. Where had the initiative come from? The Administration pointed directly to the military commander at Guantánamo Bay, Major General Dunlavey, a man Mr Haynes would later describe to the Senate

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<sup>17</sup> Diane Beaver, 'Memo 18: Legal Review on Proposed Counter-Resistance Strategies' (11 October 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 229.

<sup>18</sup> Michael Dunlavey, 'Memo 17: Counter-Resistance Strategies' (11 October 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 225.

<sup>19</sup> James T Hill, 'Memo 16: Counter-Resistance Techniques' (25 October 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 223.

<sup>20</sup> George W Bush, 'Memo 11: Humane Treatment of al Qaeda and Taliban Detainees' (7 February 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 134 ('Presidential Decision').

<sup>21</sup> Jay S Bybee, 'Memo 14: Standards of Conduct for Interrogation under 18 USC §§ 2340–2340A' (1 August 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 172 ('Torture Memo').

Judiciary Committee as an ‘aggressive Major General’.<sup>22</sup> The implication was that the techniques weren’t imposed or encouraged by the Pentagon or by the Department of Defense. They came from the bottom up.

The third element of the Administration’s account concerned the legal justification for the new interrogation techniques. This was not the result of legal positions taken by politically appointed lawyers in the upper echelons of the Administration, and certainly not the Department of Justice. The legal advice on which the Administration had relied was the legal advice of Beaver dated 11 October 2002.<sup>23</sup> It had not relied on the Department of Justice’s Torture Memo of 1 August 2002, written by Bybee and Yoo, which was only a stargazing exercise.<sup>24</sup> That document redefined physical torture to encompass only those acts which gave rise to pain equivalent to that felt with death or serious organ failure.<sup>25</sup> That, said the Administration, was not the legal advice on which it had relied.<sup>26</sup>

The fourth and final element of the Administration’s official narrative was to make clear that the provisions relating to Guantánamo Bay had no bearing on the events at Abu Ghraib or elsewhere. Mr Gonzales went out of his way to set the record straight about this. The abuses at Abu Ghraib were the result of a few bad eggs down at Abu Ghraib, and totally unconnected to legal memoranda or decisions taken by the Administration.<sup>27</sup>

#### A Exploring the Narrative

A careful review of these documents — perhaps with the eye of the barrister — suggested something problematic about the narrative being spun by the Administration. When I first read the transcript of the press conference given by Mr Haynes and Mr Gonzales, it struck me that they were acting as advocates, that they were speaking to a common and carefully prepared script which articulated a particular narrative, from which the four points I have just described had emerged. So I decided that I would try to track down and meet the key individuals who were involved in the decision-making process. I wanted to establish — on the basis of their words — what had really happened, rather than what the Administration was seeking to have us believe had happened.

Over a period of time, I spoke with almost all of the key players involved. It is a testament to the nature of modern American society that an outsider can cold-call General Meyers, the Chairman of the Joint Chiefs of Staff, and invite him for a conversation. Or meet with Doug Feith, who was number three at the Pentagon. Or find Diane Beaver, the Guantánamo Bay lawyer, who was one of the first individuals I spoke with. Or, eventually, be invited to the Pentagon on

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<sup>22</sup> Senate Judiciary Committee, *Confirmation Hearing on the Nomination of William James Haynes II To Be Circuit Judge for the Fourth Circuit*, 109<sup>th</sup> Congress, Washington DC, 11 July 2006, 49, available from <<http://judiciary.senate.gov/resources/109transcripts.cfm>> at 23 September 2008.

<sup>23</sup> Beaver, above n 17.

<sup>24</sup> Bybee, Torture Memo, above n 21.

<sup>25</sup> Ibid.

<sup>26</sup> Sands, *Torture Team*, above n 7, 22.

<sup>27</sup> See *ibid* ch 3.

two occasions to meet with Haynes. There is an openness in American society that does not exist in Britain, or even perhaps in Australia.

### 1 *The Presidential Decision that the Geneva Conventions Did Not Apply*

One of the first people I met with was Doug Feith. Mr Feith is a lawyer, and he is probably better known for his role in promoting the 2003 Iraq War. Yet it turned out he was deeply involved in the decision-making processes that led to the Rumsfeld Memo, even if the memoir he published in 2008 makes no reference to his role.<sup>28</sup> I talked to him about the circumstances in which the *Geneva Conventions* had, in effect, been set aside. That had happened as early as February 2002, and created a legal black hole. From him I wanted to understand: what had really motivated that decision? As Mr Feith is a lawyer, he affects a lawyerly approach to these matters. On his account, he proceeded on the basis that advice had come from other lawyers in the Department of Justice and in the Department of Defense. What I managed to elicit from him, however, and which was most significant, was that the decision to do away with the *Geneva Conventions* was intended to remove constraints on interrogation. In other words, as I understood it, this reflected a pre-existing policy decision, even by February 2002, to move to abusive interrogation, a decision taken at the upper echelons of the Administration.<sup>29</sup>

I also picked up from Mr Feith something as to the connections between the Rumsfeld Memo and the Torture Memo of 1 August 2002, or at least the role of the lawyers in the Department of Justice, in authorising, behind the scenes, those techniques of interrogation. That was a significant interview for me because it confirmed what many instinctively believed (but which the Administration has denied): namely, that there was a relationship between the desire to remove constraints on interrogation, on the one hand, and the effectiveness of the *Geneva Conventions*, on the other.

### 2 *The Advice of Diane Beaver*

At around the same time I spoke with Diane Beaver. She was the Staff Judge Advocate at Guantánamo Bay from June 2002. She went to Guantánamo Bay at the same time it was discovered that Detainee 063, Mohammed al-Qahtani, might be the 20<sup>th</sup> September 11 hijacker. He had sought entry to the US in August 2001, shortly before the attacks of September 11, but that had been denied and he was removed from the US. He was caught a few months later, in November 2001, in Afghanistan and shipped out to Guantánamo Bay at the end of January 2002. Six months later, in June 2002, he was discovered to be the same man who had gained entry to the airport in Orlando, allegedly at the same time that Mohamed Atta was seen on video camera, waiting in the arrivals lounge for someone to arrive.

Beaver had no real background in international humanitarian law or any expertise in the *Geneva Conventions* or the law of interrogations. She had not previously given serious advice on these issues, and had been brought in to

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<sup>28</sup> Douglas Feith, *War and Decision: Inside the Pentagon at the Dawn of the War on Terrorism* (2008).

<sup>29</sup> See Sands, *Torture Team*, above n 7, ch 5.

Guantánamo Bay from the torts department of the Pentagon.<sup>30</sup> Yet it was she who was asked to sign off on this most important of decisions, the use of new techniques of interrogation.

Beaver described to me the circumstances in which she wrote her legal advice. It was a partial story, perhaps, and no doubt there is more that will come out. Yet the essence of her story was significant. It indicated, on her account, that she was first told to provide advice verbally. If that had happened, there would have been no paper trail. She told me how she decided — in order to protect herself, in the expectation that any written legal advice she wrote would be subject to higher level review — to insist on putting her advice in writing. Beaver's game plan was to get her advice up the chain of command, recognising her own limitations — rather honestly, I thought — in the hope that, in the military legal structure, someone higher up would express a more informed, knowledgeable or experienced view.

As Beaver was writing her legal memo — she was given four days to do it — she tried to get help from the General Counsel of the Joint Chiefs of Staff, from the lawyer at US Southern Command in Miami, from the military lawyers' training school and from various other lawyers. It seems no one was willing to assist. And she was stuck with the Presidential Decision on the *Geneva Conventions*.<sup>31</sup> As she described, when she went to the pages of the rule book on military interrogations, they were gone because the *Geneva Conventions* had gone. Who was she, a lowly, entry-level lawyer, to second-guess the decision of the President? That would have been insubordination. As she told me that story, I understood the circumstances of the difficulty in which she found herself, recognising also that the legal advice would go up the chain of command and more senior lawyers would eventually have an opportunity to review her work.

Her advice is awful. I thought it was awful when I first read it; I still think it is awful today. But I understand the circumstances in which Beaver felt compelled to write it, circumstances in which, as she described to me: they were getting information of intelligence spikes; they believed a new attack was coming; and they considered that Mohammed al-Qahtani, who had until then been interrogated unsuccessfully using the normal military techniques of interrogation by rapport-building, had information that could help protect the US. I could understand all of that. But, even more, I came to understand the real circumstances in which she wrote her advice, when she described to me what had not yet fully emerged into the public domain: the visit to Guantánamo Bay in late September 2002, just a few days before she wrote her legal advice, of the most senior lawyers in the Administration. On her account, Haynes, Gonzales and David Addington (the General Counsel to the Vice-President at the time, now his Chief of Staff) came to Guantánamo Bay. These three lawyers — President Bush's lawyer, Dick Cheney's lawyer, Donald Rumsfeld's lawyer — fly down for a day, on 25 September 2002, and the message they leave to Beaver is: do what needs to be done.<sup>32</sup> Put yourself in Diane Beaver's position. Imagine the impression that is given when you are a lawyer of her limited experience, and you receive a visit from those three gentlemen.

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<sup>30</sup> Ibid ch 8.

<sup>31</sup> Bush, Presidential Decision, above n 20.

<sup>32</sup> Ibid 76.

3 *Political Appointments*

Beaver's story was essentially confirmed to me in my conversations with Dunlavey, who also described how he was handpicked for the job by Rumsfeld and by Feith, how he had been interviewed by Jim Haynes, and how his background in interrogation was essentially what cast him as the right person for the job.<sup>33</sup> Aspects of both their accounts were later confirmed to me when I met with General Hill, Commander of US Southern Command for the whole of the Southern hemisphere — a thoughtful man, obviously troubled by these new techniques of interrogation.<sup>34</sup> From him I learned more about the circumstances in which he had insisted that there be Department of Justice sign-off on these new techniques of interrogation. I went through the list of techniques with him, one by one. At some point I asked him whether he would ever be comfortable with these techniques being used on Americans. He told me he would not. If they couldn't be used on Americans, I enquired, how could they be used on others? That was a question for General Meyers, he responded, because it was up there in Washington that the decision was taken.

So I tracked down General Meyers, Chairman of the Joint Chiefs of Staff from 2001–05, who was possibly the most powerful military man in the world.<sup>35</sup> I met with him at Georgetown Law School. I thought him a genial and decent man, but formed the impression that he had been out of his depth in the decision-making process. From our conversation, I understood that General Meyers had not fully appreciated what had been decided in relation to the *Geneva Conventions*. He thought they had decided to apply the *Geneva Conventions* at Guantánamo Bay, and had not appreciated that the President's decision was to precisely the opposite effect. He thought that all the new techniques approved for use on al-Qahtani had come from the *US Army Field Manual*. So we went through the list of techniques, one at a time. As we got to forced grooming, removal of clothing and use of dogs, he became increasingly uncomfortable. I should speak with Jim Haynes, he said. Eventually I did. In the meantime, it is worth recalling that the new techniques were approved for use on 23 November 2002, even before there was formal written sign-off.<sup>36</sup> The Rumsfeld Memo — the authorising document — actually post-dated the beginning of their use. For some 54 days, al-Qahtani was subject to all 15 of the techniques of interrogation. I obtained his interrogation log and later provided a copy to a clinical psychiatrist in London for an opinion as to whether his treatment constituted severe mental or physical pain and suffering, the test for torture in the *Torture Convention*.<sup>37</sup> I describe in the book her careful, considered conclusion. If you were to put 12 clinical psychiatrists in a room, she said, and give them this document, they would all conclude that this crossed the threshold of torture.<sup>38</sup> Most striking for her was the cumulative use of techniques designed to humiliate and subjugate over an extended period of time.

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<sup>33</sup> Sands, *Torture Team*, above n 7, 50.

<sup>34</sup> *Ibid* ch 10.

<sup>35</sup> *Ibid*.

<sup>36</sup> Haynes, Rumsfeld Memo, above n 5, 237.

<sup>37</sup> *Torture Convention*, above n 10, art 1.

<sup>38</sup> See Sands, *Torture Team*, above n 7, ch 10.

#### 4 *The Decision-Making Process*

What I discovered was that the new techniques were authorised in circumstances in which the traditional decision-making processes were bypassed. I picked up, from one interview, a nugget which suggested that once General Hill's request had reached General Meyers, Haynes had intervened to short-circuit the decision-making process.<sup>39</sup> That has now been confirmed in congressional hearings that took place in June 2008, after my book was published.

When the documents reached General Meyers' office, he gave them to his lawyer, Jane Dalton, who began the usual departmental-wide policy and legal review of the techniques, at which point more senior and experienced military lawyers became involved. Some expressed a strongly negative view. But then Mr Haynes intervened and brought to an early end the review that would normally have taken place. Those who actually knew the rules — in the military, in the Department of State — were cut out of the process.

What I also established — without ambiguity, in my view — was that by the time Mr Haynes intervened at that stage, he had no need to rely on Beaver's legal advice. By then he already had knowledge of the contents of the legal advices written by the Department of Justice, by Mr Yoo and Mr Bybee. When he accompanied Mr Addington down to Guantánamo Bay on 25 September 2002, he already knew the Department of Justice had signed off on the new techniques. In the US system of government, that was dispositive. Beaver would make a useful scapegoat.

In mid-December, as al-Qahtani was being abused, word reached the Pentagon as to what was going on. Those at Guantánamo Bay who objected contacted Alberto Mora, the General Counsel of the Navy, in the Pentagon down the corridor from Jim Haynes. He intervened directly with Jim Haynes, in circumstances which eventually led to the end of the use of these techniques on 15 January 2003 in relation to al-Qahtani.<sup>40</sup>

#### B *Refuting the Administration's Account*

The upshot of all of this was that, by speaking to people directly, I was able to reach a conclusion that the narrative the Administration had spun in June 2004 was false. First, the Administration did not move with care and deliberation. The decision at a policy level to move to harsh techniques of interrogation, if not torture, was taken as early as December 2001. The law followed the prior adoption of a policy that was already fixed.

Second, and most significantly, the initiative did not come from the ground, from Guantánamo Bay. It came from the top, the very top. That too has now been confirmed as a result of hearings that took place in June and July of this year, after the book came out, establishing that Mr Haynes was already looking for new techniques of interrogation in July 2002, more than three months before Beaver was called upon to give her legal advice.

Third, the legal justifications for the new techniques did not come from Guantánamo Bay or from Beaver. It was plainly the result of the legal positions

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<sup>39</sup> Ibid ch 11.

<sup>40</sup> Ibid chs 16, 17.

that were taken by the Department of Justice lawyers and in particular reliance on the two memoranda of 1 August 2002.<sup>41</sup> I have mentioned that I had had two meetings with Haynes. He was the last person I spoke with.

Haynes was the only person who consistently said ‘no’ to my requests for an interview. A journalist friend suggested I write what she called a ‘Bob Woodward letter’ — just three paragraphs: one, here’s the list of all the people I’ve spoken to; two, here are the three worst things they say about you; three, this is your last opportunity to give me your account. It seems to have worked. The doors to the Pentagon magically opened, and the first of two lengthy conversations took place.<sup>42</sup> The agreement with Haynes was that the conversations were off the record, but the fact of our meetings was not. In the book, I was therefore able to refer to the fact of our meetings, but not what he and I talked about. I can say that all of the conclusions — today and in the book — take full account of everything that Mr Haynes said to me. The astute reader can form her own view.<sup>43</sup>

Fourth, my account knocks on the head the Administration’s claim denying a relationship between Guantánamo Bay and the events at Abu Ghraib.<sup>44</sup> Dunlavey’s successor, Major General Geoffrey Miller, and Beaver travelled to Iraq and Abu Ghraib in August 2003. They met with, amongst others, General Sanchez, who on 14 September 2003 adopted new regulations on interrogations.<sup>45</sup> These included many of the techniques that were authorised by the Rumsfeld Memo: hooding, stress positions, removal of clothing, use of dogs.<sup>46</sup> These are the same images that we associate with the pictures of abuse at Abu Ghraib. A month later, the abuses at Abu Ghraib began. The Inspector General of the Department of Defense at the Pentagon has concluded, in a most damning report published in 2006, that there was a migration from Guantánamo Bay to Abu Ghraib of these new techniques.<sup>47</sup>

All of this raises fundamental questions. How could the lawyers, who were involved at every stage of the decision-making process, have acted as they did? How could they have determined that the rules reflected in common art 3 of the *Geneva Conventions* were not applicable *at all* at Guantánamo Bay? How could they have been involved in the preparation of the techniques? And how could they have been involved in the authorisation?

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<sup>41</sup> John Yoo, ‘Memo 15: Letter 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.

<sup>42</sup> *Ibid* ch 27.

<sup>43</sup> *Ibid* 268.

<sup>44</sup> *Ibid* ch 19.

<sup>45</sup> Ricardo Sanchez, ‘CJTF-7 Interrogation and Counter-Resistance Policy’ (14 September 2003) <<http://www.aclu.org/FilesPDFs/september%20sanchez%20memo.pdf>> at 23 September 2008. These techniques were superseded with a new memorandum on 12 October: Ricardo Sanchez, ‘CITF-7 Interrogation and Counter-Resistance Policy’ (12 October 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 460.

<sup>46</sup> Haynes, Rumsfeld Memo, above n 5; Phifer, above n 12.

<sup>47</sup> Inspector General for the Department of Defense, *Review of Department of Defense Investigations on Detainee Abuse* (Department of Defense Report No 06-INTEL-10, 25 August 2006) 23.

We know the story. In the end, real responsibility centres on a small group of politically-appointed lawyers, adhering to a particular ideology as to America's place in the world and its relationship with norms of international law. The lawyers who knew the rules, who had lengthy experience on these issues, were circumvented. The military lawyers were cut out of the process. The Department of State lawyers — William Taft and his team — were cut out of the process. The normal checks and balances were avoided, with care and deliberation.

What might be the consequences of all this?

### C The Aftermath

Earlier this year, extracts from my book were published by *Vanity Fair*.<sup>48</sup> I have learnt a great deal more about the power of that publication since that article came out. Within a few days of that article being published — it came out on 2 April 2002 — the Chairman of the House Judiciary Committee, Congressman John Conyers, announced a series of hearings on the role of senior Administration lawyers in the development of the new interrogation techniques.<sup>49</sup> I have testified twice before that Committee, and once before the Senate Judiciary Committee. There have also now been hearings before the Senate Armed Services Committees. Around all of the hearings is a growing acceptance that something has gone wrong and of the necessity to establish the facts and identify the people who are truly responsible for what has happened.<sup>50</sup>

More significantly, there is broad recognition that war crimes were committed in the interrogation of al-Qahtani. You do not need to rely on my word for that. The Judge Advocates General of the Army, Navy, Air Force, and the Marines have testified before the US Congress, and when asked whether war crimes — violations of common art 3 — had occurred, they unanimously assented to that view.<sup>51</sup> You can also take that from an important judgment of the US Supreme Court. In June 2006, the Supreme Court famously ruled in the case of *Hamdan v Rumsfeld*<sup>52</sup> that the President and the Administration had got it wrong. The *Geneva Conventions* did apply at Guantánamo Bay, including their common art

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<sup>48</sup> Philippe Sands, 'The Green Light', *Vanity Fair* (Boone, Iowa, US) May 2008, 218.

<sup>49</sup> John Conyers Jr, Chairman, US House Judiciary Committee, 'Judiciary Committee To Explore Administration Approval of Torture Techniques' (Press Release, 11 April 2008) <<http://judiciary.house.gov/news/041108.html>> at 23 September 2008.

<sup>50</sup> See, eg, Senate Judiciary Committee, *Coercive Interrogation Techniques: Do They Work, Are They Reliable, and What Did the FBI Know about Them?*, 110<sup>th</sup> Congress, Washington DC, 10 June 2008 (Statement of Senator Patrick Leahy, Chairman) <[http://judiciary.senate.gov/hearings/testimony.cfm?id=3399&wit\\_id=2629](http://judiciary.senate.gov/hearings/testimony.cfm?id=3399&wit_id=2629)> at 23 September 2008; Senate Judiciary Committee, *Coercive Interrogation Techniques: Do They Work, Are They Reliable, and What Did the FBI Know about Them?*, 110<sup>th</sup> Congress, Washington DC, 10 June 2008 (Statement of Senator Dianne Feinstein) <[http://judiciary.senate.gov/hearings/testimony.cfm?id=3399&wit\\_id=2626](http://judiciary.senate.gov/hearings/testimony.cfm?id=3399&wit_id=2626)> at 23 September 2008; US Senate Committee on Armed Services, *Hearing on the Treatment of Detainees in US Custody* (Colonel Steven M Kleinman, Former Director of Intelligence, Personnel Recovery Academy, 25 September 2008) <<http://armed-services.senate.gov/statemnt/2008/September/Kleinman%2009-25-08.pdf>> at 23 September 2008.

<sup>51</sup> Evidence to US Senate Committee on Armed Services, *Military Commission in Light of the Supreme Court Decision in Hamdan v Rumsfeld*, 109<sup>th</sup> Congress, Washington DC, 13 July 2006, 42 (Response to exchange between Senator Lindsey Graham and Major General Jack L Rives, Judge Advocate General of the US Air Force) (copy on file with author). See also Sands, *Torture Team*, above n 7, 213.

<sup>52</sup> 548 US 557 (2006).

3.<sup>53</sup> All of the detainees — al Qaeda, Taliban, everyone — had minimal rights under that provision. That ruling opened the door to war crimes allegations, a point made powerfully by Justice Kennedy in his concurring but separate opinion, raising the spectre of war crimes.<sup>54</sup> Four months after the Administration received that judgment, it pushed through Congress the *Military Commissions Act of 2006*.<sup>55</sup> Buried in the heart of that 2006 legislation is a provision purporting to grant immunity to persons associated with the development, authorisation or application of these techniques of interrogation in the period between 11 September 2001 and 31 December 2005.<sup>56</sup>

#### IV REVISITING NUREMBERG: THE *JUSTICE TRIALS* AND LAWYERS' RESPONSIBILITY

There can be little doubt in relation to al-Qahtani — and, no doubt, others also — that war crimes have been committed. Who is responsible for these crimes? Can the lawyers be responsible for those war crimes? That brings us back to the film *Judgment at Nuremberg* and the *Justice Trials*.<sup>57</sup> I thought it would be interesting to find out a bit more about Josef Alstötter, the lead defendant in the *Justice Trials*, and did what I could to get hold of many documents on the case, such as the written pleadings and the oral arguments. With the help of the archivist at the Holocaust Museum in Washington, I eventually managed to gather much of this material. A number of the basic documents I could not find, however, so I tried to track down some of the lawyers who might have been involved in the case. I located Ludwig Alstötter, the son of Josef Alstötter, who was living in Nuremberg, a retired partner in a law firm in that town. Eventually I met with him.

To this day, Ludwig believes that his father was wrongly convicted.<sup>58</sup> He described him as an ordinary lawyer, reputable, who had been to the best law schools, was deeply religious and had simply been doing his job as the Permanent Secretary in the Civil Justice Division in the Reich Ministry for Justice. As ordinary a person as you or I, I suppose, or some of the lawyers I met in relation to the work that went into preparing the Rumsfeld Memo. When I got to his law office in Nuremberg and went into the conference room, he had set out all of the documents from his father's trial. He had kept everything. At the time, he had been a 15 year old boy; he had never talked to anyone about the proceedings and he now felt he wanted to set the record straight about what his father had done or not done. What I was looking for were the underlying documents that I could not find in Britain or in the US. Josef Alstötter was acquitted of war crimes and crimes against humanity, but he was convicted of membership of an illegal organisation, the Schutzstaffel ('SS') with knowledge of its illegal acts.

The judgment was important because it established — apparently for the first time in proceedings such as that — the principle that lawyers and judges in a

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<sup>53</sup> Ibid 49–72.

<sup>54</sup> Ibid 17–19.

<sup>55</sup> 10 USC (2008).

<sup>56</sup> *Military Commissions Act of 2006*, 10 USC § 8 (2008).

<sup>57</sup> *Justice Trials*, above n 2.

<sup>58</sup> Sands, *Torture Team*, above n 7, ch 25.

governmental regime bear a particular responsibility for the regime's crimes. Mr Altstötter had the misfortune, because of his name, to be the first defendant listed amongst the 16. He was not the most important, or the worst, although he was one of 10 convicted (four were acquitted, one committed suicide and there was one mistrial). He was a well-regarded member of society and a high-ranking lawyer. He joined the Reich Ministry of Justice in 1943, where he served as the Chief of the Civil Law and Procedure Division. He became a member of the SS in 1937, for which the US military tribunal found him guilty of membership of a criminal organisation.

It was not, however, membership alone of that organisation that caused him to be convicted. The Tribunal convicted Joseph Altstötter largely on the basis of two letters, indicating his knowledge of the crimes of the SS. I took Ludwig Altstötter to a striking passage in the Tribunal's judgment in his case: 'he gave his name as a soldier and a jurist of note and so helped to cloak the shameful deeds of that organization from the eyes of the German people'.<sup>59</sup> I asked Ludwig whether he had copies of those letters. He did. He went to the neat piles on his desk and found copies of the originals. The first letter was dated 3 May 1944, from the Chief of the Intelligence Service to Joseph Altstötter, asking him to intervene with the regional court of Vienna to stop it from ordering the transfer of Jews from the camp at Thereisenstadt back to Vienna to appear as witnesses in court hearings. The second letter was Altstötter's response of a month later to the President of the Court in Vienna: 'For security reasons these requests cannot be granted,' he wrote. The US military tribunal proceeded on the basis that Altstötter would have known what the camps were for and what the consequences of his letter to the President of the Tribunal in Vienna would have been. He was convicted and served five years in prison.

The claim to 'security reasons' reminded me of the words used by Haynes, when he spoke at his press conference on 22 June 2004, to explain the circumstances in which he wrote his memorandum to Mr Rumsfeld. 'Military necessity can sometimes allow warfare to be conducted in ways which might otherwise infringe on the applicable articles of the *Convention*,' he said.<sup>60</sup> Mr Haynes provided no legal authority for that proposition, and he cannot do so. Military necessity cannot be used to justify a departure from the standards reflected in common art 3 or the obligations set forth in the *Torture Convention*.

Testing the proposition of whether the senior Administration lawyers could be criminally responsible for their actions in authorising interrogation techniques that may amount to war crimes would go beyond the scope of this paper. So I will cut to the chase and describe another visit that I made, this time to a European judge and a European prosecutor.<sup>61</sup> In the book I have anonymised these two individuals, for obvious reasons. Visiting with them in the capital city of a European NATO member, I laid out all of the materials I had gathered, and asked: 'In your system of law, in accordance with the applicable international norms, is there a basis for investigating the lawyers for international crimes?' We considered art 4 of the *Torture Convention*, which criminalises complicity or participation in torture (similar principles may govern the acts of accessories to

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<sup>59</sup> *Justice Trials*, above n 2.

<sup>60</sup> Gonzales et al, above n 16.

<sup>61</sup> Sands, *Torture Team*, above n 7, ch 26.

violations of the standards reflected in common art 3 of the *Geneva Conventions*).

The European judge and the prosecutor were particularly struck by a provision in the *Military Commissions Act of 2006*, which purported to provide an immunity from investigation or prosecution in the US for any person associated with the development and application of ‘coercive’ interrogation techniques.<sup>62</sup> The prosecutor told me the inclusion of such a provision was ‘very stupid’ because it would make it much easier for investigators outside the US to justify their own investigations, since war crimes allegations would not be investigated in the US. This is one of the trip-wires for enabling foreign prosecutors or foreign judges to intervene.<sup>63</sup> It is a matter of time, the judge explained, these things take time and then something unexpected happens when one of the lawyers travels to the wrong place. This judge and this prosecutor had no doubt that, on the basis of the facts laid out before them, the clear involvement of senior Administration lawyers in the decision-making process gave rise, at the very least, to a basis for investigating accessory involvement in war crimes.

## V CONCLUSION

In our systems of government — in constitutional democracies in Australia, Britain and the US — lawyers are guardians of legality. Many of us act for governments or other clients who ask us to advise or sign off on things that may raise concerns. We ask ourselves: what are the limits of what we can do? Our responsibility is not only to our client. It extends beyond that, to the system of justice and the rule of law that underpins our system, as Malcolm Fraser described in comments he delivered at the Human Rights Law Resource Centre, Melbourne.<sup>64</sup> It is a system of justice to which we owe a particular responsibility. If we cross a line, if we rubber stamp a policy that has already been predetermined, if we act on an invitation to give advice where it is known that we will merely provide the advice that our client wants, then we risk crossing the line that separates good advice from bad advice, or bad advice from unprofessional advice, or even unprofessional advice from advice that allows a crime to occur. On the basis of the materials that have already emerged, including those which have emerged in the Congressional hearings that followed publication of the book,<sup>65</sup> it seems that there may be a good basis for investigation. This is not because the actions of the lawyers discussed in *Torture Team* are in any way analogous to those associated with the defendant lawyers in

<sup>62</sup> *Military Commissions Act of 2006*, 10 USC § 8 (2008).

<sup>63</sup> This idea is consistent with the ‘principle of complementarity’, as enshrined in the *Rome Statute of the International Criminal Court*, opened for signature 17 June 1998, 2187 UNTS 3 (entered into force 1 July 2002), which emphasises that ‘the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions’: at preamble. See especially art 17(1).

<sup>64</sup> Malcolm Fraser, ‘*Torture Team: Human Rights, Lawyers, Interrogations and the War on Terror — A Response to Philippe Sands*’ (2008) 9 *Melbourne Journal of International Law* 381.

<sup>65</sup> See, eg, Senate Judiciary Committee, *Coercive Interrogation Techniques: Do They Work, Are They Reliable, and What Did the FBI Know About Them?*, 110<sup>th</sup> Congress, Washington DC, 10 June 2008 <<http://judiciary.senate.gov/hearings/hearing.cfm?id=3399>> at 23 September 2008.

the *Justice Trials*, or in the film *Judgment at Nuremberg*. Rather, their actions associated them with acts that violate standards set forth in norms of international law that were put in place in the aftermath of the Second World War — norms that provided minimum rights for all detainees and admitted of no possible exceptions. Even if those most responsible for these actions are placed at the political level — even at the very highest levels of the Administration, it seems — their lawyers were the enablers, those who furnished the legal weapon that allowed the acts to occur. But for the lawyers, the 15 techniques used on Detainee 063 would never have seen the light of day. ‘How easily it can happen’, said Spencer Tracey’s character, foreseeing a time when even in the US there would be those who would ‘speak of the protection of country, of survival [to justify using] the means of the enemy to rest survival upon what is expedient’.<sup>66</sup>

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<sup>66</sup> Judge Dan Haywood in Stanley Kramer (dir), above n 1.