BOOK REVIEW

THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, EDITED BY KAREN GREENBERG AND JOSHUA DRATEL (NEW YORK, US: CAMBRIDGE UNIVERSITY PRESS, 2005) 1283 PAGES. PRICE US$50.00 (HARDCOVER) ISBN 0521853249.

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 Ghraib*[7] 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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1 Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (1999).

2 Letter from Martin Luther King, Jr to Bishop C C J Carpenter, Bishop Joseph Durick, Rabbi Hilton Grafman, 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).

6 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).

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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[8] For a discussion of the US Government's practice of 'extraordinary renditions' — the moving of terror suspects from one country to another for interrogation purposes — see Jane Mayer, 'Outsourcing Torture' (2005) 81(1) *The New Yorker* 106.

[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.

[10] Joshua Dratel, 'The Legal Narrative' in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) xxi, xxii.

[11] Ibid.

[12] Anthony Lewis, 'Introduction' in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) xiii, xiv.

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 internment 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

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13 Ibid xiii.

14 International Committee of the Red Cross, 'Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the *Geneva Conventions* in Iraq during Arrest, Internment and Interrogation' (February 2004) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 383.

15 Antonio Taguba, 'Article 15–6 Investigation of the 800th Military Police Brigade' (March 2004) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 405.

16 Independent Panel to Review Department of Defense Detention Operations, 'Final Report of the Independent Panel to Review Department of Defense Detention Operations' (August 2004) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 908.

17 Karen Greenberg and Joshua Dratel, 'Afterword' in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 1165, 1165.

18 Affidavit of David Hicks, 5 August 2004, in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 1234, 1234–5.

19 Karen Greenberg and Joshua Dratel, 'Afterword', above n 17, 1165.

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,[20] 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'.[21] 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*[22] and the *Authorization for Use of Military Force Joint Resolution*[23] 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.[24]

This 'amped-up view of executive power'[25] 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

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20 *Declaration of National Emergency by Reason of Certain Terrorist Acts*, Proclamation No 7463, 3 CFR 263 (2002).

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).

22 50 USC §§ 1541–8 (2000).

23 *Authorization for Use of Military Force*, SJ Res 114, 107th Cong (14 September 2001) (enacted).

24 Yoo, 'Memorandum for Timothy Flanigan', above n 21, 24.

25 Michiko Kakutani, 'Following a Paper Trail to the Roots of Torture', *The New York Times* (New York, US), 8 February 2005, E1.

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 Terrorism*[27] 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

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26 Dratel, 'The Legal Narrative', above n 10, xxi.

27 Military Order, 3 CFR 918 (2002).

28 Military Order, 3 CFR 918 (2002) § 7b(2).

29 Patrick Philbin and John Yoo, 'Memorandum for William J Haynes II, General Counsel, Department of Defense: Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba' (28 December 2001) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 29.

30 339 US 763 (1950) ('*Eisentrager*').

31 Ibid 794–6.

32 Philbin and Yoo, 'Memorandum for William J Haynes II', above n 29, 37.

> 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 memoranda 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 potentially 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

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33 Ibid 36.
34 Greenberg, 'From Fear to Torture', above n 9, xvii.
35 Philbin and Yoo, 'Memorandum for William J Haynes II', above n 29, 29.
36 124 US 2686 (2004) ('*Rasul v Bush*').
37 28 USC § 2241a (2000).
38 *Rasul v Bush*, 124 US 2686, 2693 (2004).
39 Ibid 2699.
40 Dratel, 'The Legal Narrative', above n 10, xxii–xxiii.

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'.[41] 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*[42] 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 [President 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*'.[43] Shortly after this determination was made, US Secretary of State Colin Powell requested that the President reconsider his decision.[44]

In part, the Presidential decision appears to have been based on rather 'inaccurate'[45] 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*[46] in relation to the conflict in Afghanistan, on the basis that Afghanistan was a 'failed state'.[47] 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*.[48] 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.

44 See Alberto Gonzales, 'Memorandum for the President: Decision Re Application of the *Geneva Convention* on Prisoners of War to the Conflict with al Qaeda and the Taliban' (25 January 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 118, 118.

45 Colin Powell, 'Memorandum to Counsel to the President and Assistant to the President for National Security Affairs: Draft Decision Memorandum for the President on the Applicability of the *Geneva Convention* to the Conflict in Afghanistan' (26 January 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 122, 124.

46 *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 the 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 III*, above n 42; *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*').

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 … reduc[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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49 John Yoo and Robert Delahunty, 'Memorandum for William J Haynes II, General Counsel, Department of Defense: Application of Treaties and Laws to al Qaeda and Taliban Detainees' (9 January 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 38, 79.

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'.[55] 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* …[56]

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.[57]

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'.[58] 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'.[59] 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'.[60]

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*'.[61] Thus, al Qaeda detainees were not entitled to POW status.

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55 William H Taft IV, 'Memorandum to Counsel to the President: Comments on Your Paper on the *Geneva Convention*' (2 February 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 129, 129. Interestingly, Attorney-General John Ashcroft concluded his letter to the President by saying '[c]learly, considerations beyond the legal ones mentioned in this letter will shape and perhaps control ultimate decision making in the best interests of the United States of America': Letter from John Ashcroft, Attorney-General, to the President, 1 February 2002, in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 126, 127.

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.

61 George W Bush, 'Memorandum: 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, 134.

President Bush also determined that common art 3 of the *Geneva Conventions*[62] 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'.[63] 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*'.[64]

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'.[65] 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.[66]

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.[67]

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62 This article prohibits, in relation to persons taking no active part in hostilities occurring in the territory of a High Contracting Party, violence, the taking of hostages, outrages upon personal dignity and 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples'.

63 Bush, above n 61, 135.

64 Ibid.

65 Jay Bybee, 'Memorandum for Alberto Gonzales, Counsel to the President: Status of Taliban Forces under Article 4 of the *Third Geneva Convention of 1949*' (7 February 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 136, 136.

66 Ibid 143.

67 Paul Wolfowitz, US Deputy Secretary of Defense, *Order Establishing Combatant Status Review Tribunal* (2004) available at <http://www.dod.gov/news/Jul2004/d20040707 review.pdf> at 1 May 2005; Gordon England, US Secretary of the Navy, Memorandum for Distribution, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantánamo Bay Naval Base, Cuba* (2004) available at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf> at 1 May 2005. For criticism of this tribunal see Human Rights Watch, *Making Sense of the Guantánamo Bay Tribunals* (2004) <http://hrw.org/english/docs/2004/08/16/usdom9235_txt.htm> at 1 May 2005.

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*,[68] 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'.[69] 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'.[70]

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*.[71] 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*.[72] As Memorandum 20 notes, the *Eighth Amendment* to the *US Constitution* proscribes the infliction of cruel or unusual punishment.[73] 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.[74] 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'.[75]

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*').

69 18 USC § 2340 (2000) (emphasis added).

70 Diane Beaver, 'Memorandum for Commander, Joint Task Force 170: Legal Brief 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, 233 (emphasis added).

71 *Convention against Torture*, above n 68, art 1(1); *US Constitution* amend VIII ('*Eighth Amendment*').

72 See *US Constitution* amends V, VIII, XIV, as mentioned in American Bar Association, 'Report to the House of Delegates' (August 2004) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 1132, 1138.

73 Beaver, above n 70, 230.

74 Ibid 233.

75 Jay Bybee, 'Memorandum to Alberto Gonzales, Counsel to the President: 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, 214.

techniques limited 'the ability of interrogators to counter advanced resistance'[76] 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'.[77] 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.[78]

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.[79]

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'.[80] 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.[81]

The Commanding General sought approval of the new counter-resistance techniques, in order to 'provide … interrogators with as many legally permissible tools as possible'.[82] 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?'[83] 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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76 Jerald Phifer, 'Memorandum for Commander, Joint Task Force 170: 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, 227.

77 Ibid.

78 Ibid.

79 Ibid 227–8.

80 Ibid 228.

81 Ibid.

82 James Hill, 'Memorandum for the Chairman of the Joint Chiefs of Staff, Washington DC: Counter-Resistance Techniques' (25 October 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 223, 223.

83 William J Haynes II, 'Action Memo for the Secretary of Defense: Counter-Resistance Techniques' (27 November 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 237, 237.

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

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84 'Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations' (6 March 2003) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 241; 'Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations' (4 April 2003) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 286.

85 Bybee, 'Memorandum to Alberto Gonzales, Counsel to the President', above n 75, 175.

86 *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, art 5 UN Doc A/RES/217A (III) (1948); *Filartiga v Pena-Irala,* 630 F 2d 876 (2nd Cir, 1980).

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*,[91] 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'.[92]

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'.[93] 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.[94] 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.[95] 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.[96] 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'.[97] 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'.[98] 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'.[99] 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'.[100]

V CONCLUSION

As Karen Greenberg concludes, '[f]ear is an irrefutable catalyst'.[101] In 'uninflected bureaucratic prose',[102] 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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91 125 US 1183 (2005).
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'.[103] *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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