Prime Minister's meeting with President Roosevelt — Aug. 1941
Draft of Joint Declaration —

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PROPOSED DECLARATION

ALTERNATIVE VERSION / DRAFT VERSION "A"
INCORPORATING NEW PARAGRAPH PROPOSED BY
CHURCHILL IN HIS TELEGRAM NUMBER: 31

The President of the United States of America and the Prime Minister, Mr. Churchill, representing His Majesty's Government in the United Kingdom, being met together, deem it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world.

First, their countries seek no aggrandisement, territorial or other;

Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned.

Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see self-government restored to those from whom it has been forcibly removed.

Fourth, they will endeavour, with due respect to their existing obligations, to further the enjoyment by all peoples of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity.

Fifth, they support the fullest collaboration between all Nations in the economic field with the object of securing for all peoples freedom from want, improved labour standards, economic advancement and social security.

Sixth, they hope to see established a peace, after the final destruction of the Nazi tyranny, which will afford to all nations the means of dwelling in security within their own boundaries, and which will afford assurance to all peoples that they may live out their lives in freedom from fear.

Seventh, they desire such a peace to establish for all nations freedom of the high seas and oceans.

Eighth, they believe that all of the nations of the world must be guided in spirit to the abandonment of the use of force. Because no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe that the disarmament of such nations is essential pending the establishment of a wider and more permanent system of general security. They will further the adoption of all other practicable measures which will lighten for peace-loving peoples the crushing burden of armaments.

Private Office.
August 12, 1941

Facsimile of the original draft of the Atlantic Charter, showing Winston Churchill's corrections by hand

PHILIPPE SANDS

Lawless World

America and the Making and Breaking of Global Rules from FDR's Atlantic Charter to George W. Bush's Illegal War

★ ★ ★

VIKING

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Designed by Carla Bolte

For Natalia,
and for all my students of international law

without recourse to any rules-based code or doctrine," but he is not persuaded by the concerns, and he raises the specter of international rules which are totally inadequate to meet modern challenges.

I am not persuaded by his argument. He has aligned himself with a U.S. administration that behaves as though international law does not matter, that has withdrawn from international agreements with impunity, and that is willing to bully other states which seek to promote initiatives such as the ICC and the Kyoto Protocol. The prime minister may believe that global rules matter, but ultimately his actions speak louder than his words. His actions on Iraq have degraded the international rule of law and contributed to a dangerous fiasco. They have provided legitimacy to the discredited actions of the Bush administration. They suggest a rather lesser attachment to the international rule of law than the prime minister professes.

Some will say that that these concerns are of historical interest, that the Iraq war has happened and that it is now time to move on. Unfortunately we do not have that luxury. In the run-up to the Iraq war, President Bush made clear to Tony Blair his view that Iraq should be seen as a first step. The two leaders spoke on January 30, 2003. According to a note of that conversation taken by one of Blair's foreign policy advisers, Bush said that he "wanted to go beyond Iraq in dealing with WMD proliferation, mentioning in particular Saudi Arabia, Iran, North Korea and Pakistan." The quagmire that is now Iraq may modify the approach, at least in Britain. But in the meantime there is good reason to believe that so long as Bush is in office, the validity and effectiveness of the global rules will continue to be tested.

CHAPTER NINE

Terrorists and Torturers

International law? I better call my lawyer. . . . I don't know what you're talking about by international law.

–George W. Bush, December 11, 2003

What do you do, as an international lawyer, when your client asks you to advise on the international rules prohibiting torture? Do you start with the rules, ask yourself how an international court–or your allies–might address the issue, and reach a balanced conclusion? Or do you focus on narrower issues of the relevance, applicability, and enforceability of the international rules in the national context, and reach a conclusion that you know–if you ask yourself the question–no international court would accept? Let me put it another way. Do you advise, or do you provide legal cover?

When the now notorious Abu Ghraib photographs and testimonies entered the public domain we did not know that lawyers in the U.S. Department of Justice and elsewhere in the administration had provided detailed legal advice to the U.S. government on the international torture rules. But over the weeks that followed, a rich source of leaked legal memos and opinions threw light on the logic which provided the context in which Abu Ghraib could happen. The documents argued, in short, that the international rules were inapplicable, irrelevant, or unenforceable. They suggested that interrogation practices could be defined without reference to the constraints placed on the United States by its international obligations. So long as the practice was consistent with U.S. law, it would be fine. The advice ignored the plain language of the 1984 Convention against Torture and other treaties and rules which bound the U.S. The advice ignored the definition of torture in international law, and the prohibition against torture under any circumstances. Even more outrageously, it proposed defenses, immunities, and impunity. In an effort

to limit the damage, the White House declassified and released a great deal of material, although by no means all the advice. But it turned out that the White House material had not been reviewed very carefully. Some of it was even worse than the earlier leaked material. Parts of the advice were then disavowed.

The photographs were monstrous, and so were the legal opinions. How did it come to this, at the beginning of the twenty-first century, after more than fifty years of human rights and humanitarian law? How could the government of a country so strongly committed to the rules set its lawyers on such a task? And how could it be that the lawyers would get it so badly wrong?

The "war on terrorism" has led many lawyers astray. This phony "war" has been used to eviscerate well-established and sensible rules of international law, which the U.S. has in the past supported, relied upon, and often created. In the minds of the politically appointed legal advisers the argument runs something like this: (1) The U.S. faces an unparalleled threat, presenting a clear and present danger; (2) all necessary means may be used to obtain information from captives, who are to be treated as combatants rather than ordinary criminals; and (3) international law is inapplicable and/or unenforceable and/or irrelevant, and in any case the rules of international law must be interpreted to allow a threatened state to do everything necessary to protect itself. I should make it clear that this is not the kind of legal analysis which would be applied by the vast majority of legal advisers in the U.S. State Department or the U.S. Army's Judge Advocate General's Corps, or by legal advisers to the British government or almost any other government in the world. The advice I would have expected to see would run something like this. There are two sets of international rules governing torture and interrogation practices: a first set prohibits torture; a second set provides that torture cannot be used against terrorists, whether they are combatants or criminals. The governing principle must be: Do unto others as you would have them do unto you.

Torture and other cruel and inhuman treatment have been internationally outlawed since the end of the Second World War. The 1948 Universal Declaration of Human Rights stated, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." It allows for no exceptions. Similar language can be found in the International Covenant on Civil and Political Rights (Article 7) and the American Convention on Human Rights (Article 5[2]). Both are binding on the U.S. The 1949 Geneva Convention III prohibits physical or mental torture and any other form of coercion against a prisoner of war (Article 17). It designates such acts as "grave breaches" of the convention (Article 130). Geneva Convention IV prohibits an occupying power from torturing any protected person (Article 32), as well as all other "measures of brutality" (Article 283). And the 1977 Geneva Protocol I–the relevant provision of which reflects customary law–prohibits "torture of all kinds" and any other outrages on personal dignity, against any person under any circumstances. Even the threat of such acts is banned (Article 75[2]). These are the standards to which all detainees are entitled as of right.

The 1984 Convention against Torture takes these general obligations and codifies them into more specific rules. It prohibits torture and "other acts of cruel, inhuman or degrading treatment or punishment."[1] It criminalizes torture and seeks to end impunity for any torturer by denying him all possible refuge. The House of Lords ruled that Augusto Pinochet's claim to immunity could not withstand the 1984 convention. The convention defines torture broadly: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person." It encompasses acts which have been authorized–or acquiesced in–by a public official, and it includes acts carried out to obtain from the victim or from a third person information or a confession (Article 1). The convention is categorical that there will be no circumstances–even a "war against terrorism"–in which torture is permitted:

> No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.[2]

Similarly, the Statute of the International Criminal Court treats torture and other inhumane acts as war crimes and crimes against humanity. These are parts of the Rome Statute that the United States has not objected to.

This is one area in which the rules of international law are clear. It does not matter whether a person is a criminal, or a warrior combat-

ant, or a lawful combatant or an unlawful combatant, or an al-Qaeda militant, or a private American contractor. He may not be tortured. He may not be subjected to other cruel, inhuman, or degrading treatment. If he is, then the perpetrator of such acts must be punished under the criminal law. And any person who threatens torture, or who is complicit or participates in torture, is also to be treated as a criminal. Complicity can include a commanding officer or a political official. It can include a legal adviser who gives the green light to torture. It can include a prime minister or a president.

This absolute prohibition is related to the second set of rules, addressing the status of the terrorists: Are they to be treated as criminals or combatants? The answer will depend on the particular individual. If he was a member of the Taliban's regular armed forces, or of Saddam Hussein's Republican Guard, then he is a combatant, and must be treated as such. Once caught, he is entitled to protection under international humanitarian law, including the Geneva Conventions and Protocols. Even if it is suspected that he has information which may assist in the "war on terrorism" there are strict constraints on his interrogation. He cannot be tortured or treated inhumanely under any circumstances.

What if he is a suspected member of al-Qaeda who is thought to have planned a suicide attack? Or an insurgent in Iraq after the March 2003 conflict, who is suspected of laying roadside bombs targeting the Coalition Provisional Authority? Is he a combatant or a criminal? International law generally treats such people as criminals, not warriors. Britain adopted that approach with respect to the IRA, whose claims to be treated as combatants were always rejected, largely on the grounds that applying the laws of war would add legitimacy to their efforts. The 1997 International Convention for the Suppression of Terrorist Bombings followed that reasoning, and made it a criminal offense to bomb a public place or a state or government facility with the aim of causing death or destruction. The United States, Britain, and more than 120 other states supported that approach. States which are parties to the 1997 convention agreed to subject any person who is thought to have engaged in terrorist activities to criminal process, by prosecuting him or extraditing him to a country that will prosecute him. The U.S. became a party in June 2002, after 9/11.

Nowhere does the 1997 convention say that these criminals are

exempt from the ordinary protections of the law, or that you can torture them or treat them inhumanely. Quite the contrary. The convention explicitly guarantees "fair treatment" to any person who is taken into custody under its provisions. That includes the rights and guarantees under "applicable provisions of international law, including the international law of human rights."[3]

Taken together, the rules prohibiting torture and criminalizing terrorism allow no exceptions. The rationale is simple: torture is morally wrong. According to the U.S. Army's *Field Manual,* it is a poor technique which leads to unreliable results. In 1999 the Israeli Supreme Court gave a unanimous landmark ruling that prohibited the Israeli Security Services from using physical abuse of suspected terrorists during interrogation. "This is the destiny of democracy," wrote Chief Justice Barak, "as not all means are acceptable to it, and not all practices employed by its enemies are open before it."[4] His words have a strong resonance today:

> Although a democracy must fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.

The Supreme Court said that it was not deciding whether the so-called necessity defense could be available. This might be invoked in the "ticking-time-bomb argument" (where an arrested suspect is thought to hold information concerning the location of a bomb which has been set and will explode imminently). Such a case would have to be decided on its own merits, if and when it arose. What the state could not do, ruled the Israeli Supreme Court, was invoke a necessity argument to justify directives and authorizations which would use "liberty-infringing physical means" during the interrogation of those suspected of terrorist activities. The court noted the absolute prohibition on torture and cruel, inhuman, and degrading treatment in international law: there were no exceptions, and "there is no room for balancing."

The events of 9/11 reopened a door of the kind which the Israeli Supreme Court wanted to close. Very shortly after the attacks, the

Bush administration set in motion the procedures which led from the interrogation centers at Kandahar, Bhagram, and Guantánamo to the torture of detainees at Abu Ghraib and elsewhere. According to media reports, President Bush signed a secret order giving new powers to the CIA and authorizing it to set up a series of detention facilities outside the U.S., and to question those held in them with "unprecedented harshness." Guantánamo was established as a place to gather information beyond the constraints of international law and U.S. law. The U.S. Supreme Court's judgment in *Rasul* in June 2004 initiated the unraveling of that effort. What the Supreme Court has not yet addressed, but which U.S. federal courts may yet have to consider, is whether the interrogation regime at Guantánamo was consistent with American law and America's international obligations. The Guantánamo model of interrogation technique seems to have been applied in Afghanistan, and to have been exported to Iraq, including to Abu Ghraib, where the Geneva Conventions are recognized as being applicable.

We know nothing about the covert CIA regime. As to Guantánamo, the full story is yet to be told, including how far up the hierarchy the decision making went. But much is known. The first detainees arrived on January 11, 2002. They were subjected to interrogations in accordance with the principles set out in the U.S. Army's *Field Manual 34–52*, which was published in 1987. *FM 34–52*, as it is known, sets out "the basic principles of interrogation doctrine and establishes procedures and techniques applicable to Army intelligence interrogations." It makes clear that the principles and techniques of interrogation are to be used within the constraints established by The Hague and Geneva Conventions. *FM 34–52* is unambiguous in its prohibition of the use of force, or threats of force. It says:

> The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the U.S. Government. Experience indicates that the use of force is not necessary to gain the cooperation of sources for interrogation. Therefore, the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear. However, the use of force is not to be

> confused with psychological ploys, verbal trickery, or other nonviolent and non-coercive ruses used by the interrogator in questioning hesitant or uncooperative sources. . . . Additionally, the inability to carry out a threat of violence or force renders an interrogator ineffective should the source challenge the threat. Consequently, from both legal and moral viewpoints, the restrictions established by international law, agreements, and customs render threats of force, violence, and deprivation useless as interrogation techniques.[5]

According to the Pentagon, by the summer of 2002 it had become clear that *FM 34–52* was not producing the desired results. The Pentagon wanted to use "additional interrogation techniques" on Guantánamo detainees who were alleged to have close connections to the al-Qaeda leadership and planning figures, including "financiers, bodyguards, recruiters, and operators."[6] This included individuals who were "assessed to possess significant information on al-Qaeda plans" and who demonstrated resistance to the relatively light interrogations set out in *FM 34–52*.

Lieutenant Colonel Diane Beaver, a U.S. Army lawyer, was asked to advise on the legal position. More aggressive interrogation techniques than the ones referred to in *FM 34–52*, she wrote, "may be required in order to obtain information from detainees that are resisting interrogation efforts and are suspected of having significant information essential to national security."[7] Her memorandum of October 11, 2002, described the problem: The detainees were developing more sophisticated interrogation resistance strategies because they could communicate among themselves and debrief each other. This problem was compounded by the fact that there was no established policy for interrogation limits and operations at Guantánamo, and "many interrogators have felt in the past that they could not do anything that could be considered 'controversial.'" According to her memorandum, America's international obligations are irrelevant, and interrogation techniques–including forceful means and restraints on torture–are governed exclusively by U.S. law.

Her analysis provides a useful insight on how to get around international law. President Bush's executive order of February 7, 2002, determined that the detainees were not prisoners of war. It followed, therefore, that "the Geneva Conventions limitations that ordinarily

would govern captured enemy personnel interrogations are not binding on U.S. personnel conducting detainee interrogations at [Guantánamo]." In fact, Lieutenant Colonel Beaver went even further: "No international body of law directly applies." She is not saying that there are no international rules; rather, the international rules are either not applicable or not enforceable. To reach this extraordinary conclusion she reviews various international conventions which establish binding norms for the U.S.–including the 1984 Convention against Torture, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights–and then explains why not one of them creates any obligations which could actually be applied so as to constrain interrogators. This was either because the U.S. had entered reservations which gave primacy to U.S. federal law, or because the treaty was not "self-executing" (meaning that although it might bind the U.S. under international law, it did not create rights for individuals which they could enforce in the national courts). It is striking that no mention is made of customary international law, reflected in particular in Article 75 of the 1977 Geneva Protocol I. *FM 34–52*'s reference to the "restrictions established by international law, agreements, and customs" is simply bypassed. The logic of the argument is grotesque. It means that international law is irrelevant. Can you imagine how the U.S. would react if another country tortured an American and defended it by saying, "Oh, terribly sorry, but the international treaty we signed which prohibits torture isn't enforceable in our domestic law, so we don't have to apply it"? That is Lieutenant Colonel Beaver's logic.

In the meantime, over at the U.S. Department of Justice, her civilian colleagues had not been idle. On August 1, 2002, a few months before Lieutenant Colonel Beaver produced her advice, Alberto Gonzales, counsel to President Bush, received two memoranda. Apparently these were not related to Guantánamo, but to interrogations carried out elsewhere, including those conducted by the CIA.

One memorandum was from John Yoo, a deputy assistant attorney general.[8] He had been asked whether interrogation methods used on captured al-Qaeda operatives, which were lawful under a U.S. statute, could nonetheless lead to prosecution at the ICC, or violate the 1984 Convention against Torture. The question seems to have arisen to address the possibility that an interrogation carried out on

the territory of a country which had joined the ICC might fall foul of the ICC rules. Yoo is known in academic circles as a skeptic about international law, and his opinion is replete with basic errors of law. Since the U.S. is not a party to the Rome Statute, he wrote, it "cannot be bound by the provisions of the ICC treaty nor can U.S. nationals be subject to ICC prosecution." The first point is right, but the second is wrong. Individuals, not states, are defendants before the court. If a CIA operative commits torture, rising to the level of a war crime or a crime against humanity, on the territory of a state which is a party to the statute, then he can be prosecuted at the ICC. The Rome Statute is totally clear on that point. A first-year law student could work that out.

As regards the Convention against Torture, Yoo concluded that American participation was premised on the view that the definition of torture in the convention was "in the exact terms" of the relevant U.S. federal statute. This is significant because the convention sets a lower threshold for acts to be defined as torture. On Yoo's analysis, then, if an act was not to be defined as torture under U.S. law, then it could not be torture under the convention. The argument is hopeless. It is one of the most basic rules of international law that in the event of a conflict between an international rule and a domestic rule, the international rule will prevail. Once that rule is overridden–as Yoo proposes–there is no international law left. Why bother negotiating a treaty on torture? Each state would be free to substitute its own definitions for those of the convention. But more seriously, Yoo has misunderstood what the U.S. did in ratifying the convention. It did not enter a "reservation" redefining torture and setting the bar at a higher level; it entered an "understanding." This is an entirely different thing. While a reservation can change the international legal obligation, an "understanding" cannot. Yoo writes that Germany commented on the United States' reservations but "did not oppose any U.S. reservation outright." In fact Germany said the understandings "do not touch upon the obligations of the United States of America as State Party to the Convention." So it is the definition in the convention–the international definition–which prevails. No amount of willful misreading by a politically appointed Justice Department legal adviser can change that.

The second memorandum received by Gonzales was a longer one

from Jay Bybee, an assistant attorney general and, presumably, Yoo's boss.[9] It addressed the standards of conduct required by the 1984 Convention against Torture, as implemented by U.S. federal law. Administration officials have confirmed that the Bybee memo "helped provide an after-the-fact legal basis for harsh procedures used by the CIA on high-level leaders of al-Qaeda."[10] *Newsweek* magazine has reported that the August 1, 2002, memo was prompted by CIA questions about what to do with those captives alleged to be top-ranking al-Qaeda terrorists, such as Ibn al-Shaykh al-Libi and Abu Zubaydah, who had turned uncooperative. Relying on the same starting point as Beaver and Yoo—we are supreme and our law trumps everything—Bybee dispenses with all established canons of treaty interpretation and concludes that torture covers only the most extreme acts, limited to severe pain which is difficult for the victim to endure. "Where the pain is physical," he writes, "it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure." Anything less, he implies, will not be torture and will be permissible. And where the pain is mental, then it "requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder."[11] This is the most shocking legal opinion I have ever come across. Such "legal" analysis, by a lawyer who is now a federal judge, bears no relation to the definition which the U.S. and 120 other countries signed up to in the Convention against Torture.

And it gets worse. According to Bybee, the U.S. Congress can no more interfere with the president's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. So the president is freed from all legal constraints. Laws that would prevent the president from gaining the intelligence he believes necessary to prevent attacks upon the U.S. would be unconstitutional.[12] The U.S. assistant attorney general concludes that under the current circumstances, certain criminal law defenses of necessity and self-defense could justify interrogation methods needed to prevent a direct and imminent threat to the U.S. and its citizens. This overrides the Convention against Torture's absolute prohibition on torture in all circumstances. But that prohibition is not applicable in U.S. law, advises Bybee, because it has not been included in the relevant federal statute. The U.S. Congress must therefore have in-

tended to permit the "necessity or wartime defense" for torture.[13] Finally, he concludes that self-defense could allow a government defendant to argue that using torture in an interrogation could be justified "on the basis of protecting the nation from attack."[14]

The assessment of international law is plain wrong. I can't comment on the position under American law, but I am happy to defer to Harold Koh, dean of the Yale Law School and an acknowledged expert in U.S. constitutional and international law: The memos are "blatantly wrong. It's just erroneous legal analysis. The notion that the president has the constitutional power to permit torture is like saying he has the constitutional power to commit genocide."[15] The analyses of Beaver, Bybee, and Yoo are deeply flawed, and scary. Anyone who has even the most rudimentary understanding of international law will see that. Yet these are the memoranda the White House was willing to put in the public domain.

The "global war on terrorism" was therefore used to justify the need for "additional interrogation techniques"—at Guantánamo, in Afghanistan and in Iraq, and secretly elsewhere under CIA control. Against the backdrop of this legal advice, the U.S. Army's Lieutenant Colonel Jerald Phifer requested approval for a new "interrogation plan" at Guantánamo.[16] The additional techniques, going beyond *FM 34–52*, were divided into three categories. Category I included two techniques: yelling and deception. Category II required additional permission and included the use of stress positions (such as standing) for up to four hours; the use of falsified documents; isolation for up to thirty days; deprivation of light and auditory stimuli; hooding during questioning and transportation; twenty-eight-hour interrogations; removal of comfort items (including religious items); removal of clothing; forced grooming (shaving of facial hair, etc.); and using detainee-specific phobias (such as fear of dogs) to induce stress. Category III was to be used only for "exceptionally resistant detainees," who would normally number no more than 3 percent of the total (that would be twenty people at Guantánamo). This category required approval by the commanding general, with appropriate legal review and information to the commander of the U.S. Southern Command (USSOUTHCOM). It covered the "use of scenarios designed to convince the detainee that death or severely painful consequences are

imminent for him and/or his family"; exposure to cold weather or water; use of a wet towel and dripping water to induce the misperception of suffocation; and use of mild, noninjurious physical contact such as grabbing, poking in the chest with the finger, and light pushing. All of these are plainly inconsistent with international law, as are most of the Category II techniques. Nevertheless, Phifer's memorandum implied that even more might be available: it added that any of the Category III techniques "that require more than light grabbing, poking or pushing will be administered only by individuals specifically trained in their safe application."

In another memorandum on the same day–October 11, 2002–Major General Dunlaver concluded that these techniques did not violate U.S. or international law. He relied on Lieutenant Colonel Beaver's legal analysis, which, it will be recalled, had determined that no international laws were actually applicable. Beaver gave the green light to all three techniques, although not without reservation. The use of a wet towel to induce suffocation should be done with caution, she wrote, because "foreign courts have already advised about the potential mental harm that this method may cause." Pushing and poking "technically" constituted an assault. And the U.S. Torture Statute specifically mentioned death threats as an example of "inflicting mental pain and suffering." Nevertheless, she concluded that the proposed methods of interrogation should be approved, subject to proper training and prior legal and medical review before their application. Others were cautious about Category III. General James T. Hill wrote to the chairman of the U.S. Joint Chiefs of Staff, asking that lawyers from the Department of Defense and the Department of Justice review Category III. He was unclear whether all the techniques in Category III were legal under U.S. law, he wrote, and was "particularly troubled by the use of implied or expressed threats of death of the detainee or his family."[17] But he wanted as many options as possible at his disposal.

If any legal reviews were carried out they have not been made publicly available. However, it appears that there were no legal objections to techniques that plainly violate the 1984 Convention against Torture and the requirements of the Geneva Conventions, including Protocol I. It would be interesting to know what the lawyers at the U.S. State Department would have made of all this. Perhaps they

never got a chance to have their say. On December 2, 2002, Donald Rumsfeld personally approved Categories I and II. He also approved the grabbing, poking, and pushing technique in Category III.[18] As to the other Category III techniques, he concluded that while these could be legally available, a blanket approval was not warranted "at this time." "I stand for 8–10 hours a day," Rumsfeld added in a handwritten comment. "Why is standing limited to 4 hours?"

The approval remained in force for only six weeks, and was rescinded by Rumsfeld on January 15, 2003. When this fact was made public, in June 2004, it stated that Rumsfeld had "learned of concern about the implementation of these techniques." No further explanation was provided. But more was needed, beyond *FM 34–52*. So Rumsfeld directed the Pentagon's general counsel to establish a working group on the interrogation of detainees held by the U.S. armed forces. The group was headed by Mary Walker, the U.S. Air Force's general counsel. It included top civilian and uniformed lawyers from each military branch, and consulted with the Justice Department, the Joint Chiefs of Staff, the Defense Intelligence Agency, and other intelligence agencies.[19] Again it seems the State Department was excluded.

The working group reported in March 2003. It recommended thirty-five interrogation techniques to be used on unlawful combatants outside the United States, subject to certain limitations. The legal analyses put forward by Yoo and Bybee were broadly accepted, with the effect that international law could be taken as imposing no constraints above and beyond U.S. law. A military lawyer who assisted in preparing the report said that political appointees heading the working group wanted to assign to the president virtually unlimited authority on matters of torture.[20] Military lawyers were uncomfortable with that approach, and focused on reining in the more extreme interrogation methods, rather than challenging the president's constitutional powers.[21] The report accepted the principle that unlawful acts might not give rise to criminal liability, in view of the necessity and self-defense arguments. And it concluded that the prohibition against torture "must be construed as inapplicable to interrogations undertaken pursuant to [the president's] Commander-in-Chief Authority."[22] This sweeping conclusion brushed aside fifty years of international laws.

On April 16, 2003, Donald Rumsfeld approved the use of only

twenty-four of these techniques, for the purpose of interrogating unlawful combatants at Guantánamo. Seven techniques went beyond what *FM 34–52* allowed. Four of the techniques could be used only with Rumsfeld's approval because, it was said, other countries might consider them to be inconsistent with the Geneva Conventions. They were the use of incentives to cooperate; "pride and ego down" (referring to the exploitation of a prisoner's loyalty, intelligence, or perceived weakness); good-cop, bad-cop interrogation; and isolation.

Rumsfeld did not approve eleven of the thirty-five techniques recommended by the working group, at least in this document. They included mild physical contact, threats to transfer to a third country, prolonged interrogations, forced grooming, prolonged standing, sleep deprivation, physical training, and slapping. They also included one technique which appeared in the Abu Ghraib photographs, namely increasing anxiety by use of aversions ("simple presence of a dog without directly threatening action"), and removal of clothing and hooding, two techniques which U.S. senators found especially troubling when they questioned Rumsfeld's deputy, Paul Wolfowitz, on May 13, 2004:

Senator [Jack] Reed: Mr. Secretary, do you think crouching naked for 45 minutes is humane?
Mr. Wolfowitz: Not naked, absolutely not.
Senator Reed: So if he is dressed up that is fine? . . . Sensory deprivation, which would be a bag over your head for 72 hours. Do you think that is humane? . . .
Mr. Wolfowitz: Let me come back to what you said, the work of this government . . .
Senator Reed: No, no. Answer the question, Mr. Secretary. Is that humane?
Mr. Wolfowitz: I don't know whether it means a bag over your head for 72 hours, Senator. I don't know.
Senator Reed: Mr. Secretary, you're dissembling, non-responsive. Anybody would say putting a bag over someone's head for 72 hours, which is . . .
Mr. Wolfowitz: It strikes me as not humane, Senator.
Senator Reed: Thank you very much, Mr. Secretary.[23]

The materials released by the White House raised a great number of questions. Were these the only techniques approved? Were other techniques approved for use by the CIA or other agencies? How are the approved techniques to be squared with the accounts given by released Guantánamo detainees? The accounts by the British detainees, if accurate, describe practices that go beyond what is permitted under international law and even beyond Rumsfeld's revised standards. Tarek Dergoul has reported being poked, kicked, punched, shaved, exposed to intense heat and cold, deprived of sleep, and kept chained in painful positions. He claims he was threatened with return to an Arab country where he was told he would be subjected to full-blown torture. These are some of the eleven techniques recommended by the Pentagon's working group report of March 2003, but not approved by Rumsfeld. This inevitably raises a question: Did interrogators exceed their orders, or was a parallel system of interrogations established which was permitted to apply the eleven techniques?

That question needs to be answered because similar techniques—and others which were even worse—appear to have been used in Afghanistan and in Iraq. The situation in Iraq should have been very different, since the United States accepted that the Geneva Conventions were applicable. But it is plain that the conventions were not respected in relation to all the detainees. In January 2004, Joseph Darby, a low-ranking American soldier, spilled the beans. An internal inquiry was carried out, but Congress was not informed. Why, asked Senator Robert Byrd, was the report on abuse "left to languish on the shelf at the Pentagon unread by the top leadership until the media revealed it to the world"?[24] In the spring of 2004 media photographs and reports described pictures of graphic abuse and torture at Abu Ghraib prison, Saddam Hussein's former punishment center, turned into a U.S. POW camp. They had been taken from the summer of 2003 onward. The most notorious included a picture of a hooded detainee standing on a box with what appeared to be electrode wires attached to his fingers and genitals. Another showed Private First Class Lynndie England holding a leash tied to the neck of a naked man on the floor. Others showed a terrified detainee cowering naked before dogs; a hooded detainee apparently handcuffed in an awkward position on top of two boxes in a prison hallway; a soldier kneeling on naked detainees; a hooded detainee collapsed over railings to which he was

handcuffed; and two soldiers posing over the body of Manadel al-Jamadi, a detainee who had allegedly been beaten to death by the CIA or civilian interrogators in the prison's showers. Would the U.S. accept the treatment of its nationals in this way, under any circumstances?

Also in the spring of 2004, a Red Cross report condemning the treatment of Iraqi prisoners was leaked. This described violations of the Geneva Conventions which had been documented or observed while the International Committee of the Red Cross (ICRC) had been visiting Iraqi prisoners of war, civilian internees, and other persons protected by the Geneva Conventions, between March and November 2003. The leaked extracts described brutality causing death or serious injury, physical or psychological coercion during interrogation, prolonged solitary confinement in cells devoid of daylight, and excessive and disproportionate use of force. The ICRC report described the ill-treatment as "systematic . . . with regard to persons arrested in connection with suspected security offences or deemed to have an 'intelligence' value."[25] In some cases, wrote the ICRC, the treatment "was tantamount to torture."

The rules governing interrogations in Iraq have been less easy to identify. Until August 2003 the rules set out in *FM 34–52* applied. At the end of August, Major General Geoffrey Miller, who was head of detention operations at Guantánamo, visited Iraq. According to Lieutenant General Keith Alexander, a deputy chief of staff for U.S. Intelligence, Miller's mission was "to help get the most that we could out of human intelligence operations in Iraq as a whole."[26] He visited Abu Ghraib. By September 9, Miller had completed a review and recommended a new interrogation policy that "borrowed heavily" from the approved Guantánamo procedures.[27] On September 14, Lieutenant General Ricardo Sanchez, the ground commander in Iraq, authorized rules which allowed the harsh procedures *not* permitted at Guantánamo, including sleep deprivation and stress (crouching) positions for up to an hour. Military lawyers objected, and a month later—on October 12—Sanchez restricted the policy. The new procedures were claimed to be consistent with Geneva. Nevertheless, as the *New York Times* described, troubling practices were tolerated, including forced nudity, slapping, handcuffing, hooding, and intimidation with dogs. The picture which emerges from the documents, interviews, and congressional testimony "points to a broader pattern of

misconduct and knowledge about it stretching up the chain of command."[28] It was only in May 2004, after the press got hold of the details of the procedures, that coercive practices were reported to have been ended. Whether that included any CIA interrogations which may have been taking place is not known.

As the media got hold of the material, the Bush administration came under increased pressure to explain its commitment to international rules, and the Geneva Conventions in particular. President Bush's general counsel, Alberto Gonzales (who is now attorney general in the second George W. Bush administration), made it clear that the administration had never authorized torture, but he left open the possibility that agencies other than the Department of Defense might have engaged in interrogation by reference to different rules. During his press conference on June 22, 2004, he was asked whether interrogation went beyond the twenty-four methods approved for Guantánamo, either through a "special access program" or through another government agency. "We're not going to comment on anything beyond what is accepted [by the] Department of Defense," he responded, adding that there was a directive throughout the entire government that every agency was to follow the law and could not engage in torture. But whose definition of the law? And torture defined by whom? By Beaver or Bybee? By the working group? When he was asked whether the CIA was subject to the twenty-four categories of interrogation technique, he responded: "I'm not going to get into questions related to the CIA." When pushed, he responded: "I'm not going to get into discussions about the CIA, except to repeat what I just said, and that is that the techniques that they used that have been approved—they've been approved and vetted by the Department of Justice—are lawful and do not constitute torture." This fell far short of the denial that the thirty-five techniques recommended by the working group report—which adopted the Department of Justice's approach—might actually be in use by some other agency, including the CIA.

Gonzales did disavow some of the earlier memoranda that had been drafted, including Bybee's memo of August 1, 2002. "Unnecessary, overbroad discussions in some of these memos that address abstract legal theories, or discussions subject to misinterpretation, but

not relied upon by decision makers," he said, "are under review." To the best of his knowledge, he added, the memos did not make it into the hands of soldiers in the field or to the president. They did "not reflect the policies that the administration ultimately adopted." But that disavowal did not extend to the memoranda's findings on international law, which were incorporated more or less unchanged into the April 2003 working group report, which remained in effect.

Over time a great deal more information will emerge. But even at this stage it seems pretty clear that the legal minds which created Bush's doctrine of preemption in the use of force and established the procedures at the Guantánamo detention camp led directly to an environment in which the monstrous images from Abu Ghraib could be created. Disdain for global rules underpins the whole enterprise. The international rules on torture, the treatment of prisoners of war, and human rights norms do not apply, or they add nothing to U.S. law, or they are not enforceable. To the seventeen or twenty-four or thirty-five techniques of interrogation there can be added these three techniques for avoiding international legal obligations. In this way the rules put in place by the U.S. after the horrors of the Second World War are sidestepped, and the "war on terror" is brought into disrepute.

What I find most remarkable is that such a scheme could have been put in place for the treatment of foreigners, of non-Americans, where respect for the international rules was bound to be raised. It is clear that many American military lawyers and legal advisers in the U.S. State Department were horrified by what was happening. Some took active steps to stop the new rules and practices from being adopted. When their efforts failed they alerted others, with leaks to the press, for which we must be thankful. Temporarily, however, it was the Yoos and the Bybees and the Gonzaleses of the administration that prevailed. They seem never to have asked themselves, as David Scheffer has put it, "'Would we tolerate such treatment of U.S. prisoners?' If the answer is no, then the subject is closed."[29] Nor, it seems, did they detain themselves for very long in deliberating whether their duty, as lawyers, was to ensure respect for the international rules or, rather, to provide legal cover for their political masters.

CHAPTER TEN

Tough Guys and Lawyers

Making the world a safer place for hypocrisy . . .
–Thomas Wolfe, *Look Homeward, Angel* (1929)

In the early summer of 1999, a few weeks after the House of Lords gave its third and final judgment in the Pinochet case, I was in Tehran. A professor at the university's law school invited me to give an early evening lecture to his graduate students, on an international law topic of my choosing. I opted for the Pinochet judgment, although with some trepidation. The professor did not dissuade me. I assumed that the court's decision not to recognize Pinochet's claim to immunity would be taken as a further example of the colonialist-imperialist tendency endemic in British culture, including its legal culture, and an inability to refrain from meddling in the internal affairs of Chile, another state.

The safest approach, I thought, would be to describe the case, say what happened, and leave it at that. Don't give my own views on the rights and wrongs of the judgment. Don't provide a lecture on the triumph of international law. Just say what happened, take the questions. That is what I did, to a room overflowing with several hundred of Tehran's finest law students, at least half of whom were wearing chadors.

They listened attentively, and during my lecture numerous hands were raised to make requests for clarification. I was not quite sure what to expect once I had finished, after about forty minutes of story-telling without analysis or critique. The response came as a surprise. Many, many hands were raised. The discussion ran for more than two hours. It could have continued for much longer. Even from the early questions it became clear that a great number of people in the room were knowledgeable about every twist and turn in Pinochet's case, from the minutiae of the Convention against Torture to the role of