

THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB by
Karen Greenberg and Joshua Dratel (eds), Cambridge
University Press, 2005, 1249pp, ISBN 0-521-85324-9,
A\$89.95

The spectacular, perverse story of the United States torturing its prisoners in Iraq and Afghanistan was exposed by a fateful conjunction of incriminating photographs and official documents, first reported in the US media or posted online. *The Torture Papers* fleshes out those media fragments by publishing the original texts of a flurry of internal US government documents. In doing so, this massive edited collection delivers to public scrutiny the normally secret legal and moral reasoning of key voices in the US administration in its response to 'terrorism'.

The focus of the collection is the so-called 'torture memos' (pp144-382), a series of internal documents drafted by senior lawyers in the US Departments of Justice, Defence, and State, and by Counsel to the US President (Alberto Gonzales, now Attorney-General) and the Secretary of Defense (Donald Rumsfeld). The central thrust of these opinions is an attempt to evade the international prohibition on torture by various strategies of contrived, disingenuous or incorrect legal reasoning. Thus distinctions are drawn between torture and mere 'coercive interrogation', based on a finely-honed sliding scale of pain; the law of criminal defences is invoked to justify or excuse torture in the event that it is found to have occurred; and the applicability of legal prohibitions on torture is denied altogether outside US territory.

The cumulative effect of these documents is to give the impression that mistreatment of detainees in Iraq and Afghanistan was not merely the result of isolated acts of renegade or ill-disciplined individuals, but the product of a systematic policy that was deliberately constructed, ordered and implemented by a chain of responsible government and military officials. Although authorisation for the most aggressive interrogation techniques has since been formally and publicly rescinded by the US, there remains a lingering sense that the US still believes that the exceptional threat of terrorism justifies pushing legal boundaries — especially international ones. Allied to this is an underlying theme of American exceptionalism, based on the subjective belief that the protection of American lives is a higher value than any other — even if the measures adopted are radically disproportionate or excessive.

Despite its focus on the 'torture papers', the collection also publishes a series of distinct but related US documents denying the applicability and protections of humanitarian law to Taliban and Al-Qaeda detainees in Afghanistan (pp3-143). In particular, prisoner of war status (POW) is denied to fighters captured in Afghanistan on the basis that they are non-State actors and thus 'unlawful combatants'. A further strategy revealed is the attempt to preclude judicial supervision of the classification and treatment of detainees, on the basis that constitutional protections do not apply to non-citizens outside US territory (at

Guantanamo Bay). While some of these fighters (especially Al-Qaeda) may well not have satisfied the criteria of combatancy under the Geneva Conventions, blanket denial of POW status to whole groups, without individualised determinations or an opportunity to seek review of status by a competent tribunal, is fundamentally at odds with humanitarian law. Moreover, as *de facto* State agents, much of the Taliban's forces fell squarely within the conditions of combatancy and were therefore entitled to POW status.

A fascinating dynamic revealed by this collection is the extraordinary tug-of-war for power and influence between the different branches of government in the US (executive, judicial, and congressional) and — even more pronounced — between different agencies within the executive branch itself. In particular, some of the documents reveal a startling and uninhibited tendency to tilt, redistribute and centralise power in the US President in a time of emergency, at the expense of both Congress and the courts. Thus constitutional arguments are made for the US President being able to suspend both the Geneva Conventions and the Torture Convention. Conversely, some of the documents reveal courageous attempts by the State Department (including Secretary of State Colin Powell, and Legal Adviser William H Taft IV), and professional military lawyers such as Judge Advocate Diane Beamer to stem the tide of creative but invidious lawyering by others. Their opinions try to draw attention to the negative consequences of denying humanitarian law and the prohibition on torture — not least the threat of the reciprocal treatment of captured US soldiers.

This raises underlying considerations of the professional responsibilities of government lawyers (an issue which moved centre stage in the UK and Australia in the 2003 debate about the legality of invading Iraq). While legal advisers must serve the interests of their government clients, this duty is tempered by the overriding obligation of fidelity both to the law and to the broader public interest — both of which may conflict with the interests of the government. Many of the legal opinions in *The Torture Papers* reflect overly technical and highly strained approaches to legal interpretation, disregarding the object and purpose of humanitarian or human rights treaties (and their domestic enactments), which are protective and should thus be interpreted beneficially rather than restrictively. The editors write that US government lawyering reflects:

a wholly result-oriented system in which policy makers start with an objective and work backward, in the process enlisting the aid of intelligent and well-credentialed lawyers who, for whatever reason — the attractions of power, careerism, ideology, or just plain bad judgment all too willingly failed to act as a constitutional or moral compass that could brake their client's descent into unconscionable behaviour... (pxxii).

It is fitting, then, that the remaining sections of *The Torture Papers* are given over to the reports of those who do provide a vision of moral and legal restraint (pp383–1165), such as principled and professional US military investigators, and non-government organisations such as the International Committee of the Red Cross and the American Bar Association. These reports provide counterweights to, and correctives of, many of the earlier, outlandish legal claims by government

lawyers, and detail with great specificity some of the concrete practices of torture by the US.

A review of an edited collection of primary documents must necessarily focus on the documents themselves, particularly in a collection such as this where there is relatively little editorial intervention. While something might be said about the editors' selection of documents, in this case the range of documents available for selection is largely driven by factors outside editorial control — in particular, whether an official document has become publicly available through declassification, unauthorised leakage (often to the media), court processes or freedom of information requests. The fact that so many of these US documents found their way into the public domain is itself extraordinary, particularly when contrasted with the much tighter grip on the secrecy of government information in the UK and Australia.

The editors note that the story told by the documents presented is necessarily incomplete: 'there remains the possibility that there is advice coming from numerous quarters that is not documented here. The confluence of prior associations, overlapping affiliations and other connections among the drafters of the torture memos remains for historians and journalists to discover over time'. Indeed the editors list 'missing' documents that they were unable to obtain (p xxix), and some of the documents have been disfigured by the censor's pen. In addition, the last 70 odd pages of the book, following the Afterword (p 1165), illustrate the great fluidity and currency of this saga, by hurriedly reproducing documents which became available just as the book went to press. These include an affidavit filed in the US District Court by David Hicks, an Australian detained at Guantanamo Bay, detailing his alleged mistreatment in US custody (p 1234).

The relative lack of editorial commentary refreshingly allows the documents to speak for themselves, and encourages readers to draw their own conclusions. On the other hand, the sheer volume and density of the documents sometimes make it difficult for all but the most dedicated reader to make sense of what is going on. In particular, it is often hard to discern the legal effects (if any) of particular documents (especially for readers unfamiliar with the hierarchies of authority within the US government and administration); how documents from different sources relate to others; and whether or not certain documents have been rescinded.

These problems are clarified to some extent by three short but helpful introductory pieces by Anthony Lewis (p xiii) and the editors Karen Greenberg (p xvii) and Joshua Dratel (p xxi), and also by a chronology highlighting the key documents and developments (p xxv). Nonetheless, the collection would be strengthened by including a more engaging analysis and intensive interpretation of the documents, notwithstanding the understandable pressure to publish the documents in as timely a manner as possible. Largely beyond the scope of the collection, however, is detailed consideration of the actual practice of torture or ill-treatment by US officials; the sufficiency of disciplinary measures taken; and whether different or secret rules govern exceptional organisations such as the Central Intelligence Agency.

In addition to exposing the internal legal reasoning of US government officials on the meaning of torture and the applicability of humanitarian law, the editors hope that publishing these documents will ‘enable open-minded reflection and self-correction even in times such as these’ (pxx). Such optimism is not unfounded, as earlier public exposure of the ‘torture memos’ provoked public censure that forced the US to retract its more extreme legal positions and to reaffirm the prohibition on torture. This book ultimately embodies powerful normative ideals about the importance of exposing internal administrative processes to public scrutiny and democratic accountability — even when those processes are dealing with highly sensitive matters of security; and even when the great hegemonic power of the US Presidency is arrayed against them.

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