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## Poodles and Bulldogs: The United States, Britain, and the International Rule of Law

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# Poodles and Bulldogs: The United States, Britain, and the International Rule of Law

- PHILIPPE SANDS\*

In this lecture, I will explore how it has come to pass that over the past few years, particularly since the events of September 11, British and American lawyers have come to take such different approaches to issues of international law and to the function of lawyers in giving advice on the law.

This topic underscores an apparent change in the nature of the relationship between the United States and Britain. What do I mean? I refer you to an article that appeared in the *Washington Post* on July 31, 2008, written by Dana Milbank, titled “More Bulldog than Poodle.”<sup>1</sup> The article describes the first meeting between Britain’s then new Prime Minister Gordon Brown and the President of the United States, George W. Bush. As the article states, “It was a day of . . . disagreements.”<sup>2</sup> The author continues:

Brown announced that “Afghanistan is the front line against terrorism”—contradicting Bush’s frequent claim that Iraq is the “central front” in that battle. While Bush spoke passionately of terrorists as “evil,” Brown spoke of terrorism as “a crime.” Where Bush described their meetings as “casual” and “relaxed,” Brown found them to be “full and frank”—diplomatic code for tough.

For domestic political reasons, Brown had to prove that he was not, as one of his ministers put it, “joined together at the hip” with Bush the way predecessor Tony Blair was. Others in Brown’s government have criticized Bush’s “unilateralist” ways and even his use of the phrase “war on terror.” . . . Brown “won’t be U.S. poodle”—a reference to Blair’s fatal devotion to Bush.

Brown did as advertised. Seventy-seven months ago, Bush and Blair met for the first time. . . . Bush wore a bomber jacket; Blair wore a V-neck sweater. Bush spoke of their common love of sports and the newly discovered fact that they both used Colgate toothpaste.

This time, the two leaders faced the cameras in full business attire, even though they were on a golf driving range at the presidential retreat on a blazing-hot summer morning. Bush bravely raised such subjects as the staff’s bowling competition and even ventured a brief mention of the long-ago toothpaste episode. Brown, by contrast, stood stiffly and read carefully from a prepared text.<sup>3</sup>

When a British Prime Minister believes that he cannot be seen cozying up to a United States President, it is clear that something is amiss in the relationship. It may be the first time this has happened, and it may be temporary, but it seems that, for the time

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1. Dana Milbank, *More Bulldog than Poodle*, WASH. POST, July 31, 2007, at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/30/AR2007073001597.html>.

2. *Id.*

3. *Id.*

being, it is not politically acceptable in Britain for a leader to be seen as close to a United States President. How has this come to pass? And what has been the role of lawyers in giving rise to these conditions? I will focus on one aspect: the role of a small number of political appointee lawyers in the Bush Administration that contributed very directly to this state of affairs.

What we have learned is that when lawyers in the Office of Legal Counsel (OLC), the White House, and the Defense Department give legal advice, it has consequences outside of the United States. These consequences are both legal and political. The decisions that were taken following the legal advice given to the Bush Administration after September 11 have had profound effects on the United States' political relationships with many countries, including Britain—which prides itself on the two country's "special relationship." The sharp differences emerged even before September 11, on issues such as the International Criminal Court and the Kyoto Protocol on Climate Change. Of course the United States is perfectly entitled—as a sovereign state—to stay out of the Kyoto Protocol and the International Criminal Court. Whatever the political ramifications, as a legal matter, the decisions cannot be criticized. However, the situation after September 11 is rather different.

After September 11 came the so-called "war on terror"—words that Gordon Brown and few other British politicians will use.<sup>4</sup> In Britain, the experience with the Irish Republican Army (IRA) caused the political establishment to decide not to characterize a terrorist threat as amounting to a war or armed conflict because this has the effect of elevating the status of individuals who are engaged in what some might see as a global insurgency. The IRA long sought characterization as warriors in an effort to obtain popular support and legitimacy.<sup>5</sup> Successive British governments in the 1960s and 1970s refused to offer them that status.<sup>6</sup> It was the right decision. The British government generally has made the same decision with Al Qaeda. The decision was made in the context of what the English Court of Appeal characterized as the "legal black-hole" that was the detention center in Guantánamo Bay.<sup>7</sup> Decisions were made at Guantánamo on detention and interrogation that, it now seems, are closely connected to what subsequently emerged at Abu Ghraib.<sup>8</sup> In Britain, the view is widely held that the protections reflected in the Geneva Conventions and other international rules were, in effect, set aside with the intention of creating a law-free zone in which abuses could occur.

There is also the festering sore that is Iraq. Irrespective of the merits or demerits of the decisions that were made, no one can doubt that Iraq has deeply divided both the British and the American societies. In Britain, the legality of that conflict became a

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4. David Rieff, *Brown Stresses Terror As Crime, Not War*, INT'L HERALD TRIB. (New York), July 23, 2007, at 3.

5. See PHILIPPE SANDS, *LAWLESS WORLD: MAKING AND BREAKING GLOBAL RULES* 208 (2006).

6. See *id.* at 151, 153.

7. *R (on the application of Abbasi) v. Sec'y of State for Foreign and Commonwealth Affairs*, [2002] EWCA (Civ) 1598, [64] (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2002/1598.html>.

8. *S. Comm. on Armed Servs. Hearing on the Treatment of Detainees in U.S. Custody*, 110th Cong. 5 (2008) (statement of Alberto J. Mora, Former General Counsel, U.S. Navy).

significant issue.<sup>9</sup> This issue also has contributed to a gulf in thinking that divides the attitudes in Britain and the United States towards the international rule of law, each country's engagement with international rules, and to the legal and ethical rules that govern lawyering. This gulf arose because the decisions on Iraq followed opinions given by highly placed lawyers in the Bush Administration that did not accord with established thinking. These decisions have had legal and political consequences. The lawyers and policy makers involved may not have fully appreciated the nature and extent of these consequences.

In Britain, there is an acute awareness of globalization. The transformation of the global legal order is underscored in a series of high-profile cases. The Pinochet case, for example, recognized that immunity in one country no longer holds for acts which may have occurred many years ago in another country thousands of miles away.<sup>10</sup> It was a remarkable expression of the law's globalization to see the way in which the House of Lords dealt with the question of whether Senator Pinochet was entitled to immunity—a judgment that apparently gave rise to the thinking of Bush Administration lawyers.

To put this in context, it is important to remember that Britain and the United States were joined at the hip in the 1940s on a project to create a global rule of law.<sup>11</sup> No two countries did more to replace the tyranny of the 1930s and to address the perceived threat of the Soviet Union than the United States and Britain. President Franklin Roosevelt and Prime Minister Winston Churchill met off the coast of Newfoundland in August 1941, before Pearl Harbor, and adopted a document—the Atlantic Charter—of which very few people are aware.<sup>12</sup> The Atlantic Charter created a rules-based system of international relations, underpinned by three foundational pillars: a legal prohibition on the use of force in international relations; the protection of the dignity of all human persons under the rule of law, including, for example, the right to self-determination; and the creation of a system of international economic relations based on free trade and foreign investment protection, also underscored by international treaties and rules.<sup>13</sup> This was not something other countries imposed on Britain and the United States. Britain and the United States decided for themselves in the 1940s that the Atlantic Charter's principles pointed to a sensible way forward.

Over the following decade, many now familiar institutions were put into place: the Geneva Conventions, the Nuremberg Statute, the General Agreement on Tariffs and Trade, the United Nations Charter, the Universal Declaration on Human Rights, as well as many others.<sup>14</sup> These are not inventions of anti-American or anti-British forces, but these are American and British conventions. They are an expression, as Eleanor Roosevelt put it, of our desire to export our value systems to other countries around the

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9. See SANDS, *supra* note 5, at 258–59.

10. R v. Bartle, [2000] 1 A.C. 147 (H.L. 1999) (appeal taken from Q.B.D.), available at <http://www.bailii.org/uk/cases/UKHL/1999/17.html>.

11. That project resulted in a joint statement issued by President Roosevelt and Prime Minister Churchill that stated common principles the leaders hoped would serve as goals for the world following World War II. See Atlantic Charter, U.S.-U.K., Aug. 14, 1941, 55 Stat. 1603.

12. See SANDS, *supra* note 5, at 8.

13. See *id.* at 9.

14. *Id.* at 9–12.

world.<sup>15</sup> This expression was not starry-eyed altruism at play in the creation of these rules; they were intended to make sure that other countries played by our rules. Yet after September 11, a decision was made, essentially for ideological reasons, to use those terrible events to justify sweeping away rules that were seen as a constraint of United States sovereignty. A small number of players made key decisions based on supposedly independent interpretations of which rules of international law did and did not apply.<sup>16</sup>

Much of the thinking can be traced back to an initiative that emerged in the mid-1990s called the Project for the New American Century, in which many of the main actors who moved into the Bush Administration at high-ranking positions set forth a clear political agenda explaining why some developments posed a fundamental threat to the United States.<sup>17</sup> According to the Project, international courts and tribunals, the Kyoto Protocol on Climate Change, and the Pinochet judgment posed a fundamental threat to the United States and to its expressions of sovereignty.<sup>18</sup> The supporters rejected the notion that we live in a globalized world in which common rules assist all of us. If you read the names of the signatories of the Project for the New American Century's "Statement of Principles," you will recognize many of them: Dick Cheney, Donald Rumsfeld, and Paul Wolfowitz, among others.<sup>19</sup>

September 11 thus appeared as an opportunity. Within hours of the attacks, decisions were made without consulting allies. These decisions resulted in an ill thought out, almost knee-jerk response to the very real threat of international terrorism. The response was premised on a perception that the existing rules of international law—the Geneva Conventions, human rights law, international humanitarian law, the United Nations Charter—were inadequate and failed to provide adequate protections to the United States. Those laws would be circumvented by political means if necessary, or alternatively, by legal means. In this way, Bush Administration lawyers played a crucial role in putting the new "system" in place, and for this creation they bear a particular responsibility.

We are now familiar with many of the legal documents that were written in that period. I will refer to just three, which highlight the role of the lawyers in the decision to use harsh interrogations—otherwise known as torture. Of particular interest is the infamous "Torture Memo" dated August 1, 2002.<sup>20</sup> It was signed by Jay Bybee, head of the OLC, but authored by John Yoo, now a professor at the University of California, Berkeley, with the active involvement of David Addington, then counsel to the vice president.<sup>21</sup> That memo set the definition of torture at a very high threshold, both in

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15. *See id.* at 11.

16. *See id.* at 20.

17. *See id.* at 15, 20.

18. *Id.* at 20.

19. *Id.* at 15; *see also* Project for the New American Century, Statement of Principles (June 3, 1997), <http://www.newamericancentury.org/statementofprinciples.htm>.

20. Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President, on the Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Bybee Memorandum].

21. PHILIPPE SANDS, *TORTURE TEAM: DECEPTION, CRUELTY AND THE COMPROMISE OF LAW* 88 (2008).

terms of domestic United States law and, equally significant, for the purposes of international law. This memo basically said that if interrogators inflicted physical pain that fell short of that which caused organ failure or death, the interrogators would not be committing torture.<sup>22</sup> Shortly after the adoption of the Torture Memo, another (apparently) unconnected memo was prepared at Guantánamo Bay by the Staff Judge Advocate, Diane Beaver.<sup>23</sup> This memo formed a rather similar conclusion in relation not only to the Geneva Conventions, which the presidential decision of February 7, 2002, had already set aside,<sup>24</sup> but also in relation to other conventions that might plausibly place constraints on interrogation techniques. The memo argued that international human rights conventions do not apply to activity outside United States territory.<sup>25</sup> It also argued that the torture convention did not apply to interrogation techniques because it was not self-executing.<sup>26</sup> Customary international law was not mentioned, and the memo proceeded on the basis that the protections reflected in Common Article 3 of the Geneva Conventions did not apply because the President had already decided that none of the detainees at Guantánamo Bay had any rights under the Geneva Conventions.<sup>27</sup>

The third document that is worth looking at is the memorandum authored by Jim Haynes, a Harvard-educated lawyer and General Counsel at the Defense Department, written on November 27, 2002, and later signed by Secretary of Defense Donald Rumsfeld on December 2, 2002.<sup>28</sup> In this famous memo Secretary Rumsfeld wrote, "However, I stand for 8–10 hours a day. Why is standing limited to 4 hours?"<sup>29</sup> This memorandum authorized fifteen techniques of interrogation at Guantánamo Bay, and it left open the possible future use of three others, including waterboarding.<sup>30</sup>

I read these documents as an outsider—a British barrister sharing the same legal traditions as the United States and with a background in public international law. I asked myself the question—how could it be that these legal memoranda were written in the name of the United States? It seems astonishing that they could ever have been written, and even more astonishing that they were then relied upon. Yet they were.

The approach to lawyering taken by the document's drafters seems to have had infectious trans-Atlantic consequences. In Britain, there has been great attention to certain legal opinions given by the British Attorney General, particularly in relation to

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22. Bybee Memorandum, *supra* note 20, at 176, 183.

23. SANDS, *supra* note 21, at 67, 77–82.

24. *Id.* at 22.

25. See Memorandum from Diane E. Beaver, Staff Judge Advocate, to Commander, Joint Task Force 170, on Legal Brief on Proposed Counter-Resistance Strategies (Oct. 11, 2002), in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, *supra* note 20, at 229, 230 [hereinafter Beaver Memorandum].

26. *Id.*

27. See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; SANDS, *supra* note 21, at 22; Beaver Memorandum, *supra* note 25, at 229.

28. Memorandum from William J. Haynes II, Gen. Counsel of the Dep't of Def. to Donald Rumsfeld, Sec'y of Def. on Counter-Resistance Techniques (Nov. 27, 2002), in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, *supra* note 20, at 236, 236–37 [hereinafter Haynes Memorandum].

29. *Id.*

30. See SANDS, *supra* note 21, at 6.

the war in Iraq. On March 7, 2003, the British Attorney General wrote a secret thirteen-page memorandum to the Prime Minister which said, in effect, that, without further and explicit Security Council authorization, the Iraq war may well be unlawful.<sup>31</sup> That document was not made public—it was prepared only for the Prime Minister and given to the Cabinet and Parliament. Ten days later the Attorney General wrote a one-page memorandum, made available to the Cabinet and Parliament, which appeared to state unambiguously the Attorney General's view that the war was lawful without further action by the Security Council.<sup>32</sup> What changed in those ten days? Apparently nothing outside of the political context. There was no change of law or facts—the only thing that changed was the nature of the pressure placed upon the Attorney General to sign off on the legality of the war.

The circumstances that caused this change to happen were brought up for the first time in my book, *Lawless World*, which identified the existence of a secret legal opinion.<sup>33</sup> These events have caused some rethinking about the function of the office of Attorney General in Britain. Indeed, new Prime Minister Gordon Brown's first policy statement was the issuance of a consultation paper examining the function of the Attorney General and what has been done to immunize it from perceptions or allegations of political interference.<sup>34</sup> I examine the related issues regarding the responsibilities of lawyers in my new book, *Torture Team*, which focuses on Donald Rumsfeld's memorandum.<sup>35</sup> Interestingly, the Bush Administration narrative has been that, in authorizing the eighteen techniques of interrogation, Mr. Haynes relied solely on the legal advice of a junior Staff Judge Advocate at Guantánamo Bay and took no account of the OLC's opinions on August 1, 2002.<sup>36</sup>

Having looked at these issues, I am sure that the Bush Administration's narrative is not accurate. Specifically, I do not think it is correct that the August 1, 2002, OLC's opinion was directed only at the CIA and not intended to address other interrogations.<sup>37</sup> The Bush Administration has adopted its narrative to shift the blame for what happened at Guantánamo Bay to those on the ground and to avoid responsibility at the highest levels, by claiming that the Yoo/Bybee memo was not connected to the decision to authorize new interrogation techniques at Guantánamo. There is a great deal more that will come out in relation to this story. Some of these issues have come out in books that have been written by individuals who were involved in the processes. For instance, John Yoo has written an interesting book titled *War by Other Means*.<sup>38</sup> He may be commended for consistency. He defends his opinions and expresses the view that his OLC memo was rescinded for political reasons.<sup>39</sup> Jack Goldsmith, who took over as the head of the OLC in June 2003 after a stint as special counsel to Jim

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31. See SANDS, *supra* note 5, at 196–97.

32. See *id.* at 198.

33. See *id.* at 196–97.

34. See SELECT COMMITTEE ON THE CONSTITUTION, THE GOVERNANCE OF BRITAIN, REPORT, 2006–07, H.L. 158, at 24.

35. SANDS, *supra* note 21.

36. See *id.* at 22–26.

37. See Bybee Memorandum, *supra* note 20.

38. JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR (2006).

39. *Id.* at 187.

Haynes at the Department of Defense, also has published a book titled *The Terror Presidency*.<sup>40</sup> These books raise serious issues about the function of lawyers in relation to government.

Lawyers are gatekeepers. In United States and British societies, lawyers fulfill important social functions, one of which is to act as guardians of legality and constitutionality. It is indispensable in both the British and American traditions that legal advice should be given independently and fearlessly, with reference not to what the law should be but what it actually is. It seems that this fundamental tradition has been swept aside in relation to what happened in the period after September 11. *The Terror Presidency* is plainly the work of an apparently anguished lawyer who seems to be concerned that he may have been associated with unhappy and difficult times but cannot quite accept that he is an author of the mistakes. It provides a fascinating insight into the author's perspective of a lawyer's function. Let me explain why, on a close reading, I find this to be a surprising and troubling book.

Before going to the OLC, Jack Goldsmith worked as special counsel for Jim Haynes, the General Counsel of Public Defense.<sup>41</sup> "During my time in the Defense Department," he writes, "Haynes gave me an endless stream of fascinating legal problems relat[ing] to missile defense, Guantánamo detentions, military commissions, the Iraq invasion and occupation, the United Nations, and much more."<sup>42</sup> Interestingly, the issue of interrogation is not explicitly listed, despite the fact that Professor Goldsmith's tenure coincided with Mr. Haynes's authorship of the November 27, 2002 memo on new interrogation techniques for Guantánamo detainees. The author then describes how shortly after he took office, Henry Kissinger made a demarche to Secretary Rumsfeld complaining about the implications of the Pinochet judgment.<sup>43</sup> I find it interesting that an English judgment might have caused such concern in the upper echelons of the Bush Administration. Mr. Kissinger goes to Secretary Rumsfeld and Secretary Rumsfeld then asks Jim Haynes to analyze and find a solution to what Secretary Rumsfeld termed "the judicialization of international politics."<sup>44</sup>

Secretary Rumsfeld was referring to the system of international laws that the United States and Britain put in place following the adoption of the Atlantic Charter. Professor Goldsmith evokes an image of the Department of Defense General Counsel being given a brief by his client: sort out the problem of sixty years of international law. Soon after Secretary Rumsfeld's request, Professor Goldsmith arrived at the Department of Defense. He had been a leading academic critic of many aspects of the international human rights movement, and saw himself as the perfect person for the assignment. Mr. Haynes handed him the assignment, and now it was Professor Goldsmith's task to find a solution to this pressing problem: too much international law because too many foreign courts and international courts are coming up with the solutions. This is his account:

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40. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

41. *Id.* at 20–21.

42. *Id.* at 21.

43. *Id.* at 56–59.

44. *Id.* at 59.



"In the past quarter century, various nations, NGOs [nongovernmental organizations], academics, international organizations, and others in the 'international community' have been busily weaving a web of international laws and judicial institutions that today threatens [United States] interests," began one of the memos I wrote on Secretary Rumsfeld's behalf. "The [United States government] has seriously underestimated this threat, and has mistakenly assumed that confronting the threat will worsen it," the memo continued. "Unless we tackle the problem head-on, it will continue to grow. The issue is especially urgent because of the unusual challenges we face in the war on terrorism."<sup>45</sup>

The approach raises a basic question for anyone who is used to giving advice to governments: what exactly are the NGO's, academics', and international organizations' functions? In the English tradition, it is to give legal advice, not to spout off one's own academic views, particularly when they amount to little more than expressions of political ideology (and are economical with the facts, ignoring the reality that it is states that make international laws—including the United States—and courts that interpret and apply them—including the Judicial Committee of the House of Lords, in the case concerning Senator Pinochet's immunity). It appears that the choice of this individual to give legal advice was directly related to academic views expressing a particular ideology, almost theological in its approach, that the international rule of law is fundamentally anathema to the United States. The approach is then applied to particular issues, such as the International Criminal Court. As I mentioned, the United States is perfectly entitled to remain outside of the International Criminal Court's jurisdiction, as other states have done. Yet, many have joined the International Criminal Court—including the United Kingdom, every European Union member state, and Japan. These are not wholly irrelevant countries, NGOs, or academics.

What does Professor Goldsmith have to say about the International Criminal Court? "The ICC is at bottom an attempt by militarily weak nations that dominated ICC negotiations to restrain militarily powerful nations."<sup>46</sup> Let us pause there. Is it the function of a lawyer to provide his client with his personal views as to what the true function of the International Criminal Court may be? And what is the relevance of the lawyer's view to the preparation of legal advice? The relevance here is that ideology infects the content of the actual advice, bending it to support a particular conclusion rather than engaging in the normal process of treaty interpretation.

There is much more that could be said in relation to Professor Goldsmith's incomplete account of his time serving the Bush Administration. There are casual, generalized references to the efforts by Europeans and human rights organizations to spin a particular approach. I wonder how useful or proper it would be to speculate about the role of the United States. It is not the type of statement one would usually expect from an advisor charged with giving legal advice. The sweeping generalizations are as ridiculous as would be an equivalent effort to pigeonhole all Americans as falling into a category of persons seeking to put in place a web of rules within which other states—and their nationals—might be ensnared.

Against that background, let me turn to the final part of this lecture. The legal opinions that I have mentioned are of a very poor quality. They do not reach the

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45. *Id.* at 60.

46. *Id.* at 63.

standards we have come to expect from those who customarily advise the United States government, which has always taken its domestic and international obligations seriously. Nor do these legal opinions approach the issues they address with balanced arguments in favor and against particular perspectives or identify material that is helpful as well as unhelpful to a particular interpretation. In the English context, when a government approaches an individual and asks for legal advice, it wants to know what the law is, what the legally available options are, and what support there may be for a particular construction. It is not traditional to expect a lawyer to rubber stamp a predetermined policy. Governments want to know, and are entitled to be told, what the arguments are in favor of a particular course of action, and what the arguments are against a particular course of action. I refer to you the first opinion, the secret opinion of the Attorney General on March 6, 2003, as an example of such an exercise. Even if I may not fully share its conclusion, it provides a balanced and reasonable view on a live legal question.<sup>47</sup>

What happens if the lawyer advising a government fails to engage in that type of careful, independent balancing exercise? What are the consequences? Professor Dawn Johnsen, whom I have had the occasion to meet during this visit, has addressed this issue by reference to United States law and United States ethical standards. Professor Johnsen and others have produced a set of guidelines that I find very interesting in relation to future legal advice given within the context of the OLC.<sup>48</sup> I cannot do better than Professor Johnsen, particularly in relation to the United States situation, for which I have no expertise. What I know about international law is, at the end of the day, an international lawyer will only take limited account of what domestic United States law says about giving legal advice or what domestic rules of professional ethics say about giving legal advice. The bottom line is this: does the legal advice the individual provides to the government give rise to actions that violate international laws? If it does, as is the case for the legal advice that gave rise to the authorization and application of new interrogation techniques Secretary Rumsfeld authorized on December 2, 2002,<sup>49</sup> then a further question arises: have the lawyers who provided the legal advice crossed the line, not only by giving erroneous legal advice, or unprofessional legal advice, but legal advice which may give rise to criminal charges under international law?

How might a situation like the one just posed arise? I invite you to look at the Geneva Conventions, including Article 3, and the relevant provisions of the 1984 Convention against Torture. Article 3 prohibits, in all circumstances, outrageous treatment, cruelty, humiliation, or torture, of a detainee.<sup>50</sup> It categorizes these acts as war crimes, which may be subject to universal criminal jurisdiction—the same

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47. See Draft Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Mar. 6, 2003), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB*, *supra* note 20, at 241.

48. *Secret Law and the Threat to Democratic and Accountable Government: Hearing Before Subcomm. on the Constitution of the S. Comm. of the Judiciary*, 110th Cong. (2008) [hereinafter *Secret Law Testimony*] (testimony of Dawn E. Johnsen).

49. See Haynes Memorandum, *supra* note 28.

50. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, available at <http://www.icrc.org/ihl.nsf/WebART/375-590006?OpenDocument>.

principle which arose in the Pinochet case under the Torture Convention. The Torture Convention also provides for universal jurisdiction. The person who tortures in violation of the Torture Convention is subject to investigation and, as appropriate, prosecution anywhere in the world. What about the lawyer who gives legal advice that allows such actions to happen? Article 4 of the Torture Convention deals with that issue. The person who is complicit in torture, or who participates in torture, will himself or herself be exposed to criminal responsibility.<sup>51</sup>

I have little doubt that a lawyer who violates these international rules will expose himself or herself to potential criminal responsibility under international law. Everything turns on facts. I am not making allegations against any particular individual. I say no more than that the possibility is there. When I served on a panel in San Francisco a couple of years ago with John Yoo, I put that point to him. He steered a path away from the issue. I have no doubts that it will return to touch him and others. What authority is there for the proposition that a lawyer whose advice leads to the commission of an international crime may himself be exposed to the possibility of criminal investigation? An example of this authority became the basis of a movie—one that I encourage you all to go and see. The 1961 movie “Judgment at Nuremberg,”<sup>52</sup> which tells the story of a case about lawyers in Nazi Germany. Lawyers who were judges, prosecutors, and legal advisors were indicted, tried, and convicted for international crimes in relation to their activities as lawyers.

The film actually was based on a series of cases—“*The Justice Trial*,” *In re Alstötter*, which was the trial of fourteen people<sup>53</sup>—not before the International Military Tribunal of Nuremberg, but before a United States Military Tribunal prosecuted by Telford Taylor (who went on to be a noted constitutional law scholar at Columbia Law School). Taylor was a consultant on the film. Taylor decided to make an example of some of the worst lawyers who participated in giving legal advice during the Nazi period that was contrary to international law at the time.

I want to be clear about one thing: I am not saying that what has happened recently in the United States is in any way analogous to what happened in Germany during the 1930s and 1940s. Nor am I saying—and let me be very clear about this—that the lawyers who gave advice on the torture memos and related matters are somehow substantively equivalent to the judges, prosecutors, and the legal advisors who were defendants in *The Justice Trial*. I am concerned only with the underlying legal principle. Is there authority for the proposition that a lawyer who, acting as such, may become criminally liable where she or he gives legal advice that contributes to the crime? If you go and read *The Justice Trial*, you will see that the answer to that question is yes.

Today, I do not need to descend into facts that you can find in my book.<sup>54</sup> What is significant is that lawyers have responsibilities. They have ethical responsibilities, and they have responsibilities in relation to international criminal law. I do not need to advance my argument any further than that in relation to any of the particular

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51. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, Dec. 10, 1984, 1465 U.N.T.S. 85.

52. JUDGMENT AT NUREMBERG (Roxlom Films 1961).

53. *In re Alstötter (The Justice Trial)*, 14 Ann. Dig. 278 (Nuremberg, Germany, United States Military Tribunal 1947).

54. Sands, *supra* note 21.

individuals who I have mentioned today. That said, it is clear to me that all of the lawyers who were most deeply involved at the time—and I say this subject to the facts that have not yet emerged—do have a risk of exposure to a criminal justice system written, not just in the United States, but also outside the United States.

Understandably, Professor Johnsen's guidelines do not refer to the external risks of acting in a particular way.<sup>55</sup> The reality today is that we all live in a globalized world. Events that happen in one country, even as powerful as the United States, have consequences in other countries. Like others, Americans travel. They are exposed, as we are all exposed, to rules that apply within our jurisdictions and to rules that apply at the international level. It is now fairly routine, in the giving of legal advice to the British government, that the advisor will consider the external consequences in the law, as well as the internal consequences. This will not change, and the United States needs to get used to this new reality.

The United States also needs to get used to another reality. Despite the best efforts of the Bush Administration and some of its lawyers, the international rules have not been displaced. The rules that the United States helped implement—the Geneva Conventions and the Torture Convention among others—are surely battered, but they have not been eliminated. These international laws remain in place. And it seems that with intervention of certain key individuals, as well as the United States Supreme Court, the tide has turned.<sup>56</sup> The laws that were subject to this assault remain intact, and many of you, as young lawyers, will inevitably, at some point in your professional careers, encounter them.

It is for another time and another place to talk about the role of law schools in contributing to the unhappy events of the past few years. Indiana seems to have been ahead of the curve in coming up with a *Journal of Global Legal Studies* well before many other law schools. Looking around the country, however, the reality remains that in most American law schools, international law is not taught at all, or it is taught in only the most limited way. This trend has created a space, often occupied by proponents of a particular ideological or theological view, about the nature of America's engagement with the rest of the world. Aspects of that theological (or ideological) view may be justified. It is entirely proper to raise questions about international laws and their legitimacy: What are these rules? Where did they come from? Who made them? How do they combine with domestic norms? These are legitimate issues to address. What is more problematic is what comes next: it is not permissible, in my view, to proceed to the position that when you do not like the rules, even after they have been ratified by the Senate and they are binding on the United States, you may conclude, acting unilaterally, that you will ignore them or interpret them into irrelevance.

And so, I conclude, by returning to the title of this lecture. When one talks about poodles and bulldogs, the real poodles have been some of the occupants of the highest legal offices in the Bush Administration. These poodles have failed to act independently and fearlessly in ensuring that the Bush Administration was given balanced, reasonable proper legal advice on what the domestic law allowed in its international context. This is a failing for which the United States has already paid a

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55. See *Secret Law Testimony*, *supra* note 48.

56. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

very great price, for which I have great regret, since no country in the world has been more important for creating a rules-based system of international relations than the United States. When the United States wobbles, the rest of the world suffers. The sooner this issue is sorted out, the better. The sooner real lawyers are in place, the better for all of us.