Torture Team
Deception, Cruelty and the Compromise of Law
by Philippe Sands[1]

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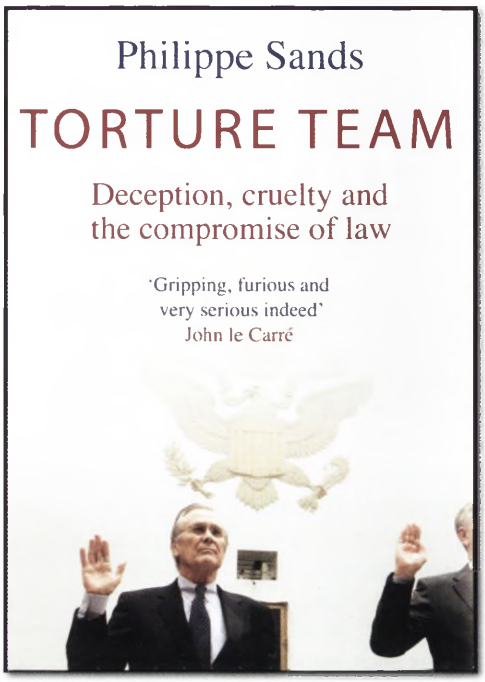

By Stephen Keim SC

In *Torture Team*, Professor Sands does not seek to unravel or reveal every act of illegality and deception engaged in by the Bush Administration since January 2001. His enquiry in this book is much more specific.

Three dates are crucial. On 7 February 2002, President Bush declared that inmates of Guantanamo Bay were unable to access rights under the Geneva Conventions that are generally available to protect persons captured in military conflict.[2]

On 2 December 2002, Secretary of Defense, Donald Rumsfeld signed a memorandum forwarded to him by the Department of Defense General Counsel, William ('Jim') Haynes. The memorandum approved use at Guantanamo Bay of a number of 'counter-resistance techniques' for use in the interrogation of detainees. These aggressive techniques marked a departure from the US defence force's traditional approach to interrogation of prisoners, which dates back to the words of President Lincoln in 1863 that 'military necessity does admit of cruelty'.

On 22 June 2004, in the wake of revelations of prisoner abuse at the Abu Ghraib prison in Iraq, a joint press conference was held by Alberto Gonzales, Personal Counsel to the President (and later Attorney-General), Jim Haynes and Dan Dell'Orto (Haynes' Principal Deputy Counsel at Department of Defense). In this press conference, the three lawyers released the Rumsfeld memo. They also released legal opinions signed by John Yoo and Jay Bybee, senior lawyers in the Justice Department, which had been widely discussed ever since parts of them had been leaked prior to the press conference on 22 June 2004. These opinions were widely perceived to be an attempt by lawyers to argue that torture should be defined so narrowly so as to allow much that should properly be considered to be torture, despite the prohibitions against the use of torture in international treaties and domestic US legislation.

The narrative that was spun at that press conference is the subject of Professor Sands' investigation, which forms the basis of *Torture Team*. The three senior lawyers portrayed the opinions of Yoo and Bybee as mere academic forays that had nothing to do with actual decisions taken by the administration. The Haynes memo was portrayed as the result of a process initiated by an aggressive major-general at Guantanamo and the military lawyer attached to his unit.

The approval given by Rumsfeld to the proposal contained in the Haynes memo, was portrayed as a reluctant and conservative approval of the request from the people on the ground at Guantanamo, supporting them in their difficult job in seeking to get information from a new type of enemy of the American people and trying to protect American lives from fresh attacks from this same, new enemy. Rumsfeld was portrayed as acting to rescind the approval after further, careful consideration.

The application of the new aggressive techniques are illustrated by the interrogation log of detainee 063, Mohamed al-Qahtani, who was interrogated, often for 20 hours a day, over 53 days, by interrogators using most of the aggressive techniques approved by Rumsfeld. Often, two or more techniques were used together. Extracts from the interrogation log form an increasingly horrific epigraph to each of the chapters of the book.

Professor Sands' research draws on many different sources but the story is told through the interaction between author as investigating interviewer, on the one hand, and most of the main players, on the other. The story unfolds as Professor Sands has conversations with these players, most of whom are now working in new jobs as academics or Pentagon bureaucrats. This method of story-telling adds drama, character and atmosphere as individual characters take on roles as fall-guy (or gal); dupe or hard-head.

The author reveals a narrative very different to that which had emerged from the press conference of 22 June 2004. The origins of the Bush announcement of the non-availability of the Geneva protections are connected to the Haynes/Rumsfeld memo. The Yoo/Bybee opinions turn out to be the legal advices relied upon by Rumsfeld and Haynes in approving the memo. And the proposals approved by Rumsfeld to throw out the time-honoured approach to interrogation of captured enemy personnel come, as it turns out, through a process of manipulation by the lawyers at the top of the Administration tree, and not from the ground at Guantanamo as was implied.

Professor Sands is interested in lawyers and how they behave when they take on political roles. He is interested in the way that lawyers are drawn from serving the law to subverting the rule of law. The *dramatis personae of Torture Team* give him plenty to feed his interest.

Torture Team, however, is not without its heroes. Interrogators from the military and FBI resented the subversion of their traditions and their professionalism by people who had power but knew nothing about the science of interrogation or the virtue of integrity. The legal tradition within the defense forces responded to the concerns of the professional interrogators. When Alberto Mora, General Counsel to the Navy, with the support of his colleagues and his supervisors, persisted in ringing the senior lawyers at the Department of Defence, Haynes and even Rumsfeld knew that they must buckle. And they did. The memo was rescinded and soon the cover-up, which is the subject of this book, commenced.

Torture Team is an exciting and important book. It is not surprising that the dust cover quotes a favourable review from John le Carré, himself an author of books of great excitement.

Professor Sands' book is a significant contribution to that process. Although, we frequently seem to be doomed to relive the worst experiences of our past, revisiting and analysing those experiences is worthwhile if it helps to avoid their repetition.

Torture Team makes a valuable contribution and carries a very warm recommendation from this reviewer. ■

Notes: **1** Philippe Sands is a Professor of Law and Director of the Centre on International Courts and Tribunals at University College London. See http://www.ucl.ac.uk/laws/academics/profiles/index.shtml?sands. He is a member of Matrix Chambers in London. See http://www.matrixlaw.co.uk/WhoWeAre_Members_PhilippeSandsQC.aspx. He took silk in 2003. he practises mainly in public international law. He has been involved in cases in the English courts involving General Pinochet and detainees of Guantanamo Bay. He has also appeared before a number of international tribunals. See http://www.matrixlaw.co.uk/WhoWeAre_Members_PhilippeSandsQC_NotableCases.aspx.
2 The declaration was differential in its application but identical in its effect. Members of the Taliban had rights under the Conventions but could not access them. Members of Al Qaeda did not have any rights under the Conventions.

Stephen Keim SC *is a barrister at Higgins Chambers, Brisbane. Mr Keim SC gained fame for his defence of Dr Mohamed Haneef and shared* The Weekend Australian's *Australian of the Year for 2007 with the instructing solicitor, Peter Russo.*

MEDIATION COSTS

By Phillipa Alexander

The costs of mediation are often substantial, and recovery of such costs in the absence of a specific order is often subject to dispute. A recent decision of the NSW Court of Appeal[1] has refocused attention on this issue. Whether the costs of mediation are recoverable by a successful party in proceedings may depend not only on the nature of any agreement between the parties, but also the jurisdiction in which the proceedings are brought.

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In a number of cases, the court has declined to order a successful party's costs of mediation to be paid by their opposing party. Austin J refused such an order in *Medulla v Abdel Hameed.*[2] While the mediation was not formally directed by the court, it had been supported by Austin J.

Similarly, in *Mead & Anor v Allianz Australia Insurance Ltd,*[3] an application that the defendants pay the plaintiffs' costs of mediation was unsuccessful. Formal court orders had been made by consent that the matter be referred to mediation. The parties entered into a mediation agreement, which provided that the parties were to be liable for payment of the mediator's fees in the following proportions:

> 'To be borne equally between the parties [the plaintiffs – 50% and Allianz – 50%] and if the mediation is not successful, then the plaintiffs reserve their rights to make an application at the hearing of [the proceedings], or at any relevant time thereafter, that Allianz pay the plaintiffs' costs of the mediation.'

The mediation was unsuccessful. However, the matter was settled later in the same month, when the defendant accepted an offer of compromise made by the plaintiffs, which included a provision for the defendant to pay the plaintiffs' 'costs of these proceedings'. The plaintiffs sought an order that the costs incurred by them in connection with the court-ordered mediation be costs of the plaintiffs' proceedings. Bergin J declined to construe the expression 'costs of these proceedings' as including