

## **The Human Rights Law Resource Centre Seminar:**

### **'Torture Team': Human Rights, Lawyers, Interrogations and the 'War on Terror'**

**Melbourne, 19 August 2008**

Tonight I have been asked to talk about the "Torture Team" but I want to go beyond that because here we have both the book and Philippe Sands. To use a word from one of the players, the context in which these events occurred is important. The rise of the neo-conservatives in the 1990s, their Statement of Principles published in 1997, the election of George Bush and the terrible events of 9/11 all created a mood and for the neo-cons an opportunity which they seized avidly. It offers some explanation as to why events unfolded as they did. The Project for a New American Century is a formative neo-con document especially *Rebuilding America's Defences* (published in 2000). It is remarkable how influential and prescient this was.

The 2004 Report of the Schlesinger Independent Panel reviewing Department of Defence detention operations was significant. In a sense it tells us as much as Philippe Sands' book because the report is silent on so many matters and inadequate on others. The silence and omissions that are revealing.

And then we have the two separate but linked series of events so adequately described and exposed in Philippe Sands' book. The first concerned the President's most senior legal advisers, his Attorney General and the Justice Department and begins in January 2002.

The second begins not much later, in February of the same year, as Rumsfeld hand-picked his man for Guantanamo Bay. These strands were largely separate, meeting at the centre in the persons of Rumsfeld and Haynes.

I am going to address these matters in turn, and then talk about some of the wider political and possibly legal implications of such events.

To Schlesinger then:

In the public sense the story begins in April of 2004. Photographs of torture at Abu Ghraib were published around the world. America's reputation was immediately threatened and difficult questions were asked. The Administration seemed to have no clear plan in handling a developing crisis.

The Abu Ghraib photographs raised serious questions. What happened and how. Were the same practices operating in Afghanistan, in Guantanamo Bay? Was it generic or an aberration by low-level military officers, not properly supervised, or by ill-trained reservists? Or was it something deeper, more fundamental, going to the very heart of the Administration?

In May 2004, Schlesinger was appointed to chair his Independent Panel, examining detention techniques and operations. He reported in August. That report suggests

that it was the fault of the army, virtually of all ranks, also of army organisation. His report didn't say much about the Department of Defense or the role of the Justice Department. It reported decisions that had been made, often without comment. It accepted the Presidential decree of February 2002, without exploring the basis of that decision. He never questioned the President's power or the legal advice on which it was based. He accepts that the request for aggressive interrogation techniques came from interrogators at Guantanamo Bay. He does not go behind that and ask how did that occur. It was an inadequate report but it served his political masters admirably. By blaming the army, the report really said that it was all the army's fault and that the centre of power, Washington, was not involved.

The Administration clearly hoped the Schlesinger Report would set the whole matter at rest. It didn't, as we have seen.

Several weeks before Schlesinger reported, Ashcroft, Attorney General and Wolfowitz, Deputy Secretary of Defense, both appeared ineffectively and disturbingly before Senate Committees, their performance highlighted rather than allayed concern.

In addition, on 22 June, well before the Schlesinger panel was due to report, Gonzales, Chief Counsel to the President and Haynes, Chief Counsel to Rumsfeld, supported by other staff, held an extraordinary Press Conference in the White House.

Documents had been published seeking to show the care, the concern, and the consideration that had been given to the issues of detention and interrogation. This was done to demonstrate accountability, and transparency, but in many ways exposed the depth of the problem even more.

One document concerned the Haynes memo to Rumsfeld, recommending the use of 18 additional interrogation techniques, some of which would, to ordinary people, clearly involve torture. Rumsfeld signed that recommendation on 2 December 2002.

At this press conference a clear lie was told to the world. The Administration tried to argue that the move to torture had come from the army, from the bottom up. The complete account tells another story and so I return to the two strands.

The first strand involves the President's decree of February 2002, denying application of the Geneva Conventions.

On 22<sup>nd</sup> January 2002, a memorandum had gone to Gonzales and to Haynes from Jay Bybee, Assistant Attorney-General. That advice concluded that neither the Federal War Crimes Act nor the Geneva Conventions would apply to detention conditions of Al Qaeda or Taliban prisoners.

Even though the Secretary of State Powell, supported by William Taft IV sought to argue to the contrary, Alberto Gonzales wrote a strong brief opinion that the Justice Department advice from Bybee should stand. A few days later on 1 February, John Ashcroft, Attorney General, joined the argument. He wished to foreclose any possibility of judicial review and recommended a determination that the Geneva Conventions do not apply, would provide the United States the highest level of legal certainty under American law.

Powell and Taft's opposition was hardly noticed.

And so the President made his determination on 7 February, putting aside the Geneva Conventions and all restraint. He reaffirmed that prisoners should be treated humanely. It would be interesting to know how he would define that term. He also said that the US would comply with Geneva in practice "to the extent appropriate and consistent with military necessity". Thus watering down even the "in principle" application of the Conventions. If he meant it, the Conventions could have been allowed to prevail.

This decision of the President established an environment of disregard for international law, and influenced events throughout the rest of the year. It could not be questioned by military officers. The Commander-in-Chief had spoken.

It wasn't long before these same Legal Counsel, who had assisted the President in placing prisoners outside legal protection, began redefining legal restraints on interrogation and redefining torture. As early as 26 February 2002 a memorandum for William J Haynes, General Counsel, Dept of Defence concerned, "potential legal constraints applicable to interrogation of persons captured by US armed forces in Afghanistan", signed Jay Bybee.

This was the Bybee whose famous opinion of 1 August 2002 concludes in this way: "torture as defined in and prescribed... covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm..."

Continuing the discussion and the legal advice, in August Deputy Assistant Attorney General Yoo responded to a request from Counsel to the President, Gonzales, concerning the legality under international law of interrogation methods to be used during the current "War on Terrorism".

There can be no doubt that at the highest level in the White House and in Justice, prisoners were placed not only outside the law but interrogation methods and techniques and their legality, was under intense scrutiny. It is not possible to argue otherwise, despite the conclusions of the Schlesinger Report.

Let me come to the second strand so ably exposed by Philippe Sands.

In February, Rumsfeld himself had discussions with Major-General Dunleavy who was a bluff, open, perhaps not highly intelligent Major-General. Rumsfeld thought he would be an ideal person to establish tough interrogation techniques at Guantanamo Bay, and so he was appointed.

Throughout the year, preparations were made. By September there had been significant discussions amongst a relatively small group, of possible techniques that might be applied. Dunleavy wanted legal cover for whatever he might do.

His Staff Judge Advocate, Lt Col Diane Beaver, was required to prepare an opinion on expanded interrogation techniques. She did as she was told but she was uneasy and isolated from her colleagues and other sources of advice. She had no access to an adequate international law library. Attempts to contact other senior lawyers within the system were not answered. Beaver was aware that Geneva Conventions did not apply because of the President's decree of February 2002.

In the end she did as she had been ordered. She provided an opinion. She knew she was not expert in this subject and, while the opinion recommended that the additional interrogation techniques that had been put together were legal, her recommendation concludes in this way: "Since the law requires examination of all facts under a totality of circumstances test, I further recommend that all proposed interrogations involving Category 2 and 3 methods, must undergo a legal, medical, behavioural science and intelligence review prior to their commencement." Clearly Diane Beaver had considerable reservations.

Her advice was sent to Dunleavy on 11 October.

Lt Col Phifer had provided the list of 18 proposed techniques. Dunleavy included this list, together with Beaver's legal opinion, with his own recommendation which concluded that these techniques do not violate US or international law.

Dunleavy ignored the reservation expressed by Beaver. He sent his recommendation up the chain of command to General Hill. Hill was a cautious and thoughtful man and didn't respond until 25 October. His note went to Chairman, Joint Chief of Staff in Washington, General Meyers. Hill was clearly uneasy with Dunleavy's recommendation.

The important element in Hill's note involved these words: "However I desire to have as many options as possible at my disposal and therefore request the Department of Defence and Department of Justice Lawyers to review the third category of techniques." Hill made no recommendation to accept any of them.

Maybe it was a hallmark of the way the Bush/Gonzales/Ashcroft/ Rumsfeld people operated but Hill heard nothing from that point until he saw the Rumsfeld order promulgated on 2 December. His advice ignored.

General Meyers didn't give the matter the attention he should have. He had a discussion with Haynes who had clearly seen the recommendations from Dunleavy, said the appropriate people had been consulted but there was nothing in writing, there was no paper trail.

On 27<sup>th</sup> Haynes wrote to the Secretary of Defence with his own recommendation to accept the additional techniques. Rumsfeld signed the request on 2 December.

It is significant that, despite the Beaver request for further legal examination, despite the request by Hill, much more senior than Beaver, for further and better advice from Defense and Justice, those requests were totally ignored. Indeed, defence and the army's legal system, with the exception of Haynes and those political appointees immediately around him was ignored. It was suspected that they would oppose the

recommendations for intensified interrogation techniques from Guantanamo Bay. The Judge Advocates General and Meyer's own Legal Counsel, were not involved.

Once the order to accept additional interrogation techniques was promulgated on 2 December, there started to be a very significant reaction, much of which was led by Alberto Mora, General Counsel to the Navy. It says a good deal for the system that he was able to get the decision rescinded as early as 15 January.

In my mind there can be no doubt at all about the Administration's guilt, about the complicity of senior lawyers, of politicians. If I knew the facts and were describing their actions in an Australian context, I would call it corrupt. The United States is a rules-based system, it has a Bill of Rights, a strong Supreme Court. The serious questions before us are these:

How can such a system be so damaged?  
How can legality be so destroyed?  
How can Due Process be so appallingly ignored?

One lesson perhaps is that the best Constitution and strongest institutions in the world are no ultimate protection if the wrong people are able to get into positions of power and place their co-conspirators in significant positions of influence and advice.

The likelihood is that the people involved will not pay any penalty, although, as Philippe Sands has said, some of those involved may need to watch which countries they travel to outside the United States.

The remarkable thing about the Schlesinger Report is, despite the severity of his condemnation of the army, the penalties seemed relatively light. In its own way, that is further supporting evidence, if any were needed, of the complicity of the highest political authorities.

While there are many protections built into the American system, for too long they failed. It is possible to argue that in the end they worked because the Rumsfeld orders were rescinded but the Presidential order was not. In this respect it is also worth recalling the Supreme Court's decisions in Rasul, Hamdan and Boumediene cases. They are very much part of the struggle by decent lawyers and judges to preserve constitutional guarantees. In this respect the Supreme Court is in a stronger position than the High Court of Australia where the Common Law, which might otherwise prevail, can be overturned by the legislation of government.

The system was and is fighting back, but can it be strengthened?

It is possible to suggest some significant steps -

The Senate could exercise even more vigorous oversight of Presidential appointees.

There could be more ruthless exposure of the facts of a person's true beliefs and attitudes. Arguably, when Gonzales was appointed in February 2005, he had already signed a document giving implicit support to torture.

The Senate's oversight system of executive actions could be strengthened. Officials breaching their oath of office should be prosecuted and suffer heavy penalties.

The Oversight Committees which survey intelligence and security could be made much more effective. Failure to disclose methods and operations to such committees should become a significant criminal offence.

For the wider international community, we should ask ourselves what can we do to re-engage the best of America, the America which has done so much to support, to lead the move to a rules-based international system in the years since the Second World War. We should not forget this. The America of Woodrow Wilson, of the Roosevelts, of Harry Truman even, was instrumental in building the post-war humanitarian and political order. The Universal Declaration of Human Rights and the later negotiated Conventions, seeking to give legal force to its high principle, the Marshall Plan and even the International Criminal Court which Bush opposes, but which Clinton had signed at the eleventh hour. None of this would have happened without American leadership and drive. America has momentarily forgotten this America and so has the world at large.

For Australia we have our own problems. We have no Bill of Rights. Our Constitution provides no protection for the rights of an individual person. The Common Law can be overturned by an Act of Parliament. In a sense, we are at the whim of government. For example, the High Court by 4:3 in Al-Kateb's case, decided that a failed asylum seeker could, if certain conditions prevailed, be jailed for life. Professor James Crawford of Cambridge University called parts of this decision "disreputable" in a speech in Canberra last month.

What happened to David Hicks, as many here would know, bears no resemblance to the application of the Rule of Law and Due Process, as is meant to apply both here and in America. This was confirmed by the English Court of Appeal Abbassi, involving a UK detainee on Guantanamo Bay.

Australians have been illegally deported by the government. Nobody has paid a penalty.

Australians, known to be innocent of any evil thought or deed, can be secretly detained for interrogation under new Security Laws. We are perhaps the only country to legislate for secret detention of the innocent.

We seriously need a properly based Bill of Rights to influence the way governments and bureaucracies behave. I see no other way of effectively limiting an excessive abuse of power.

There are ethical issues concerning the behaviour of politicians and of senior bureaucrats, especially since they are now political appointees. It is clearly not sufficient to rely on statements of principles published by Prime Ministers. Too often such statements are ignored. Perhaps we should borrow from America. The senior Senator for Alaska, Senator Stevens has recently been charged with hiding gifts by the Justice Department. We need to establish and enforce the strictest codes of ethical

behaviour, independently administered, rather than mere decision of the Prime Minister.

There are also particular issues for lawyers themselves which have been so ably but moderately exposed by Philippe Sands.

It is not just lawyers but also governments and government bureaucracies that need a stronger ethical base that may circumscribe their actions.

Stronger Freedom of Information legislation, which hopefully is on the books, should lead to fuller exposure of bureaucratic decisions and methods. We also need more effective appeal against administrative decisions to strengthen Australians against large and sometimes frightening bureaucracies.

There should be much greater accountability for damaging or ignoring the basic rights of individuals, with the possibility of significant penalties for the breach of such standards.

What is the nature of a lawyer's duty? I was once appalled to find a senior Head of Department ask me, what could the Public Service do when ordered to do something illegal? Lawyers really do have obligations to the Law and not to their political masters. A lawyer's duty is not only to that lawyer's client. It is to the law. It should be to justice within the law. If a client wishes to do something illegal and asks the least dangerous way to do it, perhaps the lawyer has a duty to provide that advice but, if it is not accompanied by advice concerning the illegality of the act itself, then it should be deficient, and perhaps in itself illegal.

A lawyer to a President or Prime Minister's duty is not to find a way of justifying or constructing a legal argument to allow that President or Prime Minister do what he wants to do. It is also to keep that President or Prime Minister within the law. A number of American lawyers at the every highest level have, in recent years, clearly failed that test. Arguably a number have breached their oath of office to uphold the Constitution and the laws of the United States. It was such an argument that propelled the UK into the Iraq War (Lord Goldsmith's advice of 17 March 2003).

More generally, legal rules must be strengthened, breach of which leads to significant penalties, whether that involves lawyers, bureaucrats or politicians, there are precedents for the liability and culpability of lawyers, precedents established by the United States itself. In the Justice Trial, *The United States of America vs. Josef Altstötter, et al*, German jurists were held responsible for implementing and furthering the Nazi "racial purity" programme. The Pinochet decisions also established new precedents which should provide some warning to heads of state or government.

We now know that our systems can be corroded, that evil actions can be undertaken which would indeed do credit to any tyranny. We know that the most powerful people can plot and lie to achieve their ideological objectives. Democratic values cannot be assumed to apply; they can be subverted and overthrown. We do not like to recognise it or to speak it. Unless we do we will continue to make serious mistakes. We have put aside George Kennan's injunction from 1946 not to fall into the ways of those with whom we are seeking to deal, to cope.

There is one other point. Much of the “Torture Team” demonstrates that the United States was prepared to ignore or evade international agreements and treaties. High officials wanted to free the Administration to do whatever it wanted. This may provide a more credible reason, certainly under Bush, why the Administration has not ratified the International Criminal Court. Its excuse, that the Treaty would have allowed capricious prosecutions against Americans, never had much credibility. It is more likely that they would have regarded the Treaty as an unwanted restraint on their capacity to do whatever they wanted to do.

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