Terrorism and Torture: when should principle yield to expediency?

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To the Immediate Past President, Ian Civil – thank you for the time and effort you have given to the Society on the committee and most recently your stewardship as president. The fact that the Society is in such good heart is testament to your very substantial contribution.

It is an honour for me to have the opportunity to serve as your President this year.

The society has for long period brought together doctors and lawyers in a social environment.

Preparing to speak, I sought a topic that was light and amusing, and directly relevant to your daily lives.

But instead, tonight I wish to look outward and discuss a topic with important legal and medical facets, that is of public interest and relevant to us all -

Terrorism and Torture: when should principle yield to expediency?

It is a very wide topic so I can only comment on some aspects that have come into focus in overseas cases of most relevance to us - this is not a lecture on politics or defence policy.

It raises important questions that I believe are food for thought we should all consider.

Introduction

1. The horrific events of 11 September 2001 heralded a new era of international terrorism. The international dimension has been demonstrated by the subsequent terrorist attacks elsewhere. Other plots have failed. Thanks to reliable intelligence and meticulous investigation, yet other plots have been identified and foiled before they could come to fruition. The threat of further attacks is ever present.

2. This has led to unprecedented steps to counter terrorist activity. International arrangements have been fast-tracked. Domestic laws, including here in New Zealand, have been passed to implement international obligations and otherwise suppress terrorism. And there has been a "War on Terror", which continues as I speak.

3. Just as terrorism is international, so the process of combating it, including intelligence gathering and sharing, is international.

4. The combination of the desperate need to combat terrorism and this international dimension has created issues which go to the heart of the rule of law. Lawyers have played an important role in addressing these issues – and not always for the best.

5. No doubt medical professionals as well, particularly some in uniform, have struggled to reconcile their responsibilities.

International legal response to terrorism after 9/11

6. Since 11 September 2001 member states of the UN have been strongly urged to cooperate and share information in order to counter terrorism. But these calls have been coupled with reminders that international law, including international humanitarian law, must be observed.

7. A key component of international humanitarian law is the prohibition against torture.

Torture prohibited

8. Historically, the common law set its face firmly against the use of torture. This was hailed as a distinguishing feature of the common law, contrasted with the practice prevalent in the states of continental Europe.

9. The practice of torture in England in the 16th and early 17th centuries, largely in exercise of the Royal prerogative, came to be an important issue in the struggle between the Crown and the parliamentary common lawyers which preceded and culminated in the English civil war.

    (a) Whereas in November 1605 James I authorised the torture of Guy Fawkes;

    (b) by 1628 when George Villiers, Duke of Buckingham and Lord High Admiral of England, was stabbed to death by John Felton, a naval officer, and King Charles I, asked the judges whether Felton could be put to the rack to discover his accomplices, the judges declared unanimously that no such proceeding was allowable by the laws of England.

10. One of the first acts of the Long Parliament in 1640 was to abolish the Court of Star Chamber, where torture evidence had been received.

11. It is now expressly recognised in the UN Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment:

    (a) that international law condemns and criminalises the official practice of torture,

    (b) requires states to suppress it, and

    (c) provides for the trial and punishment of officials found guilty of it.

    It is an international crime against humanity. The international prohibition of the use of torture has the enhanced status of a peremptory norm of general international law i.e. accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.

12. The NZ Supreme Court recognised this peremptory norm nature of the prohibition on torture in *Zaoui v Attorney-General* (No 2).[1] Section 8 of the NZBORA also states that everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment. In *Zaoui* the Supreme Court concluded that the power to deport a person whose presence has been certified to constitute a threat to national security could not apply if satisfied that there were substantial grounds for believing that the person would be in danger of being arbitrarily killed or subjected to torture or to cruel, inhuman or degrading treatment or punishment.

13. Under the Torture Convention, 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

14. What distinguishes this legal meaning of torture from its ordinary meaning is the state involvement.

15. No exceptional circumstances whatsoever, war or public emergency, may be invoked as a justification of torture.[2]

16. But even with such an inviolable rule, lines need to be drawn to deal with competing principles or practical realities.

Sovereign immunity

17. For example, the principle of sovereign immunity has to give way to the Torture Convention, as the House of Lords ultimately held in *Pinochet (No 3)* so that the former head of state of Chile had no immunity in criminal proceedings and could be extradited to Spain to face charges.

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1 [2006] 1 NZLR 289 at 51.

2 Torture Convention, Article 2.2.

18. Universal jurisdiction applies, so that any state can prosecute and punish torturers present in its jurisdiction even for crimes of torture committed abroad.

19. However, the House of Lords has also held that sovereign immunity still applied in civil proceedings.[3]

Admissibility of evidence resulting from torture

20. The Torture Convention also requires that statements made as a result of torture shall not be invoked as evidence in judicial proceedings (except against a person accused of torture). There are three principles at work here:

    - Unreliability of the statement – there are well-known examples of both false statements and true disclosures of value:

        - Senator John McCain, when tortured in Vietnam to provide the names of the members of his flight squadron, listed to his interrogators the offensive line of the Green Bay Packers football team, in his own words, "knowing that providing them false information was sufficient to suspend the abuse".[4]

        - On the other hand, during WWII the Gestapo rolled up resistance networks and wiped out their members on the basis of accurate information extracted under torture. Hence operatives sent to occupied countries were given suicide pills to prevent them from succumbing to torture and revealing valuable information about their mission and their contacts.[5]

    - Deterrence – exclusion seeks to discourage torture by devaluing its product.

    - Perhaps most importantly, the integrity of the judicial proceedings.

21. This exclusion principle undoubtedly applies where the state in whose jurisdiction the proceedings take place has inflicted or been complicit in

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3 *Jones v Saudi Arabia* [2006] UKHL 26.

4 *Newsweek,* November 21, 2005, p 50, cited by Lord Carswell 147.

5 Lord Rodger 130

the torture. In the NZ context, there would be no room for any real balancing process under section 30 of the Evidence Act.

22. But in the context of cross-border terrorism, where information may be derived from sources where torture is still practised, the English courts have had to confront the question - whether a court should receive evidence which may have been procured by torture inflicted by officials of a foreign state without British complicity?

A and others v Secretary of State for the Home Department (No 2)[6]

23. In a case concerning appeals against detention of suspected international terrorists on national security grounds under Anti-terrorism legislation enacted after 9/11, the Court of Appeal held that reliance on evidence which had or might have been obtained through torture by agencies of other states over which the British had no power did not offend the principle, so that the general common law rule, that evidence was admissible if it was relevant applied, and the court could admit the evidence (with issues about how the evidence was obtained going to the weight to be attached to it).

24. The House of Lords disagreed, holding that the prohibition nevertheless applied - evidence of a suspect or witness obtained by torture could not be admitted against a party to proceedings in a UK court irrespective of where, by whom and on whose authority the torture had been inflicted.

25. The tension between principle and expediency is perhaps highlighted in Lord Bingham's comment:

> ... the English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention. I am startled, even a little dismayed, at the suggestion (and the acceptance by the Court of Appeal majority) that this deeply-rooted tradition and an international obligation solemnly and explicitly undertaken can be overridden by a statute and a procedural rule which make no mention of torture at all...

6 [2005] 1 WLR 414, [2004] EWCA Civ 1123; [2006] 2 AC 221, [2005] UKHL 71.

Proof

26. Even so, the House of Lords divided on the question of the required proof.

27. The majority held that the appropriate test of whether the evidence should be admitted and taken into account was for the special immigration court (SIAC) to ask itself whether it was established, by means of such diligent inquiries into the sources as it was practicable to carry out and on a balance of probabilities, that the information relied on by the Secretary of State was obtained under torture. If in doubt the court should admit the evidence, bearing the doubt in mind in evaluating it.

28. However, Lords Bingham, Nicholls and Hoffman dissented in this respect. They proposed that once a plausible reason why evidence may have been procured by torture was advanced, it was for SIAC to inquire and decide whether there was a real risk. If it was unable to conclude there was not a real risk it should refuse to admit the evidence.

29. Lord Nicholls, with whom Lord Bingham agreed, put it rather bluntly:

> The contrary approach would place on the detainee a burden of proof which, for reasons beyond his control, he can seldom discharge. In practice that would largely nullify the principle, vigorously supported on all sides, that courts will not admit evidence procured by torture. That would be to pay lip-service to the principle. That is not good enough.

30. On the other hand, Lord Hope (with whom the majority agreed on the proof issue) referred to Lord Bingham's speech in this way:

> But it is one thing to condemn torture, as we all do. It is another to find a solution to the question that this case raises which occupies the moral high ground but at the same time serves the public interest and is practicable. Condemnation is easy. Finding a solution to the question is much more difficult. It requires much more thought.

31. The majority saw the exclusion as the exception not the rule so that the relevant factual basis had to be established – otherwise it would impede the special court's process.

32. Such uncharacteristic language in the House of Lords reflects the tension between principle and expediency in this difficult area.

The fruit of the poisoned tree

33. So the evidence of a suspect or witness obtained by torture cannot be admitted (except against a person accused of torture as evidence the statement was made). But what of other evidence that only comes to light as a result of the coerced statement – sometimes called "the fruit of the poisoned tree"? [7] The strong words I have referred to from Lord Bingham would suggest this must be excluded too.

34. However, as Lord Bingham noted in relation to involuntary statements generally, there is an obvious anomaly in treating an involuntary statement as inadmissible while treating as admissible evidence which would never have come to light but for the involuntary statement. This is an anomaly which the common law has accepted, no doubt regarding it as a pragmatic compromise between the rejection of the involuntary statement and the practical desirability of relying on probative evidence which can be adduced without the need to rely on the involuntary statement.

35. Lord Hoffman gave an example of a step removed from admissibility of the raw product of interrogation under torture. Even when the evidence has been obtained by torture - the accomplice's statement has led to the bomb being found under the bed of the accused - that evidence may be so compelling and so independent that it does not carry enough of the smell of the torture chamber to require its exclusion.[8]

36. So the common law may admit in evidence the fruit of torture except for the statement itself.

37. In New Zealand now there would presumably be a balancing process under section 30 of the Evidence Act.

38. Whether and how this fruit comes to light takes us to the effect of the torture ban on the rôle of the executive as opposed to the courts. Here too we must see expediency at work.

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7 Lord Brown 161.

8 88.

Executive action

39. The House of Lords judges accepted that a different balance needed to be struck when considering the role of the executive - recognising the vital importance in the global terrorism context of a flow of information between the security services of many nations. Fragments of information, acquired from various sources, can be pieced together to form a valuable picture, enabling preventative steps.

40. What should the security services, the police and other agencies do if they know or suspect information received from overseas is the product of torture? Should they discard this information as 'tainted', and decline to use it lest its use be regarded as condoning the horrific means by which the information was obtained?

41. As Lord Nicholls said:

> If the police were to learn of the whereabouts of a ticking bomb it would be ludicrous for them to disregard this information if it had been procured by torture. No one suggests the police should act in this way. Similarly, if tainted information points a finger of suspicion at a particular individual: depending on the circumstances, this information is a matter the police may properly take into account when considering, for example, whether to make an arrest.
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> In both these instances the executive arm of the state is open to the charge that it is condoning the use of torture. So, in a sense, it is. The government is using information obtained by torture. But in cases such as these the government cannot be expected to close its eyes to this information at the price of endangering the lives of its own citizens. Moral repugnance to torture does not require this.

42. Indeed Lord Brown said: not merely is the executive *entitled* to make use of this information; it is *bound* to do so. It has a prime responsibility to safeguard the security of the state and would be failing in its duty if it ignores whatever it may learn or fails to follow it up. Of course it must do nothing to promote torture. It must not enlist torturers to its aid (rendition being perhaps the most extreme example of this). But nor need it sever relations even with those states whose interrogation practices are of most concern.

43. So the Minister does not act unlawfully if he certifies, arrests, searches and detains on the strength of foreign torture evidence.[9]

44. As Lord Bingham said, this distinction between the material on which the executive may act and that which is admissible in legal proceedings is not unusual. It arises whenever a public official relies on information which rules of public interest immunity prevent being adduced in evidence. This may be seen as an anomaly, but it springs from the tension between practical common sense and the need to protect the individual against unfair incrimination.[10]

45. I will return to the topic of public interest immunity a little later.

Domestic treatment

46. But first, the House of Lords was grappling with information obtained from foreign sources. What then of the conduct of each country's own counter terrorism officials?

47. As Lord Hope said, information - the gathering of intelligence - is a crucial weapon in the battle by democracies against international terrorism. Experience has shown from the beginning of time that those who are hostile to the state are reluctant to part with information that might disrupt or inhibit their activities. They usually have to be persuaded to release it. Handled responsibly, the methods that are used fall well short of what could reasonably be described as torture.

48. Responsible handling requires the principles to be clear and well understood by those involved. Recent experience suggests that even in countries at the forefront of development of human rights and the rule of law, this may not be so. The exigencies of 9/11 and its aftermath gave rise to policies that are quite contrary to what we expect.

49. One area of uncertainty leading to wriggle room is the scope of torture and the position in relation to lesser treatment.

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9 47.

10 48.

Inhuman or degrading treatment

50. The special rules that apply to torture do not necessarily apply to ill-treatment falling short of torture. Lord Bingham said that such treatment may invite exclusion of evidence as adversely affecting the fairness of a proceeding but did not think the authorities on the Torture Convention justified the assimilation of these two kinds of abusive conduct.
In New Zealand the balancing process would apply.

51. This is perhaps still a developing area. Lord Bingham referred to one of the so-called Torture Memos now released by the US Government relating to the techniques used after 9/11, a memorandum dated 11 October 2002 addressed to the Commander, Joint Task Force 170 at Guantanamo Bay. Lord Bingham noted that it may well be that some of the Category II or III techniques detailed in that memorandum would now be held to fall within the definition in article 1 of the Torture Convention, although he did not indicate which ones.

52. As I list them, consider from a medical and legal viewpoint, where you would draw the line having regard to the definition of "severe pain or suffering, whether physical or mental":

Category II techniques:

- Use of stress positions (like standing), for a maximum of 4 hours
- Use of falsified documents or reports
- Use of the isolation facility for up to 30 days
- Interrogating in an environment other than the standard interrogation booth
- Deprivation of light and auditory stimuli
- Hood placed over the head during transportation and questioning (should not restrict breathing)
- Use of 20 hour interrogations
- Removal of all comfort items (including religious items)
- Switching detainee from hot rations to ration packs [11]
- Removal of clothing
- Forced grooming (shaving of facial hair etc)

[11] MREs - Meal ready to eat, ration packs.

- Using individual phobias (such as fear of dogs) to induce stress

Category III techniques (which required higher authorisation and control):

- 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 (with appropriate medical monitoring).
- Use of a wet towel and dripping water to induce the misperception of suffocation.
- Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing.

The Torture Memos

53. In the US, government lawyers were involved in authorising US interrogation practices.

54. The example I have already referred to was an internal DOD document at GTMO, but given the unprecedented nature of the conflict from 9/11, it was the job of the US DOJ's Office of Legal Counsel to determine the legal contours of the US efforts to combat the terrorist threat. Their legal advice included some of the so-called "Torture Memos" by senior attorneys who advised the CIA, DOD and counsel to the President on "enhanced interrogation techniques" post 9/11.[12]

55. These Torture Memos make compelling albeit uncomfortable reading. For example, they include discussion of the legal and medical justifications for the use of certain interrogation techniques during a so-called "increased pressure phase" of the interrogation of a detainee thought to be one of the highest ranking members of al Qaeda. The techniques included stress positions, sleep deprivation, insects in a confinement box, and the waterboard - now accepted to be illegal. All of the techniques except for the insects, were used in advanced resistance training in the US military. The advice proceeded on the basis that research into the use

[12] The attorneys were senior, well respected, with stellar careers including positions as law school professors.

of the harshest technique, the waterboard, indicated no prolonged mental harm. A resistance training psychologist would be present.

56. These are not the only examples in history of legal and medical professionals believing they are doing the right thing – when viewed objectively with hindsight they were plainly not.

57. The detailed legal advice has now been the subject of thorough investigation by the DOJ.

58. Investigators concluded that the attorneys had engaged in professional misconduct by failing to provide "thorough, candid and objective" advice.

59. However, in January the Associate Deputy Attorney General[13] refused to adopt the findings of misconduct, distinguishing between flawed legal advice and professional misconduct. He concluded, as many others have, that these memos contained some significant flaws, overstating the certainty of the authors' conclusions and underexposing countervailing arguments.

    (a) For example, he agreed that the investigators' criticism of the approach the advice took to the definition of "severe pain" was well founded. By analogy with a medical benefits statute the advice had concluded that severe pain must rise to the level of pain associated with death, organ failure or serious impairment of body functions. This formulation was not helpful.

    (b) In relation to waterboarding, the advice attributed too much significance to the experience in US military resistance training – a critically different context.

    (c) Another example was the erroneous view in the US legal advice that the Israeli Supreme Court decision in *PCATI v Israel* had considered that the methods challenged in that case were not torture. This was contradicted by the Israeli Court's description of the harshest of the methods, the forceful shaking of the suspect's upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly. According to an expert, the shaking method was likely to cause serious brain damage, harm the spinal

[13] David Margolis.

cord, cause the suspect to lose consciousness, vomit and urinate uncontrollably and suffer serious headaches.

60. In the Israeli case, the state had adduced countering expert evidence, disputing the medical risks and arguing that doctors were present in all interrogation compounds. This clearly put those doctors in a difficult position.

61. To its credit, the Israeli Supreme Court held that the violent interrogation of a suspected terrorist is not lawful even if doing so may save human life by preventing impending terrorist acts. It went further, concluding that even practices such as sleep deprivation, if an end in themselves rather than merely a side effect inherent to the investigation, were not permitted.

62. President of the Court, Aharon Barak, referred to the reality faced by Israel security wise and said:

> "We are aware that this decision does not make it easier to deal with the reality. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties."

Criminal defences

63. If force was nevertheless used interrogating a suspect in the ticking bomb type case and the interrogators were prosecuted, query whether they might still in certain circumstances rely on self defence, more accurately the defence of others,[14] or the justification of such force as may be

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[14] Section 48 of the Crimes Act 1961 provides that:

> "Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use."

The threat of force must be immediate to justify the defensive use of force.

reasonably necessary in order to prevent the commission of an offence which would be likely to cause immediate and serious injury.[15]

64. These defences usually apply when the force is directed at the actor who intends to injure rather than someone who has information.

65. The prohibition on torture was developed in the context of extracting confessions. Some different considerations arise when preventing crime.

66. No civilised society can condone torture even in that different context. But what about lesser treatment that is nevertheless undignified and a breach of the Practice Note on Police Questioning? For example, is trickery outlawed?

67. Having dealt with these aspects of the law relating to mistreatment of terrorist suspects, can I now turn to separate but related issues that have arisen in a very recent case – picking up on the topic of public interest immunity.

The *Binyam Mohamed* case

68. Just last month, the English Court of Appeal released its decision in the case of *Binyam Mohamed*.[16] This is an extraordinary case in several respects.

69. The Court of Appeal decision follows a series of judgments in the court below, the Divisional Court, in proceedings by Binyam Mohamed seeking certain disclosure of documents. Such simple relief might not seem earth shattering. Nor might the fact that the appeal concerned whether seven subparagraphs in the Divisional Court decision should be included in the public version of the judgment.

70. But the most senior Court of Appeal judges sat on this appeal. And the Lord Chief Justice said:

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15 Section 41 of the Crimes Act provides:

> "Every one is justified in using such force as may be reasonably necessary in order to prevent the commission of suicide, or the commission of an offence which would be likely to cause immediate and serious injury to the person or property of any one, or in order to prevent any act being done which he believes, on reasonable grounds, would, if committed, amount to suicide or to any such offence."

16 *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65.

> The issue ... has required us to address fundamental questions about the relationship between the executive and the judiciary in the context of national security in an age of terrorism and the interests of open justice in a democratic society.

71. The redacted paragraphs were based on information derived by the UK intelligence services from US intelligence services subject to an understanding of confidentiality, described as the 'control principle'.

72. The essential finding under appeal was that the Divisional Court decided to include the seven subparagraphs notwithstanding the fact that the Foreign Secretary had stated in more than one public interest immunity certificate that such publication would lead to a real risk of serious harm to the national security of the UK. Usually the court would defer to the executive on such an issue of national security.

73. The appeal by the Foreign Secretary was advanced in unusually robust terms by Mr Jonathan Sumption QC (who has been described as the cleverest man in Britain with a brain the size of a planet) on the basis that the Divisional Court's decision was in many respects "unnecessary and profoundly damaging to the interests of this country", and indeed that part of the reasoning of the Divisional Court was "irresponsible".

74. It is clear from the judgments that both the Lord Chief Justice and the Master of the Rolls did not appreciate Mr Sumption's strident criticism of the lower court.

75. So, what was this case about?

The factual history [17]

76. Mr Binyam Mohamed, an Ethiopian, who had been resident in the United Kingdom between 1994 and 2001, issued proceedings seeking an order that the UK Government supply certain documents on a confidential basis to his lawyers in the United States. He was at that time detained in Guantanamo Bay, and required the documents in order to assist in his defence against charges which he anticipated would be brought against him by the US Government. Those charges were formally laid soon after,

[17] Largely taken from Lord Neuberger MR's judgment.

and were so serious they could have carried the death penalty. He was charged with conspiracy with members of Al-Qaida, including Osama Bin Laden, to murder and attack civilians and providing support to terrorism. The charges included allegations that he reviewed technical information on the construction of an improvised radioactive, dirty bomb, and plotted to blow up apartment buildings in the US.

77. But the charges were based, at least in part, on confessions which he was alleged to have made. He denied any involvement in terrorism and claimed that his confessions were false, having been made to US interrogators as a result of his being subjected to torture, or at least inhuman treatment, and that the documents would help him establish this.

78. Mr Mohamed said he had been unlawfully arrested in Pakistan in April 2002, and that he was then detained for some 15 weeks without access to a lawyer or a court. During that period, he said he had been interrogated by US officials; beaten, threatened with a gun, fed only every other day, suspended by his wrists, and given limited access to the lavatory by the Pakistani authorities; and threatened by US officials with worse treatment elsewhere. In July 2002, he was sent by extraordinary rendition by the US authorities to Morocco, where he was interrogated further by US officials, and was beaten, subjected to sleep deprivation and cut on his private parts with a scalpel. In January 2004, he was transferred by the US authorities to Afghanistan, first to the "Prison of Darkness" in Kabul, where he was again interrogated by US agents, and deprived of sleep, starved, beaten and hung up, and thence to Bagram in May 2004, where he said he was tortured and subjected to "cruel, inhuman and degrading treatment". In September 2004 he was transported from Bagram to Guantanamo Bay.

79. The Divisional Court found that the Security Service (MI5) and the SIS (MI6) were right to conclude that Mr Mohamed was a person of great potential significance and a serious potential threat to the national security of the United Kingdom. There was therefore every reason to seek to obtain as much intelligence from him as was possible in accordance with the rule of law and to co-operate as fully as possible with the US authorities to that end.

80. However, the Divisional Court also stated that (as the Foreign Secretary accepted) Mr Mohamed had established an arguable case that he had suffered as a result of wrongdoing, including torture, cruel, inhuman or degrading treatment and unlawful rendition.

81. At issue was whether the UK Government was involved in or facilitated the arguable wrongdoing. The Divisional Court found in summary that Mr Mohamed was detained in Pakistan and interviewed by the US authorities, who gave MI5 and MI6 particulars of his detention and treatment in reports, and that MI5 personnel had read the contents before one of them (known as "witness B") went to Karachi to interview Mr Mohamed, that witness B told Mr Mohamed that the UK would not assist him unless he cooperated with the US authorities, and that MI5 were supplying information about, and questions for, Mr Mohamed to the US authorities. The role of the UK authorities went far beyond that of a bystander.

82. The redacted seven subparagraphs in issue related to this question of the involvement of UK intelligence officials.

83. Before the Divisional court made a final decision on release of the documents, the US Government provided them to Mohamed's US lawyers and following the election of President Obama, Mohamed was released from GTMO and arrived back in the UK.

84. So the remaining issue was whether the subparagraphs should be redacted from the public version of the court's judgment. Having initially decided that they should be redacted, the Divisional Court was persuaded to reconsider on the basis that the Foreign Secretary should have better informed the court about his lack of knowledge as to the position of the new Obama administration concerning the specific consequences of publication.

85. This lead to a further hearing and, reflecting Government concerns at the highest levels, a further public interest immunity certificate from the Foreign Secretary accompanied by a letter from the CIA to MI6. This third certificate referred to a meeting between the Foreign Secretary and US Secretary of State Hilary Clinton in May 2009, where she emphasised that the position of the US Government had not changed as a result of the

change of administration. "She indicated that the US remained opposed to the public disclosure of US intelligence information in this case", and that such disclosure "would affect intelligence sharing and cause damage to the national security of both the US and the UK". The CIA letter was subsequently confirmed in a letter from the White House.

86. Nevertheless, in its fifth judgment, the Divisional Court decided that the redacted paragraphs should, after all, be included in the open version of the first judgment.

Appeal

87. The Court of Appeal unanimously held that the Foreign Secretary's appeal should be dismissed. However, the reasoning in the judgments was not identical, with the emphasis of the Lord Chief Justice differing from that of the Master of the Rolls and the President of the Queen's Bench Division.

88. The Lord Chief Justice acknowledged that co-operation between the intelligence services of friendly nations is a critical element in the battle against the terrorist and without mutual inter-dependence based on trust, the risks would be almost irremediably heightened.

89. It was not suggested that there was anything in the redacted paragraphs themselves which would involve a breach of security, or disclose intelligence material, such as names, or places, or means of communication, the disclosure of which would, of itself damage the national interest. The Divisional Court had endorsed the application of public interest immunity and the maintenance of confidentiality over secret information, upholding and applying PII principles to a vast body of material – in its separate closed judgment.

Open justice

90. The prevailing consideration was open justice - a principle also affirmed in New Zealand.[18] Justice must be done between the parties.

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[18] In New Zealand, the principle of open justice is affirmed in the New Zealand Bill of Rights Act 1990 where, in criminal cases, the right to a public and fair hearing is contained in section 25. In civil cases, there is an established presumption of openness. Section 14 of the Bill of Rights Act also affirms the right to freedom of expression, which includes the right to seek, receive and impart information of any kind. This can be interpreted as supporting the right of the media to report court proceedings, and the right of the public to access court records.

With redaction, Mr Mohamed would be deprived of the full reasons which led the court to conclude that, notwithstanding the initial rejection of his claim of involvement in wrongdoing by UK authorities, it was not merely sustainable, but amply vindicated – the parties would not be treated equally. Although this may be a necessary consequence of the application of the wider public interest, as a matter of principle, and for obvious reasons, this is always undesirable.

91. But more broadly, a public judgment would be incomplete. The Lord Chief Justice said:

> The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason, every judge sitting in judgment is on trial. So it should be, and any exceptions to the principle must be closely limited. In reality very few citizens can scrutinise the judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irremediably diminished.
>
> ...In litigation, particularly litigation between the executive and any of its manifestations and the citizen, the principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself. Where the court is satisfied that the executive has misconducted itself, or acted so as to facilitate misconduct by others, all these strands, democratic accountability, freedom of expression, and the rule of law are closely engaged.

92. The Lord Chief Justice concluded:

> ...unless the control principle is to be treated as if it were absolute, it is hard to conceive of a clearer case for its disapplication than a judgment in which its application would partially conceal the full reasons why the court concluded that those for whom the executive in this country is ultimately responsible were involved in or facilitated wrongdoing in the context of the abhorrent practice of torture.

93. The other two judges, the Master of the Rolls and the President of the Queen's Bench Division, started with a different approach. Considering the position as at the date of the fifth judgment, the Master of the Rolls explained that he had, albeit with severe misgivings, reached the conclusion that the decision of the Divisional Court in the fifth judgment should be reversed. This was because:

(a) the lower court's reasoning did not persuade him that it was justifiable effectively simply to dismiss the Foreign Secretary's opinion;

(b) while publication of the whole of the first judgment was very important as a matter of general principle, the court had rather overestimated the importance of publishing the redacted paragraphs; and

(c) the balancing exercise favoured excising the redacted paragraphs, even though there were real reasons for scepticism about the Foreign Secretary's view.

94. But the two Judges changed their minds as a result of reading a US court Opinion which was not available until after the appeal hearing.[19] The effect of that Opinion was that, in proceedings between the US Government and another GTMO detainee, a US Judge found as a fact in an open judgment that Mr Mohamed's evidence as to the mistreatment he suffered at the behest of US officials in Pakistan (and indeed in Morocco and Afghanistan) was true. Indeed, in some respects the description of the treatment sounded worse.

95. It was therefore now in the public domain, as a fact found by a US court in proceedings in which the US Government was a party, that he was mistreated, indeed tortured, in the ways in which he had described, when under US control and interrogation, and that representatives of the US intelligence services knew of the mistreatment and must have observed the effect of such mistreatment of him. This could no longer be said to be confidential information, or information which was somehow in the control of the US Government.

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19 *Farhi Saeed Bin Mohammed v Barack Obama* (Civil Action No 05-1347 (GK)).

96. The Master of the Rolls said:

> ... the whole basis for the Foreign Secretary's case for redaction of the redacted paragraphs, as advanced in the three certificates, and supported by the recorded views of the CIA, the White House, and the Secretary of State, and by the submissions to the Divisional Court and this court, has fallen away.

97. There was no satisfactory reason now for concluding there was a risk to national security.

Postscript

98. There is a postscript. The release of the Court of Appeal judgment was always going to be the subject of public interest and substantial media coverage given the Court of Appeal's conclusions in relation to the role of the UK intelligence services. The Foreign Secretary made a statement to the House of Commons. The White House said it was deeply disappointed by the ruling and warned it would make intelligence sharing with Britain more difficult.

99. But the release of the Court of Appeal judgment was accompanied by further legal drama as it became known that the Court of Appeal had provided counsel with a confidential draft of the decision and Jonathan Sumption QC for the Foreign Secretary had written to the Master of the Rolls asking him to reconsider one particularly damning paragraph (paragraph 168) relating to the position of MI5, which Mr Sumption's email said constituted an exceptionally damaging criticism of the good faith of the Security Service as a whole, and would mark an unprecedented breakdown in relations between the courts and the executive in the area of public interest immunity. This led to the Master of the Rolls substantially changing the paragraph. It transpired that Mr Sumption's letter had not been circulated to all counsel, with the result that the court needed to consider further whether to reinstate the original paragraph. This attracted huge public attention and was most unfortunate, particularly in a case about open justice.

100. In the event, the Court of Appeal issued a further judgment on 26 February 2010 outlining what had happened.[20]

101. The Court of Appeal decided in the exceptional circumstances to release the first draft of paragraph 168. Open justice compelled that, to eradicate any misconception that:

> a Minister of the Crown, or counsel acting for him, was somehow permitted to interfere with the judicial process.

102. The Master of the Rolls issued his finalised version of paragraph 168. This was more akin to the damning first draft and said:

> ...some Security Services officials appear to have a dubious record relating to actual involvement, and frankness about any such involvement, with the mistreatment of Mr Mohamed when he was held at the behest of US officials. I have in mind in particular witness B, but the evidence in this case suggests that it is likely that there were others. The good faith of the Foreign Secretary is not in question, but he prepared the certificates partly, possibly largely, on the basis of information and advice provided by Security Services personnel. Regrettably, but inevitably, this must raise the question whether any statement in the certificates on an issue concerning the mistreatment of Mr Mohamed can be relied on, especially when the issue is whether contemporaneous communications to the Security Services about such mistreatment should be revealed publicly.

103. Witness B is under police investigation.

104. The case not only confirms the rejection of mistreatment of terrorist suspects but also highlights the importance of open justice and the courts' willingness to scrutinise even national security grounds claimed by the executive.

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20 That Mr Sumption's letter was not a secret or private letter to the court, but something had gone awry with its delivery in that it did not reach all parties in line with an elementary rule of the administration of justice; and that his letter had subsequently been circulated beyond the parties in breach of the confidentiality covering the draft judgments and communications in response. This meant there had been partial disclosure of the first draft of paragraph 168.

Conclusion

105. In conclusion, it is easy to reject torture in absolute terms on legal and moral grounds, and so we should.

106. At first sight, contrasting the judicial statements of high principle with the distinctions of convenience I have referred to might suggest the law is in something of a mess. These distinctions show that expediency and pragmatism is at work in the strained context of combating terrorism. However, these distinctions of convenience often reflect some necessary balancing of competing principles.

107. At the end of the day, if we have soundly based and well understood rules, even where they need to balance competing principles, the chances are much better that we will not be driven by such excesses:

    (a) both in terms of passing legislation that goes further than absolutely necessary in restricting individual rights;

    (b) and in terms of appropriate executive action in difficult times.

108. Even though in New Zealand we have well established and soundly based general legal principles, how would they stand up in the face of public clamour, even panic, during a terrorist emergency?

109. Insofar as law defers to politics in a Parliamentary democracy, the public will ultimately influence outcomes. So the principles need to be understood and accepted by the community, not just the intelligence operatives, the legal and medical advisers, and the judges who have to decide the difficult cases.