Neutral Citation Number: [2008] EWHC 2048 (Admin)

Case No: CO/4241/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/08/2008

Before :

LORD JUSTICE THOMAS
and
MR JUSTICE LLOYD JONES

Between :

The Queen on the Application of Binyan Mohamed	**Claimant**
- and -	
Secretary of State for Foreign and Commonwealth Affairs	**Defendant**

Dinah Rose QC, Philippe Sands QC and Ben Jaffey (instructed by **Leigh Day**) for the **Claimant**

Thomas de la Mare and Martin Goudie (instructed by **The Treasury Solicitor's Special Advocates Support Office**) as **Special Advocates for the Claimant**

Pushpinder Saini QC, Vaughan Lowe QC, Karen Steyn and Tim Eicke (instructed by **The Treasury Solicitor**) for the **Respondent**

Michael Birnbaum QC as **Amicus Curiae**

Mr Duncan Penny (instructed by **Kingsley Napley)** was present for Witness B

Hearing dates: 28, 29, 30 and 31 July and 1 and 18 August 2008

- -

OPEN JUDGMENT AS REVISED ON 31 JULY 2009

I N D E X

Lord Justice Thomas:

I INTRODUCTION

1. This is the judgment of the Court. **It was handed down by us on 21 August 2008. In the course of further hearings in 2009, further documents were disclosed by the defendant which have caused us to make the revisions to the judgment set out at paragraphs 17, 29, 30, 31, 32, 35A, 87 and 88. They are shown in bold.**

The issue

2. The issue in this case is whether the defendant, the Secretary of State for Foreign and Commonwealth Affairs (the Foreign Secretary), must make available certain information and documents in confidence to lawyers acting for Binyan Mohamed (BM), who is not a British national, though he was resident in the United Kingdom. He was arrested in Pakistan on 10 April 2002 and has been held by the United States at Guantanamo Bay since September 2004. On 28 May 2008 he was charged with offences which may carry the death penalty. He faces an imminent decision on the reference of those charges for trial before a Military Commission established under the United States Military Commissions Act of 2006. He contends that the only evidence against him is confessions made by him at the United States base at Bagram in Afghanistan between May and September 2004 and further confessions prior to November 2004 which were made shortly after his transfer to Guantanamo Bay in September 2004. He claims that these were made after a two year period of incommunicado detention after his arrest in Pakistan, during which he was subject to cruel, inhuman or degrading treatment and torture at the hands of Pakistani and Moroccan authorities with the connivance of the United States Government and to similar treatment by the United States Government.

3. It is accepted by the Foreign Secretary, as is set out at paragraph 47.ii) below, that it is possible that documents which the United Kingdom Government has recently found could be considered exculpatory or might otherwise be relevant in the context of proceedings before the Military Commissions. BM's lawyers contend that the importance of the documents or the information contained in them is that they may provide essential support to BM's account of what happened to him. The information or the documents should therefore be disclosed to them in confidence, as the United States Government has refused to provide any information whatsoever in relation to his detention between April 2002 and May 2004, not even his location during that period. The Foreign Secretary contends that he is under no duty to disclose the documents or the information contained in them and to do so would in any event cause significant damage to national security of the United Kingdom. He contends

that there is no disadvantage to BM, as the documents will be made available during the proceedings under the United States Military Commissions Act of 2006. That forum will therefore provide the proper remedy for BM consistent with the interests of the United Kingdom's national security. The efficacy of that process is challenged on behalf of BM.

4. The hearing before the court took place in open and closed sessions. In the closed sessions the interests of BM were represented by Special Advocates. Wherever possible without endangering interests of national security we heard argument in open session. The nature of the material placed before us has required us to produce open and closed judgments. Once again, wherever possible without endangering interests of national security we have set out in the Open Judgment our reasoning and conclusions and the evidence on which they are based. We have redacted for the time being, at the request of the Foreign Secretary, from this open judgment certain passages summarising part of our findings in the closed judgment. We did so despite submissions from the Special Advocate to the contrary, pending consideration at the further hearing to which we refer at paragraph 149. At that hearing we will decide whether to add a further summary of part of what is contained in the closed judgment and make it available as part of the open judgment. That hearing has been presently fixed for Wednesday 27 August 2008

II THE FACTS, THE ALLEGATIONS OF BM AND THE COURSE OF THE PROCEEDINGS

(1) The facts and the allegations made by BM

5. It is necessary first to provide an outline of the facts that emerged from the open part of the hearing. In doing so, we will also provide a summary of the material allegations made by BM as to what he contends happened to him during the two year period he was held by or on behalf of the United States Government in the period from 10 April 2002 to May 2004.

6. As we shall explain in more detail at paragraph 51, witness statements by Witness A and Witness B were provided on behalf of the United Kingdom Security Service (the SyS) for the hearing; annexed to those statements were redacted versions of contemporaneous documents. We made an order prohibiting the reporting of the contents of those documents during the course of the hearing for the reasons set out in paragraph 53, but in order to explain as much of the matter as is possible in the open judgment, we shall refer to the documents in their redacted form.

(a) BM's period in the United Kingdom

7. BM is an Ethiopian national and not a British national. He was born in Ethiopia on 24 July 1978. He came to the United Kingdom on 9 March 1994 after a short period in the United States and sought asylum on the basis of his family's opposition to the then government of Ethiopia. Although the application was rejected, in May 2000 he was given exceptional leave to remain in the United Kingdom for 4 years. During that period he lived in London. He worked and studied. His studies included vocational studies for electrical and electronics engineering. Other members of his family sought asylum in the United States; this was granted and some are now United States citizens and reside in the United States. He was converted to Islam. In 2001 he left the United

Kingdom to travel to Pakistan. He went on to Afghanistan in June 2001. His account is that he wanted to try and "kick" a drug habit by moving away from the places he frequented in London and to see the Taliban with his own eyes to see if it was a good Islamic country or not. He then returned to Pakistan.

8. It is alleged in the charges brought against him in May 2008 (see paragraph 47.i) below) that whilst in Afghanistan he trained in Al-Qaida camps and was brought to the front line to participate in combat operations between the Taliban and the Northern Alliance. That he was thereafter chosen by Al-Qaida, because of his refugee status in the United Kingdom, to train for and participate in terrorist actions; he was then trained in the building of remote controlled devices to be used to attack United States forces in Afghanistan. That when he went to Pakistan he worked with others on the construction of an improvised radioactive bomb to be detonated in the United States and other matters to which we refer at paragraph 47.i).

(b) The UK Security Services and their position after 11 September 2001

9. Before setting out the circumstances in which BM was arrested, it is necessary to refer to the conditions prevailing at the time in the light of the events of 11 September 2001.

i) The United Kingdom Armed Forces are trained in the laws of armed conflict set out in the Geneva Conventions. The Joint Services Intelligence Organisations' training documentation states that the following techniques are expressly and explicitly forbidden: (a) physical punishment of any sort; (b) the use of stress positions; (c) intentional sleep deprivation; (d) withdrawal of food, water or medical treatment and three other specified techniques.

ii) The United Kingdom Government has a very strong record in advocating the case against torture and urging other States not to use torture. There is, as the Intelligence and Security Committee (the ISC) established by the Intelligence Services Act 1994, concluded in its report of 1 March 2005 on the handling of detainees in Afghanistan, Guantanamo Bay and Iraq (Cm 6469), a debate as to whether intelligence which may have been obtained by torture or cruel, inhumane or degrading treatment should be rejected as a matter of principle or whether the Government should use such intelligence to protect the safety of its citizens. It is most certainly not urging States to use torture and pass that information to the United Kingdom (see paragraph 32 of the Report). Although the ISC did not attempt to answer those difficult questions on which it is clear opinions were divided, the ISC drew attention to the evidence of the then Foreign Secretary given on 11 November 2004 that there were circumstances in which intelligence was obtained from a liaison State where the Government knew that their practices were well below the line; however the Government never got intelligence which stated "Here is the intelligence and, by the way, we conducted this under torture". What was important was to consider whether the intelligence is credible. In *A v The Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2006] 2 AC 221 Lord Bingham made clear his view at paragraph 34:

> "There is reason to regard it as a duty of states, save perhaps in limited and exceptional circumstances, as where

> immediately necessary to protect a person from unlawful violence or property from destruction, to reject the fruits of torture inflicted in breach of international law. As McNally JA put it in *S v Nkomo* 1989 (3) ZLR 117, 131: 'It does not seem to me that one can condemn torture while making use of the mute confession resulting from torture, because the effect is to encourage torture.'"

iii) As regards rendition, it is clear from the decision of the Court of Appeal Criminal Division in *R v Mullen* [2000] QB 520, that the Court of Appeal considered the facilitation of the rendition by the United Kingdom Secret Intelligence Service (the SIS) of Mr Mullen from Zimbabwe to the United Kingdom (in order for him to stand trial on charges related to Irish Republican terrorism) was a serious failure to adhere to the rule of law and was a clear abuse of process. It is clear from paragraph 11 of the ISC report dated 28 June 2007 on the practice of rendition published in July 2007 (Cm7171) in its redacted form that the SyS and the SIS thereafter no longer operated the process of rendition. They must have appreciated that it was contrary to the rule of law.

iv) It is also clear from the ISC report of 1 March 2005 that the position of the SIS and SyS was that they operated in a culture that respected human rights and that coercive interrogation techniques were alien to the Services' general ethics, methodology and training (see paragraph 39 of the Report).

v) The events of 11 September 2001 were unprecedented and represented a step change in attitudes to the global terrorist threat. On 7 October 2001, the United States led coalition military action against Afghanistan. The Foreign Secretary had on 28 September 2001 approved the deployment of SIS officers to Afghanistan to support the United States military action and to take covert action. Shortly thereafter some of those fighting the coalition were captured by United States authorities and detained by them. The SIS deployed officers to Afghanistan who then began to interview detainees held by the Northern Alliance, which was part of the coalition of anti-Taliban fighters. They also explored, with United States military authorities, the possibility of gaining access to United States-held detainees. (See paragraph 37 of the ISC report of 1 March 2005). The ISC report of 1 March 2005 noted at paragraph 38 that, although the observance of human rights was an important part of the SIS's and SyS's general training, prior to deployment to Afghanistan, SIS officers were not given specific training on the rights of detainees and the Geneva Conventions, nor were they aware of the 1972 announcement banning certain interrogation techniques. The SIS regarded the normal level of training, which emphasised the requirements of the Human Rights Act 1998, as sufficient given the general ethos of the Service.

vi) On 13 November 2001 President Bush announced by Presidential Military Order a change in United States policy towards terrorism. The change in policy aimed to

> "identify terrorists and those who support them, to disrupt their activities and to eliminate their ability to conduct or support [terrorist attacks] and for suspects to be detained and, when tried, tried by Military Tribunals". (See

ISC Report of 28 June 2007 at paragraph 53 quoting a White House press release).

vii) The Presidential Military Order authorised the detention of suspects at any designated location worldwide with no guarantee of trial. It prescribed that suspects, if tried, would be tried by a Military Commission. The SIS learnt in November 2001 that the United States intended to use Military Tribunals set up under the Presidential Military Order to try terrorist suspects captured outside Afghanistan (see paragraph 4 of the report of 28 June 2007).

viii) In December 2001 it was agreed that SyS personnel should interview detainees in Afghanistan if the United States authorities permitted it. The first SyS staff arrived in Bagram on 9 January 2002 and began to interview the detainees over the course of the next few days (see paragraphs 42 and 43 of the ISC report of 1 March 2005).

ix) As appears from paragraph 46 of the ISC report of 1 March 2005, an SIS officer had access to United States-held detainees and conducted an interview of a detainee on 10 January 2002. Although the ISC report concludes that the officer was satisfied there was nothing during his interview which could have been a breach of the Geneva Conventions, he reported back to London his observations on the circumstances of the handling of the detainee by United States military before the beginning of the interview. The detail of his report has been redacted from the version of the ISC report provided to us.

x) As a consequence, on 11 January 2002, instructions were sent to the SIS officer concerned and copied to all SIS and SyS officers in Afghanistan as follows:

> "With regard to the status of the prisoners, under the various Geneva Conventions and protocols, all prisoners, however they are described, are entitled to the same levels of protection. You have commented on their treatment. It appears from your description that they may not be being treated in accordance with the appropriate standards. Given that they are not within our custody or control, the law does not require you to intervene to prevent this. That said, HMG's stated commitment to human rights makes it important that the Americans understand that we cannot be party to such ill treatment nor can we be seen to condone it. In no case should they be coerced during or in conjunction with an SIS interview of them. If circumstances allow, you should consider drawing this to the attention of a suitably senior United States official locally.
>
> It is important that you do not engage in any activity yourself that involves inhumane or degrading treatment of prisoners. As a representative of a UK public authority, you are obliged to act in accordance with the Human Rights Act 2000 which prohibits torture, or inhumane or degrading treatment. Also as a Crown Servant, you are bound by Section 31 of the Criminal Justice Act 1948, which makes acts carried out overseas in the course of your official duties subject to UK criminal law. In other words, your actions incur criminal liability in the same way as if you were carrying out those acts in the UK." (See paragraph 47 of the ISC report of 1 March 2005).

xi) It is clear from the ISC report of 1 March 2005 that the SIS regarded this as an isolated incident. Nonetheless from January 2002 the SyS, according to paragraph 49 of that ISC report, ensured that all officers involved in interviews of detainees were briefed individually by a senior manager prior to their deployment.

xii) Although as we have already set out, the United Kingdom regarded all the detainees as subject to the provisions of the Geneva Conventions, on 7 February 2002 President Bush stated that United States policy was that the Geneva Conventions did not apply to the conflict with Al Qaeda. He stated that although the Conventions did apply to the conflict with Afghanistan, the Taliban were unlawful combatants and, therefore, did not qualify for prisoner of war status. The President, however, ordered that the detainees were to be treated "humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva". (See paragraph 51 of the ISC report of 1 March 2005)

xiii) In March 2002 there was a further isolated incident reported back from an SIS officer in Afghanistan. We were provided with no details of this as we have only seen the redacted version of the report of 1 March 2005.

xiv) In April 2002, an SIS officer was present at an interview conducted by the United States military of a detainee in Afghanistan who complained of time in isolation and who had previously had a nervous breakdown. The redacted report of the ISC dated 1 March 2005 makes clear that the SIS officer asked the United States officer in charge of the interview "for better treatment", but he was unable to follow up the situation.

xv) It is apparent from paragraph 54 of the ISC report dated 1 March 2005, that in June 2002 the SyS discussed with Foreign and Commonwealth Office officials a United States report that referred to the hooding, withholding of blankets and sleep deprivation of a detainee in Afghanistan. It appears that the matter was raised promptly with United States authorities.

xvi) It also appears from paragraph 55 of the same ISC report that in July 2002 an SyS officer reported to senior management that, whilst in Afghanistan, a United States official had referred to "getting a detainee ready", which appeared to involve sleep deprivation, hooding and the use of stress positions. The officer reported they had commented to the United States official that this was inappropriate, but the SyS's senior management took no further action. The ISC were told that this was primarily because the report was based on second-hand information and the SyS had raised the general point the previous month. The detainee, when interviewed later that night, had provided a list of grievances, which included the use of constant bright lights. The SyS officer raised the complaints with the United States officer in charge of the facility at the time, but no further follow-up action was taken. The report also stated that neither the SyS nor the SIS had interviewed detainees in Afghanistan after July 2002 (see paragraph 56).

xvii) It also appears from the report (paragraph 74) that United Kingdom military personnel in Afghanistan conducted no joint interrogations with either the SIS

or SyS personnel, nor did they attend United States interviews as observers. The Ministry of Defence told the ISC that although conditions in Bagram were noted as austere, there were no records of adverse comments being formally reported by the United Kingdom military personnel in Afghanistan.

xviii) It is clear from paragraph 57 of the ISC report of 1 March 2005 and paragraph 57 of the ISC report of 28 June 2007 that on 12 January 2002 the United States authorities moved the first group of detainees to Guantanamo Bay from Afghanistan in a publicly-reported operation. They were designated by the United States as unlawful combatants. On 16 January 2002 the SyS was granted access to certain of the detainees and, in March 2002, the Foreign Secretary, with the agreement of the then Home Secretary, approved an SIS/SyS joint submission recommending that intelligence personnel should interview detainees at Guantanamo Bay. Prior to that on 31 January 2002 at a meeting of Permanent Secretaries it was reported that there were anecdotal reports, sometimes second or third hand, of "undue exuberance" by American personnel at Guantanamo Bay. The United Kingdom Government indicated at the time of the first transfer its sense of unhappiness at the process and sought assurances that detainees transferred to Guantanamo Bay would be treated appropriately. (see paragraphs 57 and 58 of the ISC report of 1 March 2005)

xix) It is apparent from paragraph 59 of the ISC report of 28 June 2007 that signs began to emerge in 2002 that the United States rendition programme was not limited to the conflict in Afghanistan. We have only been provided with the redacted version of that part of the report. We, therefore, do not know when this occurred or the name of the country to which the person concerned was transferred, but it is clear from the report that the person was not transferred into United States military custody or to his home country. The report makes clear that the SIS questioned the appropriateness of the transfer with the United States authorities, but regarded it as an isolated incident.

(c) BM's arrest in Pakistan and the provision of information to the United Kingdom

10. On 10 April 2002 BM was arrested at Karachi Airport by the Pakistani authorities when he was attempting to leave Pakistan to fly to London. This was his second attempt to leave Pakistan using the British passport of a British national.

11. On 22 April 2002 the SyS and the SIS were notified by the United States authorities that an individual, subsequently identified as BM, had been detained in Pakistan using a fake British passport; that this was the second time he had sought to leave Pakistan using that same passport. The passport was in fact genuine, but BM's photograph had been substituted for the real holder, Fouad Zouaoui.

12. On 26 April 2002, the SyS and the SIS were notified by the United States authorities that the person arrested, after initially claiming to have been born in Nigeria, claimed he was BM and that he was an Ethiopian citizen with refugee status in the United Kingdom; that he had been an engineering student and gave a United Kingdom address. The United States authorities asked the SyS to assist in his identification and verify the information. The SIS and SyS were told that BM was being interviewed by the United States authorities in Pakistan and reports of those interviews during April 2002 were passed to the SIS and SyS. It is clear from those reports (which, as is

apparent from the telegrams, included information that BM was planning to construct and detonate a dirty bomb) that BM was a person whose activities would be of importance to the SyS in protecting the vital interests of the national security of the United Kingdom.

13. Preliminary enquiries by the SyS resulted in information being provided to the United States authorities on 29 April 2002 that the person arrested had lived at the address he had claimed in London and that he was who he claimed to be.

14. Given the information provided by the United States authorities, the SyS were concerned that he might fit the profiles of persons who, although they seemed innocuous whilst in the United Kingdom, might have graduated to serious terrorist activity in Afghanistan. In order to protect the vital interests of the national security of the United Kingdom and in accordance with their usual procedures, in a telegram of 1 May 2002 they asked that BM be carefully questioned about his time in the United Kingdom (as appeared in the open evidence), before setting out the detailed questions to be asked in relation to BM's activities and activities in Afghanistan and Pakistan and his plans and intentions on his return to the United Kingdom. The telegram included the following passage:

> "We would also like to explore the possibility of Security Service officers conducting a debrief of *** regarding his time spent in the UK. As has been the case with other UK nationals/residents detained in Pakistan and Afghanistan, we believe that our knowledge of the UK scene may provide contextual background useful during any continuing interview process. This may enable individual officers to identify any inconsistencies during discussions. This will place the detainee under more direct pressure and would seem to be the most effective way of obtaining intelligence on BM's activities/plans concerning the UK. Grateful for your views"

In a further telegram of 8 May 2002 further questions were sent to be asked of BM by the United States authorities; the telegram made clear that answers would assist the SyS greatly. An update on the plans of the United States authorities for BM was also sought.

15. Reports of the interviews of BM by the United States authorities during May 2002 were passed to the SyS. The SyS provided BM's Home Office file to the United States authorities on 15 May 2002. Such exchanges are a normal and vital part of protecting the United Kingdom and its residents.

(d) The interview of BM by the Security Service

16. On 10 May 2002 the United States authorities indicated that the SyS would be permitted access to BM and arrangements were made for a SyS officer to travel to Pakistan to interview BM as part of a programme of interviewing others.

17. On 17 May 2002 an officer of the SyS, who gave evidence before us as Witness B, travelled to Pakistan and interviewed BM at an interviewing facility in Karachi. Before going he reviewed information about BM. There was a dispute **at the hearing** as to what information he saw in the course of that review. **Since that hearing,**

further documents disclosed to us make clear that a composite document was prepared for sending to Witness B for his attention in Karachi; it contained a detailed briefing package which included questions he should ask of BM and details of the reports provided by the United States authorities. No determination can be made by us as to whether it was sent to or received by Witness B.

18. It is important to emphasise that the purpose of that interview was to obtain intelligence about serious threats to United Kingdom national security, including intelligence about BM's background and contacts in the United Kingdom, his activities and contacts in Afghanistan and Pakistan and about his plans and intentions on his return to the United Kingdom.

19. The officer made notes during the interview which he put into a long report which he sent to his more senior officers by telegram on 17 May 2002. That report records BM telling Witness B about his time in the United Kingdom, how he obtained his United Kingdom passport from a criminal and the mosques he attended in London. He was recruited to travel to Afghanistan. He was trained in Afghanistan on weapons and explosives and thereafter, after the collapse of the Taliban, on remote devices, including landmines to be used against United States forces. Witness B did not cover BM's time in Pakistan because this had been covered in depth in previous interviews, but questioned him about his meeting with Abu Zubeida, a person alleged to be a close associate of Osama Bin Laden. The report records that BM had been asked to return to the United Kingdom to help in the provision of passports. BM said the report of a dirty bomb was "the FBI perception". The real story was that he had seen a file on a computer in Lahore and decided it was a joke – part of the instructions included adding bleach to uranium 238 in a bucket and rotating it around one's head for 45 minutes. He thought another major attack would happen – this was his assessment, but he did not know although the FBI thought he did.

20. Under the heading, closing remarks, the report then stated:

> "I told [BM] that he had an opportunity to help us and help himself. The US authorities will be deciding what to do with him and this would depend to a very large degree on his degree of cooperation. I said that if he could persuade me he was telling the complete truth I would seek to use my influence to help him. He asked how, and said he didn't expect ever to get out of the situation he was in. I said it must be obvious to him that he would get more lenient treatment if he cooperated. I said that I could not and would not negotiate up front, but if he persuaded me he was cooperating fully then (and only then) I would explore what could be done for him with my US colleagues. It was, however, clear that, while he appeared happy to answer any questions, he was holding back a great deal of information on who and what he knew in the UK and in Afghanistan. I said I wanted to come back and see him again. In the meantime, he should reflect on what I had told him and, if he wanted my help, he would need to be completely forthcoming. [BM] did not argue and appeared to accept what I said. We closed the interview on an amicable note."

21. Witness B concluded that BM was lying and holding back. The report concluded:

> "[BM] is intelligent and patient. If he chooses not to cooperate he has the personal qualities and I believe strength of will to maintain his story indefinitely. He showed no signs of being anxious about his position, I suspect that he will only begin to provide information of genuine value if he comes to believe that it is genuinely in his interests to do so. I don't think he has yet reached this point."

22. In his open evidence to us, Witness B stated that what he meant was that no members of the United States authorities would have taken any interest in what he, Witness B, had to say unless he could persuade them that BM was being fully cooperative; if BM was prepared to be completely forthcoming and honest, then he would do what he could to help him, but if he was not, he would be unable to. He denied the suggestion put to him by Ms Rose QC, counsel for BM, that he was threatening BM or putting any pressure on him.

(e) The lawfulness of BM's detention in Pakistan

23. During the period from 10 April 2002 until May 2004, it is common ground that BM was held incommunicado and was denied access to a lawyer. During the period in which it is known he was in Pakistan (and it is common ground that on all the evidence, both closed and open, it is only known he was in Pakistan until 17 May 2002), his detention was not reviewed by any court or tribunal in Pakistan.

24. On the evidence of Pakistani law given by Mr Afzal H Mufti of Cornelius, Lane and Mufti, an experienced advocate of considerable standing before the Supreme Court of Pakistan, it is clear that the detention was unlawful under the laws of Pakistan. The suspension of the constitution of Pakistan by General Musharraf and the issuing of a Provisional Constitution Order in October 1999, did not affect the position under the law of Pakistan that fundamental rights remained in full force. It was therefore unlawful in Pakistan to hold BM incommunicado, without access to legal representation, and to hand him over to United States agents without due judicial process. That was the only evidence of Pakistani law before us and we accept it.

25. It was the open evidence of Witness B that the question of interviewing detainees had been discussed at length by his management, with legal advisers and the Government; his task was to interview BM in accordance with what had been approved by his management. He accepted that he was aware in some circles that it was believed that the Pakistani authorities had demonstrated a poor human rights record.

(f) BM's allegations as to his treatment when held in Pakistan

26. In the evidence before us, there is an account given by BM of what he says he did and what happened to him after 17 May 2002. During his period of unlawful and incommunicado detention in Pakistan which he contends lasted from 10 April 2002 to 22 July 2002, he alleges:

i) After an initial period of custody by the Pakistani police, he was taken to the interrogation centre of the Pakistan Security Services where he was

interrogated, not by the Pakistani Security Services but by United States agents whom he believed to be the FBI. They believed he was a top Al-Qaida person and involved in the creation of a dirty bomb and would be sent to the United States to commit terrorist attacks. As we have set out above and as is set out at paragraph 47.i) below, these are amongst the matters with which he was charged on 28 May 2008.

ii) He told the United States agents that he would not talk until he was given access to a lawyer. He was told by the United States agents that the law had been changed and there were no lawyers. He was hung by a leather strap around his wrists so he could only just stand, he was allowed to go to the toilet only twice a day and was given food only once every second day. He was told by them that he must co-operate with them the hard or the easy way. If he did not do so he would be taken to Jordan. "We can't do what we want here, the Pakistanis can't do exactly what we want them to do. The Arabs will deal with you."

iii) In consequence of this threat he made admissions as to his identity and his address. That was checked out with the United Kingdom authorities and he was told it was true. He then admitted that he had been to Afghanistan.

iv) He was then beaten by the Pakistani authorities and threatened with a gun.

v) When the British agent visited him, the torture stopped. The agent introduced himself as "John". BM provided a description of him. He was interviewed in the presence of a United States agent who had previously been part of the team that interrogated him:

> "They gave me a cup of tea with a lot of sugar in it. I initially only took one. 'No, you need a lot more. Where you are going you need a lot of sugar' I didn't know exactly what he meant by this, but I figured he meant some poor country in Arabia. One of them did tell me I was going to get tortured by the Arabs."

BM asked for a lawyer. The British agent also asked what he could do to help. BM said he did not know. The agent told BM he would see what he could do with the Americans, promising to tell BM what would happen to him, but he did not see him again.

vi) He thereafter refused to talk until he was given an access to a lawyer.

27. Witness B had observed in his report that BM looked thinner than in his photograph and that had given him sufficient concern to be noticed. In his open evidence to us, Witness B made clear that he considered that BM was in a fit state to be interviewed and that BM made no complaints about his treatment, though he gave him the opportunity of doing so. Witness B strongly denied that there was any conversation to the effect we have set out in paragraph 26v); as obviously we had no oral evidence from BM, it would not be appropriate for us to express any view on this allegation made by BM.

(g) Information available to the SIS and SyS derived from other matters

28. It is necessary before referring to requests made to interview BM again to set out what was known to the SIS and SyS as appears from the reports of the ISC

i) The ISC also reported at paragraphs 77 and 78 of the Report of 28 June 2007 in relation to "ghost prisoners". The ISC asked whether the United Kingdom Agencies had knowledge of the individuals whom the United States authorities were holding at undisclosed locations under unknown conditions and to whom the International Committee of the Red Cross did not have access. The answer of the SyS was in the following terms, as recorded at paragraph 78:

> "Clearly the US is holding some Al Qaida members in detention, other than at Guantanamo, but we do not know the locations or terms of their detention and do not have access to them. The US authorities are under no obligation to disclose to us details of all their detainees and there would be no reason for them to do so unless there is a clear link to the UK. We have however received intelligence of the highest value from detainees, to whom we have not had access and whose location is unknown to us, some of which has led to the frustration of terrorist attacks in the UK or against UK interests."

ii) The ISC report of 28 June 2007 refers at paragraph 62 to the SIS being informed that an unnamed individual had been captured with the assistance of a third country. The SIS was not involved in the rendition and was informed of the transfer after it had occurred. After referring to the case of BM, paragraph 64 of the report refers to another case in mid-2002 which appeared inconsistent with what the SIS and SyS believed to be United States policy on Al Qaeda detainees, including that laid out in the Presidential Military Order of November 2001.

iii) The ISC report then states at paragraph 65 that a step change, crucial to the Agencies' growing knowledge of United States actions came in November 2002 when the authorities conducted the rendition to detention of Bisher Al-Rawi and Jamil el-Banna from The Gambia to Afghanistan and subsequently to Guantanamo Bay. The ISC concluded that this case showed that the United States rendition programme had now extended its boundaries beyond individuals connected to the conflict in Afghanistan. At paragraph 67 the report refers to the fact that the SIS and SyS became aware of another case involving the transfer of an individual to a third country. The SyS and the SIS were made aware because the individual was thought to be planning attacks in the United Kingdom. The SyS was allowed to put questions to the detainee, but the ISC concluded that it was not clear whether any assurances to prevent torture or cruel, inhuman or degrading treatment were sought. The ISC then reported at paragraph 68 that they had been told that from 2003 onwards, the SIS were involved in a number of joint operational discussions which developed to the point where they began to become concerned about the legality of their assisting what foreign liaison services, including the United States, were proposing. The ISC reported at paragraph 71 that the Agencies first suspected the possible existence of these secret CIA detention facilities in March 2003, with the arrest of Khalid Sheikh Mohammed. As appears from paragraph 71 of the report, the

Chief of the SIS told the ISC that they realised at that point in time that intelligence was coming from a detention facility which was outside and away from Guantanamo. The ISC reported that despite the suspicions about the existence of "black facilities", the Agencies did not fully appreciate at the time that this might mean an increased risk of torture or cruel, inhuman or degrading treatment. As the ISC reported at paragraph 74, the United States authorities would not divulge details of the secret facilities to the SIS or SyS when asked and, as a result, greater use was made of assurances from the United States. As the Chief of the SIS told the ISC:

> "As time went on … we began to get more aware of black facilities and … so we became more aware of the conditions [in which detainees might be held or interrogated]. At that point we began to consider [that] we need assurances that when we go back to the Americans with a follow-up question to [unsolicited intelligence] that they may have given us, that … [torture or CIDT] are not going to be used to seek and get answers to our questions." (quotation from the report)

(h) The requests by the SyS to the United States authorities to interview BM again: May to September 2002

29. After the interview on 17 May 2002, the SyS determined that, as a result of what BM had said in the interviews as well as in the reports of interviews conducted by the United States authorities, BM might have further relevant information to provide and that it was necessary in the interests of the national security of the United Kingdom to seek his responses to further questions, ideally through a further interview conducted by the SyS:

i) Witness A of the SyS stated in his open witness statement that the United States authorities suggested that BM might be transferred to Afghanistan at that time; that in the circumstances prevalent at the time, the transfer of detainees by the United States authorities to detention facilities in Afghanistan was not unusual or regarded as unlawful or improper. In a further statement witness A said that it was widely known that there were other transfers of detainees from Pakistan to Afghanistan at the time. He was not aware that the United Kingdom Government objected and did not know if anyone had given specific consideration to its lawfulness at the time. The issue of the United Kingdom's position on rendition by the United States was considered by the ISC in its report of 28 June 2007 on the practice of rendition to which we have referred at paragraph 28.

ii) On 11 June 2002 the SyS sought information as to his whereabouts in Pakistan or Afghanistan and asked to interview BM. The United States authorities noted that efforts were underway to have him moved to Afghanistan and suggested that a further interview be deferred until after the transfer had taken place. Logistically this was more convenient to the SyS and, as the SyS informed the United States authorities, it made more sense to wait until his transfer. The United States authorities indicated that they would keep the SyS informed about his transfer.

iii) In the event this did not happen. On 7 July 2002 the SyS recorded in a telegram that, frustratingly, they had no information of the whereabouts of BM who was described as one of their highest priorities. Urgent clarification of his whereabouts was sought and whether they were likely to see him at Bagram in the near future.

iv) On 15 July 2002 the United States authorities told the SyS in a briefing on an unrelated matter that BM was to be moved to Afghanistan, when a further interview could be facilitated. The SyS sought information on 31 July 2002 as to whether BM was in Pakistan or Afghanistan and for an indication as to when the interview could take place. No response was received. Witness A stated that, although this would not have been regarded as particularly unusual or suspicious, no further information was received as to whether the transfer had taken place.

v) On 12 August 2002 the SyS sought information from the SIS. They asked if on their routine visits to Bagram the SIS could check whether three individuals, including BM were at Bagram; the telegram stated "*** appear to have no information on his current whereabouts exclam".

v)(a) By 19 August 2002, the SyS were aware that BM was being held in a covert location where he was being debriefed. Direct access was not possible but the SyS were able to send questions to the US authorities to be put to him.

v)(b) On 28 August 2002 the SIS told the SyS that there was no record of BM having arrived ~~there~~ **at Bagram**.

vi) On 22 August 2002 the SyS again sought **direct** access to BM; no response was received. On 28 August 2002 the SIS informed the SyS that BM had not arrived at Bagram.

vii) In late September 2002 the SyS received a report from the United States authorities of an interview with BM.

viii) On 30 September 2002 the SyS discussed the case of BM with the United States authorities at a meeting at Thames House, the headquarters of the SyS. The SyS asked for direct access to BM, but were told that SyS access could not be facilitated at that time.

(i) The provision by the SyS of further information and questions to the United States authorities

30. Faced with this prolonged refusal to allow **direct** access, witness A stated that it was regarded as essential in the interests of the national security of the United Kingdom to send further questions to the United States authorities to be put to BM. The SyS had other information which suggested current plans for an attack on the United Kingdom and it was thought that BM might have relevant information

0) An agenda for a video conference on 23 October 2002 included an update by the US authorities on their continued interviewing of BM.

i) On 25 October 2002, the SyS sent a telegram referring to the meeting at Thames House. It included the following passage:

> "We would like to stress that we regard [BM] as a key focus point for our investigations into the activities of UK passport holders in Afghanistan and elsewhere. … We feel in the light of [BM]'s recent cooperation further debriefs by these same officers **** may have a positive effect on our intelligence gathering operation into this subject area. However we are grateful for the opportunity to provide material to be used in the current debriefing at this stage."

The telegram then set out further information about BM and the questions to be asked of BM including information relating to Fouad Zouaoui and general questions. The telegram indicated the SyS would provide further information if it discovered further intelligence and asked for updates regarding direct access to BM for the SyS.

ii) Further questions were raised on 5 November 2002 and a photobook sent. Witness A stated that no reply was ever received by the SyS to these two telegrams despite ~~a~~ chaser**s** on 8 **and 12** November 2002 which made clear that although the SyS appreciated that this might be "a long winded process", the urgent nature of the enquiries was obvious.

iii) In February 2003, the SyS received **5** reports from the United States authorities of an interview with BM, though they did not relate directly to the questions put by the SyS. We were told by witness A **at the hearing** that **two of** these were the last interview reports received.

iv) **On 15 April 2003, the SyS requested, in the light of BM's reported co-operation, a further interview by Witness B; a list of over 70 further questions was also sent.**

v) **Further information from debriefings of BM was supplied to the United Kingdom authorities by the United States authorities on 14 November 2003, 14 January 2004 and 15 March 2004.**

(j) The ~~total absence of~~ information as to BM's whereabouts between May 2002 and May 2004

31. On the totality of the open and closed evidence before the court, it is clear that the United States authorities have never informed either the SyS or any other part of the United Kingdom Government **of the covert location at which BM was held** ~~about BM's whereabouts~~ in the period between 17 May 2002 and his transfer to Bagram in May 2004.

32. That remains the position to this day. It was, however, accepted in evidence filed on behalf of the Foreign Secretary that, although the SyS was not aware ~~of his~~ **where the covert** location **was** when they received the information to which we have referred in

sub-paragraphs 29.vii) to 30 it was "apparent that he was in the custody of a third country and not yet in United States custody."

33. The evidence before us made clear that the United States Government has also, so far, refused to provide BM's lawyers with any information as to where he was or indeed what they contend happened to him in the period of 2 years between May 2002 and May 2004.

34. We refer to the procedures for disclosure under the Military Commissions Act of 2006 at paragraph 117.

(k) BM's allegations as to his rendition to Morocco and his torture there

35. In the account of the evidence of BM before us, BM alleges that he was taken to Morocco in July 2002 and was held incommunicado and tortured there until January 2004:

i) He was taken from Karachi to Islamabad and then subjected to extraordinary rendition by United States personnel to Morocco on 22 July 2002. He was handed over to other people in Morocco. His lawyers have obtained evidence which suggests that a Gulfstream V aircraft operated on behalf of the CIA left Islamabad and landed at Rabat on that day.

ii) After arrival in Morocco he was handed over to other persons and held in various facilities. He was told that the United States wanted a story from him and he was to testify against others in relation to matters such as the dirty bomb. He was then tortured by some persons who were masked. A detailed account of that alleged torture has been given to us in a note provided by his lawyers; it is only necessary to mention, for reasons that are made clear at paragraph 103.ii) below, that he contends that apart from being severely beaten and subjected to sleep deprivation, his penis and private parts were cut with a scalpel. One of those who interrogated him stated she was a Canadian; it is alleged by BM's lawyers that she was an agent of the CIA.

iii) During the course of his interrogation he was questioned about his links with the United Kingdom, told of personal information about himself (such as details of his education, the name of his kick boxing trainer and friendships in London). He was told that they had been working with the British and had seen photographs of people given to them by MI5.

35.A) It is clear from documents subsequently supplied to us that Witness B visited Morocco once in November 2002 and twice in February 2003. As no information about these visits was available at the hearing Witness B was not questioned in the open or closed sessions about these visits or the document referred to at paragraph 30.iv). We have been informed that the SyS maintains that it did not know that BM was in Morocco in the period in question.

(l) BM's allegations of rendition from Morocco to Afghanistan

36. BM then alleges that on 21 or 22 January 2004, he was transferred back into the custody of the United States at an airport in Morocco. He alleges that he was then

subject to extraordinary rendition to what he describes as "The Prison of Darkness" near Kabul in January 2004 where he remained until May 2004. He alleges that before the flight photographs were taken of his penis. BM's lawyers have provided materials that they contend suggest that there was a flight on 22 January 2004 by a Gulfstream V aircraft operated by the CIA from Rabat to Kabul.

37. He alleges that he was held in a black hole at the "Prison of Darkness" where he was deprived of sleep, blasted with sound, starved and then beaten and hung up. During this period he alleges that he was interrogated by the CIA and threatened with further torture if he did not provide the story that the United States wanted.

(m) The statements made by him at Bagram and Guantanamo Bay between May and November 2004 and the use made of them by the United States

38. BM contends that he was transferred to Bagram in May 2004. There he was subjected to further mistreatment. In the result he signed statements put before him by the United States authorities at Bagram between May and September 2004. These were made as a result of that unlawful detention, torture and cruel inhuman or degrading treatment. He had confessed during the torture and cruel, inhuman or degrading treatment to anything those inflicting that treatment on him wanted him to say. This was also his state when he signed statements at Bagram.

39. On 20 September 2004 BM was transferred to Guantanamo Bay and for the same reasons made further confessions prior to November 2004.

40. On the basis of the statements made at Bagram and Guantanamo Bay, BM was originally charged in November 2005 before the Military Commissions established by the United States Government. The procedure for those Commissions was struck down by the United States Supreme Court in June 2006 in *Hamdan v Rumsfeld* (2006) 548 US 557. A new Military Commissions Act of 2006 was passed. This is now Chapter 47A of Title 10 of the United States Code. The general purpose of such Military Commissions is set out in paragraph 948b:

> "This chapter establishes procedures governing the use of military commissions to try alien unlawful combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission."

41. Steps were then put in hand under the new Military Commissions Act to re-charge BM.

(2) The attempts made by the United Kingdom Government to assist BM

42. The ISC's report of 28 June 2007 covered the allegations made by BM where he is referred to as Binyam Mohamed Al Habashi (Al Habashi means "the Ethiopian") (see paragraphs 63 and 98-105). Part of the published report has been redacted for reasons of national security. As is clear from the letter to which we refer at paragraph 47.ii) below, the documentation and information the subject of these proceedings had not been found at that time and so was not made available to the ISC.

43. In August 2007 the United Kingdom Government requested the United States Government to return BM and others to the United Kingdom; the others were returned but BM was not. Efforts on behalf of the United Kingdom Government to have BM returned continue.

44. It is clear on the evidence we have seen that every effort has been made by the United Kingdom Government to try and secure BM's return and to provide him with assistance, save for disclosing to his lawyers the documents and information the subject of these proceedings. The refusal to disclose is based on concerns of damage to national security that such disclosure might well entail.

(3) The commencement of these proceedings

45. When it became apparent that the United States Government was going to re-charge BM under the Military Commissions Act of 2006, lawyers acting on behalf of BM, and in particular Mr Clive Stafford Smith and Leigh Day started seeking the information and disclosure of documentation from the United Kingdom Government to which we have referred. When the United Kingdom Government declined to provide to BM's lawyers the information the subject of these proceedings, BM's lawyers commenced these proceedings on his behalf on 6 May 2008, seeking

i) The quashing of the decision refusing to provide information on the basis that it was irrational.

ii) The provision of information and documents under the principles set out in *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133.

iii) The provision of the same materials under a duty said to exist under customary international law.

46. The Foreign Secretary denies that he is under any obligation either under *Norwich Pharmacal* principles or under international law to provide the information and documents sought. He contends that the decision made not to provide voluntary disclosure was one made in the interests of the national security of the United Kingdom on the basis that to disclose such information would cause grave damage to the United Kingdom's national security.

(4) The events after the commencement of these proceedings in May 2008

47. After the proceedings had been commenced, five events of considerable significance occurred:

i) On 28 May 2008 BM was charged, under the Military Commissions Act of 2006, as an alien unlawful enemy combatant with offences that may carry the death penalty. It is not yet clear whether the death penalty will be sought by United States military prosecutors. BM is charged with conspiracy with members of Al-Qaida, including Osama Bin Laden, to murder and to attack civilians and providing support to terrorism. The overt acts relied on include allegations that:

(1) He had trained with and fought for Al-Qaida and the Taliban in Afghanistan against the Northern Alliance.

(2) He was then selected for specialised terrorist missions because of his facility in English and his refugee status in the United Kingdom.

(3) He was then trained in remote controlled detonation devices both in Afghanistan and Pakistan.

(4) In Lahore, he and Jose Padilla reviewed technical information on the construction of an improvised radioactive bomb (a dirty bomb).

(5) BM and Padilla plotted attacks against the United States. BM agreed to travel to the United States and carry out a terrorist act. He discussed with Padilla blowing up gas tankers, spraying people with cyanide in night clubs and the targeting of buildings with natural gas and gas stations. BM with others were to rent several apartments in large apartment buildings in the United States, fill the apartments with natural gas and then detonate the natural gas using delayed timing devices. It was alleged that Khalid Sheikh Mohamed had instructed BM and Padilla to buttress support pillars of the apartments with aluminium or steel panels to cause the pillars to absorb the force of the blast, thereby collapsing buildings entirely. BM agreed to do this.

(6) He tried to leave Karachi with Padilla on 4 April 2002 but was detained for apparent passport irregularities. He then obtained a different forged passport while Padilla continued on to the United States.

The same or similar acts are relied on for the second charge of providing material support for terrorism

ii) On 6 June 2008 Daniel Bethlehem QC, the Legal Adviser to the Foreign and Commonwealth Office, wrote to Mr Clive Stafford Smith, at the request of the Foreign Secretary. The letter made clear that the United Kingdom Government were continuing to request BM's return and had written to the United States authorities asking them to investigate BM's allegation of mistreatment. The letter made clear that the Foreign Secretary had concerns about a number of aspects of the Military Commissions Act. The letter continued:

> "The Government has previously said to you and to the [ISC] that it had no information to confirm [BM]'s account of his detention following his arrest in Pakistan or his allegations of mistreatment while in detention. In the light of your correspondence and the related judicial review proceedings, all the various branches of the Government have recently undertaken a further review of the material held on their files. In the course of this review, some limited additional material was discovered. While this material may not have a bearing on the charges preferred against [BM], and may not be definitive, it is possible that it could be

> considered to be exculpatory or might otherwise be relevant under 948r, 949j.(d) or other sections of the MCA and the accompanying provisions of the Manual for Military Commissions (MMC).
>
> Given its nature, we are not in a position to provide you with this information. However, given the terms of the MCA and the MMC, insofar as the information may be relevant and exculpatory, and [BM] is committed for trial, trial counsel would be required to disclose the information to the defence as soon as practicable. We have raised this issue with U.S. officials and we will engage further with them on this point."

This letter is of very considerable significance:

(1) It is in effect an acceptance by the Foreign Secretary that he has in his possession material that is potentially exculpatory or otherwise relevant to the proceedings before the United States Military Commissions.

(2) The provisions to which Mr Bethlehem QC refers are provisions of the Act which exclude evidence obtained by torture and which relate to the provision of exculpatory evidence. They are set out at paragraph 117 below. Although the letter states that United States military prosecutors (referred to in the letter as "trial counsel") would be required to disclose the material as soon as practicable, as is set out in sub-paragraph 47.v) below, the Foreign Secretary no longer contends that the United States military prosecutors will disclose the material.

(3) A copy of the letter was provided to United States officials. Following the letter, Mr Bethlehem QC visited the United States on 16 June 2008 and met senior officials of the Department of Defense and the State Department to reiterate the request of the United Kingdom Government for the return of BM. Mr Bethlehem QC gave to the Acting General Counsel to the Department of Defense and to the Legal Adviser to the State Department a classified letter which drew detailed attention to the additional material which had been identified as relevant to BM's detention in Pakistan. As was made clear to us, the purpose of that letter was to "draw formally to the attention of the relevant United States authorities the documents in question to enable them to address issues of relevance, exculpation and disclosure".

(4) The letter was sent, as Sullivan J pointed out at the hearing on 20 June 2008, after summary grounds of resistance had been filed on behalf of the Foreign Secretary which made no allusion to these matters.

iii) On 20 June 2008, the Treasury Solicitor wrote to BM's solicitors setting out the Foreign Secretary's formal decision not to make voluntary disclosure; we refer to the details of that letter at paragraphs 151 and following below.

iv) On 22 July 2008 a letter was written on behalf of the Foreign Secretary to Mr Stafford Smith stating that the United States had informed the Foreign Secretary that, "based on a review of records and consultations" the allegations made by counsel to [BM] that are reflected in his letter were "not credible".

v) On 25 July 2008 the Treasury Solicitor on behalf of the Foreign Secretary wrote to BM's lawyers to state that the Foreign Secretary would no longer rely upon the fact that the prosecuting authority would necessarily disclose of its own motion the material requested by BM's lawyers when BM was tried before the Military Commissions. The contention was maintained before us, however, that the material would be disclosed in the trial before the Military Commissions as we set out at paragraphs 109 and following.

(5) The urgency of the matter

48. In the application to the court Mr Stafford Smith stated in his witness statement made on 1 May 2008 that the application was urgent because it was envisaged that BM would be subject to trial before a Military Commission in the near future.

49. On 20 June 2008, no doubt in the light of the charges brought against BM on 28 May 2008, Sullivan J ordered that the matter be heard in the week of 28 July 2008. It was contended by BM that under the procedures set out in the United States Military Commissions Act, a decision would be made in the immediate future by the Convening Authority of the Military Commissions, The Honourable Ms Susan Crawford (an official of the Department of Defense appointed by the United States Defense Secretary) as to whether to refer the charges formally brought against BM to a Military Commission. The court was told that it was hoped that the Convening Authority would defer a decision until this court heard the matter, but it would not do so for long. It will be necessary to refer to the procedure before the Convening Authority in greater detail, as we do at paragraphs 109 and following.

(6) The course of the proceedings

50. Mr Clive Stafford Smith made a number of witness statements in which he set out the account given by BM and information in relation to the processes and procedures before the United States Military Commission. Those statements formed the principal evidence relied on by BM. In response Mr Manley, the Director, Defence and Strategic Threats at the Foreign and Commonwealth Office, made a witness statement setting out the steps taken by the United Kingdom Government to assist BM (to which we have referred) and providing further reasons as to why BM was not entitled to the various remedies sought.

51. There were also served on behalf of the Foreign Secretary open witness statements from two Security Service witnesses, referred to as Witness A and Witness B. Attached to those witness statements were redacted versions of communications to United States Government agencies and internal reports and memoranda. These statements were relied upon primarily for the purpose of defending the application

made under *Norwich Pharmacal;* it was clear that the statements and documentation had been provided only for the purpose of the proceedings and the documentation could not be used elsewhere.

52. Closed witness statements were also provided by Witness A and Witness B, together with certain other closed material. The Home Secretary provided a certificate on 11 July 2008 claiming public interest immunity for the documents and the identities of Witness A and Witness B. The reasons for the claim were that there would be serious damage to the national security if the documents were disclosed to BM or his lawyers or in open court. In the light of the provision of this closed material, Special Advocates, Mr Thomas de la Mare and Mr Martin Goudie, were appointed on behalf of BM.

53. It was submitted by counsel on behalf of BM and by the Special Advocates that the statement of Witness B was neither *bona fide* nor in some respects credible and on this basis an application was made to cross-examine him. For reasons we set out at paragraph 76.i) below, we granted permission to cross-examine Witness B. That cross-examination was conducted in private by counsel for BM and under stringent conditions to prevent BM or those acting for him before the Military Commission obtaining information through cross-examination which BM's lawyers could not obtain unless his application succeeded; for similar reasons we made an order prohibiting during the continuation of the trial the publication of documents read out in court. In closed session the cross-examination was by the Special Advocate. We did not permit cross-examination of Witness A, but ordered a further statement be made, again for reasons we set out at paragraph 76.ii) below.

(7) The position of the Convening Authority

54. As we have stated at paragraph 48, the urgency of the hearing was necessitated by the contention that the Convening Authority would make a decision imminently. We were provided with correspondence in which BM's lawyers had asked the Convening Authority to provide a timetable to them so that they could try and ensure that this court would determine the proceedings within that timescale. They considered that the documentation and information which they sought to obtain in these proceedings would support the other material which, they maintained, showed that BM had been tortured. The response of the Deputy Legal Adviser to the Convening Authority in a letter dated 9 June 2008 was that Ms Crawford believed that the issues raised "were best resolved through the formal military commissions process". However, on 9 July 2002 Ms Crawford wrote to Lt Col Yvonne Bradley, defence counsel appointed by the Chief Military Defense Counsel in December 2005 to defend BM, stating that she would conduct a full review of the matters raised. Nonetheless the Convening Authority demanded that BM's submissions be filed immediately.

55. In the circumstances, the Foreign Secretary allowed BM's lawyers to use for the purpose of the submission to the Convening Authority the redacted documents disclosed solely for the purpose of the present action and to which we have referred at paragraph 51. This was yet a further example of the very real efforts made by the Foreign Secretary to assist BM.

56. A very long submission was sent to the Convening Authority on 28 July 2008, the first day of the hearing of this matter. We were provided with copies of this on the last day of the hearing.

57. As it became clear to us when the hearing of the claim began that there would be considerable difficulties in completing the matter in the two days allotted for the case and as we would need some time to consider the extensive and difficult issues which arose, we wrote to the Foreign Secretary on 29 July 2008, the second day of the hearing. We asked him to consider drawing to the attention of the Convening Authority this case and the fact that normally in this jurisdiction, the Executive Branch of Government would not make a decision in advance of the court giving its judgment. Our request was addressed to the Foreign Secretary as the Convening Authority is not part of the judicial branch of the United States Government, but part of the Executive Branch. It was therefore for the Foreign Secretary to consider whether he should lay the matter before her. On the following day, Mr Bethlehem QC, the Legal Adviser, wrote to the Acting General Counsel of the Department of Defense (with a copy to the Legal Adviser to the State Department) enclosing our letter and asking him to draw it to the attention of the Convening Authority if appropriate.

58. It is a matter of considerable regret that no response was received, despite our reiterating our request in the course of the hearing.

59. In the circumstances, as BM's lawyers were pressing us for a decision before the Convening Authority made its decision, we were put in the position of having to complete the hearing over five long days (by sitting the equivalent of almost seven court days) and to give our decision as quickly as possible. In the light of the position taken by the Convening Authority, delay might have defeated BM's primary claim to be able to use the documentation and information in its submissions to the Convening Authority. We made this judgment in draft together with the closed judgment available to the Foreign Secretary and the Special Advocates on Wednesday 13 August 2008, so that, in accordance with the Order of Sullivan J of 20 June 2008, (1) the Foreign Secretary could consider, after advice from the SIS and SyS (if necessary), whether there were any matters in the open judgment which he considered would be contrary to the public interest to disclose and (2) the Special Advocates could consider whether there were matters in the closed judgment the disclosure of which would not be contrary to the public interest. We required any submissions on these issues by 1 pm on Monday 18 August 2008. We received a submission from the Foreign Secretary in the late afternoon of Friday 15 April 2008 and a response from the Special Advocates on Monday 18 April 2008. We held a further closed hearing on 18 August 2008 to resolve the issues and made this open judgment available in draft and in confidence to the parties that day.

60. We turn therefore to the three claims.

III. THE CLAIM TO THE DOCUMENTS UNDER THE PRINCIPLES IN *NORWICH PHARMACAL*

61. It is convenient to begin with the claim under the principles established by *Norwich Pharmacal* as this was the principal basis upon which BM contended that the documentation and information should be made available to his lawyers in confidence. Mr Stafford Smith has security clearance from the United States Government to Secret documents and Lt. Col Bradley to Top Secret documents.

62. Although the claim under *Norwich Pharmacal* was included within the Judicial Review claim form, the claim was in essence the trial of an ordinary civil claim which would usually be brought as a claim in the form specified in either Part 7 or Part 8 of the Civil Procedure Rules: see *Civil Procedure 2008* at paragraph 31.18.11.

63. The principle in *Norwich Pharmacal* is best described is in the speech of Lord Reid (at page 175):

> "If through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration."

64. BM's claim to be entitled to such relief was one that sought to apply this principle to novel circumstances. It gave rise to five issues:

i) Was there wrongdoing?

ii) Was the United Kingdom Government, however innocently, involved in the arguable wrongdoing?

iii) Was the information necessary?

iv) Was the information sought within the scope of the available relief?

v) Should the court exercise its discretion in favour of granting relief?

(1) Was there wrongdoing?

65. The wrongdoing alleged by BM was, as is evident from the description of the facts and allegations set out, (i) being held by the United States incommunicado and without access to a lawyer or a court or tribunal in Pakistan and his similar detention by the United States elsewhere until his arrival in Guantanamo Bay; (ii) cruel,

inhuman or degrading treatment by or on behalf of the United States during such detention and (iii) torture during such detention by or on behalf of the United States.

66. As we have set out at paragraphs 23-24, it was common ground that BM was detained unlawfully and incommunicado in Pakistan, he was denied access to a lawyer and his detention was not reviewed by a court or tribunal.

67. It was accepted on behalf of the Foreign Secretary that BM had established an arguable case that:

i) After being subject to torture and cruel, inhuman or degrading treatment in Pakistan, he was unlawfully rendered from Pakistan to Morocco by the United States authorities.

ii) Whilst in Morocco he was subject to unlawful incommunicado detention and torture during his interrogation there by or on behalf of the United States authorities.

iii) He was unlawfully rendered by the United States authorities from Morocco to Afghanistan on 21 or 22 January 2004

iv) He was detained unlawfully and incommunicado at the "Dark Prison" near Kabul and thereafter at the United States Air Force base at Bagram.

v) He was tortured or subject to cruel, inhuman or degrading treatment by or on behalf of the United States authorities in the "Dark Prison".

68. In the light of the concession that there was an arguable case of wrongdoing and in the light of the further concession that it was sufficient for the purposes of obtaining *Norwich Pharmacal* relief if an arguable case of wrongdoing was advanced, it was not necessary for us to determine whether there was in fact any wrongdoing by or on behalf of the United States Government. It is important to emphasise that we therefore do not do so.

(2) Was the United Kingdom Government involved, however innocently, in the arguable wrongdoing?

(a) The relevant legal principles

69. There was initially a dispute as to the applicable legal principles in relation to what had to be shown to establish that the Foreign Secretary was through the SyS or the SIS mixed up in the wrongdoing of others. On behalf of the Foreign Secretary it was contended that BM had to establish that those for whom the Foreign Secretary was responsible had facilitated the wrongdoing, so that, however innocently, the actions had been causative of the occurrence of the wrongdoing. On behalf of BM it was contended that this put the test too high; it was sufficient that a person had become involved in the wrongdoing by facilitating its occurrence or taking part, however innocently, in the wrongdoing.

70. In the closing submissions made on behalf of the Foreign Secretary, it was accepted that it was not necessary for BM to establish that the actions of the Foreign Secretary were causative of the wrongdoing. We consider that that acceptance was plainly

correct for the reasons we shall set out. It is sufficient that the SyS or SIS became involved in the wrongdoing (even if innocently) by facilitating that wrongdoing. Our reasons are as follows:

a. In *Norwich Pharmacal* itself the distinction that was drawn was between the mere bystander or witness to wrongdoing whom all the Law Lords were clear could not be placed under an obligation to provide information and those who were involved or who participated in wrongdoing in such a way as to place them under an obligation. We have already referred to the test of Lord Reid – being mixed up so as to facilitate (p.175 B-C); Lord Morris of Borth-y-Gest referred to someone becoming "actually involved (or actively concerned) in some transactions or arrangements as a result of which he has acquired the information" (p.178 H); Viscount Dilhorne spoke of a person being involved in the transaction or involvement or participation in the wrongdoing (p.188 A-C); Lord Cross spoke of unwitting facilitation arising through a relationship of the person against whom relief was sought and the person alleged to have committed the wrong (p.197 B-G); Lord Kilbrandon (p.203D-204D) spoke of the right to relief of the person seeking disclosure depending on the relationship of the wrongdoer to those against whom relief was sought. None of the speeches speak of causation; it is clear that facilitation is not the same as causation.

b. In *Ashworth Hospital v MGN* [2002] UKHL 29 ([2002] 1 WLR 2033) at paragraph 30 Lord Woolf referred to the speeches in *Norwich Pharmacal* in these terms:

> "They make it clear that what is required is involvement or participation in the wrongdoing and that, if there is the necessary involvement, it does not matter that the person from whom discovery is sought was innocent and in ignorance of the wrongdoing by the person whose identity it is hoped to establish."

At paragraph 35, he added:

> "Although this requirement of involvement or participation on the part of the party from whom discovery is sought is not a stringent requirement, it is still a significant requirement. It distinguishes that party from a mere onlooker or witness. The need for involvement, the reference to participation can be dispensed with because it adds nothing to the requirement of involvement, is a significant requirement because it ensures that the mere onlooker cannot be subjected to the requirement to give disclosure. Such a requirement is an intrusion upon a third party to the wrongdoing and the need for involvement provides justification for this intrusion."

Lord Slynn of Hadley whose speech was the only other speech to refer to this element spoke only of "participation" and "involvement" in the wrongdoing. Again there is nothing that requires the involvement be causative of the wrongdoing.

c. We were referred to other decisions and observations including *Axa Equity & Life Assurance* (1998) CLC 1177 (where Morritt LJ spoke of involvement in terms of "causing or facilitating"), the observations of Sedley LJ in *InterBrew SA v Financial Times and Ors* [2002] EWCA Civ 274 ([2002] 2 Lloyd Rep 229) (where he spoke of facilitation), and *Campaign Against Arms Trade v BAE Systems plc* [2007] EWHC 330. In the last case King J said at paragraph 12:

> "The third party has to have some connection with the circumstances of the wrong which enables the purpose of the wrongdoing to be furthered."

d. We are not sure that it was necessary to go so far as King J went in that case. That is because as Sir Anthony Clarke, MR said in *Koo Golden East Mongolia v Bank of Nova Scotia and Ors* [2007] EWCA Civ 1443 at paragraph 37 it is necessary to consider all the circumstances in the light of the fact that *Norwich Pharmacal* relief is a flexible remedy.

71. It seems to us, therefore, that we ought to approach this issue not by asking the question, "Did the actions by or on behalf of the United Kingdom Government cause the alleged wrongdoing" (as they plainly did not do so) but by asking the question, "Did the United Kingdom Government through the SyS or SIS and its agents become involved in or participate in the alleged wrongdoing through facilitating it?" The issue can be further analysed by examining the relationship of the SyS and the SIS in connection with BM to the United States authorities who are alleged to be the wrongdoers.

72. As all the decisions make clear it is not necessary for BM to establish anything more than innocent participation and certainly not knowledge of the alleged wrongdoing. However if a degree of knowledge were to be established, then the involvement or participation is the clearer.

73. It was also submitted on behalf of BM that if the Foreign Secretary through his agents ought to have known of the alleged wrongdoing (or shut their eyes to it or actually knew) then by failing to act to prevent it he had also become mixed up or involved in the alleged wrongdoing. We shall consider this submission after we have set out the facts.

(b) The application of the principles in relation to the involvement in the alleged wrongdoing and our findings of fact

(i) The case made by BM

74. BM's case was in summary that the Foreign Secretary had, through the SyS and SIS become involved in the alleged wrongdoing in the following ways:

i) The supply of information about BM after his arrest in Karachi on 10 April 2002.

ii) The interview by Witness B when BM was held incommunicado and unlawfully at Karachi, his observation of BM on his arrival and his threat to

BM during interview that the United Kingdom would not help him unless he co-operated with the United States authorities.

iii) The failure to object to the intended transfer of BM to Afghanistan and the failure to obtain assurances as to BM's treatment by or on behalf of the United States authorities.

iv) Supplying further information and receiving results of the interrogation with a continued failure to seek assurances of proper treatment in the knowledge from the end of July 2002 that BM had not been transferred to Afghanistan but remained held in custody by or on behalf of the United States and that United Kingdom representatives had been refused access to him despite their requests,

v) There was an arguable case that the information supplied by the United Kingdom had been used in the interrogation of BM.

vi) Failing to make objections and protests to the United States Government about the incommunicado detention and treatment of BM during such detention

75. In addition to that case made in the open hearing, a further case was made by the Special Advocates on the closed documents in the closed hearing.

(ii) The cross-examination of Witness B: the invocation of the right against self incrimination

76. As we have set out at paragraph 53 above, we permitted cross-examination of Witness B, but not witness A. Our reasons were:

i) Both counsel for BM and the Special Advocates told us that they challenged the *bona fides* and candour of Witness B's witness statement and in some respects its credibility. This alone was a powerful reason to allow cross-examination as this was the trial of the action for disclosure. Furthermore he had specific knowledge about BM, as the interviewer of BM. The questions directed to him would not be generalised but relate to specific matters. The question of the knowledge of the SyS went not only to the issue of involvement and facilitation but also to the exercise of the court's discretion. The question of knowledge was also arguably relevant to the challenge to the decision of the Foreign Secretary on voluntary disclosure, as it was said on behalf of BM that, if the discretion were exercised on a wrong basis, then it would be open to the court to quash it. The open cross-examination conducted by Ms Rose QC was limited to specific topics. For the reasons we have given at paragraph 53 it was conducted in private.

ii) Witness A's position could be dealt with by his being asked to make a further statement in relation to the topics canvassed because there was no attack on his *bona fides* or candour and because the enquiries sought to be made of Witness A went to general matters concerning the documents and practices of the SyS and not to specific knowledge in relation to BM.

77. It was clear that a case was being made on behalf of BM by Ms Rose QC and the Special Advocates where questions would touch on the commission of offences under

the criminal law given the very wide scope of the International Criminal Courts Act 2001. Its material provisions are as follows:

> *"S. 51 Genocide, crimes against humanity and war crimes*
>
> (1) It is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime
>
> (2) This section applies to acts committed:
>
> (a) in England or Wales, or
>
> (b) outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to United Kingdom service jurisdiction.
>
> *s.52 Conduct ancillary to genocide, etc committed outside jurisdiction*
>
> (1) It is an offence against the law of England and Wales for a person to engage in conduct ancillary to an act to which this section applies.
>
> (2) This section applies to an act that if committed in England or Wales would constitute -
>
> (a) an offence under section 51 (genocide, crime against humanity or war crime), or
>
> (b) an offence under this section
>
> but which, being committed (or intended to be committed) outside England and Wales, does not constitute such an offence.
>
> *s. 55 Meaning of 'ancillary offence'*
>
> (1) References in this Part to an ancillary offence under the law of England and Wales are to:
>
> (a) aiding, abetting, counselling or procuring the commission of an offence,
>
> (b) inciting a person to commit an offence
>
> (c) attempting or conspiring to commit an offence, or
>
> (d) assisting an offender or concealing the commission of an offence.

A war crime is defined by s.50(2) to be a war crime as defined by Article 8.2 of the ICC statute as set out in schedule 8 to the Act. In so far as material Article 8.2 provides:

> "For the purpose of this Statute, 'war crimes' means:
>
> (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Conventions:
>
> (ii) Torture or inhuman treatment, including biological experiments;
>
> (iii) Wilfully causing great suffering, or serious injury to body or health;
>
> …
>
> (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
>
> (vii) Unlawful deportation or transfer or unlawful confinement;"

78. Witness B had been provided with independent legal advice, including counsel, Mr Duncan Penny, when the potential allegations against Witness B became apparent to those representing the Foreign Secretary. After discussion with all counsel, including counsel present for Witness B, as to the scope of the intended cross-examination, we considered it appropriate before the open cross-examination of Witness B to give him a warning in the usual terms that he need not answer questions that might incriminate himself.

79. In the course of his cross-examination by Ms Rose QC he answered all the questions asked of him. At the conclusion of that cross-examination, it was not possible to continue that day with his cross-examination by the Special Advocate; we were asked by counsel for Witness B if he could advise him further, but as no good reason was given to us for seeking to advise him further after answering all the questions in cross-examination by Ms Rose QC, we saw no reason for departing from the normal rule that a witness under cross-examination should not discuss his evidence with anyone. We therefore refused the application.

80. On the following afternoon, when the Special Advocate commenced his cross-examination of Witness B in the closed hearing, Witness B stated that that in the light of the very serious allegations that had been made against him his intention was not to answer any further questions from the Special Advocate. On our direction that further questions be asked, when questions (such as the nature of the group in which he worked) were asked, Witness B declined to answer any of the questions. He explained that, on the basis of the advice he had received, he felt that it was in his best interests not to answer them.

81. Because it was at first sight difficult to see how the privilege could be invoked, because of the unusual position of there being open and closed cross-examination and because of the potential implications, we asked for an *amicus curiae* to be appointed. We were able to proceed with other aspects of the hearing during the remainder of the afternoon. On the following morning we heard argument from Mr Birnbaum QC as *amicus curiae* to whom we are particularly indebted for the very prompt way in which he was able to assist us. We also heard from counsel present for Witness B, the Special Advocate as to the case he was intending to put to Witness B on the closed documents and counsel for the Foreign Secretary. It was the submission of the *amicus* that, in the light of the authorities, the wide scope of the International Criminal Courts Act 2001 and the case the Special Advocate was intending to put to Witness B on the closed documents, a point would come in the cross-examination where there would be a strong argument in favour of permitting the privilege to be invoked. We therefore decided, in the light of the decisions in *Den Norske Bank v Antonatos* [1999] QB 271 and *R(CPS) v Bolton Magistrates Court* [2003] EWHC 2697 Admin ([2004] 1WLR 835 that we would ask the Special Advocate to continue with the cross-examination and to put the questions he wished to ask once again. If the privilege was claimed, we would then rule on whether the privilege applied to answers to those questions. We would then consider, as further questions were put, the point at which we should permit the witness to invoke the privilege, if claimed. However, before re-commencing the cross-examination, as Witness B had invoked the privilege, we permitted Mr Duncan Penny and his solicitor, to advise Witness B further.

82. When the special advocate asked similar questions to those asked of Witness B on the previous day, he answered those questions and all other questions asked of him including those that might possibly be considered to touch on s. 55 of the International Criminal Courts Act 2001.

83. It was submitted to us that in assessing the credibility of Witness B we should take into account his initial invocation of the privilege. He had answered questions in the open cross-examination, but when he knew he would have to answer questions on the documents to be put to him in the closed cross-examination, he had chosen initially to invoke the privilege. It is clear, in our view, that there is a difference in authority as to whether reliance can be placed on a refusal to answer on the grounds of self incrimination: in *Sociedade Nacional de Combustatives de Angola v Lunquist* [1991] 2QB 310 Leggatt J (with whom Staughton LJ agreed) thought it should not. Templeman LJ in *Rank Film Distributors v Video Information Centre* [1980] 2 All ER 273 disagreed. Waller LJ in *Den Norske Bank* expressed the view that, in the light of sections 34 and 35 of the Criminal Justice and Public Order Act 1994, the views of Templeman LJ should be followed. We agree with Waller LJ's view as to the authority to be followed.

84. However, we have not considered it necessary to draw any inferences from Witness B's initial refusal to answer on the grounds of self incrimination for a number of reasons. First, it was his evidence that his refusal was on the basis of legal advice; that is a relevant consideration. Secondly, given the circumstances in which he was being cross-examined about BM and the position of the SyS in relation to his detention and questioning, he may well have thought the better course was to invoke the privilege in the general interests of all concerned. Thirdly and most importantly, we have reached

our view on the credibility of Witness B without the need to consider whether we should have regard to any possible inferences to be drawn from his initial refusal.

85. As this was a provisional view we had reached, we declined to make public until the publication of this judgment the position in relation to Witness B. It was only fair to him that his initial refusal be seen in context and that undue speculation should not occur. Moreover it is important to stress that in our view no adverse conclusions should be drawn by others as a result of the invocation of the privilege; Witness B's position was unprecedented and there may well have been an excess of caution on his part.

(iii) Our findings in relation to involvement and facilitation

86. We discussed with counsel the way in which we should set out our findings of fact in relation to involvement and facilitation and the reasons for those findings. As a significant part of the evidence was heard and the submissions on the evidence and the documents were made in a closed hearing, we made it clear that it was only possible to set out our detailed findings and the reasons why we made them in the closed judgment. We would provide in the open judgment the necessary summary. As our detailed findings and reasons rely on both the closed and open evidence, to provide only that part of the findings and reasons that are based on the open evidence and materials would give an incomplete account. Counsel agreed with our approach. As we have explained, at paragraph 4, part of the summary has been redacted at the request of the Foreign Secretary.

87. The summary of our findings necessary for this open judgment is as follows:

(i) The SyS and the SIS were interested in BM because of his residence in the United Kingdom, his connections with suspected persons in the United Kingdom, the period of time spent in Pakistan and Afghanistan, those whom he was said to have been with and the gravity of the allegations made against him at the time.

(ii) We have no doubt that on the basis of that information the SIS and SyS were right to conclude that BM 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 cooperate as fully as possible with the United States authorities to that end.

(iii) It was clear from reports that BM was held incommunicado from 10 April 2002 whilst a series of interviews was conducted by the United States authorities in April 2002 during which he had asked for a lawyer and had been refused.

(iv) In May 2002, the SyS and the SIS received reports containing information relating to BM's detention and treatment in Pakistan. The details of the reports are set out in the closed judgment.

(v) **Our finding after the hearing was that** the probability is that Witness B read the reports either before he left for Karachi or before he conducted the interview. **Since the hearing we have been provided with the documents to which we have referred at paragraph 17 which show a briefing document was prepared for sending to him.**

(vi) If, contrary to ~~that~~ **the** finding **we made after the hearing**, Witness B had not read them prior to going to Karachi or after arrival at Karachi and prior to the interview, we have no doubt that other persons within the SyS, including persons more senior to Witness B, must have read the reports and must have appreciated what they said about BM's detention and treatment at Karachi. Those officers should have drawn to the attention of Witness B these matters either before or after the interview. **It is now clear that the reports were studied by other desk officers.**

(vii) In the light of Witness B's continued involvement with BM and the importance attached to BM by the SyS, it is inconceivable that he did not carefully read the materials after his return.

(viii) During the interview Witness B saw himself as having a role to play in conjunction with the United States authorities in inducing BM to cooperate by making it clear that the United Kingdom would not help unless BM cooperated. We can well understand why, given the exigencies of the time, Witness B put matters in such stark terms as he did. It is clear that what he said to BM was, in effect, that the United Kingdom would not attempt to assist him unless BM persuaded him that he was cooperating fully with the United States authorities.

(ix) By 30 September 2002, it was clear to the SyS that BM was being held **at a covert location** (either by the authorities of the United States or under the direct control of the United States) ~~at a facility~~ which was not a United States military facility, such as Bagram. It is clear to us that they ~~must have appreciated~~ **knew** that he was not in a regular United States facility, that the facility in which he was being detained and questioned was that of a foreign government (other than Afghanistan) and that the United States authorities had direct access to information being obtained from him.

(x) The SyS were supplying information as well as questions which they knew were to be used in interviews of BM from the time of his arrest whilst he was held incommunicado and without access to a lawyer or review by a court or tribunal. They continued to supply information and questions after they knew of the circumstances of BM's detention and treatment as contained in the reports of the series of interviews in May 2002 and after September 2002 when they ~~must have appreciated~~ **knew** the circumstances related to his continued detention which we have described in sub-paragraph (ix).

88. We have concluded that in the light of those findings that

i) The conduct of the SyS facilitated interviews by or on behalf of the United States when BM was being detained by the United States incommunicado and without access to a lawyer.

ii) The SyS continued to facilitate the interviewing of BM by providing information and questions after 17 May 2002 until ~~November 2002~~ **at least April 2003** in the knowledge of what had been reported to them in relation to the conditions of his detention and treatment and his interviews in Karachi in May 2002 to which we have referred.

iii) Witness B worked with the United States authorities to the extent of making it clear to BM that the United Kingdom Government would not help BM unless he cooperated fully with the United States authorities.

iv) The SyS continued to facilitate interviews by the United States authorities after September 2002 when also they knew BM was still incommunicado and when they **knew** ~~must also have appreciated~~ that he was not in a United States facility and that the **undisclosed** facility in which he was being detained and questioned was that of a foreign government (other than Afghanistan) and that the United States authorities had direct access to information being obtained from him.

v) If the question of facilitation is considered as one where an important factor is the relationship between the person from whom the information is sought and the alleged wrongdoer (as some of the authorities to which we have referred at paragraph 70a suggest), then by seeking to interview BM in the circumstances described and supplying information and questions for his interviews, the relationship of the United Kingdom Government to the United States authorities in connection with BM was far beyond that of a bystander or witness to the alleged wrongdoing.

vi) **We are unable to determine the significance (if any) of Witness B's visits to Morocco discussed in paragraph 35A.**

89. The SIS and SyS have told the ISC that they should have sought assurances from the United States authorities before providing information and questions.

90. We do not consider it necessary in the light of our findings to decide the further question whether the United Kingdom Government was under a legal duty to make any protest or representations to the United States Government in relation to the matters which, as we have set out, were reported to it.

91. It is also unnecessary for us to determine, in the light of the concession made by the Foreign Secretary that BM had advanced an arguable case of wrongdoing, whether on the findings we have made the conduct amounted to wrongdoing on the part of the United States Government. But we find that, on the basis that what was done was arguably wrongdoing, the SyS facilitated it in the manner and to the extent described.

(3) Was the information necessary?

92. Before considering the scope of the documentation and information which BM's lawyers seek it is convenient to consider whether the provision of any documentation

or information is necessary. It is contended by the Foreign Secretary, as we have outlined, that the provision of documentation or information by him is not necessary because it will all be provided to the Convening Authority or made available in the course of the proceedings before the Military Commission.

(a) The legal principles

93. At paragraph 57 of his speech in *Ashworth*, as we set out at paragraph 132 below, Lord Woolf made it clear that the remedy under *Norwich Pharmacal* should only be granted when the court was satisfied that the information was necessary. In *Mitsui v Nexen Petroleum* [2005] EWHC 625 (Ch) ([2005] 2 All ER 511) Lightman J put the test in more stringent terms; at paragraph 19 he referred to its being available "where the claimant requires the disclosure of crucial information in order to be able to bring its claim or where the claimant requires the missing piece of the jigsaw". He observed at paragraph 24:

> "In my judgment despite the argument of [counsel for the claimant] that there is no authority directly in point, it is clear that the exercise of the jurisdiction of the court under *Norwich Pharmacal* against third parties who are mere witnesses innocent of any participation in the wrongdoing being investigated is a remedy of last resort …The jurisdiction is only to be exercised if the innocent third parties are the only practicable source of information."

After referring to the speeches in *Norwich Pharmacal* and *Ashworth*, Lightman J concluded:

> "The necessity required to justify exercise of this intrusive jurisdiction is a necessity arising from the absence of any other practicable means of obtaining the essential information."

In *Nikitin & Ors v Richards Butler LLP* [2007] EWHC 173 (QB) ([2007] All ER (D) 129) Langley J, after referring to the decision of Lightman J in *Mitsui* seemed to consider at paragraph 24 that it was necessary to show that such information was vital to a decision to sue or an ability to plead and whether or not, even if it was, it could be obtained from other sources. The requirement of necessity was also considered by King J in *Campaign Against Arms Trade v BAE* paragraphs 15-20; it was argued on behalf of the defendant in that case that this test was not met where the claimant had failed to exhaust other available avenues through which the information might be obtained. King J observed that that was to put the matter "too high" and to put the discretion of the court into too much of a straitjacket. He considered that the court was entitled to have regard to all the circumstances prevailing in the particular case including the size and resources of the applicant, the urgency of its need and to obtain the information it requires and any public interest in its having its needs satisfied.

94. It seems to us that the observations of Lightman J in *Mitsui* and Langley J in *Nikitin* put an undue constraint upon what is intended to be an exceptional though flexible remedy. The intrusion into the business of others which the exercise of the *Norwich Pharmacal* jurisdiction obviously entails means that a court should not, as Lord Woolf in *Ashworth* made clear, require such information to be provided unless it is

necessary. But in our view, there is nothing in any authority which justifies a more stringent requirement than necessity by elevating the test to the information being a missing piece of the jigsaw or to it being a remedy of last resort. We agree in this respect with the views expressed in *Hollander Documentary Evidence*, 9th edition at paragraph 5-26. Moreover it would be inconsistent with the flexible nature of this remedy to erect artificial barriers of this kind. In our view the approach of King J in *Campaign Against the Arms Trade* is to be preferred.

95. If the information is necessary, it is common ground that it is not a condition of the exercise of the jurisdiction that the information is required pending proceedings in a court of law. That is clear from the decision in *British Steel v Granada Television* [1981] AC 1096, another case concerned with information supplied to another in confidence. Both Lord Denning, MR, in the Court of Appeal in that case at p.1127 and Templeman LJ at p.1132 made it clear that the information could be obtained even if it was not necessary for the purpose of bringing an action. Templeman LJ said:

> "In my judgment the principle of the *Norwich Pharmacal* case applies whether or not the victim intends to pursue action in the courts against the wrongdoer provided that the existence of a cause of action is established and the victim cannot otherwise obtain justice. The remedy of discovery is intended in the final analysis to enable justice to be done. Justice can be achieved against an erring employer in a variety of ways and a plaintiff may obtain an order for discovery provided he shows that he is genuinely seeking lawful redress of a wrong and cannot otherwise obtain redress."

96. Those remarks were approved by the House of Lords in that case (see the speech of Lord Fraser at p.1200 of the report) and by Lord Woolf in *Ashworth* at paragraph 46. In *Interbrew v Financial Times*, Sedley LJ expressed the view at paragraphs 29 -34 that the relief under *Norwich Pharmacal* could not be used in aid of the detection of a crime and it would not be right to allow the victim of a crime to compel the production of information; it was only available where it was necessary to enable the applicant to bring a civil action. However at paragraphs 52-3 of his speech in *Ashworth*, Lord Woolf made it clear he did not agree with this view. It is clear that if the information is necessary, it is not a condition that the person seeking the documents needs them for a civil action. An illustration of this is the decision of Mummery J in *CHC Software Care v Hopkinson Wood* [1993] FLR 241.

97. The Special Advocates did, in fact, intimate that they had instructions that BM might bring a civil action against the Pakistani authorities (subject to state immunity principles) and against the SyS; he identified 5 potential causes of action. In the light of the considerable time that would be required to address the difficult issues such a civil claim would raise and in the light of the pressure of time in the hearing before us, it was agreed that the argument on such issues would be deferred to a further hearing, should it be necessary. In the light of our decision on the other issues, the viability of such a claim does not now have to be decided.

(b) Application of principles to the facts

98. In the skeleton argument of the Foreign Secretary, it was an important part of his argument that this court should not require him to provide the information sought in relation to BM, whilst he was being interrogated by the United States authorities or otherwise in their custody, as that information would be provided by the United States military prosecutors, as Mr Bethlehem QC's letter of 6 June 2008 (set out at paragraph 47.ii)) had made clear. The material had been identified by Mr Bethlehem QC to the United States Department of Defense and the United Kingdom Government had expressed its view as to the potentially exculpatory nature of the material.

99. However, as we have set out at paragraph 47.v), the Foreign Secretary no longer relies on disclosure being made by United States military prosecutors. The explanation for this is set out in the closed judgment. But that is not the only argument advanced by the Foreign Secretary. The Foreign Secretary also submitted that the information would be provided to the Convening Authority and taken into account by it and that if charges were referred by the Convening Authority, the information would be made available to the lawyers defending BM in the course of the proceedings by order of the Military Judge. This was challenged by BM's lawyers; it was the essence of Mr Stafford Smith's evidence that the United States authorities would never release evidence of torture or similar treatment, whatever independent position might be taken by the Military Judge. It was in any event contended that the information was necessary now given BM's mental condition after 6 years of detention without trial.

100. We must therefore examine three further questions:

i) Whether on the facts of the case the provision of the information to BM's lawyers is necessary.

ii) Whether the information will be provided to and considered by the Convening Authority if not produced by the Foreign Secretary.

iii) Whether the information will be provided to BM's lawyers by order of the Military Judge during the course of hearings before the Military Commissions

101. We were therefore required to examine the provisions of the United States Military Commissions Act and the procedures thereunder. We would observe that when the hearing began the only evidence before us was that in the initial witness statements of Mr Clive Stafford Smith. Although we were carefully and helpfully taken through the Military Commissions Act by Mr Saini QC, it became apparent, however, that in the light of the importance placed by the Foreign Secretary on this particular submission, the court should have before it admissible evidence from United States lawyers on the scope and operation of the Military Commissions Act given the very special nature of the Military Commissions. That evidence should have been provided in the course of the preparation for the hearing, but it was not. We had hoped that such evidence could have been provided in the course of the hearing, but we were told that it would take two weeks to obtain evidence from independent lawyers. In the light of the urgency of the proceedings, we were provided with a letter from Mr Daniel J Dell' Orto, Acting General Counsel to the Department of Defense and a further witness statement from Mr Stafford Smith.

(i) The necessity of the provision of the information to BM's lawyers

102. On the evidence before us, it is apparent that the case of the United States military prosecutors is based on confessions made by BM at Bagram and Guantanamo Bay after May 2004. It is BM's case that those confessions were obtained by torture and other illegal action which, although those actions preceded his delivery to Bagram, induced him to make those confessions. From what we have seen and in particular from the submission made to the Convening Authority on 28 July 2008 (to which we referred at paragraph 56), we are satisfied that there is only the slenderest evidence independent of BM to support his case of torture or cruel, inhuman or degrading treatment by the United States authorities (despite brave assertions to the contrary by BM's lawyers in correspondence and submissions in the course of the Military Commissions process), apart from the information which it is sought to obtain from the Foreign Secretary.

103. It is important to bear in mind in this respect:

i) As we have set out the United States Government has refused to provide any information as to his location between the time he was clearly in the *de facto* custody of the United States in Pakistan on 17 May 2002 and his arrival in Bagram two years later.

ii) The only information provided by the United States Government about that period is evidence that points to the fact that BM's allegations cannot be supported. On 25 April 2008, in response to requests for information under the Data Protection Act 1998 and the Freedom of Information Act 2000 the Foreign and Commonwealth Office disclosed a copy of a narrative summary of BM's medical record received by the United Kingdom Government from the United States authorities at Guantanamo Bay. That document is from the Senior Medical Officer dated 24 January 2008. It stated that BM arrived in Guantanamo Bay in fair health and set out a report on his mental condition to which it will be necessary to refer (see paragraph 126.v) below). In the letter of 22 July 2008 (to which we referred at paragraph 47.iv)) the Foreign Office also stated that the United States Government had informed them that there was no evidence to support the claim that BM's genitalia had been brutalised; nothing abnormal about his genitalia was noted in any his medical records and no scarring had been identified.

104. On the other hand, it was contended by Ms Rose on behalf of BM that the documents disclosed to BM's lawyers by the Foreign Secretary for the purpose of these proceedings (and which were used in the submission on 28 July 2008 to the Convening Authority in the circumstances set out at paragraph 55) had proved essential to them. The information had, for example, shown that he had one fake passport and not two (as is charged) and that he had at the outset said there was no dirty bomb plot (a position he has consistently maintained to his defence lawyers). The information also revealed that he could not be located by the United Kingdom authorities and that access to him was denied to the United Kingdom authorities, thus supporting his account of rendition. The information disclosing the provision of information to the United States authorities in October 2002 supported his account of what he said was put to him whilst being tortured in Morocco (as set out at paragraph 35.iii)). It is also said to be relevant that the initial assessment of Witness B was that BM had the strength of will to maintain his story indefinitely.

105. We are satisfied that the information held by the Foreign Secretary is not merely necessary but essential if BM is to have his case fairly considered by the Convening Authority and a fair trial before the Military Commission (if his case is referred). That is because without the information he will not be able to put forward a defence to the very serious charges he faces, given the confessions made by him at Bagram and Guantanamo Bay in 2004. Our reasons for that conclusion are set out in the closed judgment. Part of one of those reasons, but only part of one, can be seen from the summary of our findings set out at paragraph 87, as the information also provides the only support independent of BM in some material particulars for his general account of events which led to the confessions; this support in fact goes very significantly beyond the matters put forward by Ms Rose QC in paragraph 104. That is, however, only one of the reasons put forward in the closed judgment.

106. It was argued by Mr Saini QC that what was in effect being sought by BM was evidence and that it was clear from the authorities, summarised in *Hollander* at paragraphs 5-18 to 5-19, that under *Norwich Pharmacal* it was only possible to obtain information essential to bring proceedings and not evidence in support of them. We do not accept the submission that what is being sought is evidence; what the Foreign Secretary holds is information essential to a fair consideration of BM's case and a fair trial. As we have set out, BM has not been given by the United States authorities any information about his custody, treatment or location in the period April 2002 to May 2004. Without the information held by the UK Government, BM cannot have his case fairly considered by the Convening Authority or have a fair trial as he will not be able to try to establish the only answer he has to the confessions – namely that they were involuntary and abstracted from him by wrongful treatment. The information is as essential to a fair trial in which he is the defendant as it would be if he were pursuing a claim. Our further reasons are set out in the closed judgment.

107. But is that sufficient within the principles so far developed in the application of *Norwich Pharmacal*? There is plainly no precedent, as it would not be possible to proceed with a prosecution in the United Kingdom if information of the type held by the Foreign Secretary was not provided by the prosecutor. However in the unique circumstances of this case, we see no reason why a person facing such serious charges and who claims to be the victim of torture and cruel, inhuman or degrading treatment should not be entitled to information capable of providing the only real answer, in the light of the confessions, to the charges made, and thus affording him a fair consideration of his case and a fair trial in accordance with long established principles to which we refer at paragraph 147.v).

108. We must therefore next consider whether the information could be otherwise made available as submitted by the Foreign Secretary.

(ii) Whether the information will be provided to and considered by the Convening Authority if not produced by the Foreign Secretary

109. The role of the Convening Authority is set out in sub-chapter 748h of Chapter 47A:

> "Military commission under this chapter may be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose."

110. The person designated as the Convening Authority is, as we have stated, the Honourable Ms Susan Crawford. She was designated in accordance with the provision by the United States Secretary for Defense in February 2007. She is a former Military Judge having served as a member of the Court of Appeals for the Armed Services from 1991 to 2006 and for part of that time was Chief Judge; she had held senior legal positions within the Department of Defense.

111. As explained to us, the Convening Authority is responsible for overseeing many aspects of the military commission process and for supervising the Office of Military Commissions. Among other things, the Convening Authority reviews and approves charges against persons determined to be alien unlawful enemy combatants, as defined in the Military Commissions Act of 2006, appoints members of Military Commissions, and reviews verdicts and sentences of Military Commissions.

112. BM's lawyers wish to be able to place material independent of BM before the Convening Authority to show BM was subject to extraordinary rendition and torture; they contend that if this is done, it is likely that the Convening Authority will refuse to refer the charges to a Military Commission. The evidence from Mr Stafford Smith in his second witness statement is that it is believed by him that, although the Convening Authority did not give reasons, it was likely that it refused to refer charges in the case of Mohamed Al Qahtani because of the highly publicised evidence that he had been tortured at Guantanamo Bay.

113. It was common ground that the information sought could not be obtained by any process of United States law if it was to be put before the Convening Authority by BM's lawyers. Although that remained the position, the Foreign Secretary contended that the information would be considered by the Convening Authority under the process prescribed under the Military Commissions Act of 2006 before the charges were referred. It was therefore not necessary for him to provide that information. He relied upon a number of Rules set out in the *Manual for Military Commissions* made by the United States Secretary for Defense 18 January 2007; the Manual is stated to be adapted from the Manual for Courts Martial. The Secretary of Defence stated in the foreword:

> "This Manual applies the principles of law and rules of evidence in trial by general courts-martial so far as I have considered practicable and consistent with military intelligence activities and not inconsistent with the [Military Commissions Act of 2006]"

i) Under Part II, Rule 401, it was the obligation of the Convening Authority to consider the evidence and the interests of national security.

> "Rule 401. Forwarding and disposition of charges in general
>
> (a) *Who may dispose of charges?* Only the Secretary of Defense or an officer or official of the United States designated by the Secretary for the purpose to convene military commissions may dispose of charges.

> (b) *How charges may be disposed of.* The authority may dispose of the charges by dismissing any or all of them or referring any or all of them to a military commission in a prompt manner.
>
> **Discussion**
>
> A proper authority may dispose of charges individually or collectively. … A charge should be dismissed when it fails to state an offense, when it is unsupported by available evidence, or when there are other sound reasons why trial by military commission is not appropriate. Charges may be dismissed because trial would be detrimental to the prosecution of a war or harmful to national security, *see R.M.C. 407(B).*"

ii) Under Part II, Rule 406, the charges have to be referred to the legal adviser to the Convening Authority for consideration and advice before a decision is made. Rule 406 (b) sets out the contents of that advice and requires consultation with the Office of the Director of National Intelligence; Rule 406 (c) necessitates the provision of that advice to the defence if charges are referred. As the information held by the Foreign Secretary has been drawn to the attention of the United States Department of Defense and the State Department, it was submitted it would as part of this process be drawn to the attention of the Convening Authority by this route:

> "(c) *Contents:* The advice of the legal adviser shall include a written and signed statement which set forth that person's
>
> ….
>
> (2) Conclusion with respect to whether the allegation of each offence is warranted by the evidence indicated in the report of the investigation (if there is such a report)…
>
> (4) Conclusion, after consultation with the Office of the Director of National Intelligence and appropriate intelligence agencies, with respect to whether trial of the charges would be harmful to national security.
>
> **Discussion**
>
> The legal adviser is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice….."
>
> (c) *Distribution.* A copy of the advice of the legal advisor shall be provided to the defense if charges are referred to trial by military commission."

iii) Under Part II, Rule 407, the Convening Authority is obliged to consult the Office of the Director of National Intelligence if it finds that the trial would be inimical to national security before coming to a decision.

> Rule 407. "Action by convening authority
>
> ….
>
> (b) *National security matters.* When in receipt of charges the trial of which the convening authority finds would probably be inimical to the prosecution of a war or harmful to national security, that convening authority, unless otherwise prescribed by regulations of the Secretary of Defense, and after appropriate consultation with the Office of the Director of National Intelligence, shall determine whether trial is warranted and, if so, whether the security considerations involved are paramount to a trial. As the convening authority finds appropriate, he may dismiss the charges, or authorize trial of them."

iv) However Part II, Rule 601 makes clear the limitations on the scope of the Convening Authority's duties:

> Rule 601: Referral
>
> (d) *When charges may be referred.* If the convening authority finds, or is advised by a legal advisory that there are reasonable grounds to believe that an offense triable by a military commission has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. …….. The convening authority or legal advisory shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial."

114. In his sixth affidavit, produced to the court on the last day of the hearing, Mr Stafford Smith set out a letter dated 20 June 2008 which he had written to the military prosecutor with responsibility for BM's case requesting an assurance that exculpatory material would be provided to the Convening Authority, including evidence which the United Kingdom had provided to the United States and evidence of torture or abuse to BM. It was his evidence that he had received no such assurance and to his knowledge no such material had been provided to the Convening Authority. Repeated requests to the Convening Authority for disclosure of what was submitted to it by the military prosecutors provided no result. In the detailed submission to the Convening Authority on 29 July 2008 to which we have referred at paragraphs 56, 102 and 104, Mr Stafford Smith seeks to persuade the Convening Authority to investigate the allegations made by BM on the basis that it has power to do so and that there is evidence independent of BM to support the allegations. We have already expressed our views on the independent evidence which BM's lawyers have which is said to support BM's allegations of torture and cruel, inhuman or degrading treatment. It is

very slender. We therefore cannot treat this submission by Mr Stafford Smith as anything more than a submission made in the circumstances in which he was placed given the fact that the Convening Authority has not agreed to await the decision of this court. The submission made by an advocate is to be contrasted with the evidence given by Mr Stafford Smith in his witness statements.

(iii) Whether the information will be provided to BM's lawyers by order of the Military Judge during the course of hearings before the Military Commissions

115. It was contended by the Foreign Secretary that if the charges were referred, then the Military Judge would order the disclosure of the information held by the Foreign Secretary.

116. A Military Commission established by the Convening Authority is made up of commissioned officers of the United States armed forces and a Military Judge. By sub-chapter 948(i) and 948(j)

> "Any commissioned officer of the armed forces on active duty is eligible to serve on a military commission under this chapter."
>
> "A military judge shall be detailed to each military commission under this chapter. …. The military judge shall preside over each military commission to which he has been detailed."

117. The Military Judge's powers are set out in the Act and the Rules, the relevant parts of which we set out. We should add that in those Rules the references to trial counsel are to counsel for the prosecution.

i) The provisions in relation to self incrimination and evidence obtained by torture and coercion are at sub-chapter 948r. No evidence obtained by torture is admissible, but evidence obtained by coercion prior to December 2005 may be admissible.

> "(a) *In General*. – No person shall be required to testify against himself at a proceeding of a military commission under this chapter.
>
> (b) *Exclusion Of Statements Obtained By Torture*. – A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.
>
> (c) *Statements Obtained Before Enactment Of Detainee Treatment Act Of 2005*. – A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the Military Judge finds that –

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

(2) the interests of justice would best be served by admission of the statement into evidence."

ii) Documents detrimental to United States national security are privileged from production; sub-chapter 949d(f) provides for the protection of classified information:

"(1) *National Security Privilege.* (A) Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. The rule in the preceding sentence applies to all stages of the proceedings of military commissions under this chapter….

(2) *Introduction of Classified information*

(A) Alternatives to Disclosure. To protect classified information from disclosure the Military Judge, upon motion of trial counsel, shall authorise to the extent practicable (i) the deletion of specified items of classified information from the documents to be introduced as evidence before the military commission (ii) the substitution of a portion or a summary of the information for such classified information; or the statement of statement of relevant facts that the classified information would tend to prove.

(B)Protection of sources, methods or activities. The military judge on the motion of trial counsel shall permit trial counsel to introduce otherwise admissible evidence before the military commission, while protecting from disclosure the sources, methods or activities by which the United States acquired the evidence, if the military judge finds that (i) the sources, methods and activities by which the United States obtained the evidence are classified and (ii) the evidence is reliable. The military judge may require trial counsel to present to the military commission and the defence to the extent practicable and consistent with national security, an unclassified summary of the sources, methods or activities by which the United States acquired the evidence. ……

(3) *Consideration Of Privilege And Related Materials.* – A claim of privilege under this subsection, and any materials submitted in support thereof, shall, upon request of the

> Government, be considered by the military judge in camera and shall not be disclosed to the accused."

iii) The right of the defence to obtain documentary evidence is in chapter 949j: under the heading "*Opportunity to obtain witnesses and other evidence"*

> ….
>
> *(b)Process For Compulsion.* Process issued in a military commission under this chapter to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully use…
>
> *(c)Protection Of Classified Information.*
>
> (1) With respect to the discovery obligations of trial counsel under this section, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable -
>
> (A) the deletion of specified items of classified information from documents to be made available to the accused;
>
> (B) the substitution of a portion or summary of the information for such classified documents; or
>
> (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove
>
> (2) The military judge, upon motion of trial counsel, shall authorise trial counsel, in the course of complying with discovery obligations under this section, to protect from disclosure the sources, methods, or activities by which the United States acquired evidence if the military judge finds that the sources, methods or activities by which the United States acquired such evidence are classified. The military judge may require trial counsel to provide, to the extent practicable, an unclassified summary of the sources, methods or activities by which the United States acquired such evidence".

(d) *Exculpatory Evidence*. –

> (1) As soon as practicable, trial counsel shall disclose to the defense the existence of any evidence known to trial counsel that reasonably tends to exculpate the

> accused. When exculpatory evidence is classified, the accused shall be provided with an adequate substitute in accordance with the procedures under subsection (c).
>
> (2) In this subsection, the term 'evidence known to trial counsel' in the case of exculpatory evidence, means exculpatory evidence that the prosecution would be required to disclose in a trial by general court-martial under chapter 47 of this title."

iv) Provision for appeals and the intervention of the Federal Courts is in sub-chapter 950g

> "(a) *Exclusive Appellate Jurisdiction.* – (1)(A) Except as provided in subparagraph (B), the United States court of Appeals for the district of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority) under this chapter."
>
> "(c) *Scope Of Review*. – The jurisdiction of the Court of appeals on an appeal under subsection (a) shall be limited to the consideration of –
>
> (1) whether the final decision was consistent with the standards and procedures specified in this chapter; and
>
> (2) to the extent applicable, the Constitution and the laws of the United States."

v) The *Manual for Military Commissions* also contains a provision in Rule 701(e) and (f) in relation to exculpatory evidence:

> "(e) *Exculpatory evidence.* Subject to section (f), the trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:
>
> (1) Negate the guilt of the accused of an offense charged;
>
> (2) Reduce the degree of guilt of the accused of an offense charge; or
>
> (3) Reduce the punishment.
>
> In this section, the term "evidence known to trial counsel," as it relates to exculpatory evidence, means exculpatory evidence that the prosecution would be required to disclose

> in a trial by general court-martial under chapter 47 of this title."
>
> *(f) National Security Privilege.* Classified information shall be protected and is privileged from production if disclosure is detrimental to the national security. The rule applies to all stages of proceedings in military commissions, including the discovery phase. Pursuant to 10 USC§§949d(f) and 949(j)(c), the military judge may issue a protective order to limit the distribution or disclosure to the defence, including the sources, methods or activities by which the United States acquired the evidence
>
> (1) To withhold disclosure of information otherwise subject to discovery under this rule, the military judge must find that the privilege is properly claimed under Mil. Comm. R. Evid. 505."

Detailed provisions are then made for the provision of the information mirroring the provisions in the Act. §§ 949d (f) and 949(j)(c) are set out at subparagraphs ii) and iii) above. The reference to Mil. Com. R` Ev is a reference to the Rules of Evidence set out in the Manual at Part III; Rule 505 of that Part deals with classified information and its disclosure in similar terms. It is necessary to refer to the safeguard contained in Rule 505(e)(4) which provides:

> " *Protection of the fairness of the proceedings.* If the military judge determines that the government's proposed alternative to full disclosure be inadequate or impracticable and the Government objects to the provision of the information in a from approved by the military judge, the military judge, upon a finding that the information in question is evidence that the Government seeks to use at trial, exculpatory evidence or evidence necessary to enable the defence to prepare for trial, shall issue any order that the interests of justice require"

The orders which can be made include dismissing the charges.

vi) Part II, Rule 707 makes provision for arraigning the defendant within 30 days of the service of charges, for the assembly of the Military Commission within 120 days and the setting of an appropriate schedule for discovery as soon as practicable after the service of charges.

118. The evidence of Mr Stafford Smith in his sixth witness statement was that the Rules were framed in such a way as to deny BM the disclosure of favourable evidence as material that includes evidence of interrogation and torture techniques and the programme of rendition is classified. His opinion is that if the information is placed before the Military Judge, then the terms of §949j(c)(2) require the Military Judge to exclude such information from disclosure, but with a discretion to provide a summary

or alternatives. His opinion is that the Rules have a façade of fairness but in reality disclosure will not be provided in the most sensitive areas. As applications by military prosecutors can be made in camera under §949d(f)(3), there was no reason for the defence even to know of the existence of the documents. If the Military Judge rules in favour of the defence, then the military prosecutor can make an interlocutory appeal under §950d(a), though the defence has no such right of appeal. In his third witness statement, Mr Stafford Smith set out his views on how this power is likely to be used in the light of past experience. He has expressed the view that the military prosecutors will go to every length possible to prevent disclosure, given that senior government officials of the United States have made public statements to the effect that the United States Government does not render people for torture.

119. Mr Stafford Smith in his sixth affidavit elaborated on what we had been told by Ms Rose QC on instructions from Mr Stafford Smith in the earlier part of the hearing, namely that although over 600 pages of disclosure were made available when charges were brought against BM under the former Military Commissions process, not one single page related to his interrogations in Pakistan or in the place where he was thereafter detained (if different to Pakistan). No document had been disclosed relating to the manner in which the interviews had been conducted. He set out extensive details of the orders made to the extent permitted by the procedures of the Military Commissions. His evidence was that the statements attributable to BM indicate the date and location at which the statement was taken, but there is no statement attributable to BM prior to 21 July 2004. Nothing was included that placed BM in Pakistan at any point in time; nothing was included that would indicate that questions were posed for him by the United Kingdom Government.

120. It was Mr Stafford Smith's evidence that in all the circumstances it was unrealistic to expect the United States Government to produce the evidence of abuse, cruel, inhuman or degrading treatment, torture or rendition of BM.

121. Mr Dell' Orto, the acting General Counsel to the United States Department of Defence makes clear that the military prosecutor must provide to the defence with the charges material which includes signed or sworn statements of the accused, reports or results of physical or mental examinations. The prosecution also had to disclose as soon as practicable exculpatory evidence, which was defined in sub-chapter 949j(d) and the Rule 701 (e); he referred to the provisions relating to classified information set out above.

122. Mr Saini QC, on behalf of the Foreign Secretary, drew our attention to the ruling of Military Judge Captain Keith J Alfred given on 20 July 2008 in the proceedings in *United States of America v Salim Ahmed Hamdan*. It was submitted that this judgment showed that there was a willingness to ensure that counsel for the defence received adequate information and to rule that statements made under coercive conditions were inadmissible. It is clear from the judgment that information was provided about the circumstances in which some of the statements were made by Hamdan at Panshir and Bagram in Afghanistan between his capture in November 2001 in Afghanistan and his transfer to Guantanamo Bay in May 2002. It was found that these statements made whilst in US custody before his transfer to Guantanamo Bay were inadmissible because of the highly coercive environments in which they were made. It appears that the United States Government produced many documents during the hearing. It was, however, pointed out on behalf of BM that *Hamdan* did not involve detention in a

third country or interviews in that third country where torture or cruel, inhuman or degrading treatment was alleged; the disclosure in *Hamdan* did not, it was submitted, touch on such issues.

(iv) Our conclusion on the procedures in the United States

123. It was disappointing that we were not provided with better evidence in relation to these issues; the evidence we received was not from independent witnesses and we received little from the Foreign Secretary that addressed the practical points made by Mr Stafford Smith. As we have already observed, the timescale in which the Foreign Secretary sought to adduce further evidence did not take into account either the time that there had been to prepare such evidence before the hearing or the urgency of the matter given the lack of response from the United States Government to the request to the Convening Authority, a part of the Executive Government of the United States, to delay its decision.

124. Although we have taken note of the views of Mr Stafford Smith and Lt. Col Yvonne Bradley that the process under the Military Commissions Act remains inherently unfair and unjust and there are provisions that will ensure that BM will not receive a fair trial, we have not had placed before us the evidence on which it would be possible to reach our own view, even if it was either appropriate or necessary for us to do so.

125. It is not necessary for us to express any view at all about the overall fairness of the Military Commissions process, as we are solely concerned with the question, in the light of our finding that the information is necessary for the defence of BM, as to whether the information or documentation in the possession of the Foreign Secretary will be made available in the course of the process leading to trial. Nor are we concerned with the question as to whether the judge might rule confessions inadmissible. Our sole concern is in relation to the provision of the information.

126. Although we accept that the Military Judge may decide that such information or documentation should be made available at some point in the future, there are a number of features of the process that make it clear that the process may not produce the information or documents at all and certainly is unlikely to produce them within a proper time. We have concluded that, despite the possibility of provision of the information in the processes under the United States Military Commissions Act at some point in the future, the Foreign Secretary should nonetheless now provide the information to BM's lawyers.

i) The Foreign Secretary does not rely on the fact that the military prosecutor will provide the documentation as part of its disclosure obligations. The reasons why he has reached that view are set out in the closed judgment. Given the centrality to the common law of excluding admissions obtained by torture, cruel, inhuman or degrading treatment or coercion (as we set out at paragraph 147.v)) and the duty on any prosecutor to act fairly and in the interest of justice, it is difficult to find reasons in these circumstances to reject the submission made on behalf of BM that torturers or those who subject those in their custody to cruel, inhuman or degrading treatment do not readily hand over evidence of their conduct.

ii) On the evidence of Mr Stafford Smith (which is the only evidence before us on this issue), it is possible that the Convening Authority will take into account

evidence of rendition and torture or cruel, inhuman or degrading treatment as a reason for not referring the charges. It would not be right to deny BM the chance of such a possibility, given the long period of his detention without trial.

iii) If information was to be provided to the Convening Authority either by the military prosecutors or some other branch of the United States Government, it would have been easy to inform the United Kingdom Government that this would be the case, given the history of this matter. Similarly it would have been easy for the Convening Authority to inform the United Kingdom Government of its position. The fact that no such indication has been given must be a pointer to the fact that the information has not been provided to the Convening Authority.

iv) Moreover, the provision of the information to the Convening Authority without informing BM's lawyers or asking them for their submissions on it would not enable BM to put forward his case to the Convening Authority. We have been given no reason for the failure to provide such information, other than the Convening Authority and the military prosecutors are not required to provide it.

v) In the proceedings under the former Military Commissions Act no documents were provided under the order of the Military Judge which related to anything that occurred prior July 2004. In the light of the findings we have made and which are set out at paragraph 87 and in the closed judgment, it is inconceivable that there are no documents in the possession of the United States Government that relate to what happened to BM in the two year period from April 2002 to May 2004. There must be documents that record or evidence his movements, his custody and his treatment when interviewed. We have been given no reason why such documents cannot now be produced by United States military prosecutors and can think of none. As we have pointed out the only material to which the United States Government has made reference is documentation that is inconsistent with BM's claim as to the injuries inflicted to his genitalia (see paragraph 103.ii))

vi) There is a real concern as to the effect of further delay. It is Lt Col Bradley's evidence that there is a continuing deterioration in BM's mental health. So concerned was Lt Col Bradley at BM's behaviour by December 2007 that she located a mental health expert who had proper clearance to visit him at Guantanamo Bay. The officials at Guantanamo Bay rejected her requests for an independent mental health assessment. When she visited in January 2008, conditions had deteriorated. She again requested a mental health evaluation from an independent doctor. It was also refused. That evidence is uncontradicted, save by the medical report dated 24 January 2008 to which we have referred at paragraph 103.ii) and which simply states BM had mild depression. It contains no analysis whatsoever of the matters described in detail in Lt Col Bradley's statement.

vii) Although we approach the evidence of Mr Stafford Smith with the necessary caution that must be applied to the evidence of a defence advocate in a case such as this, there are grounds, given what has happened since information was discovered in the United Kingdom, which would lend support to the view that the United States Government will seek to delay as long as possible the

> disclosure of not only of the information and documentation provided by the United Kingdom Government, but other information and documentation which it undoubtedly also has or had in its possession

(4) Was the information sought within the scope of the available relief?

127. On behalf of BM it was contended that the Foreign Secretary was bound to provide full information in relation to the wrongdoing BM alleged. An extensive request was served to which we refer at paragraph 135 below. On behalf of the Foreign Secretary it was submitted that BM was entitled, if he was entitled to anything, only to certain specific information.

(a) The legal principles

128. In *Norwich Pharmacal* the information sought was the names and identity of those who were alleged to have committed the wrong; it was made clear that this form of relief was not to be used as an evidence gathering exercise or fishing expedition: see the speech of Lord Cross at page 199E. In *Ashworth Hospital*, the hospital authority requested (1) the newspaper to deliver up copies of documents relating to the patient which had been made available in breach of confidence and (2) that it explain how it had come to be in possession or control of the documents and identifying those involved. The newspaper was ordered by the court to serve a statement in accordance with the request made. It was in that context that Lord Woolf stated the principle at paragraph 26 of his speech in the following terms:

> "The *Norwich Pharmacal* case clearly establishes that where a person, albeit innocently, and without incurring any personal liability, becomes involved in a wrongful act of another, that person thereby comes under a duty to assist the person injured by those acts by giving him any information which he is able to give by way of discovery that discloses the identity of the wrongdoer."

129. The scope of what can be obtained under the principles in *Norwich Pharmacal* jurisdiction has been more fully considered in the context of actions where those who have been deprived of property have sought to obtain from banks and others information to enable them to trace the assets. The exercise of the *Norwich Pharmacal* jurisdiction for this purpose was approved by the Court of Appeal in *Bankers Trust v Shapira* [1980] 1 WLR 1274 – see the judgment of Lord Denning MR at page 1281-2.

130. In *Arab Monetary Fund v Hashim & Ors (No.5)* [1992] 2 All ER 911, Hoffman J, after citing the passage from the speech of Lord Reid which we have set out at paragraph 63 above, continued:

> "The reference to "full information" has sometimes led to an assumption that any person who has become mixed up in a tortious act can be required not merely to disclose the identity of the wrongdoer but to give general discovery and answer questions on all matters relevant to the course of action. In my view this is wrong. The principle upon which Lord Reid

> distinguished the "mere witness" rule was that unless the plaintiff discovered the identity of the wrongdoer, he could not commence proceedings. The reasoning of the other members of the House is the same. The *Norwich Pharmacal* case is no authority for imposing upon "mixed up" third parties a general obligation to give discovery or information when the identity of the defendant is already known."

131. We respectfully agree with the observation of Hoffman J (as he then was) that *Norwich Pharmacal* does not provide a general right of discovery. However, Lord Denning, MR in *Bankers Trust v Shapira* (a tracing case) made clear at p.1282 the position that the bank, although it got mixed up through no fault of their own in the wrongful acts of others, came "under a duty to assist [the plaintiffs] by giving them and the court full information and disclosing the identity of the wrongdoers". In this case the particular point is "full information". He added, however, an important caveat:

> "This new jurisdiction must of course be carefully exercised. It is a strong thing to order a bank to disclose the state of its customers account and the documents and correspondence relating to it."

But he went on to make it clear that the court would, if necessary, make a more wide-ranging order. Other cases were cited to us including the decision of Judge McGonigal in *Aoot Kalmneft v Denton Wilde Sapte* [2002] 1 Lloyds Rep 417.

132. In considering the scope of what can be ordered and the application of the principles in *Norwich Pharmacal* in an entirely novel area outside the commercial, confidentiality and tracing cases where the jurisdiction has previously been considered, it is important to bear in mind the statements of the highest authority that the remedy is a flexible one. It is sufficient to refer to what Lord Woolf said in *Ashworth Hospital* at paragraph 57:

> "The *Norwich Pharmacal* jurisdiction is an exceptional one and one that is only exercised by the courts when they are satisfied it is necessary that it should be exercised. New situations are inevitably going to arise where it would be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which apply to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy. That new circumstances for its appropriate use will continue to arise as illustrated by the decision of Sir Richard Scott V-C in *P v T Ltd* [1997] 1 WLR 1309 where relief was granted because it was necessary in the interests of justice, albeit that the claimant was not able to identify without discovery what would be the appropriate cause of action."

133. It seems to us, therefore, that although the action cannot be one used for wide-ranging discovery or the gathering of evidence and is strictly confined to necessary information, and the court must always consider what is proportionate and the

expense involved, the scope of what can be ordered must depend on the factual circumstances of each case. In our view the scope of the information which the court may order be provided is not confined to the identity of the wrongdoer nor to what was described by Lightman J in *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch) at paragraph 18 as "the missing piece of the jigsaw". It is clear from the development of the jurisdiction in relation to the tracing of assets that the courts will make orders specific to the facts of the case within the constraints made clear in *Norwich Pharmacal* and the cases to which we have referred.

134. We accept that the justification for the extension to the provision of more information than merely the identity of the individual or a certain specific fact was justified on the basis that equity was always prepared to assist the tracing of assets. However where in this truly exceptional case information is said to be necessary to exculpate an individual facing a possible death penalty if convicted, we consider that a court is entitled to exercise the jurisdiction to order certain specific information be made available to serve the ends of justice, without the narrow circumscription that some observations suggest. A system of law under which it is permissible to order the provision of information to trace a person's property, but under which it was not permissible to order the provision of information to assist in the protection of a person's life and liberty would be difficult to justify.

(b) The application of the principles to the facts

135. The documents sought, as conveniently analysed by Mr Saini QC, for the Foreign Secretary, were the following:

Type A: Documents and information specific to BM.

(1) Rendition: evidence of the United Kingdom's knowledge of BM's upcoming rendition when he was held in Pakistan, the decision to render BM to Morocco for torture, the identity of United States agents involved in the rendition of BM, the flights that were used to render BM to and from Morocco, BM's rendition from Bagram to Guantanamo and the identity of the two people who were taken to a military airport in Islamabad on or around 21 July 2002.

(2) BM's treatment: any evidence concerning BM's arrest and detention in Pakistan, buttressing BM's claims that he was rendered to Morocco for torture and cruel, inhuman or degrading treatment, of allegations of coercion or abuse of BM in Bagram, Afghanistan, concerning the condition of BM's detention at any time from April 2002 to date, concerning the denial of counsel to BM at any time from April 2002 to date and concerning the denial of consular access to BM at any time from April 2002 to date; information that a United States official told BM the normal rules no longer applied or similar statements.

(3) Any information concerning the SyS visit to interview BM in Pakistan on 17 May 2002.

(4) Information provided to the United States or Morocco by the United Kingdom about BM and any evidence that the United Kingdom told the United States that BM was "a nobody, only a cleaner from London".

(5) Information about BM.

(6) Any evidence that the United Kingdom has failed to provide BM with assistance that should have been provided.

Type B: General information

(1) Rendition: any evidence of extraordinary rendition carried out by the United States generally and in particular to Morocco and in respect of certain identified flights.

(2) Treatment of detainees: any evidence relating to the "Dark Prison" near Kabul or of mistreatment of prisoners or allegations of coercion, abuse or homicide committed by the United States forces in Bagram and Kandahar, information regarding the abuse of prisoners in Morocco, information concerning the torture and abuse methods used by the United States or its allies on prisoners in the United States custody in the war on terror, any United States violations of its international legal obligations and the treatment of prisoners of war on terror, including but not limited to certain identified conventions.

136. Although claims were made under the Data Protection Act and the Freedom of Information Act, we suggested that these be put over as there was no time to deal with them. The parties agreed to our request.

137. It can be seen from the requests made that, whereas they were fairly specific in relation to BM, the requests for general information were framed in the widest terms.

138. In our view, there can be no warrant for seeking documents of Type B; this is a wide ranging request for discovery and not for specific information necessary for the defence of BM. In principle, specific information within Type A is, in our view, and subject to the exercise of our discretion, within the scope of a properly made request. It is not possible for us to be more precise at this stage and it is envisaged that we may need to consider each request in more detail if the parties cannot agree on what information is to be provided and the form in which it is to be provided. It may be sufficient for a statement to be provided covering the information or a redacted document or documents relating specifically to the information.

(5) Should the court exercise its discretion in favour of making disclosure?

(a) Our approach

139. It was common ground, subject to one point raised by the Special Advocates, that the proper course for this court to take at this stage was to consider the exercise of the discretion, leaving to one side not only any claim that the Foreign Secretary might make to public interest immunity on the basis of national security but also considerations of public interest relating to national security. These factors will have

to be considered at the next hearing before any final order is made. Although a PII certificate had been provided in respect of the documentation put before the court in closed session in relation to the issue as to whether the Foreign Secretary through his agents had become mixed up or involved in the alleged wrongdoing, the Foreign Secretary would need to make a decision on each piece of information or each document or redacted document if the court otherwise thought it should be disclosed under the *Norwich Pharmacal* principles. The Special Advocates contended that no claim to public interest immunity could lie in respect of information which pointed to the commission of serious criminal offences, particularly those contrary to the rules of *jus cogens* in international law. We formed the view that the better course was to hear that argument in the context of all the issues on public interest immunity.

140. It was also common ground that the factors that we should consider in the exercise of discretion were, the seriousness of the consequences to BM if the information was not provided, the knowledge of the United Kingdom Government that was established in the evidence before us, the strength of the prohibition on state torture and cruel, inhuman or degrading treatment and general issues such as intrusion, time and cost. We have already set out our conclusions on knowledge at paragraph 87.

(b) The consequences to BM

141. BM may face the death penalty. No decision has been made by the prosecuting authorities as to whether to seek the death penalty. It was accepted on behalf of the Foreign Secretary through Mr Bethlehem QC's letter to which we have referred at paragraph 47.ii), that the material is potentially exculpatory. We have formed the view set out at paragraph 105 that the information is essential if BM's case is to be fairly considered by the Convening Authority and he is to have a fair trial of the very serious charges he faces, given the confessions made at Bagram and Guantanamo Bay after May 2004.

(c) The importance of the state prohibition on torture and cruel, inhuman and degrading treatment

142. In considering the exercise of our discretion under *Norwich Pharmacal*, we attach particular significance to the nature of the prohibition on State torture which is alleged to have been violated in this case.

i) The common law has long set its face against torture, a practice which it has regarded for centuries with a particular abhorrence reiterated most recently in the speeches in the House of Lords in *A v. Secretary of State for the Home Department (No. 2)*. When practised by a State as an instrument of State policy it is a particularly ugly phenomenon. As Lord Hoffmann explained in that case, at paragraph 82, the use of torture by a State is dishonourable, corrupting and degrading the State which uses it and the legal system which accepts it.

ii) Equally significant in this regard is the status which the prohibition on State torture has achieved in international law. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (New York, 10 December 1984; TS 107 (1991); Cm 1775) ("the Torture Convention"), which came into force in June 1987, now has some 145 State parties. The prohibition on State torture under this Convention and in

customary international law has attained a particularly high status in the hierarchy of rules constituting international law. It is now established as a peremptory norm or a rule of *jus cogens*, from which derogation by States through treaties or rules of customary law not possessing the same status is not permitted. In this it resembles the prohibition on genocide, slavery and the acquisition of territory by force. This superior status has been recognised by international and domestic tribunals. (*Prosecutor v. Furundzija*, International Criminal Tribunal for the Former Yugoslavia, unreported, 10 December 1998, Case No. IT – 95- 17/T 10; *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147, 197,199; *A v. Secretary of State for the Home Department (No. 2)*; *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26.) As the International Criminal Tribunal for the Former Yugoslavia explained in *Furundzija* at paragraphs 153-157, the status of the prohibition on State torture as a rule of *jus cogens* has the consequence that at the inter-State level, any legislative, administrative or judicial act authorising torture is illegitimate. Furthermore, the prohibition on State torture imposes obligations owed by States *erga omnes*, to all other States which have a corresponding right and interest in compliance. As a United States court put it in *Filartiga v. Pena-Irala*, (1980) 630 F 2d 876, "the torturer has become like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind".

143. It is also clear that, although acts that constitute torture have been regarded with particular abhorrence for the reasons that we have set out, a State's acts comprising cruel inhuman or degrading treatment or punishment are also the subject of international prohibition and stigmatism. We must give weight to such matters in the exercise of our discretion for similar reasons

i) Article 5 of the UN Universal Declaration of Human Rights states "no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

ii) Article 3 of the Geneva Convention relative to the Treatment of Prisoners of War 1949 and Article 3 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 both prohibit "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture". The same Articles of the Conventions also prohibit "outrages upon personal dignity, in particular humiliating and degrading treatment".

iii) Article 16 of the Convention against Torture provides, by paragraph 1, "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel inhuman or degrading treatment or punishment which do not amount to torture as defined in Article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other persons acting in an official capacity".

iv) On 2 March 1972, following the report of a Committee of the Privy Council, under the chairmanship of Lord Parker of Waddington, into allegations relating to events in Northern Ireland in 1971, the then Prime Minister told the House of Commons that the techniques of hooding, wall standing, sleep deprivation, food deprivation and white noise would not be used in future as an aid to

> interrogation. In *Republic of Ireland v United Kingdom* [1978] 2 EHRR 25, the European Court of Human Rights concluded that, since the five techniques were premeditated, were applied in combination for hours at a time and caused at least intense physical and mental suffering and acute psychiatric disturbances, they amounted to inhuman treatment. Since the five techniques were such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or mental resistance they were also degrading. However, as the term "torture" attached a special stigma to deliberate inhuman treatment causing very serious and cruel suffering, the five techniques did not occasion suffering sufficient in intensity and cruelty to constitute torture.

144. Accordingly we are bound to give great weight to these considerations in the exercise of our discretion.

(d) Time, cost and convenience

145. As to time, cost and convenience, it is clear that this can play little part in the information and documentation sought under type A set out in paragraph 135 above. The searches have been made and the documents and information are available. If we had thought that the documents in type B were properly within the scope of what could be required, the position might be different. Finding these documents would entail considerable cost and intrusion. Although it was contended on the part of Ms Rose QC that, in a case where a capital offence was involved, the considerations in relation to time, cost and intrusion were so trivial that they could be put out of account, we could not accept that those considerations should not be brought into account, though the weight to be attached might be limited.

Our conclusion on the *Norwich Pharmacal* application

146. We have concluded that the conditions in *Norwich Pharmacal* are satisfied in respect of the information of type A which relates specifically to BM, subject to agreement on the form of the provision of that information. We have set out the considerations that we have taken into account in the exercise of our discretion, issues relating to public interest immunity and similar considerations apart.

147. Our conclusions are:

i) There is plainly a case for BM to answer in relation to terrorist offences, based on the evidence contained in the statements we have been told BM made in Bagram and Guantanamo Bay after May 2004 and on the record of BM's interview by Witness B in May 2002. However the admissibility of that evidence is dependent upon the circumstances in which the confessions and statements were made.

ii) There is little doubt that the initial questioning of BM, including the questioning by Witness B, was undertaken to elicit information from him in relation to terrorist threats of a grave kind. That took place in the unprecedented situation following the attack on Washington and New York on 11 September 2001.

iii) Although those were the circumstances in which BM was interviewed and interrogated, the United States Government is now seeking to use the confessions made after a two year period of incommunicado detention as evidence against BM on charges where the death penalty may be sought.

iv) BM contends that the confessions relied on were obtained not only in consequence of the undisputed period of incommunicado detention, but in consequence of torture and cruel, inhuman and degrading treatment.

v) Although there may be a debate as to the use of information obtained through torture or cruel inhuman and degrading treatment in averting serious and imminent threats to national security (as we have set out at paragraph 9.ii)), it is a principle at the heart of our systems of justice that evidence of involuntary confessions obtained by such means are inadmissible at a trial. The principle in relation to involuntary confessions dates back at least to the decision in 1783 in *R v Warickshall* 1 Leach 263 at 263-4, where the court stated:

> " a confession forced from the mind by the flattery of hope, or by the torture of fear comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected."

In *Wong Kam-ming v R*, Lord Hailsham [1980] 1AC 247, giving the opinion of the Privy Council said at 261:

> ".. any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions."

In *R v Sang* [1980] AC 402 at 436 Lord Diplock expressed the view that the rule originated in the principle expressed as *"nemo debet prodere se ipsum"*, *"nemo tenetur se ipsum accusare"* or *"nemo tenetur prodere seipsum"*– the right against self incrimination. (See also *Lang Chi-ming v R* [1991] 2 AC 212 at 216-220, *Harz v Power* [1967] 1 AC 760 at 820, and *Helmholz and others: The Privilege against Self Incrimination*, (1997) 136, 153-162). It is closely connected to the revulsion that the common law has had for torture and to which we have referred at 142.i); the effect of that revulsion in the development of the principle is clear: see Sir James Fitzjames Stephen, *History of the Criminal Law of England* (1883) Vol 1. at 441-447); *Holdsworth, History of English Law* (1924) Vol 5 p 194-5 and *Helmholz and others* at p 108, 117-122 and at p 249 the citation from *Barlow's JP Manual* of 1745. In *Brown v Walker* 161 US 591 (1896), the Supreme Court of the United States set out at pages 596-7 its view on this. Although there may be differences in the historic rationale for the principle excluding involuntary confessions, especially any obtained by abusive treatment, the rule is a fundamental part of the right to a fair trial. For several centuries the common law has excluded

evidence obtained by torture or cruel, inhuman or degrading treatment; it cannot be used to secure a conviction.

vi) As is clear from our findings, the United Kingdom Government facilitated the interrogation of BM for part of that period in the knowledge of the reports of the interviews at Karachi which contained information relating to his detention and treatment and to which we have referred at paragraph 87. It is also significant that his detention incommunicado was unlawful under the law of Pakistan; it is important to take into account the observations of Lord Bridge in *R v Horseferry Road Magistrates Court ex p Bennett* [1994] 1 AC 42 at 67F-H:

> **"**Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots. There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view."

vii) As we have set out at paragraphs 105 to 107, one, but only one, of the reasons why the information is essential for a fair consideration of his case by the Convening Authority and for a fair trial is that the information provides some evidence independent of BM in respect of a small part of the account of BM as to what happened, as is indicated in the open judgment. The full reasons are set out in the closed judgment.

viii) The information will be disclosed solely for the purpose of the pending proceedings leading to a trial.

ix) Even though the dismissal of the charges or an acquittal would not result in BM's release (as we understand he will be detained as an enemy combatant at Guantanamo Bay until the "war on terror" is concluded), this does not in any way negate the necessity of the provision of the information to uphold the fundamental principle that BM receives a fair determination of the charges brought against him.

x) We can think of no good reason why the materials have not now been made available by the United States Government to BM's lawyers in confidence and subject to the strict conditions of secrecy in which part of the proceedings before the Military Commissions operate, given that:

(1) BM has been in custody by or on behalf of the United States for over 6 years.

(2) There is independent evidence of the deterioration in his mental health.

(3) It cannot be said that the materials are not identified and available, as the materials have been identified to the Executive Branch of the United States Government (which is responsible for the prosecution) at its highest level.

(4) The unreasoned dismissal by the United States Government of BM's allegations as "not credible" as recorded in the letter of 22 July 2008 is, in our view, untenable, as it was made after consideration of almost all the material provided to us.

xi) It is of particular significance that the United States Government has refused to provide any information as to BM's location during the period between May 2002 and May 2004. The fact that no explanation has been provided to date (despite the disclosure in the earlier proceedings) is a matter of serious concern in relation to the practical operation of the disclosure procedures before the United States Military Commission and a pointer towards the very real difficulties that BM's lawyers may face in obtaining information under the United States Military Commissions procedures. It might have been thought self evident that the provision of information as to the whereabouts of a person in custody would cause no particular difficulty, given that it is a basic and long established value in any democracy that the location of those in custody is made known to the detainee's family and those representing him.

xii) In these circumstances to leave the issue of disclosure to the processes of the Military Commission at some future time would be to deny to BM a real chance of providing some support to a limited part his account and other essential assistance to his defence. To deny him this at this time would be deny him the opportunity of timely justice in respect of the charges against him, a principle dating back to at least the time of *Magna Carta* and which is so basic a part of our common law and of democratic values.

xiii) It is clear that the United Kingdom Government considers that such material should be made available by the United States Government to BM's lawyers in confidence. All its strenuous actions have been directed to that end. It is its view that the material should be made available by the United States Government which has so far declined to do so. It has therefore been compelled to resist this claim. We set out our reasons for so concluding in the closed part of the judgment.

xiv) The material is limited in its scope and has been identified.

Relief under *Norwich Pharmacal* principles is an exceptional remedy and its application to the present circumstances is unprecedented. We have carefully weighed all the circumstances and considered whether we should extend the relief to the claim made in this case. We have concluded, subject to issues of public interest immunity and similar considerations that would also affect the exercise of our discretion, that we will, in the unique circumstances of this case, order the provision of the specific information broadly described as Type A in a form to be agreed or decided by us. We refuse to order the provision of information broadly described as Type B.

Public Interest Immunity

148. We therefore would, on the issues so far determined, order the provision of the information specifically relevant to BM. We hope that the precise ambit of the information and the form in which it is to be provided can be agreed between the Special Advocates and those representing the Foreign Secretary, as we have indicated at paragraph 138. If not we will hear the parties further.

149. However, we do not propose to make an order until the Foreign Secretary has had the opportunity to consider whether in all the circumstances he will invoke public interest immunity in respect of the disclosure of the information which would otherwise follow from our decision. If he does issue a certificate, we will then hear argument from the parties on the certificate and the outstanding issue on considerations of national security which, as we have set out, are relevant to the exercise of our discretion.

IV QUASHING THE DECISION NOT TO MAKE VOLUNTARY DISCLOSURE

150. Although the Foreign Secretary had, through the Treasury Solicitor, declined to make available information and documentation on a voluntary basis prior to the issue of the proceedings, there was no single letter where the decision of the Foreign Secretary had been set out.

151. As we have mentioned at paragraph 47.iii) above, on 20 June 2008 the Treasury Solicitor wrote to Leigh Day setting out in full the reasons for the Foreign Secretary's decision not to make voluntary disclosure. The reasons set out were four.

152. First it would not be possible to comply with the request without causing serious damage to national security. It was said that disclosure, even on a limited basis to Mr Stafford Smith and Colonel Bradley, would seriously prejudice the viability of the United Kingdom's liaison relationships with highly valued partners; reliance was placed not only on the decision in *A* but also *AG v Blake* [2001] AC 268 and *R v Shala* [2003] 1 AC 247 where their Lordships had accepted the importance of keeping secret information received on a confidential basis from informants and liaison intelligence services so as to protect the operational effectiveness of the United Kingdom security and intelligence agencies.

153. Secondly it was said that as the purpose of the request was to obtain evidence to support the contention that statements which might be used against him in the Military Commission proceedings were inadmissible because they were the product of torture or cruel, inhuman or degrading treatment, it was not known what the statements were and the request had been made on a speculative basis. In those circumstances it was not appropriate to disclose information in those circumstances. The Foreign Secretary had, however, identified that the SyS and the SIS held a small amount of material which might arguably assist BM in seeking to have statements ruled inadmissible, even though the review had not uncovered any evidence regarding the allegation that he was mistreated in Morocco and Afghanistan. The Foreign Secretary had through the letter of 6 June 2008 (set out at paragraph 47.ii) told Mr Stafford Smith that some of the material might possibly eventually be considered to be exculpatory for the purposes of the trial and that the Foreign Office would draw this to the attention of United States officials so that the United States prosecuting

authorities might keep the matter properly under review in the Military Commission's procedure.

154. Thirdly, the Foreign Secretary had provided what was necessary through an alternative means. The letter continued:

> "The Secretary of State, SIS and the Security Service have given particular consideration to the question whether this material should be disclosed in response to your request. However, they are satisfied that it would not be appropriate to do so. In the Secretary of State's view, the course he has adopted (of drawing material to the attention of the US authorities) is the appropriate one to ensure proper protection for your client's interests without causing damage to the national security interest of the UK. There is no reason to suppose that the US authorities and prosecuting counsel would fail in the course of the Military Commission proceedings to disclose this material to your client's lawyers, insofar as it may be relevant and is properly to be regarded as exculpatory under 948, 949(d) or other sections of the MCA and the accompanying provisions of the Manual for Military Commissions, having regard to the evidence on which the US authorities eventually propose to rely. The Secretary of State does not regard it as appropriate for him to seek to anticipate, on the basis of very incomplete information, what particular issues may arise in those proceedings regarding the admissibility of evidence; still less does he regard it as appropriate for him to seek to anticipate the application of the Military Commission Rules and other relevant law if the Military Commission proceedings progress or to substitute his assessment of whether the material should be disclosed in those proceedings for that of the US authorities and prosecutors."

155. Fourthly it was said that the request for disclosure would be likely to take many months to process. It would be unreasonable and disproportionate use of public resources to undertake the very time consuming further searches.

156. It is important to point out, in relation to the second and third reasons, that the letter did not, in effect, address the question of voluntary disclosure for use before the Convening Authority. However, as has been set out above, it is argued on behalf of the Foreign Secretary that the information would come to the attention of the Convening Authority through United States channels and we should treat that argument as being part of the Foreign Secretary's reasoning for refusing to disclose the documentation to save the time of a reference back on this issue to the Foreign Secretary. We proceed on the basis, with the agreement of the parties, that that was obviously a sensible course given the urgency of the matter.

157. We have already dealt above with the arguments in relation to the provision of documents and information through the procedures under the United State's Military Commissions Act.

158. It was contended by Ms Rose QC that the entitlement to a fair criminal hearing was a right which could not be outweighed by the public interest in protecting the State against terrorism. It was an absolute right of too great an importance to be sacrificed on the altar of terrorism; she relied on the observations of Lord Brown in *MB* at paragraph 91. Secondly it was said that, as BM was at risk on a trial which could result in the death penalty and the United Kingdom had accepted concerns about the procedures under the Military Commissions Act, any attempt by the Foreign Secretary to argue the court should defer to United States authorities must be treated with considerable caution. Thirdly the court should have regard to the United Kingdom's positive obligation to ensure that torture was to be discouraged and its fruit not used in legal proceedings for the reasons to which we have referred above. There were therefore the strongest possible public policy reasons for providing the information. The United States authorities had said there was no credible evidence in respect of the allegations. They had refused to examine the allegations. They had failed to disclose any material as to BM's whereabouts or his treatment before his arrival at Bagram or even to say where he was. It was accepted in the letter of 25 July 2008 to which we have referred at paragraph 47.v) above, that the Foreign Secretary no longer relied on the United States military prosecutors disclosing the material. In the light of all these matters, Ms Rose submitted that there was a serious risk that without the disclosure, evidence obtained by torture would be used in the proceedings before the Convening Authority. It was further contended that, as the material was needed for submissions to the Convening Authority, the possibility that, after charges had been referred, BM's lawyers might be able to obtain that information through the Military Judge of the Military Commission was no answer to the pressing need. That possibility was remote in any event and, if it occurred, would only occur at some time in the future. There could be very little damage furthermore to the national security of the United Kingdom as this was not disclosure that was to be made in public but to be made to Mr Stafford Smith and Lt Col Bradley who had security clearance by the United States and in the case of Lt Col Bradley to top secret documents. They had offered undertakings to this court as to the use of any information provided and both are willing to undergo United Kingdom security clearance.

159. Ms Rose QC also relied on the decision of the Canadian Supreme Court in *Canada (Minister of Justice) v Khadr* [2008] SCC28 and the subsequent decision of the Mosley J in *Khadr v A-G of Canada* [2008] FC 807 where he ordered disclosure of transcripts of interviews conducted by Canadian officials at Guantanamo Bay. As a result of that disclosure it had not been suggested there were any adverse consequences.

160. In the light of our decision on the *Norwich Pharmacal* claim and as it is clear from what we were told by Mr Saini QC that the Foreign Secretary would in any event wish to reconsider the position in the light of any findings we made, we can deal with this claim briefly. On the materials before us, we are not persuaded that the decision was unreasonable or irrational. The Foreign Secretary was in all the circumstances entitled to give the highest weight to considerations of national security when deciding whether to provide voluntary disclosure.

V THE CLAIM FOR DISCLOSURE UNDER THE ALLEGED DUTY UNDER PUBLIC INTERNATIONAL LAW

161. On behalf of BM it is submitted that the analysis of the duty on the Foreign Secretary at common law is supported by the requirements of customary international law which is itself part of the common law. We have explained earlier in this judgment why we consider that the status as *jus cogens* of the prohibition on torture in international law is a highly material consideration with regard to the exercise of discretion under *Norwich Pharmacal* principles. However, during the course of argument it became clear that BM maintained that in the circumstances of the present case the Foreign Secretary is subject to an entirely independent obligation, derived from customary international law, to make the disclosure sought.

162. Here the BM advances two principal lines of argument. First, BM submits that Article 15 of the Torture Convention imposes an obligation to disclose documents in order to ensure that evidence obtained as a result of torture is not invoked in legal proceedings in another State. He submits that the treaty obligation under Article 15 has attained the status of a rule of customary international law and, as such, forms part of the common law which he is entitled to invoke in this application. Secondly, BM points to the particular status of the prohibition on torture in international law as a rule of *jus cogens* binding on States *erga omnes* and contends that this gives rise to an obligation of disclosure on the United Kingdom.

(1) Article 15 of the Torture Convention and customary international law

163. Article 15 of the Torture Convention provides:

> "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

Although the Torture Convention has been implemented in part into domestic law within the United Kingdom by the Criminal Justice Act 1988, Article 15 has not been implemented by legislation. Non-implemented treaty provisions do not of themselves give rise to rights or obligations in domestic law within the United Kingdom. (See *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry* [1990] 2 AC 418.) It is, of course, for this reason that BM's argument depends, *inter alia*, on demonstrating that the rule for which he contends is a rule of customary international law.

164. It is well established that the contents of a provision in a multilateral treaty, and as such binding on the States parties to that treaty but not binding on other States, may in time attain the status of a rule of customary international law binding on all States. A custom has been defined as "a clear and continuous habit of doing certain actions which has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right." (*Oppenheim's International Law*, 9th Ed., (1992), Ed. Jennings and Watts, p.27.) In the *North Sea Continental Shelf* cases [1969] ICJ Rep. 3, the International Court of Justice described the process by which a treaty rule may become a rule of customary law.

> " It would in the first place be necessary that the provisions concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law … With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.
>
> …
>
> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it may be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; - and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved." (at pp 41-3)

165. In the present case, BM submits that the substance of Article 15 is capable of constituting a rule of customary law of general application. He further submits that Article 15 forms an indispensable part of the *jus cogens* obligation to prevent torture and that, as such, Article 15 is itself reflected in customary law. In this regard, reference is made to the Advisory Opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (International Court of Justice, 9 July 2004, 129 ILR 37, paragraph 88). BM points to the fact that the provisions of the Torture Convention have attracted "a very widespread and representative participation" in that some 145 States are parties to the Convention. BM relies on State practice in excluding evidence obtained by torture from legal proceedings, some of which is surveyed by Lord Bingham at paragraphs 36 – 38 of his speech in *A (No. 2)*. The further point is made that the obligation contained in Article 15 is also reflected in similar but not identical provisions of other international conventions and instruments deriving their authority from binding Security Council resolutions including Article 10, Inter-American Convention to Prevent and Punish Torture, 1985; Rule 95, ICTY Rules of Procedure and Evidence; Rule 95, ICTR Rules of Procedure and Evidence; Rule 95, Special Court for Sierra Leone; Rule 34, Transitional Rules of Criminal Procedure in East Timor adopted by the UN Transitional Authority in East Timor; Article 69(7), Statute of the International Criminal Court 1998. In this way BM contends that the obligation under Article 15 to ensure that evidence obtained by torture is excluded from all proceedings has an independent existence in customary international law and binds all States irrespective of whether they are parties to the Torture Convention.

166. It may well be that the exclusionary obligation contained in Article 15 has attained the status of a rule of customary international law and is, as such, binding on all States. However, we note that the House of Lords in *A (No. 2)* did not endorse a submission that Article 15 had become part of customary international law. (See pp. 227F-G; 236C-E; 237D.) Thus, although Lord Bingham considered that "there is reason to regard it as a duty of States, save perhaps in limited and exceptional circumstances, as

where immediately necessary to protect a person from unlawful violence or property from destruction, to reject the fruits of torture inflicted in breach of international law" (at paragraph 34), he concluded that the exclusionary rule under Article 15 assumed effect within the United Kingdom, in relation to proceedings before national courts, through Articles 3 and 5(4), European Convention on Human Rights.

> "[The Special Immigration Appeals Commission] should throughout be guided by recognition of the important obligations laid down in articles 3 and 5(4) of the European Convention and, through them, article 15 of the Torture Convention, …" (at paragraph 56 and cf Lord Hope at paragraph 112 and Lord Carswell at paragraph 151).

In view of the very limited amount of time devoted to issues of international law during the course of argument in the present case, we express no concluded view on this issue. We do not need to do so because we have come to the clear conclusion that in any event Article 15 does not create, either expressly or impliedly, the obligation of disclosure for which BM contends.

167. BM seeks to derive from Article 15 an obligation in customary international law on a State to disclose to a victim of torture information in its possession which demonstrates that evidence which another State intends to use against that victim was in fact obtained by torture. Applying the principles of interpretation of treaties set out in the Vienna Convention on the Law of Treaties, 1969, Article 15 does not, in our view, contain either expressly or by implication the obligation for which BM contends. At first sight a comparison of Article 15 with other provisions of the Torture Convention might suggest that the obligation under Article 15 is not limited to proceedings for which the State in question is responsible. Thus, for example, Article 14 which imposes an obligation to provide an effective civil remedy to victims of torture uses words expressly limiting the obligation so as to "ensure in its legal system" that remedies are available. By contrast, Article 15 includes no such limiting words. Nevertheless, we have come to the clear conclusion that the obligation under Article 15 is directed to a State's control of proceedings within its jurisdiction and applies only to prevent the invocation of evidence procured by torture in proceedings for which that State is responsible. The obligation imposed is a high one. It is a duty to ensure that a specific result shall be achieved, to ensure that any statement obtained by torture shall not be admissible. A State clearly has the power to bring about and to ensure such a state of affairs within its own legal system but it would normally be powerless to ensure such a result within the legal system of another State. Indeed, the reading of Article 15 for which BM contends would require a very high degree of intervention by one State in the legal system of another State, a matter traditionally regarded as essentially within the exclusive jurisdiction and responsibility of the forum State. In the absence of clear evidence that it was intended to impose such a startling obligation to intervene in the domestic legal system of another State – and we are told by counsel that the *travaux preparatoires* of the Torture Convention provide no support for such a conclusion – we are unable to accept the exceptionally wide reading of Article l5 which BM contends.

168. We have not been referred to any evidence of State practice, judicial decisions or writings of publicists which support the wide reading of Article 15 for which BM contends. On the contrary, we are fortified in our conclusion as to the scope of Article

15 by the observations of the United Nations Committee against Torture in its Views on Communication No. 193/20001 *P. E. v France* (2002) 10 IHRR 42. The point was not directly in issue there because the complaint to the Committee was that France was in breach of its obligation under Article 15 in extraditing the complainant to Spain in circumstances where the charges brought against her by the Spanish authorities were based on statements made as a result of torture. The Committee was therefore concerned with the question whether France had permitted evidence obtained by torture to be used in proceedings before its courts. Nevertheless, it is significant that the Committee described the scope of Article 15 in the following terms:

> "6.3 The Committee considers in this regard that the generality of provisions of Article 15 derive from the absolute nature of the prohibition of torture and imply, consequently, an obligation for each State party to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture. The Committee finds that the statements at issue constitute part of the evidence of the procedure for the extradition of the complainant, and for which the State party is competent. In this regard, in the light of the allegation that the statements at issue, at least in part the basis for the additional extradition request, were obtained as a result of torture, the State party had the obligation to ascertain the veracity of such allegations."

169. In the present case, the obligation under Article 15 to exclude evidence obtained by torture is clearly directed at the United States of America, as a party to the Torture Convention, in respect of legal proceedings for which it is responsible. We are in no doubt whatsoever that the United States is obliged under Article 15 to ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings against BM before the Military Commission at Guantanamo Bay and, as we have set out at paragraph 117.i), the Military Commissions Act so provides. Furthermore, this duty necessarily imposes correlative duties of investigation and disclosure on the United States of America so that the result required by Article 15 can be ensured. However, for the reasons set out above, we do not consider that it is possible to fashion from Article 15 an implied duty of disclosure on the United Kingdom of the kind contended for by BM.

(2) Consequences of the prohibition of torture as a rule of jus cogens

170. BM's second line of argument on this issue is that the duties which necessarily flow from the status of the prohibition on torture as a rule of *jus cogens* imposing obligations *erga omnes* include a duty on a State to disclose to a victim material in its possession which would demonstrate that evidence which another State intends to use in proceedings against the victim was obtained by torture.

171. It is beyond dispute that the fact that a rule, such as the prohibition on torture, has achieved the status of a rule of *jus cogens erga omnes* in customary law gives rise to certain special consequences in international law. The precise extent of those consequences has, however, been more controversial as the majority and minority judgments in the European Court of Human Rights in *Al Adsani v. United Kingdom*

(34 EHRR 273) clearly demonstrate. (See, in particular, the judgment of the majority (at paragraph 61) and the joint dissenting judgment of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic (at pp. 298-9).) The particular controversy as to whether the *jus cogens* nature of the prohibition on torture requires States to deny immunity in civil proceedings to foreign States or their agents who are alleged to have committed torture has now been resolved, in this jurisdiction at least, by *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270 pending any further development of international law in this area. That decision makes clear that in the existing state of international law the prohibition on torture does not automatically override all other rules of international law (per Lord Bingham at paragraph 24) and that the prohibition on torture has not generated an ancillary procedural rule which, by way of exception to State immunity, entitles or requires States to assume civil jurisdiction over other States in cases in which torture is alleged (per Lord Hoffmann at paragraph 45). Similarly, the International Court of Justice has recently accepted that breach of a jus cogens norm of international law does not suffice to confer jurisdiction (*Democratic Republic of the Congo v. Rwanda*, unreported, International Court of Justice, 3 February 2006, paragraph 64).

172. What legal consequences may, therefore, be identified as flowing from the status of a rule of international law as a rule of *jus cogens* giving rise to obligations *erga omnes*? In *Prosecutor v Furundzija*, Case No. IT 95-17/T 10 (unreported), 10 December 1998, the International Criminal Tribunal for the Former Yugoslavia addressed this issue at length. It explained that the *jus cogens* character of the prohibition on torture means that it enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules with the consequence that no derogation from the rule by States can be permitted, whether through international treaties or local or special customs or even general customary rules not endowed with the same normative force (paragraph 153). The prohibition of torture is an absolute value from which nobody must deviate (paragraph 154). It continued:

> "155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court,

> which would therefore be asked inter alia to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: 'individuals have international duties which transcend the national obligations of obedience imposed by the individual State'. ”

> “156. Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in *Eichmann*, and echoed by a USA court in *Demjanjuk*, 'it is the universal character of the crimes in question ie. international crimes which vests in every State the authority to try and punish those who participated in their commission'. ”

> “157. It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption." ”

This passage was approved by Lord Bingham in *A (No. 2)* at paragraph 33.

173. It is convenient to refer at this point to the draft articles on Responsibility of States for Internationally Wrongful Acts published by the International Law Commission in November 2001. Chapter III of Part Two addresses serious breaches of obligations under peremptory norms of general international law. Article 41(1) provides that

States shall co-operate to bring to an end through lawful means any such breach. Article 41(2) provides that no State shall recognize as lawful a situation created by such a breach, nor render aid or assistance in maintaining that situation. Article 41 is expressed to be without prejudice to the other consequences provided for under Part Two and to such further consequences that such a breach may entail under international law. Professor James Crawford, the International Law Commission's Special Rapporteur on State Responsibility, in his commentary on the draft articles observes that the obligation to co-operate applies to States whether or not they are individually affected by the serious breach of a peremptory norm. What is called for in the face of serious breaches is a joint and co-ordinated effort by all States to counteract the effects of these breaches. He notes that it may be open to question whether general international law at present prescribes a positive duty of co-operation and observes that Article 41(1) in that respect may reflect the progressive development of international law, but he points to the fact that such co-operation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law. Article 41(2) imposes duties of abstention. The obligation of collective non-recognition by the international community as a whole of the legality of situations resulting directly from serious breaches of peremptory norms extends to situations created by such breaches and prohibits acts which would imply recognition. The second obligation contained in Article 41(2) prohibits States from rendering aid or assistance in maintaining a situation created by a serious breach of a peremptory norm. It addresses aiding or assisting the maintenance of the situation created by the breach and applies whether or not the breach is continuing. (Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, (2002) pp. 249, 250, 252.)

174. The Advisory Opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, includes the following explanation of the consequences of a violation of a rule of *jus cogens*.

> "159. Given the character and the importance of the rights and obligations involved, the court is of the view that all states are under an obligation not to recognise the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all states, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition all states parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention."

175. In his speech in *A (No. 2)* Lord Bingham, having cited at length and approved the formulation by the International Criminal Tribunal for the Former Yugoslavia in

Prosecutor v Furundzija and having considered the other authorities cited above, in turn examined the consequences which flow from this status. He concluded, at paragraph 34, that the *jus cogens erga omnes* nature of the prohibition of torture requires States to do more than eschew the practice of torture. As indicated above, he considered that there was reason to regard it as a duty of States, save perhaps in limited and exceptional circumstances, as where immediately necessary to protect a person from unlawful violence or property from destruction, to reject the fruits of torture inflicted in breach of international law.

176. In *R (Al Rawi) v. Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279, [2008] QB 289 the Court of Appeal was concerned with a challenge to the legality of the refusal of the Foreign Secretary to make diplomatic representations to the United States authorities on behalf of the first three Claimants, who were United Kingdom residents held in Guantanamo Bay. An argument on behalf of the Claimants based on Articles 3 and 8 ECHR was met by reliance on a line of authority in Strasbourg that Article 1 ECHR could not give rise to any obligation on the contracting parties to secure that non-contracting States, acting within their own jurisdiction, respect the rights and freedoms guaranteed by the Convention, even though their failure to do so may have adverse consequences on persons within the jurisdiction of the contracting State. (See, for example, *Bertrand Russell Peace Foundation Ltd. v. United Kingdom* (1978) 14 DR 117.) The Claimants sought to distinguish this line of authority on the basis of "the State's *erga omnes jus cogens* obligation to forestall torture". It was in this context that Laws L.J., delivering the judgment of the court, observed:

> If the British Government owed a duty to intercede in case of torture, it would no doubt have to arrive at a judgment, after inquiry as appropriate, as to the likely truth of the allegation; although it is to be noted that the European Court of Human Rights accepts a rule in respect of allegations of violations of article 3 under the European Convention on Human Rights that they have to be established beyond reasonable doubt: see e g *Öcalan v Turkey* (2005) 41 EHRR 985 , paragraph 180. (at paragraph 100)

He then cited paragraph 33 of the speech of Lord Bingham in *A (No. 2)* and paragraphs 151–155 of the judgment of the Yugoslavia Tribunal in *Furundzija*. It is convenient to set out paragraphs 151 and 152 of the *Furundzija* judgment at this point.

> *The prohibition imposes obligations erga omnes*
>
> "151. Furthermore, the prohibition of torture imposes upon states obligations erga omnes, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.

> "152. Where there exist international bodies charged with impartially monitoring compliance with treaty provisions on torture, these bodies enjoy priority over individual states in establishing whether a certain state has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that state to fulfil its international obligations. The existence of such international mechanisms makes it possible for compliance with international law to be ensured in a neutral and impartial manner.

Laws L.J. then continued:

> "102. This learning shows that, as a matter of international law: (1) the status of *jus cogens erga omnes* empowers but does not oblige a state to intervene with another sovereign state to insist on respect for the prohibition of torture: Prosecutor v Furundzija (1998) 38 ILM 317, paragraph 151; (2) special standing is accorded to international bodies charged with impartially monitoring compliance: paragraph 152; (3) there can be no derogation from the prohibition: paragraph 153; (4) the prohibition is to be treated as an absolute value: paragraph 154; (5) any measure authorizing torture is illegitimate and proceedings may be taken to declare it so: paragraph 155; (6) perpetrators of torture may be held criminally responsible in the courts of any state: paragraph 155. These features are a powerful constellation, demonstrating that, as Lord Bingham said [2006] 2 AC 221, paragraph 33: "There can be few issues on which international legal opinion is more clear than on the condemnation of torture."
>
> "103. But none of this imposes a duty on states, sounding in international law, of the kind for which the claimants must here contend. As a matter of the law of the European Convention on Human Rights, there is nothing to qualify the principle in the *Bertrand Russell Peace Foundation* case. The claimants' point 4 above appears to possess no more force than the others."

177. In the present case the Foreign Secretary places particular reliance on these passages and submits that the Court of Appeal's conclusion that the status of *jus cogens erga omnes* empowers but does not oblige a State to intervene with another sovereign State to insist on respect for the prohibition of torture provides a complete answer to BM's argument on international law. By contrast, BM submits that the reasoning of the Court of Appeal in *Al Rawi* is inconsistent with that of Lord Bingham at paragraph 34 of *A (No. 2)*.

178. For reasons stated elsewhere in *Al Rawi* and in *R (Abassi) Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ. 1598, there was no obligation on the United Kingdom in international law to make diplomatic representations to the United States Government in the circumstances of those cases. However, it may perhaps be doubted whether an obligation to act on the international plane to vindicate the rule against torture could never arise in international law. Paragraph 151 of *Furundzija*, on which Laws L.J. relied for the proposition that the status of *jus cogens erga omnes* empowers but does not oblige a state to intervene with another sovereign state to insist on respect for the prohibition of torture, addresses the *erga omnes* character of the rule against torture. It demonstrates that the

duty is owed to all States which therefore have a correlative right to require compliance. The Tribunal was not there addressing the question whether a State may be required to take action to ensure respect for and compliance with the prohibition on torture. Moreover, we have seen that the International Law Commission draft articles on State Responsibility would impose a positive duty on States to co-operate in order to bring to an end serious breaches of a peremptory norm. They would require a joint and co-ordinated effort by all States to counteract the effects of such breaches. The provision does not prescribe what form this co-operation should take. No doubt it could take the form of action through the framework of a competent international organization but, as Professor Crawford points out, it could also take the form of non-institutionalised co-operation. It seems to be an open question whether such a duty already forms part of customary international law or whether draft Article 41(1) reflects the progressive development of international law.

179. The legal obligations ancillary to the prohibition of torture identified in the authorities referred to above are extensive. None of these authorities purports to provide a comprehensive statement of the legal consequences flowing from the *jus cogens* status of the primary rule. Nevertheless, it is significant that there is no suggestion in any of these passages of the existence of an obligation resembling that for which BM contends. There is, so far as we are aware, no judicial authority which supports the existence of such a wide obligation of disclosure. BM has certainly not identified any. This, of itself, is not necessarily fatal to BM's contention, in particular when one has regard to the rapidly developing nature of international law in this field. Nevertheless, BM's submission at present lacks any judicial support.

180. Furthermore, it does not appear to us that such an obligation is, as a matter of principle, a necessary corollary to the primary rule or to any of the ancillary obligations identified in the authorities. Lord Bingham's conclusion in *A (No. 2)* that there is reason to regard it as a duty of States, save possibly in exceptional and limited circumstances, to reject the use of evidence obtained by torture is readily explicable as one aspect of the duty, identified, for example, in *Prosecutor v Furundzija* and in the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, to deny recognition and effect to a state of affairs brought about in violation of the primary rule. By contrast, it seems to us that the ancillary obligation contended for by BM in the present case – an obligation on all States to disclose to any person claiming to be a victim of torture material which might support his objection to the admission of evidence said to have been obtained by torture in proceedings against him in another State – goes considerably beyond denying recognition or effect to a state of affairs brought about in violation of the primary rule. To employ the terminology of Lord Hoffmann in *Jones v. Saudi Arabia* (at paragraph 45) the obligation contended for by the BM is not entailed by the prohibition on torture.

181. There is, so far as we are aware, no support in any treaty for the existence of a duty of disclosure similar to that for which BM contends. In particular, we draw attention to our conclusion that no such obligation has been undertaken by the States parties to the Torture Convention. It would be surprising if customary international law imposed wider duties of disclosure than those undertaken by the parties to that Convention. The other treaties on which BM relies are identified at paragraph 165 above. They are, with one exception, all concerned with procedures before international tribunals. They

are expressed in terms which provide no support for BM's case on this point. The exception is Article 10, Inter-American Convention to Prevent and Punish Torture, 1985 which provides:

> "No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means."

The very general terms of this provision take the matter under consideration no further.

182. BM has not produced any evidence of State practice to support his contention. There is before us no evidence of the necessary widespread and general State practice or of the necessary *opinio juris* in relation to the obligation for which BM contends required for the creation of a new rule of customary international law. Similarly, we have not been shown any writings of publicists supportive of the obligation of disclosure in international law for which BM contends.

183. In the circumstances, we are unable to conclude that there exists a rule of customary international law which requires the United Kingdom to make disclosure to BM, in the manner claimed.

(3) Customary international law and the common law

184. The Foreign Secretary raised a further issue. It was submitted, on his behalf, that even if the obligations claimed by BM could be derived from customary international law, they do not enter into the common law in such a way as to create absolute rights in the manner for which BM contends. While customary international law is a source of the common law, the precise manner in which it is received into English law is a question determined by English law. It is said that duties owed by one State to another under customary international law do not automatically entail the existence of individual rights in English law to compel the United Kingdom Government to act in accordance with its duties under customary international law. In this regard reliance was placed upon *R v. Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136, in particular on the speeches of Lord Bingham at paragraphs 11 and 23 and Lord Hoffmann at paragraphs 65-66. The Foreign Secretary also submits that as BM would not have a right in English law to compel the Government to intervene in the United States proceedings by transmitting documents to the United States Government, in order to fulfil the United Kingdom's obligations under international law, he can have no greater right in English law to do so indirectly by requiring that the documents be disclosed to him. Moreover, it is submitted that there is no absolute right in English law to demand the production of information from Government departments; rather it is subject to balancing against competing rights and interests and the balance set by Parliament in the regimes created by the Freedom of Information Act and the Data Protection Act cannot be overridden by reference to the obligations of the United Kingdom under customary international law. However, these points were not

developed in argument before us and, in view of the fact that it is not necessary to decide them, we do not do so.