In The House of Lords

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND AND WALES)

B E T W E E N:

A and Others

Appellants

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

WRITTEN SUBMISSIONS OF THE COMMONWEALTH LAWYERS ASSOCIATION, THE HUMAN RIGHTS INSTITUTE OF THE INTERNATIONAL BAR ASSOCIATION AND THE INTERNATIONAL COMMISSION OF JURISTS

INTRODUCTION

The Associations

1. The Commonwealth Lawyers Association ("the CLA") is a body dedicated to the rule of law throughout the Commonwealth. All Law Societies and Bar Associations of the fifty-three countries comprising the Commonwealth are institutional members of the CLA.

2. The Human Rights Institute of the International Bar Association ("the Institute") is an international body, headquartered in London, that helps promote, protect and enforce human rights under a just rule of law, and works to preserve the independence of the judiciary and legal profession worldwide.

3. The International Commission of Jurists ("the ICJ") is an international human rights organisation. Founded in 1952, the ICJ is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. The Commission itself comprises 60 eminent jurists who are representatives of the different legal systems of the world. Supporting the work of the Commission is the International Secretariat based in Geneva, Switzerland. JUSTICE, the British section of the ICJ, was founded in 1957 and works to promote justice, human rights and the rule of law in the United Kingdom.

Summary of submissions

4. It is understood that the central issues arising in the appeal before your Lordships' House are those identified by Lord Justice Neuberger at paragraph 291 ii) of the judgment of the Court of Appeal, namely "*whether evidence obtained from a third party under torture in another country can be relied upon by the [Special Immigration Appeals Commission "SIAC"] and, if not, the extent of the exclusion of such evidence and the determination of the party on whom the burden of establishing the use or non-use of torture rests*".

5. The CLA, the Institute and the ICJ ("the Associations") seek to provide an analysis of comparative law of relevance to these issues. The Associations are aware that issues of public international law are to be addressed in submissions to be filed by Amnesty International and others and, while supporting those submissions, the Associations do not intend to duplicate them.

6. The Associations' submissions may be summarised as follows:

(a) In those few cases in other jurisdictions where the implications of the torture or inhuman or degrading treatment of a non-party by agents of a foreign State have been considered, the case law, with minimal exceptions,[1] either holds or strongly suggests that such evidence should not be admitted. This is the case both in the context of criminal proceedings and extradition proceedings;

(b) The case law of other jurisdictions also indicates that the rationale behind the general prohibition on the admission of evidence of involuntary confessions obtained by torture, inhuman or degrading treatment includes the following elements (i) the inherent unreliability of evidence so obtained (ii) the outrage to civilised values caused and represented by such conduct (iii) the public policy objective of removing any incentive to anybody to undertake such ill-treatment

[1] The sole exceptions identified are two District Court decisions from the United States of America. Each is addressed further below. It is submitted that each is distinguishable from the present case and should not be followed. There are, furthermore, a number of other United States decisions also set out below which favour the Appellants' position.

anywhere (iv) the need to ensure protection of the fundamental rights of the party against whose interest the evidence is tendered (and in particular those rights relating to due process and fairness) and (v) the need to preserve the integrity of the judicial process. Each of these aspects of the rationale applies, by parity of reasoning, to support the Appellants' contention that there should be an exclusionary rule in respect of evidence obtained by the torture or inhuman or degrading treatment of a third party by a foreign State wherever that ill-treatment has occurred;

(c) The fundamental nature of each element of the rationale set out above indicates that the exclusionary rule is itself of a fundamental nature and is not to be categorised simply as a rule of evidence;

(d) It is a general principle of the English law of evidence, followed in many other jurisdictions, that a party who wishes to adduce evidence must establish its admissibility. In these circumstances, if an exclusionary rule of the kind contended for by the Appellants is held to exist, it is the Crown which should bear the burden of proving that the evidence is not caught by the rule at least once the individual challenging the admission of the evidence has raised a serious issue that it may have been obtained by torture or inhuman or degrading treatment. That approach also reflects the practical reality as to which party is likely to have greatest access to information bearing upon this issue;

(e) In the premises, the fundamental principles underpinning the jurisprudence of other major jurisdictions are supportive of the Appellants' case on this appeal both as to the existence of an exclusionary rule and as to the proper application of the burden of proof.

SPECIFIC CASE LAW INVOLVING CONSIDERATION OF ALLEGED TORTURE OR INHUMAN OR DEGRADING TREATMENT OF NON-PARTY BY FOREIGN STATE AGENTS

7. Research has revealed very few cases where the admission of evidence allegedly obtained as a result of the torture or inhuman or degrading treatment of a non-party by foreign State agents has been considered at all. Those which have been identified are set out below. The passages in the judgments which the Associations submit are of particular relevance to this Appeal are highlighted in bold.

Canada

India v Singh 108 C.C.C. (3d) 274, 36 Imm. L.R. (2d) 17 (1996)

8. In *India v Singh* the British Columbia Supreme Court considered a request by the Indian Government for the extradition of Mahesh Inder Singh to face a charge of conspiracy to commit murder. Singh argued that most of the

evidence relied upon in support of the request was inadmissible and that there was insufficient evidence available to support his committal for extradition, (paragraph 5). In particular Singh claimed that the statements of various individuals relied upon by the Indian Government had been obtained under torture (paragraph 19) and, in consequence, were inadmissible by virtue of Section 269.1 (4) of the Canadian Criminal Code. In so far as is material s. 269.1 (4) provides as follows:

"*In any proceedings over which Parliament has jurisdiction, any statement obtained as a result of the commission of an offence under this section* [i.e. torture[2]] *is inadmissible in evidence, except as evidence that the statement was so obtained*"

9. The formal burden of proof for these purposes does not appear to have been the subject of argument, and it was treated as resting on the party seeking exclusion of the evidence. It was common ground that the standard of proof was one of balance of probabilities (paragraph 21) and applying this standard Oliver J held that one of the statements relied upon by the Indian Government had indeed been obtained by torture and, in consequence, fell to be excluded, (paragraphs 29-32). Oliver J also held, however, that faced with "*serious and persuasive*" allegations of torture, a State seeking to rely upon the disputed evidence would at least have to produce formal denials from the officers alleged to have perpetrated the torture in issue in order to be able to rely upon the evidence (paragraphs 28 & 32). The Judge accordingly appears to have held that regardless of the approach taken to the legal burden of proof, the

[2] S. 269.1 reads as follows: "*Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.*"

evidential burden shifted to the State once persuasive allegations of torture were made.[3]

10. It is recognised that extradition proceedings do not provide an exact parallel with those in issue in the instant case, as they do at least contemplate that the accused will have the opportunity of testing the evidence relied upon by cross-examination at a subsequent trial.[4] No such safeguard is available to those in the Appellants' position and, it is submitted, a more stringent approach to the admission of evidence would therefore be appropriate.

Heidi M Harrer v Her Majesty the Queen [1995] 3 SCR 562

11. This case did not concern torture but it did involve consideration of the effect of abusive conduct on the part of foreign State agents on admissibility of evidence obtained as a result of such conduct. The Supreme Court was considering an attempt by the Appellant to resist the admission of statements made by her to police in the United States into evidence in criminal proceedings subsequently brought against her in Canada. The statements had been made following compliance with the *Miranda* requirements of United States law but – if made in the same circumstances to Canadian police in Canada – would have disclosed a violation of Canadian law due to a failure to give a second "*right to counsel*" warning prior to the making of the statements.

[3] Oliver J also held that the remaining evidence did not support a case of conspiracy to murder and the extradition request was accordingly refused (paragraph 37).
[4] Oliver J expressly recognised this distinction describing his role as an extradition judge as a "modest one" (paragraph 6).

12. La Forest J, giving the majority judgment, emphasised that the critical question was whether admission of the evidence was "*unfair*" or contrary to the "*principles of fundamental justice*". If it was then the evidence would fall to be excluded by reference to both Sections 7 and 11(d) of the Canadian Charter and at common law (see pp. 572-4 & 577-8; paragraphs 13-15 & 21). La Forest J indicated that the mere fact that evidence was obtained by foreign authorities in a manner which did not conform to Canadian procedures would not justify exclusion unless it made the trial unfair and pointed to the need not to "*frustrate the necessary cooperation between the police and prosecutorial authorities among the various states of the world*". He also indicated that the Court did not have "*systemic concern*" relating to the actions of foreign police abroad (p. 574 paragraph 15). Equally, however, he made it clear that even compliance with local laws would not automatically justify admission (p. 574 paragraph 15) of contested evidence. He stated that "***in determining whether evidence should be admitted into evidence [the Court should] be guided by our sense of fairness as informed by the underlying principles of our own legal system***" (pp. 574-575 paragraph 16) and said that he was "*by no means sure*" that it was necessary to go as far as showing that the manner in which the evidence had been obtained would "*shock the conscience*" of the Court in order for it to be excluded (p. 576 paragraph 18). He also left little doubt that evidence which did reach that standard would require exclusion (pp. 578-579 paragraphs 23-24).

13. McLachlin J, giving a separate concurring judgment, also treated the central question as one of fairness. Together with Major J, she considered that

"*unfairness in the way evidence is taken <u>may</u> affect the fairness of the admission of that evidence at trial but does not necessarily do so*" (p. 587 paragraph 44) and continued "***Evidence may render a trial unfair for a variety of reasons. The way in which it was taken may render it unreliable. Its potential for misleading the trier of fact may outweigh such minimal value it might possess. Again, the police may have acted in such an abusive fashion that the court concludes the admission of the evidence would irremediably taint the fairness of the trial itself***" (ibid paragraph 46). At paragraph 55 (p. 591) McLachlin J emphasised "*certain basic standards are common to free and democratic societies*" and that it was reasonable for Canadian Courts to "*expect of police forces abroad that they meet basic standards of fairness*". On the facts, however, McLachlin J held that no such case of police abuse could be sustained "*because the police conduct of which Harrer complains was, viewed in all the circumstances of this case, including the expectations of Harrer in the place where the evidence was taken, neither unfair or abusive. Since the police conduct was not unfair it follows necessarily that its admission cannot render the trial unfair*" (p. 588 paragraph 48). At p. 589 (paragraph 51) McLachlin J gave two examples of situations which would lead to the exclusion of evidence obtained by foreign authorities as follows:

"***It may be that the procedures accepted in the foreign country fall so short of Canadian standards that the judge concludes that notwithstanding the suspect's submission to the law of the foreign jurisdiction, to admit the evidence would be so grossly unfair as to repudiate the values underlying our trial system and condone procedures which are anathema to the Canadian conscience. Or it may be that the law of the foreign jurisdiction has been abused by the authorities, again rendering it unfair to receive the evidence***."

14. The Associations submit that as a matter of Canadian law, and on the authority of the *Harrer* case, evidence obtained by torture or inhuman or degrading treatment would require exclusion on the approach of both La Forest J and McLachlin J. It would "*shock the conscience*", it would constitute sufficiently serious abusive conduct to violate fundamental principles and it would taint the fairness of the proceedings as a whole.

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France

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Cour d'Appel de Pau, Chambre de l'Instruction, Arret 16.05.03, No. 238/2003

15. This was an extradition case which involved consideration of evidence alleged to have been obtained under torture. The Cour d'Appel of Pau[5] was considering an extradition request made by the Spanish Government in respect of a Spanish national, Francisco Irastorza Dorronsoro. Irastorza Dorronsoro was alleged to have formed an armed commando unit of the terrorist group E.T.A., and to have participated in the bombing of a police station, killing a police officer. He claimed that the extradition request had been "*based on statements obtained by means of torture*" (Translation pp. 4 & 8) and that evidence obtained in breach of Article 3 of the European Convention on Human Rights ("the European Convention") could not be relied on.

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16. The statements referred to had been provided by another individual – Iratxe Sorzabal Diaz. As a result of Irastorza Dorronsoro's allegations, the French

[5] The Pau Cour d'Appel is one of 35 regional Appellate Courts with jurisdiction over different parts of France and its territories. Decisions of each Cour d'Appel are open to appeal to the Cour de Cassation.

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Examining Magistrate had sought additional information from the Spanish authorities and, in particular, had asked that they provide all information necessary for determining whether Sorzabal Diaz's statements were obtained "*by means of torture or by ill-treatment by attaching in particular the statements made by her and specifying: if a complaint of ill-treatment has been filed by Iratxe Sorzabal Diaz and if so the consequences thereof; whether or not the validity of the statements has been contested before the Spanish judicial authorities; whether these statements constitute the only evidence against Francisco Javier Irastorza Dorronsoro; and if Iratxe Sorzabal Diaz was released in Spain due to ill-treatment received by her.*"[6]

17. The Spanish Government submitted medical evidence in relation to Sorzabal Diaz indicating, amongst other matters, that after her first period of police questioning she had appeared in great emotional distress and had refused a medical examination and that when examined she had been found to have suffered traumatic injuries and had alleged that she had been hit over the head, (see Translation pp. 4-5). The Government also provided copies of Sorzabal Diaz's statements which contained considerable detail as to E.T.A. activities and indicated that she had challenged the admission of her statements on grounds of ill-treatment. The Government indicated that Sorzabal Diaz had been released from custody because of an absence of corroboration for her statements and not because of her allegations of ill-treatment.

[6] Translation p. 4. Notably in making these requests the French authorities did not seem troubled by considerations of the kind identified by Lord Justice Pill at paragraph 129 of the Court of Appeal's judgment where he stated that it would be "*unrealistic to expect the Secretary of State to investigate each statement with a view to deciding whether the circumstances in which it was obtained involved a breach of Article 3. It would involve investigation into the conduct of friendly governments with whom the Government is under an obligation to co-operate*".

18. The Spanish Government also stated that the Examining Court had ordered an investigation of the allegations of ill-treatment and, on 15th March 2002, had found that they had constituted "*minor offences*" and ruled that they should not be pursued, (Translation pp. 5, 7 & 9). The Spanish Prosecutor had apparently appealed against the classification of Sorzabal Diaz's ill-treatment as involving "*minor offences*" and she had sought a ruling that they amounted to "*misdemeanours*". That appeal had, in turn, been dismissed by the Provincial Court of Madrid on 3rd September 2002 (Translation pp. 6 & 9). The French Examining Judge had requested provision of copies of the decisions of the Spanish authorities of March and September 2002 but these were not provided (Translation p. 9).

19. The Cour d'Appel refused the extradition request. The Court referred to Article 15 of the United Nations Convention against Torture ("the Torture Convention") and indicated that where there were serious reasons for believing physical abuse of a witness to have occurred, the evidence of that witness had to be excluded and as a result the extradition request had to be refused. It stated as follows:

"*Whereas evidence has been submitted during the proceedings leading to questioning whether or not, Iratxe SORZABAL DIAZ suffered ill-treatment during the period of police custody during which she made statements held against Francisco Javier IRASTORZA DORRONSORO;*

Whereas the response to this question is even more important, as indicated by the Spanish judicial authorities, as these statements constitute the only evidence against the interested party;

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Whereas there are serious reasons to question whether Iratxe SORZABAL DIAZ suffered physical abuse during her period of custody;

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Whereas, further to her statements which alone cannot be deemed to be sufficient, the following should be pointed out:

- the medical record shows that during her period of police custody, she suffered serious emotional distress and injuries requiring urgent hospitalisation,

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- the Central Examining Court no. 2 ordered that investigations be made as to the ill-treatment alleged by Iratxe SORZABAL DIAZ,

- the Central Examining Court no. 13 characterised the acts outlined by Iratxe SORZABAL DIAZ as constituting a minor offence (contravention) which would seem to indicate that it acknowledged the existence of violence committed against her;

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Whereas furthermore, it is disturbing to note that, in her statements made during her period of custody, Iratxe SORZABAL DIAZ recounted several bomb attacks and admitted her participation in such attacks together with Francisco Javier IRASTORZA DORRONSORO and Marcos SAGARZAZU OYARZABAL and that such statements have not been deemed to be sufficient to initiate proceedings against her whereas the said statements have been deemed sufficient to initiate proceedings against the other two who are challenging their participation in the said acts;

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Whereas in order to remove any doubt as to the truth of the alleged physical harm, it was requested that the Spanish judicial authorities provide the decisions issued on 15 March 2002 by the Central Examining Court no. 13 and on 3 September 2002 by the Fifth Division of "l'Audiencia Provincial" which both ruled not to pursue the complaint filed by Iratxe SORZABAL DIAZ;

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Whereas not only did the Spanish authorities not provide the requested decisions but furthermore indicated that the decision of 15 March 2002 had characterised the acts as constituting a minor offence (contravention) in contradiction with the information contained in the report of the Department of the Public Prosecutor of 27 November 2002…

Whereas under these conditions it is impossible to dismiss the hypothesis pursuant to which the statements made by Iratxe SORZABAL DIAZ were obtained under conditions contrary to article 15 of the Convention of NEW-YORK of 10 December 1984;

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Whereas consequently, an unfavourable opinion must be given in respect of the request for the extradition of Francisco Javier IRASTORZA DORRONSORO." [emphasis added] (Translation pp. 9-10)

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20. In this earlier case, the French Cour de Cassation considered an appeal against conviction for membership of a criminal gang brought by Frederic Haramboure and others. Haramboure appealed against his conviction on the basis that evidence admitted against him should not have been admitted as it had been obtained under torture, and so its admission was in breach of Article 15 of the Torture Convention, (Translation p. 2). The evidence in question was from a co-accused – Parot – who had been convicted in absentia (the Spanish authorities refusing his extradition because of pending proceedings in Spain) - and who had not attended the trial to give evidence. At the time of Haramboure's appeal the United Nations Committee Against Torture had launched a preliminary investigation into allegations of ill-treatment of Parot, (Translation p. 3). The Cour de Cassation emphasised that despite the lapse of time since the alleged ill-treatment no official inquiry had established its existence (Translation p. 3), and that the offences for which Haramboure had been convicted were in any event established by other evidence (Translation p. 3). In these circumstances the Court concluded that there had been no breach of the Torture Convention and dismissed the appeal (Translation pp. 3-4). The corollary of this reasoning was that if it had <u>in fact</u> been shown that the evidence had been obtained by torture, then, by virtue of Article 15 of the UN Convention, it would not have been admissible, and if there had been no other evidence the conviction would have been overturned.

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Germany

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El Motassadeq, decision of the Higher Regional Court of Hamburg, 14 June 2005

21. On 14th June 2005 the Higher Regional Court of Hamburg gave a procedural ruling in the case of *El Motassadeq* NJW 2005, 2326 in which the admissibility of evidence obtained under torture was addressed. The decision formed part of criminal proceedings against El Motassadeq in which he was charged with conspiracy to cause the attacks of September 11th 2001 on the United States of America and with membership of an illegal organisation. The evidence under challenge consisted of witness summaries from three individuals – Ramzi Binalshibh, Khaled Sheikh Mohammed and Mohamad Ould Slahi – held at undisclosed locations by United States authorities. The Defendant's lawyers contended that parts of these summaries should be excluded from the proceedings by reference to Article 15 of the Torture Convention.

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22. The Court held that Article 15 was directly applicable (see Translation p. 4) but went on to find that the use of torture had not been proved (Translation pp. 7 & 9) and so the contested evidence could be admitted. The Court's principal basis for reaching this latter conclusion was that on the facts the allegations of torture were insufficiently precise or unattributed (Translation pp. 6-7) and that the contested evidence summaries contained some exculpatory material – a factor said to point against the occurrence of torture (Translation pp. 7-9). The allocation of the burden of proof in respect of the issue of torture was not

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the subject of any argument and the Court proceeded on the basis that it was simply to assess the available evidence and reach its own conclusion as to whether or not it established that the contested witness summaries had been obtained as a result of torture.[7]

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The Netherlands

Pereira, decision of the Supreme Court of the Netherlands, 1 October 1996

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23. In a 1996 decision (*Hoge Raad* 1996 1 October 1996, NJ 1997, 90) the Supreme Court of the Netherlands considered the case of a Defendant (Paolo Pereira) who had been convicted on charges of drug trafficking and kidnapping. The Court of Appeal had upheld Pereira's conviction. Pereira appealed to the Supreme Court on the grounds, *inter alia*, that the evidence against him included witness statements which, he alleged, had been obtained by torture of witnesses by the Portuguese police in Portugal.[8]

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[7] On 19th August 2005 the Higher Regional Court of Hamburg handed down its final verdict acquitting El Motassadeq of the primary charge of conspiracy but finding him guilty of the secondary charge of membership of an illegal organisation. No reasoned written decision has yet been provided (a written decision is expected in the next four months) but according to press reports at the time the Court indicated that it found the approach of the United States' authorities to the provision of evidence to be unsatisfactory and considered that the contested evidence was not crucial to the outcome of the case. Both the prosecution and the defence have indicated that they intend to bring appeals to the German Supreme Court and, subject to the content of the written reasons, as part of the Defendant's appeal the earlier evidential ruling of 14th June 2005 may be challenged. The case has already been to the Supreme Court on one occasion (El Motassadeq, decision of the German Federal Supreme Court, 4 March 2004, NJW 2004, 1259) when an appeal against an earlier conviction was allowed by reference to Article 6 of the European Convention, and as a result of the lower Court's failure to take adequate account of the unavailability of potentially material evidence which the United States' authorities had failed to provide and, in particular, the failure of the United States to make Binalshibh available for questioning by the Court. That earlier decision did not however involve any consideration of evidence alleged to have been obtained as a result of torture and it was only following that decision that the contested witness summaries were provided.

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[8] See Ground II annexed to Supreme Court decision.

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24. The Supreme Court declined to interfere with what it considered to be the lower Courts' finding of fact that it was not "*plausible*" that the relevant witness statements had been obtained by torture and accordingly it rejected this ground of appeal (Translation paragraph 6.3). However it also indicated that if (on the facts) it was plausible that the witness statements *had* been obtained by such torture, then the witness statements would have had to be excluded by the Dutch Courts. The Court reasoned that the witness statements would have been obtained unlawfully, in breach of Article 3 of the European Convention and Article 7 of the International Covenant on Civil and Political Rights and it followed automatically that they should be excluded, (see Translation paragraph 6.2).

25. It is also notable that, in his opinion, Advocate General Meijers – acting for the Procurator General[9] of the Supreme Court - had emphasised the absolute nature of the prohibition of torture. He criticised the Court of Appeal's view that more was needed than the torture of witnesses for their evidence to be rendered inadmissible as "*unacceptable*" and stated "*The right of every person to be protected from, among other things, torture, as laid down in article 3 ECHR, is an absolute right. A violation of this ius cogens with regard to someone who has made a statement that is incriminating for a suspect, leads, as soon as said statement would be used for the evidence to the irreparable violation of the fairness of the procedure.*"(Translation, p. 2).

[9] The Supreme Court has one Procurator General assisted by a number of Advocate Generals. Their opinions are treated by lower Courts in the Netherlands as having persuasive authority.

United States of America

26. The United States authorities of most direct relevance to the issues identified above arise in the context of extradition proceedings. Also of relevance are a number of authorities relating to the admissibility of evidence alleged to have been obtained through coercion of a co-accused and to the consequences of gross misconduct on the part of United States' agents or agents of a foreign State operating abroad. Again, aside from two District Court authorities which it is submitted should not be followed,[10] these authorities support the Appellants' position.

[10] The two District Court authorities are *Gill v Imundi 747 F. Supp. 1028 (S.D.N.Y. 1990)* and *In the Matter of the Extradition of Mahmoud Abed Atta aka Mahmoud El-Abed Ahmad 706 F. Supp. 1032 (E.D.N.Y. 1989)*. In *Gill v Imundi* the New York District Court rejected an attempt to bring an end to extradition proceedings pursued by the Indian Government by reference to what were said to be unlawful practices on the part of Indian police in securing confession evidence. The Court also held that the application of the exclusionary rule had "*uncertain application to extradition proceedings owing to the "doubtful deterrent effect on foreign police practices that will follow from a punitive exclusion of the evidence*"" (see p. 1048 paragraph 25). The authority cited as indicating that uncertainty was, however, a domestic criminal case relating to an attempt to exclude evidence obtained on an unlawful search carried out by Canadian authorities, (*United States v Morrow*, 537 F.2d 120, 139; U.S. App. LEXIS 7546). The *Morrow* decision had in fact emphasised that the Court's power to exclude evidence obtained by foreign authorities "*in the enforcement of foreign law*" did extend to cases which "*shock[ed] the judicial conscience*" (see p. 14 at 139) and so is, it is submitted, in fact supportive of the Appellants' position in this case where torture would readily meet that threshold. The *Gill* decision had itself followed *In the Matter of the Extradition of Mahmoud Abed Atta*. In that case the District Court was considering a challenge to a Magistrate's refusal to extradite Atta to Israel to face charges connected with an alleged terrorist attack on a bus. The Magistrate had refused extradition by reference to the political offence exception and the Court held that he had been wrong to do so. The remaining issue related to whether the evidence relied upon in support of the extradition was sufficient having regard to Atta's contention that it had been coerced and was the result of torture. This argument had been rejected by the Magistrate and was likewise rejected by the District Court which held that "*While interrogation by torture is deplorable, there is no evidence that the confessions here were coerced or that they are not reliable*" and that in any event challenges to evidence submitted by the United States in an extradition proceeding were "*not permissible*" (pp. 1051-1052 paragraphs 10 to 11). The Associations contend that this decision (and that of *Gill*) are distinguishable from the case before your Lordships' House where the proceedings under consideration are determinative in effect and where no question of extradition to face a conventional criminal process, with all its attendant safeguards and mechanisms for challenging evidence, is contemplated. In any event it is submitted that these decisions should not be followed and that the approach of the Court of Appeals of the 9th Circuit in the *Mainero* decision referred to below is to be preferred.

Mainero et al. v Gregg, 164 F.3d 1199 (9th Cir. 1999)

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27. In this case the Petitioners sought to challenge their extradition to Mexico to face charges of murder and criminal association. They alleged that the Magistrate Judge who had acceded to the extradition request had erred by

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taking into account evidence alleged to have been obtained by the torture of third party witnesses. The Court of Appeals for the Ninth Circuit dismissed the Petitioners' appeals holding that the Magistrate Judge had been entitled to conclude that there was "*no reliable evidence of torture or duress of the*

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witnesses in making their statements" and that "*none of the evidence on which it is necessary to rely was obtained by torture*" (see p. 1206 paragraph B). The implication of the Court of Appeals' reasoning was that had it been necessary to rely upon evidence obtained by torture the extradition request would have

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failed.

LaFrance v Bohlinger 499 F.2d 29 (1974)

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28. No question of ill-treatment or torture on the part of foreign authorities arose in this case, but the Court of Appeals of the First Circuit instead considered a challenge to conviction which had followed the admission of an incriminating statement from a defence witness which the witness alleged was coerced, and

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which was used by the Prosecution to impeach the credibility of the witness. The Court found that a voir dire hearing should have been held by the trial court in respect of the allegation of coercion. The Court made a number of

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observations which it is submitted support the Appellants' position on this appeal. In particular it stated as follows:

"***It is unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government's behest to bolster its case …. methods offensive when used against an accused do not magically become any less so when exerted against a witness … We conclude that although there is no absolute parallel between the exclusionary rule relative to confessions and that relative to impeaching statements of witnesses, there is a point at which the same considerations apply to both***. *That point has been reached here because there is a substantial claim by the defendant that the impeaching statement offered by the government was obtained by police threats and other blatant forms of physical and mental duress. Where such a claim is made, and supported by sworn testimony, the court has a duty to conduct its own inquiry and to exclude the statement if found to have been unconstitutionally coerced*". [emphasis added] (see pp.34-35)

Clanton v Cooper, 129 F.3d 1147; *Buckley v Fitzsimmons 20 F. 3d 789* (7th Cir. 1994)

29. In *Clanton v Cooper*, the Court of Appeals of the 10th Circuit cited *LaFrance* and held that a defendant was entitled to challenge the Government's use against him or her of a coerced confession given by another. Similarly in *Buckley v Fitzsimmons* the Court of Appeals of the 7th Circuit stated that "*using one person's coerced confession at another's trial violates his rights under the due process clause*" (p. 795, paragraphs 15-16)

30. The Associations also submit that each of *Clanton*, *Buckley* and *LaFrance*[11] provide support for the Appellants' position in that they indicate that the

[11] It should be noted in respect of United States law that Wigmore's Evidence in Trials at Common Law (1970 ed. Supplement 1999) at s. 815 cites a number of State level American authorities as providing support for the proposition that in the event of duress of a witness (as opposed to a Defendant) there is no exclusion of the evidence on the ground of extrajudicial threats or other forms of coercion. Wigmore identifies three bases for this distinction: first that the true position and the question

rationale behind exclusion of involuntary confession evidence (as summarised above and addressed in more detail below) may be extended beyond the confines of a case concerned with the admission of such evidence against the maker of the confession.

United States of America v Toscanino 500 F. 2d 267 (1974)*; United States of America v Hensel 509 F. Supp. 1364* (1981)

31. These two cases were both cited by La Forest J in his majority judgment in the Canadian Supreme Court in *Harrer* (see paragraph 12 above) as indicating that under United States law evidence obtained abroad could be excluded if the manner in which it had been obtained "*shocked the conscience*".[12] As will be explained below it is the *Hensel* case which is most directly relevant to this appeal.

32. In *Toscanino* the Appellant did not seek to challenge the admissibility of evidence obtained through ill-treatment but instead sought the dismissal of proceedings against him by reference to the circumstances in which he had been returned to stand trial. He alleged that he had been abducted from Uruguay, taken to Brazil, brutally tortured and interrogated for 17 days and

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of reliability may be brought out and assessed on examination of the witness; secondly that judicial power "*must be assumed sufficient to protect the witness from any serious apprehension of physical harm*"; and thirdly that "*any rule of exclusion on this ground would conflict with the laudable tendency of the past two generations to admit testimony as freely as possible and trust to the examination to disclose its weaknesses*". None of these bases would of course apply to facts such as those with which this appeal is concerned: there is no opportunity for examination or cross-examination of the relevant witnesses and in circumstances where they are, by definition, all outside the jurisdiction there is no means by which English judicial authorities can offer them any protection. The last full edition of Wigmore pre-dates the *Clanton*, *Buckley* or *LaFrance* decisions referred to in this paragraph and above and they are not referred to in the Supplement at s. 815.

[12] The term "*shock the conscience*" as a test for admissibility generally appears to have been first used in the Supreme Court's decision in *Rochin v People of California* 342 U.S. 165, 72 S.Ct. 205 cited by the Court in *Toscanino* and discussed in more detail at paragraph 44 below.

finally drugged and brought back to the United States, and that this had occurred with the knowledge and complicity of United States officials (see pp. 2-4 at 269-270). The Court of Appeals of the Second Circuit held that the Court's supervisory jurisdiction was not limited to admission or exclusion of evidence but extended to any measure necessary to remedy abuses of a District Court's process (p. 8 at 276). It found that an evidential hearing should take place to determine the truth of the allegations and if they were made out then the case against Toscanino would fall to be dismissed concluding "*We could not tolerate such an abuse without debasing "the processes of justice""*, (p. 8 at 276).[13]

33. In *Hensel* an attempt was made to exclude evidence obtained by Canadian authorities in a manner alleged to be inconsistent with the Fourth and Fifth Amendments of the United States Constitution. The motion was denied but the Chief Judge of the District Court made the following important observation in the context of considering the Fourth Amendment argument:

[13] The Court also stated that if Toscanino produced no evidence of involvement on the part of United States' officials in the misconduct then it would be open to the District Court to exercise its discretion to decline to hold an evidential hearing. However as the *Hensel* case illustrates, this is not a prerequisite to the exercise of the supervisory jurisdiction at least in respect of the exclusion of evidence and simply represents one of the bases for its exercise. On the case being remanded Toscanino did not in fact support the allegations of complicity on the part of United States officials, no evidential hearing took place and his conviction was maintained. As already indicated it was not argued by Toscanino that any evidence admitted at his trial fell to be excluded by reference to his ill-treatment in Uruguay or Brazil and so the sole remedy at issue was dismissal of the proceedings. Although the majority judgment in the subsequent Supreme Court decision of *United States v Alvarez-Machain*, 504 U.S. 655 has made it clear that under the *Ker-Frisbie* doctrine of United States law, the fact that a Defendant has been brought within the jurisdiction by a forcible abduction will not, on its own, suffice to bar proceedings, and the decision has not been followed in all Circuits, as La Forest J stated, *Toscanino* remains authority for the Court's supervisory jurisdiction where conduct which "*shocks the conscience*" is established. A year after *Toscanino* was decided the Court of Appeals for the 2nd Circuit had emphasised the importance of "*cruel, inhuman and outrageous conduct*" to its decision in *Toscanino* and indicated that the first remedy of the Court would be to prevent use of the "*fruit*" of such abuse, (see *United States ex rel. Lujan* 510 F.2d 62 at 65. *Toscanino* was of course also cited with approval in this jurisdiction by Lord Bridge in *R v Horseferry Road Magistrates ex parte Bennett* [1994] 1 AC 42 at 68. See also *United States v Morrow* 537 F.2d 120, 139 cited above at footnote 10 where the same formulation of the exclusionary rule set out in *Hensel* was used by the Court of Appeals for the Fifth Circuit.

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*"**The Fourth Amendment exclusionary rule does not apply to arrests and searches made by foreign authorities on their home territory and in the enforcement of foreign law even if the persons arrested and from whom the evidence is seized are American citizens… To this general rule there are two exceptions. First if the circumstances of the foreign search and seizure are so egregious that they "shock the judicial conscience", exclusion of the evidence may be required. See e.g., United States v Toscanino 500 F. 2d 267, 276 (2d Cir. 1974) (physical torture).** No such extreme conduct is alleged here … Second, if American law enforcement officials participated in the foreign search or if the foreign authorities actually conducting the search were acting as agents for their American counterparts, the exclusionary rule can be invoked."* (see p. 8 at 1372 paragraph 2)[14].

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European Union opinion on the status of illegally obtained evidence in criminal procedures in the Member States

34. In November 2003 the European Union published a formal opinion setting out the position in each of the (then 15) Member States in respect of evidence obtained illegally (CFR-CDF.opinion3-2003). The principal focus of the opinion was on evidence obtained as a result of violations of privacy but it also contained some information as to the position in respect of evidence obtained under torture. The opinion pointed out that each Member State was a

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[14]For the sake of completeness in respect of United States law of relevance to this aspect of the Associations' submissions, reference should also be made to a 1965 decision of the New York Court of Appeals – *The People of the State of New York v Portelli* 205 N.E. 2d 857. In that case the Defendants were convicted of first degree murder in part on the basis of the evidence of a witness – Melville – who stated on cross-examination that he had first implicated the Defendants eight months earlier having been held in custody overnight and severely beaten and tortured during the initial police investigation. Melville nevertheless insisted from the witness stand that the pre-trial statement he had given to the police and his oral testimony were completely true. The Court of Appeals emphasised the lapse of time between the torture and the trial, the fact that the jury had the opportunity to assess Melville's credibility directly and that "*an appropriate forum*" (p. 858) (presumably criminal proceedings against the officers concerned) was available for the misconduct to be addressed. Against this background it ruled that Melville's testimony was admissible notwithstanding the torture. There are of course numerous distinctions between the *Portelli* case and the instant Appeal where, as already indicated, there is no opportunity for examination or cross-examination of any witnesses whose evidence might be relied upon, no means of offering them protection against further abuse and no basis for anticipating that any allegations of torture would be addressed in any other forum. *Portelli* also preceded the seminal United States Supreme Court decision of *Miranda v Arizona* 384 U.S. 436, 16 L ed 2d 694 and the Torture Convention.

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signatory to the Torture Convention (p. 6, footnote 7) and the sections of the opinion relating to Cyprus, Denmark, Finland, Germany and Ireland each indicate that evidence obtained as a result of torture or other serious ill-treatment would be excluded under the law of those countries (pp. 12, 13, 16, 18). The sections of the opinion relating to the other 10 Member States did not address the issue of evidence obtained by torture or ill-treatment.

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RATIONALE BEHIND GENERAL PROHIBITION ON ADMISSION OF INVOLUNTARY CONFESSION EVIDENCE

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35. Before the Court of Appeal it was submitted on behalf of the Secretary of State that the rationale for the exclusionary rule relating to involuntary confession evidence obtained by ill-treatment or torture was based on a "*possible lack of reliability alone*" (see Pill LJ at paragraph 89 & Laws LJ at paragraph 243). This contention was not accepted by the Court of Appeal and the Associations submit that important elements of the rationale as correctly understood support the existence of such a rule in respect of evidence obtained by torture from third parties, particularly where there is no opportunity to test the quality of that evidence on cross-examination. As already set out at paragraph 6(b) above, the elements of the rationale which are relied upon by the Associations are the following: (i) the inherent unreliability of evidence obtained as a result of torture or inhuman or degrading treatment (ii) the outrage to civilised values caused and represented by such conduct (iii) the public policy objective of removing any incentive to undertake such conduct (iv) the need to ensure protection of fundamental rights and (v) the need to

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preserve the integrity of the judicial process. Set out below are citations from the higher Courts of a number of other jurisdictions which, it is submitted, support this analysis of the rationale. The particular passages relied upon by the Associations as supporting one or more elements of the rationale identified above are highlighted in bold.

36. The potential importance of this submission is that it goes directly to the correctness of Lord Justice Laws' conclusion in the instant case that there is "*nothing in the common law cases*" to support the Appellants' contention that there is or should be an exclusionary rule applicable to all evidence obtained by torture or other ill-treatment (see paragraph 242). Lord Justice Laws concluded (at paragraph 243) that the debate between the parties as to the true rationale for the rule about confessions was "*barren*" as it related to a rule of evidence which the Appellants were not entitled to rely upon by virtue of Rule 44(3) of the SIAC Procedure Rules which states that "*The Commission may receive evidence that would not be admissible in a court of law*". For the reasons set out below at paragraphs 49 to 51 the Associations respectfully submit that the rule relating to confessions, while having its application in the context of disputes as to evidence, is of a more fundamental nature than this passage in Lord Justice Laws' judgment would suggest.[15]

[15] Lord Justice Pill rejected the Secretary of State's submission that the rule relating to confessions rested on *possible* lack of reliability alone and held that the "*abhorrence of the law*" to involuntary confessions had been a major factor, (see paragraph 89). Lord Justice Neuberger described the "self-evidently unreliable" nature of involuntary confessions as "*one of the principal reasons*" for the exclusionary rule in that context and cited this as supporting the Appellants' position but did not expand upon the other reasons for the rule (see paragraph 414).

Argentina

37. In a 1981 decision relating to the admissibility of evidence allegedly obtained as a result of "*physical coercion*" of a defendant charged with armed robbery (*Corte Suprema de Justicia de la Nación, Fallos 303/1938*) the Argentinian Supreme Court referred to a conflict "*between two fundamental interests of society; its interest in a quick and efficient enforcement of the law and its interest in preventing that the rights of its individual members are undermined through unconstitutional methods of enforcement of the law*" (Translation, p. 3, paragraph 3) and, emphasising the threat to the integrity of the judicial system represented by admission of such evidence, concluded with the following words:

> *"This conflict was resolved in our country in the early days of its constitutional process when the Assembly of 1813 described torture as a "horrible invention to discover criminals" and ordered the burning of instruments used to apply it Law of 19 May 1813, Argentine Constitutional Assemblies, Volume I page 44). This decision has been adopted in the prohibition of forcing someone to declare against themselves in Article 18 of the Constitution, on the basis of which this Court has repeatedly excluded confessions given under the moral coercion established by oath (decisions 1:350 and 281:177.* ***The observance of this constitutional rule by the judges cannot be reduced to order the prosecution and punishment of the officers responsible for the coercion, because they give the result of their offence a value and base on it a judgment, this being not only contradictory to the formulated approach but also undermining the good administration of justice, as it tends to make it a beneficiary of an illegal act****"* [emphasis added] (Translation, p.3 paragraphs 4-5).

Australia

38. Research has not identified any Australian authority relating to evidence obtained under torture where the rationale of the exclusionary rule has been addressed. However in *Bunning v Cross*[16] (1978) 141 CLR 54, 74 Stephen J and Aickin J (giving the majority judgment)[17] described the general discretion to exclude unlawfully obtained evidence as requiring the weighing of two competing requirements of public policy namely:

> *"the desirable goal of bringing to conviction the wrongdoer and* ***the undesirable effect of curial approval, or even encouragement being given to the unlawful conduct of those whose task it is to enforce the law****"* [emphasis added].

Stephen J and Aickin J continued (at pp. 74 & 78) as follows:

> *" …* ***This being the aim of the discretionary process*** *called for by* Ireland [1970 126 CLR 321] ***it follows that it by no means takes as its central point the question of unfairness to the accused. It is, on the contrary, concerned with broader questions of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration….***
>
> *…In appropriate cases* ***it may be "a less evil that some criminals should escape than that the Government should play an ignoble part****" – per Holmes J in Olmstead v the United States (1927) 277 US 438 at 470 (72 Law Ed 944 at 953).* ***Moreover the courts should not be seen to be acquiescent in the face of the unlawful conduct of those whose task it is to enforce the law***" [emphasis added].

[16] This case concerned the admissibility of evidence of the result of a breathalyser test in circumstances where the test had been required without any statutory basis.
[17] Barwick CJ expressly agreed with the reasoning of Stephen J and Aickin J.

Again the Associations submit that the Court's emphasis on the danger of the Court "*acquiescing*" in unlawful conduct indicated that this was a major factor behind the exclusionary power of the Court. In addition, of course, the Court also emphasised the general question of fairness to the party against whose interest the evidence was to be admitted. In respect of the question of fairness and its application to the Appeal before your Lordships' House, the Associations also respectfully adopt Lord Justice Neuberger's observation to the following effect at paragraph 464 of the Court of Appeal's judgment:

> "*in some respects it would be even more unfair on an appellant to rely upon a statement extracted from a third party under torture than to rely upon a confession extracted from the appellant himself under torture. The appellant will at least know of all the circumstances in which the confession was extracted, and will be able to give evidence in court to explain those circumstances, and possibly to give other evidence to rebut the reliability of the confession. However it will be a very rare case where the appellant would know very much about the circumstances in which the statement was extracted from a third party, or where the appellant would be able to arrange for evidence to be given about those circumstances."*

Canada

R v Oickle [2000] 2 SCR 3

39. In *R v Oickle* the Canadian Supreme Court considered the principles governing the admissibility of confession evidence and made a number of important observations as to the effect of oppression. Iacobucci J, giving the majority judgment, conducted a detailed analysis of the "*Confessions Rule*" at common law (paragraphs 24 to 71) during the course of which he underlined the need to safeguard against miscarriages of justice, the importance of protection of the

judicial system's integrity and the need to deter unlawful conduct, as factors of particular importance when stating the following:

> *"the confessions rule is concerned with voluntariness, broadly defined. One of the predominant reasons for this concern is that involuntary confessions are more likely to be unreliable.* ***The confessions rule should recognize which interrogation techniques commonly produce false confessions so as to avoid miscarriages of justice****"* (paragraph 32) [emphasis added]
>
> *"A final consideration in determining whether a confession is voluntary or not is the police use of trickery to obtain a confession … this doctrine is a distinct inquiry. While it is still related to voluntariness* ***its more specific objective is maintaining the integrity of the criminal justice system ….****"* (paragraph 65) [emphasis added]
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> "*… I also agree with Warren CJ of the United States Supreme Court who made a similar point in Blackburn v Alabama 361 US 199 (1960) at p. 207:*
>
> > *"Neither the likelihood that the confession is untrue nor the preservation of the individual's freedom of will is the sole interest at stake.* ***The abhorrence of society to the use of involuntary confessions also turns on the deep – rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves****"*… [emphasis added]
>
> *Thus a complex of values underlies the stricture against use by the state of confession which, by way of convenient shorthand, this Court terms involuntary""* (paragraph 70)

40. Iacobucci J also approved the following dictum of Lamer J from an earlier decision:

> ***"The investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work.*** [emphasis added] ***<u>What should be repressed vigorously is conduct on their part that shocks the community</u>*** [emphasis added in judgment]*"* (paragraphs 65-66)

By approval (and emphasis) of these last words the Associations submit that the Court made it clear that conduct of this quality (such as torture or inhuman or degrading treatment) would require exclusion of evidence.

Heidi M. Harrer v Her Majesty the Queen [1995] 3 SCR 562

41. *Harrer v Her Majesty the Queen* has already been addressed at paragraphs 11 to 14 above. The Associations submit that it provides a further illustration of the right to due process and fairness forming an integral part of the rationale for the exclusionary rule relating to involuntary statements.

Ireland

The People (AG) v O'Brien [1965] IR 142

42. *The People (AG) v O'Brien* concerned an appeal against conviction for housebreaking and stealing in circumstances where a significant part of the prosecution evidence had been obtained without a valid search warrant. In giving the majority judgment of the Irish Supreme Court permitting the conviction to stand, Kingsmill-Moore J indicated that evidence obtained in deliberate and conscious violation of constitutional rights should in general be excluded. In respect of evidence obtained through torture he stated the following:

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"Somewhat extreme positions were canvassed. On the one hand it was submitted that facts discovered as a result of the adoption of any means, however illegal, could be given in evidence. If this were to be the law, facts discovered as a result of the torture of the prisoner or the torture of his wife before his eyes could be given in evidence at his trial. …

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There seems to be as yet no authority in English or Irish law to refute such a contention, however revolting and perilous it may seem, but Counsel for the Attorney General said that he did not wish to argue that evidence obtained as a result of gross personal violence or methods which offended against the essential dignity of the human person could be received. To countenance the use of evidence extracted or discovered by gross personal violence would in my opinion, involve the State in moral defilement." (at p. 150)

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Importantly for present purposes, on Kingsmill-Moore J's approach, it was not merely the obtaining of evidence by gross personal violence which involved the State in "*moral defilement*" but also the "*countenanc[ing of] the use*" of such evidence.

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New Zealand

R v Shaheed [2002] 2 NZLR 377

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43. The leading case in New Zealand governing the admissibility of evidence obtained in breach of a right protected by the New Zealand Bill of Rights Act 1990 is that of *R v Shaheed*. In that case (relating to the unlawful abduction and rape of a 14 year old girl) the Court of Appeal was considering the

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admission of a lawfully obtained blood sample of the Defendant's which the prosecuting authorities had only come to obtain as a result of an earlier blood sample obtained in good faith (but unlawfully) from a databank. The Court departed from the earlier approach adopted in the New Zealand Courts

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(indicating a presumption of exclusion of all evidence obtained as a result of a breach of the Bill of Rights) and held that the proper approach was to apply a balancing test under which admission was to be determined by considering a range of factors. The Court's judgment nevertheless indicated that the balancing test would come down in favour of excluding any evidence obtained as a result of torture. Giving the leading judgment of the majority Blanchard J said the following:

"***The starting point should always be the nature of the right and the breach.*** *The more fundamental the value which the right protects and the more serious the intrusion on it, the greater will be the weight which must be given to the breach …. **Exclusion will often be the only appropriate response where a serious breach has been committed deliberately or in reckless disregard of the accused's rights … A system of justice which readily condones such conduct on the part of law enforcement officers will not command the respect of the community. A guilty verdict obtained in this manner may lack moral authority … Society's longer term interests will be better served by ruling out such evidence***" (see paragraphs 147 - 148)

The Associations submit that, as the right to be free from torture or inhuman or degrading treatment is absolute in nature and ranks among the highest of protected human rights, this approach requires the exclusion of any evidence obtained by such means. The Court's judgment in *Shaheed* is also notable for its emphasis on the need for any credible judicial system to avoid a situation where it is seen as condoning deliberate or reckless disregard of fundamental rights. The Associations respectfully contend that that is precisely the danger which your Lordships' House would face were it to follow the approach adopted by the majority of the Court of Appeal in the instant case.

United States of America

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Rochin v People of California 342 U.S. 165, 72 S. Ct. 205 (1952)

44. In *Rochin v People of California* the United States Supreme Court held that

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evidence obtained by police officers who had forcibly opened the suspect's mouth and extracted the contents of his stomach was inadmissible notwithstanding its reliable nature. The Court stated the following at page 208:

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*"… **this Court too has its responsibility. Regard for the requirements of the Due Process Clause "inescapably imposes upon this court an exercise of judgment upon the whole course of the proceedings …. in order to ascertain whether they offend those canons of decency and fairness which express the notions of English speaking peoples even towards those charged with the most heinous offences**"*

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And, turning to the facts before it, the Court continued at pages 209 to 210:

*" This is conduct that shocks the conscience . . They are methods too close to the rack and the screw… **Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability**. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. **Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society**."*

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As with the other authorities set out above the Court was expressly citing the need for the Court to protect is own integrity and avoid providing a "*cloak*" for the brutality represented by physical ill-treatment. The Associations submit

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that that need is as applicable where the ill-treatment is at the hands of foreign law enforcement agencies, as it is where it is perpetrated by domestic agencies.

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Jackson v Denno 378 US 368, 84 S. Ct. 1774 (1964)

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45. In *Jackson v Denno*, at pages 1785-1786, the Supreme Court again emphasised the wider public policy issues underpinning the rule relating to involuntary confessions and stated:

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"It is now inescapably clear that ***the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will" …. and because of "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."*** *"*

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Brown v Illinois 422 U.S. 590, 45 L Ed 2d 416 (1975)

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46. In a later case - *Brown v Illinois* - Blackmun J, giving the majority judgment of the Supreme Court, referred to the rationale in the following terms, again placing particular emphasis on the need to protect judicial integrity:

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"*The Court in Wong Sun [371 US 471 (1963)], as is customary, emphasized that* ***application of the exclusionary rule … protected Fourth Amendment guarantees in two respects: "in terms of deterring lawless conduct by federal officers" and "by closing the doors of the federal courts to any use of evidence unconstitutionally obtained". These considerations of deterrence***

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and of judicial integrity, by now, have become rather commonplace in the Court's cases". (pp. 424-425)

In Re Guantanamo Detainees Cases 355 F.Supp.2d 443

47. This case concerned habeas corpus applications brought before the District Court of the District of Columbia by 11 detainees held at Guantanamo Bay, Cuba. The applications were brought following the Supreme Court's decision upholding the jurisdiction of the civilian courts to hear such applications in *Rasul et al v George W. Bush et al* (542 US 124 S Ct; 159 L Ed 2d 548). Citing *Jackson v Denno* the District Court refused to accede to the Government motion to dismiss the applications and, in doing so, drew attention to constitutional due process defects in the Military Combatant Status Review Tribunals established by the United States Government in the wake of the Supreme Court's decision. The Court said the following at pages 472-473:

*"**The Supreme Court has long held that due process prohibits the government's use of involuntary statements obtained through torture or other mistreatment. In the landmark case of <u>Jackson v Denno</u> … the Court gave two rationales for this rule: first, "because of the probable unreliability of confessions that are obtained in a manner deemed coercive" and second "because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will"…** Arguably, the second rationale may not be as relevant to these habeas cases as it is to criminal prosecutions in US Courts, given that the judiciary clearly does not have the supervisory powers over the US military as it does over prosecutors, who are officers of the court… At a minimum however, due process requires a thorough inquiry into the accuracy and reliability of statements alleged to have been obtained through torture".*

Notably the District Court indicated that it was only "*arguable*" that the public policy considerations militating against admission of involuntary confessions were reduced where those responsible for obtaining the same were not subject to the jurisdiction of the Court. Furthermore, although part of the judgment has been redacted on security grounds, at page 473, the District Court appears to have concluded that reliance on evidence alleged to have been obtained under torture "***cannot be viewed to have satisfied the requirements of due process***". The Associations submit that the same approach should apply in the instant case in respect of the Appellant's fair trial rights.

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Zimbabwe

S v Nkomo 1989 3 ZLR (SC) 117

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48. In *S v Nkomo* the Supreme Court of Zimbabwe considered an appeal against conviction in a murder case. Allowing the appeal the Court held that statements or remarks of any nature made by an accused person are inadmissible unless the State proves that they are freely and voluntarily made. The Appellant had alleged that the statements he had made, and the indications he had given on attendance at the crime scene, had resulted from assaults perpetrated on him by police officers. Despite this, the Appellant's statements and indications had been included in the Prosecution case outline without objection from the defence, and no trial within a trial had been held to determine admissibility. Some, but not all, of the officers alleged to have been involved in the assault attended trial to give evidence, (see p. 132). The Court

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held that in these circumstances the Prosecution had failed to prove the voluntariness of the statements relied upon and that the conviction could not stand. McNally JA explained the reasoning for this conclusion as follows:

> "***It does not seem to me that one can condemn torture while making use of the mute confessions resulting from torture, because the effect is to encourage torture.*** *I conclude therefore that s243(2) of the Criminal Procedure and Evidence Act must be interpreted in such a way as to exclude what I would describe as the mute confession element of the pointing out where the allegation of torture in relation to the pointing out is raised and not satisfactorily rebutted.*" (at p. 131).

By emphasising the need for consistency of approach in response to allegations of torture the Associations submit that the Supreme Court of Zimbabwe was, like the other courts referred to above, highlighting the importance of preserving the integrity of the judicial system as part of the rationale for exclusion of the evidence under challenge.

FUNDAMENTAL NATURE OF THE RULE

49. As indicated above, the Associations contend that the exclusionary rule applicable to confessions obtained under torture and, by analogy, to other evidence so obtained is not to be treated simply as a rule of evidence.

50. An argument to this effect in the context of the onus of proof relating to voluntariness of confessions was expressly rejected by the Constitutional Court of South Africa in *S v Zuma and Others* 1995 (4) BCLR 401 (SA). There the Constitutional Court was considering the constitutionality of a

provision of the Criminal Procedure Act creating a rebuttable presumption that a confession made to a magistrate and reduced to writing was voluntary. At page 417D-E the Court referred to the State's suggestion that "*the common law rule placing the onus of proving voluntariness on the prosecution is merely a rule of evidence and can therefore be freely altered by the legislature*" and at page 419B-E rejected the argument with the following words:

> *".. the common law rule in regard to the burden of proving that a confession was voluntary has been not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey's "golden thread" – that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt … Reverse the burden of proof and all these rights are seriously compromised and undermined .. the common law rule on the burden of proof is inherent in the rights specifically mentioned in section 25(2) and (3)(c) and (d) [of the Constitution][18], and forms part of the right to a fair trial… this interpretation promotes the values which underlie an open and democratic society and is entirely consistent with the language of section 25[19]."*

51. The Associations submit that the same approach should be adopted in respect of the exclusionary rule under scrutiny on this Appeal and that the tenor of each of the judgments set out above relating to evidence obtained under torture or coercion indicates that more fundamental principles involving the safeguarding of fundamental rights (and in particular those rights relating to fairness and due process) and the preservation of the integrity of the judicial process are each in play. In these circumstances the Associations submit that if

[18] These are, respectively, the right of an individual to be informed of the right to silence (s. 25(2)(a)) and not to be compelled to make any confession or admission which could be used in evidence against him or her (s. 25(2)(c)), the right of an accused to a fair trial including the right to be presumed innocent and to remain silent and not to testify during trial and the right of an accused to adduce and challenge evidence and not to be a compellable witness against himself or herself (s. 25(3)(c) and (d)).

[19] Section 25 of the South African Constitution relates to the rights of "Detained, arrested, and accused persons" generally.

an exclusionary rule of the kind contended for is established, the SIAC procedural rule permitting reliance on otherwise inadmissible evidence (and set out at paragraph 36 above) does not provide a gateway to permit reliance on evidence obtained by torture.

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BURDEN OF PROOF

52. At paragraphs 513 to 516 of the Court of Appeal's judgment in the instant case, Lord Justice Neuberger concluded that the burden of proving that contested evidence is not caught by any exclusionary rule lay with the Secretary of State. His Lordship identified three reasons for this conclusion, namely:

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"*First, it is the Secretary of State who will be adducing, and seeking to rely on, the statement said to have been obtained by torture. He is more likely to know of the circumstances in which the statement was obtained than is the appellant. Secondly domestic criminal law places the burden of establishing that a confession was voluntary firmly on the prosecution …Thirdly, an appellant on an appeal under s. 25 of the 2001 Act is, as Lord Woolf acknowledged in M v Secretary of State … at a particular disadvantage which, if it cannot be avoided, should be "minimised". In particular it seems quite unfair that the burden should be on an appellant when he will not know the nature of the evidence invoked against him before SIAC*".

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53. Neither Lord Justice Pill nor Lord Justice Laws found it necessary to address the question of the burden of proof – having found against the Appellants on the prior question as to the existence of an exclusionary rule - and the Associations respectfully endorse the approach adopted by Lord Justice Neuberger in this regard. They also submit that his approach is supported by general principle and by the practical effect of the comparative law authorities cited above which touch upon this question, at least once the individual

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challenging the admission of the evidence has raised a serious issue that the evidence may have been obtained by torture.

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General principle

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54. The general English common law rule relating to the burden of proving admissibility is summarised by Phipson on Evidence in the following terms: "*the party who asserts must prove. In a civil case, therefore, where a party seeks to rely upon a particular piece of evidence, and there is a dispute as to admissibility, he has the burden of proving that it is admissible. Similarly in a criminal case.*" (15th Edition at paragraph 4-15).

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55. *R v Yacoob* 1981 72 Cr App R 313 provides one illustration of the application of this principle. The issue in that case was whether it was for the prosecution to prove the competence of prosecution witnesses. Lord Justice Watkins, giving the judgment of the Court, held that this was the case and confirmed the general principle that conditions of admissibility of evidence have to be established by those alleging that they exist. He cited with approval the following passage from Cross on Evidence (5th Ed.):[20]

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"*Decisions as to which party bears the burden of establishing a fact constituting a condition precedent to the admissibility of an item of evidence belong to the law of evidence. However there is very little authority on the subject no doubt because as a matter of common sense the conditions of admissibility have to be established by those alleging that they exist.*" (at p.317).

F

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[20] The same passage appears at p. 202 of the 10th Edition of Cross & Tapper (2004).

Comparative law

Canada

56. As noted at paragraphs 8 to 10 above, in *India v Singh*, in the context of extradition proceedings, the Supreme Court of British Columbia proceeded on the basis that the burden of proving torture so as to require exclusion of evidence rested on the party seeking exclusion of the evidence. As already indicated, however, the point does not appear to have been the subject of argument and Oliver J's judgment is notable for treating the evidential burden as shifting to the State once "*serious and persuasive*" allegations of torture had been made. The Associations also submit that the approach taken by Oliver J in respect of the legal burden of proof should not be followed in the different context with which this Appeal is concerned – namely a process which led directly to what Lord Justice Laws described as "*executive detention* [of the Appellants] *without limit of time*" (paragraph 152) rather than one which could have led merely to their extradition to face a full criminal trial.

France

57. As will be apparent from the passage from the *Irastorza Dorronsoro* case cited at paragraph 19 above, the Cour d'Appel of Pau identified "*serious reasons*" for questioning the circumstances in which the contested statements had been given and ultimately excluded the evidence challenged by Irastorza

Dorronsoro on the basis that it was "*impossible to dismiss the hypothesis pursuant to which the statements were obtained [by torture]*". The Cour d'Appel accordingly proceeded on the basis that the burden of proof rested ultimately on the party seeking to rely upon the contested evidence, at least once a "*serious*" issue had been raised in this regard.[21]

The Netherlands

58. By basing its reasoning in the *Pereira* case (cited at paragraphs 23 to 25 above) on the failure to make out "*plausible*" allegations of torture, the Supreme Court of the Netherlands appears to have only placed a very limited burden on the party seeking exclusion of evidence. What was in practice apparently required was that the allegations had some credibility so as to be plausible at which point the burden of proof would rest on the party seeking to rely upon the evidence to show that no torture had occurred.

South Africa

59. In *S v Zuma and others* (supra) the South African Constitutional Court considered the practical consequences of its decision that the provision of the Criminal Procedure Act under scrutiny was unconstitutional and noted the State's contention that the reverse onus provision had the merit of promoting

[21] The *Haramboure* decision referred to at paragraph 20 above is less clear in this regard. There does not appear to have been any argument as to the burden of proof and the Court's ultimate conclusion appears to have rested on the fact that uncontested evidence was sufficient to support the conviction under challenge. Similarly in the German *El Motassadeq* case addressed at paragraphs 21 and 22 above there was no argument as to the appropriate burden of proof and, subject to the Court's full reasoning, the decision is, in any event, likely to be appealed.

the efficient conduct of criminal trials. This was not accepted as a persuasive factor, the Court stating as follows:

> "*Even if it were the case, and even if it did release police or prosecution from the inconvenience of marshalling and calling their witnesses before the accused gave evidence,* ***I cannot regard those inconveniences as outweighing and justifying the substantial infringement of the important rights which I have identified. The argument from convenience would only have merit in situations where accused persons plainly have more convenient access to proof and where the reversed burden does not create undue hardship or unfairness****" (p. 421 F-H).*

60. Applying this reasoning to the instant Appeal the Associations contend that – as found by Lord Justice Neuberger - the Crown is far more likely to be able to establish whether or not a particular piece of evidence has been obtained as a result of torture or ill treatment than any of the individual Appellants, and in these circumstances there can be nothing inappropriate in placing the burden of proof on the Crown in that regard.

OVERALL SUPPORT FOR THE APPELLANTS' CASE ON THIS APPEAL IN FAVOUR OF AN EXCLUSIONARY RULE AND ALLOCATION OF BURDEN OF PROOF

61. In summary, the Associations' submissions support the Appellants' position for the following reasons:

(a) In those cases where consideration has been given by the Courts of other jurisdictions to the admission of evidence obtained under torture or inhuman or degrading treatment of a third party by a foreign State,

the weight of the authorities is strongly against the admission of such evidence;

(b) The Associations' analysis of comparative law also indicates that the rationale for the general rule relating to the exclusion of involuntary confession evidence obtained under torture or inhuman or degrading treatment is based on a series of principles which would each apply to justify exclusion of evidence obtained by such means in proceedings of the kind to which the Appellants have been subjected, even where the torture or ill-treatment in question is alleged to have been perpetrated by the agents of foreign States and on individuals other than the Appellants;

(c) If an exclusionary rule is held to exist it should be treated as being sufficiently fundamental that it cannot be categorised merely as rule of evidence capable of being ousted by the general words of Rule 44(3) of the SIAC Procedure Rules;

(d) It is a general principle of the law of evidence that a party seeking to rely upon evidence bears the burden of establishing its admissibility. There is no good reason for departing from that principle on the facts

of the present Appeal and the burden of proof should accordingly rest with the Secretary of State.

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