LIBERTY AND JUSTICE IN THE FACE OF TERRORIST THREATS TO SOCIETY

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I. MODERN TERRORISM

A French friend wrote to me:

> I think terrorism already won a battle by reducing our freedom, our easy travelling, our going anywhere we wished to go [as] thirty years ago – not to mention the safety costs wherever we fly that we must bear.

This topic touches the debate whether the dark shadow cast across the world by the events of 11 September 2001 was deepened by the reactions to it, including the events at Guantánamo Bay and so-called "extraordinary rendition".[2]

HE Charles Swindells as United States Ambassador to New Zealand, argued that the response by the United States was inevitable.[3] The power of the President in this sphere derives from his authority as Commander in Chief of the Armed Forces and his responsibility to execute the laws

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1 The original analysis was prepared for an address to alumni at the University of Auckland on 4 March 2006. This version draws on the experience of the United Nations Fourth Regional Workshop for Police Officers, Prosecutors and Judges in South Asia on Effectively Countering Terrorism held in Thimphu, Bhutan 24-26 May 2011.

2 There are also allegations of torture such as those made in *America's Disappeared: Secret Imprisonment, Detainees and the 'War on Terror'* Rachel Meeropol (ed) (Seven Stories Press, New York, 2005). Torture is prohibited by article 7 of the International Covenant on Civil and Political Rights, by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and by international law. As to what torture is and how different states have responded to their obligations under the Torture Convention, see the *Final Report of the Advisory Council of Jurists Asia Pacific Forum of National Human Rights Instruments* "Reference on Torture" (December 2005).

3 "Of course, we will never forget the victims of September the 11th. With those attacks, the terrorists and their supporters, who so despicably distorted the peaceful message of Islam, declared war on the United States and the entire Western world. In retrospect, the tragedy of that day was the culmination of a series of earlier attacks, including the bombing of United States embassies from Beirut to Nairobi, the first bombing of the World Trade Center, and the attack on the USS Cole. Our response to each of these attacks was not sufficient to dissuade the next, and we paid a terrible price.

On September 11, the world changed. For the past 20 months, as President Bush clearly stated:

the war against terror has been proceeding according to a simple set of principles:

> Any person involved in committing or planning terrorist attacks against the American people becomes an enemy of our country, and a target of American justice. Any person, organization, or government that supports, protects, or harbors terrorists is complicit in the murder of the innocent, and equally guilty of terrorist crimes.
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> Any outlaw regime that has ties to terrorist groups and seeks or possesses weapons of mass destruction is a grave danger to the civilized world – and will be confronted."

(Address to Victoria University Diplomats Series, 8 October 2003).

of the nation.[4] The justification claimed for "rendition" is described by Silvia Borelli in an international law study "Enforcing International Law Norms Against Terrorism":[5]

> Extradition treaties and other conventional methods of international co-operation have often proven ineffective in the fight against international terrorism. Thus… in cases where the authorities of the requesting State have reasons to believe that extradition will be refused, States sometimes avail themselves of unorthodox methods to gain custody of fugitives.
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> The US in the past has resorted to forcible abduction abroad in order to gain custody of criminals, including terrorists. In June 1995, President Clinton signed a Presidential Decision Directive on the subject of "US Policy on Counterterrorism", which provided 'If we do not receive adequate cooperation from a state that harbours a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government'.

The opposing argument is stated passionately by Salmon Rushdie. He called "extraordinary rendition" "the ugliest phrase to enter the English language last year".[6] He describes "extraordinary" as an "ordinary enough adjective but its sense is being stretched to include more sinister meanings that your dictionary will not provide: secret… and extrajudicial…" He adds "As for "rendition" you will not find "to kidnap and covertly deliver for interrogation to an undisclosed address in an unspecified country where torture is permitted".

The legal position is stated by Borelli: "From the perspective of inter-State relations, the practice of trans-national abduction represents a clear violation of customary principle of territorial sovereignty."[7]

Nevertheless:[8]

> *In the absence of protest from another State*, once an individual is brought within the jurisdiction, even if he was apprehended by irregular means (including forcible abduction), he may be tried in the apprehended State.

However that doctrine, traditionally expressed in the phrase *male captus bene detentus*:[9]

> has been challenged for two different but inter-related reasons. First, domestic courts are abandoning their attitude of deference towards the actions of the Executive in cases where such action imply a violation of the international obligations of their State… Thus, if a State violates its international obligations, for instance that of respecting the territorial Sovereignty of other States by forcibly abducting a suspected criminal for trial, it is incumbent upon domestic courts to ensure that the violating ceases. Secondly, with the development of international human rights law, the issue of forcible abduction can be framed in ways other than the traditional issue of inter-state responsibility.
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> Forcible abduction is not expressly prohibited by any human rights treaty or customary rule. Nevertheless, the kidnapping of an individual implies *per se* the violation of several fundamental rights protected by international law. For instance, concerns like the preservation of the security of the individual, condemnation of arbitrary arrest and detention, the respect of the right to fair trial may be interpreted to preclude State-sponsored kidnapping. Thus, forcible abduction may constitute human rights violation sub-

4 United States Constitution article II.

5 Silvia Borelli "The Rendition of Terrorist Suspects to the United States" in Andrea Bianchi (ed) *Enforcing International Law Norms Against Terrorism* (Hart Publishing, Oxford, 2004) at 351.

6 *Sydney Morning Herald*, (Australia, 10 January 2006).

7 See Borelli, above n 5, at 352.

8 Ibid, at 353, citing *Attorney-General of the Government of Israel v Eichmann* (District Court of Jerusalem (1961), 33 ILR 5, affirmed Supreme Court of Israel (1962) 36 ILR 277).

9 "Although the seizure was wrongful nevertheless the detention is valid": at 357.

> ject of indication by the victims before the domestic courts of the abducting state, independently from any protest of the territorial state… The Human Rights Committee has held in several decisions that forcible abduction for the purpose of criminal prosecution represents a violation of the individual rights protected by the international covenant in civil and political rights. The Committee has constructed an international prohibition of forcible abduction into the context of human rights protection, framing the issue is one concerning the violation of individual rights and not of inter-state obligations, to the extent that collusion or consent of the State from whose territory the person abducted is irrelevant.

So in *R v Horseferry Road Magistrates Court ex parte Bennett*[10] the applicant for habeas corpus, a New Zealander, succeeded in his claim that his kidnapping from South Africa to face criminal trial in England was unlawful if the police prosecuting or other executive authorities have been a knowing party to the abduction.[11]

The difference of approach between English law, following New Zealand authority, and the practice of rendition is at first sight acute. However should the *Horseferry Road* case, which concerned simple dishonesty over acquiring a helicopter, be applied to an Eichmann?

There is need to stand back.

II. Perspective

The 20th century had accustomed society to the torment of national and international war; human rights abuse within a state had reached its zenith under Mao, Stalin, Hitler, Pol Pot and others. Also terrorism in various forms had existed before the term entered the English language in 1795 with reference to Jacobinism in France. Grave risk is no novelty to New Zealanders. The war generation coped with the invasion threat of 1942 that was averted by the Battle of the Coral Sea and Midway. It was followed by the Cold War and particularly the Cuba/Berlin nuclear crisis, but warfare between states, even on such massive scale, was subject to certain constraints under the dual forces of the international Law of War and the Realpolitik of Mutually Assured Destruction.

Modern terrorism is another thing. First, rather than involving identifiable national blocs, it is largely faceless. Second, the use of modern means of communication including aircraft and the cell phone as actual weapons of destruction, as in New York, Washington, Madrid and London, and the cross-border reach of terrorism as in Bali, has renewed the kind of fears that were thought to have receded in 1989 with the removal of the fear of Soviet intercontinental ballistic missiles. Third, despite rhetoric about "war on terror", the events of 9/11 simply do not fit into either familiar category, of war, traditionally between states; and of crime, that is merely domestic.[12] So it is both understandable and appropriate that governments throughout the world have reacted vehemently to what has rightly been seen as a novel threat requiring novel responses.

However that raises in turn questions of what are the proper limits of response and how are they to be maintained. What are we doing, and should we be doing, in response to one genus of violence, terrorism, in a world where another, torture, has become a regular news feature as has

10 *R v Horseferry Road Magistrates Court ex parte Bennett* [1994] 1 AC 43.

11 Alan Jones and Anand Doobay *On Extradition and Mutual Assistance* (Sweet & Maxwell, Andover, 2005) at 93-101.

12 See Jennifer Elsea "Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions" Congressional Research Service, The Library of Congress, Order Code RL31191 11 December 2001. "Dissuasion Nucléaire: M Chirac Sévèrement Critique en Allemagne".

renewed state interest in the ultimate form of violence, nuclear weapons?[13] What is happening to the rule of law?

III. Principle

It is as well to start with principle. David Hume stated:[14]

> In all governments, there is a perpetual intestine struggle, open or secret, between Authority and Liberty; and neither of them can ever absolutely prevail in the contest. A great sacrifice of liberty must necessarily be made in every government; yet even the authority, which confines liberty, can never, and perhaps ought never, in any constitution, to become quite entire and uncontroulable [sic].

Professor Taggart's *Province of Administrative Law*[15] confirms that "…the state's night-watchman functions – *war* and the *administration of justice* – [remain] primary and essential…"

Whatever the reason, people behave badly; we can no more do without protections against terrorism than dispense with our army, our police, our insurance policy and the lock on our front door. However, how to reconcile the state function of responding to terrorism with the public interest in liberty presents formidable challenges.

IV. Some Examples

A. *England*

It is illuminating, and troubling, to observe what is happening in the states with which we identify most closely. I begin with England, via a brief deviation to Switzerland.

In an address at another University in May 2003, I mentioned a holograph manuscript which an old Swiss friend had lent to me of the laws of the Swiss canton of Valais from 1597 to 1773. At an early point under "Article 2 – of the duty of judges" it states:

> 7 A judge who is minded to employ torture must examine seriously the physical strength or weakness of the offender and therefore make use of more or less powerful torture in proportion to the needs of the occasion and in conformity with the law and the opinions of academic writers.

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13 Jacques Chirac "Proteger Nos Intérêts Vitaux" *Le Monde* (France, 20 Janvier 2006) at 20. For international criticism see: "Dissuasion Nucléaire: M Chirac Sévèrement Critique en Allemagne" *Le Monde* (France 21 Janvier 2006) at 10.

14 Steven M Cahn (ed) "Of the Origin of Government' (1777) in *Classics of Modern Political Theory* (Oxford University Press, Oxford, 1997) at 517. John Stuart Mill added, following Toqueville in "Democracy in America":

> The "people" who exercise the power are not always the same people with those over whom it is exercised; and the "self-government" spoken of is not the government of each by himself, but of each by all the rest. The will of the people, moreover, practically means the will of the most numerous or the most active *part* of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently *may* desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power. The limitation, therefore, of the power of government over individual loses none of its importance when the holders of power are regularly accountable to the community, that is, to the strongest party therein. This view of things, recommending itself equally to the intelligence of thinkers and to the inclination of those important classes in European society to whose real or supposed interests democracy is adverse, has had no difficulty in establishing itself; and in political speculations "the tyranny of the majority" is now generally included among the evils against which society requires to be on its guard.

Mary Warnock (ed) *Utilitarianism and On Liberty* (Blackwell Publishing, Oxford, 2008).

15 John Allison *Theoretical and Institutional Underpinnings of a Separate Administrative Law* (Hart Publishing, Oxford, 1997) at 80.

My reference was directed to the fact, which seemed odd, that the common law of England and New Zealand had only just begun to use the concept of proportionality in a systematic way. It did not occur to me that fifteen months later judges in the very home of constitutionalism would be endorsing not the use of proportionality but the admission of evidence obtained by torture. Yet such was the decision of two greatly respected members of the Court of Appeal of England in *A v Home Secretary*.[16] That this should be permitted, for the first time since the abolition of Star Chamber in 1640, is the starkest evidence of the effects of 9/11.

B. The United States of America

It was of course the United States navy and naval aviators who fought and won the Battle of the Coral Sea and Midway. New Zealanders remain grateful and retain close bonds of friendship; such jurists as Benjamin Cardozo and Ruth Bader Ginsburg are among those most admired in this country as setting the standards for the rule of law. Yet in the United States we have the evidence of Guantánamo Bay, termed by a former Lord Chief Justice in a judgment a legal "black hole" in which the applicant was arbitrarily detained;[17] of abuse of detainees; and of the claims of "rendition". In his "*Chain of Command*",[18] the Pulitzer Prize-winning journalist Seymour Hersh correctly wrote:

> International law prohibits the rendition, or forced return of any person, no matter what his status or suspected crime, to a foreign locale where he would be at risk of torture or mistreatment.

He reported that:[19]

> On December 18, 2001, American operatives participated in what amounted to the kidnapping of two Egyptians, Ahmed Agiza and Muhammed al-Zery, who had sought asylum in Sweden. The Egyptians, believed by American intelligence to be linked to Islamic militant groups, were abruptly seized in the late afternoon and flown out of Sweden a few hours later on a US government –leased Gulfstream private jet to Cairo, where they underwent extensive, and brutal, interrogation…
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> Once in Egypt, Agiza and Zery have reported through Swedish diplomats, family members and attorneys, they were subjected to repeated torture by electrical shocks distributed to electrodes that were attached to the most sensitive parts of their bodies.

There have since been many similar allegations of "rendition" for such purposes.[20]

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16 *A v Home Secretary* [2005] 1 Wai L Rev at 414.

17 *R (ex parte Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ1598 6 November 2002 at [64]. On 16 February 2006 Collins J gave leave for three British residents to seek a court order requiring the Home Secretary to petition for their release. He observed that the United States' idea of what constitutes torture "is not the same as ours and doesn't appear to coincide with that of most civilised countries": *Weekend Herald* (New Zealand, 18 February 2006) at B9.

18 Seymour Hersh *Chain of Command* (HarperCollins, New York, 2005) at 55.

19 Ibid, at 53-4.

20 "La Suisse Aurait la Preuve de Prisons de la CIA en Roumanie" *Le Monde* (France, 10 Janvier 2006) at 5; "CIA Le Scandale qui Embarras l'Europe; de Prisons Poloniases Vraiment Trés Discrètes" Polityka (Varsovie) *Courier International* (France, 15-21 December 2005) at 16; "Que Savait-on Vraiment à Berlin?" *Die Zeit* (Hambourg), ibid, at 7.

C. Australia

Even in our closest friend Australia, with which we literally share certain parts of our legal system,[21] there is some evidence of departure from normal standards. In *Al-Kated v Godwin*[22] the appellant, a stateless person, had arrived in Australia without a visa. He was taken into immigration detention and applied for a visa. His application failed. He wrote to the Minister asking to be removed. Removal did not take place, not through any fault of his or of the Australian authorities, but because necessary international co-operation could not be obtained. The High Court held, over the dissent of three of the four senior members including the Chief Justice, that the Migration Act 1958 authorises and requires the indefinite detention of a non-citizen even if his request that he be removed from the country cannot be given effect in the foreseeable future. There was no suggestion that if given bail pending removal he would commit any criminal offence. So whereas an actual offender would have the assurance of release after a finite sentence, for such non-offenders the law in Australia at the moment is simply "no bail; stay in prison indefinitely".[23]

D. Countervailing Trends

As will appear, there are countervailing trends. In England the House of Lords has responded to the torture issue. The United States Supreme Court has already overruled decisions of lower courts that they lacked jurisdiction to review events at Guantánamo Bay.[24] In the original presentation of this paper I expressed confidence that the Court that decided *Marbury v Madison*,[25] striking down even statutes that infringe the United States Constitution, would endorse the simple precept now adopted by the common law that, wherever executive authority is exercised, even the formerly unassailable Royal prerogatives, there the writ of the courts will run to review its legality.[26] I do not doubt that in Australia in light of the English and New Zealand jurisprudence, to which I will refer, the minority judgments of the High Court will ultimately prevail.

V. "The World Turned Upside Down"

So the question must be asked: are things so bad that we can no longer afford to maintain the basic decencies that we have treated as the mark of our very civilisation? There is certainly deep cause for concern. In a review cited on the cover of Philip Bobbit's *The Shield of Achilles*[27] Lord Patten states that "We are all about to have our view of the world turned upside down by this book". Bobbit's thesis is that:

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21 See (New Zealand) Commerce Act 1986 and (Australia Federal) Trade Practices Act 1974 giving the courts of each state jurisdiction over cases in the other. It is hoped and expected that stage II Closer Economic Relations will further extend mutual co-operation.

22 *Al-Kated v Godwin* (2004) 219 CLR 562.

23 Compare *Chief Executive of the Department of Labour v Yadegary* [2008] NZCA 295.

24 *Boumediene v Bush* 553 US 723 (2008).

25 *Marbury v Madison* (1803) 5 US 137.

26 See Philip Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, ThomsonReuters, Wellington, 2001) at 17.6.2. Cf the European concept of *espace juridique* discussed by Philip Leach in "The British Military in Iraq – the Applicability of the *Espace Juridique* Doctrine under the European Conventions on Human Rights" [2005] Public Law 448.

27 Philip Bobbit *The Shield of Archilles: War, Peace, and the Course of History* (Alfred A Knopf, New York, 2002).

> We are entering a period… when very small numbers of persons, operating with the enormous power of modern computers, biogenics, air transport, and even small nuclear weapons, can deal lethal blows to any society. Because the origin of these attacks can be effectively disguised, the fundamental bases of the State will change… today a question confronts the constitutional order. It is whether and how states can continue to exist with ever more ubiquitous and powerful technologies that can alter or destroy our entire environment. These technologies include weapons of mass destruction and biogenic and cybernetic techniques. The legal institutions of the triumphant parliamentary states [he is referring to what he calls "the long war" from 1914 to the fall of the Berlin wall in 1990] are committed to the protection of individual rights and civil liberties. To protect these institutions in the face of these new challenges will require a strategic ingenuity that would tax the gifts of the historic innovators [ever since Thycidides].

It is of interest to see what has happened at home.

VI. New Zealand's Terrorism Law and Policy

A. Detention and Bail

Just ten days after the events of 11 September the New Zealand Immigration Service introduced a policy following which, as Glazebrook J observed in her judgment in the Court of Appeal in the *Refugee Council*[28] case, the rate of detention of refugee status claimants was increased from five per cent to 94 per cent. Although terrorist suspects have always had the right under the Immigration Act 1987 to apply for bail,[29] it was held that there is no jurisdiction to grant bail in such cases to refugee status claimants,[30] but on 17 June 2002 Parliament made explicit the right of a refugee status applicant to apply for bail.[31]

The final development on the bail front was *Zaoui v Attorney-General*.[32] The Supreme Court rejected the Crown's submission that there is no right to apply for bail in cases under Part 4A of the Immigration Act which concerns "special procedures in cases involving security concerns" and granted Mr Zaoui bail.

B. Deportation and Other Measures to Deal with Terrorism

Sections 72 and 73 of the Immigration Act empower the Minister to certify that the continued presence in New Zealand of any named person constitutes a threat to national security and to order the deportation from New Zealand of suspected terrorists.

The Part 4A provisions which have affected Mr Zaoui were enacted in 1999. They provide for the issue by the New Zealand Security Intelligence Service of a certificate that a person is a security risk or a threat to national security and for review of such certificate by the Inspector-General, who must be a retired High Court judge. The Court of Appeal held that despite an ouster clause

28 *Attorney-General v Refugee Council of New Zealand* [2003] 2 NZLR 577 at 655.

29 Immigration Act 1987, s 79(2)(b)(ii).

30 As Judge of first instance in the *Refugee Council* case [2002] NZAR 717 at 769, convention prevents me from commenting on my decisions and on the judgment of a plurality of the Court of Appeal that I had been wrong to hold inter alia that refugee status claimants were entitled to apply for bail.

31 Immigration Amendment Act 2002, s 9.

32 *Zaoui v Attorney-General* [2005] 1 NZLR 577.

there is a right of judicial review of the preliminary decision of the Inspector-General.[33] That decision has been substantially upheld by the Supreme Court.[34]

On 17 June 2002 Parliament further strengthened the power of the New Zealand authorities to deal effectively with crimes with transnational aspects.[35]

Soon afterwards it enacted the Terrorism Suppression Act 2002 which empowered the Prime Minister to designate a person or organisation as a terrorist entity and creating an offence punishable by 14 years imprisonment for participating in such group. Importantly, the statute as enacted maintained the jurisdiction of the High Court to subject any such designation to judicial review.

In the light of what has happened elsewhere it is notable that a clause in the Bill as introduced into the House[36] would have excluded judicial review. However it was sensibly recognised that the judicial power of review of executive authority is essential, notwithstanding the sensitivity of the subject-matter, and when the Foreign Affairs, Defence and Trade Select Committee reported back on 27 May 2002, that clause was removed.[37] It is comforting, having learned of the difficulties in other jurisdictions,[38] to discern what balanced and proportionate decisions have been reached by the New Zealand Parliament after fervent and sometimes heated debate of these acutely difficult and important issues.

VII. ENGLAND

In England too, a proportionate approach has been taken by its highest court. In an earlier phase of *A's* case, *A v Secretary of State for the Home Department*[39] which did not involve torture, the Home Secretary had issued certificates that the nine appellants, all non-British nationals, were suspected of being terrorists. Although a similar number of British nationals presented similar risks, none had been detained. Two of the appellants elected to leave the country; one was transferred to Broadmoor Hospital as mentally ill; one was released on strict bail conditions; another's certificate was revoked. None had been criminally charged nor was any criminal trial in prospect. All challenged the lawfulness of their detention.

The House of Lords held that the choice of an immigration measure to address the security problem the United Kingdom faced was unlawful. Since other measures were regarded as sufficient to deal with the activities of British nationals it was hard to see why a similar regime should not suffice for non-nationals so that they had to be detained, and the fact that two detainees had secured release by leaving for another country was hard to reconcile with a belief in their capacity to inflict serious injury to the people and interests of the United Kingdom. There was no authority

33 *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690.

34 *Attorney-General v Zaoui* [2005] NZSC 38.

35 Crimes Amendment Act 2002; Extradition Amendment Act 2002.

36 Terrorism (Bombing and Financing) Bill 2002, clause 17O.

37 By clause 17LA.

38 For comment on events in England see André le Sueur "Three Strikes and It's Out? The UK Government's Strategy to Oust Judicial Review From Immigration and Asylum Decision-Making" [2004] Public Law 225. Following heavy debate in the Commons and a critical report by the Joint Committee on Human Rights of the House of Lords and the House of Commons s 103A of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 now admits a single claim judicial review to be made within narrow time constraints but with judicial power to extend time where an application "could not reasonably practicably" have been made within time.

39 *A v Secretary of State for the Home Department* [2005] 2 AC 68. It is admirably discussed by Lady Justice Arden "Human Rights in the Age of Terrorism" (2006) 121 LQR 604.

to support the proposition that, in times of emergency, a state may lawfully discriminate against foreign nationals by detaining them, yet not detaining those of its own nationals who posed the same threat.[40]

Of the greatest importance, in *A v Home Secretary (No 2)*[41] on appeal from the Court of Appeal's torture decision, a nine-member bench of the House of Lords reversed the Court of Appeal's judgment. In the wake of the latest London bombings, in a memorable decision, the Law Lords reasserted the rule stated by Sir John Fortescue in the 1460s, affirmed by Sir Edward Coke in 1644 and admired by Voltaire in 1766 – that evidence obtained by torture will not be admitted in an English court.

VIII. Where Should New Zealand Head?

It is not however enough simply to leave it at that. We now have our own final court; it is for New Zealanders to decide what our policy will be, and while ultimate policy-making is a matter for Parliament, it is entitled to the views of others in the community.

No context provides a greater challenge than this. It takes each of us well beyond our comfort zone because it transcends any individual competence, but it is too critical to be ignored as just too hard. My present views result from reading and talking with friends and colleagues in New Zealand and Europe and reflecting on what the law and lawyers can contribute, including identification of one's own prejudices and the assessment of evidence. They are inevitably partial and provisional. My attempt to respond to the invitation to address this topic should be seen simply as a sprat, whose function is to be attacked and demolished by larger fish. I am cheered by the prospect of their being devoured in turn by still larger fish higher up the food chain.

IX. My Thesis is Four-Fold

A. The Problem Cannot be Left to Governments Alone

While the role of State governments is vital, the responses cannot simply be left to them. There is also needed the informed and active contribution of the wider community, both internationally and locally, organisationally and individually. Among the leaders must be the intellectuals who work in, or are graduates of, its universities.[42] The newly established Oxford Internet Institute has argued[43] that the Internet contains means of renewing the democratic ideal, whose different forms

40 The decision was discussed by Justice Ginsburg in [2005] CLJ 575 at 584.

41 *A v Home Secretary (No 2)* [2006] 2 AC 221.

42 Fifteen years ago the statute law of New Zealand was changed to provide:

(1) that academic freedom and the autonomy of universities are to be preserved and enhanced;

(2) that academic freedom includes the freedom of academic staff and students, within the law, to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions;

(3) that universities are primarily concerned with more advanced learning, the principal aim being to develop intellectual independence;

(4) they accept a role as critic and conscience of society.

Those responsibilities must apply equally to the alumni who have added worldly experience to the privilege of university training.

43 OII Forum Discussion Paper No 4 "A New Agenda for Democracy" (January 2005).

seen in Switzerland's referenda and current proposals for systematic education[44] and communication with the community can enrich the systems we have inherited from an earlier age.[45] As world citizens New Zealanders are as much concerned with securing the right answers as anyone else[46] and are as well positioned to do so, but we need to create means to engage.

B. There is a Need to Demystify "Terrorism"

"Terrorism" is only too real, but it needs to be demystified by being stripped of its status as an unspecific sinister abstraction. Instead its particular manifestations must be examined closely so that both its actual components and their causes can be identified.

C. Need to Identify and Deal with the People

The next point is to identify effectively the humans whose conduct constitutes the acts of terrorism. It is of course necessary to provide against those whom I will call "Category B": the bombers, as in other disaster scenarios, the managers of out of control nuclear reactors and the flight crew in an aviation disaster, who, like the mules who import drugs appear to carry immediate responsibility. Certainly the law must respond effectively to them. The British, for instance, have sought to deal with them by what are called "control orders" made under the Prevention of Terrorism Act 2005, which empowers the imposition of stringent conditions analogous to strict terms of bail. However much more important are those others "Category A", who are responsible for the policy (or lack of it) that has caused or simply permitted the conduct of their Category B subordinates. So long as they are effective there will be a continuing supply of Category B personnel. Modern thinking on disaster avoidance, such as the work by the Nobel physicist Georges Charpak and others in *De Chernobyl en Chernobyls*,[47] points to the need to get to the ultimate controlling minds. How can they be changed?

D. History Shows General Ability for Redemption

The answer to that can be found in the history of violence across the continuum from full scale war down to current youth offending. It is reflected in the Oxford Dictionary's entries for "terrorism". Beginning with France in 1795, the terrorist activities included occurrences in Ireland in 1861 and 1958, Algeria in 1963 and South Africa in 1973. Each gives pause for thought. The social reasons for the French Revolution[48] are well known and led to, even if they did not justify, the Terror;

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44 OII Forum Discussion Paper No 2 "Innovative pathways to the next level of e-learning"; OII Research Report No 2 "Towards institutional infrastructures for e-science"; OII Research Report No 4 "Towards a cyberintrastructure for enhanced scientific collaboration: providing 'soft' foundations may be the hardest part".

45 Consider the proposal of the English aviator and writer Derek Dempster, brought up in the international city of Tangier in Morocco, who drew on his experience with Moorish, Dutch, French, Spanish and American classmates who were Catholic, Protestant, Jewish, Muslim and Orthodox among others for an imaginative proposal to internationalise the land containing the most holy shrines of Israel, Christendom and Islam – the Wailing Wall, the Church of the Nativity, the Dome of the Rock and Al Aqsa mosque "Is the world's end nigh?" 5 August 2002.

46 During World War II "[p]roportionately, New Zealand's losses were significantly more than those suffered by the United Kingdom and twice those of Australia": John Crawford (ed) *Kia Kaha: New Zealand in the Second World War* (Oxford University Press, New York, 2002) at 3.

47 George Charpak and others from *Chernobyl to Chernoblys* (Odile, Jacobs, Paris, 2005). More accessible is Victor Bignell and Joyce Fortune *Understanding Systems Failures* (Manchester University Press, Manchester, 1984).

48 Adolph Thiers *Révolution Française* (Bureau de Publications Illustrées, Paris, 1839).

Pitt[49] and Gladstone[50] understood the need to stop the abuse of the Irish that led to the excesses of the Irish Republican Army; the French are currently repenting of the abuses in Algeria;[51] and Mandela's reasons for joining the leadership of the African National Congress are now tolerably understood. Incentives to violence disappear only when the fundamental value of human dignity is accorded to the enemy, as at the Treaty of Westphalia of 1648 which recognised both the nation state and the right of religious freedom[52] and in the case of Te Kooti;[53] as in Malaya during the period of confrontation;[54] as in Northern Ireland when after some 300 years of angst the British finally changed their policy so as to see hearts and minds as their true target; as, I am told, in parts of Iraq where troops who had served in Northern Ireland brought that experience to bear.

I share the opinion memorably expressed by Archbishop Tutu:[55] that while there may be some in the world who are irredeemably bad, they are a tiny minority.[56] Like the domestic criminal law, our institutions dealing with terrorism should be aimed predominantly at prevention and rehabilitation rather than punishment; undue punishment tends to intensify the problem it seeks to prevent. As the Constitutional Court of South Africa showed in the death penalty case,[57] mere force or threat of force is not sufficient by itself to prevent violence.[58] It must never be forgotten that respect for others' dignity is fundamental to all forms of human relations – from those between parent and child to those of states over nuclear ambition.

In criminal sentencing following any crime of violence there is an understandable desire and, to a degree, justifiable need for punishment. Although judicial experience teaches that to oversentence a violent offender may place at risk further victims because a disproportionate sentence is unfair and will breed resentment and brutality. Where the law is reasonably seen as unjust respect for the rule of law is destroyed.

X. The Responses

Since metaphors can distract attention from reality, rather than referring to "the war on terror" I prefer to speak of the dual policy of defending against aggression and improving relations. Each is essential.

Mutuality of respect must, in my view, be the primary goal to be sought, even though there may, en route to it, be need for subsidiary, and vital, interim goals including self-defence and (within limits that this is not the occasion to discuss) defence of others. That may sometimes re-

49 William Hague *William Pitt the Younger* (Harper Perennial, London, 2005).

50 Roy Jenkins *Gladstone* (Papermac, Basingstoke, 1995) at 276, 279-284, 347, 393, 443-4, 536-8 and 565.

51 The 2006 Paris riots, like the London bombings, appear closely associated with failure of those societies to fully embrace their immigrants.

52 Norman Davies *A History of Europe* (Oxford University Press, New York, 1996) at 565.

53 Judith Binney *Redemption Songs* (Auckland University Press/Bridget Williams Books, Auckland, 1995).

54 Scilla Elworthy and Gabrielle Rifkind *Making Terrorism History* (Rider, London, 2006).

55 "Pour une Justice Réparatrice et Guérissueuse" *Le Monde* (France, 23 Janvier 2006) at 16.

56 See Baragwanath "Ngati Kia Puawai" (Address to New Zealand Police Management Development Conference Nelson, 8-10 November 2005)" and the account of a celebrated reformed bank robber in "Bernard Stiegler un Philosophe Interactif" *Le Monde* (France, 4 Janvier 2006) at 17.

57 *State v Makwanyane* [1995] 1 LRC 269.

58 The argument is powerfully developed by in the context of United States military power in Stephen Walt "Nous Dévrons ce que la Puissance Américaine Peut et Ne Peut Par Faire" *Le Monde* (France, 22-3 Janvier 2006) at 13.

quire powerful responses to threats, but excessive zeal for the subsidiary can be inconsistent with and so risk endangering the primary goal.

Certainly there is need for careful preparation of defences. In a formidable Research Paper "Terrorism and the Law in Australia: Legislation, Commentary and Constraints"[59] prepared for the Australian Parliament, Nathan Hancock identifies the phenomenon of terrorism, so unfamiliar in Australia until Bali and the immediate response required: to work (as New Zealand has done) with other United Nations members to create a seamless international network of laws dealing with surveillance and intelligence, prevention of means of offending (including the formation and activities of criminal groups, controlling migration, dealing with laundered money) by suitable laws, institutions and methods including international co-operation.

Yet there are necessary limits to what civilised communities may sensibly and responsibly do. There is force in Paul Buchanan's argument that terrorism should be dealt with under the ordinary laws of the land,[60] provided one adds "as far as reasonably practicable". An astute submission on the Anti-Terrorism Bill (No 2) 2005 signed by Professor George Williams, Dr Andrew Lynch and Dr Ben Saul of the Faculty of Law at the University of New South Wales on 10 November 2005 argued:[61]

> Individuals should not be detained beyond an initial short period except as a result of a finding of guilt by a [court] or as part of the judicial process (such as being held in custody pending a bail hearing). Detention is only justifiable as part of a fair and independent judicial process resulting from allegations of criminal conduct or where it serves a legitimate protective function and existing powers are insufficient.

Political realities must be faced. As with criminal sentencing, so in the present sphere with a triennial election cycle a long view is impossible for elected representatives unless it is actively and publicly supported by others with the privilege of education (which may come in many forms) and experience.

That includes the media who face their own challenge of balancing the competing human propensities – for delight in scandal and sensation, yet endorsing what is good and right.[62]

Public perception is of great importance. The reasons for Mandela's changed reputation, from terrorist to virtual saint, are not that he changed but that society and others' perception did. For similar reasons the Māori Wars have become the Land Wars. In some cases there has been both need for and actuality of change – usually on both sides; the Irish Republic Army is perhaps a case in point. Like delinquent children and, for that matter, the rest of us, those who do, or come to, feel themselves to be respected behave respectably.

In his *A Brief History of Neoliberalism*[63] David Harvey presented the challenge of filling the moral void left by the selfish excesses of the post-Reagan political philosophy. The urgency of

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59 Nathan Hancock "Terrorism and the Law in Australia: Legislation, Commentary and Constraints" (paper prepared for Australian Parliament, March 2002).

60 Paul Buchanan "Law Change a Recipe for Abuse of Power" *New Zealand Herald* (New Zealand, 18 November 2005).

61 "News" (2005) University of New Sought Wales Faculty of Law Gilbert + Tobin Centre of Public Law <http://www.gtcentre.unsw.edu.au/news/docs/submission_AntiTerrorismBill.pdf> at 15.

62 A related tension was noted by Mill: "…we compare the strange respect of mankind for liberty, with their strange want of respect for it…" "On Liberty" (fn 1) at 242.

63 David Harvey *A Brief History of Neoliberalism* (Oxford University Press, New York, 2005).

the need has been learned by leading American academics, including the Dean of the Yale Law School,[64] but is largely ignored.

We have been this way before. Adam Smith's lucid and compelling *Wealth of Nations*[65] has been the intellectual force behind virtually the entire theory and practice of market politics, but too many of his economic disciples have overlooked both its context[66] and thus the theme of his *The Theory of Moral Sentiments*[67] which is needed to balance it. There he wrote: [68]

> Th[e] disposition to admire, and almost to worship, the rich and the powerful, and to despise, or at least, to neglect persons of poor and mean condition… is… the great and most universal cause of the corruption of society.

Sometimes an institution can properly intervene. In *R (Limbuela) v Secretary of State for the Home Department*[69] the House of Lords, yet again, intervened to impose minimum standards of decency in the treatment of persons in the United Kingdom. They held in that case that executive policies of refusing work permits, food and accommodation to asylum seekers whose application was made late infringed Article 3 of the European Convention on Human Rights. Requiring them to live rough and to beg constituted treatment that was in law "inhuman and degrading". Lord Bingham cited Shakespeare's *Sir Thomas More*: "your mountainous inhumanity". Relief was granted.

That Court appreciated that society must care for its disadvantaged, even those who are only temporary visitors. The response of the asylum seekers and their compatriots to the sensitivity of the highest Court can be imagined.

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64 See Anthony Kronman "The Value of Moral Philosophy" (1997) 111 Harvard Law Review 1751 and Nussbaum "Flawed Findings: the Philosophical Critique" (1997) 64 Chicago Law Review 1197.

65 Edwin Cannan (ed) Adam Smith *An Inquiry into the Nature and Cause of the Wealth of Nations* (University of Chicago Press, Chicago, 1976).

66 See Adam Nicholson *Men of Honour: Trafalgar and the Making of the English Hero* (Harper Collins, New York, 2005) at 250-251:

> The 18th Century in England saw man's existence as essentially social…As William Hutton, the free commercial thinker and bookseller in Birmingham, wrote in 1781:
>
> > For the intercourse occasioned by traffic gives a man a view of the world and of himself; removed the narrow limits that confine his judgment; removes his prejudices; and polishes his manners. Civility and humanity are ever the companions of trade; the man of trade is a man of liberal sentiment; a barbarous and commercial people is a contradiction.
> >
> > These are, of course, the ideas on which Adam Smith drew. Sociability, never more than when in the service of commerce, was goodness. Virtue was no lonely thing, as it had been for the puritan. It was a full and generous humanity, an acceptance of the human reality of other people and a duty of benevolence among men.

67 DD Rahael and AL Macfie (eds) Adam Smith *The Theory of Moral Sentiments* (Indianapolis, United States, 1984).

68 At 72, he continued:

> That utility is one of the principal sources of beauty has been observed by every body, who has considered with any attention what constitutes the nature of beauty…(p209).
>
> Nothing could have greater utility, and therefore beauty, than Smith's theory of the market, but he went on to add:
>
> > But that this fitness, this happy contrivance of any production of art, should be more valued, than the very end for which it was intended; and that the very end for which it was intended;
> >
> > > (at 210)…has not, so far as I know, been taken notice of by any body…wealth and greatness are mere trinkets of frivolous utility, no more adapted for procuring ease of body and of mind than the tweezer-cases of the lover of toys (at 212).

69 *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL66; [2006] 1 AC 396.

The need for those within the New Zealand legal system to strive to increase public confidence in it is painfully clear from statistics produced by Sir Thomas Thorp in a recent paper,[70] showing that Māori and Pacific Islanders are disproportionately reluctant to seek redress for miscarriage of justice.

There are however obvious limits on what we are able to achieve. They are seen in one tragic case where the plaintiff, healthy in England where AIDS drugs were available, was removed to an African state where they were not and where she would die within months[71] and in another refugee test case about minimum standards of living.[72] Each shows the impossibility of imposing, by judicial usurpation of executive responsibility for immigration policy, the lifting of foreign standards to meet our own. However just because we cannot do everything affords no excuse for doing nothing.

All of us, politicians, public servants, academics, members of the business community, even lawyers and judges, can contribute to the process of doing what we can. In earlier addresses I have proposed initiatives in relation to education of the disadvantaged[73] and in respect of so-called "Māori crime".[74] In each instance where the underlying causes have been identified and responded to with imagination and persistence there has been evidence of remarkable transformation. It is to be hoped that similar transformations may eventuate in relation to terrorism.

Sir John Keegan has written authoritatively on what is a vital element of any war. In *Intelligence in War…from Napoleon to Al Qaeda* he states: "[t]he challenge to the West's intelligence services is to find a way into the fundamentalist mind and to overcome it from within." [75]

While it would be naïve to suggest any single or simple answer to the turmoil in Iraq, part of the answer may be provided by Bernard Lewis (whom the Wall Street Journal calls "the world's foremost Islamic scholar"). He has written that: "…the Islamic dispensation does indeed bring a message of equality. Not only does Islam not endorse…systems of social differentiation; it explicitly and resolutely rejects them."[76]

He also speaks of how: "…new ideas of freedom and participation, inspired by English practice and French theory, gradually found their way into the Middle East."[77] He adds that:

> …at the beginning of the Nineteenth Century a poor man of humble origin had a better chance of attaining to wealth, power and dignity in the Islamic lands than in any of the states of Christian Europe.

The rise of systemic selfishness in the West has tended to swing the pendulum back in that direction. With her insight as the first female Law Lord, Baroness Hale, has emphasised:[78]

> Democracy is founded on the principle that each individual has equal value. Treating some as automatically less valuable than others not only causes them pain and distress but also violates their dignity as human beings.

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70 Sir Thomas Thorp "Miscarriages of Justice" (Legal Research Foundation, 2006).

71 *N v Secretary of State for the Home Department* [2005] 2 AC 296.

72 *Januzi v Secretary of State for the Home Department* [2006] UKHL 5 15 February 2006.

73 David Baragwanath "The Right to Education: Guarding the Guardians" (ANZELA Annual Conference "Innovation and Internationalisation: Pushing the Boundaries of Education Law", Wellington, New Zealand, 23 September 2004).

74 Baragwanath "Overview: the Treaty and the Police", above n 56.

75 Sir John Keegan *Intelligence in War…from Napoleon to Al Qaeda* (Key Porter Books, New York, 2003) at 365.

76 Bernard Lewis *What Went Wrong? Western Impact and Middle Eastern Response* (Oxford University Press, Phoenix, 2002) at 91.

77 Ibid, at 62.

78 Baroness Hale "The Quest for Equal Treatment" [2005] Public Law 571 at 578.

I believe that something of what was said in an address to the police may be pertinent:[79]

> A recently republished essay – 'Ignoring poverty as an art form'[80] – records the wilful refusal of Western communities to face the reality of different forms of poverty and its consequences…
>
> This is a theme that in today's forms of neo-liberal laissez-faire we ignore at our peril. It is often assumed that the welfare state has removed poverty. But that is to ignore the many forms it can take.

My personal view is that, unless we weaken it by causing or acquiescing in conduct inconsistent with its basic tenets, the true strength of democracy, being the people who compose the democratic state, will carry us and others through this present difficult phase. It is after all because of the basic decency of the American people and their legal system, which includes the Freedom of Information Act and a careful balance of powers, that we are able to learn about the renditions and other conduct performed in their name.

However, the plight of the poor of New Orleans reminds us of the warning of Toqueville[81] after his 1830s visit to that great country, in the phrase echoed by Hume, about the tyranny of the majority, of which hardwired selfishness may be seen as a current symptom. The parable of Nelson Mandela is surely that our failure to discern others' sensibilities and respond to their needs is an outstanding factor contributing to the existence and development of terrorism.

In his "An Intimate History of Humanity"[82] Theodore Zeldin of St Anthony's College, Oxford, writes:[83]

> One of the most important promises of democracy is that it will provide respect for everybody…[But] democracies have still not found a way to eliminate the gradations of disrespect caused by money, education and appearance.
>
> So it was to religion that individuals most frequently turned in search of the respect they yearned for. All the world's great churches agreed that every human being, however humble, had a spiritual dignity. The exactions of rules, the insults of employers and the humiliations of daily life seemed less intolerable when they touched the outer self, leaving intact the consolations of inner convictions. And when religion did not suffice, other creeds, like stoicism, socialism, liberalism and feminism, reinforced the defences of human dignity. The major changes in history have resulted less from revolutions displacing kings, than from individuals ignoring kings and giving their allegiance to spiritual values instead. That is still happening. The prophesy that the twenty-first century will be a religious one…does not mean that politicians are replaced by priests, but that people switch off from the mundane pressures which they cannot control. Instead they turn their energy to their private lives: sometimes that leads them to be selfish, but sometimes they react to the animosities of the big world by seeking more nurture, more generosity, more mutual respect.

Zeldin refers to fundamentalism in the West; the resolution of Pennsylvania School Board about how schools should teach Darwin's theory of evolution, discussed by Judge Jones in *Kitzmiller v Dover Area School*,[84] provides an example.

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79 Baragwanath, above n 56.

80 John Kenneth Galbraith "L'Art d'Ignorer les Pauvres" (2005) Le Monde Diplomatique October at 6. The technique goes back to Roman times and in Victorian era became an art form which we have relearned.

81 Alexandre de Tocqueville *Democracy in America* (Everyman Library, 1835) at 259.

82 Theodore Zeldin *An Intimate History of Humani*ty (Harper Collins, New York, 1994). See also Samuel Huntingdon *The Clash of Civilisations and the Remaking of World Order* (Simon & Schuster, New York, 1996).

83 Ibid, at 142.

84 *Kitzmiller v Dover Area School* United States District Court for the Middle District of Pennsylvania 400 F Supp 2d 707 Docket No 04cv2688.

In New Zealand we have the advantage of relative detachment from the atrocities that cause passion to overtake cool analysis. Cutting through the complexities of history, and psychology, putting aside the anguish and inevitable outrage of anything to do with terrorism, it is my view that the evidence points to a single dominant conclusion. It is that, having taken all proportionate measures against attack, we are best able to avert terrorist threats and to safeguard our own liberty by according justice and dignity to others by whatever means are open to us. That, by contrast with the use of legal techniques to take advantage of others, is the true expression of the rule of law.

That is not to suggest that such result is simply achieved. Rather it is only by broadening and deepening the debate, to examine what we are doing and failing to do, that we can contribute to change of attitudes and from that to change of results.

The friend with whom I began this paper concluded his letter to me:

> Terrorism might be also about the right of the individual to oppose a so-called "democratic" majority – as the one which elected Hitler as the new Reich Chancellor.
>
> Perhaps the solution is "dynamic", never clearly defined, walking at all times on the cutting edge, in a never-ending debate, in an extreme caution for any decision which might hamper human rights – and desperately try, at each occurrence, to separate the "noble" or "just" cause from the sadistic acts of the many sick butchers the humanity always nurtured, whatever their cultural, political orientation or social class belonging.
>
> Dealing with the poverty or lack of justice will indeed reduce terrorism, but will it eliminate the sickness of the human minds? I doubt it. And not to forget the soul crunching alternative, which one of my friends once faced in Algeria: what to do, when you arrest the man whom you know he just set a time bomb – how to ask him where is the bomb, knowing that respecting this man is to bind innocents to death? Terrible debates between those who must protect the human rights and those who collect the human debris after a bombing. Philosophy seems to be easier in the serenity of a quiet office, but anger or revenge were never good advisers.

As the celebrated philosopher and sometime New Zealander, Sir Karl Popper, observed: "… progress rests with us, with our efforts, with the clarity of our conception of our ends, and with the realism of their choice."[85]

To respond in a practical way to Sir Karl Popper's challenge, my friend's "terrible debates" must include every thinking person.[86]

It was recently my privilege to take part in the United Nations Fourth Regional Workshop for Police Officers, Prosecutors and Judges in South Asia on Effectively Countering Terrorism Conference held in Thimphu, Bhutan and attended by representatives of eight South Asian states.

The first day of the Conference was notable for the illumination provided by the Judges' long experience and first-hand understanding of the scourge of terrorism which has gravely afflicted the societies of a number of them, some of whom have experienced and are still exposed to its

85 Sir Karl Popper *The Open Society and its Enemies* (Volume 2, Routledge, New York, 1999) at 280. Sir Karl Popper added a footnote:

> By the 'realism' of the choice of our ends I mean that we should choose ends which can be realised within a reasonable space of time, and that we should avoid distant and vague Utopian ideals, unless they determine more immediate aims which are worthy in themselves.

86 Unsung examples of personal initiatives which have had notable consequences include in Dunedin the caring for Columbo Plan students who are now leaders of Asian opinion and in Oxford the intervention by a distinguished academic to befriend a student from North Korea who is now close to the President. The current significance and potential for good of such human relations are obvious.

horrors. Their pain did not however deflect them from the consensus view that the courts must achieve adherence to the best standards of human rights as well as high levels of professional competence.

There was unanimity that winning the hearts and minds of those at risk of committing terrorist acts is the major goal from which there must be no distraction. Acting and being seen to act independently and justly is itself a material step on the way to attaining that goal.

It was noted that the events of 11 September 2001 brought home to the rest of the world realities that been long experienced by certain of the states represented. Resolution 1373 and the establishment of the United Nations Counter-Terrorism Committee Executive Directorate (CTED) have been heartening, injecting vision and energy into counter-terrorism.

The exchange of experiences under Chatham House terms was appreciated by the judges and a learning experience for all. While there must be no distraction from the classic judicial tenet of judging according to one's own judgment and conscience, finding means to continue and develop judicial communication would be of value. Cross-border judicial co-operation must be enhanced if the administration of justice is to keep pace with the rapid development of global terrorism.

Within the limits of strict compliance with the separation of powers the judges can contribute to the raising of police and prosecution standards by example of excellence and, where appropriate, drawing attention both to shortcomings and to potential means of improvement.

Equally, judges must always strive to lift their own standards to the international state of the art. Sound innovation, compatible with classic judging, was the subject of various initiatives designed to do better justice. They included involvement of victims in the determination of whether a criminal case should be dismissed for lack of evidence, and use of habeas corpus, with the government as respondent, in cases of missing persons, with the effect of a mandamus against the police to discharge the state's obligation to protect the citizen (compare *Calvin's Case*).[87]

There was further discussed the tension between freedom of expression, which has allowed the press to vindicate justice in a variety of circumstances, and the protection of due process from media abuse.

The need for cross-border responses to funding of terrorism was emphasised in several state contributions. So too was the law, as to which the 16 February 2011 "Interlocutory Decision on the Applicable Law: Terrorism" of the Appeals Chamber of the Special Tribunal for Lebanon[88] contains the most substantial discussion.

Of particular topical interest was the Bhutan phrase "let truth be supported by justice". It is exemplified by the principle applied by the law of Bhutan and applicable to counter-terrorism cases. Guided by United Nations policy but based on the Constitution of Bhutan it sees the rule of law as extending to social, economic and cultural values and operating sensitively: how does this law or policy impact on society? Does it promote happiness, not only of the people of Bhutan but, in accordance with the vision of the Fourth King, that of others? It emphasises common values and a

87 *Calvin's Case* (1608) 7 Coke's Reports 1a; 77 English Reports 377 which held that a Scot born in Edinburgh was entitled to apply for relief to the King's Courts in London. It asserted the right of both citizens and friendly aliens within the state to protection by the Crown, stating that fundamental principle to be reciprocal to their duty of loyalty to the Crown.

88 Available on its website which may be searched as "Special Tribunal for Lebanon homepage" (see "Documentation").

deep sharing of concern for others. In this way not only is domestic law improved but a platform is created for enhancing international goodwill.[89]

89 Such concern for others coincides with the policy of the Final Court of Hong Kong in *B v The Commissioner of the Independent Commission Against Corruption* FACC No 6 of 2009 decided on 28 January 2010 that the Court rejected a submission that Hong Kong's anti-corruption legislation should be construed to apply to the bribery in Hong Kong only of local officials and not of foreign officials, stating per Bokhary PJ:

> 21…Such a course makes a positive and important contribution to the worldwide struggle against corruption, an endeavour inherently and highly dependent on cross-border co-operation. Acting co-operatively, each jurisdiction properly protects itself from the scourge of corruption and other serious criminal activity.