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# Transnational Human Rights Litigation: Obtaining a Civil Remedy Before an English Court for Acts of Torture Committed in a Foreign Jurisdiction.

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Master of Jurisprudence Thesis  
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March 2007



13 FEB 2008

*Para Pilar, con Amor.*

"For the purposes of civil liability, the torturer has become- like the pirate and the slave trader before him- *hostis humani*, an enemy of all mankind."<sup>1</sup>

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<sup>1</sup> *Filártiga v. Peña-Irala*, 630 F. 2d 876 (1980), at 890, *per* Judge Kaufman.

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## INTRODUCTION

Without a remedy, a right may be but an empty shell.<sup>1</sup>

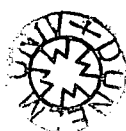
### Transnational Human Rights Litigation for Acts of Torture Committed in a Foreign Jurisdiction

Following the successful establishment of a body of international human rights law since the Second World War, recent international attention has focused on how these norms may effectively be enforced. Developments in this area have largely been in the criminal domain whereby several States have now ratified the Statute of the International Criminal Court and domestic legal systems are beginning to be used in bringing prosecutions under the various multilateral criminal treaties. However, despite these significant advancements in international criminal law, any successful prosecution brought against the person responsible for the act complained of will not provide reparation to the victim for the harm caused. Effective accountability thus seems to require not only that those responsible for committing violations of internationally protected human rights be punished for their conduct, but also that redress be provided to the victim. In this regard, redress for the purposes of providing adequate reparation to victims of gross violations of human rights would entail that both financial compensation and full medical rehabilitation be received for the harm.

Where victims have fled the State in whose territory the violation of the human right was committed, foreign States may provide the financial compensation necessary to the victim under compensation schemes which they have in place. However, the use of such schemes to provide financial compensation by third States may be criticised on the basis that the primary responsibility for providing civil

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<sup>1</sup> Higgins, *Problems and Process: International Law and How We Use It*, 1994, OUP, at p. 99.



redress is on the individual responsible for the violation.<sup>2</sup> With there being no legal justification for a State which is not implicated in the violation in providing financial redress,<sup>3</sup> it is thus asked whether international law permits States to use their legal systems to allow civil actions to be brought against the alleged offender.

Other than holding the individual responsible for the violation directly accountable for their conduct, civil litigation of this kind is recognised as having numerous benefits. Firstly, it has been suggested that victims of gross human rights violations find declaratory judgements that provide truth and stigmatises the conduct as more important than financial redress.<sup>4</sup> Secondly, civil actions have greater advantages than their criminal counterparts in that there is a lower burden of proof and victims may initiate proceedings independent to the prosecutorial discretion of the State.

This paper seeks to determine whether international law permits domestic legal systems to provide forums for civil actions seeking redress for acts of torture committed in a foreign jurisdiction by non-nationals of the forum State against other non-nationals. Such transnational human rights litigation of the kind envisaged in this paper is currently recognised by the United States following the Court of Appeal for the Second Circuit's seminal decision in *Filártiga v. Peña-Irala*.<sup>5</sup>

The discussion of the paper is divided into three main chapters which examine in detail each of the potential difficulties that such litigation would encounter. Chapter 2 will determine whether international law permits States to exercise universal civil jurisdiction over torture and make such conduct a civil offence within their domestic legal systems. The chapter will begin by outlining the universal principle and then consider whether conventional or customary international law provides a legal basis for universal civil jurisdiction. Chapter 3 will next examine whether States are under an international obligation to accord immunity in civil proceedings which seek redress for acts of torture committed in a foreign jurisdiction. Once having explored State practice on this matter, the doctrinal legitimacy of the legal arguments that granting immunity in civil proceedings for acts of torture violates the right of access to a civil

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<sup>2</sup> International Law Association Human Rights Committee, "Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad" [2001] EHRLR 129, at p. 132.

<sup>3</sup> *Ibid.*, at p. 133.

<sup>4</sup> Bianchi, *Serious Violations of Human Rights and Foreign State's Accountability*, in Vohrah *et al.*, (eds.), *Man's Inhumanity to Man: Essays in International Law in Honour of Antonio Cassese*, 2003, Kluwer Law International, at pp. 178-81.

<sup>5</sup> 630 F. 2d 876 (1980).

court and is inconsistent with the peremptory status of the prohibition on torture will then be assessed in detail. Finally, chapter 4 will briefly address the two procedural issues that a domestic court involved in transnational human rights litigation must consider before it may deal with any issues concerning substantive liability. In this regard, the discussion will consider the UK rules on private international law as to when a domestic court has jurisdiction to hear civil actions in tort, and the system of law that will be applied when adjudicating such disputes. In the conclusion of the paper it will be determined whether the current state of international law permits domestic legal systems to provide forums for civil actions seeking redress for acts of torture committed in a foreign jurisdiction, and recommendations for domestic legal systems to be used in such a way will be made.

## JURISDICTION

The lawmaker's power [extends] over all person and property present in the State... The law does not extend over other States and their subjects.<sup>1</sup>

### General Principles of Jurisdiction

#### *Jurisdiction and the Sovereign Equality of States*

At its simplest, the term jurisdiction is used to describe a sovereign administering law.<sup>2</sup> More specifically, jurisdiction is concerned with the rules of international law which regulate the competence of a State that exercises sovereign authority over all aspects of the legal process, particularly where the conduct regulated has a transnational aspect.<sup>3</sup>

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<sup>1</sup> de Martens, *Précis du droit des gens modernes de l'Europe fondé sur les traités et l'usage*, 1831, Vol. I, at paras. 85-86.

<sup>2</sup> On jurisdiction see generally: Akehurst, "Jurisdiction in International Law" (1972) 46 BYIL 145; Bowett, "Jurisdiction: Changing Problems of Authority over Activities and Resources" [1982] 53 BYIL 1; Brownlie, *Principles of Public International Law*, 6<sup>th</sup> ed., 2003, OUP, chapters 14-15; Cassese, *International Law*, 2<sup>nd</sup> ed., 2005, OUP, pp. 46-55, [hereinafter referred to as Cassese (*International Law*)]; Harris, *Cases and Materials on International Law*, 6<sup>th</sup> ed., 2004, Sweet and Maxwell, chapter 6; Higgins, *Problems and Process: International Law and How We Use It*, 1994, OUP, chapter 4; Jennings, "Extraterritorial Jurisdiction and the United States Antitrust Laws" [1957] 33 BYIL 146; Jennings and Watts, *Oppenheim's International Law*, 9<sup>th</sup> ed., 1992, London, pp. 456-498; Lowe, *Jurisdiction*, in Evans, (eds.), *International Law*, 2<sup>nd</sup> ed., 2006, OUP, chapter 11; Mann, "The Doctrine of Jurisdiction in International Law" (1964) 111 Hague Recueil, reprinted in Mann, *Further Studies in International Law*, 1990, Oxford: Clarendon Press, [hereinafter referred to simply as Mann]; Mann, "The Doctrine of Jurisdiction in International Law Revisited After Twenty Years" (1984) 186 Hague Recueil 9, [hereinafter referred to as Mann (Revisited)]; Maier, *Jurisdictional Rules in Customary International Law*, in Messon, (eds.), *Extraterritorial Jurisdiction in Theory and Practice*, 1996, Kluwer Law International; and Shaw, *International Law*, 2003, 5<sup>th</sup> ed., CUP, chapter 12.

<sup>3</sup> The present discussion will focus exclusively on the jurisdiction of States in international law.



The jurisdictional limits of States are set by both conventional and customary international law, and the precise scope of these limits are largely influenced by the principle of sovereign equality which has been described as the basic constitutional doctrine of the international legal system.<sup>4</sup> This principle recognises that the sovereignty of all States are to be equal with one another, and is established by them enjoying a horizontal relationship in the legal order.

Two related principles may be deduced from the sovereign equality of States doctrine.<sup>5</sup> Firstly, the very notion of sovereignty entails that a State has an absolute jurisdiction over all matters arising within its territory. In *The Schooner Exchange*, the US Supreme Court commented that:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible to no limitations not imposed by itself. Any restriction would imply a diminution of sovereignty to the extent of the restriction.<sup>6</sup>

International law has afforded due recognition to this in the territorial principle of jurisdiction whereby all States enjoy a general competence to exercise authority over conduct occurring within their territory.

As a corollary to the first principle that a State has an absolute jurisdiction within its own territory, is that, secondly, a State must not seek to regulate any of the internal affairs arising in another State.<sup>7</sup> Thus, according to this second principle, States are under a duty not to intervene in the domestic jurisdiction of another State.

The decision of the Permanent Court of International Justice<sup>8</sup> in the *Lotus* case formally recognised that international law no longer governed a legal order where States were truly independent from one another:

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which related to acts which have taken place abroad... Such a view would only be tenable if international law contained a general prohibition on States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory... But this is certainly not the case under

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<sup>4</sup> Brownlie, *supra* n. 2, at p. 287.

<sup>5</sup> See, further, on this doctrine: Brownlie, *ibid.*, at chapter 14; and Cassese (*International Law*), *supra* n. 2, at pp. 48-53.

<sup>6</sup> *The Schooner Exchange v. McFaddon*, 7 Cranch. 116 (1812), at 136, *per* Marshall CJ.

<sup>7</sup> Brownlie, *supra* n. 2, at pp. 287 and 290-2; Shaw, *supra* n. 2, at p. 574-6.

<sup>8</sup> Hereinafter referred to as either the Permanent Court or the PCIJ.

international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.<sup>9</sup>

As the *dictum* of the Permanent Court suggests, on certain occasions international law permits a foreign State to exercise regulatory competence over events occurring outside of its borders. Significantly, this *dictum* accepted that the exercise of extraterritorial jurisdiction *per se* would not amount to an illegitimate interference with another State's territorial sovereignty.<sup>10</sup>

The principle of sovereignty has been weakened further following the development of international human rights law since 1945. In the aftermath of the serious abuses that had been committed during the Second World War, territorial integrity was no longer regarded as the supreme value of the legal order and limitations were placed upon the competence of States with regard to their treatment of individuals.<sup>11</sup> Despite the partial demise of State sovereignty, particularly where human rights are concerned, the principle nonetheless still retains great importance in influencing developments in modern international law.<sup>12</sup>

### *The Different Species of Jurisdiction*

International law recognises three different manifestations in which a State may exercise regulatory competence over persons, property or events.

Prescriptive jurisdiction, otherwise referred to as legislative jurisdiction, describes the competence of States under international law to assert the applicability of their laws.<sup>13</sup> As a general rule, and as a reflection of sovereignty, States enjoy the competence to assert their laws over persons, property or events within their territory. Moreover, in certain circumstances international law permits States to extend their laws over conduct beyond their territorial jurisdiction where they are recognised as having a sufficiently close connection with the state of affairs.

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<sup>9</sup> The *Lotus* case (*France v. Turkey*), 1927 PCIJ, Ser. A, No. 10, at 19.

<sup>10</sup> See further on this point: Akehurst *supra* n. 2, at p. 182; and Maier, *supra* n. 2, at pp. 66-67.

<sup>11</sup> See further on this point, Tomuschat, *Human Rights: Between Idealism and Realism*, 2003, OUP, at p. 229.

<sup>12</sup> Maier, *supra* n. 2, at pp. 64-69.

<sup>13</sup> On prescriptive jurisdiction see generally: Akehurst, *supra* n. 2, at pp. 179-212; and Mann, *supra* n. 2, at pp. 15-110.

Enforcement jurisdiction is concerned with the way in which a State may enforce its prescriptive rules.<sup>14</sup> As a basic principle reflecting the sovereign equality of States, no State may exercise its enforcement jurisdiction in the territory of another State unless that State consents otherwise.<sup>15</sup> This stringent limitation on enforcement jurisdiction may impose significant practical constraints on the exercise of extraterritorial prescriptive jurisdiction.

The enforcement jurisdiction of a State may be carried out by way of adjudicative or executive means, thereby creating two sub-divisions of this specie of jurisdiction.<sup>16</sup> Adjudicative jurisdiction, more commonly referred to as judicial jurisdiction, concerns the competence of States to apply their prescribed rules through their courts or other legal institutions.<sup>17</sup> Although international law only permits a State to judicially enforce its prescribed laws through its own courts, this does not prevent it from using its domestic courts to exercising adjudicative jurisdiction over extraterritorial conduct. In the *Lotus* case, the Permanent Court stated that international law does not, “[lay] down a general prohibition to the effect that States may not extend the... jurisdiction of their courts to persons, property and acts outside their territory”.<sup>18</sup>

Executive jurisdiction refers to the ability of States to enforce their prescribed laws by way of non-judicial means.<sup>19</sup> These non-judicial means range from administrative acts, such as gathering evidence and arresting alleged perpetrators of crimes, to ensuring that judgements are complied with through coercive means. As a specie of enforcement jurisdiction, a State’s competence to perform executive acts is confined to its territorial jurisdiction unless it receives consent from a foreign State suggesting otherwise.<sup>20</sup>

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<sup>14</sup> On enforcement jurisdiction see generally: Mann, *ibid.*, at pp. 110-139; and Mann (Revisited), *supra* n. 2, at pp. 34-46.

<sup>15</sup> The *Lotus* case, 1927 PCIJ, Ser. A, No. 10, at 18-19; the Separate Opinion of President Guillaume, in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, ICJ Report, 2002, p. 3, at para 4; and the Joint Separate Opinions of Judges Higgins, Kooijmans and Buerenthal in the *Arrest Warrant* case, at para. 54.

<sup>16</sup> There is no consensus amongst academic scholars with regard to the distinction between the different species of jurisdiction. Thus, for example, Mann, *supra* n. 2, is of the opinion that there are only two categories of jurisdiction and regards both executive and adjudicative jurisdiction as a single form of enforcement jurisdiction. In contrast, Akehurst, *supra* n. 2, draws a distinction between all three categories. For the suggestion that adjudicative jurisdiction is a form of prescriptive jurisdiction see, further, O’Keefe, “Universal Jurisdiction: Clarifying the Basic Concepts” (2004) 2 JICJ 735, at p. 737.

<sup>17</sup> On adjudicative jurisdiction see generally, Akehurst, *supra* n. 2, at pp. 152-178.

<sup>18</sup> 1927 PCIJ, Ser. A, No. 10, at 18.

<sup>19</sup> On executive jurisdiction see generally, Akehurst, *supra* n. 2, at pp. 145-151.

<sup>20</sup> *Attorney General of the Government of Israel v. Eichmann* (1962) 36 ILR 277.

## *The Relationship Between the Different Species of Jurisdiction*

Despite suggesting that a rigid distinction may be drawn between the different forms of jurisdiction, it is significant to note that this is somewhat artificial and numerous academics have contended that the concept of jurisdiction, “ought to be regarded as a unitary phenomenon categorised by different stages of [an] exercise of authoritative power”.<sup>21</sup> Concerning the reason why a significant distinction should not be drawn between the different species of jurisdiction, they note that one form of jurisdiction is a function of the other.<sup>22</sup> Accordingly, Bowett has rightly claimed that, “there can be no enforcement jurisdiction unless there is [also] prescriptive jurisdiction”.<sup>23</sup>

In addition, State practice similarly does not draw a rigid distinction between the different forms of jurisdiction. When States make diplomatic protests to excessive assertions of jurisdiction performed by another State, they are not protesting to a particular form of jurisdiction that was excessive, but instead to the fact that a State has exercised power which exceeded its permissible limits. Thus, what matters from the perspective of international law is not the underlying prescription of law, nor that it was enforced, but that there was an excessive exercise of State power.<sup>24</sup> As Reydams has noted:

The [Permanent] Court in the *Lotus* case did not consider whether the Turkish statute on which the prosecution was based accords with international law (legislative jurisdiction) or whether the Turkish court was competent under international law to hear the case (judicial jurisdiction). It confined itself to the question of whether jurisdiction did or did not exist.<sup>25</sup>

Although it has been suggested that the limits which international law imposes upon the different species of jurisdiction will not essentially be different from one

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<sup>21</sup> Maier, *supra* n. 2, at p. 78.

<sup>22</sup> Brownlie, *supra* n. 2, at p. 308.

<sup>23</sup> Bowett, *supra* n. 2 at p. 1. Despite Bowett himself suggesting, *ibid.*, that, “there may be prescriptive jurisdiction without the possibility of an enforcement jurisdiction”; it is to be noted that any enactment of rules by a State will carry with it a presumption of future enforcement. See, further, on this point: Maier, *supra* n. 2, at p. 78; and Mann, *supra* n. 2, at p. 7. Moreover, Akehust, *supra* n. 2, at pp. 187-8, notes that it is permissible for a State to protest as soon as legislation is enacted or even when official proposal for such legislation are made.

<sup>24</sup> Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, 2003, OUP, at p. 26.

<sup>25</sup> *Ibid.*

another,<sup>26</sup> it will be seen below that where such a contention may be true in the criminal field of law in that the limits which international law places on prescriptive and adjudicative jurisdiction are the same, the different manifestations of State power may be governed by separate regimes in the civil field of law.<sup>27</sup>

## The Limits of Extraterritorial Prescriptive Jurisdiction

### The *Lotus* case and the Requirement of a Sufficiently Close Connection

Although the *Lotus* case confirmed that the prescriptive jurisdiction of a State is primarily territorial, the Permanent Court recognised that international law does not prohibit States, *per se*, from legislating over extraterritorial matters. The Permanent Court emphasised that the competence of States to extend their laws was not unlimited when commenting that, “international law [does] place limitations... upon jurisdiction”;<sup>28</sup> however, the Court did not enter into any discussion concerning the precise scope of these jurisdictional limits. Instead, the Court laid down the doctrinal framework upon which State jurisdiction is to operate under within international law:

The first and foremost restriction imposed by international law upon a State is that- failing the existence of a permissive rule to the contrary- it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.<sup>29</sup>

According to the Permanent Court, States are free to assert jurisdiction, in its three different forms, within their own territory unless a prohibitory rule of international law prevents them from doing so; and outside of their territory, a jurisdictional claim

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<sup>26</sup> Brownlie, *supra* n. 2, at p. 308.

<sup>27</sup> See the discussion *infra* at n. 112-6.

<sup>28</sup> 1927 PCIJ, Ser. A, No. 10, at 18. A similar statement was made earlier by the Permanent Court in the *Case of Nationality Decrees in Tunis and Morocco*, 1921 PCIJ, Ser. B No. 4, at 23-24, when the Court stated that, “jurisdiction... is limited by rules of international law”.

<sup>29</sup> *Ibid.*, at 18-19.

must be supported by a permissive rule, derived from either custom or convention, which allows for the exercise of jurisdiction.<sup>30</sup>

Great academic attention has long been given to the contentious issue of the circumstances in which international law permits a State to prescribe its laws over persons, property or events in a foreign jurisdiction.<sup>31</sup> The most authoritative work written on the doctrine of jurisdiction in international law is provided by Mann's Hague Recueil lectures. After reviewing both academic literature and judicial opinion, Mann has suggested that international law permits a State to legislate, both territorially and extraterritorially, over subject matter that it has a sufficiently close connection with.<sup>32</sup> More specifically, and with regard to the instances when a State will be said to have a sufficiently close connection, Mann has claimed that:

The conclusion, then, is that a State has legislative jurisdiction if its contact with a given set of facts is so close, so substantial, so direct, so weighty, that legislation in respect of them is in harmony with international law and its aspects (including the practice of States, the principle of non-intervention and reciprocity and the demands of inter-dependence). A merely political, economic, commercial or social interest does not in itself constitute a sufficient connection.<sup>33</sup>

Mann's formulation of when a State may exercise legislative jurisdiction has been read with a great degree of academic approval.<sup>34</sup> However, it must be noted that

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<sup>30</sup> This *dictum* of the Court has received widespread academic discussion. A similar reading of the *Lotus* case is made by Maier, *supra* n. 2, at p. 83; however, Dixon, *Textbook on International Law*, 5<sup>th</sup> ed., 2005, OUP, at p. 133, has read it as suggesting that the prescriptive jurisdiction of a State is, "virtually unlimited by international law, save only that it may have accepted specific international obligations limiting its competence... In essence, the jurisdiction to prescribe comprises a generally unfettered power to claim jurisdiction over any matter". Both Higgins, *supra* n. 2, at p. 77, and Lowe, *supra* n. 2, at pp. 334-5, have criticised instances where the *Lotus* case has been cited as authority for the proposition that a State may lawfully exercise extraterritorial prescriptive jurisdiction unless its exercise is prohibited by an international rule. Finally, Cassese (*International Law*), *supra* n. 2, at p. 50, has read the *dictum* as suggesting that enforcement jurisdiction "cannot be exercised by a State outside its territory except by virtue of a permissive rule".

<sup>31</sup> Mann (Revisited), *supra* n. 2, at p. 27, traces the discussion back to the 13<sup>th</sup> century.

<sup>32</sup> Mann, *supra* n. 2, at pp. 36-37.

<sup>33</sup> *Ibid.*, at p. 39.

<sup>34</sup> See, for example, Mann (Revisited), *supra* n. 2, p. 28, at ft. 29, listing the academics who have approved his findings. Similarly, Brownlie, *supra* n. 2, at p. 309, claims that, "extraterritorial acts can only lawfully be the object of jurisdiction if... [there is] a substantial and *bona fide* connection between the subject matter and the source of jurisdiction". Moreover, Lowe, *supra* n. 2, at p. 336, states that, "the best view is that it is necessary for there to be some clear connecting factor, of a kind whose use is approved by international law, between the legislating State and the conduct that it seeks to regulate". See, further, the Separate Opinion of Judge Padilla Nervo in the *Case Concerning Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)*, ICJ Reports, 1970, p. 3. Cf Maier, *supra* n. 2, at p. 90, who very slightly refines Mann's formulation, and states that, "the author's personal inference from a survey of sectoral studies, which persuasively reviews contemporary practice, is that international customary law makes the legality of extraterritorial jurisdictional claims dependant on the existence of

his formulation is one of general application in that it only provides an objective test. Indeed, it seems that this may not, in itself, be a criticism since the instances where international law permits a State to exercise prescriptive jurisdiction appears to be incapable of any precise formulation. Mann himself has recognised that it would be a “formidable criticism” if legislative jurisdiction were to be defined with certainty;<sup>35</sup> and that international law could only, “for the time being, offer [a] general formulae”.<sup>36</sup> Such a view that the limits on prescriptive jurisdiction are incapable of any precise definition is supported by the fact that the law in this area is “still rather unsettled [and] is developing”<sup>37</sup> in light of new international concerns. Therefore, it appears that any precise formulation that brings certainty to the doctrine may be incapable of withstanding the test of time.

The following discussion will consider the limits which international law places on a State’s extraterritorial prescriptive jurisdiction in both the criminal and civil fields of law. The discussion will begin by briefly identifying the criminal bases of jurisdiction which custom has recognised as bearing a sufficiently close connection between the prescribing State and the impugned conduct. Once having dealt with this matter, the discussion will then consider the extent to which customary international law permits a State to prescribe its civil laws over persons, property or events in a foreign jurisdiction.

### The Criminal Bases of Jurisdiction

International law recognises several bases of criminal jurisdiction whereby the prescribing State asserting the applicability of its criminal laws is recognised as having a sufficiently close connection over the impugned conduct performed by an individual.<sup>38</sup> At present there exists no universal consensus regarding the exact number of criminal bases recognised by custom; however, State practice appears to

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an *effective and significant connection* between the regulating State and the activity in fact to be regulated. A connection can be held to be significant when it is *perceived* as such by the same States in international practice. Contrary to previous theories that focus on factual links... the novelty of this approach is that the effectiveness and the significance of a connection are entirely determined in the light of State practice in a given area”. (Original emphasis).

<sup>35</sup> *Ibid.*, at p. 28.

<sup>36</sup> *Ibid.*

<sup>37</sup> Brownlie, *supra* n. 2, at p. 297.

<sup>38</sup> For an early comprehensive study on criminal jurisdiction see, generally, Harvard Research in International Law, “Jurisdiction with Respect to Crime” 29 AJIL 435 (1935).

have widely accepted five: the territorial principle; the nationality principle; the passive personality principle; the protective principle; and the universal principle.<sup>39</sup>

The first four jurisdictional bases will each be briefly considered in turn before a detailed examination is made with regard to the universal principle. In short, the universal principle provides that a State may extend its laws over conduct performed in a foreign jurisdiction by a non-national against another non-national, and thus its examination is of great significance for the concerns of the paper.

### *The Territorial Principle*

The territorial principle provides that a State may criminalize conduct which is performed within its territory. The territorial principle has an extraterritorial dimension in that it encompasses not only conduct where all of the constituent elements of the offence are committed within the territory of the State, but also conduct where parts of the offence are committed extraterritorially.<sup>40</sup> The extraterritorial dimensions of this principle of jurisdiction are expressed in both the objective and subjective territorial principles; whereby the objective territorial principle provides that a State may exercise prescriptive jurisdiction over offences which are completed within its territory, and the subjective territorial principle provides that a State may exercise prescriptive jurisdiction over offences which commence within its territory.

### *The Nationality Principle*

The nationality principle, sometimes referred to as the active personality principle, provides that a State may criminalize the conduct performed by one its nationals regardless of whether the conduct was performed in a foreign jurisdiction.

### *The Passive Personality Principle*

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<sup>39</sup> Three further bases of criminal jurisdiction were identified, after reviewing the literature on this matter, by the European Court of Human Rights in *Banković v. Belgium* (2001) 11 BHRC 435, at para. 59: the diplomatic and consular relations principle; the principle of the flag; and the effects doctrine.

<sup>40</sup> The *Lotus* case, 1927 PCIJ, Ser. A No. 10.



The passive personality principle provides that a State may criminalize the conduct of a non-national who performs an act that is harmful to a national of the prescribing State. Unlike the nationality principle, which focuses on the identity of the alleged author of the criminal offence, the concern of the passive personality principle is with the identity of the victim.

### *The Protective Principle*

The protective principle provides that a State may criminalize the conduct of non-nationals who commits extraterritorial offences that are recognised as injurious to the security or vital interests of the prescribing State. The exact scope of the offences which give rise to this type of jurisdiction are uncertain, but those which have been generally accepted include: plots to overthrow the government; counterfeiting currency; and illegal immigration.

### *The Universal Principle*

#### The Definition of Universal Jurisdiction

The Dissenting Opinion of Judge Van den Wyngaert in the *Arrest Warrant* case stated that:

There is no generally accepted definition of universal jurisdiction in conventional or customary international law... Much has been written in legal doctrine about universal jurisdiction. Many views exist as to its legal meaning.<sup>41</sup>

Despite this judicial statement to the contrary, it is suggested that the universal principle provides that a State may criminalize certain conduct performed in a foreign jurisdiction committed by a non-national against another non-national where the conduct is regarded as particularly heinous and destructive to the legal order as a whole.<sup>42</sup> This principle of jurisdiction is concerned exclusively with the nature of the

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<sup>41</sup> At paras. 44-45.

<sup>42</sup> On the universal principle see generally: Akehurst, *supra* n. 2, at pp. 160-166; Bowett, *supra* n. 2, at pp. 11-14; Brownlie, *supra* n. 2, at pp. 303-5; Cassese (*International Law*), *supra* n. 2, at pp. 451-52; Cassese, *International Criminal Law*, 2003, OUP, at pp. 284-295, [hereinafter referred to as Cassese

conduct, and is well defined by Principle 1(1) of the Princeton Principles of Universal Jurisdiction:

Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the State exercising such jurisdiction.<sup>43</sup>

#### Universal Jurisdiction *in absentia*

Having thus established that international law permits a State to exercise extraterritorial legislative jurisdiction over certain conduct which is deemed as particularly abhorrent under the universal principle, next comes the issue of establishing the circumstances in which international law permits a State to judicially enforce the criminalized conduct. A contentious issue surrounding international law at present is whether it is a requirement that the alleged offender be present in the territory of the prosecuting State before it may exercise a claim of universal adjudicative jurisdiction over him, or whether the presence of the alleged offender is not a requirement and that domestic courts may exercise universal jurisdiction *in absentia*. The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case commented that, "considerable confusion surrounds this topic";<sup>44</sup> and this confusion has been noted further by the International Law Association in its Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences:

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(*International Criminal Law*); Higgins, *supra* n. 2, at pp. 56-65; Inazumi, *Universal Jurisdiction in Modern International Law*, 2005, Intersentia; Jennings, *supra* n. 2, at p. 156; Lowe, *supra* n. 2, at pp. 348-9; Macedo, (eds.), *Universal Jurisdiction*, 2004, University of Pennsylvania Press; Mann, *supra* n. 2, at pp. 80-81; O'Keefe, *supra* n. 16; Randall, "Universal Jurisdiction Under International Law" 66 *Tex L Rev* 785 (1988); Reydams, *supra* n. 24; Shaw, *supra* n. 2, at pp. 592-604.

<sup>43</sup> Princeton Principles of Universal Jurisdiction, Princeton, 2001. [Hereinafter referred to as the Princeton Principles].

<sup>44</sup> At para. 54.

The only connection between the crime and the prosecuting State that *may* be required is the physical presence of the alleged offender within the territory of that State.<sup>45</sup>

The contentious issue of universal jurisdiction *in absentia* was recently brought before the International Court of Justice<sup>46</sup> in the *Arrest Warrant* case.<sup>47</sup> The facts of the case arose out of an investigating judge in Belgium issuing an international arrest warrant *in absentia* against Mr. Yerodia charging him, firstly, with offences constituting grave breaches of the Geneva Conventions 1949 and its Additional Protocols, and, secondly, with crimes against humanity. The international arrest warrant issued by Belgium was based upon a 1993 Belgian law, as amended in 1999, which had been adopted to implement the Geneva Conventions into domestic law.<sup>48</sup> Article 7 of the Belgian law provided that, “the Belgian courts shall have jurisdiction in respect of the offences provided in the present law, wheresoever they may have been committed”.<sup>49</sup> At the time when the arrest warrant was issued, Mr. Yerodia, a Congolese national, was the incumbent Minister of Foreign Affairs of the Congo.

The Democratic Republic of Congo brought an application before the International Court on two legal grounds. It claimed, firstly, that the exercise of universal jurisdiction *in absentia* by Belgium had violated the principle of sovereign equality in that no State may exercise its authority in the territory of another State. Secondly, it claimed that the non-recognition of the immunity of an incumbent

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<sup>45</sup> International Law Association, “Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences”, in Report of the 69<sup>th</sup> Conference of the International Law Association, London, (2000), 403, at p. 404. (Emphasis added). [Hereinafter referred to as ILA Report on Universal Jurisdiction].

<sup>46</sup> Hereinafter referred to as either the International Court or the ICJ.

<sup>47</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, ICJ Report, 2002, p. 3. For a case comment see: Cassese, “When may Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v. Belgium* case” (2002) 13 EJIL 853, [hereinafter referred to as Cassese (Senior State Officials)]; Orakhelashvili, “Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*)” 96 AJIL 677 (2002); Wickremasinghe, “Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*), Preliminary Objections and Merits, Judgement of 14 February 2002” [2003] ICLQ 775; Wirth, “Immunity for Core Crimes? The ICJ’s Judgement in the *Congo v. Belgium* case” (2002) 13 EJIL 877; and Wouters, “The Judgement of the International Court of Justice in the *Arrest Warrant* case: Some Critical Remarks” (2003) 16 Leiden Journal of International Law 253.

<sup>48</sup> Loi Relative a la Répression des Violations Grave du droit International Humanitaire, Montieur Belge 23 March 1999. For a comment see Ratner, “Belgium’s War Crimes Statute: A Postmortem” 97 AJIL 888 (2003). An English translation of the Belgian law is published in (1999) 38 ILM 918.

<sup>49</sup> In addition, Article 5(3) of the Belgian law further provided that, “immunity attaching to the official capacity of a person shall not prevent the application of the present law”.

Foreign Affairs Minister was contrary to customary international law. The Democratic Republic of Congo subsequently abandoned its first argument in its memorial and final oral proceedings. Consequently, the Court decided that it could no longer rule on the issue of whether it is a precondition for the assertion of universal jurisdiction that the accused be within the territory of the State.<sup>50</sup> Although the Court gave no consideration to universal jurisdiction in its judgement, several judges, however, deemed that it was necessary to do so in their Separate and Dissenting Opinions.

Of those Judges which commented on the Belgian court issuing an arrest warrant *in absentia*, all found that international law did not impose the precondition that the alleged offender be present in the territory of the prosecuting State before it exercise an adjudicative claim under the universal principle.<sup>51</sup> The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal used the term “universal jurisdiction properly so called” when referring to universal jurisdiction *in absentia*;<sup>52</sup> and President Guillaume described it as the “true” form of universal jurisdiction in his Separate Opinion.<sup>53</sup>

Having concluded that the presence of the alleged offender is not a requirement for an exercise of universal adjudicative jurisdiction, the Judges continued and found that, “universal jurisdiction *in absentia* is unknown to international conventional law”.<sup>54</sup> Conventions which are based on the *aut dedere aut judicare* principle provide that a State is under an obligation to arrest an individual found within its territory alleged to have committed the conduct criminalized by the convention and then either prosecute or extradite the individual. Such conventions, by definition, envisage the presence of the suspect within the territory of the State,<sup>55</sup> and none of them have, “contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the

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<sup>50</sup> The Court thus based its decision entirely on the question of immunity. This aspect of the judgement is considered in detail in the chapter 3 at n. 46-51.

<sup>51</sup> See the Separate Opinion of President Guillaume; the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal; the Separate Opinion of Judge Koroma; the Separate Opinion of Judge Rezek; the Separate Opinion of Judge Ranjeva; and the Dissenting Opinion of Judge Van den Wyngaert.

<sup>52</sup> At para. 45.

<sup>53</sup> At para. 12.

<sup>54</sup> The Separate Opinion of President Guillaume, at para. 9. A similar comment is made by the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, at para. 41.

<sup>55</sup> The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, at para. 57.

territory of the State in question”.<sup>56</sup> The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal commented that as a result of a “loose use of language” conventions based on the *aut dedere aut judicare* principle had come to be referred to as universal jurisdiction<sup>57</sup> when, more accurately, the obligations they impose should be described as, “a duty to establish a territorial jurisdiction over persons for extraterritorial events”.<sup>58</sup> In contrast, President Guillaume described such conventions as establishing subsidiary universal jurisdiction.<sup>59</sup>

The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, similar to the other Separate and Dissenting Opinions in the *Arrest Warrant* case, specifically held that there is no rule of international law which makes illegal universal jurisdiction *in absentia*.<sup>60</sup> Recent State practice has endorsed this finding that universal jurisdiction *in absentia* is not precluded by international law made in the *Arrest Warrant* case. The decision of the Spanish Constitutional Tribunal in the *Guatemalan Genocide* case,<sup>61</sup> which overturned the decision of the Spanish Supreme Tribunal,<sup>62</sup> recently held that universal jurisdiction *in absentia* could be exercised over alleged acts of genocide perpetrated by individuals residing in Guatemala. Moreover, the Belgian Court of Cassation in *H.S.A. et al v. S.A.*,<sup>63</sup> rejected the findings made by the Appeal Court and held that it is not a requirement for the initiation of criminal proceedings under the universal principle that the accused be present in the forum State. Finally, academic opinion has similarly suggested that States may lawfully exercise universal jurisdiction *in absentia*.<sup>64</sup>

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<sup>56</sup> The Separate Opinion of President Guillaume, at para. 9. See, further, the similar comment made at para. 12.

<sup>57</sup> At para. 41.

<sup>58</sup> *Ibid.*, at para. 42.

<sup>59</sup> At para. 7.

<sup>60</sup> At para. 58. However, any exercise of such jurisdiction may raise issues under general human rights law where fair trials standards are not guaranteed. The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, at para. 56, commented that, “if it is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right to a fair trial but has little to do with bases of jurisdiction recognised under international law”.

<sup>61</sup> (2005) Judgement No. STC 237/2005. For a case comment see: Ascensio, “The Spanish Constitutional Tribunal’s Decision in *Guatemalan Generals*” (2006) 4 JICJ 586; and Roht-Arriaza, “*Guatemalan Genocide* case” 100 AJIL 207 (2006).

<sup>62</sup> (2003) 42 ILM 683. For a comment on the Supreme Tribunal’s decision see, Ascensio, “Are Spanish Courts Backing Down to Universality? The Supreme Tribunal’s Decision in *Guatemalan Generals*” (2003) 1 JICJ 690.

<sup>63</sup> 12<sup>th</sup> February 2003, No. P.02.1139.F. For a case comment see, Cassese, “The Belgian Court of Cassation v. The International Court of Justice: The *Sharon and others* case” (2003) 1 JICJ 437.

<sup>64</sup> Bowett, *supra* n. 2, at p. 11; Cassese (Senior State Officials), *supra* n. 47, at p. 857; Higgins, *supra* n. 2, at pp. 58 and 64; Shaw, *supra* n. 2, at pp. 592-593 and 597-599. Similarly, Principle 13 of the Brussels Principles Against Impunity and for International Justice states that, “[Universal] jurisdiction

## Offences which are Subject to Universal Criminal Jurisdiction

The universal principle allows each and every State to exercise jurisdiction over certain abhorrent offences regardless of where the conduct was committed or the nationality of the victim or perpetrator. By virtue of their very nature, the number of offences that are regarded as particularly destructive to the legal order will be very few.<sup>65</sup> As has already been mentioned above, the Separate and Dissenting Opinions in the *Arrest Warrant* case found that universal jurisdiction is unknown to conventional international law and thus offences which are subject to universal jurisdiction will only be recognised by custom.<sup>66</sup>

It is widely accepted that customary international law has for many centuries recognised universal jurisdiction over the crime of piracy.<sup>67</sup> The recognition that all States have competence to apprehend pirates on the high seas and prosecute them for their acts is based upon two rationales. Firstly, since the offence of piracy can only be committed on the high seas, pirates fall outside the ambit of other principles of jurisdiction and therefore evade being brought to justice. Secondly, the nature of the crime is regarded as particularly serious, and a pirate is recognised as a *hostis humani generis* by all States.

In addition to piracy, it is also widely accepted that customary international law recognises universal jurisdiction over war crimes.<sup>68</sup> In the aftermath of the Second World War, national courts of the Allied States prosecuted war crimes alongside the International Military Tribunals at Nuremberg and Tokyo. Several of the domestic trials conducted by the Allied States were based upon the universal

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is exercisable...regardless of whether or not the presumed author is present on the territory of the forum State. Cf Inazumi, *supra* n. 42, at p. 27, who maintains throughout her monograph on universal jurisdiction that, "the concept of universal jurisdiction has long been understood in association with the presence of a suspect [in the prosecuting State]".

<sup>65</sup> Mann, *supra* n. 2, at p. 81.

<sup>66</sup> See particularly the Separate Opinion of President Guillaume, at para. 9.

<sup>67</sup> *Re Piracy Jure Gentium* [1934] AC 586; the Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, at para. 61; the Separate Opinion of President Guillaume, at paras. 5 and 12; Princeton Principle 2(1); The Third *Restatement of the Law: Foreign Relations Law of the United States*, § 404. [Hereinafter referred to as the Third Restatement]. See further: Higgins, *supra* n. 2, at p. 58; Lowe, *supra* n. 2, at p. 348; Shaw, *supra* n. 2, at pp. 593-4. Cf Cassese (Senior State Officials), *supra* n. 47, at pp. 857-858.

<sup>68</sup> The Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, at para. 60. See further, the ILA Report on Universal Jurisdiction, *supra* n. 45, at pp. 408-9; Princeton Principle 2(1); § 404 of the Third Restatement. Cf the Separate Opinion of President Guillaume who held, at para. 5, that, "customary international law... [only] recognises one case of universal jurisdiction, that of piracy".

principle of jurisdiction in instances where reliance could not be placed upon other jurisdictional ground.<sup>69</sup> Inazumi has rightly commented that because these trials were conducted after an extraordinary event, they cannot, in themselves, be regarded as conclusive on whether customary international law recognises war crimes to be subject to universal jurisdiction.<sup>70</sup> However, since these post-war trials, judicial precedents have been set by the decisions of *Eichmann*<sup>71</sup> and *Demjanjuk*<sup>72</sup> where it was held in both cases that customary international law recognises war crimes to be subject to universal jurisdiction. In addition, a strong consensus of academic opinion supports this conclusion.<sup>73</sup>

Beyond the offences of piracy and war crimes, both State practice and *opinio juris* is highly ambiguous as to whether other crimes, if any at all, are subject to universal jurisdiction.

In the *Arrest Warrant* case, President Guillaume was of the belief that if customary international law were to recognise universal jurisdiction for offences other than piracy this would:

Risk creating total judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agents for an ill-defined 'international community'. Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backwards.<sup>74</sup>

On this basis he held that the international arrest warrant issued *in absentia* by the Belgian court against Mr. Yerodia charging him with grave breaches of the Geneva Conventions and crimes against humanity found no jurisdictional basis in customary international law and was thus illegal.<sup>75</sup>

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<sup>69</sup> See Randall, *supra* n. 42, at pp. 807-810, who considers several cases in detail where the prosecuting State assumed jurisdiction under the universal principle. See, further, on this State practice, Bianchi, "Immunity versus Human Rights: The *Pinochet* case" (1999) 10 EJIL 237, at pp. 251-2. Cf *Inazumi*, *supra* n. 42, at pp. 55-57.

<sup>70</sup> *Ibid.*, at p. 57.

<sup>71</sup> *Attorney General of the Government of Israel v. Eichmann* (1962) 36 ILR 277.

<sup>72</sup> *Demjanjuk v. Petrovsky*, 776 F.2d 571 (1985).

<sup>73</sup> Akehurst, *supra* n. 2, at p. 160; Baxter, "The Municipal and International Law Basis of Jurisdiction over War Crimes" (1951) 28 BYIL 382; Bowett, *supra* n. 2, at p. 12; Cowles, "Universality of Jurisdiction over War Crimes" 33 California LR 177 (1945); Higgins, *supra* n. 2, at p. 59; Lowe, *supra* n. 2, at p. 348; Mann, *supra* n. 2, at p. 81; Randall, *supra* n. 42, at pp. 800-815; Shaw, *supra* n. 2, at pp. 594-597.

<sup>74</sup> At para. 15.

<sup>75</sup> *Ibid.*, at para. 17. Both the Separate Opinion of Judge Rezek and the Separate Opinion of Judge Ranjeva arrived at the same conclusion.

The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal found that it was undeniable, after reviewing both national legislation and case law, that there was no State practice demonstrating an exercise of universal jurisdiction properly so called.<sup>76</sup> However, they held that this lack of State practice on the exercise of universal jurisdiction was neutral since a State is not required to legislate up to the full scope of jurisdiction permitted by international law, and there was no *opinio juris* suggesting the illegality of such jurisdiction.<sup>77</sup> The Joint Separate Opinion then reviewed the customary limits of jurisdiction and found that:

The only prohibitive rule (repeated by the Permanent Court in the *Lotus* case) is that criminal jurisdiction should not be exercised, without permission, within the territory of another State.<sup>78</sup>

From this they held that because the Belgian arrest warrant envisaged the arrest of Mr. Yerodia in Belgium, or the possibility of his arrest in a third State at the discretion of the State concerned, it violated no existing prohibitory rule of customary international law.<sup>79</sup> In addition, the Joint Separate Opinion held that universal criminal jurisdiction could be exercised over the most heinous crimes,<sup>80</sup> and that crimes against humanity fell within this small category of offences.<sup>81</sup> Accordingly, the international arrest warrant issued *in absentia* against Mr. Yerodia was not an exercise of universal jurisdiction that was precluded by international law.<sup>82</sup>

The Joint Separate Opinion, however, stressed that if a State were to exercise universal criminal jurisdiction *in absentia*, then it would have to do so subject to a number of conditions that were designed to prevent abuse and not jeopardize the stable relations between States.<sup>83</sup> The safeguards specified by the Joint Separate Opinion include: that immunities from jurisdiction be respected; that the prosecuting State offer the national State of the accused the opportunity to prosecute the

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<sup>76</sup> At para. 45.

<sup>77</sup> *Ibid.* Cf. Reydams, *supra* n. 24, at p. 230, who finds State practice to be not all that neutral.

<sup>78</sup> *Ibid.*, at para. 54.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*, at para. 60.

<sup>81</sup> *Ibid.*, at paras. 61-5.

<sup>82</sup> *Ibid.*, at para. 65. The Dissenting Opinion of Judge Van den Wyngaert, at para. 58, similarly held that neither conventional nor customary international law prohibited the exercise of universal jurisdiction *in absentia* over crimes against humanity.

<sup>83</sup> *Ibid.*, at para. 59.



individual first; that charges be brought by fully independent prosecutors; and that jurisdiction only be exercised over the most heinous crimes.<sup>84</sup>

One commentator has suggested that:

It is one of the big questions which to date remains unresolved whether universal jurisdiction exists for all offences which the international community has taken to calling 'international crimes'.<sup>85</sup>

Following the *Arrest Warrant* case, the divided views amongst the Separate and Dissenting Opinions concerning which offences are subject to universal criminal jurisdiction still leaves this matter formally unresolved. Although a majority of the Judges who commented on the issue were of the opinion that the universal principle has expanded beyond the traditional offences of piracy and war crimes to cover international crimes,<sup>86</sup> there existed a sizable minority suggesting otherwise.<sup>87</sup>

International crimes are, by definition, conduct made criminal by customary international law. As such, the criminalized offence exists in the international legal system, and an individual accused of such a crime may be prosecuted before a competent international tribunal.<sup>88</sup> If a State wishes to domestically prosecute an individual for such an offence then it necessary that it prescribe this conduct, whose definition already exists internationally, as criminal within its legal system.<sup>89</sup> It is

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<sup>84</sup> *Ibid.*, at paras. 59-60. These findings of the Joint Separate Opinion have been welcomed by Cassese (Senior State Officials), *supra* n. 47, at p. 857.

<sup>85</sup> Tomuschat, *supra* n. 11, at p. 275.

<sup>86</sup> The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, at para. 59; the Separate Opinion of Judge Koroma, at para. 9; and the Dissenting Opinion of Judge Van den Wyngaert, at para. 67. A large number of academics have similarly advanced the suggestion that universal jurisdiction exists over international crimes: Aceves, "Liberalism and International Legal Scholarship: The *Pinochet* case and the move towards a Universal System of Transnational Law Litigation" 41 *Harv Int'l L J* 129 (2000), at p. 165; Bassiouni, "Universal Jurisdiction for International Crimes" *VJIL* 1114 (2001); Brownlie, *supra* n. 2, at pp. 303-305; George, "Defining *Filártiga*: Characterising International Torture Claims in United States Courts" 3 *Dick J Int'l L* 1 (1984), at p. 26; Kobruk, "The *ex post facto* Prohibition and the Exercise of Universal Jurisdiction Over International Crimes" 87 *Columbia LR* 1515 (1987); Randall, *supra* n. 42, at pp. 829-831; Van Alebeek, "The *Pinochet* Case: International Human Rights Law on Trial" [2000] 71 *BYIL* 29, at pp. 33-35. See also the judgement of Lord Millet in *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [1999] 2 *WLR* 825, at 911.

<sup>87</sup> The Separate Opinion of President Guillaume, at para. 16; the Separate Opinion of Judge Rezek, at para. 10; the Separate Opinion of Judge Ranjeva, at para. 12.

<sup>88</sup> See further on this point, Warbrick, Salgado and Goodwin, "The *Pinochet* cases in the United Kingdom" (1999) 2 *YB Int'l Hum L* 91, at p. 107.

<sup>89</sup> See, further, on this point, Kress, "Universal Jurisdiction over International Crimes and the *Institut de Droit International*" (2006) 4 *JICJ* 561, at p. 564. One possible exception to this noted by Warbrick *et al*, *ibid.*, is where customary international law is incorporated directly into domestic law.

therefore suggested that, as a legal concept, international crimes say nothing about whether a States will be permitted to criminalize this conduct on a universal basis:

The criminalization of certain conduct under international law does not necessarily coincide with the existence of a right of States to universal jurisdiction; the latter must still be proven with respect to each crime under international law concerned... It is [therefore] possible to conceive of crimes under international law which are not covered by the universality principle.<sup>90</sup>

It is suggested, however, that offences deemed by customary international law as international crimes do in fact have some relevance with regard to the universal principle. As has already been mentioned above, one of the definitional requirements of the universal principle is that jurisdiction may only be exercised over conduct recognised as particularly heinous and destructive to legal order as a whole. Accordingly, whether customary international law recognises the severity of certain conduct as warranting it to be recognised as an international crime may therefore be of relevance when determining whether customary international law recognises such conduct to be subject to universal jurisdiction.<sup>91</sup> The better view on whether international crimes are subject to universal jurisdiction may therefore be that of Lord Slynn in *Pinochet (No 1)*:

It does not seem... that it has been shown that there is any State practice or general consensus... that all crimes against international law should be justiciable in national courts on the basis of the universality of jurisdiction... The fact even that an act is recognised as a crime under international law does not mean that the courts of all States have jurisdiction to try it... there is no universality of jurisdiction for crimes against international law.<sup>92</sup>

## The Limits of Prescriptive Civil Jurisdiction

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<sup>90</sup> Kress, *Ibid.*, at pp. 572-3.

<sup>91</sup> Cf the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, at para. 58, who comment that, "the underlying purpose of designating certain acts as international crimes is to authorise a wide jurisdiction to be asserted over persons committing them". See, further, the similar argument presented *infra* at n. 236-50 with regard to whether violation of a *jus cogens* norm gives rise to universal jurisdiction.

<sup>92</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 1)* [1998] 3 WLR 1456. This obiter *comment* has been read with approval by President Guillaume, at para. 12, in his Separate Opinion.

At present great uncertainty surrounds the extent to which international law permits a State to extend its civil laws over matters occurring in a foreign jurisdiction. Indeed, one reason why such uncertainty exists may be because of a lack of diplomatic protests to exercises of extraterritorial civil jurisdiction when compared to that of criminal jurisdiction.<sup>93</sup> Another reason for this uncertainty is that most of the doctrinal attention given to jurisdiction has tended to focus on criminal rather than civil law, and this trend is noticeably reflected in the academic literature written on the topic. However, the leading works on jurisdiction written by Akehurst and Mann provide a significant exception to this trend;<sup>94</sup> yet despite their detailed considerations regarding the limits which international law imposes on a State when exercising prescriptive civil jurisdiction, the matter still remains largely unresolved since each scholar reaches a different conclusion to the other.

#### *The Requirement of a Sufficiently Close Connection*

Brownlie has noted that international law does not draw a major distinction between the principles that limit extraterritorial legislative jurisdiction in the different fields of law.<sup>95</sup> In all instances, a State must keep within the jurisdictional limits imposed by international law if the exercise of jurisdiction is to be lawful. Thus, he is of the opinion that, "the exercise of civil jurisdiction...presents essentially the same problems as the exercise of criminal jurisdiction".<sup>96</sup>

It will be recalled that Mann has suggested that international law only permits a State to exercise jurisdictional competence in instances where it has a sufficiently close connection with the subject matter.<sup>97</sup> This formulation proposed by Mann has

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<sup>93</sup> Shaw, *supra* n. 2, at pp. 578-9. Note, however, the strong protests by European States to the extraterritorial application of anti-trust law, which is partly civil, by the United States. See, further, on this point: Lowe, "Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act 1980" 75 AJIL 256 (1981); and Lowe, "US Extraterritorial Jurisdiction: The Helms Burton and D'Amato Acts" [1997] 46 ICLQ 378.

<sup>94</sup> Mann, *supra* n. 2, at pp. 60-69; Mann (Revisited), *supra* n. 2, at pp. 67-77; Akehurst, *supra* n. 2, at pp. 179-187. Other work found to discuss civil jurisdiction includes: Bowett, *supra* n. 2, at pp. 1-4; Brownlie, *supra* n. 2, at p. 298; Shaw, *supra* n. 2, at p. 578-9; and George, *supra* n. 67, at pp. 18-21. However, this latter work is too generalised and any discussion on civil jurisdiction often makes no clear distinction between prescriptive and adjudicative jurisdiction. Surprisingly, not a single author in Scott's collected essays in *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Right Litigation*, 2001, Hart Publishing, gave any consideration to the international limits of prescriptive civil jurisdiction.

<sup>95</sup> *Supra* n. 2, at p. 308.

<sup>96</sup> *Ibid.*

<sup>97</sup> See the discussion *supra* at n. 32-37.

been claimed to be one of general application. Accordingly, and regardless of the field of law, the same question of whether there exists a sufficiently close connection between the State and the subject matter that it seeks to regulate is applicable in all instances when assessing the legality of a State's exercise of prescriptive jurisdiction.<sup>98</sup>

If Mann's formulation that there must be a sufficiently close connection between the State and the subject matter that it seeks to regulate is correct;<sup>99</sup> then the conclusion thus follows that international law *must* impose some limits on a State when exercising legislative civil jurisdiction in the same way it does with criminal jurisdiction. Indeed, such a conclusion is consistent with the principles derived from the sovereign equality of states doctrine which still underpins modern international law.

#### *Defining the Limits International Law Imposes on Prescriptive Civil Jurisdiction*

Having suggested that international law does impose limitations on a State when exercising prescriptive civil jurisdiction if it is to pay due respect to the sovereignty of States, next comes the issue of defining the precise contours of these jurisdictional limits. It is this issue where the opposing schools of thought are encountered in the academic literature.

Some academics have advanced the view that international law draws no distinction between the regulation of criminal and civil jurisdiction; and as a result of this view, they have, therefore, suggested that the clearly defined customary bases of criminal jurisdiction apply equally to civil jurisdiction.<sup>100</sup> Reydams has claimed that:

It should be... that what applies for criminal jurisdiction applies to some extent *mutatis mutandis* for civil jurisdiction, because the latter is considered less intrusive. The presumption is that if universal criminal jurisdiction is permissible under international law, [then] universal civil jurisdiction is also permissible (*qui peut le plus puet le moins*, the greater includes the lesser).<sup>101</sup>

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<sup>98</sup> Mann (Revisited), *supra* n. 2, at p. 29.

<sup>99</sup> See, the commentary *supra* at ft. 34 citing the great academic and judicial support that this formulation has received.

<sup>100</sup> Strictly speaking, the two academics that advance this view refer to the concept of jurisdiction generally and make no distinction between its different forms. Therefore, it is assumed that their argument is made in relation to both prescriptive and adjudicative jurisdiction.

<sup>101</sup> Reydams, *supra* n. 24, at pp. 2-3.

While it cannot be denied that civil jurisdiction is considered to be less intrusive than its criminal counterpart,<sup>102</sup> it is submitted that this statement cannot, in itself, be treated as a principle of international law. Criminal and civil law are entirely separate bodies of law and are founded upon different rationales. International law has recognised this distinction between the two and found that what applies to the criminal law will not automatically apply to the civil law. One example of this may be provided by the rules governing State immunity where the scope of immunity from criminal jurisdiction is not the same as the scope of immunity from civil jurisdiction. If the greater infringement to sovereignty includes the lesser were a principle of international law, as Reydams indeed suggests, then it would thus follow that the scope of criminal immunity would apply to civil immunity. This however is simply not the case.

The same opinion that, “the scope of jurisdiction in civil matters is coterminous with criminal jurisdiction” is taken by Dixon.<sup>103</sup> In his work, Dixon draws the conclusion that:

The better view is that the heads of jurisdiction... can apply equally to civil and criminal matters.<sup>104</sup>

What is significant to note about Dixon’s conclusion is that it appears to be inconsistent with other statements that he makes when discussing civil jurisdiction. He comments that:

There is an argument that civil jurisdiction should depend on some sort of real and direct link between the State asserting jurisdiction and the substance of the civil proceedings, but there is little convincing authority to support this.<sup>105</sup>

If there is, as he states, “little convincing authority” to support the view that there should be a substantial connection between the State and the subject matter in civil proceedings, then how can the criminal heads of jurisdiction, which *are* said to be based upon a substantial connection between the State and the subject matter,

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<sup>102</sup> See Reydams’ own detailed argument for drawing this conclusion, *ibid.*, p. 3, at ft. 14; and, further, Shaw, *supra* n. 2, at pp. 578-9.

<sup>103</sup> *Supra* n. 30, at p. 134.

<sup>104</sup> *Ibid.*, at p. 135.

<sup>105</sup> *Ibid.*, at pp. 134-5.

therefore be said to apply to civil jurisdiction? Surely, if the argument that there is no requirement that there should be a substantial connection in civil jurisdiction were correct, then logic would dictate that the criminal heads of jurisdiction should not apply to civil jurisdiction.

It is therefore submitted that the academic suggestions claiming that the customary bases of criminal jurisdiction are also the limits which international law places on civil jurisdiction must be called into question. Not only is Dixon's work self-contradicting, but his opinion that there is no jurisdictional requirement of a substantial connection between a State and the subject matter in civil law runs counter to the above discussion which suggests that there is such a requirement. Moreover, both works advancing these views are largely underdeveloped since they make no reference to State practice nor other academic opinion in support of their conclusions.<sup>106</sup>

Mann's work draws two conclusions when discussing the limits that international law imposes on legislative civil jurisdiction, one of which, significantly, would clearly reject the view that the bases of jurisdiction apply equally to both criminal and civil law. As already noted, Mann has suggested that the same overriding question of whether there exists a substantial connection between the State and the subject matter is applicable in the different fields of law. When considering the jurisdictional limits in each of the different fields, he notes that:

The process of weighing [the interests will not] be the same in each field of law. Thus criminal law, civil procedure, taxation and bankruptcy, nationality or restrictive practices each involve and demand the consideration of different aspects. In each case the overriding question is: does there exist a close connection to justify, or make it reasonable for, a State to exercise legislative jurisdiction? We know that in certain field other than the conflicts of laws such rules have been developed. Criminal law is perhaps the most prominent example where one speaks of the theory of universality or the objective principle and so forth. Perhaps in the course of time similar rules applicable to other fields will emerge.<sup>107</sup>

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<sup>106</sup> Reydams' monograph on universal jurisdiction was a detailed study concerned solely with criminal law, and dealt with civil law in just one paragraph. Strangely, Redyams, *supra* n. 24, p. 3, at ft. 15, cites Akehurst's leading work on the doctrine of jurisdiction, and recognises that Akehurst himself would reject the conclusion which he drew.

<sup>107</sup> Mann (Revisited), *supra* n. 2, at p. 29. Similarly, Maier, *supra* n. 2, at p. 76, has suggested that the "jurisdictional issues deeply diverge from one another depending on the particular field in which they arise".

Therefore, according to Mann, the jurisdictional limits imposed by international law on a State's legislative jurisdiction are not the same in the different fields of law since each field weighs different interests.

The second conclusion that may be drawn from Mann's work on civil jurisdiction relates to the precise boundaries that international law imposes. Clearly, Mann is of the belief that jurisdictional limits do exist when stating that the exercise of prescriptive civil jurisdiction by a State, "cannot claim international validity except and in so far as it keeps within the limits which public international law imposes".<sup>108</sup> Indeed, such an opinion is consistent with his sufficiently close connection formula. When Mann turns to the issue of defining the jurisdictional limits imposed on a State wishing to extend its civil laws, he notes, as the passage cited above suggests, that they are insufficiently developed unlike their criminal counterparts and are, therefore, incapable of being clearly defined.

Despite recognising that these limits which international law imposes on prescriptive civil jurisdiction are insufficiently developed, Mann makes a few general observations on the matter. He finds that the jurisdictional limits governing civil law are more strongly influenced by the principle of State sovereignty than any other field of law.<sup>109</sup> The reason he suggests that these jurisdictional limits have remained more firmly rooted in territoriality than other branches of the law is because a greater degree of certainty and foreseeability is required by civil jurisdiction.<sup>110</sup> Although noting that the territorial doctrine of jurisdiction has been strongly criticised as being incapable of meeting the demands of modern international law, Mann recognises that the relaxation of the territorial doctrine that has occurred in other fields may certainly occur in the field of civil law. However, and after making a comparative survey of civil jurisdiction, he concludes that civil law does not require the same degree of flexibility that others do.<sup>111</sup>

In conclusion, what may be deduced from Mann's work on civil jurisdiction is that there must be a sufficiently close connection between the State and the subject matter that it seeks to regulate. The instances when it may be said that a State has a sufficiently close connection with the subject matter are insufficiently developed by

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<sup>108</sup> Mann, *supra* n. 2, at p. 61.

<sup>109</sup> *Ibid.*, p. 62; Mann (Revisited), *supra* n. 2, at p. 67.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

customary international law; however, these jurisdictional bases are more firmly rooted in the territorial principle than other fields of law.

*Defining the Limits of Prescriptive Civil Jurisdiction by Regarding Jurisdiction as a Unitary Concept*

It has already been suggested above that an overly rigid distinction between the different forms of jurisdiction should not be drawn, and that jurisdiction ought to be more properly regarded as a unitary concept.<sup>112</sup> In the criminal field of law, it is widely accepted that the limits which customary international law imposes on prescriptive jurisdiction are the same which it imposes on adjudicative jurisdiction.<sup>113</sup> Accordingly, courts will be permitted to take jurisdiction over matters in so far as the State has legislated for them. However, asking whether international law imposes the same limits on prescriptive civil jurisdiction as it does on adjudicative civil jurisdiction produces different academic conclusions.

Throughout his work on the doctrine of civil jurisdiction, Mann often overlaps his discussion of prescriptive and adjudicative jurisdiction thereby suggesting that the concept of civil jurisdiction should similarly be regarded as a unitary phenomenon. Furthermore, when discussing civil jurisdiction he, significantly, comments that:

The international jurisdiction to adjudicate is... not a separate type of jurisdiction, but merely an emanation of the international jurisdiction to legislate: a State's right of regulation is exercised by legislative jurisdiction which includes adjudication. It follows that both aspects of jurisdiction are co-extensive.<sup>114</sup>

Although he does not explicitly state the point in his work, if one specie of jurisdiction *is* an emanation of the other, then it thus follows that the limits which international law imposes on adjudicative civil jurisdiction are the same limits which it imposes on prescriptive civil jurisdiction.

A contrary conclusion is, however, drawn by Akehurst. Akehurst finds that in civil law, "a State may legislate for cases which fall beyond the jurisdiction of its

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<sup>112</sup> See the discussion *supra* at n. 21-25.

<sup>113</sup> See, for example, Akehurst, *supra* n. 2, at p. 179.

<sup>114</sup> Mann (Revisited), *supra* n. 2, at p. 67. A similar comment was made by Mann, *supra* n. 2, at p. 61, in his earlier work on civil jurisdiction: "A judgement, viz. a command conveyed through the courts, is not essentially different from a command expressed by legislative or administrative action".



courts".<sup>115</sup> Accordingly, he thus submits that, "legislative and judicial jurisdiction do not necessary coincide" in civil law.<sup>116</sup>

As a result of these conflicting views, the issue of whether the limits that international law imposes on a State's adjudicative civil jurisdiction are the same limits that it imposes on prescriptive civil jurisdiction remains unresolved. Moreover, even if it could be concluded that customary international law did in fact impose the same limits on the different forms of civil jurisdiction, next would come the difficult task of determining the customary limits of adjudicate civil jurisdiction.

*State Practice: International Law Imposes no Limits on Prescriptive Civil Jurisdiction*

Akehurst's work on the limits which international law places on the legislative civil jurisdiction of a State reaches a different conclusion to that drawn by Mann.<sup>117</sup> Akehurst begins his analysis by citing Mann's argument that a State may only legislate over persons, property or events that it has a sufficiently close connection with.<sup>118</sup> He continues by finding that Mann's view is rejected by some academics who maintain that international law imposes no limits on the legislative jurisdiction of a State over private law relationships.<sup>119</sup> Akehurst then cites a number of domestic decisions which demonstrate States applying their civil law to disputes where there was no real connection between the facts of the case and the forum where the dispute was heard.<sup>120</sup> In light of this State practice he concludes that:

These cases in which the *lex fori* is applied to facts which have little or no real connection with the State of the forum may not be very frequent or desirable, but they are too numerous to be disregarded. They are certainly far more numerous than the very rare instances of other States protesting against the application of the *lex fori*. The overwhelming preponderance of the relevant State practice therefore suggest that there are no rules of international law limiting the legislative jurisdiction over States in questions of what might loosely be described as 'private law'.<sup>121</sup>

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<sup>115</sup> Akehurst, *supra* n. 2, at p. 179.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*, at pp. 181-7.

<sup>118</sup> *Ibid.*, at p. 182.

<sup>119</sup> *Ibid.* In this regard he cites, Cook, *The Logical and Legal Bases of the Conflict of Laws* (1949), at pp. 41 and 71.

<sup>120</sup> *Ibid.*, at pp. 182-7.

<sup>121</sup> *Ibid.*, at p. 187.

Thus, according to Akehurst, the fact that States do not protest when other States extend their civil laws to facts which bear no close relationship with that State suggests that international law does not place any limits on prescriptive civil jurisdictions.

### *Conclusion*

The conclusion that international law places no limits on a State's prescriptive civil jurisdictions contradicts the principle of sovereign equality that the legal order was founded upon which still remains a central tenant of modern international law. Although it appears that State practice rejects Mann's argument that a State may only legislate over persons, property or events that it has a sufficiently close connection with, it is submitted that there is not an *opinio juris* to this effect. The very function of jurisdiction is to regulate competence between sovereign States in a horizontal legal system. Accordingly, international law must prescribe some limits if State jurisdiction is not to be unfettered. It is suggested that Mann's work on civil jurisdiction, which finds that international law does in fact place limits on the legislative civil jurisdiction of a State and that these limits are not the criminal bases of jurisdiction but instead other less well defined limits, is to be preferred to that of Akehurst.

## Universal Civil Jurisdiction over Torture

As will be recalled, the seminal *dictum* from the *Lotus* case provided that a State may not exercise its jurisdictional competence within the territory of another State unless supported by a permissive rule of international law.<sup>122</sup> The following discussion will consider in detail whether international law permits a State to exercise civil jurisdiction over acts of torture which are committed in a foreign territory by a non-national against another non-national, for whom the legislative State bears no international responsibility.<sup>123</sup>

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<sup>122</sup> See the discussion on the *Lotus* case *supra* at n. 28-30.

<sup>123</sup> This discussion proceeds on the assumption, contrary to the uncertainty identified above, that the universal principle is in fact a recognised base of civil jurisdiction.

In order to answer this question the discussion will fall in two parts. The first part will examine whether conventional international law allows a State to exercise universal civil jurisdiction over acts of torture. Specifically, this part of the discussion will consider in detail the jurisdictional scope of the obligation to provide civil redress contained in Article 14 of the Convention against Torture 1984,<sup>124</sup> and then the legality of both the Torture Victim Protection Act 1991<sup>125</sup> and the Alien Tort Claims Act 1789.<sup>126</sup> The second part of the discussion will remain in the same vein to that of the first and consider whether customary international law permits a State to exercise universal civil jurisdiction over acts of torture. A detailed analysis will be made of the relationship in international law between *jus cogens* norm, obligations *erga omnes* and universal jurisdiction.

## Conventional International Law: The Convention against Torture 1984

### *An Overview of the Criminal Framework of the Torture Convention*

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was drafted by the General Assembly so as to make more effective the struggle against torture.<sup>127</sup> Recognizing the previous efforts made to combat torture, including Article 5 of the Universal Declaration on the Protection of Human Rights<sup>128</sup> and Article 7 of the International Covenant on Civil and Political Rights,<sup>129</sup> both of which provide that no one shall be subjected to torture, the Torture Convention develops the obligations of this substantive right much further.

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<sup>124</sup> The Convention against Torture was adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46, U.N. GAOP, 39<sup>th</sup> Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1985), of 10<sup>th</sup> December 1984, and entered into force on 26<sup>th</sup> June 1987 in accordance with Article 27(1) CAT. [Hereinafter referred to as the Torture Convention or the CAT].

<sup>125</sup> 28 USC § 1350. [Hereinafter referred to as the TVPA].

<sup>126</sup> Judiciary Act 1789, Ch. 20, s. 9(b); codified at 28 USC § 1350. [Hereinafter referred to as the ATCA].

<sup>127</sup> For the most extensive literature on the Torture Convention see generally: Burgers and Danelius, *The United Nations Convention against Torture*, 1988, Kluwer Academic Publishers; and Boulesbaa, *The UN Convention on Torture and Prospects for Enforcement*, 1999, Martinus Nijhoff Publishers.

<sup>128</sup> The Universal Declaration was adopted by General Assembly Resolution 217A (III), U.N. GAOR, 3d Sess. Resolutions, Part 1, at 71, U.N. Doc. A/810 (1948) on 10<sup>th</sup> December 1948. [Hereinafter referred to as the Universal Declaration or the UDHR].

<sup>129</sup> The International Covenant was adopted by General Assembly Resolution 2200 (XXI), UN GAOR, 21<sup>st</sup> Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) on 16<sup>th</sup> December 1966, and entered into force on 23<sup>rd</sup> March 1976. [Hereinafter referred to as the International Covenant or the ICCPR].

Article 1 of the Torture Convention provides the definition of torture and reads:

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

2. This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

The significant features of the definition of torture contained in Article 1 are that the pain or suffering must be severe, that it must be intentionally inflicted to accomplish one of the specified purposes, and that it can only be inflicted by a State through the acts or under the direction of its officials.

The Torture Convention contains detailed provisions governing the assumption and exercise of criminal jurisdiction.<sup>130</sup> Article 4 CAT imposes the obligation on contracting States to ensure that all acts of torture, as defined by Article 1, are criminal offences within their domestic legal systems. Article 5(1) CAT then establishes the duty for States to take jurisdiction over alleged offenders on the grounds of territoriality, nationality and passive personality. Finally, Article 5(2) requires each State to either prosecute alleged offenders found within their territory or to extradite them to a State meeting the Article 5(1) CAT jurisdictional criteria. This latter obligation may require States to prosecute acts of torture which are committed in a foreign territory where neither the offender nor the victim is a national of the prosecuting State.

#### *The Obligation to Provide Civil Redress: Article 14 of the Torture Convention*

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<sup>130</sup> For a detailed study of the criminal jurisdiction under the Convention see, generally, Institute for International Law of the K.U. Leuven Group, "Universal Criminal Jurisdiction over Torture: A State of Affairs" Working Paper No. 66 (revised August 2005).

The principal objective of the Torture Convention is to establish a widely ratified treaty under which States are obliged to criminalize torture so as to prevent alleged torturers from finding safe havens where they could avoid prosecution. In conjunction with the comprehensive criminal obligations established by the Torture Convention, the Convention contains a substantive provision which establishes civil liability. Article 14 CAT provides:

1. Each State Party shall ensure in its legal system that the victim of an act torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for full rehabilitation as possible.

2. Nothing in this Article shall affect any right of the victim or other person to compensation which may exist under national law.

From the text of Article 14 CAT it is thus clear that States are under an obligation to provide civil redress to victims of torture. However, two issues that are left unresolved by the treaty text concern, firstly, what constitutes redress for the purposes of the Convention, and, secondly, the jurisdictional scope of the redress which a State is to provide.

Article 14 CAT does not impose an obligation of result but instead one of means whereby each contracting State is to ensure that its legal system provides victims of torture with the means to obtain redress.<sup>131</sup> The term redress is considered in paragraph 14(1) and states that victims of torture shall be provided with both “adequate compensation and full rehabilitation”. Compensation for acts of torture may be provided by either a State compensation scheme,<sup>132</sup> or by a private right of action for punitive damages against the alleged offender. Where a State provides compensation by way of a civil cause of action, it is uncertain whether Article 14 CAT requires the State to recognise torture as a civil wrong in their domestic legal system in the same way in which Article 4 requires them to recognise torture as a crime. However, given the absence of any express stipulation that torture be recognised as a civil wrong by the Torture Convention, it is suggested that it is

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<sup>131</sup> Hyland, *International Human Rights Law and the Tort of Torture*, in Scott, (eds.), *Torture as Tort*, 2001, Hart Publishing, p. 406, at ft. 27.

<sup>132</sup> Victims of torture are compensated in the UK under the Criminal Injuries Compensation Scheme. On the arrangements made for compensation under this Scheme see, further, the *Initial Report of the United Kingdom to the Committee against Torture*, U.N. Doc. CAT/C/9/Add.6 and 10, (1991), at paras. 107-118.

unlikely that it imposes such an obligation. In addition, many States make use of the traditional torts of trespass to the person, which include assault and battery, unlawful imprisonment and negligence, as the means to provide a private law cause of action for acts of torture. Significantly, the Committee against Torture, the body established by Article 19 CAT to receive and monitor reports from State parties on the measures they have taken to give effect to the undertaking of the Torture Convention, has not yet expressed the view that States need introduce a tort of torture in situations where it already recognises other torts which provide an incidental cause of action for such harm. Furthermore, even in situations where the traditional torts of trespass to the person have failed to provide substantial redress for the harm caused by an act of torture, the Committee has not yet made a recommendation to the effect that a tort of torture be recognised.<sup>133</sup>

Unlike the criminal provisions of the Torture Convention, which clearly stipulate the situations when both territorial and extraterritorial criminal jurisdiction is to be exercised over acts of torture, the jurisdictional scope of its civil counterpart is left uncertain by the treaty text. Article 14 CAT is simply silent with regard to whether a State is only obliged to provide civil redress to victims who have been tortured within their territory, or whether they are obliged to provide redress for all acts of torture including those which have been perpetrated extraterritorially over which they bear no international responsibility.<sup>134</sup>

As has already been noted above, Article 14 CAT regards the concept of redress to include both adequate compensation and full rehabilitation, whereby compensation may be provided by a statutory scheme or by a private right action against the alleged offender, and full rehabilitation includes psychiatric and medical assistance. It is suggested that were a State to offer a victim of torture either rehabilitation or compensation through its statutory scheme it is somewhat unlikely

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<sup>133</sup> The Committee against Torture in its *Concluding Comments on the First Report of Namibia*, U.N. Doc. A/52/44, (1997), at para. 240, merely expressed "concern" when finding that traditional torts were inadequate, and in many cases ineffective, to provide redress for torture because they did not provide redress in situations where physical or mental injury had been caused to the complainant. See, further, on this point, Byrnes, *Civil Remedies for Torture Committed Abroad*, in Scott, (eds.), *Torture as Tort*, 2001, Hart Publishing, p. 542, at ft. 15.

<sup>134</sup> Where State officials have committed extraterritorial acts of torture in a foreign jurisdiction, the Committee against Torture has found that the responsible State is to provide civil redress pursuant to Article 14 CAT. See, further on this point, the Committee's recommendation to the UK that compensation be provided for torture committed by its military officials in Afghanistan and Iraq in its *Concluding Observations on the Fourth Periodic Report of the United Kingdom*, U.N. Doc. CAT/C/CR/33/3, (2004), at para. 4(b).

that such an act would receive protest from the State where the acts of torture were carried out. In contrast, however, it is likely that protest may be received if a State were to allow its domestic legal system to be used in bringing a civil action for torture that was committed in a foreign jurisdiction. As will be recalled, the definition of torture provided by Article 1 stipulates that torture can only be inflicted by a State, and thus any action for damages brought in a foreign jurisdiction would be regarded as interfering with the territorial sovereignty of that State by seeking to regulate its internal affairs.<sup>135</sup>

### Resolving the Jurisdictional Scope of Article 14 CAT

With it being uncertain from the text of Article 14 CAT whether this provision creates universal civil jurisdiction over torture, recourse will be made to the rules on treaty interpretation contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969<sup>136</sup> in an attempt to resolve the ambiguity surrounding the jurisdictional scope of this provision.<sup>137</sup>

Article 31(1) VCLT lays down the general rule of treaty interpretation, and can be taken to be reflective of custom.<sup>138</sup> It provides that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

The International Court has commented that, “the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur”.<sup>139</sup> Accordingly, preference is to be given to the ordinary meaning of the agreement over other methods of interpretation.

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<sup>135</sup> In *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia and Lieutenant-Colonel Abdul Aziz; Mitchell, Walker and Sampson v. Ibrahim Al-Dali and Others* [2004] EWCA Civ. 1394, it was argued in both the Court of Appeal and the High Court (unreported) by Saudi Arabia that the English court did not have jurisdiction to hear the claim. Both courts, however, focused their judgements exclusively on the issue of immunity.

<sup>136</sup> 1115 UNTS 332, (1969) 8 ILM 679. [Hereinafter referred to as the Vienna Convention or VCLT].

<sup>137</sup> See, extensively, on this point, Byrnes, *supra* n. 131, at pp. 537-550.

<sup>138</sup> *Territorial Dispute (Libya/Chad)*, ICJ Reports, 1994, p. 6; *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, ICJ Reports, 1995, p. 6.

<sup>139</sup> *Competence of the General Assembly for the Admission of a State to the United Nations* case ICJ Reports, 1950, p. 4, at p. 8.

In the recent decision of *Jones v. Saudi Arabia*, concerning two separate actions brought before an English court seeking damages for torture which the applicants had allegedly suffered while in official custody in Saudi Arabia, Lord Bingham held that:

The natural reading of... [Article 14 CAT] is that it requires a private right of action for damages only for acts of torture committed in the territory under the jurisdiction of the forum State.<sup>140</sup>

How Lord Bingham found that the natural and ordinary meaning of Article 14 CAT only requires States to provide a private right of action for territorial acts of torture is unknown. An analysis of the actual words contained in the text of Article 14 simply does not indicate the jurisdictional scope of this treaty provision. The silence of Article 14 with regard to its jurisdictional application must be contrasted with other provisions in the Torture Convention. The clearly drafted Articles 4 and 5 CAT expressly detail the precise situations when extraterritorial criminal jurisdiction is to be both assumed and exercised. Moreover, the text of Articles 11 to 13 CAT stipulate that the obligation which this substantive provision imposes is only applicable to “territory under its jurisdiction”.

It is submitted, therefore, that the better view is that no conclusion can be drawn from the text of Article 14 as to whether it requires a State to provide a cause of action for acts of torture committed in a foreign jurisdiction.<sup>141</sup> In *Bouzari v. Islamic Republic of Iran*, the Court of Appeal for Ontario held that, “the text of the Convention itself simply provides no answer to the question”.<sup>142</sup>

Articles 31(3)(a) and (b) VCLT provide that any subsequent agreement and practice between the parties relating to the application of the treaty may be used as an aid to treaty interpretation. No State has interpreted Article 14 CAT as requiring it to provide a private right of action for acts of torture committed in a foreign

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<sup>140</sup> [2006] UKHL 26, at para. 25.

<sup>141</sup> A similar conclusion is drawn by Adams, *In Search of a Defence of the Transnational Human Rights Paradigm*, in Scott, (eds.), *Torture as Tort*, 2001, Hart Publishing, at p. 262. Cf Orakhelashvili, *Peremptory Norms in International Law*, 2006, OUP, at pp. 310-11, who finds that it is clear from the text of Article 14 that it establishes universal civil jurisdiction.

<sup>142</sup> [2004] OJ No. 2800, at para. 76, *per* Goudge JA.



jurisdiction.<sup>143</sup> When the United States ratified the Torture Convention it entered the following understanding:

It is the understanding of the United State that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of the State Party.<sup>144</sup>

This understanding provoked no dissent from other States party to the Torture Convention, nor, more significantly, from the Committee against Torture when the understanding was subsequently repeated by the United States in its *Initial Periodic Report*.<sup>145</sup>

The Committee against Torture has long maintained the view that Article 14 CAT does not require civil redress to be provided to victims of torture who have come from abroad. In the relatively few instances where States have provided either medical rehabilitation or a private right of action to victims of torture committed in a foreign jurisdiction, the Committee has “welcomed” such efforts thereby suggesting that the State has gone beyond the duty imposed by Article 14.<sup>146</sup>

Recently, however, the Committee has twice considered the issue of whether a State should provide a private right of action to victims of torture who have been allegedly been tortured abroad by foreign State officials. When considering the United Kingdom’s *Fourth Periodic Report*, the Committee asked whether there had been any

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<sup>143</sup> Similarly, no State has interpreted Article 14 CAT as requiring it to provided medical rehabilitation to victims of torture committed in a foreign jurisdiction, and when such rehabilitation has been provided the State has made it clear that it is goes beyond the duty imposed by Article 14. See the *Second Periodic Report of Germany to the Committee against Torture*, U.N. Doc. CAT/C/29/Add.2, (1997), at para. 39.

<sup>144</sup> Appendix A to the *Report of the Committee on Foreign Relations*, Senate Exec. Rep. No. 30, 101<sup>st</sup> Cong., 2d Sess. 1 (1990), at II (3). For an assessment of the various reservations, declarations and understandings entered by the United State see further: Magee, “The United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment: The Bush Administration’s Stance on Torture” 25 *Geo Wash J Int’l L & Econ* 807 (1992); and Stewart, “The Torture Convention and the Reception of International Criminal Law within the United States” 15 *Nova L Rev* 449 (1991).

<sup>145</sup> *Initial Report of the United States of America to the Committee against Torture*, U.N. Doc. CAT/C/28/Add.5, (2000), at para. 285.

<sup>146</sup> On the Committee’s position of States that provides medical rehabilitation to victims of torture who have come from abroad see: *Concluding Observations on the Third Periodic Report of Denmark*, U.N. Doc. A/52/44, (1997), at para. 177; *Concluding Observations on the Second Periodic Report of Germany*, U.N. Doc. A/53/44, (1998), at para. 183; and *Concluding Observations on the Second Periodic Report of New Zealand*, U.N. Doc. A/53/44, (1998), at para. 174. On the Committee’s position of a State which provides a private right of action to victims of torture committed in a foreign jurisdiction see the *Concluding Observations on the First Periodic Report of the United States of America*, U.N. Doc. A/55/44 (2000), at para. 178(b). See, further, on this latter point, Byrnes, *supra* n. 131, at pp. 544-545.

civil suits brought before an English court for acts of torture that had been committed in a foreign jurisdiction.<sup>147</sup> Similarly, the Committee asked Canada whether Article 14 required it to provide a civil cause of action to all victims of torture during consideration of its *Fourth and Fifth Periodic Report*.<sup>148</sup> In its *Concluding Observations*, the Committee noted as a “subject of concern” Canada’s lack of effective measures to provide civil compensation to all victims of torture,<sup>149</sup> and recommended that it should review its position under Article 14 to ensure that a provision of compensation be available to all victims.<sup>150</sup> In *Jones*, Lord Hoffmann found that why Canada had been singled out in this way remained unclear, and regarded the Committee’s interpretation of Article 14 as a statement of international law to have no value.<sup>151</sup> More emphatically, Lord Bingham commented that:

I would not wish to question the wisdom of this recommendation, and of course I share the Committee’s concern that all victims of torture should be compensated. But the Committee is not an exclusively legal and not an adjudicative body; its power under Article 19 is to make general comments; the committee did not, in making this recommendation, advance any analysis or interpretation of Article 14 of the Convention; and it was no more than a recommendation. Whatever its value in influencing the trend of international thinking, the legal authority of this recommendation is slight.<sup>152</sup>

Despite this recommendation of the Committee against Torture, it is submitted that there is a broad State practice reflecting a common understanding that Article 14 CAT only requires a State to provide a cause of action for torture committed within its territorial jurisdiction.<sup>153</sup>

Finally, Article 32 VCLT provides that where the interpretation of a treaty provision is ambiguous or obscure, or leads to a manifestly absurd or unreasonable result, recourse may be had to supplementary means of interpretation. These means

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<sup>147</sup> *UNCAT Hearing: Provisions of Lists of Issues to State Parties, Second Session*, (2004), at pp. 14-15.

<sup>148</sup> *Consideration of the Fourth and Fifth Periodic Report of Canada*, U.N. Doc. CAT/C/SR.643 and 646 (2005).

<sup>149</sup> *Concluding Observations on the Fourth and Fifth Periodic Reports of Canada*, U.N. Doc. CAT/C/CR/34/CAN, (2005), at para. 4(g).

<sup>150</sup> *Ibid.*, at para. 5(f).

<sup>151</sup> [2006] UKHL 26, at para. 57.

<sup>152</sup> *Ibid.*, at para. 23.

<sup>153</sup> The Court of Appeal for Ontario reached the same conclusion in *Bouzari* [2004] OJ No. 2800, at para. 79.

include both the preparatory work of the treaty and the circumstances of its conclusion.

During the 1981 negotiation session of the Torture Convention it was decided to include the phrase “committed in any territory under its jurisdiction” in an early draft of Article 14.<sup>154</sup> However, these words were subsequently omitted from the final version of the text. On the one hand, it has been suggested that the omission of this important phrase from the final text of Article 14 was on the grounds of being superfluous since the territorial limitation is already implicit in the treaty provision.<sup>155</sup> On the other hand, the removal of this phrase may even suggest that the provision was not intended to be limited territorially.<sup>156</sup> However, neither the preparatory work, nor the commentary on the drafting of the Torture Convention offered by Burgers and Danelius, gives any indication as to why this phrase was omitted. Therefore, in light of the fact of there being no clear indication as to why the phrase was omitted, the better conclusion may be that of the United States who suggest that it could only have been deleted by mistake.<sup>157</sup>

The principle of effectiveness is a further canon of treaty interpretation. Although it is not referred to by the Vienna Convention it is used often when interpreting human rights treaties, most notably the European Convention on Human Rights.<sup>158</sup> According to this principle, human rights treaties are regarded as living instruments<sup>159</sup> and thus a more dynamic and purpose-orientated approach is used so that the provisions of the treaty are interpreted in a way to make the object and purpose of it both practical and effective.<sup>160</sup> Most significant under this method of interpretation is that the treaty may be construed in a way well beyond what may have been originally envisaged by the drafters. Despite the Committee against Torture recently making the recommendation that Canada provide civil redress to all victims of torture, it is important to emphasise that this recommendation stands alone and has not been repeated in subsequent Concluding Observations as a matter of principle. At

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<sup>154</sup> *Report of the informal open-ended working group on a Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. E/CN.4/L.1576, at paras. 40-4. On the drafting history of the Convention see, further, Burgers and Danelius, *supra* n. 127, at p. 74.

<sup>155</sup> *Bouzari* [2004] OJ No. 2800, at para. 80, *per* Goudge JA.

<sup>156</sup> Byrnes, *supra* n. 131, at p. 546.

<sup>157</sup> *Initial Report of the United States of America to the Committee against Torture*, *supra* n. 145, at para. 268. A similar conclusion is drawn by Stewart, *supra* n. 144, at p. 459. *Cf* Orakhelashvili, *supra* n. 141, at p. 312.

<sup>158</sup> 213 UNTS 221 (1950). [Hereinafter referred to as either the European Convention or the ECHR].

<sup>159</sup> *Selmouni v. France* (2000) 29 EHRR 403.

<sup>160</sup> *Soering v. United Kingdom* (1989) 11 EHRR 439; *Loizidou v. Turkey* (1996) 23 EHRR 513.

present, therefore, it appears that the Committee has chosen not to interpret Article 14 CAT in an expansive manner beyond the text of the provision.

#### Concluding on Whether Article 14 CAT Creates Universal Civil Jurisdiction for Torture.

The text of Article 14 CAT simply does not indicate whether this provision creates a duty to provide a private cause of action for acts of torture committed in a foreign jurisdiction. However, after reviewing this treaty provision in relation to the others in the Torture Convention, State practice to date, and the drafting history of this provision, the conclusion is drawn that Article 14 does not create universal civil jurisdiction for acts of torture.<sup>161</sup> This conclusion is consistent with the two decisions that have considered the jurisdictional application of Article 14 to date. In *Bouzari*, the Court of Appeal for Ontario held that, “Canada’s treaty obligation pursuant to Article 14 does not extend to providing the right to a civil remedy against a foreign State for torture committed abroad”.<sup>162</sup> Similarly, in *Jones*, Lord Bingham held that, “Article 14 of the Torture Convention does not provide for universal civil jurisdiction”,<sup>163</sup> and Lord Hoffmann held that, Article 14 is “plainly concerned with acts of torture within the jurisdiction of the State concerned”.<sup>164</sup>

Having concluded that the Torture Convention does not *require* State parties to provide a civil cause of action for acts of torture committed in a foreign jurisdiction, the argument has been made that neither does the Convention *prohibit* such a remedy.<sup>165</sup> Article 14(2) CAT is a disclaimer to Article 14(1) and provides that, “nothing in this Article shall affect any right of the victim or other person to compensation which may exist under national law”. Clearly, the disclaimer envisages the possibility of provisions for civil redress that are wider in application than those required by Article 14(1) being available in domestic legal systems. Although the

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<sup>161</sup> Cf Orakhelashvili, *supra* n. 141, at pp. 310-6.

<sup>162</sup> [2004] OJ No. 2800, at para. 81, *per* Goudge JA. Similarly, in the Superior Court of Justice [2002] OJ No. 1624, at para. 54, it was held by Swinton J. that, “the [Torture] Convention creates no obligation on Canada to provide access to the Courts so that a litigant can pursue an action for damages against a foreign State for torture committed outside of Canada. Rather, Article 14 requires States like Canada, who are signatories, to provide a remedy for torture committed within their jurisdiction”.

<sup>163</sup> [2006] UKHL 26, at para. 25.

<sup>164</sup> *Ibid.*, at para. 46.

<sup>165</sup> Byrnes, *supra* n. 131, at p. 543; Orange, *Torture, Tort Choice of Law and Tolofson*, in Scott, (eds.), *Torture as Tort*, 2001, Hart Publishing, at p. 305.

preparatory work is silent as to why this provision was drafted, it is likely that it would have been drafted so as to not preclude the availability of domestic remedies in the United States that allow a victim of torture committed abroad to seek civil redress.<sup>166</sup>

When *Jones* was heard in the Court of Appeal, Lord Justice Mance approved the argument that the Article 14(2) CAT disclaimer does not prohibit universal civil jurisdiction over torture, but went further to claim that Article 14(2) grants permission for a State to establish universal civil jurisdiction over such acts:

Article 14(1) is dealing with (no more than) a right of redress in the legal system of the State (State A)... State A is, in short, the responsible State and it must ensure proper civil redress. Article 14(1) is not designed to *require* every other State (State B) to provide redress in its civil legal system for acts of torture committed in State A, although under Article 14(2) it remains *permissible* for State B to provide redress in State B for acts of torture committed (either in State A or elsewhere) by officials, etc., of State A.<sup>167</sup>

In effect, Lord Justice Mance has concluded that because Article 14(2) CAT does not prohibit States from providing a civil cause of action for acts of torture committed in a foreign jurisdiction, then the Torture Convention must be read as permitting States to provide such redress.

It is suggested that this reasoning of Lord Justice Mance has misunderstood the framework upon which jurisdiction is said to operate under within international law established by the Permanent Court in the *Lotus* case. The better view of Article 14 is that it does not preclude a State from providing a civil cause of action for acts of torture committed in a foreign jurisdiction; however, while not prohibiting such an exercise of universal jurisdiction, it does not provide the permissive rule of international law supporting such an exercise of jurisdiction.<sup>168</sup> Accordingly, it is thus concluded that the Torture Convention neither prohibits States from exercising universal civil jurisdiction over acts of torture, nor does it create such jurisdiction. If such unilateral assertions of jurisdiction are to be lawful under international law then

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<sup>166</sup> Byrnes, *ibid.*, at p. 543. See the discussion, *infra* at n. 169-223, regarding these civil remedies available in the United States and the legality of these unilateral assertions of jurisdiction.

<sup>167</sup> [2004] EWCA Civ. 1394, at para. 21. (Original emphasis). Orange, *supra* n. 165, at p. 305, makes the same claim.

<sup>168</sup> As stated above, both Higgins, *supra* n. 2, at p. 77, and Lowe, *supra* n. 2, at pp. 334-5, have criticised instances where the *Lotus* case has been cited as authority for the proposition that a State may lawfully exercise extraterritorial prescriptive jurisdiction unless its exercise is prohibited by an international rule.

they must find a legal basis in either other provisions of conventional international law or custom.

### *The Torture Victim Protection Act 1991*

In recognising that there were between 200,000-400,000 refugees and asylees living in the United States who had been victims of torture that had been committed in a foreign territory,<sup>169</sup> the United States enacted the Torture Victim Protection Act 1991.<sup>170</sup> The TVPA creates an express federal cause of action against any individual who subjects another individual to torture in a foreign jurisdiction. S. 2 TVPA provides:

An individual, who under, actual or apparent authority, or colour of law, of any foreign nation...subjects an individual to torture shall, in a civil action, be liable for damages to that individual.<sup>171</sup>

For an action in damages to be successfully brought under the TVPA against an alleged offender the victim must show that they were subjected to torture, that the offender acted under authority of law, and that they had exhausted all adequate and available remedies.

Was the TVPA Enacted so as to Meet the Demands of Article 14 CAT?

The United States ratified the Torture Convention on October 27<sup>th</sup> 1990, one year before enacting the TVPA. Indeed, the legislative history of the TVPA reveals that comments were made in both Congress and the Senate stating that one of the reasons for enacting the TVPA was to fulfil the obligations imposed by the Torture

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<sup>169</sup> *Initial Report of the United States of America to the Committee against Torture*, *supra* n. 145, at para. 285.

<sup>170</sup> The academic literature on the TVPA is vast, and for the most insightful commentary see generally: Gery, "The Torture Victim Protection Act: Raising Issues of Legitimacy" 26 *Geo Wash J Int'l L & Econ* 597 (1993); Haffke, "The Torture Victim Protection Act: More Symbol than Substance" 43 *Emory LJ* 1469 (1994); and Schwartz, "And Tomorrow? The Torture Victim Protection Act" 11 *Ariz J Int'l & Comp L* 271 (1994).

<sup>171</sup> In addition, s. 2 TVPA creates a cause of action against any individual who subjects another individual to extrajudicial killing.

Convention.<sup>172</sup> However, it is strongly submitted that the TVPA does not implement any obligations imposed by the Torture Convention;<sup>173</sup> and when President Bush senior signed the TVPA, he expressed words to this effect:

The TVPA does not help to implement the [Torture Convention] and does present a number of potential problems about which the Administration has expressed concern in the past.<sup>174</sup>

The TVPA establishes universal civil jurisdiction over torture. In contrast, it has been suggested that Article 14 CAT only requires States to exercise civil jurisdiction over territorial acts of torture. Accordingly, opponents of the TVPA have thus argued that the Act is not demanded by the Torture Convention,<sup>175</sup> and often cite the understanding entered by the US when ratifying the Convention, providing that Article 14 is limited territorially, as authority for this point.<sup>176</sup> Furthermore, when the United States submitted its *Initial Report* to the Committee against Torture, it regarded the TVPA as an “additional right and remedy under United States law”, rather than one required by Article 14.<sup>177</sup> At one point in the Report, the United States commented that:

[United States] law currently provides rights which are potentially broader than those required by Article 14 with respect to obtaining redress for acts of torture occurring outside of the United States territory.<sup>178</sup>

Significantly, the Committee against Torture, when responding in its Concluding Comments, “particularly welcomed” this broad legal recourse to compensation for victims of torture,<sup>179</sup> thereby suggesting that the TVPA does indeed go further than what is required by Article 14 CAT.

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<sup>172</sup> S. Rep. No. 249, 102d Cong., 1<sup>st</sup> sess., (1991). [Hereinafter referred to as the Senate Report]. H.R. Rep. No.367, 102d Cong., 1<sup>st</sup> Session, pt. 1 (1991). [Hereinafter referred House Report]. The House Report, at p. 2, stated that the Torture Convention “obligates State parties to adopt” legislation such as the TVPA. In addition, Drinan and Kuo, “Putting the World’s Oppressors on Trial: The Torture Victim Protection Act” (1993) 15 HRQ 605, at p. 607, have claimed that, “the TVPA carries out the intent of the Torture Convention by providing redress to victims of torture”.

<sup>173</sup> Gery, *supra* n. 170, at p. 609, makes the same submission.

<sup>174</sup> 1992 U.S.C.C.A.N. (106 Stat.) 91.

<sup>175</sup> See the statement of Mr McGinnis, Deputy Assistant Attorney General, Senate Report, *supra* n. 172, at 13.

<sup>176</sup> Gery, *supra* n. 170, at pp. 611-612; Stewart, *supra* n. 144, at pp. 459-460.

<sup>177</sup> *Supra* n. 145, at paras. 277-286.

<sup>178</sup> *Ibid.*, at para. 268.

<sup>179</sup> *Concluding Comments on the First Report of the United States*, U.N. Doc., A/55/44, (2000), at para. 178(b).

Despite the statements made to the contrary, it is suggested that the TVPA does not implement any obligation imposed by Article 14 CAT. Such a conclusion is drawn on the basis that the TVPA is itself inconsistent with the demands of Article 14 since it *only* provides a remedy for acts of torture committed in a foreign jurisdiction and not one for those acts which are committed territorially.

#### The Legal Status of the TVPA as an Exercise of Universal Civil Jurisdiction

The private cause of action provided by the TVPA, enabling a torture victim to use US Federal Courts as a forum to seek civil redress, is a unilateral assertion of jurisdiction that no other State has matched in scope. Both Congress and the Senate relied on the international doctrine of universal jurisdiction as the legal basis for the enactment of the TVPA.<sup>180</sup> More specifically, the Senate Report cited § 404 of the *Third Restatement*, which provides that:

A State has jurisdiction to define and prescribe punishment for certain offences recognised by the community of nations as of universal concern.

When faced with the view that international law does not require States to provide universal civil jurisdiction over acts of torture, but instead only universal criminal jurisdiction,<sup>181</sup> the Senate Report cited the *Third Restatement* again:

In general, jurisdiction on the basis of universal jurisdiction has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example by providing a remedy in tort or restitution for victims of piracy.<sup>182</sup>

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<sup>180</sup> Senate Report, *supra* n. 172, at p. 5; House Report, *supra* n. 172, at p. 55.

<sup>181</sup> See the statement of Mr McGinnis, *supra* n. 175, at p.13.

<sup>182</sup> § 404, cmt.b.



Although the *Third Restatement* correctly recognises that international law does not preclude the application of universal civil law,<sup>183</sup> the authoritativeness of this claim, however, must be read with a degree of caution since it cites no legal authority to support such an application of jurisdiction.<sup>184</sup>

The legal status of the TVPA has never been formally considered before either an international or domestic judicial body.<sup>185</sup> As a result of this, academic opinion on the lawfulness of the TVPA appears to be divided. Drinan and Kuo have made the most far-reaching comments in support of the TVPA and claimed that, “the [Act] codifies international law principles that have already been universally accepted in numerous human rights instruments”.<sup>186</sup> Despite several international human rights treaties prohibiting torture, none of them, however, appear to support universal civil jurisdiction as a means of combating torture.<sup>187</sup> Significantly, Drinan and Kuo’s work fails to elaborate and explain this claim. In contrast, opponents of the TVPA have found the Act to be legally unwarranted, and Stewart has suggested that, “absent [of] a treaty providing for such jurisdiction, there would seem to be little justification for such overreaching”.<sup>188</sup>

### *The Alien Tort Claims Act 1789*

#### The Scope and Meaning of the ATCA

The Alien Tort Claim Act,<sup>189</sup> enacted by the first United States Congress in 1789, provides that:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of any nations or a treaty of the United States.

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<sup>183</sup> Higgins, *supra* n. 2, p. 58, at ft 5.

<sup>184</sup> Donovan and Roberts, “The Emerging Recognition of Universal Civil Jurisdiction” 100 AJIL 142 (2006), at p. 146.

<sup>185</sup> Lord Hoffmann commented, *obiter dicta*, in Jones [2006] UKHL 26, at para. 58, that the TVPA “is not required and perhaps not permitted by customary international law”.

<sup>186</sup> *Supra* n. 172, at p. 622. See also the comments made at pp. 621 and 624. Similarly, Schwartz, *supra* n. 170, at p. 284, has commented that, “the TVPA is anything but a bold arrogation of power by the US. It is well within the bounds of modern thinking in international law”.

<sup>187</sup> On this point see further the discussion *infra* at n. 224-8 concerning both the ECHR and the ICCPR. Cf Orakhelashvili, *supra* n. 141, at p. 316.

<sup>188</sup> Stewart, *supra* n. 144, at p. 460.

<sup>189</sup> See, generally, on the ATCA, Steinhardt and D’Amato, (eds.), *The Alien Tort Claims Act: An Analytical Anthology*, 1999, Transnational Publishers.

The Act remained largely dormant until revisited by the US Court of Appeal for the Second Circuit in its landmark decision in *Filártiga v. Peña-Irala*.<sup>190</sup> The case of *Filártiga* concerned a Paraguayan national invoking the ATCA in order to bring an action for damages in a district court of the US against a Paraguayan State official for acts of torture that had been committed in that State. Judge Kaufman, handing down the only judgement of the Court, held that where an alleged offender had been served with process within the US, the ATCA conferred subject matter jurisdiction on a court. In addition, he held that the ATCA created a civil cause of action for a “violation of the law of nations”, and that official acts of torture constituted such a violation. Following this innovative decision, victims of gross violations of human rights could use the United States’ legal system as a forum for bringing civil actions in cases where the violations had occurred abroad and had no connection with the forum State.

In *Tel-Oren v. Libyan Arab Republic*,<sup>191</sup> Israeli survivors and representatives of persons murdered in an armed attack on a civilian bus in Israel filed suit against Libya and the Palestine Liberation Organization. Judge Bork noted the lack of reasoning supporting the conclusions drawn by *Filártiga*, and held that the ATCA was purely a jurisdictional statute that did not create a civil cause of action.<sup>192</sup> If a plaintiff were to bring a claim under the ATCA then, according to Judge Bork, they would have to show that they had an existing cause of action that had been expressly created. Since neither international law nor a statutory provision had expressly created such a cause of action, any claim brought under the ATCA would thus fail.<sup>193</sup> Judge

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<sup>190</sup> 630 F. 2d 876 (1980). On the large academic literature available on *Filártiga* see, *inter alia*: Blum and Steinhardt, “Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after *Filártiga v. Peña-Irala*” 22 Harv Int’l LJ 53 (1981); Danaher, “Torture as Tort in Violation of International Law: *Filártiga v. Peña-Irala*” 33 Stan L Rev 353 (1981); George, *supra* n. 67; Hassan, “A Conflict of Philosophies: The *Filártiga* Jurisprudence” [1983] 32 ICLQ 205; and Paust, “Litigating Human Right: A Commentary on the Comments” 4 Hous J Int’l L 81 (1981).

<sup>191</sup> 726 F.2d 774 (1984).

<sup>192</sup> The other members of the court dismissed the claim for lack of a cause of action, but on different grounds to those of Judge Bork. Senior Judge Robb held that the case was non-justiciable due to the political issues involved, and Judge Edwards held that the law of nations did not impose any liability on non-state entities that cause human rights violations.

<sup>193</sup> The passage of the TVPA was in part a response to the doubts raised that the ATCA did not create a cause of action. In the House of Representatives, Republican Fascell, 135 Cong. Rec. H6423, H6424 (1989), commented that, the TVPA “will clarify and expand existing human rights law” to make explicit that victims of torture can bring a federal cause of action.

Bork's findings have received strong academic criticism<sup>194</sup> and subsequent tort claims involving foreign violations of human rights have successfully been brought in the United States under the ATCA.<sup>195</sup>

The recent decision of *Sosa v. Alvarez-Machain*<sup>196</sup> was the first time in which the United States Supreme Court analysed the meaning and scope of the ATCA in detail. The case of *Sosa* concerned a Mexican national being abducted and detained arbitrarily in Mexico for less than one day before being brought to the US to stand trial for torture and murder. After being acquitted of these charges, he proceeded to bring a civil action against the Mexican nationals who had been involved in his abduction and arbitrary detention under the ATCA. The Court of Appeal for the Ninth Circuit held that he had suffered a violation of his right under the law of nations which gave rise to liability under the ATCA.<sup>197</sup>

The decision was appealed to the Supreme Court where it was argued, *inter alia*, that abduction and arbitrary detention did not breach the law of nations, and that the ATCA merely provides subject matter jurisdiction and does not create a substantive cause of action. Delivering the majority opinion of the Court, Justice Souter endorsed the first conclusion that had been drawn in *Filártiga*, and held that the ATCA was a jurisdictional statute which granted federal courts jurisdiction to hear civil claims over conduct that amounted to a violation of the law of nations.<sup>198</sup> However, unlike *Filártiga*, he held that the ATCA did not create a private cause of action. Instead, it was the common law that gave rise to the cause of action necessary for a claim under the ATCA since it incorporates violations of the law of nations.<sup>199</sup> Concerning which offences the common law provided a cause of action for, Justice Souter held that the common law, when the ATCA was enacted in 1789, would have recognised a cause of action for only piracy, violations of safe conduct, and an

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<sup>194</sup> D'Amato, "What does *Tel-Oren* Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken" 79 AJIL 92 (1985); Quigley, "Judge Bork is Wrong" 71 Wash U L Q 1087 (1993). Cf Rubin, "Professor D'Amato's Concept of Jurisdiction is Seriously Mistaken" 79 AJIL 105 (1985).

<sup>195</sup> *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D. Cal. 1987). For an overview of the jurisprudence that has developed post-*Filártiga* see, Stephens and Ratner, *International Human Right Litigation in US Courts*, 1996, Transnational Publishers.

<sup>196</sup> 124 S. Ct 2739 (2004). For a case comment see: Berkowitz, "*Sosa v. Alvarez-Machain*" 40 Harv CRCL L Rev 289 (2005); Norberg, "The US Supreme Court Affirms the *Filártiga* Paradigm" (2006) 4 JICJ 387; and Roth, "*Sosa v. Alvarez-Machain*" 98 AJIL 798 (2004).

<sup>197</sup> *Alvarez-Machain v. United States*, 266 F.3d 1045 (9<sup>th</sup> Cir. 2001).

<sup>198</sup> 124 S. Ct 2739 (2004), at 2754-5.

<sup>199</sup> *Ibid.*, at 2761.

infringement of the rights of ambassadors.<sup>200</sup> Accepting that the ATCA was not enacted against a backdrop of modern international law, Justice Souter held that the First Congress which enacted the ATCA would have intended for federal courts to have identified further international norms as actionable in the future.<sup>201</sup> He emphasised that federal courts should exercise restraint when recognising new causes of action,<sup>202</sup> and held that contemporary norms would only be recognised as actionable when they were definable, obligatory, specific and universal.<sup>203</sup> Applying this standard to the facts of the case, Justice Souter concluded, after citing a large body of international and domestic material on the matter, that a single illegal detention of less than one day, followed by a transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.<sup>204</sup> Thus, on the grounds that there was no common law cause of action upon which to bring the claim, the decision of the Court of Appeal for the Ninth Circuit was overturned.

The Supreme Court's decision significantly affirms that foreign individuals may continue to bring civil actions in the United States for gross violation of human rights committed abroad under the ATCA. However, by finding that the ATCA is purely jurisdictional in nature, and that the common law only recognises a cause of action for a limited number of violations, the scope of claims brought under the ACTA has been reduced. The decision has been criticised for failing to establish a clear standard of which international legal norms the common law will provide a cause of action for.<sup>205</sup> However, it can readily be assumed that the common law will provide a cause of action for torture, slavery, genocide and crimes against humanity.<sup>206</sup>

#### The Legal Status of the ATCA as an Exercise of Universal Civil Jurisdiction

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<sup>200</sup> *Ibid.*, at 2756.

<sup>201</sup> *Ibid.*, at 2765. Rehnquist CJ., Scalia J. and Thomas J. all dissented on this point, and held that the common law did not create private causes of action for violations of contemporary international norms.

<sup>202</sup> *Ibid.*, at 2761.

<sup>203</sup> *Ibid.*, at 2765-6.

<sup>204</sup> *Ibid.*, at 2769.

<sup>205</sup> Berkowitz, *supra* n. 196, at pp. 290 and 295.

<sup>206</sup> Norberg, *supra* n. 196, at p. 395.

Prior to the Supreme Court's decision in *Sosa*, very little consideration had been given to the legal status of the ATCA as a statute exercising civil jurisdiction over a foreign disputes bearing no connection with the United States.<sup>207</sup> In the few instances where the matter had been raised, the lower courts simply cited § 404 of the *Third Restatement*,<sup>208</sup> but failed to question whether the *Third Restatement* did in fact provide a valid legal basis for the Act. *Sosa* presented the Supreme Court with an opportunity to consider whether litigation arising under the ATCA infringed the sovereignty of other States, and two of the *amici curiae* briefs submitted to the Supreme Court addressed, *inter alia*, whether the Act was in fact consistent with international law.

The *amici curiae* brief submitted by Australia, Switzerland and the United Kingdom claimed that international law only recognises universal criminal jurisdiction in a few cases involving the most heinous crimes and does not recognise universal civil jurisdiction at all.<sup>209</sup> Accordingly, the ATCA was said to be inconsistent with international law.<sup>210</sup> These broad exercises of jurisdiction made under the ATCA interfered with the sovereignty of other States by undermining policy choices that they had made with regard to the proper vindication of rights and redressing civil wrongs.<sup>211</sup> Recognising the potential disharmony that this could lead to in the international arena,<sup>212</sup> the *amici curiae* brief suggested that the Supreme Court should restrict litigation under the ATCA significantly so as to minimise these conflicts of jurisdiction.

Taking a slightly different approach to that of the sovereign States, the *amici curiae* brief submitted by the European Commission claimed that because universal civil jurisdiction had received less attention than its criminal counterpart, its existence and scope was not very well established under international law.<sup>213</sup> However, to the extent that universal civil jurisdiction was recognised by international law, it applied

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<sup>207</sup> Donovan and Roberts, *supra* n. 184, at p. 146.

<sup>208</sup> See, for example, *Kadic v. Karadzic*, 70 F.3d 232 (CA, 2 Cir. 1995), at 240; *Beanal v. Freeport-McMoRan Inc.*, 969, F.Supp. 362 (E.D. La. 1997), at 371. See also Judge Edwards' concurring opinion in *Tel-Oren*.

<sup>209</sup> Brief of The Governments of The Commonwealth of Australia, The Swiss Confederation and The United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of the Petitioner, *Sosa v. Alvarez-Machain*, 124 S. Ct 2739 (2004), at p. 6.

<sup>210</sup> *Ibid.*, at p. 2.

<sup>211</sup> *Ibid.* Moreover, it was claimed, at p. 10, that there was also a substantial risk that such broad exercise of civil jurisdiction would disrupt trade and investment in a global economy.

<sup>212</sup> *Ibid.*, at pp. 9-10.

<sup>213</sup> Brief of *Amicus Curiae* of The European Commission in Support of Neither Party, *Sosa v. Alvarez-Machain*, 124 S. Ct 2739 (2004), at p. 17.

to only a narrow category of cases that are consistent with the rationale of universal principle.<sup>214</sup> The *amici curiae* brief suggested that domestic courts could be used as forums to hear civil claims arising from disputes in foreign jurisdiction, but this should be limited only to disputes where there was no reasonable prospect of redress in other States bearing a closer jurisdictional connection with the events.<sup>215</sup>

Disappointingly, the Supreme Court's majority opinion in *Sosa* did not directly address the legality of the ATCA. However, the Concurring Opinion of Justice Breyer did consider whether "the exercise of jurisdiction under the [ATCA] is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations".<sup>216</sup> Justice Breyer found that there existed a procedural agreement within the international community to prosecute a limited set of norms under the universal principle.<sup>217</sup> The fact that there existed this procedural consensus, he claimed, suggested that recognition of universal jurisdiction will not threaten the practical harmony that comity seeks to protect.<sup>218</sup> However, this consensus existed with regard to criminal jurisdiction. Justice Breyer nonetheless endorsed the principle of universal civil jurisdiction on the grounds that, firstly, universal civil jurisdiction is no more threatening than its criminal counterpart, and, secondly, because many nations permit civil claims to be filed as an adjunct to a criminal prosecution:

Criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well.<sup>219</sup>

It is suggested that the reasoning offered by Justice Breyer endorsing the principle of universal civil jurisdiction is somewhat underdeveloped and cannot be taken as conclusive of the matter. To simply recognise universal civil jurisdiction on the basis that it is no less intrusive than universal criminal jurisdiction clearly fails to take into consideration the fact that it is only universal criminal jurisdiction that has been accepted by the international community. In effect, Justice Breyer has concluding that because States in the international community have willingly limited the sovereignty of their criminal law by recognising universal jurisdiction as a means

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<sup>214</sup> *Ibid.*, at p. 5.

<sup>215</sup> *Ibid.*, at pp. 22-26.

<sup>216</sup> 124 S. Ct 2739 (2004), at 2782.

<sup>217</sup> *Ibid.*, at 2783.

<sup>218</sup> *Ibid.*

<sup>219</sup> *Ibid.*, at 2784.

of repressing the most serious crimes, then they have done so also with regard to civil law as this would represent no greater an infringement to their sovereignty. This is clearly not the case. The *amici curiae* brief submitted by Australia, Switzerland and the United Kingdom in *Sosa* demonstrates, for the first time,<sup>220</sup> States challenging these broad unilateral assertions of universal civil jurisdiction made under the ATCA as undermining their sovereignty in the civil field of law. Moreover, the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, similarly noted in the *Arrest Warrant Case* that most States have not supported the exercise of universal civil jurisdiction made under the ATCA:

In civil matters we are already seeing the beginning of a very broad form of extraterritorial jurisdiction. Under the Alien Tort Claims Act, the United States... has asserted a jurisdiction both over human rights violations and over major violations of international law, perpetrated by non-national overseas.... While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally.<sup>221</sup>

The protests made by the States in the *amici curiae* brief, as well as the comments made by the Joint Separate Opinion, are significant as they strongly suggest that litigation under the ATCA may not be reflective of customary international law.

Justice Breyer also endorsed the principle of universal civil jurisdiction on the basis that the legal systems of many States combine criminal and civil proceedings. Although it is correct that criminal and civil proceedings are combined in many legal systems,<sup>222</sup> it must be emphasised that there are substantive differences between the two, and that this distinction is more significant in cases involving a transnational dimension. When criminal proceedings are initiated, the public prosecutor may take into consideration whether another State has a greater interest in exercising jurisdiction over the events under the doctrine of international comity. Similarly, in civil proceedings national courts have a discretion to decline the adjudication of a civil claim under the doctrine of *forum non conveniens*. However, the *amici curiae*

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<sup>220</sup> Cassese, (*International Criminal Law*), *supra* n. 42, pp. 290-1, at ft. 29, writing before the *Sosa* decision, commented that States had previously acquiesced to these assertions of universal civil jurisdiction made by US courts under the ATCA.

<sup>221</sup> At para. 48.

<sup>222</sup> See, further, on this point, Van Schaack, "In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgements Convention" 42 *Harv Int'l LJ* 141 (2001), at pp. 145-147.

brief submitted by the European Commission noted that the discretion to decline adjudication in civil proceedings is more limited than that of the public prosecutor when bring a criminal prosecution.<sup>223</sup> Recognising universal civil jurisdiction on the basis that some legal systems combine domestic criminal litigation with civil litigation may, therefore, run into practical difficulties when universal civil claims are brought in those legal systems that do not combine the two.

Justice Breyer's rather limited reasoning upholding the legality of the ATCA merely provides a thin veneer of principle behind which great uncertainty on the matter still remains. The protests made in the *amici curiae* brief submitted by Australia, Switzerland and the United Kingdom, present a strong argument in favour of regarding unilateral exercises of civil jurisdiction as contrary to international law.

### *General Human Rights Treaties and Universal Civil Jurisdiction*

Article 3 ECHR is the substantive provision in the European Convention that prohibits the use of torture and reads:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The text of this provision is noticeably silent with regard to civil redress that may be provided by States when committing acts of torture. Nonetheless, Strasbourg has interpreted Article 3 ECHR, in conjunction with both the auxiliary right to an effective remedy contained in Article 13 and the right to determine civil disputes before a domestic court contained in Article 6(1), to require that a civil remedy be available before the domestic courts of States party to the European Convention where it is alleged that an individual has been tortured.<sup>224</sup> However, in situations where an individual has brought a civil action for acts of torture that have been committed outside the jurisdiction of a State party to the European Convention, and the forum State bears no international responsibility over the acts,<sup>225</sup> Strasbourg has

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<sup>223</sup> *Supra* n. 213, at p. 22.

<sup>224</sup> *Aksoy v. Turkey* (1996) 23 EHRR 553, at para. 90; *Aydin v. Turkey* (1997) 25 EHRR 251, at para. 93.

<sup>225</sup> In *R. (On the Application of Al-Skeini and Others) v. Secretary of State for Defence* [2005] EWCA Civ 1609, an Iraqi citizen successfully brought a civil action for damages against the United Kingdom before its domestic courts for violations of Articles 2 and 3 ECHR performed by British soldiers in Iraq at a time when the United Kingdom, along with other States, had overthrown the government and were temporally in effective occupation of the South Eastern part of the country.



held that there is no obligation under the European Convention to provide redress for such acts. In *Al-Adsani v. United Kingdom*,<sup>226</sup> the applicant contended, *inter alia*, that the United Kingdom had failed to secure his rights under Article 3 ECHR when failing to provide civil redress for acts of torture that had been committed in the territorial jurisdiction of a State not party to the European Convention. The European Court of Human Rights, sitting as a Grand Chamber, unanimously dismissed this argument under Article 3, and held that:

In these circumstances, it cannot be said that the High Contracting Party was under a duty to provide a civil remedy to the applicant in respect of torture.<sup>227</sup>

Similarly, in *Bouzari* the applicant argued that Articles 7 and 14 ICCPR created an obligation on States party to the International Covenant to provide civil redress for acts of torture committed in a foreign jurisdiction. The Court of Appeal for Ontario firmly rejected this claim, and held that the International Covenant does not require States to provide access to its courts for acts of torture committed outside of its jurisdiction by a foreign sovereign.<sup>228</sup>

#### *Concluding on whether Conventional International Law Creates Universal Civil Jurisdiction for Torture*

It is concluding that conventional international law, and most specifically Article 14 CAT, does not create the permissive rule of international law allowing a State to exercise universal civil jurisdiction over acts of torture. Accordingly, it is thus submitted that any assertions of universal civil jurisdiction over torture, such as those made by the ATCA and TVPA, will be unlawful unless finding a legal basis in customary international law. The discussion will now turn to consider this matter.

### Customary International Law: Universal Jurisdiction, Torture as a *Jus Cogens* Norm and Obligations *Erga Omnes*

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<sup>226</sup> (2001) 34 EHRR 273.

<sup>227</sup> *Ibid.*, at para. 41.

<sup>228</sup> [2004] OJ No. 2800, at para. 83. *Cf* Orakhelashvili, *supra* n. 141, at p. 316, who, somewhat remarkably, suggests that Article 7 ICCPR does in fact create universal civil jurisdiction.

Numerous academics have advanced the claim that customary international law creates universal criminal jurisdiction over all violations of *jus cogens* norms.<sup>229</sup> Moreover, it has been further suggested that because there is an intrinsic relationship between *jus cogens* norms and obligations *erga omnes*,<sup>230</sup> that the universal principle should also be seen as having a theoretical basis in the *erga omnes* concept.<sup>231</sup> Consequently, because violations of *erga omnes* obligations are the concern of all States, it is thus suggested that the prosecution of serious international offences under the doctrine of universal jurisdiction is an obligation *erga omnes*.<sup>232</sup>

The contention that the violation of a *jus cogens* norms gives rise to universal criminal jurisdiction has received judicial endorsement at both the domestic and international level. In *Pinochet (No. 3)*, Lord Millet held that:

Crimes prohibited by international law attract universal jurisdiction under customary international law if two conditions are satisfied. First they must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order. Isolated offences, even if committed by public officials, would not satisfy these criteria.<sup>233</sup>

Similarly, the Trial Chamber in the International Criminal Tribunal for the Former Yugoslavia commented in *Furundžija* that:

At the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community... is that every State is entitled to investigate, prosecute, punish or extradite individuals... who are present in territory under its jurisdiction.<sup>234</sup>

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<sup>229</sup> Cassese (*International Law*), *supra* n. 2, at p. 208; Orakhelashvili, *supra* n. 141, at p. 288; Randall, *supra* n. 42, at pp. 829-831; Van Alebeek, *supra* n. 67, at pp. 33-35. See, further, the discussion *supra*, at n. 85-92, on whether international crimes give rise to universal criminal jurisdiction under customary international law.

<sup>230</sup> Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" *Law and Contemporary Problems* 25 (1996) 63, has commented that, "*jus cogens* refers to the legal status that certain international crimes reach, and *obligatio erga omnes* pertains to the legal implications arising out of a certain crime's characterisation as a *jus cogens*". However, it is noted that *erga omnes* obligations can exist which are not *jus cogens* in character.

<sup>231</sup> Van Albeek, *supra* n. 67, at p. 34.

<sup>232</sup> Randall, *supra* n. 42, at p. 831.

<sup>233</sup> [2000] 1 AC 147, at 275. On Lord Millet's judgement see, further, O'Keefe, "Customary International Crimes in English Courts" [2001] 72 BYIL 293.

<sup>234</sup> *Prosecutor v. Furundžija*, ITCY Trial Chamber II, Judgement of 10 December 1998 (Case No. IT-95-17/1-T 10), at para. 156.

This extract from *Furundžija* has subsequently been read with approval by the ILA Report on Universal Jurisdiction.<sup>235</sup>

Despite the concepts of universal jurisdiction, *jus cogens* and obligations *erga omnes* enjoying a close relationship with one another in international law, it is suggested, however, that they are theoretically different, and that the allocation of jurisdiction to a domestic court does not arise following the violation of a peremptory norm.<sup>236</sup> In order to put this argument into context, it is necessary to define the concepts of *jus cogens* and obligations *erga omnes* in turn before then contrasting them from the doctrine of universal jurisdiction.

### *The Definition and Scope of Jus Cogens Norms*

*Jus cogens* norms are peremptory norms of customary international law that enjoy a higher ranking status over all other international rules. The concept of according certain norms a superior status in the legal order is based upon protecting the most fundamental values of the international community.

Article 53 VCLT provides the authoritative definition of *jus cogens*:

A peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 53 of the Vienna Convention then applies this definition to treaties that are in conflict with a peremptory norm and says that they are void at the time of their conclusion. Given that the Vienna Convention was limited solely to issues of treaties, Article 53 VCLT does not provide a comprehensive account of the legal effects of *jus cogens* outside of this context. The only other reference made to peremptory norms by conventional international law is found in Articles 40 and 41 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001. Article 41 sets forth the particular consequences which arise from a breach of a peremptory norm: paragraph 1 provides that States are under a positive obligation to cooperate in bringing the breach to an end through lawful means; and paragraph 2 provides that all

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<sup>235</sup> *Supra* n. 45, at p. 410.

<sup>236</sup> On this point see further Inazumi, *supra* n. 42, at pp. 124-7.

States shall refrain from recognising as lawful the situation created by a breach and not render any aid or assistance in maintaining the breach. Outside of these references made by these international texts great uncertainty at present surrounds whether any further legal consequences ensue from the violation of a *jus cogens* norm.<sup>237</sup> Significantly, the International Court has neither mentioned nor considered the term.

In addition, controversy exists with exactly which norms have been endowed with a peremptory status and there is no authoritative list on the matter.<sup>238</sup> However, certain standards are widely recognised as being fundamental values of the international community. It is suggested that the prohibition on torture represents one such standard given that numerous international human rights instruments have outlawed it.<sup>239</sup> In all of these instruments the prohibition is absolute in nature and there are no lawful exceptions, implied limitations, or justifications for acts of torture.<sup>240</sup> Judicial statements of the highest authority have recently articulated that the prohibition has now become one of the most fundamental standards of the international community that is now to be recognised as an established norm of *jus cogens*.<sup>241</sup>

#### *The Definition and Scope of Obligations Erga Omnes*

Obligations *erga omnes* are concerned with the consequences following a breach of an international rule. The International Court stated in the *Barcelona Traction* case that:<sup>242</sup>

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<sup>237</sup> Brownlie, *supra* n. 2, at p. 490.

<sup>238</sup> See, generally, D'Amato, "It's a Bird, It's a Plane, It's a *Jus Cogens*!" 6 Conn J Int'l L 1 (1990).

<sup>239</sup> Article 5 of the Universal Declaration; Article 7 of the International Covenant; Article 3 of the European Convention; Art 5(2) of the American Convention on Human Rights 1969; Article 5 of the African Charter on Human and Peoples' Rights 1981; the Torture Convention; the Inter-American Convention to Prevent and Punish Torture 1985; the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment 1987. For a summary of the international prohibition on torture see, generally, Nagan and Atkins, "The International Law of Torture: From Universal Proscription to Effective Application and Enforcement" 14 Harv Hum Rts J 87 (2001).

<sup>240</sup> *Chahal v. United Kingdom* (1997) 23 EHRR 413, at paras. 79-81. See also ICCPR General Comment No. 20, of 10 March 1992, UN Doc. ICCPR/A/53/44, at para. 3.

<sup>241</sup> *Al-Adsani v. United Kingdom* (2001) 34 EHRR 273, at para. 61; *Furundžija*, ITCY Trial Chamber II, Judgement of 10 December 1998 (Case No. IT-95-17/1-T 10), at para. 154; *Pinochet* (No. 3) [2000] 1 AC 147, at 197-8.

<sup>242</sup> *Case Concerning Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)*, ICJ Reports, 1970, p. 3.

An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State... By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.<sup>243</sup>

Violation of an *erga omnes* obligation permits all States that are party to the international rule that imposes the obligation, and not just those which have been affected by the breach, to invoke responsibility.

The Court continued and said that obligations *erga omnes* found in contemporary international law include, outlawing acts of aggression and genocide, and protecting the basic human rights such as slavery and racial discrimination.<sup>244</sup> Since this early decision of the International Court it has subsequently been held by the ICTY in *Furundžija* that the prohibition on torture imposes an obligation *erga omnes*.<sup>245</sup>

#### *Does Violation of a Jus Cogens Norm give rise to Universal Criminal Jurisdiction?*

From the definitions of *jus cogens* and obligations *erga omnes* it is thus clear that *jus cogens* are primarily concerned with the invalidation of treaties, while *erga omnes* are purely concerned with the responsibility of States. According to these definitions, both concepts only have effects at the inter-state level and neither imposes any obligations on the State at the individual level.<sup>246</sup> In contrast, universal jurisdiction is concerned with individual responsibility and the doctrine provides a legal basis for holding perpetrators of serious international offences accountable for their conduct. Despite this important distinction drawn above, Randall has nevertheless claimed that the universal principle may draw support from the *jus cogens* and *erga omnes* concepts:

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<sup>243</sup> *Ibid.*, at p. 33.

<sup>244</sup> *Ibid.*, at p. 34.

<sup>245</sup> ICTY Trial Chamber II, Judgement of 10 December 1998 (Case No. IT-95-17/1-T 10), at paras. 151-152. See also ICCPR General Comment No. 31, of 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, at para. 2.

<sup>246</sup> *Cf Furundžija, ibid.*, at para. 156.

If the [*Barcelona Traction*] *dictum* supports judicial remedies against State offenders, it logically also supports judicial remedies against individual offenders.<sup>247</sup>

It is suggested that this is an erroneous contention since the *erga omnes* concept is not concerned with criminal responsibility and does not impose any obligations on States to exercise jurisdiction. The use of the *Barcelona Traction dictum* as authority for universal jurisdiction has rightfully been criticised by Higgins:

It is spoken of as if it provides guidance for the contemporary application of the principle of universality of jurisdiction- as if the Court was affirming universal jurisdiction in respect of each of these offences. Of course, the Court was doing nothing of that kind. Its *dictum* was made in the context not of asserting jurisdiction but of an examination of the law relating to diplomatic protection.<sup>248</sup>

It is concluded, then, that the fact that certain conduct may violate a peremptory norm, whose protection is an obligation *erga omnes* on all States, does not give rise to universal criminal jurisdiction. On this matter, Lord Bingham commented in *Jones* that:

There is no evidence that States have recognised or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law, nor is there any consensus of judicial and learned opinion that they should.<sup>249</sup>

This indeed is correct. The partly dissenting opinion of Lord Millet in *Pinochet (No. 3)* was the view of just one member of the House of Lords; the other Law Lords were of the belief that jurisdiction over the crime of torture was established under the Torture Convention. Moreover, the comments made by the ITCY in *Furundžija* were, strictly speaking, *obiter* since it is its statute which provides the jurisdictional basis of the International Tribunal to prosecute those allegedly responsible for serious offences.

The suggestion identified above that jurisdiction automatically arises from the violation of a peremptory norm, whose exercise is an obligation on all States, may be the result of confusion caused from the close relationship that these concepts enjoy

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<sup>247</sup> *Supra* n. 42, at p. 831.

<sup>248</sup> *Supra* n. 2, at p. 57.

<sup>249</sup> [2006] UKHL 26, at para. 27.

with one another in international law. All three represent a common concern of the international community in protecting its most fundamental values; however, it is submitted that they provide different mechanisms seeking to protect these values. Since the concepts share a common concern, the way in which one of the concepts treats a certain offence may be indicative of how the other concepts should view it. Thus, for example, *jus cogens* and obligations *erga omnes* may become part of the evidence considered indicating whether a certain crime is deemed as particularly destructive to the legal order as a whole- this being a requisite for the exercise of universal jurisdiction.<sup>250</sup> Yet the fact that certain offences may have satisfied the definitional requirements of one concept does not mean that it satisfies the definitional requirements of the others concepts *per se*.

*Does Violation of a Jus Cogens Norm give rise to Universal Civil Jurisdiction?*

If, contrary to what has been concluded above, the violation of a *jus cogens* norm does in fact gives rise to universal criminal jurisdiction- as some academics and judicial authority indeed presume- then it must be considered whether the violation of a *jus cogens* norm gives rise to universal civil jurisdiction as well. In the recent decision of *Ferrini v. Federal Republic of Germany*<sup>251</sup> the Italian Court of Cassation drew such a conclusion.

The case of *Ferrini* concerned an Italian national bringing a civil action against Germany after being deported from Italy where he was forced to work in the German war industry. The Court of Cassation held that deportation and forced labour were both international crimes and peremptory norms,<sup>252</sup> and that it was well established that universal jurisdiction existed over crimes that infringe values of the international community.<sup>253</sup> In addition, it held that the peremptory nature of *jus cogens* gives all States the power to repress them not only under the doctrine of universal criminal jurisdiction, but also under universal civil jurisdiction on the basis that there is no reason to doubt the applicability of the universal principle to civil proceedings.<sup>254</sup>

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<sup>250</sup> See further on this point, Inazumi, *supra* n. 42, at p. 126

<sup>251</sup> (Cass. Sez. Un. 5044/04) 87 *Rivista du Diritto Internazionale* 539 (2004).

<sup>252</sup> *Ibid.*, at para. 7.

<sup>253</sup> *Ibid.*, at para. 9.

<sup>254</sup> *Ibid.*, at para 10.

It is suggested that the legal authority of this judicial decision may be doubted on two separate, but significant, grounds. Firstly, the legal reasoning with regard to universal civil jurisdiction is rather limited and the judgement lacks any theoretical insight into this highly uncertain matter. Secondly, it is unclear precisely why the Court considered that it was necessary to exercise universal jurisdiction over the events when the commission of the offence had begun in the forum State and thus the Court could have assumed jurisdiction under the more established subjective territorial principle. This inherent contradiction renders the judgement somewhat unsatisfactory, and, in conjunction with its lack of any doctrinal reasoning, it is suggested that it is likely that this decision will not be used as reflecting a State practice that violation of a *jus cogens* norm gives rise to universal civil jurisdiction.<sup>255</sup>

In the absence of a free-standing customary rule to the effect that universal civil jurisdiction is created by the violations of peremptory norm, scholars have advanced an alternative, and more subtle, argument. Adams has suggested that a civil claim for violation of a peremptory norm committed in a foreign jurisdiction may be brought under the universal criminal doctrine where such acts amount simultaneously to criminal and tortious conduct in a legal system.<sup>256</sup> Accordingly, if criminal proceedings for violation of a *jus cogens* norm may be brought under the universal principle, then it thus follows that civil proceedings may also be brought on the back of this claim. Indeed there may be some merit in this suggestion; Donovan and Roberts have asserted in a recent paper that, "State practice endorsing the exercise of universal civil jurisdiction as a permissive customary norm is beginning to emerge".<sup>257</sup> Significantly, they then claim, somewhat contradictory, that this growing recognition of universal civil jurisdiction is not derived from State practice itself, but instead from breaking down the distinction drawn between criminal and civil law and then fusing the litigation of the two:

It might be more accurate to characterise these developments, however, as an increasing recognition that the well-accepted modern rationale for exercising universal jurisdiction to impose criminal penalties also justifies exercising it to provide civil remedies. That is, rather than looking solely or primarily for separate and independent evidence of an emerging principle of universal civil jurisdiction, we might be better served by considering whether our

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<sup>255</sup> Cf Orakhelashvili, *supra* n. 141, at pp. 308 and 310.

<sup>256</sup> Adams, *supra* n. 141, at p. 264.

<sup>257</sup> Donovan and Roberts, *supra* n. 184, at p. 153.



existing understanding of universal jurisdiction encompasses a civil dimension and, if so, its appropriate scope and limits.<sup>258</sup>

Despite an abundance of scholarly literature available that attempts to dismantle the distinction drawn between criminal and civil law,<sup>259</sup> it is significant to once again emphasize that States have only consented to their sovereignty being limited in the criminal domain. Since none of the literature that has assimilated transnational civil litigation with its criminal counterpart has provided any cogent legal reasoning which adequately addresses this matter, it is suggested that such litigation would, more than likely, be contrary to customary international law.

### Conclusion

The conclusion is drawn that, at present, neither conventional nor customary international law provides a legal basis for universal civil jurisdiction over acts of torture. What has become most apparent after reviewing the rather limited jurisprudence of those domestic courts which have considered the legality of universal civil jurisdiction, most notably the US Supreme Court in *Sosa* and the Italian Court of Cassation in *Ferrini*, is that there is an assumption that because international law recognises universal jurisdiction in the criminal field of law then it does so automatically in the civil field of law. This chapter, however, has found that the established bases of criminal jurisdiction do not, *per se*, apply to civil jurisdiction. At present only the US unilaterally asserts universal civil jurisdiction over acts of torture, and thus it cannot be said that there is a widespread and consistent practice amongst States on this matter. Moreover, the *amici curiae* brief submitted by Australia, Switzerland and the United Kingdom in *Sosa* significantly provides clear evidence of States protesting to such assertions of jurisdiction.

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<sup>258</sup> *Ibid.*

<sup>259</sup> See, *inter alia*, on this point: Friedman, "Beyond the Tort/Crime Distinction" 76 BUL Rev 103 (1996); Hall, "Interrelations of Criminal Law and Torts" 43 Colum L Rev 759 (1943); Stephens, "Conceptualising Violence Under International Law: Do Tort Remedies Fit the Crime?" 60 Alb L Rev 579 (1996).

## IMMUNITY

It is a basic principle of international law that one sovereign State (the forum State) does not adjudicate on the conduct of a foreign State. The foreign State is entitled to procedural immunity from the process of the forum State. This immunity extends to both criminal and civil liability.<sup>1</sup>

### General Principles of Immunity

#### *The Doctrine of State Immunity and its Relationship with Jurisdiction*

The doctrine of State immunity serves as a bar to a claim of jurisdiction and is granted so as to preserve orderly relations within the international community.<sup>2</sup> Although the doctrine may be invoked to bar proceedings before international tribunals, it has been said that its main significance relates to its effects upon the jurisdiction of national

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<sup>1</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147, at 201, *per* Lord Browne-Wilkinson. [Hereinafter referred to as *Pinochet (No. 3)*].

<sup>2</sup> On immunity see generally: Badr, *State Immunity*, 1984, The Hague; Bröhmer, *State Immunity and the Violation of Human Rights*, 1997, The Hague; Brownlie, *Principles of Public International Law*, 6<sup>th</sup> ed., 2003, OUP, chapter 16; Cassese, *International Law*, 2<sup>nd</sup> ed., 2005, OUP, chapter 6, [hereinafter referred to as Cassese (*International Law*)]; Cassese, *International Criminal Law*, 2003, OUP, chapter 14, [hereinafter referred to as Cassese (*International Criminal Law*)]; Fox, *International Law and the Restraints on the Exercise of Jurisdiction by National Courts of States*, in Evans, (eds.), *International Law*, 2<sup>nd</sup> ed., 2006, OUP, chapter 12, [hereinafter referred to as Fox (*Restraints on the Exercise of Jurisdiction*)]; Fox, *The Law of State Immunity*, 2004, OUP, [hereinafter referred to as Fox (*State Immunity*)]; Harris, *Cases and Materials on International Law*, 6<sup>th</sup> ed., 2004, Sweet and Maxwell, chapter 6; Higgins, *Problems and Process: International Law and How We Use It*, 1994, OUP, chapter 5; Jennings and Watts, *Oppenheim's International Law*, 9<sup>th</sup> ed., 1992, London, at pp. 339-79; Schreier, *State Immunity: Some Recent Developments*, 1988, Cambridge; Shaw, *International Law*, 5<sup>th</sup> ed., 2003, CUP, chapter 13; Simbeye, *Immunity and International Criminal Law*, 2004, Aldershot: Ashgate; Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers" 247 HR 1994 III 13; and Wickremasinghe, *Immunities Enjoyed by Officials of States and International Organisations*, in Evans, (eds.), *International Law*, 2<sup>nd</sup> ed., 2006, OUP, chapter 13.

courts.<sup>3</sup> A successful plea of immunity before a national court will prevent a State from exercising adjudicative jurisdiction over a dispute that involves a foreign State. The grant of immunity to a foreign State does not act as a defence to absolve the substantive liability of that State, but instead as a procedural bar to prevent the substantive issues from being heard by a domestic court.

Despite the concepts of jurisdiction and immunity being described as “inextricably linked”,<sup>4</sup> they are, nonetheless, two separate and distinct concepts within international law. Jurisdiction is said to be concerned with the ability of a State to exercise sovereign authority over persons, property or events; whereas immunity, in contrast, is concerned with exceptions that are made to the rules on judicial jurisdiction. The International Court of Justice<sup>5</sup> commented in the *Arrest Warrant* case that, as a matter of logic, immunity should only be addressed once there has been an establishment of jurisdiction.<sup>6</sup> However, the few domestic decisions which have been brought seeking civil redress for acts of torture committed in a foreign jurisdiction have focused exclusively on the issue of immunity. Consequently, and made evident from the discussion in chapter 2, almost no jurisprudence concerning universal civil jurisdiction over acts of torture has so far been developed.<sup>7</sup>

### *The Rationale of Immunity*

Two main reasons provide the rationale for domestic courts being debarred from adjudicating disputes involving foreign States.<sup>8</sup> Indeed, the close relationship which immunity enjoys with jurisdiction is reflected in the fact that the rationales of both are strongly allied. Firstly, in a horizontal legal system where States of the international community are in an equal standing with one another, one sovereign State cannot claim jurisdiction over another. This principle is expressed in the maxim *par in parem*

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<sup>3</sup> Fox (*State Immunity*), *ibid.*, at p. 19.

<sup>4</sup> The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, in the *Case Concerning the Arrest Warrant of 11 April 2000*, (*Democratic Republic of Congo v. Belgium*), ICJ Report, 2002, p. 3, at para. 3.

<sup>5</sup> Hereinafter referred to as either the International Court or ICJ.

<sup>6</sup> ICJ Report, 2002, p. 3, at para. 46.

<sup>7</sup> It is suggested that the reason for this may be because immunity from judicial jurisdiction is a preliminary plea made by a State when proceedings are commenced.

<sup>8</sup> This point is common to all of the academic literature. For the most extensive comments, and other rationales, see generally, Fox (*State Immunity*), *supra* n. 2, at pp. 28-33.

*non habet imperium*, and reflects the sovereign equality and independence of States.<sup>9</sup> In *The Schooner Exchange*,<sup>10</sup> the US Supreme Court commented:

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good office with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.<sup>11</sup>

The second rationale for immunity is non-intervention in the internal affairs of another State. Although this rationale similarly derives from notions of sovereignty, it does however have a more practical underlying basis. The reasons why States cannot have their internal disputes resolved in foreign courts is because of the factual impossibility of the forum State enforcing the judgement. The application of forcible measures by one State against another is regarded by international law as an unlawful act which is generally prohibited.<sup>12</sup> In the absence of a power of enforcement, domestic courts are therefore not to intervene in any of the acts committed by foreign sovereigns.

#### *From an Absolute Doctrine of Immunity to a Restrictive One*

At the time when the international community was established in the early 18<sup>th</sup> century, States applied an absolute doctrine of immunity whereby all acts performed by a foreign sovereign would be immune from the jurisdiction of a domestic court.<sup>13</sup> By the late 19<sup>th</sup> century States had begun to participate increasingly in commercial trade with private individuals and national courts soon developed a theory of restrictive immunity whereby they could adjudicate the commercial disputes arising between the two. According to the theory of restrictive immunity, a distinction is

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<sup>9</sup> On the equality of States in international law see, further, Jennings and Watts, *supra* n. 2, at pp. 339-70, who significantly comment, at p. 342, that, "it is doubtful whether any of these considerations supplies a satisfactory basis for the doctrine of immunity. There is no obvious impairment of the rights of equality, or independence, or dignity of a State, if it is subjected to ordinary judicial processes within the territory of a foreign State... The grant of immunity from suit amounts in effect to a denial of a legal remedy in respect of what may be a valid legal claim; as such, immunity is open to objection".

<sup>10</sup> *The Schooner Exchange v. McFaddon*, 7 Cranch. 116 (1812).

<sup>11</sup> *Ibid.*, at 137, *per* Marshall CJ.

<sup>12</sup> Fox (*State Immunity*), *supra* n. 2, at pp. 28-9.

<sup>13</sup> For an example of the absolute doctrine of immunity being applied by a UK court see, *Le Parlement Belge* (1880) 5 Prob. Div. 197.

drawn between the acts of a State that are performed in the exercise of a public or sovereign function, *acta de jure imperii*, and those acts which are performed by a State in a private capacity, *acta de jure gestionis*. Immunity from judicial jurisdiction will only be granted with respect to the former acts, and denied with respect to the latter.

The restrictive doctrine of immunity has been widely accepted by numerous States; however, it must be emphasised that some States still apply the absolute doctrine.<sup>14</sup> Brownlie has identified twenty States whose national courts apply a restrictive approach to immunity,<sup>15</sup> and another eleven who support this restrictive approach in principle.<sup>16</sup> In addition, eight common law jurisdictions have enacted domestic legislation which codifies the restrictive doctrine of immunity.<sup>17</sup> Moreover, both the European Convention on State Immunity 1972,<sup>18</sup> and the UN Convention on Jurisdictional Immunities of States and Their Property 2004,<sup>19</sup> similarly provide a comprehensive code based on the restrictive doctrine.<sup>20</sup> Indeed, the State practice on the matter suggests that the restrictive doctrine of immunity is to be regarded as a rule of customary international law; and in her detailed study on the law of State immunity, Fox has drawn the conclusion that the restrictive doctrine of immunity should now be viewed as the prevailing doctrine.<sup>21</sup>

## Immunity Accorded to States and its Officials

### *Immunity Accorded to States*

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<sup>14</sup> The main adherent to the absolute rule is China. For a summary of other States who still accept the principle of absolute immunity see, Brownlie, *supra* n. 2, p. 324, at ft. 31. Cf Parlett, "Immunity in Civil Proceedings for Torture: The Emerging Exception" [2006] EHRLR 49, at p. 53, who comments that, "a rule of absolute immunity no longer exists in international law".

<sup>15</sup> *Ibid.*, p. 323, at ft. 25.

<sup>16</sup> *Ibid.*, p. 324, at ft. 26.

<sup>17</sup> The US Foreign Sovereign Immunities Act 1976; the UK State Immunity Act 1978; the Singapore State Immunity Act 1979; the Pakistan State Immunity Ordinance 1981; the South African Foreign State Immunities Act 1981; the Malaysian Immunities and Privileges Act 1984; the Australian Foreign States Immunities Act 1985; and the Canadian State Immunity Act 1985.

<sup>18</sup> 16 May 1972, 74 ETS 3. For a comment see, Sinclair, "The European Convention on State Immunity" (1973) ICLQ 254. Only eight States are party to the Convention.

<sup>19</sup> December 16 2004, UN GA Resolution 59/38.

<sup>20</sup> For a historical account of the development of restrictive immunity in both common law and civil law jurisdictions see, generally, Sinclair, "Law of Sovereign Immunity: Recent Developments" (1980) 167 RC 113.

<sup>21</sup> Fox (*State Immunity*), *supra* n. 2, at pp. 257-8.

The primary beneficiary of State immunity is, as the term suggests, the State itself.<sup>22</sup> According to the restrictive doctrine of immunity, it is only the sovereign acts performed by a States that are immune from the adjudicative jurisdiction of a foreign national court. The method of distinguishing between sovereign and non-sovereign State acts is highly complex,<sup>23</sup> most particularly in borderline disputes. A substantial body of both judicial and academic opinion has frequently considered this matter, and given that this discussion is well beyond the scope of this paper no attempt shall be made to enter into it.<sup>24</sup>

The international conventions and domestic legislation which codify the restrictive doctrine of immunity all follow a similar pattern based on distinguishing between sovereign and non-sovereign acts. They begin with a presumption in favour of recognising the immunity of a State and then list a number of general exceptions. Exceptions to State immunity which are common to all include, proceedings relating to contracts which are of a commercial nature, contracts of employment, immoveable property, personal injury, and damage to tangible property.

#### *Immunity Accorded to State Officials*

Although it is the State which is granted the immunity from jurisdiction by international law, it is through its government and public officials that the State exercises sovereign authority. International law similarly accords immunity to State officials so as to not circumvent the rationales behind the doctrine that were identified above. However, the immunity granted to officials is not vested in them personally, but instead in the State. As such, a State may waive the immunity of its officials.<sup>25</sup>

Customary international law recognises two forms of immunity that may be accorded to State officials, and the form of immunity granted is dependant upon the

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<sup>22</sup> Wirth, "Immunity for Core Crimes? The ICJ's Judgement in the *Congo v. Belgium* case" (2002) 13 EJIL 877, at p. 882.

<sup>23</sup> Brownlie, *supra* n. 2, at p. 327.

<sup>24</sup> The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case commented, at para. 72, that the meaning of sovereign and non-sovereign acts is, "subject to continuously changing interpretations which varies with time reflecting the changing priorities of society".

<sup>25</sup> See, *In re Grand Jury Proceedings Doe No. 770*, 817 F.2d 1008 (1987), concerning the Philippines waiving the immunity of President Marcos.

status that the individual holds in public office. Both forms of immunity co-exist and overlap to a certain degree with one another.

#### Immunity *Ratione Personae*: Immunity Accorded to Senior State Officials

Immunity *ratione personae*, otherwise known as personal immunity, is an absolute bar to the exercise of jurisdiction by a foreign national court. Such immunity is granted so as to ensure and protect the effective functional performance of certain key State officials who are recognised by international law as wielding significant State authority. Were total immunity from foreign judicial proceedings denied to these key State officials then the internal stability of the State, and indeed international relations, may potentially be severely hampered. Accordingly, immunity *ratione personae* bars jurisdiction in civil and criminal proceedings, for acts performed in both an official and private capacity, that may have been committed either before or when the individual came into public office.<sup>26</sup>

In the *Arrest Warrant* case, the International Court had to consider which State officials were entitled to claim immunity *ratione personae* when the incumbent Congolese Foreign Affairs Minister was charged by a Belgium investigating magistrate with crimes against humanity and grave breaches of the Geneva Conventions.<sup>27</sup> The Court began by observing at the outset that it was firmly established that customary international law grants immunity *ratione personae* to Heads of State,<sup>28</sup> Heads of Government and Foreign Affairs Ministers.<sup>29</sup> With regard to the immunity of the last, the Court recognised that Foreign Affairs Ministers, who are in charge of a State's diplomatic activity and generally acts as their representative at intergovernmental meetings, performs a comparable function to that of a Head of

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<sup>26</sup> In the *Arrest Warrant* case, ICJ Report, 2002, p. 3 the International Court confirmed, at para. 58, that there were no exceptions in customary international law to immunity *ratione personae*.

<sup>27</sup> The facts of the case are considered in detail in chapter 2 at n. 47-50. For a listing of case comments on this decision see chapter 2 at ft. 47.

<sup>28</sup> A similar *obiter* comment is made by Lord Browne-Wilkinson in *Pinochet (No. 3)* [2000] 1 AC 147, at 201-2.

<sup>29</sup> ICJ Report, 2002, p. 3, at para. 51. This part of the judgement has been read with approval by Cassese, "When may Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v. Belgium* case" (2002) 13 EJIL 853, at p. 855. [Hereinafter referred to as Cassese (Senior State Officials)]. In addition, Articles 29 and 31 of the Vienna Convention on Diplomatic Relations 1961 accords immunity *ratione personae* to diplomats, and the UN Convention on Special Missions 1969 accords immunity *ratione personae* to officials on special missions in foreign States.

State.<sup>30</sup> In order to effectively perform this role, a Foreign Affairs Minister must be freely able to travel when required and must, therefore, be accorded absolute immunity so as to avoid the risk of being exposed to legal proceedings which may act as a deterrent to such international travel.<sup>31</sup>

The precise extent to which immunity *ratione personae* extends to other senior State officials is left uncertain following the *Arrest Warrant* case which was solely concerned with the immunity of a Foreign Affairs Minister. However, the reasoning that a State official who performs a comparable function to that of a Head of State is entitled to the same immunity *ratione personae* may be applied in analogous cases.<sup>32</sup> Recently, the UK District Courts have applied this reasoning to a Minister of Defence<sup>33</sup> and a Minister of Commerce<sup>34</sup> and held that both individuals were entitled to immunity *ratione personae*.

Immunity *ratione personae* attaches to a senior State official by virtue of the position that he holds. Once the individual leaves senior public office he no longer has an official function to perform, and thus the need for an absolute immunity from foreign jurisdiction no longer exists. Although a senior State official no longer enjoys immunity *ratione personae* when leaving office, he does, however, enjoy immunity *ratione materiae* for the official acts carried out whilst in public office.

#### Immunity *Ratione Materiae*: Immunity Accorded to all State Officials

Immunity *ratione materiae*, otherwise known as functional immunity, is a partial immunity to the exercise of jurisdiction by a foreign domestic court. Such immunity is accorded to the public acts which are carried out by State officials.<sup>35</sup> Immunity *ratione materiae* is premised on the notion that most State officials do not enjoy immunity in their own right, but because public acts are performed on behalf of the

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<sup>30</sup> *Ibid.*, at para. 53. Cf the Dissenting Opinion of Judge Al-Khasawneh, at paras. 1-2; the Dissenting Opinion of Judge Van den Wyngaert, at para. 16; and Watts, *supra* n. 2, at p. 102, who comments that, "Heads of Government and Foreign Ministers, although senior and import figures, do not symbolise or personify their State in the way that Heads of State do".

<sup>31</sup> *Ibid.*, at para. 55.

<sup>32</sup> Cf the Dissenting Opinion of Judge Van den Wyngaert, at para. 14, who criticised this reasoning of the Court.

<sup>33</sup> *Mofaz*, 12<sup>th</sup> February 2004, unreported decision of Bow Street Magistrate. The judgement is reproduced in (2004) 53 ICLQ 771.

<sup>34</sup> *Bo Xilai*, 8<sup>th</sup> November 2005, unreported decision of Bow Street Magistrate, cited by Wickremasinghe, *supra* n. 2, at p. 409.

<sup>35</sup> *Propend Finance Pty Ltd. v. Sing* (1997) *The Times*, May 2, CA.



State they are, therefore, attributable to the State. So as to not indirectly circumvent the immunity that is accorded to foreign sovereigns, public acts which are carried out by State officials as part of their official functions are immune from jurisdiction. On the rationale for this form of immunity, Lord Justice Diplock has commented:

A foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless extended also to its agents in respects of acts done by them on its behalf. To sue an envoy in respect of acts done in his official capacity would be, in effect, to sue his government irrespective of whether the envoy had ceased to be 'in post' at the date of suit.<sup>36</sup>

Where immunity *ratione personae* attaches to a State official by virtue of holding a senior governmental post, immunity *ratione materiae*, in contrast, attaches to the public acts performed by State officials. Immunity *ratione materiae* is therefore determined by reference to the nature of the act in question rather than by reference to the office held by the official. Shaw has found that the definition of what constitutes an official act for the purposes of immunity *ratione materiae* is somewhat unclear in international law.<sup>37</sup> In a similar vein, Parlett notes this uncertainty and suggests that, "the distinction applied by the restrictive theory of State immunity, that of *acta de jure imperii* and *acta de jure gestionis*, seems not unlike the distinction between acts in an official and private capacity applied when determining whether acts are covered by immunity *ratione materiae*".<sup>38</sup> It is suggested that Parlett's claim is indeed correct given that the act with respect to which the official claims immunity *ratione materiae* must be an act with respect to which the State itself may claim immunity.

Since immunity *ratione materiae* attaches to the official acts performed by public officials on behalf of the State, the immunity will be accorded to such acts regardless of whether the public official is in office. However, once the individual has left public office he no longer carries out acts on behalf of the State and thus no longer enjoy immunity *ratione personae*.

Private acts carried out by State officials are not performed on behalf of the State and therefore cannot be attributed to the sovereign State. Consequently, such acts do not attract immunity *ratione materiae*. State officials will be subject to the

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<sup>36</sup> *Zoernsch v. Waldcock* [1964] 2 All ER 256.

<sup>37</sup> Shaw, *supra* n. 2, at p. 658.

<sup>38</sup> Parlett, *supra* n. 14, at p. 59.

jurisdiction of a foreign court for any private acts that they perform. However, senior State officials, who enjoy immunity *ratione personae*, will only be subject to this jurisdiction when no longer holding their public position. This was recently confirmed by the International Court in the *Arrest Warrant* case when commenting, *obiter dicta*, that a senior State official who no longer holds office enjoys complete immunity from the criminal jurisdiction of another state except “for acts committed in a private capacity”.<sup>39</sup>

## Immunity Accorded in Criminal Proceedings for the Commission of International Crimes

### *Individual Criminal Responsibility and the Development of International Criminal Law*

International law has always rejected any notion of a State being held criminally responsible for the commission of an international crime, but has accepted the criminal liability of individuals who commit such crimes. Thus, the International Military Tribunal at Nuremberg has held that those who commit international crimes will be personally accountable for their conduct:

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.<sup>40</sup>

Following the Nuremberg precedent, where those responsible for the atrocities committed in World War II stood trial for their conduct, further developments have been made in the field of international criminal law. The first of the two most significant developments in holding individuals accountable for their internationally criminal conduct is at the international level where the *Ad Hoc* Tribunals for the former Yugoslavia and Rwanda, and the International Criminal Court, have been

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<sup>39</sup> ICJ Report, 2002, p. 3, at para. 61. This *obiter* comment made by the International Court is unqualified with regard to whether the commission of an international crime by a State official is to be regarded as an act performed in an official or private capacity, and is considered *infra* at n. 144-153.

<sup>40</sup> *Trials of the Major War Criminals Before the International Military Tribunal*, Vol. I, at p. 223.

created. Secondly, at the inter-state level, several multilateral treaties criminalizing international crimes have been drafted and widely ratified. This part of the discussion seeks to identify the current status of customary international law when according immunity to individuals alleged to have perpetrated international crimes in light of both of these developments. Given that this paper is concerned with obtaining a civil remedy before a domestic court, the immunities available before an international criminal tribunal will only be considered briefly. Once having identified the status of immunity from the criminal jurisdiction of a domestic court in proceedings for the commission of an international crime, attention will then turn to the status of the doctrine in the civil field of law.

### Immunity Accorded before International Criminal Tribunals

One of the rationales underlying the doctrine of State immunity is that one sovereign cannot exercise jurisdiction over another in a legal system whereby States enjoy an equal standing with one another.<sup>41</sup> Accordingly, State immunity constitutes a procedural bar in proceedings involving a foreign sovereign brought before a domestic court. Such a rationale, however, is not applicable to the jurisdiction of an international criminal tribunal where proceedings are not conducted within a State's legal system. Since Nuremberg it has been accepted that official status, including that of a Head of State, may not be pleaded as a bar to the jurisdiction of an international tribunal.<sup>42</sup> This principle has been said to be "indisputably declaratory of customary international law",<sup>43</sup> and has been expressed recently in Article 7(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia 1993, Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda 1994, and Article 27 of the Rome Statute of the International Criminal Court 1998.<sup>44</sup> However, the

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<sup>41</sup> See the discussion *supra* at n. 8-10.

<sup>42</sup> Article 7 of the Charter of the International Military Tribunal at Nuremberg 1945, and Article 6 of the Charter of the International Military Tribunal at Tokyo 1945. The Special Court for Sierra Leone held in *Prosecutor v. Charles Taylor, Immunity from Jurisdiction*, Judgement of 31<sup>st</sup> May 2004, (Case No. SCSL-03-01-1), at para. 52, that, "the sovereign equality of States [doctrine] does not prevent a Head of State from being prosecuted before an international criminal court".

<sup>43</sup> *Prosecutor v. Furundžija*, ITCY Trial Chamber II, Judgement of 10 December 1998, (Case No. IT-95-17/1-T 10), at para. 140.

<sup>44</sup> On immunities before the international criminal tribunals see further: Akande, "International Law Immunities and the International Criminal Court" 98 AJIL 407 (2004); and Gaeta, *Official Capacity and Immunities*, In Cassese, Gaeta and Jones, (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2002, OUP.

International Court has held that the denial of immunity in these legal instruments is applicable solely to these tribunals and does not create an exception in customary international law to immunities available before domestic courts.<sup>45</sup>

*Immunity Ratione Personae from Criminal Jurisdiction for the Commission of International Crimes*

The International Court in the *Arrest Warrant* case had to consider whether international crimes created an exception to immunity *ratione personae* from the criminal jurisdiction of a foreign domestic court when Belgium had initiated criminal proceedings against the incumbent Congolese Foreign Affairs Minister for war crimes and crimes against humanity.<sup>46</sup> In reconciling the conflicting interests of ending impunity and preserving harmonious relations at the interstate-level, both of which were accepted to be of high importance to the international community, the Court stated:

That it is unable to deduce from [the State] practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.<sup>47</sup>

The Court held that it was necessary for immunity *ratione personae* to remain absolute if senior State officials were to effectively perform their function in international relations. In essence, the denial of immunity *ratione personae* in proceedings for international crimes would represent a greater interference to international relations than it would serve in protecting human rights<sup>48</sup> since the removal of immunity would, in effect, only prevent senior officials from travelling abroad.<sup>49</sup> The International Court was keen to emphasise that the immunity *ratione personae* only bars prosecution for a certain period of time and does not exonerate the

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<sup>45</sup> The *Arrest Warrant* case, ICJ Report, 2002, p. 3, at para. 58.

<sup>46</sup> *Ibid.*, at paras. 56-61.

<sup>47</sup> *Ibid.*, at para. 58.

<sup>48</sup> Tunks, "Diplomats or Defendants? Defining the Future of Head of State Immunity" 52 Duke LJ 651 (2002), at pp. 678-9. See, further, Gaeta, *supra* n. 44, at pp. 985-9, who submits that immunity *ratione personae* should prevail over international crimes so long as there is no risk of impunity.

<sup>49</sup> Akande, *supra* n. 44, at p. 411.

person from criminal responsibility.<sup>50</sup> The Court then identified four instances where international law denied a senior State official immunity from criminal jurisdiction: where proceedings are brought in the domestic courts of their own country; where the State they represent has decided to waive their immunity; where the senior State official is no longer in office they may be tried before a foreign domestic court for acts committed in a private capacity whilst in office; where they are subject to proceedings before an international criminal tribunal.<sup>51</sup>

State practice has consistently reflected this trend of according immunity *ratione personae* in criminal proceedings conducted in foreign jurisdiction for international crimes. In *Ghadaffi*, the French Court of Cassation held that the Libyan Head of State enjoyed immunity *ratione personae* in criminal proceedings for acts of international terrorism leading to murder and the destruction of an aircraft.<sup>52</sup> Similarly, the Spanish Audiencia Nacional held in *Fidel Castro* that the Cuban Head of State was immune from the criminal jurisdiction of a domestic Spanish court.<sup>53</sup> Moreover, in *Pinochet (No. 3)* all of the Lords in the majority held, *obiter*, that a Head of State in office would have enjoyed immunity for the acts of torture.<sup>54</sup>

#### *Immunity Ratione Materiae from Criminal Jurisdiction for the Commission of International Crimes*

The *Pinochet* litigation concerned an attempt made by the Spanish Government to have Senator Pinochet extradited from the United Kingdom to stand trial in Spain for, *inter alia*, acts of torture and hostage-taking carried out whilst Pinochet was Head of State in Chile. It was not alleged that Senator Pinochet had personally committed any of these acts, but instead that these acts were carried out in pursuance of a conspiracy

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<sup>50</sup> ICJ Report, 2002, p. 3, at para. 60.

<sup>51</sup> *Ibid.*, at para. 61.

<sup>52</sup> Cour de Cassation, Chambre Criminelle, 13<sup>th</sup> March 2001, No. 1414. For a comment see, Zappalà, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghadaffi* case before the French Cour de Cassation" (2001) 12 EJIL 595.

<sup>53</sup> Audiencia Nacional, 4<sup>th</sup> March 1999, (No. 1999/2723). See also, *H.S.A. et al v. S.A.*, Cass. 2e Civ., 12<sup>th</sup> February 2003, No. P.02.1139.F, where a Belgian court dismissed criminal proceedings for crimes against humanity and war crimes against the Israeli Prime Minister, Ariel Sharon, on the grounds of immunity *ratione personae*.

<sup>54</sup> [2000] 1 AC 147. See, for example, the speech of Lord Browne-Wilkinson at 201-2. Recently, first instance courts have dismissed two applications brought in the UK for grave breaches of the Geneva Convention against the Israeli Minister of Defence in *Mofaz*, 12<sup>th</sup> February 2004, unreported decision of Bow Street Magistrate; and acts of torture brought against the Zimbabwean Head of State in *Mugabe*, 14<sup>th</sup> January 2004, unreported decision of Bow Street Magistrate, both on the grounds of immunity *ratione personae*. Both judgements are reproduced in (2004) 53 ICLQ 769.

to which he was a party and with his knowledge. When the UK Magistrates issued two provisional arrest warrants, Pinochet petitioned the High Court. The Divisional Court quashed these arrest warrants when finding that Pinochet enjoyed immunity from criminal procedure as the alleged offences were held to official acts that had been performed in the exercise of his function as a Head of State.<sup>55</sup> By a 3-2 majority, the House of Lords overturned the findings of the Divisional Court and held that Pinochet did not enjoy immunity from jurisdiction.<sup>56</sup> Lords Nicholls found that customary international law only accords immunity *ratione materiae* to a former Head of State for acts which it recognised as falling within the scope of an official function of a Head of State.<sup>57</sup> Lord Steyn endorsed this view and held that acts condemned by international law, such as torture and hostage-taking, cannot constitute official conduct said to be performed as a function of a Head of State.<sup>58</sup> Lord Hoffmann concurred with both of these judgements.<sup>59</sup> In contrast, Lords Slynn and Lloyd both dissented from the majority when finding that because the alleged conduct had been exercised under colour of law, it had thus been performed in the execution of sovereign authority.<sup>60</sup> Moreover, since it could not be shown that there was any express international convention, State practice or general consensus that the commission of international crimes constituted an exception to immunity *ratione materiae*, Senator Pinochet was therefore entitled to claim immunity for his official acts.<sup>61</sup>

The judgement was subsequently set aside when it was revealed that Lord Hoffmann should have been disqualified from sitting on the Appellate Committee of the House of Lords due to the ties that he had with Amnesty International who were

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<sup>55</sup> *Re Augusto Pinochet Ugarte*, 28 October 1998, unreported decision of the Divisional Court, reproduced in (1999) 38 ILM 68.

<sup>56</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 1)* [2000] 1 AC 61. For a comment see, Fox, "The First *Pinochet* case: Immunity of a Former Head of State" (1999) 48 ICLQ 207.

<sup>57</sup> *Ibid.*, at 110-1.

<sup>58</sup> *Ibid.*, at 116.

<sup>59</sup> *Ibid.*, at 118.

<sup>60</sup> Lord Lloyd commented, *Ibid.*, at 95, that, "where a person is accused of organising the commission of crimes as the head of the government... and carries out those crimes through the agency of the police and the secret service, the inevitable conclusion is that he was acting in a sovereign capacity and not in a personal or private one".

<sup>61</sup> *Ibid.*, at 79, *per* Lord Slynn.

interveners in the case.<sup>62</sup> A new hearing was convened; this time before seven Law Lords.

A six-member majority of the House of Lords arrived at the conclusion that a former Head of State does not enjoy immunity *ratione materiae* in criminal proceeding for the international crime of torture, but on profoundly different grounds.<sup>63</sup> Where the majority in *Pinochet (No. 1)* had reached this conclusion by reasoning that the heinous crime of torture must always be construed as a personal act, the majority in *Pinochet (No. 3)*, save Lord Hutton, based the denial of immunity on the Convention against Torture.<sup>64</sup> However, each Law Lord in the majority handed down a differing individual opinion whereby reliance was placed on the Torture Convention to a varying degree.

Lord Brown-Wilkinson, the presiding Law Lord, held that both the definition of torture and the obligation to extradite or prosecute offenders laid down by the Convention is entirely inconsistent with any retention of immunity *ratione materiae*.<sup>65</sup> In his opinion, the very objective of the Torture Convention would have been frustrated if State officials, who are by definition the only ones capable of committing the act, are granted immunity from suit:

If the implementation of a torture regime is a public function giving rise to immunity *ratione materiae*, this produces bizarre results... Under the Convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the State of Chile is prepared to waive its right to its officials' immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by its officials is rendered abortive and one of the main

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<sup>62</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2)* [2000] 1 AC 119.

<sup>63</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147. The academic literature on *Pinochet (No. 3)* is extensive. See generally: Barker, "The Future of Former Head of State Immunity after *ex parte Pinochet*" [1999] 48 ICLQ 937; Bianchi, "Immunity versus Human Rights: The *Pinochet* case" (1999) 10 EJIL 237; Black-Branch, *Sovereign Immunity Under International Law: The Case of Pinochet*, in Woodhouse, (eds.), *The Pinochet case: A Legal and Constitutional Analysis*, 2000, Hart Publishing; Chinkin, "*Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*" 93 AJIL 703 (1999); Denza, "*Ex parte Pinochet: Lacuna or Leap?*" [1999] 48 ICLQ 949; Fox, "*Pinochet (No. 3)*" [1999] 48 ICLQ 681, [hereinafter referred to as Fox (*Pinochet (No.3)*)]; Hopkins, "*Pinochet (No. 3)*" [1999] 58 CLJ 461; Nicholls, "Reflections on *Pinochet*" 41 VJIL 140 (2000); Van Alebeek, "The *Pinochet* Case: International Human Rights Law on Trial" [2000] 71 BYIL 29; and Warbrick, Salgado, and Goodwin, "The *Pinochet* cases in the United Kingdom" (1999) 2 YB Int'l Hum L 91.

<sup>64</sup> GA Res. 39/46, U.N. GAOP, 39<sup>th</sup> Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1985) of 10<sup>th</sup> December 1984. [Hereinafter referred to as either the Torture Convention or the CAT].

<sup>65</sup> *Pinochet (No. 3)* [2000] 1 AC 147, at 205.

objectives of the Torture Convention- to provide a system under which there is no safe haven for tortures- will have been frustrated.... The notion of continued immunity for ex-heads of State is inconsistent with the provisions of the Torture Convention.<sup>66</sup>

In his judgement, Lord Browne-Wilkinson placed great emphasis on the fact that all three States were party to the Torture Convention and that immunity would only be denied once all three had ratified the Convention, the date when they agreed to exercise the obligatory extraterritorial criminal jurisdiction over acts of torture.<sup>67</sup> Lord Saville, who based his conclusion entirely on the Torture Convention, similarly found that immunity *ratione materiae* could not co-exist with the terms of the Convention.<sup>68</sup> Lord Hope noted that although torture was regarded as an international crime by customary international law, it was not until Chile had ratified the Torture Convention that immunity *ratione materiae* could not be invoked.<sup>69</sup>

The remaining majority took a broader approach. Lord Phillips held that customary international law denies immunity *ratione materiae* for international crimes where States have agreed by way of treaty for foreign domestic courts to exercise jurisdiction over them.<sup>70</sup> Lord Millet was of the belief that all international crimes contrary to *jus cogens* are subject to universal jurisdiction under customary international law.<sup>71</sup> In his opinion, the Torture Convention merely affirmed this and imposed the obligation on State parties to exercise jurisdiction over the crime.<sup>72</sup> If immunity were accorded to a former Head of State then this would clearly be inconsistent with the obligations contained in the Convention.<sup>73</sup> Finally, Lord Hutton held that it was customary international law that denied immunity *ratione materiae* over the international crime of torture.<sup>74</sup>

Lord Goff dissented and held that the denial of immunity for a former Head of State charged with the international crime of torture can only be achieved by way of express agreement and not implied into the Torture Convention like the majority had done. In his opinion:

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*, at 204-5.

<sup>68</sup> *Ibid.*, at 266-7.

<sup>69</sup> *Ibid.*, at 247-8.

<sup>70</sup> *Ibid.*, at 289.

<sup>71</sup> *Ibid.*, at 275.

<sup>72</sup> *Ibid.*, at 276.

<sup>73</sup> *Ibid.*, at 277-8.

<sup>74</sup> *Ibid.*, at 259.



How extraordinary it would be, and indeed what a trap would be created for the unwary, if State immunity could be waived in a treaty *sub silentio*.<sup>75</sup>

According to Lord Goff, States that had become party to the Convention had not agreed to exclude immunity *ratione materiae* at the time of ratification and had they been aware of the contrary then the number of signatories would have been far smaller.<sup>76</sup>

Despite the majority arriving at the same conclusion that Senator Pinochet was not entitled to claim immunity, the fact that each judgement relied to a different extent on the Torture Convention and customary international law prevents any common *ratio decidendi* being drawn from the case. In addition, the individual judgements in *Pinochet (No. 3)* have been described as being rather convoluted with their treatment of many aspects of international law, sometimes to the point of incomprehensibility.<sup>77</sup> Accordingly, this lack of clarity when framing the legal issues thus inhibits any significant weight being attributed to the reasoning of the case in terms of establishing a precedent. Furthermore, the denial of immunity based on customary international law considerations, most notably by Lords Phillips, Millet and Hutton, were deployed with great confidence in the judgement,<sup>78</sup> but at the time of the judgement there was a shortage of practice about the consequences which ensue from the violation of an international crime contrary to a norm of *jus cogens*.<sup>79</sup> When the judgement in *Pinochet (No. 3)* was delivered, some academics strongly contended that State immunity could no longer be invoked in any proceedings concerning an alleged violation of a peremptory norm on the basis that such norms enjoyed the highest status within the international community and therefore prevailed over the rules of State immunity.<sup>80</sup> However, subsequent to *Pinochet (No. 3)*, both judicial decisions and academic opinion have formed the consensus that this simply is not the case. Significantly, the International Court in the *Arrest Warrant* case accepted that the

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<sup>75</sup> *Ibid.*, at 223.

<sup>76</sup> *Ibid.*, at 222.

<sup>77</sup> Bianchi, *supra* n. 63, at p. 248; Warbrick, Salgado, and Goodwin, *supra* n. 63, at pp. 100, and 110-11.

<sup>78</sup> Fox (*Pinochet (No. 3)*), *supra* n. 63, at p. 688.

<sup>79</sup> *Ibid.*; Warbrick, Salgado, and Goodwin, *supra* n. 63, at p. 111.

<sup>80</sup> Thus, for example, Bianchi, *supra* n. 63, at p. 265, asserts that, "as a matter of international law, there is no doubt that *jus cogens* norms, because of their higher status, must prevail over other international rules, including jurisdictional immunities. See, further, the comments made at pp. 261-2; and Van Alebeek, *supra* n. 63, at p. 64.

commission of war crimes and crimes against humanity did not entail an exception to the rules on State immunity.<sup>81</sup>

In light of the above, it is submitted that the *ratio* to be drawn from *Pinochet* (No. 3) may be confined, at the very least, to the facts of the case: accordingly, a former Head of State enjoys no immunity *ratione materiae* from the criminal jurisdiction of a State party to the Torture Convention in proceedings for acts of torture that are committed in an official capacity on behalf of a State which is also party to the Convention from when the Convention comes into force between the parties. The implied waiver of immunity from the extraterritorial criminal jurisdiction established by the Torture Convention is one of logic which would otherwise frustrate the underlying objectives of the Convention. As Lord Bingham rightly commented in *Jones v. Saudi Arabia* when reading *Pinochet* (No. 3):

The essential *ratio* of the decision, as I understand it, was that international law could not without absurdity require criminal jurisdiction to be assumed and exercised where the Torture Convention conditions were satisfied and, at the same time, require immunity to be granted to those properly charged. The Torture Convention was the mainspring of the decision.<sup>82</sup>

It is suggested, further, that the logic behind this implied waiver reasoning used by the House of Lords in *Pinochet* (No. 3) may be endorsed in future decisions involving other international crimes where there exists an obligation on domestic courts to exercise extraterritorial jurisdiction.<sup>83</sup> However, the International Court in the *Arrest Warrant* case has cast strong doubt on the likelihood of this happening when commenting that:

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<sup>81</sup> ICJ Report, 2002, p. 3, at para. 58. Admittedly, although the International Court did not explicitly state that war crimes and crimes against humanity were *jus cogens* norms it is significant to note that the Separate and Dissenting Opinions found that they were, and that the Court has never made use of this term to date. See, further, the extensive discussion on whether peremptory norms of *jus cogens* prevail over the procedural rule of State immunity considered *infra* at n. 210-233.

<sup>82</sup> *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia and Lieutenant-Colonel Abdul Aziz; Mitchell, Walker and Sampson v. Ibrahim Al-Dali and Others* [2006] UKHL 26, at para. 19.

<sup>83</sup> Such a contention is supported by, Akande, *supra* n. 44, at p. 415; and Shaw, *supra* n. 2, at p. 658. In *Hissène Habré*, 20<sup>th</sup> March 2001, criminal proceedings were initiated in Senegal against the former Chadian Head of State under the Torture Convention for acts of torture carried out while the dictator was in office. Despite the Senegalese Supreme Court finding that it had no jurisdiction to hear the case, this was, significantly, on the grounds that the Torture Convention had not been fully implemented into domestic law and not on the grounds that the former Head of State enjoyed immunity *ratione materiae*. Moreover, no challenge was made to the Dutch court's jurisdiction in the first successful prosecution brought under the Torture Convention against a Congolese commander in *Sébastien N.*, 7<sup>th</sup> April 2004, Rotterdam District Court. For a case comment on this decision see, Kamminga, "First Conviction under Universal Jurisdiction Provisions of the UN Convention Against Torture" (2004) NILR 439.

The rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law... These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.<sup>84</sup>

This comment made by the International Court was, strictly speaking, unnecessary since the Court was not considering the compatibility of immunities from the obligatory extraterritorial criminal jurisdiction of a domestic court created by an international treaty, but instead whether international crimes created an exception to immunity *ratione personae* in proceedings before a foreign domestic court. As such, and in light of the fact that this comment undermines the main thrust of the reasoning used by the House of Lords in *Pinochet (No. 3)* which, significantly, has received minimal criticism from other States<sup>85</sup> and has been supported by numerous commentators, the comment should be treated as *obiter dicta*.

Following the reasoning of the House of Lords in *Pinochet (No. 3)*, it remains a question of *opinio juris* as to whether immunity *ratione personae* will be denied in criminal proceeding for torture between States that are party to the Torture Convention, despite the fact that all of the Lords in the majority held, *obiter*, that Senator Pinochet would have enjoyed immunity had he still been in office.<sup>86</sup> The difficulty with this contention is that immunity *ratione personae* is just as inconsistent with the provisions of the Torture Convention as immunity *ratione materiae* is.<sup>87</sup> However, that even though immunity *ratione personae* is, *prima facie*, inconsistent with the underlying objectives of the Torture Convention, this specie of immunity is only of limited temporal duration which ceases once the senior State official leaves office. Given that such an individual will only enjoy immunity *ratione materiae* upon leaving office, it is therefore suggested that immunity *ratione personae* may remain absolute without undermining the Torture Convention. Indeed, such a suggestion

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<sup>84</sup> ICJ Report, 2002, p. 3, at para. 59.

<sup>85</sup> Sands, "International Law Transformed? From Pinochet to Congo...?" (2003) 16 *Leiden Journal of International Law* 37, at p. 50.

<sup>86</sup> See, for example, the speech of Lord Browne-Wilkinson at 201-2.

<sup>87</sup> Fox (*Pinochet (No. 3)*), *supra* n. 63, at p. 700.

would accommodate the reasoning of the International Court in the *Arrest Warrant* case where it was held that immunity *ratione personae* was subject to no exceptions.<sup>88</sup>

## Immunity Accorded in Civil Proceedings for the International Crime of Torture

It is well established in international law that a foreign State enjoys absolute immunity in criminal proceedings held in the courts of a foreign State. However, in civil proceedings the matter is entirely different since the restrictive doctrine of immunity has made several inroads into the general rule of immunity.

The discussion will now consider whether a State enjoys immunity in civil proceedings where it is alleged to have committed the international crime of torture. The discussion will begin by considering the practice of domestic courts which have heard such disputes to ascertain whether there exists a customary exception to the general rule of immunity in civil proceedings for torture. Once having reviewed whether customary international law accords immunity to States in such proceedings, attention will then turn to consider whether a State may claim immunity on behalf of its officials who commit the acts of torture. The final part of the discussion assesses the doctrinal legitimacy of two separate challenges that have recently been made to the law of State immunity where immunity has been granted in civil proceedings for torture. The first considers whether the procedural right of access to a court in order to determine a civil dispute is violated when domestic courts bar their adjudicative jurisdiction by granting immunity; and the second considers whether the prohibition on torture which has acquired the status of a peremptory norm of international law has any consequential effect on the law of State immunity.

### Immunity Accorded to the State in Civil Proceedings for Torture: Current State Practice

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<sup>88</sup> ICJ Report, 2002, p. 3, at para. 58. In *Mugabe*, 14<sup>th</sup> January 2004, unreported, it was recently held by a UK first instance court that the Zimbabwean Head of State enjoyed immunity *ratione personae* in criminal proceedings for acts of torture. Zimbabwe, however, is not a party to the Torture Convention.

Current State practice in the form of national legislation on State immunity and the UN Convention on Jurisdictional Immunities of States and Their Property 2004 will be examined to see whether immunity will be granted in civil proceedings to a State where allegations of torture are made. A review will be made only of the UK State Immunity Act 1978, the Canadian State Immunity Act 1985 and the US Foreign Sovereign Immunities Act 1976, on the basis that all of these legislative provisions have been invoked to bar a claim against a State in civil proceedings for acts of torture committed in a foreign jurisdiction.

### *The United Kingdom State Immunity Act 1978*

The UK State Immunity Act 1978 was enacted to codify the restrictive rule of State immunity recognised by the common law,<sup>89</sup> and to enable the UK to ratify the European Convention on State Immunity.<sup>90</sup> Section 1 of the Act lays down a general principle of absolute immunity that is subject to a number of exceptions contained in sections 2-11. The exceptions contained in the SIA include: commercial transactions and contracts to be performed in the UK (section 3); contracts of employment made in the UK (section 4); death, personal injury and loss of tangible property in the UK (section 5); ownership, possession and use of immovable property situated in the UK (section 6); patents, trademarks and copyrights (section 7); membership of a body corporate (section 8); arbitration (section 9); ships used for commercial purposes (section 10); and taxation and custom duties (section 11).

In *Al-Adsani v. Government of Kuwait*, a dual Kuwaiti and British national was falsely imprisoned in a Kuwaiti State prison where he was violently tortured by government officials for several days. The applicant subsequently spent six weeks in hospital when returning to England where he was diagnosed with suffering from severe post-traumatic stress disorder. These psychological injuries were exacerbated further by threatening telephone calls that he received in London from the Kuwaiti ambassador and an anonymous individual.

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<sup>89</sup> *Trendtex Trading Corp. v. Central Bank of Nigeria* [1977] 1 QB 529; *I Congreso del Partido* [1983] 1 AC 244.

<sup>90</sup> 64 ILR 221. For a comment see: Bowett, "The State Immunity Act 1978" (1978) 37 CLJ 193; Fox (*State Immunity*), *supra* n. 2, at pp. 128-87; Mann, "The State Immunity Act 1978" (1979) BYIL 43; and White, "The State Immunity Act 1978" (1979) 42 MLR 72. [Hereinafter referred to as the SIA].

The applicant initiated civil proceedings in the High Court against the Government of Kuwait for the acts of torture that had been committed by its officials. The High Court refused to allow the service of a writ against the Kuwaiti Government on the basis that it was entitled to claim immunity under section 1 SIA.<sup>91</sup> A renewed application was made to the Court of Appeal where leave was granted to serve a writ against the Kuwaiti Government when it was held that the applicant had made a good arguable case that the Government should not be afforded immunity under the SIA for acts of torture which were contrary to public international law.<sup>92</sup> In addition, the Court of Appeal held that the physical and psychological injuries that the applicant had suffered in the UK, as well as the threatening telephone calls that the applicant had received, were to be regarded as a separate form of injury to the physical acts of torture that were inflicted in Kuwait.<sup>93</sup> Since s. 5 SIA provides an exception where personal injury was caused by a foreign State in the UK, it was found that the general rule of immunity was not applicable.

The Kuwaiti Government challenged this writ in a separate action before the Court of Appeal.<sup>94</sup> The Court of Appeal accepted that international law prohibited torture, but found the SIA to contain no exceptions in proceedings where a foreign State is alleged to have violated a human right outside of the UK. Moreover, the Act was said to be comprehensive code that was not subject to any overriding considerations that may be implied into the statute:

It is inconceivable, it seems to me, that the draughtsman, who must have been well aware of the various international agreements about torture, intended section 1 to be subject to an overriding qualification.<sup>95</sup>

With regard to the personal injury exception contained in s. 5 SIA, it was held, contrary to the findings of the previous Court of Appeal, that the exception is only applicable where the act causing the personal injury is committed in the UK so as to not circumvent the SIA. Finally, it was held that the applicant had not adduced any

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<sup>91</sup> *Al-Adsani v. Government of Kuwait and Others* (1993) unreported decision of the High Court.

<sup>92</sup> *Al-Adsani v. Government of Kuwait and Others* [1994] 100 ILR 465. [Hereinafter referred to as *Al-Adsani* (No. 1)].

<sup>93</sup> *Ibid.*, at 467, *per* Evans LJ.

<sup>94</sup> *Al-Adsani v. Government of Kuwait and Others* [1996] 12<sup>th</sup> March, CA; 106 ILR 536. For a comment see: Byers, "*Al-Adsani v. Government of Kuwait*" [1996] 67 BYIL 537; and Marks, "Torture and the Jurisdictional Immunity of Foreign States" [1997] CLJ 8. [Hereinafter referred to as *Al-Adsani* (No. 2)].

<sup>95</sup> *Ibid.*, at 542, *per* Stuart-Smith LJ.

evidence to the Court to establish, on a balance of probabilities, that the threatening telephone calls made in the UK were attributable to the Kuwaiti Government. Accordingly, and on a simple application of the SIA, it thus followed that there was no jurisdiction to serve proceedings against the Kuwaiti Government.

In the recent decision of *Jones v. Saudi Arabia*,<sup>96</sup> two separate civil actions were brought before the UK courts seeking damages for acts of torture that had been committed by State officials while the applicants were unlawfully detained in a Saudi Arabian prison. The House of Lords endorsed the findings made by the Court of Appeal in *Al-Adsani (No. 2)* and dismissed these actions on a straightforward application of the SIA on the grounds that there were no exceptions to the general rule of immunity contained in the provisions of the Act.<sup>97</sup>

#### *The Canadian State Immunity Act 1985*

Section 3 of the Canadian State Immunity Act 1985 accords immunity to foreign States in civil suits unless one of the exceptions contained in sections 5-8 of the Act applies.<sup>98</sup> The exceptions to the general rule of immunity are similar to those found in the SIA, and no exception for violation of a human right is contained in the Act.

In *Bouzari v. Islamic Republic of Iran*,<sup>99</sup> an Iranian national was forcibly abducted from his home, imprisoned for six months in Tehran without due process, and then brutally tortured by State officials during this period of detention. The applicant fled to Canada as an immigrant shortly after his release where he continued to suffer severe post-traumatic stress disorder, ongoing pain, and loss of hearing. He subsequently brought a civil action against Iran in a Canadian court for the acts of torture that he had suffered at the hands of its officials, where he argued, *inter alia*, that his continued suffering fell within the tort exception contained in section 6 of the Act and thus the general rule of immunity was displaced. The Court of Appeal for Ontario accepted that the tort exception could apply to physical and psychological injuries, but held that these injuries must occur within Canada. In giving no consideration to whether the continued suffering in Canada amounted to a separate

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<sup>96</sup> *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia and Lieutenant-Colonel Abdul Aziz; Mitchell, Walker and Sampson v. Ibrahim Al-Dali and Others* [2006] UKHL 26.

<sup>97</sup> *Ibid.*, at para. 13, *per* Lord Bingham.

<sup>98</sup> R.S.C. 1985, C.S-18.

<sup>99</sup> [2004] OJ No. 2800; [2002] OJ No. 1624.

tort, the Court of Appeal held that both the physical and related psychological injuries had occurred in Iran.<sup>100</sup> Thus, with the acts of torture falling outside the scope of the exceptions contained in the Canadian State Immunity Act, the foreign State was accordingly immune from the jurisdiction of the domestic Canadian court.<sup>101</sup>

### *The United States Foreign Sovereign Immunities Act 1976*

Section 1604 of the US Foreign Sovereign Immunities Act 1976 provides that a federal court lacks subject matter jurisdiction over a claim against a foreign State unless the claim falls within one of the exceptions to immunity contained in sections 1605-1607 which are broadly similar to those contained in the SIA.<sup>102</sup> The Anti-Terrorism and Effective Death Penalty Act specifically amended the FSIA in 1996 to allow civil claims to be brought against foreign States that have been designated as terrorist by the US Department of State who commit acts of terrorism, or provided material support and resources to an individual or entity who commit such an act, which results in the death or personal injury of a US citizen.<sup>103</sup>

In *Amerada Hess*,<sup>104</sup> a Liberian corporation brought an action against the Argentine Republic in a US District Court for damage to an oil tanker that its military aircrafts had caused during the Falkland War. The US Supreme Court accepted that the attack to the tanker amounted to a violation of international law, but held that the foreign State enjoyed immunity on the basis that, “cases involving alleged violations of international law do not come within one of the FSIA’s exceptions”.<sup>105</sup> This reasoning was subsequently applied by the 9<sup>th</sup> Circuit Court of Appeals in *Siderman de Blake*<sup>106</sup> to dismiss an application brought by an Argentinean national in a US District Court against the Republic of Argentina for acts of torture that had been committed by its State officials in Argentina. Despite the Court making the distinction from *Amerada Hess* in that this case involved a violation of a peremptory norm, it

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<sup>100</sup> [2004] OJ No. 2800, at para. 47.

<sup>101</sup> *Ibid.*, at para. 59.

<sup>102</sup> 28 USC § 1330. For a comment see: Brower, Bistline and Loomis, “The Foreign Sovereign Immunities Act 1976 in Practice” 73 AJIL 200 (1979); Delaume, “Three Perspectives on Sovereign Immunity” 71 AJIL 399 (1977); and Fox (*State Immunity*), *supra* n. 2, at pp. 187-208. [Hereinafter referred to as the FSIA].

<sup>103</sup> 28 USC § 1605(a)(7).

<sup>104</sup> *Argentine Republic v. Amerada Hess Shipping Corporation*, 488 U.S. 428, 109 S Ct. 683 (1989).

<sup>105</sup> *Ibid.*, at 435, *per* Rehnquist CJ. delivering the opinion of the Court.

<sup>106</sup> *Siderman de Blake v. Republic of Argentina*, 965F 2d 688 (9<sup>th</sup> Cir. 1992).



nonetheless found there to be no exception in the FSIA to deny the foreign State immunity, and specifically commented that:

Clearly, the FSIA does not specifically provide for an exception to sovereign immunity based on *jus cogens*...If violations of *jus cogens* committed outside the US are to be exceptions to immunity, Congress must make them so. The fact that there has been a violation of a *jus cogens* does not confer jurisdiction under the FSIA.<sup>107</sup>

The US Supreme Court in *Saudi Arabia v. Nelson*<sup>108</sup> has endorsed the decision made in *Siderman de Blake*, where it was similarly held that systematic acts of torture are not an exception contained in the FSIA.

Section 1605(a)(5) FSIA removes the general rule of immunity for personal injury caused by a foreign State that occurs in the US. In *Princz v. Federal Republic of Germany*,<sup>109</sup> it was held that the lingering effect of a personal injury caused by a gross violation of a human right amounting to a norm of *jus cogens* does not fall within this exception if the act took place abroad.

#### *The UN Convention on Jurisdictional Immunities of States and Their Property 2004*

The United Nations Convention on Jurisdictional Immunities of States and Their Property was adopted by the General Assembly in December 2004 following almost 25 years of international negotiation.<sup>110</sup> Work began on the Convention with the International Law Commission, which led to the 1991 Draft Articles on Jurisdictional Immunities of States and Their Property,<sup>111</sup> and was then followed by further deliberations by an *Ad Hoc* Committee reporting to the Sixth Committee of the General Assembly. The Convention on State Immunity provides a comprehensive code which is broadly reflective of national legislation and judicial decisions.

Article 5 of the Convention on State Immunity establishes the general rule that a State enjoys immunity from the jurisdiction of foreign domestic courts subject to the

<sup>107</sup> *Ibid.*, at 56, *per* Fletcher J. giving the judgement of the Court.

<sup>108</sup> 507 US 349, 113 S Ct 1471 (1993).

<sup>109</sup> 26 F.3d 1166 (DC Cir. 1994).

<sup>110</sup> December 16 2004, UN GA Resolution 59/38. For a comment on the Convention see generally: Denza, "The 2005 UN Convention on State Immunity in Perspective" [2006] 55 ICLQ 395; Fox, "In Defence of State Immunity: Why the UN Convention on State Immunity is Important" [2006] 55 ICLQ 399; and Stewart, "The UN Convention on Jurisdictional Immunities of States and Their Property" 99 AJIL 194 (2005). [Hereinafter referred to as the Convention on State Immunity].

<sup>111</sup> UN Doc. A/46/10. [Hereinafter referred to as the Draft Articles on Jurisdictional Immunities].

exceptions contained in Articles 10-17. Significantly, the Convention contains no provision providing an exception to the general rule in actions brought against a State seeking a civil remedy for violations of a human right committed outside the territorial jurisdiction of the forum State. Despite such an exception being considered twice during the negotiation stages, it was rejected on both occasions by the drafters of the Convention.<sup>112</sup>

Article 12 of the Convention on State Immunity provides an exception to the general rule in civil suits involving personal injury. However, this exception is subject to numerous requirements and thereby precludes recovery where the personal injury was committed outside of the forum. Article 12 reads:

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person... caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

It is clear from the text of Article 12 that the exception will only apply to personal injuries caused by an act that occurs in the territory of the forum State, in whole or in part, when the author of the act is present in the forum. These requirements render the exception extremely narrow, and in litigation involving a civil remedy for acts of torture committed in a foreign jurisdiction it is apparent that a foreign State party to the Convention on State Immunity will be under an obligation to accorded immunity for such acts.

### *Conclusion*

National legislation and the Convention on State Immunity provide clear evidence of a consistent international practice in which no exception is made to the general rule of immunity in civil proceedings against a foreign sovereign involving allegations of torture committed within the territorial jurisdiction of the foreign State. Significantly, the Convention on State Immunity provides a very recent and highly authoritative

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<sup>112</sup> Hall, "UN Convention on State Immunity: The Need for a Human Rights Protocol" [2006] 55 ICLQ 411, at p. 412.

endorsement of this view. In addition, all of the cases that have been brought before the courts of common law jurisdictions, which have domestic legislation codifying the restrictive rule of State immunity, seeking civil redress for acts of torture have all been dismissed. This, accordingly, suggests an *opinio juris* to the effect that customary international law at present does not recognise torture as providing an exception to the rules on State immunity.<sup>113</sup>

### Immunity Accorded to State Officials in Civil Actions for the International Crime of Torture: The Official Nature of Torture

The immunity accorded to a State can be distinguished from that accorded to the individuals through whom the State acts. Having drawn the conclusion that a State will enjoy immunity in civil proceedings where it is alleged to have committed acts of torture, it will now be considered whether a State is entitled to claim immunity on behalf of its officials who commit such acts.

#### *Immunity Ratione Personae in Civil Proceedings for the Commission of the International Crime of Torture*

In *Tachiona v. Mugabe*, civil proceedings were brought before a US District Court under the US Alien Tort Claims Act<sup>114</sup> and the US Torture Victim Protection Act<sup>115</sup> against the Zimbabwean president, Robert Mugabe, seeking damages for, *inter alia*, torture. The District Court held that a serving Head of State enjoyed absolute immunity from the jurisdiction of a US domestic court and dismissed the application.<sup>116</sup> Although the Court's reasoning focused primarily on both the wording of the US Foreign Sovereign Immunities Act and the jurisprudence under the Act, the decision to accord a serving Head of State absolute immunity is consistent with the findings of the International Court in the *Arrest Warrant* case. This decision of the District Court was subsequently upheld by the Court of Appeals for the Second

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<sup>113</sup> *North Sea Continental Shelf Cases*, (*Federal Republic of Germany/Denmark; Federal Republic of Germany/ Netherlands*), ICJ Reports, 1969, p. 3, at para. 77.

<sup>114</sup> Judiciary Act 1789, Ch. 20, s. 9(b). [Hereinafter referred to as the ATCA].

<sup>115</sup> 28 USC § 1350. [Hereinafter referred to as the TVPA].

<sup>116</sup> 169 F.Supp. 2d 259 (S.D.N.Y. 2001).

Circuit<sup>117</sup> and endorsed in *A, B, C, D, E, F v. Jiang Zemin*<sup>118</sup> where civil proceedings brought against the Chinese president seeking redress for torture were similarly dismissed.

*Immunity Ratione Materiae in Civil Proceedings for the Commission of the International Crime of Torture*

In *Jones v. Saudi Arabia*, two separate civil actions were brought before the UK courts seeking damages for acts of torture that had been committed by State officials in Saudi Arabia. The first action was brought by a British national who was systematically tortured over a two-month period while unlawfully detained in a Saudi Arabian prison. The applicant brought his claim in tort for assault and battery, false imprisonment, torture and negligence, against the Kingdom of Saudi Arabia, in its capacity as Ministry of the Interior, and the State official who was allegedly responsible for carrying out the acts of torture, Lieutenant-Colonel Abdul Aziz. The High Court refused leave to serve proceedings out of the jurisdiction against both defendants on the basis that the Kingdom of Saudi Arabia was entitled to claim immunity for itself under s. 1 SIA, and that it was entitled to claim immunity on behalf of its officials under s. 14 SIA.<sup>119</sup> In the second action, two British and one Canadian national brought a civil claim against two captains in the Saudi Arabian police force and the deputy governor of a prison where it was alleged that they had been systematically tortured whilst falsely imprisoned. Again, the High Court struck out the claim on the same grounds.<sup>120</sup>

In a conjoined appeal, a unanimous Court of Appeal held that the Kingdom was entitled to claim immunity from the jurisdiction of UK domestic courts under s. 1 SIA in respect of the allegations of torture.<sup>121</sup> However, with regard to the State officials who were alleged to have committed the acts of torture, the Court of Appeal

<sup>117</sup> *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004).

<sup>118</sup> 282 F.Supp. 2d 875 (N.D. Ill. 2003).

<sup>119</sup> *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia and Lieutenant-Colonel Abdul Aziz* (2003) No. HQ020X01805. Unreported decision of the High Court.

<sup>120</sup> *Mitchell, Walker and Sampson v. Ibrahim Al-Dali and Others* (2004) No. HQ04X00431. Unreported decision of the High Court.

<sup>121</sup> *Jones v. Saudi Arabia and Lieutenant-Colonel Abdul Aziz; Mitchell, Walker and Sampson v. Ibrahim Al-Dali and Others* [2004] EWCA Civ. 1394, at paras. 10-27, *per* Mance LJ. For a comment on the Court of Appeal's decision see: Fox, "Where does the Buck Stop? State Immunity from Civil Jurisdiction and Torture" [2005] LQR 353; and Yang, "Universal Tort Jurisdiction over Torture?" [2005] 64 CLJ 1.

held that the Kingdom was not entitled to claim immunity on their behalf under s. 14(1) SIA. Lord Justice Mance, giving the leading judgement of the Court, reasoned that although s. 14(1) SIA made no express reference to the position of individual officials, it was nonetheless established by *Propend Finance* that, “section 14(1) must be read as affording... officials of a foreign State protection under the same cloak [that] protects the State itself.”<sup>122</sup> However, because the principle in *Propend Finance* was not concerned with the immunity of State officials in respect of allegations of torture, Lord Justice Mance was of the belief that it was necessary to consider, as a matter of first principle, whether the cloak of State immunity could be accorded in such instances.<sup>123</sup> On this matter he held that it was irrelevant that the individual defendants had been acting as agents of the Kingdom at all material times when carrying out the acts of torture. Systematic torture was an international crime prohibited by a peremptory norm of *jus cogens* and could not be regarded as an official function. Accordingly, the acts of torture performed by the individual defendants must be regarded as outside the scope of any proper exercise of sovereign authority and could not be attributed to the State. Upon such reasoning, the Kingdom was therefore not entitled to claim immunity *ratione materiae* on behalf of its State officials alleged to have committed acts of torture.<sup>124</sup>

A unanimous House of Lords rejected this findings made by the Court of Appeal.<sup>125</sup> The Lords began their analysis by noting that there was a wealth of international and domestic authority to show that a foreign State was entitled to claim immunity on behalf of its officials who carried out sovereign acts.<sup>126</sup> They continued and found that it was not a requirement that the acts committed by the officials be lawful in order for a State to claim immunity as the Court of Appeal had suggested; but instead, that the acts were committed under colour of public authority.<sup>127</sup> Since the alleged acts of torture were committed by public officials in a State prison during a prolonged interrogation procedure where the applicants were accused of terrorist

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<sup>122</sup> *Propend Finance Pty Ltd. v. Sing*, The Times, May 2<sup>nd</sup> 1997, CA; 111 ILR 611, at 699.

<sup>123</sup> [2004] EWCA Civ. 1394, at para. 45.

<sup>124</sup> *Ibid.*, at para. 96.

<sup>125</sup> *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia and Lieutenant-Colonel Abdul Aziz; Mitchell, Walker and Sampson v. Ibrahim Al-Dali and Others* [2006] UKHL 26. For a comment on the House of Lord’s decision see: Seymour, “Immunity for Torture: The State and its Representatives Reunited” [2006] 65 CLJ 479; and Steinerte and Wallace, “*Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*” 100 AJIL 901 (2006).

<sup>126</sup> *Ibid.*, at para. 10, *per* Lord Bingham; para. 66, *per* Lord Hoffmann.

<sup>127</sup> *Ibid.*, at paras. 12-13, *per* Lord Bingham; para. 74, *per* Lord Hoffmann.

activities, it was held that they were performed as part of an official function. Accordingly, they were said to be attributable to the Kingdom who was thus able to claim immunity for these acts under s. 14(1) SIA.<sup>128</sup>

### The Official Nature of Torture

The Court of Appeal's reasoning in *Jones* when denying immunity to the State officials was that systematic acts of torture cannot constitute official conduct and therefore fall outside the scope of immunity *ratione materiae*. The Court of Appeal drew a distinction between the actions that were brought in the torts of assault and battery, false imprisonment and negligence, with the actions that were brought in tort for torture; where the former were said to be official acts, and therefore subject to immunity *ratione materiae*, while the latter were not.<sup>129</sup>

The decision of the Court of Appeal that systematic acts of torture were not official acts was largely based upon US jurisprudence under the ATCA and TVPA, the reasoning of the House of Lords in *Pinochet (No. 1)*, a series of *obiter* comments made in *Pinochet (No. 3)* supporting this decision, and a misunderstanding of the reasoning in *Pinochet (No. 3)*.

The US cases which have explicitly dealt with the issue of State officials pleading immunity *ratione materiae* in civil proceedings for acts of torture have all held that such acts could not be treated as a State function and were thus beyond the scope of the plea.<sup>130</sup> However, it is significant to note that this repeated view of the US Federal Courts is contrary to that of the Supreme Court in *Saudi Arabia v. Nelson* where it was held that systematic acts of torture committed by the police have long been understood as being sovereign in nature.<sup>131</sup>

In addition, both Lord Justice Mance and Lord Phillips MR placed great emphasis on the *ratio* of *Pinochet (No. 1)* and a series of *obiter* comments made in *Pinochet (No. 3)* to support their conclusion drawn. As stated above, Lords Nicholls and Steyn held in *Pinochet (No. 1)* that Senator Pinochet did not enjoy immunity on

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<sup>128</sup> *Ibid.*, at para. 35, *per* Lord Bingham; para. 102, *per* Lord Hoffmann.

<sup>129</sup> [2004] EWCA Civ. 1394, at para. 98, *per* Mance LJ.

<sup>130</sup> *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996); *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (1994), at 1470-1; *Rios v. Marshall*, 520 F. Supp. 351 (S.D.N.Y. 1981), at 371-372; *Trajano v. Marcos*, 978 F.2d 493 (1992), at 496-7; *Xuncax v. Gramajo*, 886 F. Supp. 162 (1995), at 175.

<sup>131</sup> 507 US 349, 113 S Ct 1471 (1993), at para. 14.

the basis that customary international law regarded acts of torture to be outside the function of a Head of State, and that immunity *ratione materiae* was only accorded to those acts that were recognised as constituting an official function of a Head of State.<sup>132</sup> It seems curious that the Court of Appeal placed such great emphasis on the reasoning of the Lords' decision in *Pinochet (No. 1)* when this judgement was subsequently set aside thereby rendering it void of any binding legal authority. Nonetheless, similar views to the effect that torture cannot be said to be an official act were expressed by some members of the House of Lords in *Pinochet (No. 3)*.<sup>133</sup> However, these comments did not feature as part of the reasoning of the Lords' in their respective judgements and were, strictly speaking, *obiter*. Such a fact did not go unnoticed by Lord Justice Mance:

The statements in *Pinochet (No. 3)*... were not, as I see it, necessary, even for these decisions of the three members of the House making them.<sup>134</sup>

The greatest difficulty that the Court of Appeal faced when concluding that acts of torture could not be said to be official acts was that the definition provided by Article 1 of the Torture Convention clearly stipulates that torture must be, "inflicted by... a public official or other person acting in an official capacity". Moreover, the very facts of the case concerned acts of torture that had been performed by public officials, in a State prison, and for an official purpose. Lord Justice Mance, however, found there to be no inconsistency between the reference made to a public official in Article 1 CAT and that torture could be regarded as a non-official act:

The requirement that the pain or suffering be inflicted by a public official does no more in my view than identify the author and the public nature context in which the author must be acting. It does not lend to the acts of torture themselves any official or governmental character in nature, or mean that it can in any way be regarded as an official function to inflict, or that an official can be regarded as representing the State in inflicting, such pain or suffering. Still less does it suggest that the official inflicting such pain or suffering can be afforded the same cloak of State immunity.<sup>135</sup>

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<sup>132</sup> [2000] 1 AC 61, at 110-1, *per* Lord Nicholls; and 116, *per* Lord Steyn.

<sup>133</sup> [2000] 1 AC 147, at 205, *per* Lord Browne-Wilkinson; 242-3, *per* Hope; and 260-1, *per* Lord Hutton.

<sup>134</sup> [2004] EWCA Civ. 1394, at para. 74.

<sup>135</sup> *Ibid.*, at para. 71.

It is submitted that this interpretation of Article 1 CAT seems most perverse since the requirement that torture be inflicted by a public official strongly suggests that all acts of torture must be performed in an official context to fall within the definition provided by the Torture Convention. In addition, Lord Hoffmann, in the House of Lords, disagreed with Lord Justice Mance's interpretation of Article 1 CAT:

The acts of torture are either official acts or they are not. The Torture Convention does not 'lend' them an official character; they must be official to come within the Convention in the first place. And if they are official enough to come within the Convention, I cannot see why they are not official enough to attract immunity.<sup>136</sup>

Furthermore, Lord Hoffmann noted that there would be a "striking asymmetry" if it were held that an act of torture was official for the purposes of the definition provided by the Torture Convention, yet non-official for the purposes of immunity.<sup>137</sup>

Both judgements handed down by the Court of Appeal found strong support for their conclusion that a State official does not enjoy immunity *ratione materiae* in civil proceedings for torture in *Pinochet (No. 3)*, despite there being a number of *obiter* comments in this judgement suggesting otherwise.<sup>138</sup> It is suggested that both judgements relied far too heavily on the outcome of *Pinochet (No. 3)* rather than the reasoning which led to Senator Pinochet being denied immunity *ratione materiae*. Lord Justice Mance read *Pinochet (No. 3)* as, "firmly establishing... that a State can claim no immunity in respect of an individual officer committing systematic torture in an official context".<sup>139</sup> Lord Phillips MR endorsed this reading of *Pinochet (No. 3)*, and held that it would be illogical to maintain any distinction between immunity *ratione materiae* in criminal and civil proceedings:

Once the conclusion is reached that torture cannot be treated as the exercise of a State function so as to attract immunity *ratione materiae* in criminal proceedings against individuals, it seems to me that it cannot logically be so treated in civil proceedings against individuals.<sup>140</sup>

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<sup>136</sup> [2006] UKHL 26, at para. 83.

<sup>137</sup> *Ibid.*, at para 79.

<sup>138</sup> [2000] 1 AC 147, at 264, *per* Lord Hutton; 273 and 278, *per* Lord Millet; and 280-1, *per* Lord Phillips.

<sup>139</sup> [2004] EWCA Civ. 1394, at para. 74.

<sup>140</sup> *Ibid.*, at para. 127.



Both judges clearly overlooked the fact that immunity *ratione materiae* had been set aside in *Pinochet (No. 3)* due to the extraterritorial criminal jurisdiction that had been established by the Torture Convention which would have been void of any meaning had immunity been granted. Remarkably, Lord Phillips MR overlooked this important issue despite the fact that he had himself sat in the Appellate Committee of the House of Lords in *Pinochet (No. 3)*, where he had held that customary international law denied immunity *ratione materiae* in instances where States had ratified treaties obliging foreign domestic courts to exercise jurisdiction over international crimes.<sup>141</sup>

Although the decision in *Pinochet (No. 3)* had been given effect to civil proceedings involving allegations of torture by the Court of Appeal, in no way was it possible for the reasoning of the Lords in *Pinochet (No. 3)* to be applied in civil proceedings. In his judgement, Lord Justice Mance had accepted that Article 14(1) CAT did not create any obligatory subsidiary universal civil jurisdiction like other provisions in the Torture Convention had created such criminal jurisdiction.<sup>142</sup> Nor did he suggest that customary international law had created universal civil jurisdiction over the international crime of torture which was prohibited by a norm of *jus cogens*. Despite the fact that he had recognised that there was no obligation on domestic courts of foreign States to exercise extraterritorial civil jurisdiction over acts of torture, Lord Justice Mance nonetheless concluded that:

There is the obvious possibility for anomalies if the international criminal jurisdiction which exists under the Torture Convention is not matched by some wider parallel power to adjudicate over civil claims.<sup>143</sup>

In an attempt to reconcile *Pinochet (No. 3)*, Article 1 of the Torture Convention, and the House of Lords judgement in *Jones*, it is suggested that the following conclusion is to be drawn: systematic acts of torture are by definition an official function and therefore subject to immunity *ratione materiae* unless there exists an obligation on foreign States to exercise extraterritorial jurisdiction over the acts. Clearly, the Torture Convention establishes such an obligation in criminal

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<sup>141</sup> [2000] 1 AC 147, at 289.

<sup>142</sup> [2004] EWCA Civ. 1394, at para. 21. For a detailed discussion on this point see the commentary in chapter 2 at n. 136-168.

<sup>143</sup> *Ibid.*, at para 79.

proceedings; however, as concluded in chapter 2, neither conventional nor customary international law creates such an obligation for civil proceedings.

### The Official Nature of all International Crimes

Torture is distinct from other international crimes in that it is supported by an international convention which explicitly states that, by definition, the crime can only be committed in an official capacity.

The International Court in the *Arrest Warrant* case commented, *obiter dicta*, that once a senior State official leaves office he will no longer enjoy immunity from the criminal jurisdiction of a foreign domestic court in respect of acts committed before or after his period in office, nor in respect of acts committed in a private capacity during his period in office.<sup>144</sup> The comment made by the Court is indeed correct as it recognises that a State official may be made the subject of foreign judicial proceedings for acts that are not performed on behalf of the sovereign State. However, this *obiter* comment has received widespread academic disapproval,<sup>145</sup> as well as judicial disapproval from two Judges in the case,<sup>146</sup> on the basis that it is unqualified and makes no reference to immunity in criminal proceedings for international crimes which, on two different grounds, are said to be committed only in an official capacity. Admittedly, the Court does not expressly stipulate in its judgement that international crimes committed by State officials are to be regarded as acts done in a private capacity, but the two Dissenting Opinions provided by Judges Van den Wyngaert and Al-Khasawneh have found this to be implicit from the decision.<sup>147</sup> Furthermore, the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal cited a growing State practice to the effect that international crimes cannot be regarded as official acts since they are not normal State functions.<sup>148</sup>

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<sup>144</sup> ICJ Report, 2002, p. 3, at para. 61.

<sup>145</sup> Cassese, (Senior State Officials), *supra* n. 29, at pp. 866-70; Spinedi, "State Responsibility v. Individual Responsibility for International Crimes: *Tertium Non Datur?*" (2002) 13 EJIL 895, at pp. 895-9; Wirth, *supra* n. 22, at pp. 877-93; and Wouters, "The Judgement of the International Court of Justice in the *Arrest Warrant* case: Some Critical Remarks" (2003) 16 Leiden Journal of International Law 253, at pp. 262-3.

<sup>146</sup> See the Dissenting Opinion of Judge Van den Wyngaert, at para. 36; and the Dissenting Opinion of Judge Al-Khasawneh, at para. 6.

<sup>147</sup> *Ibid.*

<sup>148</sup> At para. 85. The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal made no comment as to the validity of this claim, but Higgins has suggested extra-judicially, *The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom*, in Conforti

Two arguments have been advanced strongly suggesting that international crimes committed by State officials cannot be regarded as acts performed in a private capacity. Firstly, both Cassese and Judge Van den Wyngaert recognise that international crimes can, for practical purposes, only be committed by individuals who make use of their official status to commit the crime through the mechanisms of the State by ordering other individuals, who themselves act in an official capacity, to perpetrate the crime.<sup>149</sup> Moreover, the commission of such crimes seldom are perpetrated on behalf of an individual, but instead as part of a State policy.<sup>150</sup> Secondly, Spinedi has found that if international crimes were to be regarded as acts performed in a private capacity, this would therefore mean that such acts could not be attributed to the State.<sup>151</sup> The ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 makes it clear in Draft Articles 4 and 7 that the conduct of any State organ shall be considered to be an act of the State even if the acts are unlawful or unauthorised. However, the consequence of recognising that international crimes are performed in a private capacity, and thus cannot be attributed to the State at the international level, is that the rules on State responsibility cannot be invoked for them. As Spinedi rightly suggests, this “would produce a more negative outcome than the harm it was intended to remedy”.<sup>152</sup>

Accordingly, it is concluded that international crimes performed by State officials are to be regarded as official acts. However, if the *obiter* comment made by the International Court were to be taken literally, then it thus follows that State officials would be said to enjoy immunity *ratione materiae* in criminal proceedings for international crimes. In light of this, several academics have advanced the view that customary international law recognises an exception to immunity *ratione materiae* in criminal proceedings for all international crimes.<sup>153</sup> Such a contention is well beyond the scope of the reasoning of the House of Lords in *Pinochet (No. 3)* where it was held that immunity *ratione materiae* will be denied in criminal

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and Francioni, (eds.), *Enforcing International Human Rights Before Domestic Courts*, 1997, Martinus Nijhoff Publishers, at p. 53, that, “acts in the exercise of sovereign authority (*acta jure imperii*) are those which can only be performed by States, but not by private persons. Property deprivation might fall in this category: torture would not”.

<sup>149</sup> Dissenting Opinion of Judge Van den Wyngaert, at para. 36; Cassese (Senior State Officials), *supra* n. 29, at p. 868.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Supra* n. 145, at pp. 895-899.

<sup>152</sup> *Ibid.*, at p. 898.

<sup>153</sup> Cassese (Senior State Officials), *supra* n. 29, at pp. 870-4; Cassese (*International Criminal Law*), *supra* n. 2, at pp. 267-271; Wirth, *supra* n. 22, at pp. 884-9; Zappalà, *supra* n. 52.

proceedings for torture when there is an obligation on domestic courts to exercise extraterritorial jurisdiction over the crime. Given that the concern of this paper is with immunity in civil proceedings for the international crime of torture, the validity of this academic suggestion, which significantly finds no expression in any judicial authority, will not be considered in any detail.

### Immunity for Acts of Torture Committed in a Foreign Jurisdiction and the Right of Access to a Civil Court

The right of access to a domestic court to determine civil disputes is widely recognised by international human rights law and expressed in various international and regional instruments. The inherent tension between State immunity and the procedural right of access to a court was recently considered by the European Court of Human Rights in three of its Grand Chamber judgments resulting from domestic courts barring their adjudicative jurisdiction in compliance with obligations imposed by the law of State immunity. Significantly, one of these decisions involved a torture victim being denied the right to seek civil redress against the foreign State which was alleged to have committed the acts of torture.

#### *Article 6(1) of the European Convention on Human Rights and State Immunity*

Following the Court of Appeal's dismissal of the civil action for damages in *Al-Adsani (No. 2)*, the applicant brought a case before the European Court of Human Rights alleging that the immunity granted to the Government of Kuwait under the SIA for acts of torture amounted to a violation of his rights under Article 3 ECHR, read in conjunction with Articles 1 and 13, and Article 6(1) ECHR.<sup>154</sup>

A Grand Chamber of the of the European Court of Human Rights accepted that Articles 1, 3 and 13 ECHR placed a number of positive obligations on contracting parties to provide redress for acts of torture; however, such obligations were said to be applicable only to acts of torture which were committed within the jurisdiction of the

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<sup>154</sup> *Al-Adsani v. United Kingdom* (2002) 34 EHRR 11. For a case comment on the Strasbourg decision see: Bates, "Article 6: Right to a Fair Trial" (2002) ELR 157; Emberland, "*Al-Adsani v. United Kingdom*" 96 AJIL 699 (2002); and Garnett, "State Immunity Trumps in the European Court of Human Rights" [2002] LQR 367.

contracting party.<sup>155</sup> Since the applicant did not contend that the acts of torture took place within the United Kingdom, nor that there was any causal connection between the acts of torture carried out by the Kuwaiti Government and the United Kingdom, the Grand Chamber unanimously held that there had been no violation of Article 3 ECHR.<sup>156</sup>

The applicant then alleged that his denial of access to a court by the SIA amounted to a violation of Article 6(1) ECHR which impliedly embodies this right. Article 6(1) provides that:

In the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The Court found that Article 6(1) was applicable to the proceedings in question given that there was a genuine dispute over civil rights.<sup>157</sup> However, the Court then emphasised that the right of access to a court is not an absolute right and may be subject to limitations that are in pursuit of a legitimate aim and are proportionate to that aim.<sup>158</sup> With regard to whether the limitation was in pursuit of a legitimate aim, the European Court found that granting immunity pursues the legitimate aim of complying with international law to promote comity and good relations between States.<sup>159</sup> The Court then assessed whether this restriction was proportionate to the aim pursued. On this matter, the Court gave consideration to the fact that State immunity was a well recognised principle of public international law which the European Convention, as a human rights instrument, must take into account and be construed in harmony with where possible.<sup>160</sup> In addition, the Court gave consideration to the universal prohibition on torture and accepted that it had achieved the status of a peremptory norm in international law,<sup>161</sup> but concluded that:

Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other material

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<sup>155</sup> *Ibid.*, at para. 38.

<sup>156</sup> *Ibid.*, at paras. 40-41.

<sup>157</sup> *Ibid.*, at para. 49.

<sup>158</sup> *Ibid.*, at para. 53.

<sup>159</sup> *Ibid.*, at para. 54.

<sup>160</sup> *Ibid.*, at para. 55.

<sup>161</sup> *Ibid.*, at para. 60.

before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suits in the courts of another State where acts of torture are alleged.<sup>162</sup>

Accordingly, the Grand Chamber held, by a bare majority of nine votes to eight, that granting the Kuwaiti Government immunity in civil proceedings for acts of torture which were committed outside the forum State was not an unjustified restriction violating the applicant's right of access to a court embodied in Article 6(1) ECHR.<sup>163</sup>

The Joint Dissenting Opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Cabral Barreto, Costa and Vajić, held that the applicant was unduly deprived of his right of access to a court. The minority held that once it had been accepted that the prohibition of torture had crystallised into a *jus cogens* norm the procedural bar of State immunity was automatically lifted given that, "*jus cogens*... deprives the rule of sovereign immunity of all its legal effects".<sup>164</sup> The validity of this dissenting view will be considered in detail below.<sup>165</sup> Judge Ferrari Bravo similarly found that there had been a violation of Article 6(1), and held that the Court should have endorsed the House of Lords' judgement in *Pinochet (No. 3)*, to the effect that immunity will be denied in criminal proceedings involving allegations of a peremptory norm, rather than drawing an unnecessary distinction between criminal and civil proceedings. It is suggested, for reasons that have already been detailed above, that such a reading of *Pinochet (No. 3)* by Judge Ferrari Bravo is wrong on the basis that the *jus cogens* nature of torture was not the reason why Senator Pinochet was denied immunity from criminal jurisdiction.<sup>166</sup> Instead, the distinction drawn by the Court between the facts of the present case and *Pinochet (No. 3)* is viewed as correct; as the Court rightly commented, albeit indirectly, the *Pinochet (No. 3)* argument could not be applied in civil proceedings where acts of torture are alleged because international law, at the time, did not provide the same firm basis for such a conclusion as it did in *Pinochet (No. 3)*. Finally, Judge Loucaides held that any form of blanket immunity that is applied by a court in order to block completely the judicial determination of a civil right without balancing the competing interests is a disproportionate limitation on Article 6(1) ECHR.

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<sup>162</sup> *Ibid.*, at para. 61.

<sup>163</sup> *Ibid.*, at paras. 66-67.

<sup>164</sup> At para. 4.

<sup>165</sup> See the discussion *infra* at n. 211-233.

<sup>166</sup> See the discussion *supra* at n. 77-83.

The reasoning that Strasbourg had employed in *Al-Adsani* was applied identically in the Grand Chamber judgements of *Fogarty v. United Kingdom*<sup>167</sup> and *McElhinney v. Ireland*<sup>168</sup> that were handed down on the same day, which similarly concerned the relationship between Article 6(1) and State immunity.<sup>169</sup> In both judgements the Court held, by different majorities, that the grant of immunity to bar a civil claim did not amount to a violation of Article 6(1).<sup>170</sup> Subsequently, the European Court has affirmed these three Grand Chamber judgements in its admissibility decision of *Kalogeropoulou v. Greece and Germany*<sup>171</sup> arising out of a civil claim seeking war reparations for the *Distomo Massacre* that was barred on the grounds of immunity.<sup>172</sup> More recently, the Grand Chamber unanimously held inadmissible an application brought against France following the French Court of Cassation's decision that it had no jurisdiction to hear a civil action brought against Colonel Ghadaffi alleging his complicity in murder in *Association SOS v. France*.<sup>173</sup> Despite the legal submissions dealing with the international rules on State immunity at length, the European Court in *Association SOS* chose not to deliberate on this issue<sup>174</sup> thus suggesting that both the reasoning employed and the decision reached in *Al-Adsani* have become established principles of Convention jurisprudence.<sup>175</sup>

#### Is Article 6(1) ECHR Engaged when State Immunity bars a Civil Claim?

The European Court of Human Rights held in all three of its Grand Chamber judgements that Article 6(1) was applicable on the basis that granting immunity to bar a suit created a serious and genuine dispute over civil rights. This view of the Court

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<sup>167</sup> (2002) 34 EHRR 12.

<sup>168</sup> (2002) 34 EHRR 13.

<sup>169</sup> In *Fogarty*, the applicant alleged that the United Kingdom had denied her right of access to a court when granting immunity to the US in an employment dispute. In *McElhinney*, the applicant brought a claim against Ireland for granting immunity to the United Kingdom in a personal injuries dispute.

<sup>170</sup> *Fogarty* by a majority of 16 votes to 1; and *McElhinney* by a majority of 12 votes to 5.

<sup>171</sup> App. No. 50021/00, 12<sup>th</sup> December 2002, unreported.

<sup>172</sup> The facts of the *Distomo Massacre* case are considered *infra* at n. 205.

<sup>173</sup> *Association SOS Attendants and de Boëry v. France*, App. No. 76642/01, 4<sup>th</sup> October 2006, unreported. For a comment see, "Civil Procedure: Civil Action brought against Colonel Ghadaffi on behalf of Families of Victims of Bomb Attacks on an Aeroplane" [2007] EHRLR 93.

<sup>174</sup> *Ibid.*, at p. 95.

<sup>175</sup> Following the House of Lords decision in *Jones*, the alleged victims of torture have made an application to Strasbourg: see, "Victims lose Saudi Torture case" *The Guardian*, 14<sup>th</sup> June 2006.

concerning the applicability of Article 6(1) is significantly different to that taken by Lord Millet in *Holland v. Lampen-Wolfe*.<sup>176</sup>

In *Holland v Lampen-Wolfe*, a US national brought a claim for defamation before the UK courts against an employee of the United States Department of Defence, and argued that if the courts were to deny jurisdiction on the grounds of immunity this would amount to a violation of Article 6(1) ECHR. The House of Lords upheld the dismissal of the claim on the grounds that the defendant enjoyed immunity from suit. Regarding the alleged violation of Article 6(1), Lord Millet, with whom three other Law Lords agreed with, held that while Article 6(1) protects the right of access to a court in order to determine civil disputes, the recognition of immunity by a State party to the European Convention cannot involve a violation of this guaranteed right in situations where customary international law requires immunity to be granted. According to Lord Millet, in order for Article 6(1) ECHR to be engaged the “contracting States [must] have the powers of adjudication necessary to resolve the issues in dispute”.<sup>177</sup> Lord Millet drew a distinction between internal limitations provided by domestic law on the adjudicative jurisdiction of a court that are self-imposed by a State, with State immunity which is prescribed by international law and thus an external “limitation imposed from without upon the sovereignty of [a State]”.<sup>178</sup> Because Article 6(1) does not confer on contracting States adjudicative powers that they do not possess, Article 6(1) cannot be applicable in instances where international law denies jurisdiction. Therefore, where international law imposes the obligation on States to accord immunity, it cannot be said that they have denied access to their courts. Lord Bingham in *Jones* endorsed this view when commenting that, “I do not understand how a State can be said to deny access to its court if it has no access to give”.<sup>179</sup>

It is submitted that the reasoning of Lord Millet in *Holland v. Lampen-Wolfe* concerning the applicability of Article 6(1) ECHR when immunity is granted to a foreign State in civil proceedings is to be preferred to that of the European Court of Human Rights in its three Grand Chamber judgements. Indeed, the reasoning of Lord

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<sup>176</sup> [2000] 1 WLR 1573. For a case comment see, Fox, “Access to Justice and State Immunity” [2001] 117 LQR 10. [Hereinafter referred to as Fox (Access to Justice)]

<sup>177</sup> *Ibid.*, at 1588.

<sup>178</sup> *Ibid.*

<sup>179</sup> [2006] UKHL 26, at para. 14.



Millet has been read with approval in favour to that of Strasbourg by the House of Lords in *Jones*<sup>180</sup> and several academics.<sup>181</sup>

Does barring a Civil Claim under the Doctrine of State Immunity pursue a Legitimate Aim that is Necessary in a Democratic Society?

Having suggested that Article 6(1) ECHR will only be engaged in situations where international law does not deny a contracting party adjudicative jurisdiction over a civil dispute involving a foreign sovereign; the possibility thus arises of establishing a fair balance between the law of State immunity and the procedural right of access to a court in instances where a contracting State accords immunity beyond the requirements of customary international law.

In each of its Grand Chamber judgments, Strasbourg held that Article 6(1) was applicable despite the fact that customary international law required immunity to be granted in each situation. Having found that there was a *prima facie* interference with a Convention right came the question of establishing whether this interference was in pursuit of a legitimate aim, and, if so, whether this restriction was proportionate to that aim. In all three cases, Strasbourg held that granting immunity to bar a civil claim pursued “the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State’s sovereignty”.<sup>182</sup> Indeed, such an approach suggests that Strasbourg did not intend to bring the Convention into conflict with international law. When determining whether the restriction on Article 6(1) was proportionate to the legitimate aim of complying with international law, the Court held in each case that:

Measures taken by High Contracting Parties which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1).<sup>183</sup>

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<sup>180</sup> *Ibid.*, per Lord Bingham; and para. 64, per Lord Hoffmann.

<sup>181</sup> Fox (Access to Justice), *supra* n. 176, at p. 14; Jones, “Article 6 and Immunities Arising in Public International Law” [2003] 52 ICLQ 463, at pp. 469-70; Voyiakis, “Access to Court v. State Immunity” [2003] 52 ICLQ 297, at pp. 309-10.

<sup>182</sup> *Al-Adsani*, at para. 54; *Fogarty*, at para. 34; and *McElhinney*, at para. 35.

<sup>183</sup> *Al-Adsani*, at para. 56; *Fogarty*, at para. 36; and *McElhinney*, at para. 37.

Such reasoning of the Court when conducting the proportionality test may be criticised on the basis that it makes no attempt in balancing the legitimate aim of complying with international law against the restriction placed on the applicant's right of access to a court.<sup>184</sup> Somewhat strangely, the Court reasoned that restrictions which are taken to comply with international law cannot, in principle, be regarded as disproportionate to the legitimate aim of complying with international law. As has rightly been suggested by Vouiakis, the Court appears to have conflated the concept of proportionality with that of whether the restriction pursued a legitimate aim in its reasoning, and thus rendered them both void of any meaning.<sup>185</sup> Indeed, such a misapplication of the proportionality test may have been deliberate as it inevitably leads to the result that the Court did not have to assume the role of deciding on whether a rule of international law, which came into direct conflict with the Convention, was a proportionate restriction on Article 6(1).<sup>186</sup>

Despite these shortcomings in Strasbourg's application of the legitimate aim and proportionality tests, the House of Lords in *Jones* nonetheless employed this reasoning of the European Court when considering the compatibility of the SIA with Article 6(1) ECHR which had been incorporated into domestic law by the Human Rights Act.<sup>187</sup> Accordingly, both Lords Bingham and Hoffmann focused exclusively on whether international law denied a foreign State from being accorded immunity in civil proceedings where allegations of torture were made. After reviewing conventional and customary international law, judicial decisions and the writing of publicists, both drew the conclusion that there was no such exception to the general rule of immunity.<sup>188</sup> This conclusion was then directly applied to the reasoning of the European Court where it had been decided that restrictions which comply with international law cannot be regarded as disproportionate; it was thus held that the SIA did not impose a disproportionate restriction on Article 6(1) ECHR.<sup>189</sup>

For reasons that will be clearly reached at the end of this chapter,<sup>190</sup> it is suggested that the findings of the House of Lords in *Jones* to the effect that

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<sup>184</sup> A similar view is taken by Jones, *supra* n. 181, at p. 471; and Vouiakis, *supra* n. 181, at pp. 311-2. It was this matter that Judge Loucaides dissented on in all three decisions.

<sup>185</sup> *Ibid.*, at pp. 311-2.

<sup>186</sup> Jones, *supra* n. 181, at pp. 471-2.

<sup>187</sup> Despite expressing strong reservation on the matter, Lords Bingham and Hoffmann both proceeded on the assumption that Article 6(1) was engaged as suggested by the European Court.

<sup>188</sup> [2006] UKHL 26, at para. 28, *per* Lord Bingham; and para. 64, *per* Lord Hoffmann.

<sup>189</sup> *Ibid.*

<sup>190</sup> See the discussion *infra* at n. 234.

international law accords immunity in civil proceedings for acts of torture committed in a foreign jurisdiction is correct. However, by endorsing Strasbourg's application of the legitimate aim and proportionality tests, the House of Lords similarly failed to give any due consideration to the applicant's right under Article 6(1), assuming, of course, that it was applicable in the first place. It is suggested that the correct approach to be taken when a contracting State bars a civil claim by according immunity to a foreign State is, firstly, to employ the reasoning of Lord Millet in *Holland v. Lampen-Wolfe* concerning whether Article 6(1) is applicable; and in situations where the Convention Article is properly engaged, to, secondly, conduct a meaningful proportionality test where the restriction on the applicant's right of access to a court is balanced against the legitimate aim which this restriction pursues. Given that customary international law imposes the obligation on States to grant immunity in civil proceedings where a foreign State is alleged to have committed acts of torture, the victim's right of access to a court embodied in Article 6(1) will not be applicable in instances where domestic courts bar their adjudicative jurisdiction over the dispute. With the Convention Article not being engaged, there would thus be no need to apply the legitimate aim and proportionality tests in order to determine whether there had been a violation of the Convention right.

### State Immunity and the Prohibition of Torture as a *Jus Cogens* Norm

Having firmly concluded in chapter 2 that torture has acquired the status of a *jus cogens* norm<sup>191</sup> the discussion will now consider whether this entails any consequence on the law of State immunity. Two arguments have been made in civil proceedings seeking redress for the violation of *jus cogens* norms, and each will now be considered in turn.

#### *The Implied Waiver of State Immunity*

The argument that a State which violates a peremptory norm impliedly waives its right of enjoyment to immunity was first advanced by Belsky, Merva and Roht-

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<sup>191</sup> See the discussion in chapter 2 at n. 238-41.

Arriaza<sup>192</sup> following the US Supreme Court's decision in *Amerada Hess*. The scholars argued that the denial of immunity for such conduct could fall within section 1605(a)(1) FSIA which provides that a foreign State will not be immune from jurisdiction in any case "in which the foreign State has waived its immunity either explicitly or by implication". The argument is predicated on the assumption that the violation of a *jus cogens* norm cannot constitute a sovereign act and therefore cannot attract any of the incidental benefits of sovereignty.<sup>193</sup> According to such a view, the violation of a peremptory norm impliedly waives the enjoyment of any right to immunity.

While the existence of peremptory norms cannot be disputed, their exact scope and nature in international law, beyond rendering incompatible treaties void *ab initio*,<sup>194</sup> is still being explored.<sup>195</sup> It is therefore suggested that, at present, it is uncertain whether one of the effects of peremptory norms is to render the conduct that violates the norm as non-sovereign despite the fact that a recently published monograph has concluded otherwise.<sup>196</sup> Indeed, it appears that the better view may be that a State does not cease to be sovereign when violating a peremptory norm of customary international law.<sup>197</sup> More significantly, however, the implied waiver argument has been described as inherently contradictory in the sense that it presupposes an entirely fictitious implied waiver of immunity in circumstances where a State would not be likely to have expressly waived its immunity.<sup>198</sup> Although the implied waiver argument has received some judicial support in first instance decisions, it has consistently been rejected on appeal.

The argument has been made twice before US courts and on each occasion has been rejected. In *Siderman de Blake*, the 9<sup>th</sup> Circuit Court of Appeals accepted that torture was a peremptory norm, but dismissed the argument that the FSIA impliedly waives sovereign immunity for violations of such norms. Similarly, in *Princz* a

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<sup>192</sup> "Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law" 77 *Cali L Rev* 365 (1989).

<sup>193</sup> *Ibid.*, at pp. 390-4.

<sup>194</sup> Article 53 Vienna Convention on the Law of Treaties 1969.

<sup>195</sup> Brownlie, *supra* n. 2, at p. 490.

<sup>196</sup> Orakhelashvili, *Peremptory Norms in International Law*, 2006, OUP, at pp. 322-7.

<sup>197</sup> This was the finding of the German Federal Supreme Court in *Greek Citizens v. Federal Republic of Germany*, (*The Distomo Massacre case*), 26<sup>th</sup> June 2003, III ZR 245/98. The facts of the *Distomo Massacre* case are considered *supra* at n. 205.

<sup>198</sup> Bröhmer, *supra* n. 2, at p. 191; Caplan, "State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory" 97 *AJIL* 751 (2003), p. 744, at ft. 14.

majority of the Court of Appeal<sup>199</sup> rejected the findings of the District Court<sup>200</sup> which held that it had jurisdiction over a civil claim seeking damages for slave labour performed during World War Two. Judge Ginsburg, writing for the majority, accepted that a foreign State may waive its immunity by way of implication under the FSIA, but held that the violation of a *jus cogens* norm could not in itself be considered as constituting an implied waiver of immunity. In his opinion, an implied waiver of immunity under the FSIA, “depends upon the foreign government having at some point indicated its amenability to suit”.<sup>201</sup> Judge Wald, however, dissented from the majority and held that violations of *jus cogens* should be considered to be an implied waiver of immunity within section 1605(a)(1) FSIA.

The Court of Appeal in *Al-Adsani (No. 2)* cited with approval this US jurisprudence and found that there was no room for any implied exceptions to the SIA for violations of peremptory norms. Lord Justice Ward was of the opinion that the SIA was “as plain as can be” and thereby rejected the argument that the term ‘immunity’ from sovereign acts within section 1 must be interpreted to ‘immunity from sovereign acts that were in accordance with international law’.<sup>202</sup> The implied waiver argument was slightly modified when presented in the post-Human Rights Acts decision of *Jones*. The applicants argued that the duty under section 3(1) HRA on UK domestic courts requiring them to interpret legislation, so far as is possible, compatibly with the European Convention required an implied exception to be introduced into s. 1(1) SIA. Given that the House of Lords had reached the firm conclusion that granting immunity in civil proceeding for acts of torture did not violate Article 6(1) ECHR, if indeed Article 6(1) was engaged at all, the argument was accordingly dismissed. Lord Hoffmann noted that even if a violation of Article 6(1) had been found by the Court, then it would not have been possible under s. 3(1) HRA to have read the implied exception into s. 1(1) SIA as suggested by the applicants; instead, a s. 4 HRA declaration of incompatibility would have been made in the circumstances.<sup>203</sup>

The implied waiver argument has thus been dismissed in common law jurisdictions where the restrictive rule of State immunity has been codified into

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<sup>199</sup> 26 F.3d 1166 (D.C. Cir. 1994).

<sup>200</sup> 813 F.Supp. 26 (D.D.C. 1992).

<sup>201</sup> 26 F.3d 1166 (D.C. Cir. 1994), at 1174.

<sup>202</sup> 106 ILR 536, at 549.

<sup>203</sup> [2006] UKHL 26, at para. 64.

domestic legislation. Arguably, this may be unsurprising since the legislation attempts to provide a comprehensive code of the instance when exceptions are to be made to the general rule of immunity and is thus not subject to any overriding considerations. The courts in both *Siderman de Blake* and *Al-Adsani (No. 2)* found themselves bound by the clear terms of the legislation when rejecting the implied waiver argument, and suggested that it was for the legislator to expressly provide an exception to the general rule of immunity for violations of *jus cogens* norms.<sup>204</sup>

Not only has the implied waiver argument been dismissed by courts in common law jurisdictions when undertaking a literal approach to the terms of the domestic legislation that codifies the restrictive rule of State immunity, but also by courts in civil law jurisdictions which have a more flexible uncodified rule. The facts of *Prefecture of Voiotia v. Federal Republic of Germany* arose out of a compensation claim brought against Germany for the massacres that had been committed by occupying forces during the Second World War in the village of Distomo. The Court of First Instance of Levadia held that violation of a *jus cogens* norm could not be regarded as a sovereign act and therefore could not be characterised as an act *de jure imperii*.<sup>205</sup> Accordingly, the Court held that the Greek courts had adjudicative jurisdiction to hear this civil case on the grounds that Germany had impliedly waived its right to immunity. On appeal, the Greek Supreme Court effectively confirmed the decision of the Court of First Instance that Germany did not enjoy immunity for the massacres that had been committed in Distomo; but, despite the fact that the Supreme Court approved the reasoning of the Court of First Instance, immunity was denied on a different ground.<sup>206</sup> The reasoning of the Supreme Court was not that Germany must be deemed to have waived its right to immunity by violating a peremptory norm, but that there existed a clear customary rule providing an exception to State immunity in instance where a foreign State has committed a tort in the territory of the forum State and it was the breach of the peremptory norm that constituted the tort.<sup>207</sup> As evidence

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<sup>204</sup> *Siderman de Blake*, 965F 2d 688 (9<sup>th</sup> Cir. 1992), at 56, *per* Fletcher J.; *Al-Adsani (No. 2)*, 106 ILR 536, at 542, *per* Stuart-Smith LJ.

<sup>205</sup> 30<sup>th</sup> October 1997, Case No. 137/1997, Court of First Instance of Levadia, Greece. For a case comment see Bantekas, "*Prefecture of Voiotia v. Federal Republic of Germany*" 92 AJIL 765 (1998).

<sup>206</sup> May 4<sup>th</sup> 2000, Case No. 11/2000, Areios Pagos, Hellenic Supreme Court. For a case comment see Gavouneli and Bantekas, "*Prefecture of Voiotia v. Federal Republic of Germany*" 95 AJIL 198 (2001).

<sup>207</sup> This important point has been overlooked by some of the academic literature: McGregor, "State Immunity and *Jus Cogens*" [2006] 55 ICLQ 437, at p. 440; and Orakhelashvili, *supra* n. 196, at p. 327. *Cf* the correct reading made by de Wet, "The Prohibition of Torture as an International Norm of *Jus Cogens* and its Implications for National and Customary Law" (2004) 15 EJIL 97, at pp. 108-9; and De

for the existence of this customary rule the Court cited Article 12 of the 1991 ILC Draft Articles on Jurisdictional Immunities, Article 11 of the European Convention on State Immunity 1972, and similar provisions contained in domestic legislation. Furthermore, the Court held that immunity could not be retained in situations involving armed conflict against innocent citizens, despite the fact that both the Draft Articles on Jurisdictional Immunities and the European Convention on State Immunity expressly provide that immunity is to be granted in such instances. The Special Supreme Court of Greece subsequently held that Germany was entitled to claim immunity in this civil case involving war reparations on the basis that the torts had been committed by its armed forces.<sup>208</sup>

The implied waiver argument has thus received a notable lack of judicial support. In keeping with this trend, the Italian Court of Cassation in *Ferrini v. Federal Republic of Germany* recently rejected the theory when commenting that, “a waiver cannot... be envisaged *in the abstract*, but only encountered *in the concrete*”.<sup>209</sup>

#### *The Normative Hierarchical Status of Jus Cogens Norms*

The suggestion that the rules on State immunity would be invalidated by a peremptory norm of international law in proceedings where a foreign State was alleged to have violated such a norm was introduced into the academic community well over a decade ago and has since been the subject of an ensuing lively debate.<sup>210</sup> The premise of the argument is that *jus cogens* norms enjoy the highest-ranking normative status within the legal order and therefore prevail over the rules on State immunity which rank lower in the hierarchy of international norms. Following the House of Lords judgement in *Pinochet (No. 3)*, this argument gained further academic support when it was suggested that the denial of immunity was based on the normative status of the prohibition on torture.<sup>211</sup> Admittedly, several of the Lords in the majority referred to *jus cogens* in their judgement, but for the reasons already suggested above it is

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Sena and De Vittor, “State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case” [2005] 16 EJIL 89, at pp. 96-7. Significantly, this misreading of the Supreme Court’s decision was similarly made by Lord Hoffmann in *Jones* [2006] UKHL 26, at paras. 55 and 62.

<sup>208</sup> *Federal Republic of Germany v. Miltiadis Margellos*, 17<sup>th</sup> December 2002, Case No. 6/17-9-2002.

<sup>209</sup> (Cass. Sez. Un. 5044/04) 87 *Rivista du Diritto Internazionale* 539 (2004), at para. 8.2. (Original emphasis).

<sup>210</sup> Bianchi, “Denying State Immunity to Violators of Human Rights” (1994) 46 *Austrian J Pub Int’l L* 195, at p. 219.

<sup>211</sup> See the discussion, and citations, *supra* at n. 80.

submitted that the superior status of peremptory norms was not part of the *ratio decendi*.<sup>212</sup> The normative hierarchical theory has since received some judicial endorsement in the Dissenting Opinions of two International Courts, and, more significantly, the Italian Court of Cassation.

As will be recalled, a large eight-member dissenting minority of the European Court in *Al-Adsani* firmly held that, “*jus cogens*... deprives the rule of sovereign immunity of all its legal effects”.<sup>213</sup> In addition, a similar view was taken by the Dissenting Opinion of Judge Al-Khasawneh in the *Arrest Warrant* case who was of the belief that, “when the hierarchically higher [*jus cogens*] norm comes into conflict with the rules on immunity, it should prevail”.<sup>214</sup> More recently, the Italian Court of Cassation fully upheld the normative hierarchical argument in *Ferrini v. Federal Republic of Germany*.<sup>215</sup>

The case of *Ferrini* involved an Italian national bringing a civil action against Germany for being deported from Italy to Germany where he was forced to work in the war industry. At first instance the applicant’s claim for war reparations was dismissed on the grounds that Germany enjoyed immunity from suit, and this finding was subsequently upheld on appeal.<sup>216</sup> The Court of Cassation however reversed this decision when finding that a foreign State is not entitled to claim immunity in respect of civil proceedings where it is alleged to have violated a peremptory norm of international law. The Court reached this conclusion by, firstly, defining both deportation and forced labour as a *jus cogens* norm,<sup>217</sup> and, secondly, claiming that there was no doubt that *jus cogens* norms “prevail over all other norms, either statutory or customary in nature, and therefore over norms concerning immunity”.<sup>218</sup> In supporting this conclusion, the Court cited with approval the dissenting opinion of the European Court in *Al-Adsani*, which similarly held that priority must be granted to the higher-ranking norm. By finding that *jus cogens* norms override State immunity due to their status in the hierarchy of norms, the Court was thus of the opinion that it

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<sup>212</sup> Cf Orakhelashvili, *supra* n. 196 at p. 355.

<sup>213</sup> The Joint Dissenting Opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Cabral Barreto, Costa and Vajić, at para. 4, endorsed by Judges Ferrari Bravo and Loucaides.

<sup>214</sup> At para. 7.

<sup>215</sup> (Cass. Sez. Un. 5044/04) 87 *Rivista du Diritto Internazionale* 539 (2004). For a comment see: Bianchi, “*Ferrini v. Federal Republic of Germany*” 99 *AJIL* 242 (2005), [hereinafter referred to as Bianchi (*Ferrini*)]; and Focarelli, “Denying Foreign State Immunity for Commission of International Crimes: The *Ferrini* Decision” [2005] 54 *ICLQ* 951.

<sup>216</sup> Corte App. Firenze, 14<sup>th</sup> Jan 2002.

<sup>217</sup> (Cass. Sez. Un. 5044/04) 87 *Rivista du Diritto Internazionale* 539 (2004), at para. 7.

<sup>218</sup> *Ibid.*, at para. 9.



need not show the existence of an explicit customary rule providing that a foreign State will be denied immunity when it is alleged to have violated a peremptory norm.

In addition, the Court of Cassation drew a material distinction between the facts of *Ferrini* from those of *Al-Adsani* (No. 2) and *Bouzari* on the basis that the torts in these decisions had taken place outside the jurisdiction of the forum State.<sup>219</sup> It appears somewhat strange that the Court of Cassation placed any reliance on the fact that the applicant was captured on and deported from Italian territory to draw a distinction between those decisions where the domestic courts had held that a foreign State enjoyed immunity in civil proceedings when alleged to have violated a *jus cogens* norm. It is suggested that it would have been much more preferable for the Court to have denied immunity on the basis of the clearly recognised customary exception to the general rule of immunity in instances where a foreign State has committed a tort in the territory of the forum.<sup>220</sup> Had the Court adopted such reasoning then it would have been unnecessary for it to have drawn the doubtful conclusions that deportation and forced labour constitute peremptory norms,<sup>221</sup> and that such norms take precedence over the rules on State immunity.<sup>222</sup>

Despite the Italian Court of Cassation's endorsement of the normative hierarchal theory in *Ferrini*, it is suggested that this decision alone cannot be seen as conclusive of the matter. Not only does the decision stand in isolation to a number of cases where the argument has been rejected,<sup>223</sup> but, and more significantly, the theory has correctly been criticised by numerous academics on the basis of being conceptually flawed.<sup>224</sup> This criticism of the normative hierarch theory was explicitly endorsed by both the Court of Appeal and the House of Lords in *Jones*.<sup>225</sup>

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<sup>219</sup> *Ibid.*, at para. 10.

<sup>220</sup> This, however, is on the basis that the customary exception does not apply in armed conflicts. See, further, on this point Gattini, "War Crimes and State Immunity in the *Ferrini* Decision" (2005) 3 JICJ 224. Given that this point is well beyond the scope of this paper no attempt shall be made to consider it.

<sup>221</sup> See further on this point, De Sena and De Vittor, *supra* n. 207, at pp. 97-100.

<sup>222</sup> Similarly, it would have been unnecessary for the Court to have held that it had jurisdiction over the events under the universal civil jurisdiction principle, but instead under the widely accepted subjective territorial principle. See further the discussion of this point in chapter 2 at n. 254-2.

<sup>223</sup> Most notably by the International Court in the *Arrest Warrant* case, ICJ Report, 2002, p. 3, at para. 58.

<sup>224</sup> Caplan, *supra* n. 198, at pp. 771-2; de Wet, *supra* n. 207, at pp. 109-10; Fox (*State Immunity*), *supra* n. 2, at pp. 524-5; Gattini, *supra* n. 220, at pp. 236-7; Voyiakis, *supra* n. 181, at pp. 320-2; Zimmermann, "Sovereign Immunity and Violations of International *Jus Cogens*- Some Critical Remarks" 16 Mich J Int'l L 433 (1994), at p. 438. Cf Orakhelashvili, *supra* n. 196, at pp. 340-57.

<sup>225</sup> Respectively: [2004] EWCA Civ 1394, at para. 17 *per* Mance LJ.; [2006] UKHL 26, at para. 24, *per* Lord Bingham; and paras. 44-5, *per* Lord Hoffmann.

If peremptory norms are to override the rules on State immunity under the normative hierarchy theory then it is necessary to show that the norms are in conflict with one another. State immunity is a procedural rule that is concerned with the judicial power of a State and bars domestic courts from exercising adjudicative jurisdiction in disputes which involve foreign sovereigns. The rules of State immunity are not concerned with the substantive question of whether a State is responsible for its acts in a given situation, but with the procedural question of which forum shall be used in order to resolve the dispute.<sup>226</sup> Accordingly, it may be said that State immunity is not a plea that provides a substantive defence exonerating a foreign State from liability. In contrast, peremptory norms are primarily concerned with substantively prohibiting the violation of the norm.

The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case recently commented that, “immunity is never substantive”,<sup>227</sup> and the strictly procedural nature of immunity was similarly emphasised by the International Court.<sup>228</sup> Lord Hoffmann rightly commented in *Jones* that a domestic court which accords immunity to a foreign State “is not proposing to torture anyone. Nor is the... [foreign State], in claiming immunity, justifying the use of torture”.<sup>229</sup> Consequently, with the obligations of State immunity not affecting substantive law, the norms can never be in conflict at their level of substance.

For peremptory norms to displace the rules on State immunity under the normative hierarchy theory it is thus necessary for the theory to show that peremptory norms create procedural obligations, and that such obligations conflict with the rules on State immunity. Accordingly, it must be shown that peremptory norms create a procedural right of access to foreign domestic courts which allow an individual to seek civil redress for violation of the norm. On this matter, Bianchi has suggested that State immunity comes into conflict with the values which underlie *jus cogens* norms, and thus should be overridden when applying this to the normative hierarchy

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<sup>226</sup> See, further, on this point, Yang, “State Immunity in the European Court of Human Rights: Reaffirmation and Misconceptions” [2004] 74 BYIL 333, at pp. 342-3.

<sup>227</sup> At para. 74.

<sup>228</sup> ICJ Report, 2002, p. 3, at para. 60. The ICTY Appeals Chamber has held in *Prosecutor v. Blaškić*, (*subpoena*), Judgement of 29 October 1997, (Case No. IT-95-14-AR 108 bis.), at paras. 38-41, that immunity *ratione materiae* is a substantive defence enjoyed by State officials. This finding has been approved by Cassese (*International Law*), *supra* n. 2, at pp. 110-3; but rightly been criticised by Fox, *Some Aspects of Immunity from Criminal Jurisdiction of the State and its Officials: The Blaškić case*, in Vohrah, *et al.*, (eds.), *Man’s Inhumanity to Man*, 2003, Kluwer Law International.

<sup>229</sup> [2006] UKHL 26, at para. 44.

theory.<sup>230</sup> Moreover, in a recent and comprehensive study on the subject of peremptory norms, Orakhelashvili has claimed that international law has endowed peremptory norms with ‘inherent consequential effects’ so that they may be practically applied, and that the enforcement of the norm is similarly *jus cogens*.<sup>231</sup> According to Orakhelashvili, “a norm that cannot be enforced is not a norm”.<sup>232</sup>

At a time when there is great uncertainty surrounding the legal consequences which ensue from the violation of a *jus cogens* norm, the Court of Appeal for Ontario has commented in *Bouzari* that:

The extent of the prohibition against torture as a rule of *jus cogens* is determined not by any particular view of what is required if it is to be meaningful, but rather by the widespread and consistent practice of States.<sup>233</sup>

It is submitted that, at present, the consistent practice yielded by international law is that peremptory norms do not possess any enforcement obligations, and this is clearly reflected by the fact that customary international law does not provide an exception in civil proceedings seeking redress for violations of *jus cogens* norms. With there being no conflict between the procedural rules of State immunity and the, non-existent, procedural obligations of *jus cogens*, the normative hierarchy theory may thus be said to be conceptually flawed.

## Conclusion

It is thus concluded that customary international law obliges States to accord immunity to foreign States in civil proceedings seeking redress for acts of torture committed in a foreign jurisdiction. Moreover, since the commission of torture has been concluded to be an official act, and therefore attributable to the sovereign State, immunity is similarly to be granted to foreign State officials. Despite *Pinochet (No. 3)* denying immunity *ratione materiae* in criminal proceedings for acts of torture committed in a foreign jurisdiction, it has strongly been argued that the reasoning of

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<sup>230</sup> Bianchi (*Ferrini*), *supra* n. 215, at p. 247.

<sup>231</sup> *Supra* n. 196, at p. 341.

<sup>232</sup> *Ibid.*, at p. 349.

<sup>233</sup> [2004] OJ No. 2800, at para. 90. Significantly, both the International Court in the *Arrest Warrant* case, ICJ Report, 2002, p. 3, at para. 58, and the European Court of Human Rights in *Al-Adsani* (2002) 34 EHRR 11, at para. 61, referred to State practice when determining the consequences that ensue from the violation of a *jus cogens* norm.

the House of Lords in *Pinochet (No. 3)*, to the effect that international law does not grant immunity in instances where it obliges extraterritorial jurisdiction to be both assumed and exercised, cannot be applied in civil proceedings following the conclusions drawn in chapter 2 in that international law, at present, does not establish such obligatory universal civil jurisdiction for torture. Finally, the doctrinal legitimacy of the separate legal arguments that granting immunity in civil proceedings for acts of torture violates the right of access to a civil court and is inconsistent with the peremptory status of the norm have both been rejected.

## PRIVATE INTERNATIONAL LAW

It is to the law of the *lex loci delicti* to which the defendant owed obedience at the decisive moment, and it is by that law that his liability, if any, should be measured.<sup>1</sup>

### The Relationship Between the Different Fields of International Law

The relationship between public and private international law is a highly complex issue that has evaded most of the mainstream academic literature which tends to treat the two fields of international law as entirely separate bodies of law.<sup>2</sup> However, this relationship is of great significance in transnational human rights litigation where legal issues are raised in both fields of law and thus must be considered.

Public international law is primarily concerned with regulating the legal rules which govern inter-State relations; where as, in contrast, private international law is primarily concerned with regulating the rules which govern the resolution of private law relations involving a foreign element. Thus, by way of definition, it may be said that the different species of international law are complementary to one another. Public international law itself does not contain any detailed rules regulating the procedural norms that determine how a private law dispute involving a foreign

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<sup>1</sup> Cheshire, *Private International Law*, 6<sup>th</sup> ed., 1961, at p. 277.

<sup>2</sup> For the most extensive comments on the relationship between public and private international law see: Akehurst, "Jurisdiction in International Law" (1972) 46 BYIL 145, at pp. 216-31; Lowe, "Public International Law and the Conflict of Laws: The European Responses to the United States Export Administration Regulations" [1984] 33 ICLQ 515, at pp. 521-3; Mann, "The Doctrine of Jurisdiction in International Law" (1964) 111 Hague Recueil, reprinted in Mann, *Further Studies in International Law*, 1990, Oxford: Clarendon Press, at pp. 10-15 and 43-51, [hereinafter referred to simply as Mann]; Mann, "The Doctrine of Jurisdiction in International Law Revisited After Twenty Years" (1984) 186 Hague Recueil 9, at pp. 26-33, [hereinafter referred to as Mann (Revisited)]; Maier, "Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law" 76 AJIL 280 (1982); Maier, *Jurisdictional Rules in Customary International Law*, in Messon, (eds.), *Extraterritorial Jurisdiction in Theory and Practice*, 1996, Kluwer Law International, at pp. 79-81; and Scott, *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms*, in Scott, (eds.), *Torture as Tort*, 2001, Hart Publishing, at pp. 51-3.

element is to be dealt with by a domestic legal system.<sup>3</sup> However, in his seminal work on the doctrine of jurisdiction, Mann has noted one exception whereby public international law does in fact have a limiting function in relation to private international law.<sup>4</sup> According to Mann, all of the regulatory rules of private international law have to stand the test of the public international law doctrine of jurisdiction:

If jurisdiction directs that in given circumstances a person, thing or act may be made subject to the law of a given State... it is the municipal law of that State and possibly of other States that makes the person, thing or act so subject. If the doctrine of jurisdiction defines the States enjoying, in given circumstances, the international right of regulation, private international law decides which of several laws enacted in the exercise of such right shall prevail in a given country.<sup>5</sup>

Thus, the function of jurisdiction, when used as doctrine of public international law, is to define a State's competence when enacting rules of private international law: "if jurisdiction provides the frame or limit, the conflict rule fills it in".<sup>6</sup> So long as these rules do not exceed the customary limits of jurisdiction, public international law will be indifferent to them.

### Private International Law and Transnational Human Rights Litigation

Any transnational human rights litigation seeking civil redress raises two procedural issues that must be considered by a domestic court before it may deal with any issues concerning substantive liability. Firstly, the domestic court must determine whether it has jurisdiction to hear the dispute; and if so, it must, secondly, determine which system of law will be applied when adjudicating the dispute. Each domestic legal system will have its own body of private international law rules which determine these procedural issues of jurisdiction and choice of law, and in some situations States may have entered into bilateral treaty arrangements with one another which provide the rules determining these issues. The discussion will now briefly examine each of

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<sup>3</sup> This is, however, not to say that States may not enter into international conventions which provide regulatory rules of private international law such as, for example, the Brussels Convention on Jurisdiction and Enforcement in Civil and Commercial Matters 1968. See further on this point, Scott, *ibid.*, at p. 52.

<sup>4</sup> Mann, *supra* n. 2, at pp. 12-3; Mann (Revisited), *supra* n. 2, at pp. 31-2.

<sup>5</sup> Mann, *ibid.*, at p. 12.

<sup>6</sup> *Ibid.*

these private international law issues in the context of them being faced by an alleged victim of torture bringing civil proceedings against a foreign defendant before an English court.<sup>7</sup>

### *Jurisdiction*

The question of whether a domestic court has jurisdictional competence over a private law dispute is concerned with whether both the cause of action and the litigants to the dispute have a sufficiently close connection with the forum. Although this test of jurisdiction is same which determines the existence of jurisdiction in public international law,<sup>8</sup> the grounds for the exercise of jurisdiction under private international law are not the same as those grounds in public international law. With respect to the former, specific subjects may be regulated in terms of domicile or residence, but such grounds would not found jurisdiction where public international law matters are concerned.<sup>9</sup>

In the UK, the usual basis for determining whether a court has jurisdiction to hear a private law dispute involving a foreign defendant is whether the applicant is able to serve a writ upon the defendant.<sup>10</sup> If the defendant is physically present in England, and the writ is properly served upon him, the common law provides that the individual is automatically subject to the jurisdiction of the court even if this presence in England is merely transient. Where a writ cannot be served upon a defendant who is not physically present in England, it is still possible for the court to exercise jurisdiction over the defendant if the civil claim falls within one of the categories recognised by the Civil Procedure Rules 1998<sup>11</sup> and the court then grants permission to serve the writ extraterritorially. This latter situation will be applicable in instances where the defendant in civil proceedings is a foreign State.<sup>12</sup>

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<sup>7</sup> For a detailed and comprehensive guide see, generally, REDRESS, *Challenging Impunity for Torture: A Manual for Bringing Criminal and Civil Proceedings in England and Wales for Torture Committed Abroad*, 2000, published by the REDRESS Trust, at pp. 125-176. See, further, International Law Association Human Rights Committee, "Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad" [2001] EHRLR 129, at pp. 139-49 and 158-62. [Hereinafter referred to as ILA Report on Civil Actions].

<sup>8</sup> Mann (Revisited) *supra* n. 2, at p. 31.

<sup>9</sup> Shaw, *International Law*, 5<sup>th</sup> ed., 2003, CUP, at pp. 573-4.

<sup>10</sup> In civil law countries the usual ground for jurisdiction is the habitual residence of the defendant in the forum State.

<sup>11</sup> As amended at 1<sup>st</sup> October 2005.

<sup>12</sup> See s. 12 of the State Immunity Act 1978 which details how writs are served on foreign States.

Civil Procedure Rule 6.20(8)(a) will be the most relevant in determining whether a claim form may be served outside of the jurisdiction in tort actions seeking civil redress against a foreign defendant alleged to have committed acts of torture in a foreign State.<sup>13</sup> Rule 6.20(8)(a) provides that leave can be granted to serve a claim form outside of the jurisdiction in an action for tort where the damage was sustained in England. In *Al-Adsani (No. 1)*, the Court of Appeal held that the consequential psychological damage suffered by the applicant when returning to England was to be regarded as a separate form of injury to the physical acts of torture that were inflicted by the State officials in Kuwait.<sup>14</sup> Accordingly, the Court granted leave to serve the claim form on the foreign State outside the jurisdiction.

In cases where proceedings have properly been served upon the defendant, the court retains an inherent competence to stay the proceedings on the grounds of *forum non conveniens*. Under this doctrine, the court will stay proceedings where it “is satisfied that there is some other available forum, having competent jurisdiction, in which the case may be tried more suitably for the interest of all the parties and the ends of justice”.<sup>15</sup> Factors that will be relevant when deciding whether to decline jurisdiction for any transnational human rights litigation seeking civil redress for torture include whether the claimant has legitimate fears for his personal safety if returning to the foreign jurisdiction,<sup>16</sup> and whether the foreign court will award low damages.<sup>17</sup>

### *Choice of Law*

Once a domestic court has concluded that it has jurisdictional competence to hear a private law dispute, it must next determine which system of law shall be applied to the dispute. In criminal proceedings, domestic courts will always apply the law of the *lex fori* regardless of whether the conduct was committed extraterritorially; however, in civil proceedings, a domestic court may apply either the law of the *lex fori* or the law of the *lex loci delicti*. A majority of States have adopted the principle in their respective rules on private international law that the law of the *lex loci delicti* shall be

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<sup>13</sup> REDRESS, *supra* n. 7, at pp. 138-9; ILA Report on Civil Actions, *supra* n. 7, at p. 142.

<sup>14</sup> *Al-Adsani v. Government of Kuwait and Others* [1994] 100 ILR 465, at 467 *per* Evans LJ.

<sup>15</sup> *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] 1 AC 460, at 482, *per* Lord Goff.

<sup>16</sup> *Oppenheimer v. Louis Rosenthal & Co.* [1937] 1 All ER 23.

<sup>17</sup> *The Adhiguna Meranti* [1988] 1 Lloyd's Rep. 384.



applied when adjudicating civil actions brought in tort.<sup>18</sup> Thus, for example, in the UK, s. 11(1) of the Private International Law (Miscellaneous Provisions) Act 1995 provides the general rule that an English courts is to apply the law of the country in which the events constituting the tort occurred.<sup>19</sup>

Where the action in tort relates to death or personal injury, and the elements of those events constituting the tort occur in different countries, section 11(2)(a) PIL Act provides that the applicable law is the law of the country where the individual was when he sustained the injury. Since personal injury, for the purposes of the Act, includes any impairment of physical and mental condition,<sup>20</sup> and, as already stated above, the Court of Appeal in *Al-Adsani (No. 1)* recognised that the psychological damage suffered by a victim of torture is to be regarded as a separate form of injury to the direct physical acts, it is thus possible to argue that English law be applicable in cases where post-traumatic stress disorder is suffered in the UK as a result of acts torture carried out in a foreign jurisdiction.<sup>21</sup> However, it is suggested that the better view may well be that the psychological damage suffered by the victim of torture can no longer be regarded as a separate form of injury since this argument has been dismissed in litigation subsequent to *Al-Adsani (No. 1)* where the applicant has sought to invoke the recognised exception that immunity will not be available where personal injury is caused within the forum State.<sup>22</sup> Accordingly, it is concluded that in a tort action seeking civil redress for acts of torture committed in a foreign jurisdiction the law of the *lex loci delicti* will, *prima facie*, be applicable unless one of the exceptions contained in the PIL Act is applicable.

For the tort action seeking civil redress for acts of torture committed in a foreign jurisdiction to be successful, it is necessary that the *lex loci delicti* recognise civil liability for torture. In this regard, it is not necessary that the *lex loci delicti* specifically recognise a tort of torture, but that it recognise some form of civil liability for the acts such as assault and battery which may capture at least some aspects of the tort.<sup>23</sup> However, in situations where the *lex loci delicti* recognises that the acts

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<sup>18</sup> Mann (Revisited), *supra* n. 2, at p. 47.

<sup>19</sup> For a comment see, Morse, "Torts in Private International Law: A New Statutory Framework" [1996] 45 ICLQ 888. [Hereinafter referred to as the PIL Act].

<sup>20</sup> S. 11(3) PIL Act.

<sup>21</sup> REDRESS, *supra* n. 7, at pp. 173-4.

<sup>22</sup> *Al-Adsani v. Government of Kuwait and Others (No. 2)* [1996] 106 ILR 536; *Bouzari v. Islamic Republic of Iran* [2004] OJ No. 2800.

<sup>23</sup> See, further, on this point, Virgo, *Characterisation, Choice of Law and Human Rights*, in Scott, (eds.), *Torture as Tort*, 2001, Hart Publishing, at pp. 325-36.

complained of are lawful, such as, for example, where the tortious conduct of public officials cannot give rise to civil claims or amnesty laws have been enacted, then the action will fail.

Section 14(3)(a)(i) PIL Act provides one exception to the general rule contained in s. 11(1) which will be relevant in transnational human rights litigation of the sort envisaged in this paper. According to s. 14(3)(a)(i), English courts are not to apply the law of the *lex loci delicti* where this would conflict with a principle of public policy. In *Oppenheimer v. Cattermole*, the House of Lord held that English courts would disregard a foreign law where this would represent a serious infringement to human rights.<sup>24</sup> Thus, if the *lex loci delicti* is disregarded in favour of English law because it does not recognise civil liability for torture then, in the absence of any tort of torture recognised by English law,<sup>25</sup> the court will apply the English law of assault and battery.

Under the UK's rules on private international law it thus remains possible that an English court may provide a civil remedy for acts of torture committed in a foreign jurisdiction, even in situations where the *lex loci delicti* does not recognise civil liability for such acts.

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<sup>24</sup> [1976] AC 249, at 263, *per* Lord Hailsham.

<sup>25</sup> *Cf Jones v. Saudi Arabia* [2004] EWCA Civ. 1394 where the judgement made in the Court of Appeal by Mance LJ. implicitly assumes that the common law does recognise a tort of torture.



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