HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 26
on appeal from[2004] EWCA Civ 1394

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Jones (Respondent) *v.* Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants)

Mitchell and others (Respondents) *v.* Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants)

Jones (Appellant) *v.* Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Respondents)
(Conjoined Appeals)

Appellate Committee

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[2006] UKHL 26

LORD BINGHAM OF CORNHILL

My Lords,

1. The issue at the heart of these conjoined appeals is whether the English court has jurisdiction to entertain proceedings brought here by claimants against a foreign state and its officials at whose hands the claimants say that they suffered systematic torture, in the territory of the foreign state. The issue turns on the relationship, in these circumstances, between two principles of international law. One principle, historically the older of the two, is that one sovereign state will not, save in certain specified instances, assert its judicial authority over another. The second principle, of more recent vintage but of the highest authority among principles of international law, is one that condemns and criminalises the official practice of torture, requires states to suppress the practice and provides for the trial and punishment of officials found to be guilty of it. Thus, like the Court of Appeal of Ontario in *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675, para 95, the House must consider the balance currently struck in international law

> "between the condemnation of torture as an international crime against humanity and the principle that states must treat each other as equals not to be subjected to each other's jurisdiction."

The proceedings

2. On 6 June 2002 Mr Jones, the claimant in the first action giving rise to this appeal, issued High Court proceedings against two defendants: the Ministry of Interior of the Kingdom of Saudi Arabia ("the Kingdom"), which (it is accepted) is for present purposes the Kingdom itself; and Lieutenant Colonel Abdul Aziz, sued as servant or agent of the Kingdom. He claimed aggravated and exemplary damages for assault and battery, trespass to the person, false imprisonment and torture in the Kingdom between March and May 2001. Permission was granted by Master Whitaker ex parte to serve the Kingdom out of the jurisdiction, and service was duly effected. Further permission was granted to serve Colonel Abdul Aziz, but he was not served. The Kingdom then applied to set aside service of the proceedings and to dismiss Mr Jones's claim on the ground of state immunity under the State Immunity Act 1978. On that ground, on 30 July 2003, Master Whitaker set aside service of the proceedings and refused permission to serve Colonel Abdul Aziz by an alternative method. With the master's permission, Mr Jones appealed to the Court of Appeal, contending that Part 1 of the 1978 Act was incompatible with article 6(1) of the European Convention on Human Rights.

3. Messrs Mitchell, Sampson and Walker are the claimants in the second action giving rise to this appeal. They issued High Court proceedings on 12 February 2004 against four defendants. The first two defendants were sued as officers in the Kingdom's police force. The third defendant was sued as a colonel in the Ministry of Interior of the Kingdom and deputy governor of a prison in which the claimants were confined. The fourth defendant was sued as head of the Ministry of Interior. They claimed aggravated damages for assault and negligence, contending that they had been subjected to torture by the first two defendants, which the third and fourth defendants had caused or permitted or negligently failed to prevent. On 18 February 2004 Master Whitaker refused the claimants' ex parte application to serve the proceedings out of the jurisdiction on the ground of state immunity under the 1978 Act. With the master's permission, the claimants appealed to the Court of Appeal.

4. The claimants in both actions have pleaded particulars of severe, systematic and injurious torture which they claim to have suffered, and annexed medical reports which appear to substantiate their claims. But the facts have not been investigated in these proceedings at all, and the stage has not been reached at which the defendants can be called on to

answer these very serious allegations. The Kingdom has indicated through counsel that the allegations are denied.

5. In the Court of Appeal the Secretary of State for Constitutional Affairs intervened, supporting the legal submissions of the Kingdom. The Redress Trust intervened in support of the claimants. In the House, the Secretary of State again intervened for the same purpose. The Redress Trust, Amnesty International, Interights and Justice made joint submissions in writing.

6. The Court of Appeal dismissed Mr Jones's appeal against the dismissal of all his claims against the Kingdom, including his claim based on torture (but not including his claim in false imprisonment, which he had abandoned). But it allowed Mr Jones's appeal against refusal of permission to serve Colonel Abdul Aziz out of the jurisdiction by an alternative method, and it allowed the appeal of the three claimants in the second action against the refusal of permission to serve all four defendants out of the jurisdiction (save in respect of the claimants' allegations of negligence). The applications for permission to serve out of the jurisdiction in both actions were remitted to Master Whitaker for him to consider whether, in the exercise of his discretion, to grant permission to serve out. Mr Jones, the Kingdom and the claimants in the second action have all appealed against those parts of the Court of Appeal's orders which were adverse to them, save that none of the claimants has challenged the dismissal of his claims not based on torture. The main issues which the House must now resolve are twofold: first, whether the English court has jurisdiction to entertain Mr Jones's claim based on torture against the Kingdom; and secondly, whether it has jurisdiction to entertain the claims based on torture against Colonel Abdul Aziz in the first action and against the four defendants in the second.

The Law

7. Section 1(1) in Part 1 of the 1978 Act is headed "General immunity from jurisdiction" and provides:

> "A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act."

The following provisions referred to, found in sections 2-11 of Part 1, specify proceedings in which a state is not immune. Section 14(1) provides that references to a state "include references to? (a) the sovereign or other head of that State in his public capacity; (b) the government of that State; and (c) any department of that government". Section 16(4) provides that Part 1 does not apply to criminal proceedings.

8. Part 1 of the 1978 Act represented a marked relaxation of the absolutist principle, described by Lord Atkin in *Compania Naviera Vascongado v Steamship "Cristina"* [1938] AC 485, 490, as "well established" and "beyond dispute", that

> "the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages."

It was a relaxation prompted partly by decisions such as *The Philippine Admiral* [1977] AC 373 and *Trendtex Trading Corpn v Central Bank of Nigeria* [1977] QB 529, and partly by the European Convention on State Immunity signed on behalf of seven European states, including the United Kingdom, in May 1972 (Cmnd 5081), which together showed that the British absolutist position had ceased to reflect the understanding of international law which prevailed in most of the rest of the developed world. As compared with the 1978 Act, the 1972 Convention was differently set out. It provided in article 15 that "A Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within articles 1 to 14". But articles 1 to 14 covered very much the same ground as sections 2-11 of the 1978 Act. Much more recently, in the United Nations Convention on Jurisdictional Immunities of States and Their Property adopted by the General Assembly on 16 December 2004, the same approach is adopted. Article 5 provides that "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention", and a number of exceptions are again specified. This Convention is not in force, and has not been ratified by the United Kingdom. But, as Aikens J observed in *AIG Capital Partners Inc v Republic of Kazakhstan* [2005] EWHC 2239 (Comm), [2006] 1 All ER 284, 310, para 80,

> "its existence and adoption by the UN after the long and careful work of the International Law Commission and the UN Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, powerfully demonstrates international thinking on the point."

9. Thus the rule laid down by section 1(1) of the 1978 Act is one of immunity, unless the proceedings against the state fall within a specified exception. This rule conforms with the terms of the international instruments already referred to. It also conforms with a number of domestic statutes elsewhere, such as section 1604 of the United States Foreign Sovereign Immunities Act 1976, section 3(1) of the Singapore State Immunity Act 1979, section 3(1) of the Pakistan State Immunity Ordinance 1981, section 2(1) of the South African Foreign States Immunities Act 1981, section 3(1) of the Canadian State Immunity Act 1982 and section 9 of the Australian Foreign States Immunities Act 1985. It is not suggested on behalf of Mr Jones that any of the exceptions in the 1978 Act covers his claim against the Kingdom for damages for mental and personal injury caused by torture inflicted there.

10. While the 1978 Act explains what is comprised within the expression "State", and both it and the 1972 European Convention govern the immunity of separate entities exercising sovereign powers, neither expressly provides for the case where suit is brought against the servants or agents, officials or functionaries of a foreign state ("servants or agents") in respect of acts done by them as such in the foreign state. There is, however, a wealth of authority to show that in such case the foreign state is entitled to claim immunity for its servants as it could if sued itself. The foreign state's right to immunity cannot be circumvented by suing its servants or agents. Domestic authority for this proposition may be found in *Twycross v Dreyfus* (1877) LR 5 Ch D 605, 618-619; *Zoernsch v Waldock* [1964] 1 WLR 675, 692; *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611, 669; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, 269, 285-286; *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1583. Courts in Germany, the United States, Canada and Ireland have taken the same view: see *Church of Scientology Case* (1978) 65 ILR 193, 198; *Herbage v Meese* 747 F Supp 60 (1990), 66; *Jaffe v Miller* (1993) 13 OR (3d) 745, 758-759; *Schmidt v Home Secretary of the Government of the United Kingdom* (1994) 103 ILR 322, 323-325. The International Criminal Tribunal for the Former Yugoslavia has also taken the same view: *Prosecutor v Blaskic* (1997) 110 ILR 607, 707. In the UN Convention of 2004 already referred to, this matter is expressly addressed in article 2 where "State" is defined in

(1)(b)(iv) to mean "representatives of the State acting in that capacity". It is further provided, in article 6(2)(b), that "A proceeding before a court of a State shall be considered to have been instituted against another State if that other State … (b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State".

11. In some borderline cases there could be doubt whether the conduct of an individual, although a servant or agent of the state, had a sufficient connection with the state to entitle it to claim immunity for his conduct. But these are not borderline cases. Colonel Abdul Aziz is sued as a servant or agent of the Kingdom and there is no suggestion that his conduct complained of was not in discharge or purported discharge of his duties as such. The four defendants in the second action were public officials. The conduct complained of took place in police or prison premises and occurred during a prolonged process of interrogation concerning accusations of terrorism (in two cases) and spying (in the third). There is again no suggestion that the defendants' conduct was not in discharge or purported discharge of their public duties.

12. International law does not require, as a condition of a state's entitlement to claim immunity for the conduct of its servant or agent, that the latter should have been acting in accordance with his instructions or authority. A state may claim immunity for any act for which it is, in international law, responsible, save where an established exception applies. In 2001 the International Law Commission promulgated Draft Articles on the Responsibility of States for Internationally Wrongful Acts. Article 4 provides

> "*Conduct of organs of a State*
>
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

The commentary on paragraph (2) of this article observes:

> "A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State."

Article 7 takes the matter further:

> "*Excess of authority or contravention of instructions*
> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

This article also is considered in the commentary:

> "The problem of drawing the line between unauthorized but still 'official' conduct, on the one hand, and 'private' conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression 'if the organ, person or entity acts in that capacity' in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State. In short, the question is whether they were acting with apparent authority."

This approach was endorsed by the International Court of Justice in *Democratic Republic of the Congo v Uganda* (unreported), 19 December 2005, paras 213-214; see also James Crawford, *The International Law Commission's Articles on State Responsibility*, (2002), pp 106-109. The fact that conduct is unlawful or objectionable is not, of itself, a ground for refusing immunity. As Lord Wilberforce pointed out in *I Congreso del Partido* [1983] 1 AC 244, 272:

> "It was argued by the [appellants] that even if the Republic of Cuba might appear to be entitled to plead the state immunity, it should be denied that right on various grounds: that its acts were contrary to international law, or to good faith, or were discriminatory, or penal. On the view which your Lordships take these arguments do not arise, but I would wish to express my agreement with the judge and with Waller LJ as to their invalidity. The whole purpose of the doctrine of state immunity is to prevent such issues being canvassed in the courts of one state as to the acts of another."

13. Pausing at this point in the analysis, I think that certain conclusions (taking the pleadings at face value) are inescapable: (1) that all the individual defendants were at the material times acting or purporting to act as servants or agents of the Kingdom; (2) that their acts were accordingly attributable to the Kingdom; (3) that no distinction is to be made between the claim against the Kingdom and the claim against the personal defendants; and (4) that none of these claims falls within any of the exceptions specified in the 1978 Act. Save in the special context of torture, I do not understand the claimants to challenge these conclusions, as evidenced by their acquiescence in the dismissal of their claims not based on torture. On a straightforward application of the 1978 Act, it would follow that the Kingdom's claim to immunity for itself and its servants or agents should succeed, since this is not one of those exceptional cases, specified in Part 1 of the 1978 Act, in which a state is not immune, and therefore the general rule of immunity prevails. It is not suggested that the Act is in any relevant respect ambiguous or obscure: it is, as Ward LJ observed in *Al-Adsani v Government of Kuwait (No 2)* (1996) 107 ILR 536, 549, "as plain as plain can be". In the ordinary way, the duty of the English court is therefore to apply the plain terms of the domestic statute. Inviting the House to do otherwise, the claimants contend, as they must, that to apply the 1978 Act according to its natural meaning and tenor by upholding the Kingdom's claim to immunity for itself and the individual defendants would be incompatible with the claimants' well-established right of access to a

court implied into article 6 of the European Convention on Human Rights. To recognise the claimants' Convention right, the House is accordingly asked by the claimants to interpret the 1978 Act under section 3 of the Human Rights Act 1998 in a manner which would require or permit immunity to be refused to the Kingdom and the individual defendants in respect of the torture claims, or, if that is not possible, to make a declaration of incompatibility under section 4.

14. To succeed in their Convention argument (and the onus is clearly on them to show that the ordinary approach to application of a current domestic statute should not be followed) the claimants must establish three propositions. First, they must show that article 6 of the Convention is engaged by the grant of immunity to the Kingdom on behalf of itself and the individual defendants. In this task they derive great help from *Al-Adsani v United Kingdom* (2001) 34 EHRR 273 where, in a narrowly split decision of the Grand Chamber, all judges of the European Court of Human Rights held article 6 to be engaged. I must confess to some difficulty in accepting this. Based on the old principle par in parem non habet imperium, the rule of international law is not that a state should not exercise over another state a jurisdiction which it has but that (save in cases recognised by international law) a state has no jurisdiction over another state. I do not understand how a state can be said to deny access to its court if it has no access to give. This was the opinion expressed by Lord Millett in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1588, and it seems to me persuasive. I shall, however, assume hereafter that article 6 is engaged, as the European Court held. Secondly, the claimants must show that the grant of immunity to the Kingdom on behalf of itself and the individual defendants would deny them access to the English court. It plainly would. No further discussion of this proposition is called for. Thirdly, the claimants must show that the restriction is not directed to a legitimate objective and is disproportionate. They seek to do so by submitting that the grant of immunity to the Kingdom on behalf of itself or its servants would be inconsistent with a peremptory norm of international law, a jus cogens applicable erga omnes and superior in effect to other rules of international law, which requires that the practice of torture should be suppressed and the victims of torture compensated.

15. As the House recently explained at some length in *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2005] 3 WLR 1249, the extreme revulsion which the common law has long felt for the practice and fruits of torture has come in modern times to be the subject of express agreement by the nations of the world. This new and important consensus is expressed in the UN Convention against

Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (1990) (Cm 1775), which came into force in June 1987 and to which both the UK and the Kingdom (with the overwhelming majority of other states) are parties. It is common ground that the proscription of torture in the Torture Convention has, in international law, the special authority which the claimants ascribe to it. The facts pleaded by the claimants, taken at face value, like other accounts frequently published in the media, are sufficient reminder, if such be needed, of the evil which torture represents.

16. Four features of the Torture Convention call for consideration in the present context. First is the definition of torture in article 1:

> "1. For the purposes of this Convention, the term '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 …."

Thus, for purposes of the Convention, torture is only torture if inflicted or connived at for one of the specified purposes by a person who, if not a public official, is acting in an official capacity. Secondly, the Convention requires all member states to assume and exercise criminal jurisdiction over alleged torturers, subject to certain conditions, a jurisdiction fairly described as universal. Thirdly, the Convention provides in article 14:

> "1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."

Fourthly, the Convention provides in Part II for establishment of an expert Committee against Torture which has the function, under article 19, of receiving reports by states parties on their compliance with the Convention and of making such comments as it considers appropriate on such reports. The significance of these features is considered below.

17. The claimants' key submission is that the proscription of torture by international law, having the authority it does, precludes the grant of immunity to states or individuals sued for committing acts of torture, since such cannot be governmental acts or exercises of state authority entitled to the protection of state immunity ratione materiae. In support of this submission the claimants rely on a wide range of materials including: the reasoning of the minority of the Grand Chamber in *Al-Adsani v United Kingdom* (2001) 34 EHRR 273; observations by members of the House in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 1)* [2000] 1 AC 61 and *(No 3)* [2000] 1 AC 147 (hereinafter *Pinochet (No 1)* and *Pinochet (No 3)*); a body of United States authority; the decision of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v Furundzija* (1998) 38 ILM 317; the decision of the Italian Court of Cassation in *Ferrini v Federal Republic of Germany* (2004) Cass sez un 5044/04; 87 Rivista di diritto internazionale 539; and a recommendation made by the Committee against Torture to Canada on 7 July 2005. These are interesting and valuable materials, but on examination they give the claimants less support than at first appears.

18. The Grand Chamber's decision in *Al-Adsani* is very much in point, since it concerned the grant of immunity to Kuwait under the 1978 Act, which had the effect of defeating the applicant's claim in England for damages for torture allegedly inflicted upon him in Kuwait. The claimants are entitled to point out that a powerful minority of the court found a violation of the applicant's right of access to a court under article 6 of the European Convention. The majority, however, held that the grant of sovereign immunity to a state in civil proceedings 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 (para 54); that the European Convention on Human Rights should so far as possible be interpreted in harmony with other

rules of international law of which it formed part, including those relating to the grant of state immunity (para 55); and that some restrictions on the right of access to a court must be regarded as inherent, including those limitations generally accepted by the community of nations as part of the doctrine of state immunity (para 56). The majority were unable to discern in the international instruments, judicial authorities or other materials before the court any firm basis for concluding that, as a matter of international law, a state no longer enjoyed immunity from civil suit in the courts of another state where acts of torture were alleged (para 61). While noting the growing recognition of the overriding importance of the prohibition of torture, the majority did not find it established that there was yet acceptance in international law of the proposition that states were not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum state (para 66). It is of course true, as the claimants contend, that under section 2 of the 1998 Act this decision of the Strasbourg court is not binding on the English court. But it was affirmed in *Kalogeropoulou v Greece and Germany* (App No 50021/00) (unreported) 12 December 2002, when the applicant's complaint against Greece was held to be inadmissible, and the House would ordinarily follow such a decision unless it found the court's reasoning to be unclear or unsound, or the law had changed significantly since the date of the decision. None of these conditions, in my opinion, obtains here.

19. It is certainly true that in *Pinochet (No 1)* and *Pinochet (No 3)* certain members of the House held that acts of torture could not be functions of a head of state or governmental or official acts. I have some doubt about the value of the judgments in *Pinochet (No 1)* as precedent, save to the extent that they were adopted in *Pinochet (No 3)*, since the earlier judgment was set aside, but references may readily be found in *Pinochet (No 3)*: see, for example, p 205 (Lord Browne-Wilkinson, pp 261-262 (Lord Hutton). I would not question the correctness of the decision reached by the majority in *Pinochet (No 3)*. But the case was categorically different from the present, since it concerned criminal proceedings falling squarely within the universal criminal jurisdiction mandated by the Torture Convention and did not fall within Part 1 of the 1978 Act. 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, and certain members of the House expressly accepted that the grant of immunity in civil proceedings was unaffected: see p 264 (Lord Hutton), p 278 (Lord Millett) and pp 280, 281, 287 (Lord Phillips of Worth Matravers). It is,

I think, difficult to accept that torture cannot be a governmental or official act, since under article 1 of the Torture Convention torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting in an official capacity. The claimants' argument encounters the difficulty that it is founded on the Torture Convention; but to bring themselves within the Torture Convention they must show that the torture was (to paraphrase the definition) official; yet they argue that the conduct was not official in order to defeat the claim to immunity.

20. The claimants rely on a substantial body of United States authority as showing that US courts will not entertain claims against states, irrespective of the subject matter, because of the terms of the Foreign Sovereign Immunities Act 1976; that US courts recognise that individual officials are able to enjoy the immunity afforded to their states where they are acting in an official capacity; but that US courts will not recognise acts performed by an individual official, contrary to a jus cogens prohibition, as being carried out in an official capacity for the purposes of immunity under the 1976 Act. The Kingdom replies that in the latter cases the states concerned did not claim immunity for their officials, and that appears to be so. But the claimants refer to and rely on the doubts expressed by Breyer J in *Sosa v Alvarez-Machain* 542 US 692 (2004), 762-763, about the need for a strict demarcation in the immunity context between criminal and civil cases. I do not, with respect, think it necessary to examine these US authorities in detail, for two reasons. First, the decisions are for present purposes important only to the extent that they express principles widely shared and observed among other nations. As yet, they do not. As Judges Higgins, Kooijmans and Buergenthal put it in their joint separate opinion in *Democratic Republic of the Congo v Belgium (Case concerning Arrest Warrant of 11 April 2000)* [2002] ICJ Rep 3, para 48:

> "In civil matters we already see the beginnings of a very broad form of extraterritorial jurisdiction. Under the Alien Tort Claims Act, the United States, basing itself on a law of 1789, has asserted a jurisdiction both over human rights violations and over major violations of international law, perpetrated by non-nationals overseas. Such jurisdiction, with the possibility of ordering payment of damages, has been exercised with respect to torture committed in a variety of countries (Paraguay, Chile, Argentina, Guatemala), and with respect to other major human rights violations in yet other countries. 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."

Secondly, when notifying its ratification of the Torture Convention in December 1984 the United States expressed its understanding

> "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 that State Party."

This understanding, which was not a reservation, provoked no dissent, but was expressly recognised by Germany as not touching upon the obligations of the United States as a party to the Convention. 20 years have passed, but there is no reason to think that the United States would now subscribe to a rule of international law conferring a universal tort jurisdiction which would entitle foreign states to entertain claims against US officials based on torture allegedly inflicted by the officials outside the state of the forum.

21. In the course of my opinion in *A v Secretary of State for the Home Department (No 2)*, above, para 33, I quoted with approval a long passage from the judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Furundzija*, above. The passage quoted included para 155 where the tribunal, discussing the possibility that a state might authorise torture by some legislative, administrative or judicial act, said:

> "If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act."

I do not understand the tribunal to have been addressing the issue of state immunity in civil proceedings; but if it was, its observations, being those of a criminal tribunal trying a criminal case in which no such issue arose, were, on that issue, plainly obiter, as was my citation of them.

22. In *Ferrini v Federal Republic of Germany*, above, the Italian Court of Cassation entertained a civil claim based on war crimes committed in 1944-1945, partly in Italy but mainly in Germany. In para 9 of its judgment the court found "no doubt that the principle of universal jurisdiction also applies to civil actions which trace their origins to such crimes". In reaching this decision the court distinguished *Al-Adsani v United Kingdom*, above, and *Bouzari v Islamic Republic of Iran* (2002) 124 ILR 427, and placed some reliance on a Greek decision which was later effectively overruled. It may be, despite the court's closing statement to the contrary, that the decision was influenced by the occurrence of some of the unlawful conduct within the forum state. The decision has been praised by some distinguished commentators (among them Andrea Bianchi in a case note in (2005) 99 Am Jo Int Law 242), but another (Andrea Gattini, "War Crimes and State Immunity in the *Ferrini* Decision" (2005) 3 Jo Int Crim J 224, 231) has accused the court of "deplorable superficiality"; see also Hazel Fox QC, "State Immunity and the International Crime of Torture" (2006) 2 EHRLR 142. The *Ferrini* decision cannot in my opinion be treated as an accurate statement of international law as generally understood; and one swallow does not make a rule of international law. The more closely-reasoned decisions in *Bouzari v Islamic Republic of Iran* (2002) 124 1LR 427, (2004) 71 OR (3d) 675 are to the contrary effect.

23. In commenting on periodic reports by Canada received in 2002 and 2004, the Committee against Torture established under article 17 of the Torture Convention noted as a subject of concern, on 7 July 2005, the absence of effective measures to provide civil compensation to victims of torture in all cases, and recommended that Canada should review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture. 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.

24. In countering the claimants' argument the Kingdom, supported by the Secretary of State, is able to advance four arguments which in my opinion are cumulatively irresistible. First, the claimants are obliged to accept, in the light of the *Arrest Warrant* decision of the International Court of Justice [2002] ICJ Rep 3 that state immunity ratione personae can be claimed for a serving foreign minister accused of crimes against humanity. Thus, even in such a context, the international law prohibition of such crimes, having the same standing as the prohibition of torture, does not prevail. It follows that such a prohibition does not automatically override all other rules of international law. The International Court of Justice has made plain that breach of a jus cogens norm of international law does not suffice to confer jurisdiction (*Democratic Republic of the Congo v Rwanda* (unreported) 3 February 2006, para 64). As Hazel Fox QC put it (*The Law of State Immunity* (2004), p 525),

> "State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite."

Where state immunity is applicable, the national court has no jurisdiction to exercise.

25. Secondly, article 14 of the Torture Convention does not provide for universal civil jurisdiction. It appears that at one stage of the negotiating process the draft contained words, which mysteriously disappeared from the text, making this clear. But the natural reading of the article as it stands in my view conforms with the US understanding noted above, that it requires a private right of action for damages only for acts of torture committed in territory under the jurisdiction of the forum state. This is an interpretation shared by Canada, as its exchanges with the Torture Committee make clear. The correctness of this reading is confirmed when comparison is made between the spare terms of article 14 and the much more detailed provisions governing the assumption and exercise of criminal jurisdiction.

26. Thirdly, the UN Immunity Convention of 2004 provides no exception from immunity where civil claims are made based on acts of torture. The Working Group in its 1999 Report makes plain that such an exception was considered, but no such exception was agreed. Despite its embryonic status, this Convention is the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases, and the absence of a torture or jus cogens exception is wholly inimical to the claimants' contention. Some British commentators have welcomed the Convention and urged its ratification by the United Kingdom: see, for example, Eileen Denza, "The 2005 UN Convention on State Immunity in Perspective" (2006) 55 ICLQ 395, 397, 398; Hazel Fox, "In Defence of State Immunity: Why the UN Convention on State Immunity is Important" (2006) 55 ICLQ 399, 403; Richard Gardiner, "UN Convention on State Immunity: Form and Function" (2006) 55 ICLQ 407, 409. Other commentators have criticised the Convention, and opposed ratification, precisely because (in the absence of an additional protocol, which they favour) the Convention does not deny state immunity in cases where jus cogens norms of international are said to have been violated outside the forum state: see Christopher Keith Hall, "UN Convention on State Immunity: The Need for a Human Rights Protocol" (2006) 55 ICLQ 411-426; Lorna McGregor, "State Immunity and Jus Cogens" (2006) 55 ICLQ 437-445. But these commentators accept that this area of international law is "in a state of flux", and they do not suggest that there is an international consensus in favour of the exception they would seek. It may very well be that the claimants' contention will come to represent the law of nations, but it cannot be said to do so now.

27. Fourthly, 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. This is significant, since these are sources of international law. But this lack of evidence is not neutral: since the rule on immunity is well-understood and established, and no relevant exception is generally accepted, the rule prevails.

28. It follows, in my opinion, that Part 1 of the 1978 Act is not shown to be disproportionate as inconsistent with a peremptory norm of international law, and its application does not infringe the claimants' Convention right under article 6 (assuming it to apply). It is unnecessary to consider any question of remedies.

The Court of Appeal decision

29. I would respectfully agree with the Court of Appeal that Mr Jones's claim against the Kingdom should be dismissed on the ground of state immunity for the reasons given by Mance LJ in paras 10-27 of his closely-reasoned leading judgment, with which Neuberger LJ and Lord Phillips of Worth Matravers MR agreed (paras 100, 102) [2004] EWCA Civ 1394; [2005] QB 699. I also agree that the non-torture claims against the individual defendants were rightly dismissed on the same ground: paras 98, 100, 101. But in my respectful opinion the Court of Appeal's conclusion on the torture claims against the individual defendants cannot be sustained.

30. First, the Court of Appeal departed from the principle laid down in *Propend* 111 ILR 611 and the other authorities cited in para 10 above, despite following it, correctly, in relation to the non-torture claims. Mance LJ thought it correct to ignore the description of Colonel Abdul Aziz as a "servant or agent" (para 28). The Master of the Rolls considered this description "irrelevant and, arguably, embarrassing" (para 103). But there was no principled reason for this departure. A state can only act through servants and agents; their official acts are the acts of the state; and the state's immunity in respect of them is fundamental to the principle of state immunity. This error had the effect that while the Kingdom was held to be immune, and the Ministry of Interior, as a department of the government, was held to be immune, the Minister of Interior (the fourth defendant in the second action) was not, a very striking anomaly.

31. This first error led the court into a second: its conclusion (para 76) that a civil claim against an individual torturer did not indirectly implead the state in any more objectionable respect than a criminal prosecution. A state is not criminally responsible in international or English law, and therefore cannot be directly impleaded in criminal proceedings. The prosecution of a servant or agent for an act of torture within article 1 of the Torture Convention is founded on an express exception from the general rule of immunity. It is, however, clear that a civil action against individual torturers based on acts of official torture does indirectly implead the state since their acts are attributable to it. Were these claims against the individual defendants to proceed and be upheld, the interests of the Kingdom would be obviously affected, even though it is not a named party.

32. Both these errors, in my respectful opinion, sprang from what I think was a misreading of *Pinochet (No 3)*. Despite the Master of the Rolls' change of mind in this case (para 128), the distinction between criminal proceedings (which were the subject of universal jurisdiction under the Torture Convention) and civil proceedings (which were not) was fundamental to that decision. This is not a distinction which can be wished away.

33. Fourthly, the court appears to have ruled that the exercise of jurisdiction should be governed by "appropriate use or development of discretionary principles" (para 96; and see also para 135). This is to mistake the nature of state immunity which, in this and most countries, is governed by the law, not by executive or judicial discretion (Hazel Fox QC, "In Defence of State Immunity: Why the UN Convention on State Immunity is Important" (2006) 55 ICLQ 399, 403-406). Where applicable, state immunity is an absolute preliminary bar, precluding any examination of the merits. A state is either immune from the jurisdiction of a foreign court or it is not. There is no half-way house and no scope for the exercise of discretion. There may be dispute whether acts, although committed by an official, were purely private in character, but that is not a question which arises here.

34. It is, I think, hard to resist the suggestion by Hazel Fox QC ("Where Does the Buck Stop? State Immunity from Civil Jurisdiction and Torture" (2005) 121 LQR 353, 359) that the Court of Appeal's decision represented a "unilateral assumption of jurisdiction by one national legal system". The court asserted what was in effect a universal tort jurisdiction in cases of official torture (see Yang, "Universal Tort Jurisdiction over Torture?" (2005) 64 CLJ 1, 3-4), for which there was no adequate foundation in any international convention, state practice or scholarly consensus, and apparently by reference to a consideration (the absence of a remedy in the foreign state: para 86 of the judgment) which is, I think, novel. Despite the sympathy that one must of course feel for the claimants if their complaints are true, international law, representing the law binding on other nations and not just our own, cannot be established in this way.

Disposal

35. In admirably clear and succinct judgments given on 30 July 2003 and 18 February 2004 Master Whitaker gave his reasons for upholding the claims to state immunity made on behalf of the Kingdom and the

individual defendants. In my opinion he reached the right decisions for essentially the right reasons. For these reasons, and those given by my noble and learned friend Lord Hoffmann, with which I agree, I would dismiss Mr Jones's appeal and allow the Kingdom's. Pursuant to undertakings given by the Kingdom to the Court of Appeal, there will be no order for costs.

LORD HOFFMANN

My Lords,

36. The question is whether the claimants, who allege that they were tortured by members of the Saudi Arabian police, can sue the responsible officers and the Kingdom of Saudi Arabia itself. The Court of Appeal held that they could sue the officers but that the Kingdom was protected by state immunity. In my opinion both are so protected.

37. Mr Ronald Jones, who alleges that in 2001 he was held in solitary confinement and systematically tortured for 67 days, appeals against the decision of the Court of Appeal that the Kingdom is immune from suit. The language of section 1(1) of the State Immunity Act 1978 (hereafter "SIA") is unequivocal:

> "A state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act."

It is not suggested that this case falls within the terms of any other provision of the Act.

38. In *Al-Adsani v Government of Kuwait (No 2)* (1996) 107 ILR 536, on similar facts, the Court of Appeal held that the State was immune. Ward LJ said (at p 549) "the Act is as plain as plain can be." But Mr Crystal QC, who appeared for Mr Jones, submitted that section 1(1) should be read subject to an implied exception for claims which allege torture.

39. The argument in support of this submission involves three steps. First, article 6 of the European Convention on Human Rights (hereafter "the Convention") guarantees a right of access to a court for the determination of civil claims and that right is prima facie infringed by according immunity to the Kingdom. Secondly, although the right is not absolute and its infringement by state immunity is ordinarily justified by mandatory rules of international law, no immunity is required in cases of torture. That is because the prohibition of torture is a peremptory norm or jus cogens which takes precedence over other rules of international law, including the rules of state immunity. Thirdly, section 3 of the Human Rights Act 1998 (hereafter "HRA") requires a court, so far as it is possible to do so, to read legislation in a way which is compatible with the Convention rights. This can be done by introducing an implied exception. I do not accept any of these steps in the argument but will postpone consideration of the first and third until I have discussed the second.

40. The second and crucial step was rejected by the European Court of Human Rights in *Al-Adsani v United Kingdom* (2001) 34 EHRR 273. The majority opinion said (at paragraph 56) that measures taken by a member state which "reflect generally recognised rules of public international law" could not in principle be regarded as imposing a disproportionate restriction on access to a court. State immunity was such a rule. As for the alleged exception for torture, the court said (at para 61):

> "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 materials before it any firm basis for concluding that, as a matter of international law, a state no longer enjoys immunity from civil suit in the courts of another state where acts of torture are alleged."

41. Mr Crystal submitted that the decision of the majority was wrong. The House should prefer the reasoning of the minority. But in my opinion the majority was right.

42. A peremptory norm or jus cogens is defined in article 53 of the Vienna Convention of the Law of Treaties of 23 May 1969 (which provides that a treaty is void if, at the time of its conclusion, it conflicts with such a norm) as:

> "a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted".

43. As the majority accepted, there is no doubt that the prohibition on torture is such a norm: for its recognition as such in this country, see *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147. Torture cannot be justified by any rule of domestic or international law. But the question is whether such a norm conflicts with a rule which accords state immunity. The syllogistic reasoning of the minority in *Al-Adsani* 34 EHRR 273, 298 - 299 simply assumes that it does:

> "The acceptance therefore of the jus cogens nature of the prohibition of torture entails that a state allegedly violating it cannot invoke hierarchically lower rules (in this case, those on state immunity) to avoid the consequences of the illegality of its actions."

44. The jus cogens is the prohibition on torture. But the United Kingdom, in according state immunity to the Kingdom, is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture. It is objecting in limine to the jurisdiction of the English court to decide whether it used torture or not. As Hazel Fox has said (*The Law of State Immunity* (2002), 525):

> "State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of state immunity upon which a jus cogens mandate can bite."

45. To produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles or perhaps requires states to assume civil jurisdiction over other states in cases in which torture is alleged. Such a rule may be desirable and, since international law changes, may have developed. But,

contrary to the assertion of the minority in *Al-Adsani*, it is not *entailed* by the prohibition of torture. (See also Swinton J in *Bouzari v Islamic Republic of Iran* (2002) 124 ILR 427, 443 at para 62).

46. Whether such an exception is now recognised by international law must be ascertained in the normal way from treaties, judicial decisions and the writings of reputed publicists. Two treaties are relevant. First, the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (1990) (Cm 1775) (hereafter "the Torture Convention") which formed the basis of the decision in *Pinochet (No 3)* [2000] 1 AC 147 that the prohibition of torture was jus cogens. It deals with universal criminal jurisdiction over individuals who have been guilty of torture and, in article 5.2, applies the principle aut dedere aut prosequi to states in whose territory an alleged offender is present. Article 14 requires every state party to ensure that a victim of an act of torture obtains redress and has a right to a fair and adequate compensation. But this article is, as the Court of Appeal held, plainly concerned with acts of torture within the jurisdiction of the state concerned: see [2005] QB 699,716-720; Swinton J in *Bouzari v Islamic Republic of Iran* 124 ILR 427, paras 44-54; Goudge JA in *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3rd) 675 (Ontario Court of Appeal) at pp 691-693 and Andrew Byrnes, in *Torture as Tort* (2001), pp 537-550. There is nothing in the Torture Convention which creates an exception to state immunity in civil proceedings.

47. The other relevant treaty is the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) (hereafter "the State Immunity Convention") which has been signed but not yet ratified by the United Kingdom and a number of other states. It is the result of many years work by the International Law Commission and codifies the law of statute immunity. Article 5, in terms similar to section 1(1) of SIA, provides that:

> "A state enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another state subject to the provisions of the present Convention."

There follows a number of exceptions but none for cases in which there is an allegation of torture.

48. The next source of international law is judicial decisions. I shall start with international tribunals. In *Democratic Republic of the Congo v Belgium (Case concerning arrest warrant of 11 April 2000)* [2002] ICJ Rep 3 ("the Arrest Warrant Case.") the Congo complained of the issue by Belgium of a warrant for the arrest of its then serving Foreign Minister on charges of war crimes and crimes against humanity. The International Court of Justice accepted that the law prohibiting the commission of such crimes was jus cogens but held that this did not entail an exception to the rule of state immunity for a head of state and certain other high state officials including a foreign minister. In addition:

> "58. The court has carefully examined state practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this 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….
>
> 60. The court emphasises, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they may have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility."

49. What this case shows is that the jus cogens nature of the rule alleged to have been infringed by the state or one of its officials does not provide an automatic answer to the question of whether another state has jurisdiction. It is necessary carefully to examine the sources of international law concerning the particular immunity claimed. Thus *Pinochet (No 3)* derived from the terms of the Torture Convention (and in particular, the definition of torture) the removal from torturers of an immunity from criminal prosecution which was based simply on the fact that they had acted or purported to act on behalf of the state. But the

Arrest Warrant case confirms the opinion of the judges in the *Pinochet* case that General Pinochet would have enjoyed immunity, on a different basis, if he had still been Head of State.

50. In a separate concurring opinion, Judges Higgins, Kooijmans and Buergenthal speculated about possible future developments in international law. They said (at para 48) that in civil matters they saw "the beginnings of a very broad form of extraterritorial jurisdiction." Such a jurisdiction had been exercised in torture cases by Federal Courts in the United States under the terms of the Alien Tort Claims Act (hereafter "ATCA"). I shall discuss some of these cases later, but the comment of the judges in the *Arrest Warrant* case was chilly:

> "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."(para 48)

51. The judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Furundžija* (1998) 38 ILM 317 contains an interesting discussion of the international law which prohibits torture. First (at p 348) the prohibition covers potential breaches. That does not concern us here. Secondly (pp 348-349), it imposes obligations erga omnes. That means that obligations are:

> "owed towards all the other members of the international community, each of which then has a correlative right [which] gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued."

52. This presumably means that a state whose national has been tortured by the agents of another state may claim redress before a tribunal which has the necessary jurisdiction. But that says nothing about state immunity in domestic courts.

53. Thirdly (pp 349-350), the prohibition has acquired the status of jus cogens. As to this, the tribunal said:

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

54. The observations about the possibility of a civil suit for damages are not directed to the question of state immunity. They assume the existence of a "competent international or national judicial body" before which the claimant has locus standi and are concerned to emphasise that a national measure purporting to legitimate torture will be disregarded.

55. Next, there is the decision of the European Court of Human Rights in *Al-Adsani* 34 EHRR 273, which was followed by the same court in *Kalegoropoulou v Greece and Germany* (Application No 50021/00) (unreported) 12 December 2002. The latter case arose out of Greek proceedings, to which I shall shortly refer in my discussion of national decisions, by which some Greek nationals sued the German government for damages for war crimes committed in 1944. The Greek Court of Cassation in *Prefecture of Voiotia v Federal Republic of Germany* (Case No 11/2000) (unreported) 4 May 2000 held that a Greek court could assume jurisdiction on the ground that a country which committed war crimes must be deemed to have waived its sovereign immunity. The claimants accordingly obtained a judgment for damages. But the judgment could be enforced against German state property in Greece only with the consent of the Minister of Justice, which could not

be obtained. Proceedings to enforce the judgment without consent on the ground that the claimants were being deprived of a remedy, contrary to article 6 of the Convention, were dismissed by the Greek Court of Cassation. In *Kalegoropoulou* a petition to the European Court of Human Rights was held, applying *Al-Adsani*, to be "manifestly ill-founded".

56. Finally, at the international level, there are some comments of the Committee against Torture, set up under the Torture Convention to monitor its workings, on the reports submitted by Canada in 2005. The committee has various functions, including (under article 19) to receive reports from state parties on the measures they have taken to give effect to their undertakings under the Convention and to "make such general comments…as it may consider appropriate." During the course of discussion on the Canadian report, an American member, Ms Felice Gaer, raised the question of whether article 14 did not require Canada to provide a civil remedy for victims of torture in foreign states. The Canadian representatives said that their understanding of the effect of article 14 was that it did not. As I have said earlier, that is the general understanding of article 14 and the United States in particular accompanied its ratification of the Convention with a statement that:

> "it is the understanding of the United States 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 that state party".

57. No one has ever objected to that statement of understanding by the United States and similar views have been expressed in reports to the committee by New Zealand and Germany (see Andrew Byrnes in *Torture as Tort* (2001), p 544, n 18). Nevertheless, in its comments on the Canadian report, the committee expressed concern at "the absence of effective measures to provide civil compensation to victims of torture in all cases" and recommended that Canada should "review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture": Conclusions and recommendations of the Committee against Torture: Canada 7 July 2005 (CAT/C/CR/34/CAN. Quite why Canada was singled out for this treatment is unclear, but as an interpretation of article 14 or a statement of international law, I regard it as having no value. The nearest approach to reasoning in support of the committee's opinion is a remark of Ms Gaer in the course of discussion (Committee Against Torture, 34th session, Summary of Record of 646th Meeting,

6 May 2005 (CAT/C/SR.646/Add1)), when she said (at para 63) that "given that there was an exception to State immunity in legislation for business deals, it seemed unclear why an exception could not be considered for torture." The short answer is that an exception for acts jure gestionis is recognised by international law and an exception for torture is neither recognised by international law nor required by article 14. Whether it should be is another matter. The committee has no legislative powers.

58. Ms Gaer's concerns may have been influenced by the existence of the United States Torture Victim Protection Act 1991, which establishes civil liability against an individual who "under actual or apparent authority, or color of law, of any foreign nation", subjects an individual to torture (section 2). This represents a unilateral extension of jurisdiction by the United States which is not required and perhaps not permitted by customary international law. It is not part of the law of Canada or any other state.

59. I turn next to the decisions of national courts. In *Siderman v Republic of Argentina* (1992) 965 F 2d 699 (9th Cir) the US Court of Appeals decided that Argentina was entitled to state immunity in an action alleging torture. The reasoning of the court (at p 718) left open the possibility that there might be such an exception in customary international law, derived from the jus cogens nature of the prohibition on torture ("the…argument carries much force") but held that the court was bound by the unequivocal terms of the FSIA. While *Siderman* turned upon the terms of national legislation, the legislation itself is evidence against a state practice of having an exception to state immunity in torture cases.

60. In *Bouzari v Islamic Republic of Iran* 124 ILR 427 the question of whether customary international law recognised a torture exception to state immunity was specifically raised. In the Superior Court Swinton J examined the authorities, including the *Arrest Warrant* case [2002] ICJ Rep 3and *Al-Adsani* 34 EHRR 273 and concluded (at para 73) that:

> "the decisions of state courts, international tribunals and state legislation do not support the conclusion that there is a general state practice which provides an exception from state immunity for acts of torture committed outside the forum state."

61. This conclusion was upheld by the Ontario Court of Appeal: *Bouzari v Islamic Republic of Iran* 71 OR (3rd) 675, 694-696.

62. The decision of the Greek Court of Cassation in *Prefecture of Voiotia v Federal Republic of Germany*, 4 May 2000, which I have already mentioned, went upon a theory of implied waiver which has received no support in other decisions. It was undermined by the court's own refusal to order enforcement of the judgment and held to be wrong by a judgment of a special Supreme Court (the Anotato Eidiko Dikasterio) convened to decide cases involving the interpretation of international law: *Margellos v Federal Republic of Germany* (unreported) 17 September 2002. The original judgment was coldly received by the German Supreme Court when the claimants attempted to enforce it directly in Germany: *Greek Citizens v Federal Republic of Germany (The Distomo Massacre Case)* (2003) 42 ILM 1030. The court said, at p 1033:

> "There have recently been tendencies towards a more limited principle of state immunity, which should not apply in case of a peremptory norm of international law (ius cogens) has been violated…According to the prevailing view, this is not international law currently in force."

63. That leaves the Italian *Ferrini* case, *Ferrini v Federal Republic of Germany*, which exhibits the same bare syllogistic reasoning as the judgment of the minority in *Al-Adsani*. In a thoughtful comment on the case by Pasquale De Sena and Francesca De Vittor ("State Immunity and Human Rights: the Italian Supreme Court Decision on the *Ferrini* Case" (2005) 16 EJIL 89-112) the authors acknowledge these shortcomings and accept that a jus cogens prohibition of torture does not *entail* a corresponding exception to state immunity. But they say that the *Ferrini* case should be seen rather as giving priority to the *values* embodied in the prohibition of torture over the values and policies of the rules of state immunity. I think that this is a fair interpretation of what the court was doing and, if the case had been concerned with domestic law, might have been regarded by some as "activist" but would have been well within the judicial function. As Professor Dworkin demonstrated in *Law's Empire* (1986), the ordering of competing principles according to the importance of the values which they embody is a basic technique of adjudication. But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to "develop" international law by

unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states. (See *Al-Adsani* 34 EHRR 273, 297, para O-II9 in the concurring opinion of judges Pellonpää and Bratza).

64. In my opinion, therefore, Mr Crystal has failed to make good the second and essential step in his argument. I can deal relatively briefly with the first and third steps. On the question of whether article 6 is engaged at all, I am inclined to agree with the view of Lord Millett in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1588 that there is not even a prima facie breach of article 6 if a state fails to make available a jurisdiction which it does not possess. State immunity is not, as Lord Millett said, a "self-imposed restriction on the jurisdiction of [the] courts" but a "limitation imposed from without". However, as the European Court of Human Rights in *Al-Adsani* 34 EHRR 273 proceeded on the assumption that article 6 was engaged and the rules of state immunity needed to be justified and as it makes no difference to the outcome, I will not insist on the point. On the third step, I do not think that the implication of an exception into section 1(1) of SIA can be described as a possible interpretation of the section. If I had accepted the first two steps in the argument, it would have been necessary to make a declaration of incompatibility. But the point does not arise. I would dismiss Mr Jones's appeal.

65. The appeal of the Kingdom in the case of Mitchell, Sampson and Walker raises the question of whether the same immunity covers the individual agents of the state allegedly responsible for the infliction of torture upon the claimants. The Court of Appeal concluded that it did not and I must at the outset pay tribute to the careful judgment of my noble and learned friend Lord Mance, which meticulously confronts and deals with every objection to his view of the case; a tribute no less sincere for the opinion I have formed that he was wrong.

66. I start with the proposition that, as a matter of international law, the same immunity against suit in a foreign domestic court which protects the state itself also protects the individuals for whom the state is responsible. Article 2(1)(b)(iv) of the Immunity Convention defines "state" to include "representatives of the state acting in that capacity". The traditional way of expressing this principle in international law is to say that the acts of state officials acting in that capacity are not attributable to them personally but only to the state. Thus in *Prosecutor v Blaskic* (1997) 110 ILR 607, 707 the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, presided

over by the distinguished international lawyer Professor Antonio Cassese, said:

> "Such officials are mere instruments of a state and their official action can only be attributed to the state. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a state. In other words, state officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the state on whose behalf they act: they enjoy so-called 'functional immunity'. This is a well-established rule of customary international law going back to the 18th and 19th centuries, restated many times since."

67. Similarly, in the *Church of Scientology Case* (1978) 65 ILR 193, 198 the German Federal Supreme Court, in according immunity to the Commissioner of the Metropolitan Police for acts done pursuant to the Federal Republic of Germany - United Kingdom Agreement on Mutual Assistance in Criminal Matters 1961, said:

> "Scotland Yard – and consequently its head – was acting as the expressly appointed agent of the British State so far as performance of the treaty in question between the United Kingdom and the Federal Republic was concerned. The acts of such agents constitute direct state conduct and cannot be attributed as private activities to the person authorised to perform them in a given case…Any attempt to subject state conduct to German jurisdiction by targeting the foreign agent performing the act would undermine the absolute immunity of sovereign states in respect of sovereign activity."

68. Despite the undoubted authority for expressing the rule in this way, I do respectfully think that it is a little artificial to say that the acts of officials are "not attributable to them personally" and that this usage can lead to confusion, especially in those cases in which some aspect of the immunity of the individual is withdrawn by treaty, as it is for criminal proceedings by the Torture Convention. It would be strange to say, for example, that the torture ordered by General Pinochet was attributable to him personally for the purposes of criminal liability but only to the State of Chile for the purposes of civil liability. It would be clearer to say that the Torture Convention withdrew the immunity

against criminal prosecution but did not affect the immunity for civil liability. I would therefore prefer to say, as Leggatt LJ did in *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611, 669, that state immunity affords individual employees or officers of a foreign state "protection under the same cloak as protects the state itself". But this is a difference in the form of expression and not the substance of the rule.

69. What is important, however, is that, as Lord Diplock said in *Alcom Ltd v Republic of Columbia* [1984] AC 580, 597, the provisions of the SIA "fall to be construed against the background of those principles of public international law as are generally recognised by the family of nations." That means that "state" in section 1(1) of the SIA and "government", which the term "state" is said by section 14(1)(b) to include, must be construed to include any individual representative of the state acting in that capacity, as it is by article 2(1)(b)(iv) of the Immunity Convention. The official acting in that capacity is entitled to the same immunity as the state itself.

70. In his judgment in the Court of Appeal, Mance LJ says more than once that the SIA does not expressly mention officials: see [2005] QB 699, 719H, 721G. True, it does not use the words "officials" or "representatives" or the like. But the question is not what words the Act uses but what it means. If, against the background of established rules of international law, "the state" or "the government" includes individual officials, then they are entitled to the same immunities as if they had been expressly mentioned. The absence of express reference may make it easier, if section 3 of the HRA applies, to construe references to the state as not including officials. (Even that would have its difficulties, since there is no suggestion that the state should not include officials other than in cases of torture or other jus cogens prohibitions). But before one gets to section 3 of the HRA, it is necessary to establish that the immunity of an official would infringe the right of access to a court guaranteed by article 6 of the Convention and therefore be inconsistent with a Convention right. For that purpose it is necessary, as in the case of the immunity of the state itself, to show that international law does not require immunity against civil suit to be accorded to officials who are alleged to have committed torture.

71. Once again, it is impossible to find any such exception to the immunity of representatives of the state in a treaty. The Immunity Convention does not contain one. The Torture Convention, which defines torture as the infliction of severe pain and suffering for various purposes "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 a public capacity" was held in *Pinochet (No 3)* [2000] 1 AC 147, by necessary implication, to remove the immunity from criminal prosecution which would ordinarily attach to acts performed by individuals in a public capacity. But the Torture Convention says nothing to remove the immunity of such individuals from civil process.

72. The essence of the reasoning of the Court of Appeal in denying immunity to individuals who are alleged to have committed acts of torture is that torture cannot constitute an official act. It is so illegal that it must fall outside the scope of official activity.

73. This argument is based upon judicial dicta; first, in the *Pinochet* litigation and secondly in a series of United States cases under ATCA. But before I come to these dicta, I will examine the proposition in principle.

74. It has until now been generally assumed that the circumstances in which a state will be liable for the act of an official in international law mirror the circumstances in which the official will be immune in foreign domestic law. There is a logic in this assumption: if there is a remedy against the state before an international tribunal, there should not also be a remedy against the official himself in a domestic tribunal. The cases and other materials on state liability make it clear that the state is liable for acts done under colour of public authority, whether or not they are actually authorised or lawful under domestic or international law.

75. So for example in *Mallén v United States of America* (1927) IV Reports of International Arbitral Awards 173, a US deputy constable in El Paso, Texas boarded a street car, showing his badge, beat up the Mexican consul and took him to the county jail. The assault was in pursuit of a private grudge but an international arbitration tribunal held that the United States was liable because the deputy constable had acted under colour of public authority.

76. The International Law Commission is in the process of preparing a draft with a view to a UN treaty on the responsibility of states for intentionally wrongful acts. Article 4 of the 2001 draft provides that the conduct of any state organ shall be considered an act of that state under international law and that an organ includes a person or entity which has

that status in accordance with the internal law of that state. In its commentary, the commission says:

> "It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State."

77. The commission went on to say that the distinction between unauthorised conduct of a state organ and purely private conduct had been "clearly drawn in international arbitration decisions" and referred to the *Mallén* case. Article 7 of the draft dealt specifically with the point:

> "The conduct of an organ of a state or of a person or entity empowered to exercise elements of the government authority shall be considered an act of the state under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

78. It seems thus clear that a state will incur responsibility in international law if one of its officials, under colour of his authority, tortures a national of another state, even though the acts were unlawful and unauthorised. To hold that for the purposes of state immunity he was not acting in an official capacity would produce an asymmetry between the rules of liability and immunity.

79. Furthermore, in the case of torture, there would be an even more striking asymmetry between the Torture Convention and the rules of immunity if it were to be held that the same act was official for the purposes of the definition of torture but not for the purposes of immunity. Lord Millett in *Pinochet (No 3)* [2000] 1 AC 147, 273 drew attention to this feature of the definition:

> "The very official or governmental character of the acts which is necessary to found a claim to immunity ratione materiae, and which still operates as a bar to the civil

> jurisdiction of national courts, was now to be the essential element which made the acts an international crime."

80. It was this feature which made Lord Millett conclude, at p 278, that the Torture Convention must, by necessary implication, have removed the immunity which would ordinarily attach to an act of official or governmental character:

> "In my opinion there was no immunity to be waived. The offence is one which could only be committed in circumstances which would normally give rise to the immunity. The international community had created an offence for which immunity ratione materiae could not possibly be available. International law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose."

81. In my opinion, this reasoning is unassailable. The reason why General Pinochet did not enjoy immunity ratione materiae was not because he was deemed not to have acted in an official capacity; that would have removed his acts from the Convention definition of torture. It was because, by necessary implication, international law had removed the immunity.

82. In the Court of Appeal, Mance LJ met the charge of inconsistency by saying [2005] QB 699, 742:

> "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 context in which the author must be acting. It does not lend to the acts of torture themselves any official or governmental character or 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 cloak of state immunity."

83. I do not, with respect, find this answer satisfactory. 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.

84. The notion that acts contrary to jus cogens cannot be official acts has not been well received by eminent writers on international law. Professor Antonio Cassese, who presided over the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, described it as "unsound and even preposterous": see "When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case" (2002) 13 EJIL 853-875 (hereafter "*International Crimes*") at p 869, while Professor Andrea Gattini gave it short shrift in a footnote: see "War Crimes and State Immunity in the *Ferrrini* Decision" (2005) Journal of International Criminal Justice 224-242, at p 234 n 41 ("an argument which can be easily discarded"). More moderately, in a comment on the present case, Hazel Fox said that it was "directly contrary to current international law": (2005) 121 LQR 353-359, at p 355.

85. In principle, therefore, I would reject the argument that torture or some other contravention of a jus cogens cannot attract immunity ratione materiae because it cannot be an official act. I must now examine some of the dicta which have been relied upon in support.

86. First, the dicta in the *Pinochet* litigation. In order to understand some of the passages in the judgments of the Law Lords, it is necessary to bear in mind that General Pinochet did not only claim immunity at common law by virtue of the official nature of his acts. He also claimed a special statutory immunity for former heads of state by virtue of section 20(1) of the SIA, which provides that "subject to…any necessary modifications" the Diplomatic Privileges Act 1964 shall apply to a head of state as it applies to a head of a diplomatic mission." The 1964 Act gave effect to the Vienna Convention on Diplomatic Relations (1961), article 39 of which provided that when the functions of a diplomat came to an end, immunity continued to subsist "with respect to acts performed … in the exercise of his functions as a member of the mission." If one applied that article with the necessary modifications to a Head of State, it would (on the broadest possible construction) mean that immunity would continue to subsist with respects to acts performed in the exercise of his functions as head of state.

87. Section 20(1) of the SIA therefore gave rise to the question of whether torturing people could be an exercise of the functions of a head of state, which is a very different question from whether it could be an official act for the purposes of common law immunity ratione personae. It is in this context that one must read some of the dicta on which the Court of Appeal relied.

88. The judgments of the majority in *Pinochet (No 1)* [2000] 1 AC 61 concentrated almost entirely upon the question of whether General Pinochet was entitled to immunity under section 20(1) of the SIA. Reliance upon ordinary immunity ratione materiae was summarily rejected on the ground that it was inconsistent with the universal jurisdiction over torture as an official act created (pursuant to the Torture Convention) by section 134 of the Criminal Justice Act 1988. It was in relation to article 39 of the Vienna Convention that Lord Nicholls of Birkenhead said (at p 109) that "torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state". Although it is true that Lord Steyn (at p 116) expressed some doubt about whether "what was allegedly done in secret in the torture chambers of Santiago" could be regarded as official acts, he founded his judgment upon the failure to satisfy the "further essential requirement" that the acts were part of the functions of a head of state.

89. In *Pinochet (No 3)* [2000] 1 AC 147 the argument rather different. Lord Browne-Wilkinson appeared to assimilate the immunity under section 20(1) with common law immunity ratione materiae, expressed doubts as to whether torture was a "state function" but concluded that in any event the universal criminal liability created by the Torture Convention would be inconsistent with the existence of immunity ratione materiae. There are passages which can be read as saying that torture therefore cannot be an official act, but nothing to explain why, if that is the case, it satisfies the definition of torture in the Convention. His conclusion (at p 205) is simply that "continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention", which is consistent with Lord Millett's view that, though the acts are official, the Convention lifts the immunity.

90. Lord Goff of Chieveley formulated the argument against immunity (at p 213) with great clarity:

> "In broad terms I understand the argument to be that, since torture contrary to the Convention can only be committed

> by a public official or other person acting in an official capacity, and since it is in respect of the acts of these very persons that states can assert state immunity ratione materiae, it would be inconsistent with the obligations of state parties under the Convention for them to be able to invoke state immunity ratione materiae in cases of torture contrary to the Convention."

91. Lord Goff went on to point out that since the Torture Convention did not expressly lift the immunity, the argument must be that it did so by necessary implication. He went on to reject the implication, but his formulation of the argument shows that he did not understand it as a claim that the same act could be official for the purposes of the Torture Convention and not official for the purposes of immunity.

92. Lord Hope of Craighead said in terms (at p 242) that in principle the immunity ratione materiae protected all acts which the head of state has performed in the exercise of the functions of government. He was willing to allow only two exceptions under customary international law: "criminal acts which the head of state did under the colour of his authority as head of state but which were in reality for his own pleasure or benefit" and war crimes. I would respectfully doubt the first exception: if the act is done under colour of official authority, the purpose of personal gratification (as in the *Mallén* case) should be irrelevant. The second is well established. But Lord Hope doubted whether customary international law had brought torture within the second exception. It was the Torture Convention which had done so: see p 247.

93. Lord Hutton concentrated on section 20 of the SIA and said, like Lords Nicholls and Steyn in *Pinochet (No 1),* that torture was not a function of a head of state. But he must have regarded it as an official act for the purposes of the common law ratione materiae rule, because he said, at p 264:

> "I consider that under international law Chile is responsible for acts of torture carried out by Senator Pinochet, but could claim state immunity if sued for damages for such acts in a court in the United Kingdom. Senator Pinochet could also claim immunity if sued in civil proceedings for damages…."

94. Lord Saville of Newdigate clearly based his opinion on the proposition that the Torture Convention had removed the immunity ratione materiae and Lord Millett, as I have already noted, did the same. Lord Phillips of Worth Matravers likewise said (at p 290) that the Convention was "incompatible with the applicability of immunity ratione materiae" but (at p 281) that in civil proceedings against General Pinochet for damages, the State of Chile could claim immunity on his behalf. In the Court of Appeal in this case Lord Phillips said that he had changed his mind on the latter point but I respectfully think that his first thoughts were correct.

95. The respondents next rely on cases decided in the United States under ATCA. This Act, passed in 1789, confers jurisdiction upon Federal Courts in "all causes where an alien sues for a tort only [committed] in violation of…the law of nations". There are dicta and some lower court decisions which support the view that, for the purposes of the act of state doctrine and the FSIA, torture cannot be an official act. For example, *Filartiga v Pena-Irala* (1980) 630 F 2d 876 concerned the torture and killing of a Paraguayan citizen in Paraguay by a Paraguayan policeman who was served with process in New York. The court assumed jurisdiction under ATCA on the ground that torture was a tort contrary to the law of nations. There was no reference to the immunity of an "agency or instrumentality of a foreign state" under the FSIA and only a brief reference to the act of state doctrine, which the court said (at p 889) was "not before us on this appeal". It was in this context that Kaufman J said:

> "We note in passing, however, that we doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state".

96. *In re Estate of Ferdinand Marcos* (1994) 25 F 3d 1467, in the US Court of Appeals (Ninth Circuit), was an application to strike out a claim for damages for torture and killing by ex-President Marcos on the ground, inter alia, that he had been an agent or instrumentality of the state for the purposes of the FSIA. The court said (at pp 1470-1471) that for the purposes of the application, the claimants' allegations must be taken as true, including the allegation that his actions were "taken without official mandate pursuant to his own authority". The government of the Philippines made no claim to immunity. But the judgment does contain an extensive discussion of authorities which are

said to support the proposition that unlawful or very unlawful acts cannot be official.

97. *Xuncax v Gramajo* (1995) 886 F Supp 162, a judgment of the US District Court for Massachusetts, was a judgment in default, the defendant (a former Guatemalan Minister of Defence) having been served with process while attending a course at Harvard and thereafter taken no part in the proceedings. Woodlock J followed cases in the Ninth Circuit such as *In re Estate of Ferdinand Marcos* and held, at p 175 that although immunity under the FSIA extended to an individual official of a foreign state acting in his official capacity:

> "an individual official of a foreign state is *not* entitled to immunity under the FSIA in an action brought against him for acts beyond the scope of his authority".

(See also, for a similar ruling, *Cabiri v Assasie-Gyimah* (1996) 921 F Supp 1189, a decision of a District Judge in the Second Circuit).

98. The approval (or at any rate, lack of disapproval) of *Filartiga v Pena-Irala* 6630 F 2d 876 by the Supreme Court in *Sosa v Alvarez-Machain* (2004) 542 US 692 was solely concerned with the assumption of jurisdiction under the ATCA and not with any question of state immunity. In a concurring opinion, Breyer J speculated (at p 762) that international acceptance of universal criminal jurisdiction over certain criminal offences by state officials (as in *Pinochet*) may in due course lead to an acceptance of a similar tort jurisdiction. But there is no suggestion that this represents current international law.

99. Although, as Professor Cassese says, the ATCA cases may be "meritorious" as "a practical expedient for circumventing the [FSIA]" (*International Crimes*, at p 869) and were, as I have noted, described by Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case, at para 48, as a "unilateral exercise of the function of guardian of international values", they are in my opinion contrary to customary international law and the Immunity Convention and not in accordance with the law of England.

100. The Court of Appeal, having held that the English court had jurisdiction to entertain proceedings alleging torture against foreign

officials, drew back from allowing the court to exercise that jurisdiction on ordinary principles. It recognised that such proceedings could create difficulties about both proof and enforcement and could cause difficulties with foreign governments. It therefore proposed that the power to allow service out of the jurisdiction or to stay proceedings on grounds of forum non conveniens should be exercised with due regard to the potential sensitivity of the subject-matter (the word "sensitive" appears six times in the concluding pages of the judgment).

101. In my opinion this approach is inappropriate for questions of state immunity. As Lord Millett said in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1588, state immunity is not a "self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt" and which it can, as a matter of discretion, relax or abandon. It is imposed by international law without any discrimination between one state and another. It would be invidious in the extreme for the judicial branch of government to have the power to decide that it will allow the investigation of allegations of torture against the officials of one foreign state but not against those of another. As Kingsmill Moore J said in a different but not wholly unrelated context, "safety lies only in universal rejection": see *Peter Buchanan Ltd v McVey* [1955] AC 516, 529.

102. I would therefore allow the appeal of the Kingdom and restore the order of Master Whitaker. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill, with which I agree.

LORD RODGER OF EARLSFERRY

My Lords,

103. I have had the advantage of considering the complementary speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Hoffmann, in draft. I agree with them and there is nothing which I can usefully add. For the reason they give I would dispose of the appeals as they propose.

LORD WALKER OF GESTINGTHORPE

My Lords,

104. I have had the privilege of reading in draft the opinions of my noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann. I am in full agreement with them, and I would dispose of the appeals in the way in which Lord Bingham proposes.

LORD CARSWELL

My Lords,

105. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann. For the reasons which they give I too would dismiss Mr Jones' appeal and allow the Kingdom's appeal.