

Case Note

A Torturer's Manifesto? Impunity through Immunity in *Jones v The Kingdom of Saudi Arabia*

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Abstract

In *Jones v The Kingdom of Saudi Arabia*,¹ the House of Lords was required to determine whether both the Kingdom of Saudi Arabia ('the Kingdom'), and its agents, were entitled to foreign state immunity before the courts of England in a civil suit alleging acts of torture. The House of Lords held unanimously that both the Kingdom and its agents were entitled to immunity from the suit, notwithstanding that the prohibition against torture is a peremptory norm of international law or '*ius cogens*'. The House of Lords decided that the Kingdom itself was unequivocally bestowed immunity by s 1 of the *State Immunity Act 1978* (UK) and that the Act in this regard accorded with customary international law. Further, the House of Lords found that, although state agents do not fall within the scope of the *State Immunity Act 1978*, under common law the Kingdom's agents were also entitled to immunity, as this was also the position in customary international law. A critical issue was the United Kingdom's obligation to promote the right of access to a court, guaranteed by article 6 of the *European Convention on Human Rights*. However, the House of Lords considered state immunity to be a legitimate abrogation of that right. In arriving at its decision, the House of Lords overturned a highly persuasive decision of the Court of Appeal on, it is argued, quite dubious grounds.

1. The Doctrine of Foreign State Immunity

The doctrine of foreign state immunity grew from the general principle that all the sovereign states of the world are equal in law.² The classical common law position was that neither a state, nor any of its instrumentalities, could ever be subject to the jurisdiction of another state's courts unless the former state consented.³

However, during the course of the twentieth century, states became increasingly involved in commercial, as opposed to strictly governmental activities, and in response absolute sovereign immunity began to give way to a more restrictive interpretation of the doctrine. This emerging distinction between

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1 *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another; Mitchell and others v Al-Dali and others* [2007] 1 AC 270 ('Jones').

2 *Charter of the United Nations* art 2.1.

3 Stephen Hall, *International Law* (2nd ed, 2006) at 231; for the traditional statement of the principle, see *The Schooner Exchange v McFadden* 7 Cranch 116 (1812) at 137 (Marshall CJ).

acts for a governmental or sovereign purpose and acts for a commercial or private purpose has received statutory recognition in many common law jurisdictions, such as the *State Immunity Act 1978* (UK) ('SIA') of the United Kingdom and the Australian *Foreign States Immunities Act 1985* (Cth) ('FSIA').⁴ The Australian Act follows the British model and is very similar to it in terms of substance. The legislative instruments provide for prima facie state immunity in the classical sense, before listing a range of exceptions to the general principle. The exceptions are mostly commercial in character. It is against this background of an increasingly restrictive interpretation of foreign state immunity that the House of Lords was required to adjudicate the question of immunity in *Jones*.

2. *Factual Background*⁵

In *Jones v The Kingdom of Saudi Arabia*,⁶ the House of Lords was required to hear two separate, but factually similar actions on joint appeal. The claimant in the first action, Ronald Jones, made allegations of torture perpetrated by state officials of the Kingdom which occurred over a period of 67 days of imprisonment in Riyadh. Mr Jones further alleged that he had suffered psychological damage upon his return to England as a result of the torture inflicted upon him. Mr Jones' claim was made against both the Ministry for the Interior of the Kingdom of Saudi Arabia, for all intents and purposes the Kingdom itself,⁷ and Colonel Abdul Aziz, the state agent allegedly responsible for the torture.

The second claim, made by three claimants, Sandy Mitchell, Leslie Walker and William Sampson, was made against four individual state agents of the Kingdom. The claimants alleged that the first and second defendants inflicted systematic torture upon them in order to elicit confessions. They further alleged that the third and fourth defendants, the Deputy Governor of the prison where the claimants were held and the head of the Ministry of the Interior, negligently allowed the torture to occur. Similar to Mr Jones, all three claimants allegedly suffered ongoing psychological damage in England as a result of the torture they had suffered.

The Kingdom made an application to set aside Mr Jones' claim on the grounds that both it and its agents enjoyed immunity from the jurisdiction of the English courts. This application was successful. Similarly, the claimants in the second action were refused permission to serve outside the jurisdiction owing to foreign state immunity. The claimants in both actions were given leave to appeal to the Court of Appeal, where their actions were joined.

3. *Summary of Findings*

In short, the Court of Appeal dismissed Mr Jones' appeal against the decision not to allow service on the Kingdom itself, on the grounds of foreign state immunity. The Court of Appeal did, nonetheless, allow the appeal of Mr Jones in terms of

4 Hall, above n3 at 232.

5 See generally, *Jones* [2005] 1 QB 699 (Court of Appeal) at 710-712.

6 *Jones* [2007] 1 AC 270.

7 *Jones* [2007] 1 AC 270 at 278.

Colonel Abdul Aziz, and the appeal of the claimants in the second action, in so far as the claims alleged torture.⁸

However, The House of Lords in a unanimous decision reversed the Court of Appeal's findings with respect to the state agents in both actions, and decided that all six defendants across both actions were entitled to immunity from the jurisdiction of the English courts. The leading judgments were delivered by Lord Bingham and Lord Hoffmann.⁹

In order to best explain the outcomes and reasoning of the House of Lords' decision in *Jones*, the analysis will be broadly divided into two sections, the first being concerned with the immunity claimed by the Kingdom for itself, and the second section dealing with the extension of that immunity to the Kingdom's agents.

4. *Immunity of the Kingdom*

A. *Findings of the House of Lords*

At the outset, the court noted that, whatever the status of international law or the common law, the SIA codifies the law concerning the application of state immunity in the English courts. Section 1(1) provides for prima facie immunity:

A state is immune from the jurisdiction of the courts of the United Kingdom except as provided in ... this Act.¹⁰

Furthermore, it was not at all suggested that any of the express exceptions to immunity in the SIA were applicable to the present case. Therefore, prima facie the Kingdom was able to assert immunity in respect of itself.¹¹

(i) *The European Convention on Human Rights*

Article 6 of the *European Convention on Human Rights* ('the Convention')¹² guarantees the right to a fair trial, and implicit in that right is the right of access to a court in order to have the trial heard.¹³ Plainly, allowing a foreign state to claim immunity abrogates this right.¹⁴ Nevertheless, European jurisprudence does recognise that there are circumstances where a domestic law may validly limit a Convention right. Where this occurs, it must be shown that the law is a proportionate measure in pursuit of a legitimate end.¹⁵

8 The Court of Appeal dismissed the appeals of the claimants in the second action insofar as they alleged negligence: *Jones* [2005] 1 QB 699 at 753.

9 With Lords Rodger, Walker and Carswell agreeing.

10 *State Immunity Act 1978* (UK) s 1(1).

11 *Jones* [2007] 1 AC 270 at 279-280 and 291.

12 *European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950, CETS No 005 (entered into force 3 September 1953).

13 *Golder v United Kingdom* (1975) 1 EHRR 524; *Airey v Ireland* (1979) 2 EHRR 305.

14 *Jones* [2007] 1 AC 270 at 284.

15 *Al-Adsani v United Kingdom* (2001) 34 EHRR 273 ('Al-Adsani').

In *Jones*, the House of Lords rejected the claimants' contention that, as their suits concerned breaches of *ius cogens*,¹⁶ s 1 of the SIA was not proportionate in its blanket denial of access to the English courts. Consequently, the House of Lords declined to either read into s 1 an exception for cases of civil suits against foreign states alleging torture, or make a declaration of inconsistency with the Convention.¹⁷

As was the Court of Appeal, the House of Lords was highly influenced by the decision of the European Court of Human Rights in the factually analogous case of *Al-Adsani v United Kingdom*.¹⁸ That case also involved a civil claim in an English court, where a British-Kuwaiti dual-national alleged that he had been tortured by government officials in Kuwait. The court in *Jones* decided to follow the majority in *Al-Adsani*, which concluded that to grant state immunity in civil actions pursued the legitimate objectives of 'complying with international law to promote comity and good relations between states through the respect of another state's sovereignty'.¹⁹ Nor was it disproportionate to pursue that aim even where the allegations involved international crimes in breach of *ius cogens*.²⁰

According to the court, there may have been an argument that s 1 of the SIA was disproportionate if it could be shown that at international law states no longer enjoyed immunity for civil actions alleging torture.²¹ However, agreeing with the majority in *Al-Adsani*, no such conclusions could be drawn from the 'international instruments, judicial authorities or other materials before the court'.²²

(ii) Immunity Ratione Personae and Immunity Ratione Materiae

The House of Lords categorically rejected Mr Jones' assertion that an act of torture, a clear breach of *ius cogens*, could not in any way constitute a sovereign or state act, and therefore a state could not claim immunity in respect of it.²³ In doing so, the Law Lords emphasised the distinction between *immunity ratione personae* and *immunity ratione materiae*.

Immunity ratione personae is that claimed by the state itself, and the highest ranking officials which embody it, such as the head of state, head of government, certain ministers and diplomats. This immunity is enjoyed by mere virtue of the sovereign status of the entity and survives irrespective of the nature of the acts giving rise to the court process. *Immunity ratione materiae*, on the other hand, is

16 'Ius cogens', or peremptory norms, are superlative norms of international law from which no derogation is possible, see below n36. The prohibition against torture has the status of *ius cogens*: *Jones* [2007] 1 AC 270 at 284 and 292; *Jones* [2005] 1 QB 699 at 716.

17 Pursuant to the *Human Rights Act 1998* (UK) ss 3, 4.

18 *Al-Adsani* (2001) 34 EHRR 273.

19 *Jones* [2007] 1 AC 270 at 285. This of course begs the question: how can it be asserted that protecting breaches of *ius cogens* adds to the comity between nations?

20 *Jones* [2007] 1 AC 270 at 285.

21 '[M]easures...which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1)': *Al-Adsani* (2001) 34 EHRR 273 at 289.

22 *Jones* [2007] 1 AC 270 at 285

23 *Jones* [2007] 1 AC 270 at 294.

that which must be claimed by state officials and agents (known henceforth simply as ‘agents’).²⁴ As state agents do not embody the state themselves, state immunity can only be extended to them if their acts can properly be interpreted as ‘sovereign’, ‘official’ or ‘state’ acts.²⁵

The House of Lords relied on the reasoning of the International Court of Justice in *The Arrest Warrant Case*,²⁶ where it was held that an incumbent foreign minister possessed *immunity ratione personae* from prosecution, even where the crimes alleged involved war crimes and crimes against humanity, the prohibitions against which have the status of *ius cogens*. The majority in that case concluded that, for as long as the foreign minister remained in office, no foreign jurisdiction could be exercised over him. However, the acts in question could not attract *immunity ratione materiae*, meaning he would be liable to prosecution once his term in office concluded.

Although *Arrest Warrant* involved the proposed exercise of criminal jurisdiction, the principles espoused in that case are equally applicable to the facts in *Jones*. Presumably, the principle of *immunity ratione personae*, even in the face of allegations of a breach of *ius cogens*, would also apply to those officials higher than a foreign minister, such as the head of state and of course the state itself (which these higher officials personify). This is indeed the conclusion reached by the House of Lords in *Jones*, which decided that the Kingdom was entitled to claim *immunity ratione personae* from Mr Jones’ action. Therefore, Mr Jones’ appeal against the Court of Appeal’s decision to grant the Kingdom immunity was dismissed.

B. Universal Jurisdiction

The issue of universal civil jurisdiction for acts of torture was raised in the proceedings. The essence of universal jurisdiction is that it does not require the existence of any personal or territorial link to the forum. There is almost certainly universal criminal jurisdiction to prosecute those who violate peremptory norms of international law.²⁷ However, whether a corresponding universal civil jurisdiction exists remains an open question.²⁸ If there does exist in international law a universal civil jurisdiction to try the commission of torture, it would make it very difficult to sustain an argument that foreign state immunity was available, as a matter of international law, in a civil case alleging the extra-territorial commission of torture.

The argument was made on behalf of the claimants that article 14 of the *Convention against Torture* (‘CAT’)²⁹ should be interpreted so as to bequeath

24 ‘...[S]ubject-matter immunity which is otherwise available to a state to assert in respect of its officials’: *Jones* [2005] 1 QB 699 at 719 (Mance LJ).

25 In this context these adjectives are synonyms.

26 *Democratic Republic of Congo v Belgium* (*Case Concerning Arrest Warrant of 11 April 2000*) [2002] ICJ Rep 3 (‘*Arrest Warrant*’).

27 Alexander Orakhelashvili, *Peremptory Norms in International Law* (2006) at 295-296.

28 *Id* at 308.

29 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984, [1984] PITSE 4 (entered into force 26 June 1987).

universal civil jurisdiction to try acts of torture committed under the colour of state authority. Although the wording of the provision does not make clear whether or not this interpretation is correct, it would certainly complement the universal criminal jurisdiction expressly provided for by article 5(2) of the CAT.

Article 14(1) of the CAT reads as follows:

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.

The House of Lords addressed briefly the scope of article 14 and concluded that it does not provide for universal civil jurisdiction. Rather, it requires only the provision of civil remedies for torture committed within the territorial jurisdiction of the forum state.³⁰ This interpretation did clear up the quite curious conclusion of the Court of Appeal, whereby it was decided that article 14 provided for not only civil redress where the torture occurred within the territorial jurisdiction of the forum court, but also the unique situation where the torture was committed by officials of the forum state abroad.³¹

Although the House of Lords adopted a more rational reading of article 14 than the Court of Appeal, it is quite unclear why it decided to adopt such a restrictive interpretation of article 14. It is fair to say that the provision does not explicitly provide for universal civil jurisdiction. However, it equally does not expressly provide for a territorially limited one either.³² It would seem more compatible with international law to adopt an expansive interpretation, as this would recognise the peremptory status of the prohibition against torture.³³ This is certainly the view of the Committee against Torture.³⁴ Nevertheless, Lord Hoffmann was very dismissive of the Committee's view and instead relied on the tenuous unilateral interpretations of article 14 made by a small number of domestic courts, which limited the operation of the provision in the same way he chose to.³⁵

C. *The Hierarchy of Norms*

Speaking in general terms, it is not clear how it is possible on the one hand to acknowledge the superlative status of *ius cogens* prohibitions, which are norms

³⁰ *Jones* [2007] 1 AC 270 at 289.

³¹ *Jones* [2005] 1 QB 699 at 718. This is a reading which is completely unsupported by the text.

³² See generally, Orakhelashvili, above n27 at 311-313.

³³ See, for example *Ferrini v Federal Republic of Germany* (2004) Cass sez un 5044/04; 87 Rivista di diritto internazionale 539 (Italian Court of Cassation); contrast *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675 (Ontario Court of Appeal).

³⁴ Committee against Torture, *Consideration of Reports Submitted by States Parties under article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture: Canada* (2005) <http://www.bayefsky.com/pdf/canada_t4_cat_34.pdf> accessed 19 October 2007. The committee is a treaty body established pursuant to Part II of the CAT with functions associated with monitoring the implementation of the Convention.

³⁵ *Jones* [2007] 1 AC 270 at 296; Lord Bingham was also dismissive of the Committee's views: [2007] 1 AC 270 at 288.

from which ‘no derogation is possible’,³⁶ and on the other hand to relegate them in favour of *immunity ratione personae*. As stated, the House of Lords in *Jones* was influenced heavily by *Al-Adsani*, as well as *Arrest Warrant*, as authorities for the assertion that customary international law still recognises that states possess immunity from civil actions alleging torture.³⁷ Apart from being empirically doubtful,³⁸ this is highly questionable from a theoretical point of view. For how can customary international law provide an exception to *ius cogens* norms, when inherent in these norms is their primacy over all other international laws, including customary international law?

The House of Lords did recognise this conundrum to a limited extent; yet, it was explained away in an unsatisfactory manner. Both Lords Bingham and Hoffmann contended that state immunity is a procedural rule relating to jurisdiction, whereas the prohibition on torture is a matter of substantive law; hence the two are somehow quarantined from each other. As Lord Hoffmann explained:

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...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.³⁹

Such an explanation, although not without support,⁴⁰ is most unsatisfying. To deny a norm the ability to be determined anywhere other than the courts of the offending state, more often than not a most unlikely prospect, is to strip the norm of all meaning. To confine violations of *ius cogens* to mere substance, independent of jurisdiction, is to completely ignore the hierarchy of norms in international law and the position of peremptory norms at the top of this pyramid.

Admittedly, irrespective of the state of international law, the House of Lords was bound by the terms of s 1 of the SIA to grant the Kingdom immunity.⁴¹

36 *Vienna Convention on the Law of Treaties* 1969 [1974] ATS 2 (entered into force 27 January 1980) art 53; *The Barcelona Traction Case (Barcelona v Spain)* [1970] ICJ Rep 3 at 32.

37 *Jones* [2007] 1 AC 270 at 292.

38 A number of scholars have contended that, due to the lack of a necessary consensus amongst states, foreign state immunity has not reached the status of customary international law, and hence there is no customary international law requirement upon states to grant immunity to other states, see Orakhelashvili, above n27 at 335, 337; Ernest K Bankas, *The State Immunity Controversy in International Law* (2005) at 252, 324-325; ‘To my mind this notion of consensus is a fiction. The nations are not in the least agreed on the doctrine of sovereign immunity’: *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 at 552 (Lord Denning MR); contrast *Al-Adsani* (2001) 34 EHRR 273 at 289, which claimed that granting immunity reflected ‘generally recognised rules of public international law’. Nevertheless, the majority in *Al-Adsani* failed to recognise that courts are required to prove the existence of those customary norms which they state: Orakhelashvili, above n27 at 338.

39 *Jones* [2007] 1 AC 270 at 293.

40 This conclusion was cautiously made in Hazel Fox, *The Law of State Immunity* (2002) at 525; see also, *Jones* [2005] 1 QB 699 at 716.

However, the conclusion that this is consistent with international law is debatable. The powerful minority in *Al-Adsani*⁴² realised this, observing:

The prohibition of torture, being a rule of *ius cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere... The jurisdictional bar is lifted by the very interaction of the international rules involved.⁴³

The minority went on to conclude that s 1 of the SIA, in so far as it restricts the right of access to a court in civil cases alleging torture, is not consistent with international law and consequently not in proportionate pursuit of a legitimate aim. There is a strong claim that the House of Lords in *Jones* would have been better served by following the minority in *Al-Adsani* and making a declaration of inconsistency pursuant to s 4 of the *Human Rights Act 1998* (UK).⁴⁴

5. Immunity for the Kingdom's Agents

A. Court of Appeal

The SIA, although providing prima facie immunity for states in s 1, does not specifically address the issue of state agents. The scope of the term 'state', for the purposes of s 1, is defined in s 14 of the SIA. However, individual state 'agents' or 'officials' are not included within this definition.⁴⁵ Hence, it remains the purview of the common law, and through it international law, to fill this lacuna.

The Court of Appeal found that, although the Kingdom itself was entitled to state immunity, that same immunity could not be extended to its agents. Central to the court's decision was that torture, being a breach of a *ius cogens* prohibition, could never be considered a legitimate state act as a matter of international law and therefore could not attract immunity *ratione materiae*.⁴⁶ Consequently, the Court of Appeal concluded that to grant immunity to the Kingdom's agents would be a disproportionate abrogation of article 6 of the Convention.⁴⁷ The majority in *Al-Adsani* was distinguished as that case was dealing only with the immunity of the State of Kuwait, and not its agents.⁴⁸ The Court of Appeal further noted that even apart from the Convention, immunity would not be available under international law, the common law or the SIA.⁴⁹

41 *Human Rights Act 1998* (UK) s 3(2).

42 The decision was made nine votes to eight.

43 Cited in Alastair R Mowbray, *Cases and Materials on the European Convention of Human Rights* (2nd ed, 2007) at 391.

44 The provision would still have to be enforced, however, notwithstanding such a declaration: *Human Rights Act 1998* (UK) s 4(6).

45 S 14(1) provides:

'...references to a State include references to –
the sovereign or other head of that State in his public capacity;
the government of that State; and
any department of that government'

S 14(2) is not applicable to individual state agents either: *Propend Finance v Sing* (1997) 111 ILR 611 (Court of Appeal) at 670 ('*Propend*').

46 *Jones* [2005] 1 QB 699 at 742.

The Court of Appeal did recognise that there may well be occasions where, in the circumstances, it might be appropriate to decline jurisdiction. However, in such cases, the court retains an inherent discretion to decline its jurisdiction based on the discretionary doctrine of *forum non conveniens*.⁵⁰

6. *House of Lords*

The House of Lords reversed the decision of the Court of Appeal in respect of the state agents, deciding that they were entitled to *immunity ratione materiae*. The court conceded that the SIA did not expressly provide for cases where a suit is brought against state agents, but concluded that they were nevertheless entitled to 'foreign state protection under the same cloak as the state protects itself'.⁵¹ The acts of the individual defendants in both actions were in fact sovereign in nature, irrespective of their illegality under international law.⁵²

Lord Hoffmann criticised Mance LJ's conclusion⁵³ that a discretionary approach to immunity was more appropriate than a 'blanket' denial of jurisdiction. Lord Hoffmann remarked that this represented a misconception of the nature of state immunity, which was not imposed at the discretion of the domestic court, but imposed from the outside by international law.⁵⁴ That is, the foreign state either has the right to claim immunity or not, and the decision is not down to the discretion of the domestic court. This perhaps misunderstands Mance LJ's argument that the discretion exists in the domestic court *because* there is no right to *immunity ratione materiae* for torture. The court would exercise discretion pursuant to the doctrine of *forum non conveniens*, not state immunity.

7. *The 'Cloak' of State Immunity*

Lord Bingham observed in *Jones* that:

A state can only act through its 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.⁵⁵

47 *Jones* [2005] 1 QB 699 at 748. The Court of Appeal felt that to grant immunity would be particularly disproportionate where there was no real prospect of a remedy in the foreign state where the torture occurred. In such a case, immunity would deprive article 6 of the Convention of any real meaning: [2005] 1 QB 699 at 750; '...the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective': *Soering v United Kingdom* (1989) 11 EHRR 439 at 467, cited in *Jones* [2005] 1 QB 699 at 749.

48 *Jones* [2005] 1 QB 699 at 760.

49 *Jones* [2005] 1 QB 699 at 752.

50 *Jones* [2005] 1 QB 699 at 746-747; see also, Richard Garnett, 'Foreign States in Australian Courts' (2005) 29 *Melbourne University Law Review* 704 at 711.

51 *Propend* (1997) 111 ILR 611 at 669 (Leggatt LJ).

52 *Jones* [2007] 1 AC 270 at 281-282 and 301.

53 Mance LJ delivered the leading judgment in the Court of Appeal, with Lord Phillips MR and Neuberger LJ agreeing.

54 *Jones* [2007] 1 AC 270 at 298; see also, *Holland v Lampen-Woolfe* [2000] 1 WLR 1573 at 1588.

It is no doubt true that the availability of *immunity ratione materiae* to state agents is crucial, for a state functions through them, yet only the highest ranking officials attract the protection of *immunity ratione personae*.

In *Propend*, Leggatt LJ famously declared that:

Section 14(1) [of the SIA] must be read as affording to individual employees or officers of a foreign State protection under the same cloak as protects the State itself.⁵⁶

Propend was highly influential to both the Court of Appeal and the House of Lords in *Jones*, even if their applications of it differed. The House of Lords decided that the individual defendants in *Jones* came within the ‘cloak’ of the Kingdom’s immunity, as their acts were clearly state acts.⁵⁷ Both leading judgments placed great emphasis on the International Law Commission’s *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* 2001 (‘Draft Articles’),⁵⁸ in asserting that the acts of state agents should be considered state acts as long as ‘they were acting with apparent authority’,⁵⁹ irrespective of whether those agents had abused their public power, or exceeded or contravened instructions.⁶⁰

Furthermore, it was noted by the Law Lords that in article 1 of the CAT, the very thing which brought torture within the scope of that Convention was that it was instigated by ‘a public official or a person acting in an official capacity’,⁶¹ and that it would create a ‘striking’ asymmetry ‘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’.⁶² For the House of Lords, congruity between the CAT and the rules regarding immunity could only be achieved by recognising that an act could constitute both torture and at the same time a state act attracting *immunity ratione materiae*.⁶³

It could be said, however, that the House of Lords’ reliance on both the Draft Articles and the CAT is misplaced. Firstly, regarding the Draft Articles, Lord Bingham leaps from what they state in their terms to the conclusion that ‘[t]he fact that conduct is unlawful and objectionable is not, of itself, a ground for refusing immunity’.⁶⁴ This is not a step that the Draft Articles themselves seem to take, nor

⁵⁵ *Jones* [2007] 1 AC 270 at 290.

⁵⁶ *Propend* (1997) 111 ILR 611 at 669.

⁵⁷ ‘[T]hese are not borderline cases’: *Jones* [2007] 1 AC 270 at 281 (Lord Bingham). It should be noted, however, that of the authority relied on by the court in the *Propend* decision, none involved a state agent who had committed an international crime: *Jones* [2005] 1 QB 699 at 725.

⁵⁸ *Jones* [2007] 1 AC 270 at 281-282 and 301.

⁵⁹ Commentary to draft article 7, cited in *Jones* [2007] 1 AC 270 at 301.

⁶⁰ Commentary to draft article 4, cited in *Jones* [2007] 1 AC 270 at 301.

⁶¹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984 art 1; *Jones* [2007] 1 AC 270 at 286.

⁶² *Jones* [2007] 1 AC 270 at 301 (Lord Hoffmann).

⁶³ ‘There may be a dispute whether acts, although committed by an official, were purely private in character, but that is not a question which arises here’: *Jones* [2007] 1 AC 270 at 291 (Lord Bingham).

is it warranted. The Draft Articles do not consider the case where the acts of state agents constitute international crimes, and international crimes so serious as to contravene prohibitions of *ius cogens*. This is wholly apart from the separate point that the Draft Articles are in no way part of the binding corpus of international law.

Secondly, in terms of the supposed asymmetry between the denial of immunity and the terms of article 1 of the CAT, their Lordships appear to have misconceived the effect of the terms of that article. The phrase ‘public official or person acting in a public capacity’ refers only to the context in which the acts of torture are committed and the ostensible status of those committing them, and does not suggest that the *quality of the acts themselves* is ‘official’. This is certainly a point noticed by the Court of Appeal, which insisted that the CAT does not give the acts of torture themselves any official character, nor does it mean that to inflict torture can in any way be considered a state function.⁶⁵ On the contrary, ‘[t]he whole tenor of the Torture Convention is to underline the individual responsibility of state officials for acts of torture’.⁶⁶

8. *The Distinction between Criminal and Civil Jurisdiction – General Pinochet before the English Courts*

When an attempt was made to exercise universal jurisdiction over General Pinochet, the English courts were called to consider whether he was entitled to immunity from criminal prosecution for acts of torture allegedly committed during his reign as leader of Chile. The House of Lords eventually decided that he was not.⁶⁷

Considerations of article 5(2) of the CAT, which requires signatories to exercise universal criminal jurisdiction over alleged torturers, were certainly prominent in the judgments in *Pinochet*. In *Jones*, Lord Bingham considered the ratio of *Pinochet* to be that immunity was not available to General Pinochet because it would be absurd to grant immunity in circumstances where the CAT, by the operation of article 5(2), would *require* criminal jurisdiction to be exercised.⁶⁸ Owing to this intimate relationship between article 5(2) and the conclusions of the various judgments in that case, Lord Bingham distinguished *Pinochet* from *Jones*, restricting its application to criminal jurisdiction, as no such extraterritorial

64 *Jones* [2007] 1 AC 270 at 282.

65 ‘[T]he ultimate test of what constitutes an act *jure imperii* is whether the act in question is of its own character a governmental act... It follows that, in the case of acts done by a separate entity, it is not enough that the entity should have acted on the directions of the state, because such an act need not possess the character of a governmental act. To attract immunity... what is done by the separate entity must be something which possesses that character’: *Kuwait Airways v Iraqi Airways* [1995] 1 WLR 1147 at 1160 (Lord Goff).

66 *Jones* [2005] 1 QB 699 at 742 (Mance LJ); compare the dictum of Lord Millett in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 at 273, with which Mance LJ expressly disagreed.

67 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 (‘*Pinochet*’).

68 *Jones* [2007] 1 AC 270 at 286.

jurisdiction could be required under article 14 of the CAT.⁶⁹ Lord Hoffmann reached the same conclusion, albeit more forcefully. He rejected the argument that acts constituting a contravention of a *ius cogens* norm cannot attract *immunity ratione materiae*. Rather, the decision in *Pinochet* was arrived at

not because [General Pinochet] 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 [through article 5(2) of the CAT] had removed the immunity.⁷⁰

Critical to the above conclusions of both Lords Bingham and Hoffmann was the idea that by necessary implication, torture must be capable of constituting an official act, as this is the character of the act required to bring it within the scope of the CAT in the first place.⁷¹ However, as articulated above,⁷² this reasoning involves a critical confusion between the *character* of an act of torture, and the *context* or, to use the language of the CAT, the *capacity* in which it is committed.⁷³

The interpretation of the majority position in *Pinochet* proposed by the Court of Appeal in *Jones* was quite different to that proposed by the House of Lords. Lord Phillips MR felt that the connection between the denial of immunity and article 5(2) of the CAT could be overstated. He felt that, rather than immunity being necessarily removed by operation of article 5(2), the judgments in *Pinochet* indicated that it is impossible to assert *immunity ratione materiae* in relation to criminal proceedings for a breach of a *ius cogens* norm in the first place, because such acts could never constitute official acts. Furthermore:

[t]his does not merely apply to those states who are party to the Torture Convention. The Torture Convention reflects the position under public international law.⁷⁴

The analysis of the *Pinochet* decision by Lord Phillips MR is most persuasive and his conclusions are critical. They provide justification for denying immunity *apart* from the CAT,⁷⁵ and therefore weaken the insistence of the House of Lords in *Jones*, that *Pinochet* ought to be quarantined to cases involving the exercise of criminal jurisdiction.⁷⁶

69 *Jones* [2007] 1 AC 270 at 286; ‘There is nothing in the Torture Convention which creates an exception to state immunity in civil proceedings’: *Jones* [2007] 1 AC 270 at 293 (Lord Hoffmann). For an analysis of the House of Lords’ approach to article 14, see above at Part 4(B), ‘Universal Jurisdiction’.

70 *Jones* [2007] 1 AC 270 at 302.

71 *Jones* [2007] 1 AC 270 at 286 and 302.

72 See above Part 4(C), ‘The “Cloak” of State Immunity’.

73 *Jones* [2005] 1 QB 699 at 742.

74 *Jones* [2005] 1 QB 699 at 758 (Lord Phillips MR); see also *Jones* [2005] 1 QB 699 at 732 (Mance LJ).

75 This is certainly a position which sits more comfortably with *Arrest Warrant*, where it was decided that certain acts in breach of *ius cogens* could not constitute government acts owing to the preemptory status of *ius cogens* norms. Why such logic should not apply to the *ius cogens* prohibition on torture, irrespective of the ambiguities associated with art 14 of the CAT, is not altogether clear.

It is quite anomalous for immunity to be denied in criminal actions alleging torture, but for it to be maintained in civil actions concerned with the very same activity. As Lord Phillips MR recognised, it is absurd to conclude that a court is obliged to grant immunity in civil actions alleging conduct which states have outlawed, both within the CAT and customary international law; it is for this very reason that torture cannot reasonably be considered to fall within the scope of state actions.⁷⁷ Lord Browne-Wilkinson made the following observation in *Pinochet*:

How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?⁷⁸

The provision of civil remedies is crucial when one considers that the overarching intention of the CAT is to prevent ‘official’ torture and to hold its transgressors accountable.⁷⁹ Moreover, to recognise the compensatory effect of the CAT in favour of victims is consistent with the growing prominence of the individual, as opposed to the state, in international law.⁸⁰

One argument made by the House of Lords against denying immunity to state agents for acts of torture is that the state, even though itself possessing *immunity ratione personae*, would nevertheless be indirectly impleaded through its agents.⁸¹ However, the state would be indirectly impleaded no more than it would be in a criminal action, where, the House of Lords conceded, there would be no immunity. Furthermore, a state may not necessarily be indirectly impleaded, for it is entirely a matter for the state whether they should choose to indemnify their agent or not.⁸² The House of Lords also failed to recognise that in many states, the demarcation between civil and criminal jurisdiction is not always clear. Even within the common law world, there is some cross-over between criminal law and the law of tort.⁸³

9. Conclusion

A. A Torturer’s Manifesto?

The decision of the House of Lords in *Jones* is certainly a blow for those advocating greater accountability of both states and individuals for heinous abuses of human rights. Kaufman J quipped in *Filartiga v Pena-Irala* that ‘for the purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis generis*, an enemy of all mankind’.⁸⁴ This is recognised by the prohibition on torture attracting the status of *ius cogens*.

76 Only three of the seven judges in *Pinochet (No 3)* expressed the view that immunity may be maintained in the civil jurisdiction, one of whom was Lord Phillips, who changed his mind in *Jones*: [2005] 1 QB 699 at 734.

77 *Jones* [2005] 1 QB 699 at 758.

78 *Pinochet* [2000] 1 AC 147 at 205.

79 *Jones* [2005] 1 QB 699 at 742.

80 Jürgen Bröhmer, *State Immunity and the Violation of Human Rights* (1997) at 143.

81 *Jones* [2007] 1 AC 270 at 290.

82 *Jones* [2005] 1 QB 699 at 744.

83 Francis Trindade, Peter Cane & Mark Lunney, *The Law of Torts in Australia* (4th ed, 2007) at 6-7.

84 *Filartiga v Pena-Irala* 630 Fed Rep 2d 876 (1980) (US Court of Appeals) at 890.

Nevertheless, this prohibition is dealt with in *Jones* in a way which is completely incongruous with its status atop the normative pyramid of international law. The reasons the court gives for granting state immunity, especially in the case of the state agents, are spurious, and the decision leaves the complainants in *Jones* with only one option: to pursue their claim in the Kingdom. The suggestion that such an action might be pursued is as farcical as its prospects of success are remote. It is almost invariably going to be a fact of the matter that there will not be a judicial remedy available in a foreign state where 'official' torture has been committed. For that reason, in practice, *Jones* goes a long way to granting de facto impunity to official torturers through the immunity extended to them.

It is submitted that the decision of the Court of Appeal in *Jones*, although perhaps not flawless itself, is a more cogent one than that of the House of Lords, especially with respect to the immunity of state agents. The protection of fundamental human rights has been at the forefront of the development of international law in recent decades, and the law of foreign state immunity should reflect this fact.⁸⁵ Human rights belong to the individual, and to effectively deny an individual civil redress for acts of torture, is to work contrary to those rights.

10. *Australia and the Foreign States Immunities Act 1986 (Cth)*

As previously noted, the FSIA is substantially similar to the SIA, and in all respects relevant to the decision in *Jones*, identical. For this reason, the case has high precedential value for Australian courts. Whether Australian courts choose to follow the decision remains to be seen. However, the Supreme Court of New South Wales will soon get the chance in the case of *Zhang v Zemin*.⁸⁶ That case is a civil action for, inter alia, damages resulting from alleged torture by government officials in the People's Republic of China. The case is still in its preliminary stages, and the issue of state immunity, although flagged, is yet to be adjudicated upon. It will be most interesting to see whether the court chooses to follow the House of Lords in *Jones*. Given the serious flaws in that decision, however, it cannot be assumed that it will.

⁸⁵ Bröhmer, above n80 at 143-144.

⁸⁶ *Zhang v Zemin and another* [2007] NSWSC 229, see specifically at [22].