

Reparation for torture?

Considering the impact of the decision of the UK House of Lords in Jones v Saudi Arabia¹

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Introduction

John Pugh (Southport) (LD): “Now that Ron Jones and others have lost the right to sue Saudi officials for torture, what meaningful legal redress is there for any Briton tortured abroad in the light of the Law Lords’ ruling?”

Tony Blair (Prime Minister): “May I point out to the hon. gentleman that we intervened in this case in order to ensure that the rules of international law and state immunity are fully and accurately presented and upheld? That is important for us as a country and for others. But our strong position against torture remains unchanged: we utterly condemn it in every set of circumstances.”²

Governments continue to steadfastly condemn the heinous practice of torture and courts have followed suit. In the landmark decision named *A (FC) and others v. Secretary of State for the Home Department before the UK House of Lords*, Lord Bingham of Cornhill noted that “there can be few issues on which international legal opinion is more

clear than on the condemnation of torture.”³ What is less clear, as is evidenced by the House of Lords’ later regrettable ruling in *Jones et al. v. Saudi Arabia*,⁴ is the practical import of this universal condemnation as regards survivors’ ability to assert their right to effective and enforceable remedies against

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1) This paper benefits in large part from an international study prepared by Lorna McGregor for REDRESS, entitled: IMMUNITY v. ACCOUNTABILITY: Considering the Relationship between State Immunity and Accountability For Torture and Other Serious International Crimes (December 2005) and REDRESS, Amnesty International, Interights and Justice’s’ third party intervention before the UK House of Lords in the case of *Jones v. Minister of Interior Al-Mamlaka Al-Arabiya AS Saudiya* (the Kingdom of Saudi Arabia); *Mitchell and others v. Al-Dali and others and the Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* (the Kingdom of Saudi Arabia) [2006] UKHL 26.

2) Prime Minister’s Question Time, 10 Downing Street, 14 June 2006.

3) *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* (2004) *A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent)* (Conjoined Appeals) (2005) UKHL 71, at para. 33.

4) *Supra*, n. 1, [2006]UKHL 26.

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their abusers. Torture can be condemned, but if it is not adequately redressed, have we devalued the absolute prohibition of torture of all meaning? As was indicated by the solicitor of Mr. Mitchell, Mr. Sampson and Mr. Walker at the time of the handing down of the ruling on 14 June 2006, “The House of Lords have chosen to support the rights of states, including those who torture, over the rights of torture victims.”⁵

Effective and enforceable remedies for torture, be they criminal sanctions, civil awards for restitution and compensation, administrative sanctions or other guarantees of non-repetition, are an essential precondition to the eradication of the odious ill that is torture once and for all. Equally, such measures serve to quell survivors’ feelings of powerlessness and disenfranchisement and acknowledge that what was done to them was wrong and deserving of punishment.

Ideally, reparations claims proceed in the location where the torture occurred. Yet torture by its very nature can be state-sanctioned and is often allowed to thrive in an environment where the rule of law and the independence of the judiciary is markedly absent. This may render illusory national prospects for accountability and redress. The significant barriers facing survivors who wish to access justice in the location in which the torture took place, coupled with few opportunities to bring a case at the international level, often makes the national courts of other states the only other prospect for some measure of justice.

The *Jones et al. v. Saudi Arabia* case, which involves four British torture survivors’ search for justice, has inspired legal pundits and great controversy, yet at its heart is the

experiences of four individuals: Scottish tax accountant Ron Jones, anesthetist Alexander Mitchell, marketing consultant Dr. William Sampson, and housing and compound manager Leslie Walker. All of these individuals were long-time residents in Saudi Arabia, but were people in the wrong place at the wrong time, as they were caught up in the Saudi Government’s campaign to defuse attention after a spate of bomb attacks in Riyadh. All of the victims allege that they were regularly subjected to torture during their time in prison and all have complained of ongoing psychological and physical damage as a result of the torture.

Ron Jones was rushed to hospital after being injured by a bomb attack and was later taken away by the Saudi secret police still wearing his hospital gown. He alleges that he was kept in solitary confinement, shackled, repeatedly beaten on the soles of the feet and hung from a bracket. He was released 67 days later without any charge or any legitimate reason being given for his detention. Mitchell, Sampson and Walker were kept in solitary confinement for more than two and a half years. The stress and abuse led to their televised confessions to the bombings and to acting as spies under orders from the British Government, and ultimately to their closed court conviction without legal representation at first instance. Death sentences by Al Haad (partial-beheading and strained suspension on an X-frame) were issued against Mitchell and Sampson and an 18 year sentence was issued for Walker. They were eventually released on an order of clemency after more than 900 days of captivity.

It remains impossible for any of these survivors to access justice in Saudi Arabia, and indeed there has been a complete failure on the part of the Saudi Government to institute any official investigation at all, despite

5) Statement of Tamsin Allen of Bindmans & co., 14 June 2006.

the clear and convincing evidence of torture. Consequently, claims were lodged in UK courts for damages including aggravated and exemplary damages for assault and battery, trespass to the person, torture and unlawful imprisonment against the Saudi officials said to be responsible for the torture, and the Saudi Ministry of the Interior, the principal Government agency responsible for the treatment of prisoners and detainees.

The Saudi Government asserted that it and its officials were immune from civil suit in the United Kingdom on the basis of the UK State Immunity Act, which exempts states from the jurisdiction of UK courts aside from enumerated exceptions. The UK Government (Secretary of State for Constitutional Affairs) intervened in support of the Saudi case, to argue that foreign states and their officials should be entitled to immunity in this case, notwithstanding that what is at stake is the torture of British nationals. After a series of twists and turns, the UK House of Lords decided on 14 June 2006 that immunities blocked the claims against the Saudi State and the individual officials involved.

The absolute prohibition against torture

Torture has been recognized as one of the worst human rights violations in which all states have a duty under international law to take all possible steps to prevent, punish and afford effective remedies and reparation to victims. The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment⁶

recognizes in Article 5(2) that “Each State Party shall ... take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him ...”.

Equally, the prohibition of torture has been accorded the highest status under international law. As was stated by the International Criminal Tribunal for the former Yugoslavia in the *Furundzija* judgment,

“... because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or *jus cogens*, that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules ... Clearly the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.”⁷

The obligation of states to afford a civil remedy to victims of torture, irrespective of where the torture took place, has been subject to much debate. Article 14 of the Convention against Torture specifies that each State party must “ensure in its legal system that the victim of an act of torture obtains

6) 1984, G.A. res.39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force 26 June 1987.

7) *Prosecutor v. Furundzija*, Case. No. IT-95-

17/1-T (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Territory of Former Yugoslavia since 1991, Dec. 10, 1998) at paras. 153-4.

redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.” This right to reparation is reinforced by the recent adoption of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.⁸ Yet the extent to which Article 14 extends to torture perpetrated outside of the State called upon to exercise jurisdiction has been controversial. In *Bouzari v. the Islamic Republic of Iran*, the Ontario Court of Appeal found that the text of the Convention Against Torture “does not provide clear guidance” on the territorial reach of Article 14(1),⁹ and this lack of clarity on the scope of Article 14 led it to find in favour of the clear rule of state immunity, enshrined by its domestic state immunity act.

The United Nations Committee against Torture, the official interpretive body of the UN Convention against Torture, had occasion to comment on the scope of Article 14(1) of the Convention in its review of Canada’s State party report, which was considered shortly after the Ontario Court of Appeal decided the *Bouzari* appeal. The Committee against Torture criticised, “the absence of effective measures to provide civil compensation to victims of torture in all cases” and recommended that Canada, “review its position under article 14 of the

Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture.”¹⁰ The English Court of Appeal in *Jones et al v Saudi Arabia* opined that:

“One possible interpretation of article 14(1) is certainly that it is only concerned to ensure a right of redress in the state where an act of torture is committed. The civil redress required under article 14(1) would on that basis mirror the criminal jurisdiction required to be introduced under article 5(1). But, since torture is by definition an act 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, it would seem curious if each state were not required to ensure a civil right of redress in respect of torture committed abroad by one of its officers – paralleling the criminal jurisdiction required under article 5(1)(b) in each state in respect of an alleged offender who is a national of that state.”¹¹

The English Court of Appeal made the distinction between claims against the State and against the individual officials involved, holding that Article 14(1) was at least obliging States parties to afford remedies against the latter category, irrespective of where the torture occurred. Lord Hoffmann, a member of the UK House of Lords committee which unanimously overturned the decision of the English Court of Appeal in *Jones et*

8) C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (19 April 2005).

9) *Bouzari v. Iran (Islamic Republic) Ont. C.A.* (2004), at paras. 68–95.

10) Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Conclusions and Recom-

mendations of the Committee against Torture, 34th Session (May 2005), CAT/C/CO/34/CAN at paras. C (4)(g) and D(5)(f).

11) *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya (The Kingdom of Saudi) and another Mitchell and others v. Al-Dali and others* [2004] All ER (D) 418 (Oct.), at para 20.

al. v. Saudi Arabia, noted somewhat gratuitously in respect of the Committee against Torture's findings and recommendations in relation to Canada that "as an interpretation of article 14 or a statement of international law, I regard it as having no value."¹²

The House of Lords decided that there is no evidence that states have recognised or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law, nor is there any consensus of judicial and learned opinion that they should. In other words, whilst they recognize the existence of the prohibition against torture as a peremptory norm, they were not prepared to go so far as to recognize the tools to give it practical effect. Since the rule on immunity is well understood and established, and no relevant exception is generally accepted, the rule prevails.¹³

State immunity

The principle of state immunity – that states cannot be subjected to the judicial processes of other states – prevents a state being made a party to proceedings in the courts of a foreign state and will protect its property from being seized to satisfy a judgment. The principle is premised on the equal sovereignty and dignity of states and is designed to protect the conduct of foreign relations. Yet over time, this once absolute doctrine has evolved to recognize a number of exceptions, including waiver of immunity, the commercial activities exception, and civil proceedings arising from death or personal injury occurring within the forum State. A more modern and

restrictive understand of the principle recognizes that immunity will only be accorded for acts carried out by a state in the exercise of its sovereign authority (as opposed to purely commercial or private transactions).

When considering the relationship between state immunity and civil proceedings for torture occurring outside the forum state, a question arises as to whether torture can properly be characterised as a sovereign act of the State to which immunity would apply. While there may be a limited category of officials (an acting head of state or a foreign minister) who might be entitled to a form of immunity on the basis of their status whilst they remain in office, this differs from any immunity which might appropriately be accorded to a State, which relates only to those acts that can properly be considered to be within the sphere of government or sovereign authority. The act of committing torture – a clear violation of international law – cannot be considered to be a legitimate exercise of authority.

In the Pinochet case, Lord Browne-Wilkinson determined that torture could not be considered to be a state function,¹⁴ which would merit function immunity. To him, the idea of affording immunity *ratione materiae*, or immunity that relates to acts carried out as a state function was nonsensical in torture cases given the definition of torture which requires some level of involvement or acquiescence of state officials; if one could consider torture as qualifying as an official act then it would undermine the entire regime of the torture convention designed to ensure accountability for torture. The claimants' in *Jones et al* argued that for the aforementioned reasons, torture

12) *Supra.*, n. 1 at para. 57.

13) *Ibid.*, at para. 27.

14) *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No. 3)*, [1999] 2 All ER 97 at 114-115.

by a state official (or other person acting in a public capacity) cannot be regarded as a function of such an official or person; and that consequently, the state cannot claim state immunity in respect of an official or other agent committing such torture. This reasoning was adopted by the minority of the Grand Chamber in *Al-Adsani v United Kingdom*.¹⁵ The House of Lords, however, picked up on the anomaly of requiring some involvement of torture to satisfy the definition of torture – the essence of torture is its “officialness”, whilst at the same time arguing that there can be no functional immunity for torture:

“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. ... 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.”¹⁶

By distinguishing criminal torture proceedings (to which no immunity *ratione materiae*

applied because international law removed the immunity) and civil claims for damages in torture cases, in which an international law rule removing immunity was not deemed to have been clearly established, the House of Lords concluded that immunity in the latter case remained.

Several cases which have considered the relationship between State immunity and *jus cogens* norms have examined whether extra-territorial tort claims fit within the enumerated exceptions of national immunity legislation, and from a straight reading of the usual enumerating exceptions (commercial transactions, tort in the forum state...), torture occurring outside the forum clearly falls outside. In *Al Adsani v. Kuwait*,¹⁷ the applicant sought to show that part of the tort continued on UK soil; in *Bouzari v. Iran (Islamic Republic)*, the applicant sought to fit the claim within the commercial exception, given the allegation that the basis for the torture related to pressure for business gain.¹⁸ In both cases, the respective courts rejected these attempts to come within the enumerated exceptions. The claimants further argued that even if they could not fit their factual circumstances into the enumerated exceptions, there was an implied exception to state immunity in relation to *jus cogens* violations: by committing or fostering torture the states in question have impliedly waived their immunity. Whilst this argument had met with some success in a decision of the Greek Supreme Court,¹⁹ the

15) (2001) 34 EHRR 273.

16) *Supra.*, n. 1 at paras. 81 and 83.

17) *Al-Adsani v. Government of Kuwait and Others*, CA 12 March 1996; 107 ILR 536.

18) *Bouzari v. Iran (Islamic Republic) Ont. C.A.* (2004).

19) *Prefecture of Voiotia v. Federal Republic of Germany*. Case. No. 137/1997. The facts of this case are described in *Ilias Bantekas*, Case report: *Prefecture of Voiotia v. FRG*, 92 *Amer. J. Int'l L.* 765 (1998); *Maria Gavouneli*, War reparation claims and state immunity, 50 *Revue hellénique de droit international* 595 (1997). Whilst the case succeeded at the jurisdiction phase, in a separate decision, immunity was held to operate as a bar at the enforcement phase.

UK and Canadian courts did not concur, and found the respective national immunity legislation to constitute comprehensive codes. The implied waiver theory was flatly rejected by the UK House of Lords in *Jones v. Saudi Arabia*.²⁰

Another strong feature of the jurisprudence in the argument that when two different norms conflict, the hierarchically higher norm should prevail. By implication, *jus cogens* norms such as the prohibition of torture should trump the principle of state immunity, which though recognized as an international law principle, is a procedural rule of lower status. This was the position taken in *Pinochet* in respect of criminal cases, though the European Court of Human Rights in *Al Adsani*, followed by the Ontario Court of Appeal in *Bouzari* and the House of Lords in *Jones et al.*, distinguished civil and criminal cases, and determined that no similar rule of international law had emerged with respect to the immunity of States in the context of civil proceedings.²¹ The House of Lords in *Jones et al.* followed the *Al Adsani* line of cases in rejecting the hierarchy of norms argument, however its sphere of argumentation is probably one of the most worrying aspects of the judgment. The House of Lords recognizes the *jus cogens* nature of the prohibition against torture yet reads in no obligation to ensure the practical effectiveness of the prohibition in practice. Lord Hoffmann notes at para. 44 of the judgment as follows:

20) *Supra.*, n. 1 at paras. 38 – 63.

21) The contrary position was taken by the Italian Supreme Court in *Ferrini v. Federal Republic of Germany* (Cass Sez Un 5044/04), the 8-9 dissent in the Grand Chamber in *Al Adsani v. the United Kingdom*, 35763/97, ECHR 2001^11, 79, at 111 et seq.: which opined: “It is not the nature of the

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.”

The right of access to court

In *Al-Adsani v. the United Kingdom*, the Grand Chamber recognized that the right of access to justice was called into question by the grant of immunity from extraterritorial civil suit in torture cases. While the Chamber indicated that this was not an absolute right, it did not enter into detail about the rights to be balanced to determine whether the restriction of the right of access to court was legitimate and proportionate. In its judgment of 28 October 2004, the UK Court of Appeal held in *Jones et al. v. Saudi Arabia* that blanket subject matter immunity (*immunity rationae materiae*) for State officials (as opposed to the State itself) in torture

proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule. The prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere.”

cases would deprive the right of access to a court under Article 6 of the European Convention of Human Rights of real meaning in a case where the victims of torture have no prospect of recourse in the state whose officials committed the torture. The Court of Appeal was able to distinguish the Grand Chamber's decision in *Al-Adsani* which had only considered the immunity of the State.

The House of Lords in *Jones et al. v. Saudi Arabia*, however, disagreed with the conclusion of the Court of Appeal. Its view was that upholding state immunity, which is an accepted norm of international law, would only breach Article 6 if it was disproportionate, and that the provision of state immunity in relation to a civil action which alleged torture was not so disproportionate as to amount to a breach of Article 6.

The representative of the UK Secretary of State in his oral arguments before the House of Lords noted, in relation to the proportionality test, that there were other possibilities for the survivors to satisfy their claims, inferring to the potential for the UK Government to espouse the claim on behalf of its nationals. Yet, the likelihood of espousal is minimal, given that the decision to espouse is at the discretion of the Government and it has shown little genuine interest in the survivors' claims to date.

Conclusions

The righteous abhorrence that governments publicly extol for the practice of torture is exceedingly difficult to rationalise with their seeming disinterest and disaffection for torture survivors: their rights, their needs, their futures. The principle of immunity was designed to protect foreign relations and the dignity of states, yet the decision of the House of Lords in *Jones et al. v. Saudi Arabia* causes one to pause and to ask – Whose dignity are we interested in protecting? That

of the torturers, responsible in this case for torturing nationals of the forum state? There is no dignity in that.