The International Law of State Immunity: An Exception for Torture?

by

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Abstract

The absence of an international provision, governing State immunity in civil cases based on the extra-territorial torture, has made the issue a disputed area in the law of State immunity. In recent years, national courts mostly ruled in favor of State immunity and denied to hear claims of torture victims. Although being compatible with States preference not to be prosecuted before foreign courts, this norm would accord the States the effective freedom to avoid accountability for torture. In the unlikely emergence of a new State practice, the only possible way to move the practice in a direction that is responsive to States’ obligation in international law would be to adopt an exception to the United Nations Convention on Jurisdictional Immunities of States and Their Property that expressly drops States immunity in cases of torture.
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1 Introduction

Judicial scrutiny in the decisions of national and international courts shows that, throughout the years, different approaches have been taken on whether victims of torture must be allowed to raise civil claims before national courts of States other than the perpetrator State to recover damages for their sufferings. The absence of an international provision, governing State immunity, when victims of torture sue the perpetrator State before courts of other States, has made the issue a disputed area in the law of State immunity. In recent years, however, national courts mostly ruled in favor of foreign State immunity and denied to hear claims of extra-territorial tortures. Nonetheless, Several political considerations, in my belief, have made it difficult for States to decide without prejudice. From the foreign policy perspective, prosecuting a State before national courts of another State may lead to the deterioration of diplomatic relations between the two States. States are worried that, by rejecting immunity in cases of torture, they would be treated similarly by the perpetrator State. Moreover, the forum State may have the perception that by allowing individuals to seek reparation before its courts, it would confront with floods of litigation from the torture victims around the world. Although a safe haven for all torture victims where they can be heard is ideal for human rights advocates, States won’t like their courts to become tribunals for human rights claims against the foreign States. The recent practice of States shows that courts, being influenced by the mentioned political concerns, have largely, and at times blindly, followed the previous rulings of national and international courts who upheld immunity in cases of extra-territorial torture. Specific attention, thus, should be given to the judicial reasoning of courts, based on which immunity was granted, to see whether decisions are also legally, and not merely politically, justified: are they compatible with the principles and concepts of contemporary international law including the responsibilities of States to condemn acts of torture, and their obligations under the Convention Against Torture1 as well as other human rights conventions to provide victims of torture with reparations.

1 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984,
In Part II of this paper, the compatibility of national courts’ decisions with international law in several important cases, having been used as leading cases in the field, is evaluated. Given that examination of the judicial practice of all States is virtually impossible, the most influential decisions within US, UK and Canada case laws are examined. Under Part III, similar analysis is conducted on the decision of the International Court of Justice on Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) and two of the most controversial decisions of the European Court of Human Rights on the issue of State immunity and torture: Al-Adsani and Jones. The ICJ in Jurisdictional immunities of the State decided that Italy had violated its obligation to respect Germany’s immunity under international law, by allowing civil claims to be brought against Germany based on war crimes committed by its military forces during the Second World War. Similarly, the ECtHR, notwithstanding the significant dissent opinions, ruled in favor of the decisions of the British courts upholding immunity in both cases. While there is no formal hierarchy between international institutions, ICJ jurisprudence, in practice, is given considerable weight by other judicial bodies, specifically when its decision is compatible with States political concerns such as their tendency to keep a friendly relationship with the perpetrator State. Accordingly, although rejection of civil claims raised by victims of extra-territorial torture on State immunity grounds is not in line with obligations of States under international law, after the ICJ decision, being affirmed by the ECtHR in its 2014 decision in Jones, it is unlikely that courts depart from this trend in future cases.

In the Forth Part, I examine the provisions of the UN Convention on Jurisdictional Immunities of States and Their Properties and its drafting history to examine whether any references have been made to acts of torture or other human rights violation of peremptory nature. The United Nations International Law Commission (ILC), being asked by the General

1465 UNTS 85 (entered into force 26 June 1987). [CAT]


Assembly (GA) to look into the issue of State immunity, established a Working Group to prepare draft of the *UN Convention* in 1999. Although the Working Group repeatedly drew the Committees’ attention to the developments in States practice relating to the issue of immunity and *jus cogens* ⁴ in civil claims brought before their courts, ⁵ it failed to address the status of immunity in the specific cases of torture during the drafting process. According to the Working Group, the interaction between immunity and *jus cogens* norms, although of “current interest”, did not seem to be “ripe enough for the Working Group to engage in a codification exercise over it”. ⁶ Hence, the final product of this Committee, the *UN Convention*, does not contain any provision with regard to State immunity when the alleged act is torture. The drafting history of this Convention demonstrates that despite the exception to immunity for torts committed within the forum State, no serious consideration was given to determine whether immunity should be granted when torture is committed outside the forum State. Surprisingly, notwithstanding the growing recognition of the importance of the prohibition of torture, in the framework of contemporary international law, no specific provision has yet addressed the issue of State immunity with respect to claims for damages alleged from the act of torture committed abroad.

The danger is that, in the unlikely emergence of a new State practice, and in the absence of an international treaty law on the issue, rulings of courts in favor of immunity would be determinative of the issue. Further, if this practice is supported by *opinio juris* it will lead to a

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⁴ *Jus cogens* are peremptory norms of international law from which no derogation is allowed and can only be set aside by another norm of *jus cogen* nature. It has been recognized under Article 53 of the Vienna Convention on the Law of Treaties. There is not a consensus over the exact number of *jus cogens* norms, however the *jus cogens* character of the prohibition of torture has been internationally accepted. To see the definition of peremptory norms of international law see: *Vienna Convention on the Law of Treaties*, UN Conference on the Law of Treaties, 1st and 2nd Sess, UN Doc. A/CONF.39/27 (1969), (enter into force 27 January 1980), Article 53, online: <http://www.refworld.org/docid/3ae6b3a10.html>.


customary international law, making State immunity a permanent obstacle for victims to seek reparations before the courts of other States on the basis of extra-territorial torture. Such customary international law, although compatible with States preference not to be prosecuted before foreign courts, would accord the States the effective freedom to avoid accountability for a crime such as torture. Upholding the perpetrator’s immunity in the cases of torture instead of following immunity’s actual purpose, which is to maintain comity and friendly relations among States, would imply the impunity of States from civil accountability for torture. Moreover, such a practice is at odds with internationally recognized rights of victims such as the right to obtain remedies and to access a fair trial.

Finally, I argue that it is time for the ILC to engage in a codification exercise over the issue of State immunity and torture. Considering the current practices of States, I see State immunity as a barrier to the enforcement of rights of those who have been subject to torture. Given the current international law of State immunity, it seems that the only possible way to move the practice in a direction that is responsive to States’ obligation under the contemporary concepts of international law, would be to adopt an exception to the UN Convention that expressly drops States immunity in civil cases based on torture, regardless of where they were committed. Otherwise, one would not be certain as to whether future victims of torture will have recourse to a fair trial and whether perpetrators of torture will ever be accountable for the atrocities they have committed.
2 Judicial Practice of States: State Immunity and Torture

Any study of international law of State immunities cannot fail to take into account the judicial practice of States. It’s only been a decade since the sovereign immunity has been internationally codified under the *UN Convention*. Hence, the current law of State immunity has been developed primarily from judicial decisions on the field. In the absence of treaty law to determine the status of State immunity in the cases of torture, the judicial practice of States, the rulings of international courts and the scholarly opinions are the only sources from which courts could determine weather immunity should be upheld in cases of torture. According to the report of the special reporter, Sompong Sucharitkul, on the topic of immunities of States, there are difficulties and obstacles encountered in an effort to find uniform rules of international practice on State immunity. The main difficulty may be said to result from “the diversity of legal procedures and the divergency of judicial practice, which varies from system to system and from time to time”. These diversions may be partially due to the fact that legal decisions on State immunity yield to foreign policy considerations so as to maintain friendly relations with the perpetrator State.

Several notable judicial decisions have been used as precedents in the decisions of other national courts on the issue of State immunity and torture. Therefore, in an effort to explore how domestic courts have dealt with the issue and which trends can be expected in the future in light of current case laws, relevant cases should be analyzed.

In this Part, I examine the judicial rulings of national courts in the US, UK and Canada case laws, which remain famous for their dealings with State immunity and torture. I show that decisions in the majority of these cases are in favor of granting immunity to the perpetrator State and its officials, however they are mostly influenced by foreign policy interests of the forum.

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State and are subject to considerable dissent opinions. I argue that the judicial reasoning being advanced by courts to reject civil claims of extra-territorial torture victims are not compatible with international legal norms and that the concept of sovereign immunity should be interpreted and implemented in accordance with the wider concerns of international law including human rights concerns, *jus cogens* norms and *erga omnes* obligations. To grant immunity to the violators of the *jus cogens* norm of prohibition of torture is in fact to rely on the traditional concept of absolute immunity which accords the perpetrator the effective freedom to avoid accountability for a heinous crime such as torture, while advancing a rhetorical commitment to its prohibition in the modern international law.\(^8\) The purpose of this Part is to demonstrate that the absence of explicit international provision determinative of the issue has inclined decision makers in the US, UK and Canada to follow the same path, although inconsistent with their obligations under the international human rights law. The following is an examination of States practice and relevant notable judicial decisions from the courts of the US, UK and Canada.

### 2.1 US Case Law

The United States is among a few countries that have national legislations on the law of State immunity. Accordingly, the US practice is based on its relevant national legislation rather than being limited to the international law of State immunity. Nevertheless, in the absence of specific rule in the *UN Convention*, States have referred to rulings of other State including the US courts to deal with civil claims based on extra-territorial torture. Therefore, developments in the US law of State immunity regarding torture claims are relevant and influential to the practice of other States. The principle statute is the *US Foreign Sovereign Immunities Act*, which creates a presumption of immunity for foreign States unless the claim is subject to one of the exceptions listed in Section 1605(a). The practice of US courts shows that the debate surrounding the possible denial of State immunity in cases of torture has developed either around the issue of waiver of immunity or around efforts to bring the case under one of the listed exceptions under the *FSIA*.\(^9\)

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\(^9\) Michele Potesta, “Sate Immunity and Jus Cogens Violations: The Alien Tort Statute Against the
One of the exceptions, under the *FSIA*, is the personal injury exception which has a particular relevance to torture claims. 10 It concerns personal injury or death occurring within the forum State, for the purpose of the *FSIA*, injuries occurring within US territories. This territorial nexus has proven to be a great obstacle for victims of extra-territorial torture suing perpetrator States before the US courts. Although the acts of torture performed by a foreign government in the US would fall under this exception, given the international recognition of the prohibition of torture, it is unlikely that such practices occur in the territory of a foreign State. 11 Another exception to immunity, under the *FSIA*, concerns the case when foreign State has, either implicitly or explicitly, waived its immunity. 12 Victims of torture have tried to argue against immunity based on the assumption that the perpetrator State, by engaging in acts of torture, has violated a norm of *jus cogens* status, and therefore has implicitly waived its immunity. 13 This argument has rested on the universal recognition of the prohibition of torture as a *jus cogens* norm “from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. 14

The first case precisely considering the relationship between *jus cogens* and sovereign

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10 *Foreign State Immunity Act*, 1976, 28 U.S. Code, C 97, s 1605 (a)(5). [*FSIA*]

11 One of the few cases in which US courts denied foreign State immunity under the personal injury exception were *De Letelier v Republic of Chile*, 488 F Supp 665 (DDC 1980); and *Alicog v Saudi Arabia*, 860 F Supp 379 (SD Tex 1994).

12 *FSIA*, *supra* note 10, s 1605(a)(1):

Foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the foreign State has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign State may purport to effect except in accordance with the terms of the waiver.


immunity in the US courts was *Siderman De Blake v. Argentina* in 1992. 15 In *Siderman*, an action was brought before the US courts against Argentina for torture committed by Argentine military personnel in Argentina. Despite the *jus cogens* character of the allegation, it was not deemed sufficient for the court to confer jurisdiction under the *FSIA*. The Ninth Circuit followed the Supreme Court’s decision in *Amerada Hess*, which held that foreign States enjoy immunity unless the claim comes under one of the exceptions in the *FSIA*. 16 It found that the *FSIA* did not “specifically provide for an exception to sovereign immunity based on *jus cogens*” and that “If violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so”. 17 Along the same line as *Siderman*, the court in *Princz v. Federal Republic of Germany*, 18 did not accept the implied waiver theory of immunity based on violation of *jus cogens*. Hugo Princz sought damages from Germany for his internment at Auschwitz and the slave labour that he provided. The court upholding Germany’s immunity stated: “something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims…”. 19 The dissent argued that by engaging in violation of *jus cogens* norms, Germany had implicitly waived its immunity and due to the superior position enjoyed by these norms, which sits atop the hierarchy of international law, immunity should be denied. 20 However, this argument has was not successful in the practice of US courts on the grounds that the implied waiver provision in the statute governing foreign sovereign immunity had to be narrowly construed and required “strong evidence” of the State’s intention to waive its immunity, which could not be satisfied by the act of violation of a *jus cogens* norm alone. 21

15 *Siderman*, Supra note 13.


17 *Siderman*, supra note 13 at para 718.

18 *Princz*, Supra note 13.

19 *Ibid* at 1174, N.1.

20 *Ibid*, dissent opinion of Judge Wald at 1180. To see arguments in favor of *jus cogens* implied waiver immunity see for e.g Adam C. Belsky, Marka Merva and Naomi Roht-Arriaza, “implied waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory norms of International Law” (1989) 77 Cal.L.Rev. 365.

21 See for e. g. *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, (US 7th Cir. 2001)
Arguments have also been made with regards to the implied waiver immunity when States ratify human rights treaties. It has been argued that States, by ratifying a human rights treaty, agree to be bound by the legal standards set forth in the treaty and to provide effective remedy for victims of human rights violations.\footnote{Andrea Bianchi, “Denying State Immunity to Violators of Human Rights” (1994) 45 AJPIL. 227. [Bianchi, “Denying State Immunity”]} Although the US Appellate Court in \textit{Amerada Hess} endorsed this argument, the Supreme Court rejected it when specified that a State would waive its immunity by signing an international agreement only if that agreement would mention a waiver of immunity to suits in the US.\footnote{\textit{Amerada Hess}, supra note 16 at 441-42.} The US Supreme Court has also interpreted the “treaty exception” restrictively to apply only to those treaties which create a private right of action to recover compensation against a foreign State before a US court. After this ruling, one may no longer argue in favor of the US intention to create rights of action against foreign States before its courts from ratification of human rights treaties.\footnote{Ibid.} In any case, the implicit waiver argument, either based on the violation of \textit{jus cogens} or ratification of human rights treaties, does not seem plausible under the \textit{UN Convention}, because in contrast with the \textit{FSIA} which concerns with explicit and implicit waiving of immunity, Article 7 of the \textit{UN Convention} only allows explicit expression of consent to the jurisdiction of foreign State by “international agreement, a written contract or declaration before the court or a written communication in a specific proceeding”.\footnote{\textit{UN Convention}, supra note 3, Article 7.}

Despite constant calls over many years for amendments to the \textit{FSIA} for an inclusion of an exception for human rights violations, what ultimately emerged was the \textit{Antiterrorism and Effective Death Penalty Act} when the \textit{FSIA} has been amended in 1996.\footnote{Richard Garnett, “The Defence of State Immunity for Acts of Torture” (1997) 18 Aust. YBIL 97 at 113. [Garnett]} The \textit{Act} created a new exception to immunity “for personal injury or death that was caused by an act of torture, extra-
judicial killing or provisions of material support or resources for such an act”. However, the scope of this exception was limited to “State sponsor of terrorism”. This Act was re-codified during the 2008 amendments of the FSIA and established “terrorist State exception”. According to “terrorist State exception”, the deprivation of the perpetrator State’s immunity depends on whether that State is a supporter of terrorism for the US government. Although, this provision may give individual victims of torture or other human rights violations an opportunity to seek reparations before the US courts, several conditions should be available to open the US forum to this category of suits. First, the acts on which suit could be brought would be limited to torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support for such an act. Second, the act must be committed by an agent of a foreign State acting within the scope of employment. Third, the defendant State must be designated by the Department of State as a State sponsor of terrorism. Forth, the claimant or victim must be a US national. Finally, the claimant must have offered the foreign State an opportunity to arbitrate the claim. The restriction of this exception to the US nationals as well as the requirement of designation of the defendant State, by the US government, as a terrorist State elaborates a mere political approach to the law of State immunity in the cases of human rights violation. The strength of practice of this exception is weakened by its selectiveness and lack of reciprocity: there is no recognition that current immunity enjoyed by the US might equally be removed for the alleged acts of violation of international law. Outside the scope of this exception, US courts have largely rejected claims that a foreign State should be denied immunity because of its alleged violation of a human rights norm, even if the alleged act enjoys the jus cogens character.

An overall view on the practice of the US courts in this area shows that lower courts have occasionally resorted to a variety of interpretive doctrines in order to avoid granting immunity to

28 FSIA, supra note 10, s 1605A
foreign violators of human rights. In 1993 the Supreme Court in \textit{Saudi Arabia v Nelson},\footnote{\textit{Saudi Arabia v Nelson}, 507 US 349, (1993) at 1480. [\textit{Nelson}]} however outrageous, held that acts of torture are by definition sovereign acts and they entitle the foreign State to immunity. The binding force of the Supreme Court precedent has caused lower courts, although in some cases reluctantly,\footnote{See for e.g \textit{Siderman, supra} note 13 at 718: “when a State violates \textit{jus cogens} the cloak of immunity provided by international law falls away, leaving the State amenable to suit”; \textit{Smith v Lybia}, 101 F. 3d 239, (US 2\textsuperscript{nd} Cir. 1996) at 244. [\textit{Smith}]: “as a matter of international law State immunity would be abrogated by \textit{jus cogens} norms”. Cited from Andrea Bianchi, “Immunity Versus Human Rights: The Pinochet Case” (1999) 10 EJIL 237 at 263. [Bianchi, “Immunity v Human Rights”]} to adjust their case law accordingly. What is clear is the fact that the US courts are merely implementing a deliberate foreign policy of the US government not to remove immunity in this area. The court in \textit{Smith v Libya} emphasized that the lack of \textit{jus cogens} exception in \textit{FSIA} is not a reflection of Congress’s “condonation of such lawless conduct. Congress might well have expected the response to such violations to come form the political branches of the US government”.\footnote{\textit{Smith}, supra note 32 at 244.} Hence, claims of torture against foreign States also impact upon US government policy and judicial caution. The US government does not want its courts to become tribunals for claims of human rights violations against foreign States, particularly where its own relations with such States may be harmed. Therefore, it has filed an \textit{amicus} brief, in several cases, requesting the court to decline jurisdiction.\footnote{Garnett, supra note 26 at 112.} Most significantly the US State Department intervened in support of Saudi Arabia in the \textit{Nelson} case.\footnote{\textit{Nelson}, supra note 31.} The US therefore maintains the view that, in the case of the vast majority of claims for torture against foreign States, immunity should continue to prevail.

\subsection*{2.2 UK Case Law}

UK case law has made significant contributions to the different scholarly opinions around the issue of State immunity and torture. Decisions of the British courts on well-known cases such as \textit{Al-adsani, Pinochet}\footnote{\textit{R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3)}, (1999) UKHL, [2000] 1 A.C. 147 41. [\textit{Pinochet (No. 3)}]} and \textit{Jones} have had national and international consequences.
Ruling of courts on these cases have been used by scholars and courts of other States to substantiate arguments both in favor and against immunity, therefore the UK case law needs to be assessed in more details. What follows is an overview of the judicial reasoning and decisions of judges in the three mentioned cases that have constituted basis for the most significant scholarly opinions on the field.

2.2.1 Al-Adsani Case

The case of *Al-Adsani* is one of the most controversial cases on the relationship between State immunity and prohibition of torture as a peremptory norm of international law. Being subject to vendetta involving the Emir of Kuwait, Sulaiman Al-Adsani had been tortured by Kuwaiti authorities. Taken at gunpoint in a government jeep to a Kuwaiti State Security Prison, he was subject to false imprisonment and beatings ensued for three days until a false confession was signed. Two days later, further unpleasant events ensued at the palace of the Emir of Kuwait's brother as a result of which Al-Adsani was seriously burnt. He was treated in a Kuwaiti hospital, and returned to the UK where he was treated in hospital for burns covering 25 percent of his body. He also suffered from psychological damage and was diagnosed with a severe form of post-traumatic stress disorder. This was aggravated by further threats by Kuwaiti government warning him not to take any action or give any publicity to his plight.  

In August 1992, Al-Adsani brought a civil suit for compensation against the Kuwaiti government and three individual defendants before the British court. In May of 1995, the High Court ordered that the action be struck out finding that the clear language of the UK *State Immunity Act 1978*, 38 UK national legislation on the law of State immunity, conferred immunity upon foreign States for acts committed outside the jurisdiction of English courts. Following the reasoning of the US courts in *Amerada Hess* and *Siderman*, the British Court of Appeal upheld the lower court’s decision and the applicant was refused leave to appeal to the House of Lords. 39 Further, Al-Adsani’s attempts to obtain compensation from the Kuwaiti authorities via

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38 The UK *State Immunity Act 1978*, C 33
diplomatic channels were not successful. Eventually, Al-Adsani brought a case before the European Court of Human Rights (ECtHR) arguing that he had been unfairly denied his right of access to court under Article 6(1) of the European Convention on Human Rights (ECHR). The ECtHR held that there had been no violation of Article 6(1), however, only by a narrow margin of nine votes to eight. For the purpose of evaluating the UK case law, our concern in this part is solely with Al-Adsani’s claim before the English courts. His claim before the ECtHR is assessed in the next Part.

Al-Adsani is an important decision to be evaluated in the course of this study due to different opinions that was given by judges on the *jus cogens* nature of torture and its connection with the decision of immunity. Submissions, both in favor and against immunity, were made before the Court of appeal in this case. On a hearing of January 21, 1994, Judge MacDonald cited a judgment of the US courts to propose that a person guilty of torture, who by definition would have acted in some official capacity, has become “like the pirate and slave trader before him; *hostis humanis generis*, an enemy of all mankind”. He, thus, submitted, “there is no immunity under public international law for acts of torture”. Given that public international law is a part of English law, he submits that there can be no immunity under English law in respect of acts of torture. Judge Evance, in conformity with MacDonald, held that “no state should be accorded in respect of acts which it is alleged are properly to be described as torture in contravention of public international law”. This proposition was also accepted by Butler-Sluss

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40 European Convention on Human Rights, Article 6(1):

From all or in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

41 *Al-Adsani v the United Kingdom*, 2001 ECHR 35763/97, [2002] 34 EHRR 273. [*Al-Adsani, ECtHR*]

42 The concluding paragraph of the judgment of Circuit Judge Kaufmann in the case of *Filartiga v Pena-Irala* [1980] reported in 630, Federal Reporter, 2nd series at 876.


and Rose. Therefore, the English Court of Appeal, after an ex parte hearing, accepted that the doctrine of State immunity does not apply in favor of the Kuwaiti government, despite the clear contradictory terms of the *State Immunity Act*.

However, this ruling was criticized at the time. Therefore, before the case could be properly considered, the traditional line on State immunity was re-asserted by the High Court and then the Court of Appeal in 1996. As Judge Stuart-Smith stated, although “international law against torture is so fundamental that it is a *jus cogens*, or compelling law, which overrides all other principles of international law, including the well-established principles of sovereign immunity, the [1978] Act is a comprehensive code and is not subject to overriding considerations”. The court held that State Immunity Act was very clear in its wording with regards to exceptions to immunity and those exceptions do not include human rights violations even if the acts are contrary to international law. Therefore, so far as the English Court was concerned, immunity was upheld in *Al-Adsani* despite the clear international legal prohibition on torture and its *jus cogens* character.

### 2.2.2 Pinochet Case

Human rights advocates have largely used the ruling of House of Lords on the famous case of *Pinochet*, denying immunity to the former heads of Chile for the alleged act of torture, to argue against immunity when the alleged act is a peremptory norm of international law. Although this case is dealing with the conflict of State immunity and prohibition of torture in a

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46 *Al-Adsani*, CA, *supra* note 39 at 541-42.

47 *Ibid*.


49 For an analysis and discussion of the case, see for e.g. Christine M. Chinkin, “Case Report: Regina v. Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)” (1999) 93 AJIL 703; Bianchi, “Immunity v Human Rights”, *supra* note 32.
criminal procedure, the decision of the House of Lords in this case is significant to our study given that it has been referred to by many judges in civil proceedings as a precedent in favor of torture victims. According to the ILC’s report on fragmentation: “the most significant use of *jus cogens* as a conflict norm was by the British House of Lords in the *Pinochet* case…for the first time a local domestic court denied immunity to a former head of State on the grounds that there cannot be immunity against prosecution for breach of *jus cogens*”.

I shall discuss later that the criminal nature of *Pinochet* does not have anything to do with the basic rationale behind the decision of the House of Lords which is based on the *jus cogens* character of torture and its superior status over other international norms.

General Augusto Pinochet was accused of using torture against political opponents in Chile during the 1970s and 1980s. In 1997, he entered the UK to undertake surgery in London. During this time Spain requested his extradition on charges of State torture committed while in office. The British House of Lords had to decide whether Britain was obliged to extradite Pinochet to Spain. In this regard one of the issues was whether Pinochet could plea immunity as a past head of State. The majority of the Lords, considering torture an international crime and violation of a *jus cogens* norm, held that “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 which it seeks to impose”.

In fact, the court resorted to the *jus cogens* status of the prohibition of torture to override the immunity *rationae materiae* enjoyed by a former head of State.

Here, a distinction should be made between different forms of immunity. One form of immunity immunizes foreign State from suit in domestic courts, another form, which is the issue in *Pinochet*, immunizes from suit particular high-ranking officials of foreign States, such as

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50 In its study of fragmentation of international law, the ILC describes “how a rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority.” This is the case of *jus cogens* norms. Conclusion of the work of the study Group on the “Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law adopted In 2006 and submitted to UNGA as part of the ILC’s Report Covering Work of the 58th session. UN Doc. A/61/10 at paras 251, 370,371. Cited from Hazel Fox, *The Law of State Immunity, 1st* ed (Oxford: Oxford University Press, 2004). [Fox, *The Law of State Immunity*]

51 *Pinochet* (No.3), *supra* note 36 at para 158
heads of State and foreign ministers. A further distinction also exists between immunity that attaches because of a particular status, such as being head of State, and immunity that attaches because of the nature of a particular conduct underlying a claim. These immunities are referred to, respectively, *rationae personae* and *rationae materiae*. Given Pinochet was not in office at the time of prosecution, he could not enjoy immunity *rationae personae*. However, he pleaded immunity *rationae materiae* based on acts performed in the course of official functions that amounted to torture contrary to international law. The approach of the House of Lords to immunity *rationae materiae* in this case, being based on the superior status of prohibition of torture to the ordinary rules of international law, seems also applicable to the immunity of State when it violates a rule of *jus cogens*. According to the hierarchy of norms theory, violation of *jus cogens* norm can be treated as superior to and possessed of overriding force against the rule of immunity, either be immunity *rationae materiae* or immunity of a foreign State.  

*Pinochet* has also had historical consequences in encouraging the exercise of universal criminal jurisdiction over cases involving issues of serious violation of international law. According to Lord Browne-Wilkinson: “International law provides that offences of *jus cogens* nature may be punished by any State because the offenders are common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution”.  

The majority of the Law Lords held that immunity *rationae materiae* did not cover the acts of torture imputable to Augusto Pinochet committed after December, 8, 1988, the date the United Kingdom ratified the *CAT*. The *CAT* requires State parties to ensure either that they are in a position to prosecute cases of torture wherever they may have occurred, or to extradite alleged offenders to other States having jurisdiction over them. The expansive regime of jurisdiction established by the *CAT* seems to have justified the use of universal jurisdiction by foreign States to hear criminal and civil cases based on allegation of torture. States parties, in order to fulfill their


53 Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (No.1), 119 I.L.R. 135 (1999). [Pinochet (No. 1)]

54 *CAT*, supra note 1, Articles 14, 5, 7.
commitment under the CAT, are equally entitled to exercise jurisdiction over the alleged act of torture committed by other States. As peremptory norms are a matter of concern to all States, for the safeguard of the interests of the international community, States are urged to exercise universal jurisdiction over breaches of jus cogens committed by another State or its officials. In these cases, State immunity is defeated by the prevailing interest of the community. This view, however, was not adopted by the House of Lords in the civil case of Jones making distinction between universal civil and criminal jurisdiction. This distinction was made due to limited interpretation of Article 14 of the CAT, which in the belief of the court in Jones does not provide universal civil jurisdiction for acts of torture committed outside the forum State.

The argument that universal civil jurisdiction over international crimes is incompatible with the foreign State immunity was neither adopted by the ICJ in the Arrest Warrant case between The Congo and Belgium. 55 The ICJ indicated that: “although various international conventions on the prevention and punishment of certain serious crimes impose on States’ obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such an extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs”. 56 Nevertheless, in their separate opinions, the judges acknowledged that this situation might evolve due to the existence of contemporary trends toward the extension of jurisdiction based on the heinous nature of the alleged violation. 57 This decision of the ICJ along with its more recent decision in Jurisdictional Immunities of a State (Germany v Italy: Greece Intervening) practically foreclosed the possibility of further arguments based on hierarchy of norms in favor of developing an exception to immunity based on the jus cogens nature of torture.

2.2.3 Jones Case

Ronald Grant Jones was arrested at the hospital bed where he was recovering from the explosion allegedly attributed to him by Saudi Arabia’s officials. He was taken to an interrogation center where he was systematically tortured for sixty-seven days and was forced to

56 Ibid at para 59
57 Ibid at para 47 (joint separate opinion of Judge Higgins et al.).
confess to the bombing.\textsuperscript{58} As a British national he sued The Kingdom of Saudi Arabia and responsible officials in English courts, seeking damages for assault and battery, trespass to the person, unlawful imprisonment and torture. \textsuperscript{59} Similar to \textit{Al-Adsani}, \textit{Jones} was also brought before the ECtHR to challenge the ruling of the UK courts. However, our concern in this part is the UK courts’ decisions only.

In \textit{Jones v The Kingdom of Saudi Arabia}, the House of Lords was required to hear two factually similar actions on a joint appeal. \textsuperscript{60} The second claim was made by three individuals, Sandy Mitchell, Leslie Walker and William Sampson, similarly alleged that they have been subject to systematic torture by Saudi Arabia’s agents in order to elicit confessions. The issue before the British courts was whether the Kingdom of Saudi Arabia and its officials, were entitled to foreign State immunity before the courts of England. Lords Bingham and Hoffman had similar opinions in favor of immunity for Saudi Arabia and its agents, which were concurred by the remaining Lordships. Lord Bingham rejected the petitioner's contention that the \textit{jus cogens} nature of the international prohibition of torture trumps sovereign immunity. \textsuperscript{61} He instead held that sovereign immunity is procedural in nature while \textit{jus cogens} claim is a substantive claim. \textsuperscript{62} Following the decision of the ECtHR in \textit{Al-Adsani}, he noted that neither Article 14 of the Convention Against Torture does not provide for universal civil jurisdiction, nor does the \textit{UN Convention} on immunity of States provide exceptions to immunity for civil claims based on acts of torture. \textsuperscript{63} The House of Lords eventually held that both the Kingdom and its agents were entitled to immunity.

The core allegation against immunity in this case was based, \textit{inter alia}, on three arguments. The first argument involved the UK obligation to promote the right of access to a court, under Article 6(1) of the ECHR. \textsuperscript{64} The second allegation was based on the universal civil

\begin{itemize}
\item \textsuperscript{59} \textit{Jones v. Kingdom of Saudi Arabia and others}, [2004] CA 1394. [Jones, CA]
\item \textsuperscript{60} \textit{Ibid}; \textit{Mitchell and others v Al-Dali and others} [2007] CA 270.
\item \textsuperscript{61} \textit{Jones v. Kingdom of Saudi Arabia}, [2006] UKHL 26 at para 27. [Jones, UKHL]
\item \textsuperscript{62} \textit{Ibid} at para 33.
\item \textsuperscript{63} \textit{Ibid} at paras 25-26.
\item \textsuperscript{64} \textit{European Convention for the Protection of Human Rights and Fundamental Freedoms} 1950, CETS No
jurisdiction on the issue of torture under provisions of the *CAT*. The third argument was mainly influenced by *Pinochet* case and was based on the normative hierarchy theory given the *jus cogens* nature of prohibition of torture. What is followed is the judicial reasoning of the House of Lords for upholding immunity of the State and its agents.

2.2.3.1 The House of Lords Ruling in *Jones* and Its Flaws

2.2.3.1.1 Right to Access to a Court

One of the claimants’ contentions against immunity was based on the obligation of the UK under Article 6(1) of the European Convention on Human rights. This Article guarantees the right to a fair trial and implicitly, the right to access a court in order to have the trial be heard. Plainly, the right of foreign States to immunity from being sued before the English courts abrogates this right. However, in the European case law, domestic law may limit this right if it is a proportionate measure pursuing a legitimate end. 65 The claimants in *Jones* alleged that since the case is concerned with breaches of *jus cogens*, the presumption of immunity under the SIA is not a proportionate reason to limit the right to access the English courts.

The House of Lords being highly influenced by the ruling of the ECtHR on *Al-Adsani v United Kingdom*, denied claimants’ contention and any inconsistency of the principle of immunity with the right to access to a court. The House of Lords did not consider it disproportionate to grant immunity to Saudi Arabia and its agents, even in the case of the breach of *jus cogens*, based on the legitimate objectives of foreign State immunity: “complying with international law to promote comity and good relation between States through the respect of another sovereignty”. 66 Following the Majority in *Al-Adsani*, the court asserted that no conclusion could be drawn from “international instruments, judicial authorities or other materials before the court” 67 that States should not enjoy immunity when the alleged act is torture.

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65 *Al-Adsani*, ECtHR, *supra* note 41.
66 *Jones*, C.A *supra* note 59 at para 13 quoting *Al-Adsani*, ECtHR, *supra* note 41 at para 54
In the wording of Orakhelashvili, \(^{68}\) the House of Lords, “blindly” followed the reasoning of the EChTR in *Al-Adsani*, without enquiring whether the ruling in this case was in fact compatible with international law. For instance, *Al-Adsani* suggests that the ECHR “should so far as possible be interpreted in harmony with other rules of international law”, including State immunity. \(^{69}\) However, as Article 31 of the 1969 Vienna Convention on the Law of Treaties affirms, the primary method of interpreting a treaty is to interpret it in terms of its plain meaning and the object and purpose of the treaty. It is clear that the purpose of Article 6 of the ECHR is to guarantee due process right for every individual. Article 31(3)(c) of the Vienna Convention suggests that the relevant rules of international law shall be taken into account, but does not require the treaty to be interpreted so as to make it compatible with those rules. \(^{70}\) Moreover, the European courts’ case law \(^{71}\) only allows Article 6 to be set aside in cases where individuals have access to other means of justice, which was not the case either in *Al-Adsani* or *Jones*. Being aware of the fact that the UK denied diplomatic protection against the perpetrator State and that the UK courts did not provide jurisdiction to hear his case, the EChTR however denied any violation of Article 6. A more detailed analysis of the Ruling of the EChTR in *Al-Adsani* is brought later in Part III.

### 2.2.3.1.2 Universal Civil Jurisdiction for Acts of Torture

Another argument against immunity was based on the obligation of the UK courts, under the *CAT*, to establish their jurisdiction on claims of torture. According to Article 14 of the *CAT*, “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”. The House of Lords, however based on the alleged territorial limitation on this Article, claimed that its application is limited to the acts of torture occurring within the forum State, and thus denied any violation of this Article in *Jones*. However, no such limitation can be seen in the text of the Article. The question is what limits Article 14 to the acts within the State in the view of the House of Lords.

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\(^{68}\) Orkhelshvili, “State Immunity and Hierarchy of Norms”, *supra* note 52 at 959.

\(^{69}\) *Al-Adsani* EChTR, *supra* note 41 at para 55.

\(^{70}\) Orkhelshvili, “State Immunity and Hierarchy of Norms”, *supra* note 52 at 958

\(^{71}\) Beer and Regan and Waite and Kennedy case. Cited from *ibid* at 959.
The territorial nexus might have been deduced from Articles 5 and 7 of the CAT concerned with universal criminal jurisdiction on acts of torture that require territorial connections. The limitation of obligation to establish criminal jurisdiction on acts of torture committed within the territory of the State or acts which are subjectively or objectively connected to the forum State might be justified because otherwise, given its public nature, courts might not be aware of the torture happening in other States all around the world. However, in civil cases when a victim of torture in one State raises a claim of torture before the court of another State, the obligation of that State to condemn acts of torture requires it to establish jurisdiction on the issue regardless of where the alleged act has happened. Moreover, reading Article 14 with the territorial limitation leaves its application to a very few, if any at all, circumstances. First, one would unlikely be able to sue a State or its officials before its Courts for the alleged act of torture. Second, it would rarely happen that an official of one State engages in acts of torture in the territory of other States. Therefore, conceiving of Article 14 with the territorial requirement leaves it with no actual application. In addition, the textual interpretation of Article 14 and its plain meaning, along with considerations of the purpose and object of the Convention, prove that if State parties wished to provide for a territorially restricted jurisdiction they would do so expressly. The universal civil jurisdiction for acts of torture is conducive to the prohibition of torture and accountability of States for such acts. Therefore, the universal jurisdiction has to be

72 CAT, supra note 1, Article 5(1):

Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: when the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; when the alleged offender is a national of that State; when the victim was a national of that State if that State considers it appropriate;

Article 7(1):

The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

73 This has been affirmed by the Committee Against Torture in its General Comment No.3 on implementation of Article 14 of the CAT, UNGAOR, 2012, UN Doc. CAT/C/GC/3 at paras 22, 42. [General Comment No. 3]

74 Orkhelshvili, “State Immunity and Hierarchy of Norms”, supra note 52 at 962.
preferred to the narrow territorial jurisdiction in reading Article 14.

To justify the territorial limitation of Article 14 references have been made, by Lord Bingham, to the practice of certain States, in particular, the US and Canada attitude toward this Article. 75 He referred to the US understanding of Article 14 when ratifying the CAT that “Article 14 requires a State party to provide right of action for damages only for acts of torture committed in the territory under the jurisdiction of that State Party”, 76 and further positive response of Germany to this assertion. However, this statement, at best, can be considered a bilateral agreement between Germany and US to interpret this Article restrictively. In Bouzari v Iran, Canadian courts found Article 14 inapplicable to the acts of torture committed abroad, similarly referring to the US position. 77 Neither the House of Lords nor the Canadian courts, made any effort to prove that such limited practice of States is sufficient to conclude the territorial limitation of Article 14. There is, thus, no evidence whatsoever that the restrictive territorial reading of Article 14 is justified.

Moreover, after failure of the Canadian courts to provide Bouzari with the opportunity to seek civil redress, concerns had been raised by the UN Committee against Torture on the way the Article had been interpreted. The Canadian approach that Article 14 requires the establishment of jurisdiction only over the acts of torture committed in the forum State’s territory was defended by representatives of Canada, 78 but was not accepted by the Committee. The Committee expressed its concern at “the absence of effective measures to provide civil compensation to victims of torture in all cases”. It 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”. 79 Although, the approach of the Canadian courts to Article

75 Jones, UKHL, supra note 61 at paras 20, 46
76 Ibid at para 20
77 Bouzari v Islamic Republic of Iran, 2002 OSCJ 1624, [2002] 114 ACWS (3d) 57 at paras 49-51. [Bouzari, OSCJ] (per Judge Swinton)
78 UN Committee against Torture, 34th session, 13 May 2005, Summary Record of the 646th Meeting, CAT/C/SR.646/Add. 1, at paras 41-43, 74.
79 UN Committee against Torture, 34th session, 2005, Observations of the Report of Canada, UN. Doc. CAT/C/CO/34/CAN at paras 4(g) and 5(f).
14 was denied by the Committee, in *Jones* no proper attention was made to the attitude of the UN Committee because, according to Lord Bingham, the Committee’s conclusions were not considered to have binding force.  

The House of Lords blindly followed the approach of Canadian courts to Article 14 without due regards to the fact that the Committee Against Torture is the responsible body under the Convention to interpret and implement the Convention, thus more weight should be given to its interpretation of the Convention in comparison to State’s interpretation. Moreover, Committee’s interpretation is more compatible with the textual meaning and the purpose of the Convention.

### 2.2.3.1.3 *Jus Cogens* Nature of the Prohibition of Torture

Two arguments were raised by the petitioners based on the peremptory nature of the prohibition of torture in *Jones*. One argument, being influenced by decision of this court in *Pinochet*, was that the act of torture, as a violation of *jus cogens* norm of international law, cannot be considered an official and sovereign act of a State that generates immunity.  

The other argument was concerned with the supremacy of prohibition of torture as a *jus cogens* norm over other rules of international law including the law of State immunity. Both arguments however, were rejected by the House of Lords.

Rejecting the first argument Lord Bingham referred to the definition of torture under Article 1 of the *CAT*.  

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82 *CAT*, *supra* note 1, Article 1(1):

For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
official act since under the CAT, “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”. 83 However, considering the purpose of the Convention, which is to condemn the heinous act of torture and to establish international recognition on prohibition of torture, one might unlikely infer from the wording of Article 1 that it intends to consider torture a permissible sovereign act. This Article explicitly excludes “pain or suffering arising only from, inherent in or incidental to lawful sanctions”, implicitly affirms torture an inadmissible act. There is no doubt that the rationale for State immunity requires it only to be applicable to permissible acts of States, therefore the rule of State immunity should not cover inadmissible acts of torture.

Moreover, the Lordship accepting the correctness of the decision reached by the majority in Pinochet, did not consider it applicable to the current case due to their categorical difference, being concerned with criminal and civil proceeding respectively. 84 In Pinochet the House of Lords held that the torture allegation is outside the head of State immunity that Pinochet claimed. Therefore, the same court as in Jones, once has expressed that torture is not an official behavior that immunity intends to protect. Although Pinochet was concerned with criminal prosecution of torture, the distinction between criminal and civil proceedings seems not fundamental to this decision. The fundamental message of Pinochet is that acts of violation of norms of jus cogens nature, such as prohibition of torture, cannot be of the official nature being protected under State immunity. In the wording of Lord Browne-Wilkinson, “How can it be for international law purposes an official function to do something which international law itself prohibits”. 85 One cannot find any concern in this message with regards to the criminal nature of the case which might make it inapplicable in civil cases. Hence, differentiating between civil and criminal nature of the two cases by Lord Bingham seems not persuasive enough to consider torture an official act of States in civil but not in criminal proceedings.

Another argument was concerned with the supremacy of jus cogens norms over other rules of international law including the law of State immunity. This argument derived from the concept of hierarchy of norms in international law, which considers a lower rank for State

83 Jones, UKHL, supra note 61 at para 19.
84 Ibid at para 20.
85 Pinochet (No. 3), supra note 36.
immunity in the hierarchy of international rules. This approach that \textit{jus cogens} trumps State immunity before national courts of other States, has been supported by many scholars throughout the years.\textsuperscript{86} The supremacy of \textit{jus cogens} norms has been also affirmed by a joint dissenting opinion of six judges of the ECtHR in \textit{Al-Adsani}, which will be discussed later in Part III. Nevertheless, the hierarchy of norms theory against immunity has been contradicted by some scholars and the House of Lords in \textit{Jones}, based on the different character of the two doctrines.\textsuperscript{87} The House of Lords argued that the peremptory norms regulate the substantive conduct while State immunity is the matter of procedural rules and thus one may not trump the other, since there is no actual conflict between the two doctrines given that they stand on different levels. In the opinion of the majority in the House of Lords, a conflict would occur if there would also be a peremptory norm requiring States to establish civil jurisdiction over the acts of other States with respect to allegations of torture. However, they conceive prohibition of torture a primary norm, which solely aims to condemn acts of torture without stipulating anything about the ways the rule must be enforced.\textsuperscript{88}

In general, in dealing with the issue of State immunity and \textit{jus cogens}, the House of Lords in \textit{Jones} asserted that the peremptory nature of the prohibition of torture does not automatically override all other rules of international law.\textsuperscript{89} Although accepted \textit{jus cogens} nature of the prohibition of torture, Lord Hoffman asserted that by granting immunity to Saudi Arabia and its agents, the UK is not proposing to torture anyone, thus granting immunity does not conflict with peremptory norm of prohibition of torture. The ill-conceived procedural-


\textsuperscript{88} Knuchel, supra note 87 at 160.

\textsuperscript{89} \textit{Jones}, UKHL, supra note 61 para 26
substantive distinction however is based on inconsistent conceptual and normative grounds. At the level of international law no such categorical distinction really exists between the specifically substantive or procedural in nature norms of international law. The procedural-substantive distinction might be conceived at the level of national law but under international law immunity it remains a norm just like any other norm that may conflict with prohibition of torture.

Moreover, the legal consequence of the prohibition of torture is the accountability of its perpetrator, which implies that there is an obligation on the forum State to enforce this prohibition by establishing its jurisdiction over the issue. If a State rejects to hear the claim of torture before its courts, it effectively holds the perpetrator not accountable and conceives torture a lawful act for the purpose of that case. Granting immunity to the perpetrator State implies the recognition of torture as a sovereign act, granting the torturers absolute security and refusing the victims the only available remedy which all represent breach of jus cogens. The House of Lords in Jones failed to consider its previous decision on A v Secretary of States that the peremptory status of the prohibition of torture “requires member States to do more than eschew the practice of torture”. The court in the mentioned case, by rejecting the evidence that was obtained by way of torture abroad, accepted the procedural consequences of jus cogens.

The argument against the procedural consequence of jus cogens norm of prohibition of torture, is also contrary to what has been said by the ICTY in Prosecutor v. Furundžija: “What is even more important is that perpetrators of torture…may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime…”. Although Lord Hoffman referred to this case in Jones, he interpreted it as it only provides the possibility for a State whose national has been victim of torture to claim redress before a tribunal, which has the necessary jurisdiction. However, no evidence can be seen in

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90 Orkhelshvili, “State Immunity and Hierarchy of Norms”, supra note 52 at 968.
91 Ibid at 969.
92 Ibid at 970.
93 A (FC) and others (FC) v secretary of State [2005] UKHL 71 at para 34.
94 Prosecutor v. Furundžija, [1998] Case No. IT-95-17/1-T at para 155. [Furundžija]
95 Jones, UKHL, supra note 61 at para 51
this passage to permit claiming of redress only through diplomatic protection. According to the decision of the ICTY in Furundzija, States need to “put in place all those measures that may preempt the perpetration of torture”. The tribunal also emphasized that the obligation extends beyond State borders and creates a responsibility to non-citizens as well as to citizens. This case along with the House of Lords’ decision in A v Secretary of States affirm the procedural consequences of jus cogens norms, and effectively makes the procedural-substantive arguments of the House of Lords in Jones invalid.

In conclusion, UK case law is reflective of diverse opinions and judicial reasoning on the law of State immunity and torture. The UK courts tried to justify their different approaches, denying immunity in Pinochet on one hand and upholding immunity in Al-Adsani and Jones on the other, by referring to the different nature of the suits, being criminal or civil in nature. In Pinochet, the Law Lords generally, with a few exceptions, regarded the Al-Adsani irrelevant for its being concerned exclusively with civil proceedings. The same contention has been raised in Jones, considering Pinochet inapplicable due to its criminal nature. One may conclude that after the Pinochet case, while State and State officials would continue to be held immune for acts of torture in civil proceedings before the UK courts, they might be held accountable and not immune in criminal proceedings. Nevertheless, such civil-criminal distinction by the UK courts was made without any considerations of the different purposes of the two forms of liability and that both forms need to be available to enforce the peremptory norm of the prohibition of torture. The criminal condemnation of torture only affirms that the perpetrator State or its officials have breached their obligation under international law by engaging in acts of torture contrary to its international prohibition, but it does not give individual victims any redress for the harm they suffered. In fact, it is only through the civil proceedings that individuals are able to sue States

96 Furundzija, supra note 94 at para 148.
97 Ibid at paras 151-152.
98 Pinochet (No. 1), supra note 53 at 1324, Lord Lloyd quoted Al-adsani, ECtHR, supra note 41 and Siderman, supra note 13 to hold that allegations of torture may not trump a plea of immunity. Cited from Bianchi, “Immunity v Human Rights”, supra note 32.
99 See for e.g. Pinochet (No. 1), supra note 53 at 1331 opinions of Lord Nichollas. Cited from Bianchi, “Immunity v Human Rights”, supra note 32.
who breach their obligation to protect their rights and treat them with the basic level of human dignity. In the concept of modern international law that individuals and their rights are the principal concerns of international society, providing torture victims with the opportunity to seek civil redress is as, if not more, significant as considering States and their officials criminally liable for torture.

2.3 Canada Case Law

The decision of the Canadian courts in the famous case of Bouzari, the first Canadian case in which a plaintiff has sought civil redress for acts of extraterritorial torture, is the Canadian contribution to the issue of State immunity and torture in civil cases. Kazemi is a more recent case, involving allegation of torture and extrajudicial killing, which after being heard in the Quebec Superior Court and the Court of Appeal, was recently heard before the Supreme Court of Canada on March 18, 2014. It is unlikely that the Supreme Court of Canada after Bouzari, Jones, Al-Adsani and the ICJ decision in Jurisdictional immunities of the State depart from the general practice in favor of granting immunity to the perpetrator State, however its decision would be vital to determine the Canadian jurisprudence on the issue of State immunity and torture. What follows is an overview of the current practice of the Canadian courts by evaluating the judicial reasoning and decisions in Bouzari and Kazemi.

2.3.1 Bouzari Case

Following the business conflicts Houshang Bouzari had with Mehdi Hashemi Bahramani, the son of the President of Iran at the time, he alleged to be incarcerated for several months during which he had been tortured, was subject to mock executions, was hung by the shoulders for extended durations, and was beaten around the ears with slippers. Bouzari continued to suffer

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100 Bouzari, OSCJ, supra note 77; Bouzari v. Islamic Republic of Iran, 2004 OCA 2800, 243 DLR (4th) 406.

101 Kazemi (Estate of) v. Islamic Republic of Iran et al, 2011 QCCS 196, 227 C.R.R. (2d) 233. [Kazemi, QCCS]
from post-traumatic stress disorder, ongoing pain and damaged hearing. He thus brought a civil suit against Iran before the Ontario Court of Justice, in November 2000, seeking damages for kidnapping, false imprisonment, torture, and death threats as well as punitive damages. The issue before the court was whether it has jurisdiction over this proceeding under the Canadian State Immunity Act, (SIA), the national legislation on foreign sovereign immunity. The Ontario Court of Justice held that the court has no jurisdiction over the issue due to the SIA. The plaintiff further challenged the constitutionality of the SIA under the Canadian Charter of Rights and Freedoms, which was also dismissed by the court. The issue of the constitutionality of the SIA exceeds the scope of this paper, which seeks to address the Canadian jurisprudence in cases involving the State immunity and torture.

The Canadian SIA, similar to its equivalents in the UK, and the US, presumes immunity for foreign States before the Canadian courts unless the case meets one of the exceptions contained in the SIA. Bouzari argued for the application of three exceptions to immunity in his case: exception for criminal proceedings, the tort exception, and commercial activity exception. Bouzari also referred to Canada’s international obligations, specifically its obligation under Article 14 of the CAT, and claimed that the SIA must be read in conformity with

103 Bouzari, OSCJ, supra note 77 at para 18.
104 State Immunity Act, RSC 1985, c S-18, (available on CanLII) [Canada SIA]
105 Bouzari, OSCJ, supra note 77 at para 90.
107 Canada SIA, supra note 104, ss 4-8, 18.
108 Ibid, s 18:

This Act does not apply to criminal proceedings or proceedings in the nature of criminal proceedings; Section 6:A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to: any death or personal or bodily injury, or any damage to or loss of property that occurs in Canada; Section 5:A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.
those obligations. Nevertheless, given the civil and non-commercial nature of the claim, Judge Swinton found that Bouzari does not fall under Sections 18 and 6 exceptions. She also held that the territorial limitation of the tort exception makes it only applicable to injuries occurred within Canada, which was not the case in Bouzari, although the effects of torture were felt in Canada. The Ontario Court of Appeal upheld the lower court’s decision based on the clear wording of Section 3(1) of the SIA which, “except as provided by this Act”, presumes immunity for foreign States from the jurisdiction of any courts in Canada.

Similar to other cases on the field dealing with jus cogens norms, one of the arguments of Bouzari’s counsel and supporting interveners was based on the hierarchy of legal norms. Although both courts agreed that prohibition of torture constitutes a jus cogens norm, they refused to accept that customary international law provides an exception from State immunity where torture had been committed abroad. The Court of Appeal interestingly expressed that even if international law required Canada to provide a civil remedy for torture committed abroad, it was open to Canada to legislate contrary to its international obligations. The court confirmed that domestic legislation should, insofar as possible, be interpreted consistently with Canada's international obligations, specifically with regards to jus cogens norms. Nevertheless, Canada had legislated contrary to its international obligations by not providing an exception for jus cogens violations in the SIA.

“In other words, the Court strongly implied that jus cogens, notwithstanding its superior status in international law, is derogable in Canadian law”. In other words, Bouzari had been determined merely on the basis of Canada’s domestic legislation, regardless of its international obligations and hence should not be referred to by courts of other States, such as the House of Lords in Jones, as a precedent to support arguments in favor of granting immunity. This decision is reflective of the interplay between Canada’s obligation

110 Bouzari, OSCJ, supra note 77 at paras. 18-34.
111 Bouzari, OCA, supra note 100 at para 42.
112 Ibid at paras 87, 94.
113 Ibid at paras 65-67,
under public international law and its domestic legislations and the way Canadian courts apply international law, which is out of the scope of this paper.\(^{115}\)

References have also been made to *Pinochet* by Bouzari’s counsel to deduce that “if the prohibition of torture is to be respected, torture cannot be considered a State function and therefore cannot be accorded State immunity”.\(^{116}\) The court rejected this argument making the criminal-civil distinction between the two proceedings,\(^{117}\) which was later followed by the House of Lords in *Jones*. I agree with the minority of judges of the ECtHR in *Al-Adsani* who stated “the distinction … between civil and criminal proceedings, concerning the effect of the rule of the prohibition of torture, is not consistent with the very essence of the operation of a *jus cogens* rule.” In fact, “it is not the nature of the 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…”\(^{118}\)

The Canadian Courts eventually concluded that while the law may be moving in this direction in the future, neither emerging State practice nor Article 14 of the *CAT* “requires it to take civil jurisdiction over a foreign State for acts committed outside the forum State”.\(^{119}\) It was discussed earlier in *Jones* that such an interpretation of Article 14 is not compatible with its plain meaning. This perversion from the clear meaning of Article 14 raised the reaction of the UN Committee Against Torture following the review of the periodic report of Canada on its implementation of the *CAT* in 2005. This committee, as an international body with the task to interpret and monitor the application of the *CAT*, expressed its concern at Canada’s failure “to


\(^{116}\) *Bouzari*, supra note 100 at para 89.

\(^{117}\) *Ibid* at para 91.


\(^{119}\) *Bouzari*, OCA, supra note 100 at para 87.
provide civil compensation to victims of torture in all cases”. 120 Rejecting the territorial limitation of Article 14 defended by Canadian representatives, 121 the Committee 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”. 122 With regards to the customary international law, the Court of Appeal ruled that the States practice is not in favor of granting a civil remedy for torture committed abroad by foreign States. 123 Therefore, the court concluded: “both under customary international law and the international treaty there is today a balance struck 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”. 124 However, the court deemed it possible that “in the future, perhaps as the international human rights movement gathers greater force, this balance may change, either through the domestic legislation of States or by international treaty”. Accordingly, the ruling of the courts in Bouzari might have been different if the ILC had more precisely addressed the issue of State immunity and torture. It is not clear how many Bouzaris, Jones and Al-Adsanis should be left without any forum to be heard until the ILC deems the issue important enough to engage in a codification practice over it and adds an exception to the UN Convention on State immunity for acts of torture.

2.3.2 Kazemi Case

Zahra (Ziba) Kazemi was a photojournalist who was arrested by government officials while she was taking pictures of protestors near a prison in Tehran and was allegedly tortured to death in 2003. It has been alleged that during her detention, she was severely tortured and sexually abused. Kazemi was eventually taken to a hospital with internal bleeding and a brain

120 Observations of the Report of Canada, supra note 79 at para 4(g).
121 Summary Record of the 646th Meeting, supra note 78 at paras 41-43, 74.
122 Observations of the Report of Canada, supra note 79 at para 5(f)
123 Bouzari, OCA, supra note 100 at para 94.
124 Ibid at para 95.
injury where she died.  
125 In 2006, Kazemi’s son, Stephan Hashemi, filed a civil lawsuit in
Montreal against the Government of Iran and three individual Iranian officials. This included
Iran’s head of State, who was alleged to have been involved in arrest and torture of Kazemi.  
126 He brought the action on behalf of his mother’s estate and also claimed for the emotional and
psychological injuries he allegedly suffered in Canada as a result of his mother’s detention and
death and Iran’s subsequent refusal to repatriate her body to Canada.  
127

The case was heard before the Quebec Superior Court of Justice in December 2009. Judge Robert Mongeon further issued his judgment in January 2011. The court, based on the
plain meaning of the SIA, concluded that the State of Iran as well as its head of State is immune
from the jurisdiction of any court in Canada and thus accepted their plea of immunity.  
128 While the court used the plain meaning of the SIA to determine the immunity of Iran and its head of
State, it used another method of interpretation to address the immunity of foreign officials.
Despite the apparent absence of immunity rationae materiaein the wording of the SIA, the court claimed that it could still read foreign officials immunity in this case, because “to give immunity
to a government department and to deny it to its functionaries would render the SIA ineffective and inoperative”.  
129 The court brought the case of Yousuf v Samantar decided in the US Supreme Court,  
130 which found that the FSIA does not cover foreign officials. However regardless of similarities between the FSIA and the SIA the Quebec Superior Court, rather unconvincingly, claimed that the latter “appear to have codified all the applicable common law
principles”, and thus covers the immunity of foreign officials.  
131 In fact, the court failed to explain how the SIA codified all the common law on State immunity and why a suit against an

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125 Canadian Center for International Justice, online: <http://www.ccij.ca/programs/cases/index.php?DOC_INS T=10>
126 Kazemi, QCCS, supra note 101.
127 Ibid at para 2.
128 Kazemi, QCCS, supra note 101 at para 98.
129 Ibid at para 112.
130 Ibid at para 124.
131 Ibid at paras 132, 138. Cited from Lorna McGregor, “Two New Decisions on Subject-matter
official renders the SIA “ineffective and inoperative”.  

The general rule of immunity under the SIA is subject to several exceptions including tort exception, which excludes immunity when torts occurred within Canada.  

Although, the court dismissed the claims by the estate of Kazemi because the abuses she suffered were committed in Iran, it allowed the individual claims of Stephan Hashemi under the SIA tort exception, since the alleged trauma occurred in Canada as a direct result of the acts of the Defendants.  

The Plaintiff and the intervener, Canadian Center for International Justice, argued that the SIA is not the only source of State immunity and it should be interpreted with regards to the Canada’s international obligations under the CAT and customary international law. The question before the court was, thus, whether there are unwritten exceptions such as torture or other common law exceptions, which may find application in the case. Referring to decisions of the courts in Bouzari, Al-Adsani and Jones, the court concluded that no exceptions could be found in the practice of States for acts of torture and thus “The SIA is a complete statute which suffers no intrusion from the common law, international law or Canada's international treaty obligations”.  

The case was appealed to the Quebec Court of Appeal. In August 2012, the Court upheld immunity and dismissed the estate of Kazemi's claims. It also applied immunity to Stephan Kazemi's claims, concluding that the tort exception in the SIA should not have applied to his case. The court rejected the argument of the Estate and the interveners, including AICF, CCIJ, and CCLA that immunity should not be granted in cases of torture. The appellants relied on the “emerging, continuing and compelling developments in the customary international law of

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132 Ibid.
133 Canada SIA, supra note 107, S 6
134 Ibid at paras 211, 212.
135 For the argument of the Canadian Center for International Justice see online: <http://www.ccij.ca/programs/cases/index.php?DOC_INST=10; for the argument of Amnesty International see online: <http://www.amnistie.ca>
136 Kazemi, QCCS, supra note 101 at para 51.
137 Islamic Republic of Iran, et al v Stephan Hashemi, et al, 2012 QCCA 1449 (available on CanLII) [Kazemi, OCCA]
State immunity which stands for the clear proposition that the SIA cannot apply to acts of torture”. In addition to the rulings in Bouzari, Al-Adsani and Jones, which were used by the Superior Court to deduce the current customary international law on the issue, the Court of Appeal referred to the ICJ decision on Jurisdictional Immunity of the State (Germany v Italy: Greece intervening), decided on February 3, 2012. The ICJ, making the procedural-substantive distinction between the State immunity and the nature of the alleged act, denied that State immunity should be evaluated based on the seriousness of the alleged violation.

In dealing with Canada’s obligation under Article 14 of the CAT, the Court of Appeal followed the interpretation used by Judge Swinton in Bouzari, being later affirmed by Judge Goudge in Court of Appeal, that “the present state of international law”, regardless of what “is possible or even hoped for future”, does not require member States to provide victims of torture abroad with civil redress. Nevertheless, as it was mentioned earlier, the approach of the courts to Article 14 in Bouzari was criticized by the Committee Against Torture on its observation of the implementation of the CAT in Canada. The Committee was concerned with the lack of effective measures to provide redress through civil jurisdiction to all victims of torture, mainly due to restrictions under the provisions of the SIA. The Committee asked Canada to consider “amending the SIA to remove obstacles to redress for all victims of torture”. Borrowing the words of Judge Goudge in Bouzari, the Court of Appeal in Kazemi considered the Committee’s observation “a possible or even hoped for future” of conventional international law. Instead, it referred to the decision of the ICJ in Germany v Italy to deduce that the current customary international law is far from reaching that stage of development. The court however, failed to consider that the Committee Against Torture, as an international organ made under Article 17 of the Convention, is specifically concerned with interpretation of the

138 Kazemi, QCCA, supra note 137 at para 43.
139 Ibid at para 48.
140 Ibid at para 54 quoted from Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), [2012] IJC Rep 99 at para 82. [Germany v Italy]
141 Ibid at para 57 quoted from Bouzari, OSCJ, supra note 77 at para 75.
142 UN Committee Against Torture, Supra note 120 at para 5(f)
143 Kazemi, QCCA, supra note 137 at para 58.
Convention and thus is the appropriate organ to suggest on the way the Convention should be implemented. Moreover, it is clear from the wordings of the Committee that the interpretation of Article 14 was made in the context of contemporary international law and with regards to its fundamental values including the international prohibition of torture and the right of individual victims to access justice. The promotion and protection of human rights, as affirmed in the preamble of the UN Charter, is one of the principal goals of international community in the UN era, which resulted in adoption of lots of other international and regional Conventions with specific focus on the rights of individuals. If the suggestion of the Committee on how to implement the CAT is merely a hope for future, because some States implement it differently, then implementation of all other Conventions having human rights concerns should also be left for the future because there are always practices which violate States obligations under these Conventions. Moreover, I argued earlier that the reading of Article 14 with territorial limitations would be very limited in its applications.

The case was heard by the Supreme Court of Canada on March 18, 2014.\textsuperscript{144} The argument of the plaintiffs, inter alia, was that the SIA should be interpreted in conformity with Canada’s constitutional and quasi-constitutional instruments, namely the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms. This was supported by several interveners: \textsuperscript{145} “These instruments serve not only to safeguard the rights and freedoms of Canadians but also to implement Canada’s obligation under the CAT and other international human rights conventions that Canada has ratified”. \textsuperscript{146} The Appellants supported their position by referring to the impossibility of access to a fair and impartial hearing in Iran and that application of the SIA in their case would deprive them of being heard in a fair trial. An analogous argument, based on

\textsuperscript{144} Estate of the Late Zahra (Ziba) Kazemi, et al. v. Islamic Republic of Iran, et al, 2014 SCC 35034 (available on CanLII)

\textsuperscript{145} Interveners including: CCIJ, REDRESS Trust, British Columbia Civil Liberties Association, Center for Constitutional Rights, Canadian Lawyers for International Human Rights, Amnesty International (Canada), Canadian Association of Refugee Lawyers, Iran Human rights Documentation Center, Canadian Civil Liberties Association and Canadian Bar Association

\textsuperscript{146} To access the factums of the appellant, the respondent and the interveners see online: Supreme Court of Canada <http://www.scc-csc.gc.ca/case-dossier/info/fac-mem-eng.aspx?cas=35034>
the right to a fair trial, was raised in Bouzari, Al-Adsani and Jones. However, they were based on different provisions: The Canadian Bill of Rights in Kazemi, Article 14(1) of the ICCPR in Bouzari, and Article 6(1) ECHR in Jones and Al-Adsani. It is likely that the Supreme Court follows the same path as the ECtHR in Jones and Al-Adsani and the Court of Appeal in Bouzari, ruling in favor of immunity. Given the binding nature of the decision of the Canadian Supreme Court for the lower courts in Canada, the ruling in this case would be determinative of Canada’s approach to State immunity with regards to extra-territorial torture claims. If the court rules in favor of immunity it would provide another precedent for courts of other States to uphold immunity in their future dealings with the issue of State immunity and torture.

Finally, judicial scrutiny in the Canadian case law shows that in Canadian case law, similar to that of the US and the UK, references have been made to the practices of other States, rejecting civil remedies to torture victims, without any effort to search for their judicial reasoning to see whether they have been based on international norms or are merely illustrative of States’ foreign policy on the subject matter. Throughout the Bouzari, the position of the Attorney General was mostly reflective of Canada’s political interests. Relying on the reasoning in Schreiber v Canada, the court endorsed the view that “it is not in Canada’s interest to attempt to adjudicate every – or any but the most egregious- act of a foreign State.” The Attorney General of Canada maintained that if Canadian courts were to view jurisdiction expansively, other countries would be less inclined to respect the Canadian legal system and its authority and this could lead to actions in foreign States against Canada or Canadian interests. Therefore, regardless of the international legal norms governing the issue, the final decision of the courts must be, to a high degree, influenced by Canada’s political interests. The danger of balancing between individual rights and foreign policy interests, as Amnesty International has noted is that “the State will often sacrifice the legal rights of the victims to competing political considerations, such as maintaining friendly relations of the State responsible for the wrong”.

148 Novogrodsky, supra note 109 at 944.
An overall view of the US, UK, and Canada case law shows that the practice of all three States is in favor of granting immunity to the perpetrator of torture. If the Canadian Supreme Court in Kazemi follows the already existed States practice on the issue, which is likely to happen, it would make another precedent against the rights of torture victims and would probably foreclose any opportunity for victims to be heard before the national courts in future. Along with Jones, Al-Adsani and Bouzari, Kazemi would help the progressive development of the general practice, which if being supported by opinio juris would lead to a customary international law in the interest of States who practice torture. Similarly, it would be another support for our argument that an international provision is needed to provide an exception to immunity for acts of torture. If an exception added to the UN Convention to exclude torture, the current practices of States wont be followed in future cases given that the courts in almost all the above mentioned cases consider it the responsibility of the legislature and not the court to add an exception for torture if it deems it necessary. The Courts were clear in their decisions that if there were an exception in treaty law, which excludes acts of torture from immunity, cases would have been decided differently. In deciding whether to grant immunity to the foreign State, courts were looking for a customary international law or a treaty law to solve the problem and since there were no treaty law determinative of the issue they followed the general practice of States in previous cases which was also compatible with forum States political tendency to keep friendly relations with the perpetrator State.

3 International and Regional Courts: Victims of Extra-territorial Torture and the Right to Remedy

It was seen that in domestic law jurisprudence, where States have their own national legislation on the law of State immunity, courts have been constrained by those legislations not excluding immunity for acts of torture. In the absence of explicit provision with regard to claims of torture in the UN Convention and national legislations, judges mostly followed the practice of national and international courts in similar cases and rejected the argument that State immunity should be denied by the legal effects of the prohibition of torture as a jus cogens norm. In this Part, I evaluate the recent and controversial decisions of the International Court of Justice and the European Court of Human Rights on jurisdictional immunity of States when the alleged acts is the violation of fundamental human rights. Although there is not any formal judicial hierarchy in the context of international law, making the decisions of international courts binding, it was seen
that national courts gave considerable weight to decisions of the ICJ and the ECtHR and occasionally based their judgments on the rulings of those courts. Therefore, it is significant, for the purpose of this study, to examine specific cases in international and regional level, which have been used by national courts to determine status of immunity in cases of gross human rights violations. First, the decision of the ICJ in the Jurisdictional Immunities of the State is evaluated. Then, the two controversial decisions of the ECtHR in Al-Adsani and Jones, which have been decided following the decisions of the British courts on those cases, are examined.

3.1 International Court of Justice: Jurisdictional Immunities of the State

The recent ruling of the International Court of Justice (ICJ)\(^\text{150}\) that Italy had violated its obligation to respect Germany’s immunity under international law, by allowing civil claims to be brought against Germany, was subject to widespread disappointments by human rights advocates. Given that the ICJ is an international body charged with resolving disputes of international law arising under international treaty law, customary international law and general principles of law, scholars had hoped for a broader analysis of the international law of the State immunity considering the nature of the alleged act: gross human rights violation.\(^\text{151}\)

Jurisdictional Immunities of the State was concerned with civil proceedings before the Italian courts, which was based on the conduct of Germany military forces during the Second World War. The court, \textit{inter alia}, found that Italy infringed international law by denying Germany’s immunity from jurisdiction although the alleged acts were sever violation of human and humanitarian rights. The court rejected the four arguments raised by Italy against immunity. It found that the territorial exception to immunity does not include situations of armed conflict.\(^\text{152}\) The court, referring to the judgments of national courts in six other countries, rejected arguments based on the \textit{jus cogens} nature of the alleged acts and the gravity of the violations.\(^\text{153}\)

\(^{150}\) \textit{Germany v Italy}, \textit{supra} note 140.


\(^{152}\) \textit{Germany v Italy}, \textit{supra} note 140 at para 65.

\(^{153}\) \textit{Ibid} at paras 81-97.
noted that the *UN Convention* on Jurisdictional Immunities of States doesn’t include an exception based on the gravity of the alleged act or the peremptory nature of the rule breached. Moreover, it made the procedural-substantive distinction while evaluating the connection between the doctrine of State immunity and prohibition of torture and rejected the hierarchy of the norms theory. It also rejected the argument based on a forum of last resort, and ruled that granting immunity would not leave individual victims without compensation.  

Prior to the ICJ’s decision, national courts of dualist States mostly rejected arguments against immunity based on the significant nature of the alleged act due to the lack of an explicit *jus cogens* exception within their national legislation or under the *UN Convention*. Until *Jones v Saudi Arabia*, these courts usually dismissed the argument without engaging in an examination of the relevant international law, and merely based on statutory construction. In *Jones*, as it was discussed earlier, Lord Bingham and Hoffman considered the relevant international law on the issue more closely. Quoting Lady Fox, they made the procedural-substantive distinction and ruled that “State immunity does not go to substantive law” and so it does not contradict the prohibition of torture, but “merely diverts any breach of it to a different method of settlement”. The ICJ in this case, similarly gave little reasoning other than what has been argued by the House of Lords in *Jones*. In fact, “it offered thin reasoning and failed to engage in different theories advanced for an exception to State immunity on the grounds of the nature of the alleged act”. The ICJ mainly referred to the number of national decisions in which immunity was upheld and considered it sufficient to identify customary international law without requiring *opinio juris*. The court expressly denied the reasoning of the Italian courts and was not persuaded by the intervention of Greece, as the only State other than Italy, in which the

154 *Ibid* at paras 98-104.


judiciary had dismissed immunity based on the nature of the allegations. 159

Italy’s argument was not based on the nature of the allegation alone but also raised another concern that “the absolute denial of access to justice and the denial of any form of reparation, to victims of behaviors that were unquestionably forbidden by customary international law when they were committed, and unquestionably constitute violations of *jus cogens* today, is not compatible with the contemporary concept of *jus cogens*”. 160 The ICJ found that no State practice supported the contention that “the entitlement of a State to immunity is dependent upon the existence of effective alternative means of securing redress”. 161 By referring to a lack of State practice on this point and by noting that “the claims could be the subject of further negotiations involving the two States concerned”, 162 the court dismissed the argument on the lack of alternative means of securing redress. However, the court failed to consider that in majority of the cases, claims by victims of torture and other human rights violations are generally brought before the courts of foreign States because there is no alternative means of redress in the State allegedly responsible. Even if we accept the contention of Lords Hoffmann and Bingham in *Jones*, being replicated by the ICJ, that State immunity is a procedural rule which merely diverts the claim to an alternative forum of settlement, when no alternative forum exists for victims to have their claims resolved, such diversions is not meaningful. Judge Yusuf, as one of three dissenters in the case, emphasized on the obligation of States under international Conventions to pay compensation and make reparations for violations of humanitarian law. He also suggested an exception to State immunity where the victims lack effective means of obtaining redress. 163

The majority of decision in this case, practically allowed immunity to shield a State from its obligation to make reparations because domestic courts were the only means of redress available to victims. Judge Yusuf, asserting that courts should take into account the relative value of State immunity and the reparation of victims, suggested that the weight given to State

159 *Ibid* at 130.

160 *Ibid* at 131.

161 *Germany v Italy*, *supra* note 140 at paras 101, 104.

162 *Ibid* at para 106.

163 *Ibid* at paras 13, 14, 20, 58 (dissenting opinion of Judge Yusuf)
immunity be shifted to reflect the growing importance of human rights in international law.  

Judge Cancado Trindade, dissenting from the majority opinion entirely, suggested a broader analysis of the law of State immunity based on human rights concerns. Since legal doctrine, which refers to the teaching of the most highly qualified publicists of the various nations, is among the formal sources of international law together with “judicial decisions”, he supports his analysis by referring to the work of legal jurists who endorsed an approach to immunity with a focus “on the human person”.  

Judge Trindade, persuasively argued that the majority, by invoking immunity, would allow the perpetrators of great crimes to avoid legal consequences for their illegal acts.  

Asserting the unfairness of the majority decision, he conceived it as of permission for “double injustice”: gross human rights violations by Germany and the denial of providing victims with subsequent reparation.  

He also found that the majority procedural-substantive distinction unpersuasive, emphasizing that the ultimate role of legal procedure is the realization of justice.

Although, to many, the decision of the ICJ in the noted case represents great injustice to victims of the German Reich, the ICJ in fact carried out its duty faithfully by taking the international convention and the State’s practice on the law of State immunity in to consideration. ICJ is limited by its Statute to apply the law as it exists.  

Therefore, the lack of specific provision in treaty law, determinative of the issue compatible with the obligation of

164 Ibid at paras 32, 42, 52.  
165 Ibid at paras 32-38, 52, 132, 183 (dissenting opinion of Judge Trindade); for instance he referred to series of lectures, delivered in Paris, from November 1932 to May 1933, by Albert de La Pradelle who pondered that the droit des gens transcends inter-State relations and regulates them so as to protect human beings. He also referred to Max Huber’s book in which he drew attention to the relevance of “superior values”, above “State interests”, in the whole realm of the jus gentium as a law of mankind.  
166 Ibid at 183.  
167 Ibid at 264, 267.  
168 Ibid at para 295.  
States under human rights conventions have led to an unfavorable decision with regards to rights of individual victims. Although an exception to immunity is attractive given the heinous human rights violations being alleged in this case, States practice does not recognize one. This case shows the shortcoming of the application of States’ practice in resolving the issue of State immunity and human rights violations. States’ practice referred to by the court, not being compatible with human rights concerns, cannot ensure an equitable resolution of a dispute. Perhaps that led Amnesty international to argue that finding an exception for immunity in this case would be consistent with international law. Judge Koroma, concurring with the majority, emphasized that the ICJ has a limited role, which is to apply the existing law of State immunity, thus its judgments are regardless of changes that the issue might undergo in future. Due to the absence of specific treaty law determinative of the issue, it was convincing that the majority of the court referred to the practice of States to determine the status of immunity in case of gross human rights violations. Nevertheless, as Judge Koroma expressed, this law might change in future. However, to be realistic, given the current practice of States, the political concerns and the considerable weight national courts often give to decisions of the ICJ, it is unlikely that courts will depart from the ICJ decision in future cases. Therefore, this case admits that a change in the law of State immunity in cases of torture or other human rights violations would only be applicable through a change in the UN Convention.

3.2 European Courts of Human Rights: Al-Adsani Case

The European Court of Human Rights’ judgment in Al-Adsani v United Kingdom is one of its most controversial in recent times. Having been tortured in Kuwait, Al-Adsani sought to bring a civil case for compensation against the Kuwaiti government before the UK courts. Following the UK courts’ rejection of his case on State immunity grounds, Al-Adsani turned to Strasbourg arguing, inter alia, that he had been treated unfairly and his right of access to court under Article 6(1) of the ECHR had been denied. The ECtHR rejected the appeal by a slim

170 Amnesty International, “Germany v Italy: The Right to Deny State Immunity When Victims Have no Other Recourse” (2011), at 11, 13,43.
171 Ibid at para 10. (Separate opinion of Judge Koroma)
172 Al-Adsani, ECtHR, supra note 41.
majority of nine to eight, indicating that the position of the international law on the issue is contested.

The main point of disagreement which caused the division of views across the judges in *Al-Adsani* concerned compliance with Article 6(1) of the ECHR and whether the right of access to a court could legitimately be denied in civil claims growing out of allegation of extraterritorial torture on the grounds of State immunity. In the European case law, restrictions on the right of access to court should pursue a legitimate aim and be proportionate to that aim. Although the judges agreed on the legitimate aim of State immunity, promoting comity and good relations between States through the respect of another States sovereignty, the main disagreement was on whether restriction on Al-Adsani’s claim was proportionate to the aim pursued by granting State immunity. 173 In assessing the proportionality, the court based its analysis on Article 31(3) c of the Vienna Convention on the Law of Treaties, which reiterates that the ECHR has to be interpreted in light of the relevant rule of international law, including the law of State immunity. 174 In other words in the view of the majority, “the Convention, including Article 6 could not be interpreted in a vacuum… and should so far as possible be interpreted in harmony with other rules of international law of which it forms part”. 175 The Majority of the court, referring to the decision of British courts in *Al-Adsani*, expressed that “the measure taken by a High Contracting Party” was reflective of generally recognized rules of international law and, thus, immunity in that case imposed proportionate limitation on the right of access to court embodied in Article 6 (1). 176 The question, therefore, is whether upholding immunity in *Al-Adsani* indeed meets the requirements of public international law.

Although for the majority, the UK’s State immunity legislation, which provided the relevant grounds for immunity in this case, was compatible with generally recognized rules of public international law, the minority disagreed. The great point of disagreement between the majority and minority of the court stemmed form the consequences to be drawn from the *jus

173 *Al-Adsani*, ECtHR, *supra* note 41 at para 54.
175 *Ibid*.
176 *Ibid* at para 56.
cogens status of the prohibition of torture at international law and whether it trumps State immunity. The majority of judges, while accepting that the prohibition of torture had achieved the status of jus cogens, held that the court is “unable to discern, in 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”. 177 The court acknowledged the growing recognition of the prohibition of torture by referring to international instruments and judicial decisions in cases of furundzija and Pinochet to the effect that the prohibition of torture attained the status of a peremptory norm. 178 However, it proceeded to suggest that State practice is still firmly against the proposition that immunity should be denied in civil cases concerning jus cogens violations. In other words, the majority refused to accept that international law of State immunity, when viewed from the perspective of States’ practice, evolved such that a State no longer enjoyed immunity from civil suit in the courts of another State even for acts contrary to jus cogens. 179 On the flip side, the joint dissent noted that the law of State immunity is derived from customary and conventional international law, which are of vertically lower status than jus cogens norms. Accordingly the State immunity had to be overridden by the effect of the peremptory norm, which contradicted it, such as the rule prohibiting torture. The joint dissent argued that the domestic law, in this case the UK State Immunity Act, was in fact designed to give national effect to the international rule of State immunity so it had to be interpreted in accordance with, and in light of the imperative concept of jus cogens in international law.

Another proposition by the majority to reject the supremacy of jus cogens norm of prohibition of torture over the State immunity was the procedural-substantive distinction of the two doctrines. The court held that “the grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts’ power to determine the right”. 180 Therefore the two doctrines basically do not conflict because they are in different categories. Moreover, in the opinion of the ECtHR the procedural rule of State immunity simply diverts the

177 Ibid at para 61.
178 Ibid at para 60.
180 Al-Adsani, ECtHR, supra note 41 at para 48.
claim to a different form of settlement. However, this allegation presupposes that a different form of settlement exists on the international level. In *Al-Adsani*, the English Court of Appeal acknowledged that Al-Adsani “had attempted to make use of diplomatic channels but had been refused by the UK government.” Nonetheless, the government argued “there were other traditional means of redress for wrongs of this kind available to the applicant namely diplomatic representations or inter-state claims”. This submission was made after the UK government had already precluded the option of diplomatic protection. Given that Kuwait was a defendant in this case the dual nationality of Al-Adsani could not help because he could not refer to his Kuwaiti nationality. Moreover, diplomatic protection does not properly constitute an alternative means for the victim to realize the right to a remedy and reparation because, under current international law, it reflects a discretionary process, whereby an individual must first negotiate with her State in order to have the claim espoused. The discretionary nature of diplomatic protection renders it incapable of offering an alternative remedy to torture victims, because it turns on factors external to the individual rights including the foreign policy issues and relationship between the two States. Even if the State is eventually found to have breached the international law against torture, the offending State will only have to pay reparations to the State of nationality. Given that the ILC has so far left “the matter open” as to whether the State is “under an obligation to pay over to an injured individual money that it had received by way of compensation for a claim based on diplomatic protection”, in order to “allow for further development in the law”, the State of nationality enjoys discretion as to whether to transfer the reparations made to the victim of the violation. As such, diplomatic protection for victims of torture abroad, being a discretionary process, could not be considered an alternative way of settlement because it is not compatible with the right to a remedy and reparation.

The dissent in *Al-Adsani* also argued that distinction between criminal and civil proceedings, which had been relied upon by the majority, is immaterial to determine the effects that a *jus cogens* rule has upon another rule of international law. The dissenters stressed “it is not

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182 *Al-Adsani*, ECtHR, *supra* note 41 at para 50.
184 *Al-Adsani*, ECtHR, *supra* note 41.
the nature of the proceedings which determines the effect 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*. Judge Loucaides, in agreement with the joint dissent added that given the absolute nature of the prohibition of torture “it would be a travesty of law to allow exceptions in respect of civil liability by permitting the concept of State immunity to be relied on successfully against a claim for compensation by any victim of torture”. In fact, he could not see why there should be any distinction between criminal and civil proceedings in this respect since, “the rationale behind the principle of international law that those responsible for atrocious acts of torture must be accountable is not based solely on the objectives of criminal law. It is equally valid in relation to any legal liability whatsoever”. In the wording of Judge Ferarri, another dissenting judge, the ECtHR in *Al-Adsani* has missed “a golden opportunity to make a clear and forceful condemnation of all acts of torture”. He suggested that the court should have upheld the House of Lords judgment in *Pinochet*, endorsing that the prohibition of torture is now *jus cogens*, so that torture is a crime under international law. Accordingly, “every State has a duty to contribute to the punishment of torture and cannot hide behind formalist arguments to avoid having to give judgment”. He considered it a formalist argument which the court endorsed “when it said, in paragraph 61 of the judgment, that it was unable to discern any rules of international law requiring it not to apply the rule of immunity from civil suit where acts of torture were alleged”.

Following the *Al-Adsani* decision in the ECtHR, the organization of REDRESS

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185 *Ibid*, joint dissent opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral, Berreto and Vajic

186 *Ibid*, dissenting opinion of Judge Loucaides.

187 *Ibid*.

188 *Ibid*, dissenting opinion of Judge Ferarri Bravo.

189 *Ibid*.

190 REDRESS is an international human rights non-governmental organization, based in London, with a mandate to assist torture survivors to seek justice and other forms of reparation. It fulfills its mandate through a variety of means, including casework, law reform, research and advocacy. It has accumulated a wide expertise on the various facets of the right to reparation for victims of torture under international
suggested draft of Redress for Torture Bill, which if enacted, will provide an effective and enforceable civil remedy for torture survivors in the UK. On February 13, 2002, a meeting of academics, practitioners, representatives of non governmental organizations and government was held to assess the ruling of the ECtHR in Al-Adsani and its impact on the draft Redress for Torture Bill. This meeting on Al-Adsani judgment and its impact on Redress for Torture Bill illustrate the existing barriers for torture survivors to obtain an effective civil remedy before the national courts. The ECtHR, finding that immunity is legitimate jurisdictional bar to pursue a civil claim for damages for acts of torture, appears to further entrench the status of immunity. However, the fact that the Court's decision was based on such a narrow majority provides hope for change in the future.

I agree with REDRESS that there are only three possible ways to ensure that immunity does not apply to cases of torture survivors seeking redress in the UK: “to create an exception to State immunity through UK legislation, to set out an exception to State immunity on a multilateral basis within Europe, or to wait for State practice to develop further”. It is similar with regards to the practice of other States in that we are only able to ensure that immunity does not bar torture victims to seek reparations in a forum State, either through an

law. Online: <http://www.redress.org>

191 Torture (Damages) Bill, online: <http://www.publications.parliament.uk/pa/ld201011/ldbills/031/11031.i-i.html> This Bill would allow survivors to bring a claim for compensation in the courts of England and Wales against those individuals and governments responsible, where they are unable to do so in the country in which they were tortured. This Bill was introduced into the House of Lords as a Private Members' Bill by late Lord Archer of Sandwell QC in 2006-2007. Online: REDRESS, <http://www.redress.org/the-torture-bill/the-torture-bill>


193 Ibid at 14.

194 Ibid.
adoption of torture exception to the national legislation or to a multilateral convention on State immunity. Given the recent States’ practice and their tendency to uphold immunity of the perpetrator State, it is unlikely that States change their national legislations or their practice in favor of torture victims, unless “developments to restrict immunity are under way at a regional or international level”. 195 Wait for a change in State’s practice to create a new exception to State immunity without an international development on the filed is, in the wording of REDRESS, “a precarious option- being without a timeframe” which leaves the chances of change “to the whim of the Courts”. 196

3.3 European Court of Human Rights: Jones Case 197

As a result of the ECtHR decision in Jones and others v the UK on January 14, 2014, victims of torture now confront another obstacle in successfully raising civil actions in third States for their sufferings due to act of torture. Not being able to sue the government of Saudi Arabia in English courts for torture he suffered on the State immunity grounds, Ronald Jones alleged violation of his right of access to the court before the ECtHR. The ECtHR, following the decision of the ICJ in Germany v Italy in 2012, held that there is no exception to the general rule of State immunity before the courts of other States based on the jus cogens nature of the allegation. 198 Upholding the decision of the House of Lords, the Chamber of the Court held, by six votes to one, that the granting of immunity to Saudi Arabia and to its officials in civil proceedings reflected generally recognized rules of public international law. Therefore, the dismissal of the case by the English courts on the grounds of State immunity was not violation of Article 6(1) of the ECHR, which guarantees the right of access to court. The ECtHR confirmed his decision in Al-Adsani that the right of access to a court is not absolute and may be subject to limitations that pursue a legitimate aim and is proportionate. It also considered the granting of immunity from civil proceedings to a foreign State to be a justified restriction on an individuals right of access to a court. However, the court failed to consider that the nature of torture in

195 Ibid at 15.
196 Ibid.
197 Jones and others v the United Kingdom, 2014 ECtHR 34356/06 and 40528/06. [Jones, ECtHR]
198 Ibid at paras 88-94
respect of which access to court was sought, required a more restrictive approach to any limitations imposed. Moreover, such restriction could only be proportionate if there were alternative means of redress for applicants, while in this case, as the Committee Against Torture had found, on the one hand there were no effective mechanisms for investigating claims of torture in Saudi Arabia and on the other hand, the diplomatic protection, for the reasons already discussed, could not constitute an effective remedy. 199

The ECtHR could depart from the earlier nine-votes-to-eight decision in Al-Adsani, being decided in 2001, evaluating the decision again to see whether it was correctly decided and to see whether a torture exception to the doctrine of State immunity had since evolved under international law. The court referred to number of national jurisdictions, both prior to and following the decision of the House of Lords in Jones, which have considered whether there is now a jus cogens exception to State immunity in civil claims against the State. 200 However, it decided that, “it is not necessary for the court to examine all these developments in detail since the recent judgment of the ICJ in Germany v Italy, which was considered by the court as authoritative as regards to the content of customary international law, clearly established that no jus cogens exception for State immunity has yet crystallized”. 201 Therefore, the court declined to relinquish jurisdiction to the Grand Chamber and followed the decision of the ICJ and ruled that the decision of the House of Lords to grant immunity to Saudi Arabia and its officials was not violation of Article 6(1) of the ECHR. However, in the last paragraph of its judgment, the court “in the light of the current developments in this area of public international law”, admitted that “this is a matter which needed to be kept under review by Contracting States”. 202

The ECtHR also referred to the Committee’s General Comment No. 3 (2012) on implementation of Article 14 by State Parties, which noted inter alia:

199 Ibid at para 185.
200 Ibid at para 197. E.g: Siderman de Blake, Princz, Smith and Sampson in the US, Bouzari and Hashemi in Canada, Ferrini in Italy, Perfecture of Voiotia in Greece, Natoniewski in Poland, Bucheron and Grosz in France, A.A in Slovenia, and Al-Adsani in the UK.
202 Jones, ECtHR, supra note 196 at para 215.
Under the Convention, State parties are required to prosecute and extradite alleged perpetrators of torture when they are found in any territory under its jurisdiction, and to adopt necessary legislation to make this possible. The Committee considers that the application of article 14 is not limited to victims who were harmed in the territory of State party or by or against nationals of the State party. The committee has commended the efforts of the State parties for providing civil remedies for victims who were subjected to torture or ill treatment outside their territory. This is particularly important when a victim is unable to exercise the rights guaranteed under Article 14 in the territory where the violation took place. Indeed Article 14 requires state parties to ensure that all victims of torture and ill treatment are able to access remedy and obtain redress.  

The court further cited Committee’s assertion on the question of State immunity and obstacles to the right to redress:

Similarly, granting immunity, in violation of international law to any States or their agents or to non-State actors for torture or ill-treatment is in direct conflict with the obligation of providing redress to victims from seeking full redress to victims. When immunity is allowed by law or exists de facto, it bars victims from seeking full redress as it allows the violators to go unpunished and denies victims full assurance of their rights under article 14. The Committee affirms that under no circumstances may arguments of national security be used to deny redress for victims.

Nevertheless, the ECtHR ruled that the interpretation by the Committee in favor of universal civil jurisdiction for acts of torture had been rejected by several courts and “the question whether the torture convention has given rise to the universal civil jurisdiction is therefore far from settled”. As Judge Zdravka Kalaydjieva suggested in his dissent opinion, while it might be correct to conclude that by February 2012, when the ICJ decided Germany v Italy, and prior to the General Comment No. 3 of the CAT Committee on November 2012, no jus

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203 Ibid at para 67 citing General Comment No. 3, supra note 73 at para 22.
204 Ibid, citing General Comment No. 3, supra note 73 at para 42.
205 Ibid at para 208.
cogens exception to State immunity had yet been crystallized, it was necessary for the court to examine developments subsequent to the decision of the ICJ in Jurisdictional Immunities of the State considering the mentioned General Comment. 206

With regards to the immunity of States officials, although the court found that there is some emerging support in favor of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials the bulk of the authority is, as Lord Bingham put it in the House of Lords in Jones, to the effect that “States’ right to immunity may not be circumvented by suing its servants or its agents instead”. 207 Third party interveners in this case, including REDRESS, Amnesty International, INTERIGHTS, and JUSTICE submitted joint written comments on the question of the State immunity of officials, and emphasized that the alleged torture has given rise to both individual and State responsibility under international law. Therefore, the claim against an official for his role in the commission of torture could not be said to be the practical equivalent of a case against the State itself, such as to support the contention that the State itself was directly impled. Moreover, “any eventual award of compensation would only be enforceable against the individual and not against the State or its assets”. 208 In the view of Judge Kalaydjieva, “the personal accountability of torturers is reflected unequivocally in Article 3 taken together with Article 1 of the ECHR, in the UN Convention on Torture and in the very concept of establishing the ICC”. Contrary to the view of the majority, in Kalaydjieva’s understanding “these principles were intended and adopted specifically as special rules for ratione materiae exceptions from immunity in cases of alleged torture”. 209 The interveners also argued that granting immunity ratione materiae to the officials in this case was inconsistent to the object and purpose of the CAT, which was to ensure accountability and to prevent impunity for torture, particularly where no alternative means of redress existed. They also brought evidence of States’ practice, refusing State immunity to both current and former officials charged with crimes under international law in France, Italy, the

206 Ibid, dissenting opinion of Judge Kalaydjieva
207 Ibid at para 213.
208 Ibid at para 182
209 Ibid, dissenting opinion of Judge Kalaydjieva
Moreover, limitation to access to court due to immunity of the State officials in this case did not pursue a legitimate aim and was not proportionate. The immunity *ratione materiae*, contrary to the immunity of State, did not contribute to the proper functioning of the State, but the purpose was “to prevent suit against officials when they incurred no independent responsibility and merely acted as mouthpiece of the State.” That aim did not apply when the torture was alleged as it fell within the personal responsibility of the official and thus immunity only prevented the official from being held to account, which could not be considered a legitimate aim under Article 6(1).  

Upholding immunity of State’s officials, the ECtHR however, admitted that the State practice on this issue is in a state of flux, with evidence of both the grant and the refusal of immunity *rationae materiae* in such cases, therefore the international opinion on the question may evolve and further developments can be expected.

Judge Bianku, in a concurring opinion, expressed a great hesitation in voting in favor of the majority’s conclusion. According to Bianku, “almost thirteen years after delivery, with a very narrow majority, of the judgment in *Al-Adsani v the UK*, during which the subject matter has been the subject of very significant developments, the case should have been relinquished to the Grand Chamber in order to give it an opportunity to consider whether *Al-Adsani* still remains good law”. Judge Kalaydjieva, dissent judge in *Jones*, also shared doubts of some of the numerous dissenting judges in *Al-Adsani*. He found it difficult to accept that ECtHR waived immunity and found a violation of the right of access to court concerning disputes involving employment, but not concerning redress for torture, as was the case in *Jones*. At the end of his statement, borrowing the words of one of the dissenting judges in *Al-Adsani*, Judge Kalaydjieva said “what a pity” to express his feeling on the ECtHR judgment in this capacity.

211 *Ibid* at para 184.
212 *Ibid* at para 213.
214 *Ibid*, dissenting opinion of Judge Kalaydjieva; see *Cudak v Lithuania*, 2010 ECtHR 15869/02 and *Sabeh El Leil v France*, 2011 ECtHR 34869/05.
215 *Ibid*. 
4 The United Nations Convention on Jurisdictional Immunities of States and Their Property: An Exception to Torture?

Identifying uniform rules governing State immunity is a difficult task because, as noted by the ILC, “the sources of international law on the subject of State immunities appear to be more widely scattered than normally expected in the search for rules of international law on any other topic”. 216 Moreover, customary international law on State immunity has grown “principally and essentially out of the judicial practice of States on the matter”. 217 Therefore, to conceive the current approach of international law toward the issue of State immunity and torture, different sources of international law, which have played constructive role in crystallization of the law of State immunities, should be examined in the course of this study. In this Part another source of the law of State immunity, the UN Convention is evaluated to see its approach toward the civil claims raised by victims of extra-territorial torture. It was seen that the national and international judicial decisions were mostly in favor of granting immunity to the perpetrator State regardless of internationally recognized prohibition of torture and State responsibility to provide victims with adequate compensation. My concern in this paper is that, following the current judicial practice and with the lack of specific treaty law providing victims of torture with the opportunity to seek reparations for the atrocities they endured, State immunity becomes a barrier for torture victims to raise civil claims against the wrongdoers before the courts of other States. If this trend becomes the general practice of States, being supported by opinio juris, it would establish a new rule of customary international law in the field. Emergence of such a customary international law would leave torture victims with no possible access to justice and redress contrary to obligation of States under the contemporary international law. In this Part, I argue that while it would be possible for a widely followed international treaty, such as the UN Convention on Jurisdictional Immunities of States and their property, to change this

216 Sucharitkul, Preliminary Report, supra note 7 at para 22.

217 Ibid at para 23
practice it has not done so yet.

On 2 December 2004, after more than a quarter of a century of intense international negotiations on the field, the UN GA adopted resolution A/Res/59/38 concerning the United Nations Convention on Jurisdictional Immunities of States and Their Property.218 This Convention is the result of 27 years of work of the ILC and the Sixth Committee of the GA. It is the first modern international treaty to articulate a uniform approach to the question of the immunity of foreign States and their property from the jurisdiction of the courts of a forum State. This Convention was intended to codify the existing principles of customary international law on the issue of State immunity. 219 Substantively, the convention embraces the so-called “restrictive approach” toward the immunity of States. According to the restrictive theory, sovereigns maintain their immunity when engaged in sovereign activities (acta jure imperii) but they are treated as private entities when acting in the capacity of private persons doing commercial transactions or private law activities (acta jure gestionis). This is contrary to what was believed in international law and practice until the mid-twentieth century, according to which states were absolutely immune from the jurisdiction of sovereign courts.220

The question is whether this Convention contains any provision relevant to the issue of State immunity and torture, and if not, whether it is compatible with significant developments in international law. The first development is with respect to the structure of international law which changed the States responsibility based on bilateralism of rights and corresponding

218 UN Convention, supra note 3.


obligations to a hierarchy which accords a superior status to some rules on international law: the recognition of *jus cogens* norms and *erga omnes* obligations. The second development is based on the recognition of an individual’s position in international law, which allows the perception of individuals as victims of international law violations and consequently entitled to reparation for damage they have suffered. It should be determined whether this Convention has denied any possible development in international law, which might allow torture victims to claim compensation from the perpetrator State before the court of foreign State. Although this Convention has been a major step towards the enhanced legal certainty in this area of law and it might well represent a “diplomatic triumph”, the question is whether it could be said to be a triumph for justice as well.

Compatible with the restrictive theory, Part III of this Convention includes several exceptions to the general rule of States’ enjoyment of immunity from the national courts of other States. Articles 10 to 17 pertain to these exceptions which apply to suits involving claims pertaining to one of the following: commercial transactions, contract of employment, personal injuries and damage to property, ownership possession and use of property, intellectual and industrial property, participation in companies or other collective bodies, and ships owned or operated by State. In other words, if any of these claims are at stake, a state will not be able to allege immunity in a foreign court. Most of these exceptions refer to *acta jure gestionis* i.e situations where sovereigns (either States or its officials) act in the capacity of private entities. The only provision with reference to a foreign State’s tortious act or omission, regardless of the act being *acta jure gestionis* or *acta jure imperii*, is Article 12, which includes an exception to immunity for torts committed by a foreign State within the territory of the forum State. What is clear is that the Convention did not endorse the proposition that States can be subject to claims for torts, including acts of torture or other human rights infringements, committed outside the forum State.

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221 Fox, *The Law of State Immunity*, supra note 50 at 139.

Specifically, Article 12 provides that unless otherwise agreed upon between the States concerned:

A State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission. 223

According to the required territorial nexus in this Article, the pertained act or omission must have occurred in whole or in part within the forum State. Moreover, the author of the act or omission must have been present in that territory at the time of the act or omission. The scope of this Article, thus, is so narrow and it does not cover purely extraterritorial tortious acts of States.

The ILC’s Commentary on this Article, during the course of negotiations for the drafting of the Convention, shows that the intent of the Article was primarily to cover “accidental death or physical injuries to persons or damage to tangible property”. 224 It has been said that the Article is primarily concerned with “accidents which are occurring routinely within the territory of the State of the forum” by foreign States or their officials, such as accidents involved in the transport of goods and passengers by rail, road, air or waterway. In other words, “the basis for the assumption and exercise of jurisdiction in cases covered by this exception is territoriality”. This point was also made by the ILC that the provision “does not cover cases where there is no physical damage”. Therefore, it does not apply where the claim is raised because of mental pain and suffering, a frequent consequence of torture and other serious human rights violations. In addition, the term “pecuniary compensation” appears to exclude other forms of redress. The provision, thus, appears to exclude the possibility of recovering damages for acts such as torture committed entirely outside the forum State even where the victim suffers the mental effects of that torture in the forum State.

223 UN Convention, supra note 3, Article 12.

According to the Chair of the Ad Hoc Committee, Gerhard Hafner, in his introductory remarks to the Sixth Committee on October 24, 2004, the drafting history of this convention and discussions during its elaboration, form an integral part of the Convention and the provisions of this Convention should be read in light of those negotiations. Chairman Hafner noted:

Generally, it must be borne in mind that this Convention will have to be read in conjunction with the commentary as prepared by the ILC … and the Reports of the Ad Hoc Committee and the UN General Assembly Resolution adopting the Convention will form an important part of the travaux préparatoires of the Convention. 225

Accordingly, given the lack of specific provision with regards to the immunity of States when the alleged act is torture outside the forum State, the negotiations and commentaries made during the lengthy period of negotiation of the Convention would be helpful to determine the approach of the drafters towards this issue.

The negotiation history of the Convention shows that neither the 1986 nor the 1991 draft Articles of the ILC included any exception for acts contrary to international law. However, questions were raised by the ILC, in its 1998 Report, regarding “the existence or non-existence of immunity in the case of violation by a State of jus cogens norms of international law”. 226 The ILC Working Group, established by the UN General Assembly Sixth Committee, consequently in 1999 considered the possibility of an exception to State immunity for human rights violation. It drew the attention of this Committee to the development in States practice concerns the argument increasingly put forward that “immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of jus cogens, particularly the prohibition on torture”. 227 It drew the Committee’s attention to the number of civil claims that have been brought against foreign governments in


226 Hafner, Report on the UN Convention, supra note 6 at paras 46-47,

national courts of the United States and the United Kingdom, arising out of acts of torture committed outside the forum State. Even if “in most cases, the plea of sovereign immunity has succeeded”, the Working Group observed that national courts, in some cases, had shown sympathy for denying immunity. \textsuperscript{228} It enumerated two developments supporting the argument that a State may not plead immunity in respect to gross human rights violations: first, the United States amendment to its Foreign Sovereign Immunities Act to include a new exception to immunity. Secondly, the \textit{Pinochet} case and the widespread publicity that it received, which has generated support for the view that States officials should not be entitled to plead immunity for acts of torture committed in their territories.

However, according to the chairman of the Committee, Gerhard Hafner, “it was generally agreed [by the Ad Hoc Committee] that the issue, although of current interest, did not fit into the draft Articles”. \textsuperscript{229} Furthermore, it was believed that this issue did “not seem to be ripe enough for the Working Group to engage in a codification exercise over it.” He further noted that “In any case, it would be up to the Sixth Committee itself, rather than the Working Group, to decide what course of action, if any, to take on the issue”. In this connection, the view was also expressed that “the issue, rather than being a Sixth Committee matter, seemed to fall within the purview of the Third Committee of the General Assembly, particularly in connection with non-impunity issues dealt with by that Committee”. Eventually, neither the Sixth Committee nor the Third looked into the interaction between State immunity and violations of \textit{jus cogens} norms any further.

Gerhard Hafner, explaining the omission in the \textit{UN Convention} of any provision relating to abuse of human rights, stated: “this issue was raised in the ILC and the UN GA and it was dropped because, in the light of the \textit{Al-Adsani} case and other developments, it was concluded that there was no clearly established pattern by States in this regard”. \textsuperscript{230} Therefore, he believes:

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228 \textit{Al-Adsani}, CA, supra note 39; Controller and Auditor-General v. Sir Ronald Davison, particularly at 290 (as per P. Cooke); dissenting opinion of Justice Wald in \textit{Princz}, supra note 12 at 1176-1185.


230 Gerhard Hafner, Remarks at the Chatham House Conference on State Immunity and the New U.N.
\end{flushleft}
“any attempt to include such a provision would, almost certainly jeopardise the conclusion of the Convention”. Difficulties on determining the scope of the “serious violations of human rights” and its interpretation was another reason, in his view, for the ILC not to engage on the issue.

Nonetheless, one might not infer that the Convention’s silence has denied any possibility for further development in international law that would allow States to provide civil jurisdiction over claims of alleged violations of peremptory norms committed by foreign governments in their own territory. Although the Convention provides no textual basis on the issue, the ILC Working Group cautioned about the ignorance of the States’ developments and nascent trend toward a *jus cogens* exception to immunity. 231 Likewise, nothing in the negotiation history of the Convention expressly prohibits the possibility of exercising such jurisdiction by its parties. The lack of textual basis in the *UN Convention* is not, however, surprising because the ILC finalized its drafts Articles in 1991 and it is only in the last two decades that the rights of victims to recover reparation for crimes under international law have received serious recognition. 232

In my opinion, Hafner’s assertion regarding the lack of clear pattern by States on the issue of State immunity and human rights violations makes the issue even more appropriate for the ILC to engage in a codification exercise over it. It has been asserted, in the preamble of this Convention, 233 that it would “contribute to the codification and development of international law and the harmonization of practice in this area”. Therefore, this Convention should also contemplate the disputed area of the law of State immunity when the alleged act is extra-territorial torture. It is appropriate to produce a universally applicable legal regime in order to unify the States’ practice in this field compatible with the contemporary international law.

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232 Fox, *The Law of State Immunity, supra* note 50 at 140
233 *UN Convention, supra* note 3, pmbl.
As adopted, the Convention neither expresses a rule on the issue nor endorses the idea of an exception, and at best leaves the question open to be determined in the case law. In the absence of specific provision on the issue, the current trend of national courts could possibly expand so as to become a general practice supported by *opinio juris* and establish a new rule of customary international law. 234 It was presumably for this reason that in ratification of the Convention three States, including Norway, Sweden and Switzerland, made the declaration that this instrument was “without prejudice to any future international development in the protection of human rights”. 235 Switzerland recorded that “Article 12 does not govern the question of pecuniary compensation for serious human rights violations which are alleged to be attributable to a State and are committed outside the State of the forum”. Therefore, this Convention is without prejudice to developments in international law on the issue of State immunity and violation of norms having the status of *jus cogens* including prohibition of torture.

5 Conclusion

The *UN Convention on Jurisdictional Immunities of States and their Property* successfully codified a complex area of international law, and dropped the immunity of a foreign State in litigation over commercial matters or personal injuries and property damages within the forum State. However, notwithstanding the development of international law in the fields of human rights and humanitarian law, and the growing recognition of the importance of the prohibition of torture, the drafters failed to take into account civil litigations arising from extra-territorial torture. In the absence of specific provision in the *UN Convention* excluding immunity in claims raised by victims of torture abroad, and given the current judicial practice of States, denying to hear the claims of torture victims on the grounds of State immunity, there is a serious risk that victims of extra-territorial torture would no longer be able to access fair trials. In

234 Knuchel, supra note 87 at 150.

addition, there is a fear that the current trend of upholding the perpetrator’s immunity, instead of following its actual purpose, which is to maintain comity and friendly relations among States, causes the impunity of States from civil accountability for the torture they committed.

In the context of contemporary international law, the rights of victims and their families to obtain reparations for crimes under international law has been affirmed in a number of international instruments adopted over the past two decades.\(^{236}\) Even before that in 1966, the right to a remedy was recognized in Article 2(3) of the International Covenant on Civil and Political Rights.\(^{237}\) The apparent bar in the UN Convention for victims of torture to seek reparations against a State and its officials before the court of other States, on the basis of extra-territorial torture, is at odds with this and other internationally recognized rights of victims, such as right to access to a fair trial.\(^{238}\) Although the right to access to justice is not an absolute right, any restriction on this right, as it was affirmed by the ECtHR both in Al-Adsani and Jones, should be proportionate. Nevertheless, in the absence of an alternative forum before which victims could bring their claims, such restrictions are not proportionate, since it has the effect of


\(^{237}\) International Convention on Civil and Political Right [ICCPR], Article 2(3):

Each State Party to the present Covenant undertakes: (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies when granted.

\(^{238}\) Being recognized in Article 10 of the Universal Declaration of Human rights, Article 6 of the ECHR, Articles 14 and 16 of the ICCPR
extinguishing the underlying rights. I discussed that other methods such as diplomatic protection is unlikely to provide victims of torture with any reparations, since the ILC’s draft Articles on diplomatic protection do not include an obligation to exercise diplomatic protection, leaving it to the complete discretion of States. 239

In addition, granting immunity to the perpetrator State is also inconsistent with the fundamental rule of State responsibility for internationally wrongful acts and omissions. There is no doubt that States are responsible for their wrongful acts under international law including the act of torture. 240 As REDRESS points out, “probably one of the worst aspects of torture and many of the other crimes under international law is that the State, the very body that is designed to protect the rights of individuals, has abused its position of power and itself been responsible for the perpetration of serious crimes”. Despite ingrained State responsibility for international crimes, the UN Convention allows States to hide behind the barrier of State immunity and thus not be held accountable for the alleged heinous crimes from a civil perspective. In this sense, the UN Convention on State immunity may result in impunity for torture, 241 especially in the

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Impunity is defined as the impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative, or disciplinary proceedings – since they
absence of other reasonable alternative means, making States accountable for the torture they have committed. 242

In this paper, I argued that there are two options to change the present legal system on the laws of State immunity in order to be in line with the mentioned obligations of States under the contemporary international law. The first option is to advocate for a new judicial approach, which would allow national courts to hear claims concerning extra-territorial torture. The second option is to call for the adoption of an exception to the UN Convention, which would lift immunity protections for foreign States when the alleged act is torture. It was shown that neither national, international or regional courts took the initiative to change the States practice to meet the needs of contemporary international law. Because, from a political perspective, States do not like their courts to become tribunals for human rights claims against other States and State immunity is an instrument that both protects them from floods of litigations from torture victims as well as maintains their friendly relation with the perpetrator State. It was also discussed that the ILC was likewise, in adoption of the UN Convention, more deferential to the State preference of not being prosecuted before the courts of other States. In the analysis of the judicial reasoning and ruling of courts in leading cases on the field, I argued that they were not decided based on the wider concerns of international law, such as international human rights law and that they don’t satisfy the need of torture condemnation and punishment. Nevertheless, after the recent rulings of the ICJ in jurisdictional immunity of the State, and the ECtHR decision in Jones and

are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.

242 Ibid, principle 1:

Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.
Al-Adsani, a new judicial approach to immunity appears foreclosed. Moreover, the analysis of State practice showed that in several cases judges maintained that if States immunity should be dropped in cases of torture that would be the duty of legislature to add a torture exception to the law of State immunity and not the judicial system’s to take this initiative. 243 Similarly, in the context of international law it is the duty of the ILC, being primarily responsible for the adoption of the Convention, to engage in a codification exercise over the issue.

In this paper, it was shown that States rejected the claims on immunity grounds mostly due to the lack of an explicit torture exception within their national legislation and the UN Convention, providing for a general rule of immunity subject to specific exceptions. 244 Until Jones, courts usually dismissed extra-territorial torture claims through statutory construction rather than by engaging in a detailed examination of the relevance of international law. 245 It was only in Jones that, although still focused on statutory construction, Lords Bingham and Hoffmann considered the relevant international law on the issue more closely and made the procedural-substantive distinction between the State immunity and prohibition of torture, whose flaws were discussed. 246 It seems that the only possible way to move international law of sovereign immunity in a direction that is responsive to State obligations under the contemporary concepts of international law would be to adopt an exception to the UN Convention that expressly drops States immunity in civil cases based on torture, regardless of where they were committed. However, from the practical perspective, such an exception might not be quickly drafted or widely ratified, in the current status of international law of State immunity, it seems the only effective way to ensure justice for the victims of the most heinous crime in the world.

244 Jones, UKHL, supra note 61 at paras 25, 26; Bouzari, OCA, supra note 100 at paras 42, 95; Kazemi, QCCA, supra note 137 at para 58
245 See Bouzari, OCA, supra note 100; and Al-Adsani, CA, supra note 39.
246 Jones, UKHL, supra note 61 quoting Fox, The Law of State Immunity, supra note 50 at 525.
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