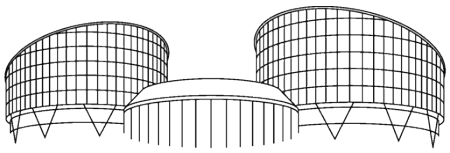

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF JONES AND OTHERS v. THE UNITED KINGDOM

(Applications nos. 34356/06 and 40528/06)

JUDGMENT

STRASBOURG

14 January 2014

FINAL

02/06/2014

This judgment has become final under Article 44 § 2 of the Convention.

In the case of Jones and Others v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Ineta Ziemele, *President*,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Paul Mahoney, *judges*,
and Françoise Elens-Passos, *Section Registrar*,

Having deliberated in private on 10 December 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 34356/06 and 40528/06) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). In the first, the applicant is Mr Ronald Grant Jones, a British national who was born in 1953. His application was lodged on 26 July 2006. In the second, the applicants are Mr Alexander Hutton Johnston Mitchell, Mr William James Sampson and Mr Leslie Walker. They are also British nationals who were born in 1955, 1959 and 1946 respectively. Mr Sampson also has Canadian nationality. Their application was lodged on 22 September 2006.

2. Mr Jones was represented by Mr G. Cukier, a lawyer practising in London with Kingsley Napley LLP. Mr Mitchell, Mr Sampson and Mr Walker, who had been granted legal aid, were represented by Ms T. Allen, a lawyer practising in London with Bindmans LLP. The United Kingdom Government ("the Government") were represented by their Agent, Mr J. Grainger, Foreign and Commonwealth Office.

3. The applicants alleged, in particular, that the grant of immunity in civil proceedings to the Kingdom of Saudi Arabia in the case of Mr Jones and to the individual defendants in both cases amounted to a disproportionate interference with their right of access to a court under Article 6 of the Convention.

4. On 15 September 2009 the applications were communicated to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

5. The Redress Trust (REDRESS), Amnesty International, the International Centre for the Legal Protection of Human Rights (Interights)

and JUSTICE ("the third-party interveners") were given leave by the President of the Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). They submitted joint written comments.

6. The applicants requested an oral hearing but on 29 November 2011 the Chamber decided not to hold a hearing in the case.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Allegations of torture and proceedings brought by Mr Jones

7. On 15 March 2001, while he was living and working in the Kingdom of Saudi Arabia, Mr Jones was slightly injured when a bomb exploded outside a bookshop in Riyadh. He alleges that the following day he was taken from hospital by agents of Saudi Arabia and unlawfully detained for sixty-seven days. During that time he was tortured by a Lieutenant Colonel Abdul Aziz. In particular, he alleges he was beaten with a cane on his palms, feet, arms and legs; slapped and punched in the face; suspended for prolonged periods by his arms; shackled at his ankles; subjected to sleep deprivation; and given mind-altering drugs.

8. Mr Jones returned to the United Kingdom where a medical examination found he had injuries consistent with his account and where he was diagnosed with severe post-traumatic stress disorder.

9. On 27 May 2002 Mr Jones commenced proceedings in the High Court against "the Ministry of Interior the Kingdom of Saudi Arabia" and Lieutenant Colonel Abdul Aziz, claiming damages, *inter alia*, for torture. In the particulars of claim he referred to Lieutenant Colonel Abdul Aziz as a servant or agent of Saudi Arabia. Service was effected on Saudi Arabia via its then solicitors, but the solicitors made it clear that they had no authority to accept service of the claim on Lieutenant Colonel Abdul Aziz.

10. On 12 February 2003 Saudi Arabia applied to have the claim struck out on the grounds that it, and its servants and agents, were entitled to immunity and that the English courts had no jurisdiction. Mr Jones applied for permission to serve the claim on Lieutenant Colonel Abdul Aziz by an alternative method. In his judgment of 30 July 2003, a Master of the High Court held that Saudi Arabia was entitled to immunity under section 1(1) of the State Immunity Act 1978 (see paragraph 39 below). He also held that Lieutenant Colonel Abdul Aziz was similarly entitled to immunity under that Act and refused permission to allow service by an alternative method. Mr Jones appealed to the Court of Appeal.

B. Allegations of torture and proceedings brought by Mr Mitchell, Mr Sampson and Mr Walker

11. Mr Mitchell and Mr Sampson were arrested in Riyadh in December 2000; Mr Walker was arrested there in February 2001. All three applicants alleged that, while in custody, they were subjected to sustained and systematic torture, including beatings about the feet, arms, legs and head, and sleep deprivation. Mr Sampson alleged he was anally raped. The applicants were released and returned to the United Kingdom on 8 August 2003. Each obtained medical reports which concluded that their injuries were consistent with their accounts.

12. The applicants decided to commence proceedings in the High Court against the four individuals they considered to be responsible: two policemen, the deputy governor of the prison where they were held, and the Minister of the Interior who was alleged to have sanctioned the torture. They therefore applied for permission to serve their claim on the four individuals out of the jurisdiction. On 18 February 2004 this was refused by the same Master who had heard Mr Jones's claim, on the basis of his previous ruling in respect of Mr Jones. However, the Master acknowledged that he had enjoyed the benefit of fuller argument than on the applications relating to Mr Jones's claim, and said:

> "[H]ad the matter come before me as a free-standing application, without my having decided the *Jones* case ..., I might have been tempted to give permission to serve out of the jurisdiction on the basis that it seems to me that, having heard the arguments, that there is a case to be answered by these defendants as to whether there is jurisdiction in these courts over them."

13. The applicants appealed to the Court of Appeal with the leave of the Master.

C. The Court of Appeal judgment

14. The two cases were joined and on 28 October 2004 the Court of Appeal published its judgment. It unanimously dismissed Mr Jones's appeal from the decision of the Master to refuse permission to serve Saudi Arabia outside the jurisdiction. However, it allowed the appeals in respect of the refusal of permission in each case to serve the individual defendants.

15. As regards the immunity of Saudi Arabia, Lord Justice Mance, with whom Lord Phillips and Lord Justice Neuberger agreed, refused to depart from this Court's ruling in *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI. He further found that Article 14 § 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Convention against Torture" – see paragraph 63 below), which obliges a Contracting State to ensure that a victim of an act of torture obtains redress, could not be interpreted as

imposing an obligation on a State to provide redress for acts of torture when those acts were committed by another State in that other State.

16. In respect of the immunity of the individual defendants, Mance LJ considered the case-law of the domestic courts and courts of other jurisdictions, which recognised State immunity *ratione materiae* in respect of acts of agents of the State. However, he noted that none of these cases was concerned with conduct which was to be regarded as outside the scope of any proper exercise of sovereign authority or with international crime, let alone with systematic torture. He did not accept that the definition of torture in Article 1 of the Convention against Torture as an act "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" (see paragraph 59 below) was fatal to the applicants' claims:

> "71. ... It seems doubtful that the phrase 'acting in an official capacity' qualifies the reference to 'a public official'. The types of purpose for which any pain or suffering must be inflicted ... would appear to represent a sufficient limitation in the case of a public official. Be that as it may, the requirement that the pain or suffering be inflicted by a public official does no more in my view than identify the author and the public context in which the author must be acting. It does not lend to the acts of torture themselves any official or governmental character or nature, or mean that it can in any way be regarded as an official function to inflict, or that an official can be regarded as representing the state in inflicting, such pain or suffering. Still less does it suggest that the official inflicting such pain or suffering can be afforded the cloak of state immunity ... The whole tenor of the Torture Convention is to underline the individual responsibility of state officials for acts of torture ..."

17. Mance LJ did not consider it significant that Lieutenant Colonel Abdul Aziz had been described in Mr Jones's claim as the "servant or agent" of Saudi Arabia. Nor did he accept that general differences between criminal and civil law justified a distinction in the application of immunity in the two contexts. He noted that the House of Lords in *Pinochet (No. 3)* (see paragraphs 44-56 below) had considered that there would be no immunity from criminal prosecution in respect of an individual officer who had committed torture abroad in an official context. It was not easy to see why civil proceedings against an alleged torturer could be said to involve a greater interference in the internal affairs of a foreign State than criminal proceedings against the same person. It was also incongruous that if an alleged torturer was within the jurisdiction of the forum State, he would be prosecuted pursuant to Article 5 § 2 of the Convention against Torture (see paragraph 62 below) and no immunity could be claimed, but the victim of the alleged torture would be unable to pursue any civil claim. Furthermore, there was no basis for assuming that, in civil proceedings, a State could be made liable to indemnify or otherwise support one of its officials proved to have committed systematic torture.

18. Mance LJ considered that whether any claim in the English courts against individuals could proceed was better determined not by reference to

immunity, but by reference to whether it was appropriate for the English courts to exercise jurisdiction. A number of factors were relevant to the assessment of this question, including the sensitivity of the issues involved and the general power of the English courts to decline jurisdiction on the ground that England was an inappropriate forum for the litigation.

19. In considering the impact of Article 6, Mance LJ found important distinctions between a State's claim to immunity *ratione personae*, in issue in *Al-Adsani* (cited above), and a State's claim to immunity *ratione materiae* in respect of its officials, in issue in the present cases. Firstly, he considered it impossible to identify any settled international principle affording the State the right to claim immunity in respect of claims directed against an official, rather than against the State, its Head of State or diplomats. He was of the view that the legislation and case-law of the United States of America (see paragraphs 112-25 below) militated strongly against any such settled principle and supported a contrary view. In so far as counsel for the Government purported to refer to evidence of settled practice, Mance LJ noted that the case-law to which he had referred related either to the immunity of the State itself or to the immunity of individual officials for alleged misconduct that bore no relationship in nature or gravity to the international crime of systematic torture. He considered the *dicta* in the separate opinion of Judges Higgins, Kooijmans and Buergenthal to the judgment of the International Court of Justice in the "*Arrest Warrant*" case (see paragraphs 84-85 below) to provide further confirmation that there was no settled international practice in this area.

20. Mance LJ explained that where, under Article 14 of the Convention against Torture, a State had created a domestic remedy for torture in the State where that torture was committed, other national courts could be expected to refuse to exercise jurisdiction. However, where there was no adequate remedy in the State where the systematic torture occurred, it might be regarded as disproportionate to maintain a blanket refusal of recourse to the civil courts of another jurisdiction. He acknowledged that the courts of one State were not to adjudicate lightly upon the internal affairs of another State, but considered that there were many circumstances, particularly in the context of human rights, where national courts did have to consider and form a view on the position in, or conduct of, foreign States.

21. Mance LJ concluded that giving blanket effect to a foreign State's claim to State immunity *ratione materiae* in respect of a State official alleged to have committed acts of systematic torture could deprive the right of access to a court under Article 6 of real meaning in a case where the victim of torture had no prospect of recourse in the State whose officials had committed the torture. He therefore allowed the applicants' appeals in respect of the individual defendants and remitted them for further argument, concluding:

> "96. ... [I]t seems to me that any absolute view of immunity must at the very least yield in the face of assertions of systematic torture to a more nuanced or proportionate approach. As it is, having regard to the [European Convention on Human Rights], it is sufficient to decide this appeal that, whether issues of state immunity are or are not treated as theoretically separate from issues of jurisdiction in English law, the permissibility, appropriateness and proportionality of exercising jurisdiction ought to be determined at one and the same time. Such a conclusion reflects the importance attaching in today's world and in current international thinking and jurisprudence to the recognition and effective enforcement of individual human rights. It fits harmoniously with the position already achieved in relation to criminal proceedings. It caters for our obligation under article 6 of the [Convention] not to deny access to our courts, in circumstances where it would otherwise be appropriate to exercise jurisdiction applying domestic jurisdictional principles, unless to do so would be in pursuit of a legitimate aim and proportionate. ..."

22. In his concurring judgment, Lord Phillips agreed with the conclusions of Mance LJ as regards both the claim against Saudi Arabia and the claims against the individual officials. In particular, he considered that the judgment in *Pinochet (No. 3)* (see paragraphs 44-56 below) had shown that torture could no longer fall within the scope of the official duties of a State official. It therefore followed that if civil proceedings were brought against individuals for acts of torture in circumstances where the State was immune from suit, there could be no suggestion that the State would be vicariously liable: it was the personal responsibility of the individuals, not that of the State, which was in issue.

23. On the approach of this Court, he commented:

> "134. Had the Grand Chamber been considering a claim for state immunity in relation to claims brought against individuals, I do not believe that there would have been a majority in favour of the view that this represented a legitimate limitation on the right to access to a court under Article 6(1). Had the Court shared the conclusions that we have reached on this appeal, it would have held that there was no recognised rule of public international law that conferred such immunity. Had it concluded that there was such a rule, I consider that it would have been likely to have held that it would not be proportionate to apply the rule so as to preclude civil remedies sought against individuals."

D. The House of Lords judgment

24. Saudi Arabia appealed to the House of Lords against the decision of the Court of Appeal in respect of the individual defendants and Mr Jones appealed against the decision of the Court of Appeal in respect of his claim against Saudi Arabia itself. On 14 June 2006, the House of Lords unanimously allowed Saudi Arabia's appeal and dismissed the appeal by Mr Jones.

25. Lord Bingham considered that there was a "wealth of authority" in the United Kingdom and elsewhere to show that a State was entitled to claim immunity for its servants or agents and that the State's right to immunity could not be circumvented by suing them instead. In some

borderline cases there could be doubt whether the conduct of an individual, although a servant or agent, had a sufficient connection with a State to entitle it to claim immunity for his conduct. However, in his view, these were not borderline cases. Lieutenant Colonel Abdul Aziz was sued as a servant or agent of Saudi Arabia and there was no suggestion that his conduct was not in discharge or purported discharge of his duties. The four defendants in the second case were public officials and the alleged conduct took place in public premises during a process of interrogation.

26. Further, referring to the International Law Commission's (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (see paragraphs 107-09 below), Lord Bingham said that "international law does not require, as a condition of a State's entitlement to claim immunity for the conduct of its servant or agent, that the latter should have been acting in accordance with his instructions or authority". The fact that conduct was unlawful or objectionable was not, of itself, a ground for refusing immunity.

27. In order to succeed in their Convention claim, Lord Bingham explained that the applicants had to establish three propositions. Firstly, they had to show that Article 6 of the Convention was engaged by the grant of immunity; Lord Bingham was prepared to assume, based on this Court's judgment in *Al-Adsani*, cited above, that it was. Secondly, they had to show that the grant of immunity denied them access to a court; Lord Bingham was satisfied that it plainly would. Thirdly, the applicants had to show that the restriction was not directed to a legitimate objective and was disproportionate.

28. Lord Bingham disagreed with the applicants' submission that torture could not be a governmental or official act since, under Article 1 of the Convention against Torture, torture had to be inflicted by or with the connivance of a public official or other person acting in an official capacity (see paragraph 59 below). Although the applicants referred to a substantial body of authority showing that the courts of the United States would not recognise acts performed by individual officials as being carried out in an official capacity for the purposes of immunity if those acts were contrary to a *jus cogens* prohibition, Lord Bingham found it unnecessary to examine those authorities since they were only important to the extent that they expressed principles widely shared and observed among other nations. However, as Judges Higgins, Kooijmans and Buergenthal had stated in their concurring opinion in the "*Arrest Warrant*" case, the "unilateral" US approach had not attracted the "approbation of States generally" (see paragraph 84 below).

29. Concerning the applicants' reliance on the recommendation of the United Nations Committee Against Torture of 7 July 2005 in respect of Canada, comments made in the judgment of the International Criminal Tribunal for the former Yugoslavia in *Furundžija*, and the judgment of the Italian Court of Cassation in *Ferrini v. Germany* (see, respectively,

paragraphs 66, 82 and 140 below), Lord Bingham considered the first to be of slight legal authority, the second to be an *obiter dictum* and the third not to be an accurate statement of international law.

30. Lord Bingham identified four arguments advanced by Saudi Arabia which he said were "cumulatively irresistible". Firstly, given the conclusion of the International Court of Justice in the "*Arrest Warrant*" case, the applicants had to accept that State immunity *ratione personae* could be claimed for a serving foreign minister accused of crimes against humanity. It followed that the prohibition of torture did not automatically override all other rules of international law. Secondly, Article 14 of the Convention against Torture did not provide for universal civil jurisdiction. Thirdly, the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (see paragraphs 75-80 below) did not provide any exception from immunity for civil claims based on acts of torture; although such an exception was considered by a working group of the ILC, it was not agreed (see paragraph 79 below). Lord Bingham noted in this respect that although some commentators had criticised the United Nations Convention because it did not include a torture exception, they nonetheless accepted that this area of international law was "in a state of flux" and did not suggest that there was an international consensus in favour of such an exception. Finally, there was no evidence that States had recognised or given effect to any international-law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law, nor was there any consensus of judicial or learned opinion that they should. For these reasons, Lord Bingham agreed with the Court of Appeal that the claim brought by Mr Jones against Saudi Arabia was to be dismissed.

31. In respect of the individual defendants, he found that the conclusion of the Court of Appeal on the torture claims could not be sustained. He considered that the Court of Appeal had incorrectly departed from the position in its previous ruling in *Propend* that the acts of State officials were to be considered the acts of the State itself (see paragraphs 42-43 below). He explained:

> "30. ... [T]here was no principled reason for this departure. A state can only act through servants and agents; their official acts are the acts of the state; and the state's immunity in respect of them is fundamental to the principle of state immunity. This error had the effect that while the Kingdom was held to be immune, and the Ministry of Interior, as a department of the government, was held to be immune, the Minister of Interior (the fourth defendant in the second action) was not, a very striking anomaly."

32. Lord Bingham explained that this first error had led the court into a second: its conclusion that a civil claim against an individual torturer did not indirectly implead the State in any more objectionable respect than a criminal prosecution. He observed:

> "31. ... A state is not criminally responsible in international or English law, and therefore cannot be directly impleaded in criminal proceedings. The prosecution of a

> servant or agent for an act of torture within article 1 of the Torture Convention is founded on an express exception from the general rule of immunity. It is, however, clear that a civil action against individual torturers based on acts of official torture does indirectly implead the state since their acts are attributable to it. Were these claims against the individual defendants to proceed and be upheld, the interests of the Kingdom would be obviously affected, even though it is not a named party."

33. In Lord Bingham's view both errors resulted from a misreading of *Pinochet (No. 3)* (see paragraph 44-56 below), which concerned criminal proceedings only. The distinction between criminal proceedings (which were the subject of universal jurisdiction) and civil proceedings (which were not) was, he said, "fundamental" and one that could not be "wished away".

34. Finally, Lord Bingham noted that the Court of Appeal had found that jurisdiction should be governed by "appropriate use or development of discretionary principles". He considered that this was to mistake the nature of State immunity. Where applicable, State immunity was an absolute preliminary bar and a State was either immune from the jurisdiction of a foreign court or it was not, so there was no scope for the exercise of discretion.

35. Lord Hoffmann, concurring in the judgment, considered that there was no automatic conflict between the *jus cogens* prohibition on torture and the law of State immunity: State immunity was a procedural rule and Saudi Arabia, in claiming immunity, was not justifying torture but merely objecting to the jurisdiction of the English courts in deciding whether it had used torture or not. He quoted with approval the observation of Hazel Fox QC (*The Law of State Immunity* (Oxford University Press, 2004), p. 525) that State immunity did not "contradict a prohibition contained in a *jus cogens* norm but merely divert[ed] any breach of it to a different method of settlement". For Lord Hoffmann, a conflict could only arise if the prohibition on torture had generated an ancillary procedural rule which, by way of exception to State immunity, entitled a State to assume civil jurisdiction over other States. Like Lord Bingham, he found that the authorities cited showed no support in international law for such a rule.

36. As regards the application of State immunity to individual defendants, Lord Hoffmann indicated that in order to establish that the grant of immunity to an official would infringe the right of access to a court guaranteed by Article 6 of the Convention, it was necessary, as in the case of the immunity of the State itself, to show that international law did not require immunity against civil suit to be accorded to officials who were alleged to have committed torture. He considered that, once again, it was impossible to find any such exception in a treaty. He reviewed in some detail the circumstances in which a State would be liable for the act of an official in international law and found it clear that a State would incur responsibility in international law if one of its officials "under colour of his authority" tortured a national of another State, even though the acts were unlawful and unauthorised. He said:

> "78. ... To hold that for the purposes of state immunity [the official] was not acting in an official capacity would produce an asymmetry between the rules of liability and immunity.
>
> 79. Furthermore, in the case of torture, there would be an even more striking asymmetry between the Torture Convention and the rules of immunity if it were to be held that the same act was official for the purposes of the definition of torture but not for the purposes of immunity ..."

37. Lord Hoffmann found Lord Justice Mance's conclusion that the Convention against Torture's definition of torture did not lend acts of torture any official character to be unsatisfactory, explaining:

> "83. ... The acts of torture are either official acts or they are not. The Torture Convention does not 'lend' them an official character; they must be official to come within the Convention in the first place. And if they are official enough to come within the Convention, I cannot see why they are not official enough to attract immunity."

38. He also considered inappropriate the Court of Appeal's proposed approach to the exercise of jurisdiction, on the ground that State immunity was not a self-imposed restriction but was "imposed by international law without any discrimination between one State and another." He concluded that it would be "invidious in the extreme for the judicial branch of government to have the power to decide that it will allow the investigation of allegations of torture against the officials of one foreign state but not against those of another".

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The State Immunity Act 1978

39. Part I of the State Immunity Act 1978 deals with the extent of State immunity in civil proceedings. Section 1 provides:

> "(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of the Act.
>
> (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question."

40. The remainder of Part I of the Act identifies exceptions from immunity including: submission to the jurisdiction (section 2); commercial transactions and contracts to be performed in the United Kingdom (section 3); contracts of employment (section 4); personal injuries and damage to property "caused by an act or omission in the United Kingdom" (section 5); ownership, possession and use of property (section 6); patents and trade marks (section 7); membership of bodies corporate (section 8); arbitrations (section 9); ships used for commercial purposes (section 10); and value-added tax and customs duties (section 11).

41. Section 14 provides:

> "(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to–
>
> (a) the sovereign or other head of that State in his public capacity;
>
> (b) the government of that State; and
>
> (c) any department of that government,
>
> but not to any entity (hereafter referred to as a 'separate entity') which is distinct from the executive organs of the government of the State and capable of suing or being sued.
>
> (2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if–
>
> (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and
>
> (b) the circumstances are such that a State ... would have been so immune."

B. *Propend Finance Pty Ltd v. Sing and another* (1997) 111 ILR 611 ("*Propend*")

42. In *Propend*, the Court of Appeal of England and Wales considered the application of the State Immunity Act 1978 to the Head of the Australian Federal Police. The court considered that the defendant benefited from State immunity, explaining:

> "The protection afforded by the Act of 1978 to States would be undermined if employees [or] officers ... could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity. Section 14(1) must be read as affording to individual employees or officers of the foreign State protection under the same cloak as protects the State itself."

43. The court observed that this proposition had wide support in Commonwealth and foreign jurisdictions, citing German, Canadian and US cases.

C. *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147 ("*Pinochet (No. 3)*")

44. *Pinochet (No. 3)* concerned a request by Spain for the extradition of Senator Augusto Pinochet from the United Kingdom to stand trial for crimes, including torture, committed primarily in Chile while he was Head of State there. Senator Pinochet and the government of Chile argued that the Senator enjoyed immunity *ratione materiae* in respect of the alleged offences. The House of Lords handed down its judgment in March 1999 and

held unanimously that the respondent did not benefit from immunity from prosecution in respect of the torture charges.

45. Lord Browne-Wilkinson observed that if the respondent was not entitled to immunity in relation to the acts of torture, it would be the first time that a local domestic court had refused to afford immunity to a former Head of State on the grounds that there could be no immunity against prosecution for certain international crimes. He explained that the adoption of the Convention against Torture was intended to provide for an international system under which the torturer could find no safe haven. He noted the following points of importance: (1) "torture" in this context could only be committed by a public official or other person acting in an official capacity, which included a Head of State; (2) superior orders provided no defence; (3) there was universal criminal jurisdiction; (4) there was no express provision dealing with State immunity; and (5) Chile, Spain and the United Kingdom were all parties to the Convention and were therefore bound by its provisions.

46. Turning to the facts of the case, he said:

> "The question then which has to be answered is whether the alleged organisation of state torture by Senator Pinochet (if proved) would constitute an act committed by Senator Pinochet as part of his official functions as head of state. It is not enough to say that it cannot be part of the functions of the head of state to commit a crime. Actions which are criminal under the local law can still have been done officially and therefore give rise to immunity *ratione materiae*. The case needs to be analysed more closely."

47. He was of the view that there was strong ground for saying that the implementation of torture as defined in the Convention against Torture could not be a State function, although he had doubts whether, before the entry into force of the Convention against Torture, the existence of the international crime of torture as *jus cogens* was enough to justify the conclusion that the organisation of State torture could not constitute the performance of an official function for immunity purposes. He continued:

> "... Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. But in my judgment the Torture Convention did provide what was missing: a worldwide universal jurisdiction. Further, it required all member states to ban and outlaw torture: Article 2. How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?"

48. Lord Browne-Wilkinson considered that if the implementation of a torture regime was a public function giving rise to immunity *ratione materiae*, this produced bizarre results. Since such immunity extended to all State officials involved in carrying out the functions of the State, and since the international crime of torture under the Convention against Torture can only be committed by an official or someone in an official capacity, all perpetrators of torture would be entitled to immunity. It would follow that

there could be no case outside Chile in which a successful prosecution against the respondent for torture could be brought unless Chile were prepared to waive immunity. He concluded:

> "... Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention – to provide a system under which there is no safe haven for torturers – will have been frustrated. In my judgment all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention."

49. Lord Hope of Craighead addressed the question whether the concept of official functions included acts of the kind alleged in the case, which were not private acts but acts done in the exercise of State authority. He said:

> "... I consider that the answer to it is well settled in customary international law. The test is whether they were private acts on the one hand or governmental acts done in the exercise of his authority as head of state on the other. It is whether the act was done to promote the state's interests – whether it was done for his own benefit or gratification or was done for the state ... The fact that acts done for the state have involved conduct which is criminal does not remove the immunity ...
>
> It may be said that it is not one of the functions of a head of state to commit acts which are criminal according to the laws and constitution of his own state or which customary international law regards as criminal. But I consider that this approach to the question is unsound in principle. The principle of immunity *ratione materiae* protects all acts which the head of state has performed in the exercise of the functions of government. The purpose for which they were performed protects these acts from any further analysis. There are only two exceptions to this approach which customary international law has recognised. The first relates to criminal acts which the head of state did under the colour of his authority as head of state but which were in reality for his own pleasure or benefit ... The second relates to acts the prohibition of which has acquired the status under international law of *jus cogens* ..."

50. Lord Hope concluded that following the adoption of the Convention against Torture, it was no longer open to any State that was a signatory to it to invoke immunity *ratione materiae* in the event of allegations of systemic or widespread torture, which amounted to an international crime, committed after that date. He explained:

> "I would not regard this as a case of waiver. Nor would I accept that it was an implied term of the Torture Convention that former heads of State were to be deprived of their immunity *ratione materiae* with respect to all acts of official torture as defined in article 1. It is just that the obligations which were recognised by customary international law in the case of such serious international crimes by the date when Chile ratified the Convention are so strong as to override any objection by it on the ground of immunity *ratione materiae* to the exercise of the jurisdiction over crimes committed after that date which the United Kingdom had made available."

51. Lord Hutton concluded that the clear intent of the Convention against Torture was that an official of one State who had committed torture should be prosecuted if present in another State. He therefore considered

that the respondent could not claim that the commission of acts of torture after the Convention's entry into force were functions of the Head of State. While the alleged acts of torture by the respondent were carried out under the colour of his position as Head of State, they could not be regarded as functions of a Head of State under international law when international law expressly prohibited torture as a measure which a State could employ in any circumstances whatsoever and had made it an international crime.

52. Lord Saville of Newdigate agreed that, after the entry into force of the Convention against Torture, State immunity *ratione materiae* for acts of torture could not exist consistently with its terms. It therefore followed that an agreement to an exception to the general rule of State immunity *ratione materiae* existed between Spain, Chile and the United Kingdom from the date on which the three States became party to that Convention.

53. Lord Millett held that the definition of torture in the Convention against Torture was entirely inconsistent with the existence of a plea of immunity *ratione materiae*. He concluded:

> "... [T]he Republic of Chile was a party to the Torture Convention, and must be taken to have assented to the imposition of an obligation on foreign national courts to take and exercise criminal jurisdiction in respect of the official use of torture. I do not regard it as having thereby waived its immunity. In my opinion there was no immunity to be waived. The offence is one which could only be committed in circumstances which would normally give rise to the immunity. The international community had created an offence for which immunity *ratione materiae* could not possibly be available. International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose."

54. He saw a difference between civil and criminal proceedings, explaining:

> "... I see nothing illogical or contrary to public policy in denying the victims of state sponsored torture the right to sue the offending state in a foreign court while at the same time permitting (and indeed requiring) other states to convict and punish the individuals responsible if the offending state declines to take action. This was the very object of the Torture Convention. It is important to emphasise that Senator Pinochet is not alleged to be criminally liable because he was head of state when other responsible officials employed torture to maintain him in power. He is not alleged to be vicariously liable for the wrongdoing of his subordinates. He is alleged to have incurred direct criminal responsibility for his own acts in ordering and directing a campaign of terror involving the use of torture ..."

55. Lord Phillips of Worth Matravers also commented that the principles of the law of immunity that applied to civil litigation would not necessarily apply to a criminal prosecution. He said that had the *Pinochet* proceedings been civil in nature, Chile could have argued that it was indirectly impleaded; but that argument did not run where the proceedings were criminal and where the issue was the respondent's personal responsibility, not that of Chile. On the question posed in this case, Lord Phillips, like Lord Saville, considered that State immunity *ratione materiae* could not coexist

with the notion of international crimes. Since, in the case of torture, the only conduct covered by the Convention against Torture was conduct which would be subject to immunity *ratione materiae* if it applied, the Convention was incompatible with the applicability of such immunity.

56. Lord Goff of Chieveley, dissenting, considered it clear that if State immunity in respect of torture was excluded in the case, then it could only have been done by the Convention against Torture itself. He did not consider that the well-established principle that a State's waiver of immunity had to be express could be circumvented by finding that torture did not form part of the functions of a State and that no immunity *ratione materiae* therefore applied to such acts. He highlighted that there was no evidence of any consideration being given to a waiver of State immunity in the negotiations leading to the Convention against Torture. He further pointed out that if immunity *ratione materiae* were excluded, former heads of State and senior public officials would have to think twice about travelling abroad, for fear of being the subject of unfounded allegations emanating from States of a different political persuasion. He therefore concluded that State immunity applied.

D. Service of claims outside the jurisdiction

57. Part 6 of the Civil Procedure Rules for England and Wales regulates service of claims outside the jurisdiction. At the material time, under Rules 6.20 and 6.21, to obtain permission to serve out of the jurisdiction a claimant was required to show that there was a reasonable prospect of success in the claim, to satisfy the court that it was an appropriate case in which discretion should be exercised to permit service, and to demonstrate that England and Wales was the appropriate jurisdiction in which to bring the claim.

E. Compensation in criminal proceedings

58. Pursuant to section 130 of the Powers of Criminal Courts Sentencing Act 2000, a criminal court has the power to make a compensation order for personal injury, loss or damage resulting from a criminal offence. The order is designed for simple and straightforward cases where the amount of compensation can be readily and easily ascertained and where the judge has the necessary evidence before him. It is not designed to replicate civil damages, where quantification of loss may be difficult.

III. RELEVANT INTERNATIONAL LAW MATERIALS

A. Prohibition of torture

59. The United Kingdom, Saudi Arabia and 151 other States are parties to the 1984 United Nations Convention against Torture. Article 1 provides:

> "1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
>
> 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

60. Article 2 § 1 of the Convention against Torture requires States to take "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".

61. Article 4 obliges States to ensure that all acts of torture, including an attempt to commit torture or an act which constitutes complicity or participation in torture, are offences under its criminal law.

62. Article 5 provides:

> "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:
>
> (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
>
> (b) When the alleged offender is a national of that State;
>
> (c) When the victim is a national of that State if that State considers it appropriate.
>
> 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law."

63. Article 14 provides:

> "1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
>
> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."

64. Upon ratification of the Convention against Torture, the United States lodged a reservation expressing its understanding that Article 14 required a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

65. In its conclusions and recommendations of 12 June 2002 in respect of the periodic report submitted by Saudi Arabia (CAT/C/CR/28/5), the Committee Against Torture considered it to be a subject of concern that in Saudi Arabia there was an apparent failure to provide effective mechanisms to investigate complaints of breaches of the Convention against Torture; and that while mechanisms for the purpose of providing compensation for conduct in violation of the Convention had been instituted, in practice compensation appeared to be rarely obtained and full enjoyment of the rights guaranteed by the Convention was consequently limited.

66. In its conclusions and recommendations of 7 July 2005 in respect of periodic reports submitted by Canada (CAT/C/CR/34/CAN), the Committee considered it to be a subject of concern that in Canada there was an absence of effective measures to provide civil compensation to victims of torture in all cases. Although compensation was available for torture inflicted in Canada, it was not available where the torture had occurred elsewhere. 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".

67. In its General Comment No. 3 (2012), the Committee considered the implementation of Article 14 by States Parties. On the extent of the right to redress, it noted, *inter alia*:

> "22. Under the Convention, States parties are required to prosecute or extradite alleged perpetrators of torture when they are found in any territory under its jurisdiction, and to adopt the 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 the State party or by or against nationals of the State party. The Committee has commended the efforts of States 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 States parties to ensure that all victims of torture and ill-treatment are able to access remedy [sic] and obtain redress."

68. As to the question of State immunity and obstacles to the right to redress, the Committee said:

> "42. Similarly, granting immunity, in violation of international law, to any State or its agents or to non-State actors for torture or ill-treatment, is in direct conflict with the obligation of providing redress to victims. When impunity 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."

69. In *Prosecutor v. Furundžija*, case no. IT-95-17/1-T, judgment of 10 December 1998, the International Criminal Tribunal for the former Yugoslavia (ICTY) held that the prohibition of torture was *jus cogens*, which articulated the notion that the prohibition had become one of the most fundamental standards of the international community. Similar statements were made in *Prosecutor v. Delacić and Others* (16 November 1998, case no. IT-96-21-T) and in *Prosecutor v. Kunarac and Others* (22 February 2001, case nos. IT-96-23-T and IT-96-23/1-T).

B. State immunity

1. The European Convention on State Immunity 1972 ("the Basle Convention")

70. The Basle Convention has been signed by nine member States of the Council of Europe and has been ratified by eight, including the United Kingdom in 1979.

71. Pursuant to Article 15 of the Basle Convention, Contracting States are immune from the jurisdiction of the court of another Contracting State unless the proceedings fall within Articles 1 to 14. Article 27 provides that the expression "Contracting State" does not include any legal entity of a Contracting State which is distinct and capable of suing and being sued, even if that entity has been entrusted with public functions.

72. Articles 1 to 14 include proceedings concerning contracts of employment (Article 5); participation in companies or other collective bodies (Article 6); commercial transactions (Article 7); intellectual and industrial property (Article 8); ownership, possession and use of property (Article 9); personal injury or damage to property caused by an act or omission which occurred in the territory of the forum State (Article 11); and arbitration agreements (Article 12).

73. Article 24 permits a State to declare that, notwithstanding the provisions of Article 15, in cases not falling within Articles 1 to 13, its courts shall be permitted to entertain proceedings against other member States to the same extent as they are permitted to do so against States which are not party to the Basle Convention. Six States, including the United Kingdom, have made such a declaration.

2. The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property ("the UN Jurisdictional Immunities Convention")

74. In 1991, the ILC adopted Draft Articles on the jurisdictional immunities of States.

75. The UN Jurisdictional Immunities Convention, based on the Draft Articles, was adopted in 2004. Fourteen States are party to this Convention

and a further eighteen States have signed it. It has not yet come into force since it requires thirty ratifications to do so. The United Kingdom has signed but not ratified it, and Saudi Arabia acceded to the Convention on 1 September 2010.

76. Article 5 provides as a general principle that a State enjoys immunity from the jurisdiction of the courts of another State. Article 2 § 1 (b)(iv) defines "State" as including representatives of the State acting in that capacity. The ILC commentary to the provision in the 1991 Draft Articles (where it appeared as Article 2 § 1 (b)(v)) explains:

> "(17) The fifth and last category of beneficiaries of State immunity encompasses all the natural persons who are authorized to represent the State in all its manifestations, as comprehended in the first four categories mentioned in paragraphs 1 (b) (i) to (iv). Thus, sovereigns and heads of State in their public capacity would be included under this category as well as in the first category, being in the broader sense organs of the Government of the State. Other representatives include heads of Government, heads of ministerial departments, ambassadors, heads of mission, diplomatic agents and consular officers, in their representative capacity. The reference at the end of paragraph 1(b)(v) to 'in that capacity' is intended to clarify that such immunities are accorded to their representative capacity *ratione materiae*."

77. Article 6 § 1, of the UN Jurisdictional Immunities Convention provides that a State shall give effect to State immunity by refraining from exercising jurisdiction in a proceeding before its courts against another State. Under Article 6 § 2 a proceeding before a court of a State shall be considered to have been instituted against another State if that other State is named as a party to that proceeding or if it is not named as a party but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

78. Part III of the Convention sets out proceedings in which State immunity cannot be invoked. They include commercial transactions (Article 10); contracts of employment (Article 11); personal injuries and damage to property caused by an act or omission which occurred in whole or in part on the territory of the forum State (Article 12); ownership, possession and use of property (Article 13); intellectual and industrial property (Article 14); participation in companies or other collective bodies (Article 15); ships owned or operated by a State (Article 16); and arbitration agreements (Article 17).

79. The UN Jurisdictional Immunities Convention does not include an exception to State immunity based on an alleged violation of *jus cogens* norms ("*jus cogens* exception"). At its fifty-first session, in 1999, the ILC established a working group on Jurisdictional Immunities of States and Their Property in accordance with General Assembly Resolution 53/98 on the then Draft Articles. In its resolution, the General Assembly invited the ILC to present any preliminary comments it might have regarding outstanding substantive issues related to the Draft Articles, taking into account recent developments of State practice and other factors arising since

the adoption of the Draft Articles. The working group therefore considered, *inter alia*, recent practice on jurisdictional immunity in this area. It noted recent developments in State practice and legislation and referred to the existence of some support for the view that State officials should not be entitled to plead immunity for acts of torture committed in their own territories in both civil and criminal actions. No amendment to the Draft Articles was proposed prior to the adoption of the UN Jurisdictional Immunities Convention in 2004.

80. Three States made declarations upon ratification of the Convention. Norway and Sweden declared that the Convention was without prejudice to any future international development concerning the protection of human rights. Switzerland considered that Article 12 did not govern the question of pecuniary compensation for serious human rights violations which were alleged to be attributable to a State and were committed outside the State of the forum. It therefore declared, like Norway and Sweden, that the Convention was without prejudice to developments in international law in this regard.

3. Relevant case-law of the international courts

(a) *Prosecutor v. Blaškić* (1997) 110 ILR 607 ("*Blaškić*")

81. In *Blaškić*, considering whether State officials were personally liable for wrongful acts, the Appeals Chamber of the ICTY explained:

> "38. The Appeals Chamber dismisses the possibility of the International Tribunal addressing subpoenas to State officials acting in their official capacity. Such officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity'. This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since. More recently, France adopted a position based on that rule in the *Rainbow Warrior* case. The rule was also clearly set out by the Supreme Court of Israel in the *Eichmann* case.
>
> ...
>
> 41. ... It is well known that customary international law protects the internal organization of each sovereign State: it leaves it to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State agents or organs. Each sovereign State has the right to issue instructions to its organs, both those operating at the internal level and those operating in the field of international relations, and also to provide for sanctions or other remedies in case of non-compliance with those instructions. The corollary of this exclusive power is that each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions." (footnotes omitted)

(b) *Prosecutor v. Furundžija,* case no. IT-95-17/1-T

82. In *Prosecutor v. Furundžija*, the ICTY did not directly address the question of immunity but made reference to the personal responsibility of the perpetrators of torture and the possibility of bringing proceedings for torture:

> "155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: 'individuals have international duties which transcend the national obligations of obedience imposed by the individual State'." (footnotes omitted)

(c) *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *ICJ Reports* 2002 ("the '*Arrest Warrant*' case")

83. Belgium issued an arrest warrant in respect of the incumbent minister for foreign affairs of the Democratic Republic of the Congo for grave breaches of the Geneva Conventions and crimes against humanity. The International Court of Justice (ICJ) found that the issue and international circulation of the warrant had failed to respect the immunity from criminal jurisdiction and the inviolability which the foreign minister enjoyed under international law. It emphasised that the case concerned only immunity from criminal jurisdiction and the inviolability of an incumbent minister for foreign affairs. The immunity accorded to such an individual protected him from any act of authority of another State which would hinder him in the performance of his duties. No distinction could be drawn between acts performed by a minister for foreign affairs in an "official" capacity, and those claimed to have been performed in a "private capacity". The court added:

> "59. It should further be noted that rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities:

jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs ..."

84. In their joint separate opinion, Judges Higgins, Kooijmans and Buergenthal observed that immunity and jurisdiction were two distinct norms of international law but were "inextricably linked". On jurisdiction, they observed:

"In civil matters we already see the beginnings of a very broad form of extraterritorial jurisdiction. Under the Alien Tort Claims Act, the United States, basing itself on a law of 1789, has asserted a jurisdiction both over human rights violations and over major violations of international law, perpetrated by non-nationals overseas. Such jurisdiction, with the possibility of ordering payment of damages, has been exercised with respect to torture committed in a variety of countries (Paraguay, Chile, Argentina, Guatemala), and with respect to other major human rights violations in yet other countries. While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally."

85. On immunity, they discerned a trend towards the rejection of impunity for serious international crimes, a wider assertion of jurisdiction and the availability of immunity as a shield becoming more limited. They added:

"... It is now increasingly claimed in the literature ... that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform ... This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public State acts. The same view is gradually also finding expression in State practice, as evidenced in judicial decisions and opinions ..."

(d) *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, *ICJ Reports* 2008, p. 177 ("*Djibouti v. France*")

86. The case concerned the immunity from criminal prosecution in France of the public prosecutor and the Head of the National Security Service of Djibouti. The ICJ noted:

"194. ... [T]here are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case."

87. As to the existence of immunity *ratione materiae*, it explained:

"196. At no stage have the French courts (before which the challenge to jurisdiction would normally be expected to be made), nor indeed this Court, been informed by the Government of Djibouti that the acts complained of by France were its own acts, and

that the *procureur de la République* and the Head of National Security were its organs, agencies or instrumentalities in carrying them out.

The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State. Further, the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs."

(e) *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, *ICJ Reports* 2012 ("*Germany v. Italy*")

88. The case arose from a complaint lodged by Germany following a series of judgments by the Italian courts that the German State did not benefit from immunity in respect of allegations of violations of international humanitarian law committed by Germany in Italy during the Second World War; and ordering Germany to pay civil damages. The Italian government made two submissions: firstly, that the doctrine of State immunity allowed an exception where the wrongful acts were committed on the territory of the State where the claim was lodged ("the territorial tort principle"); and secondly, that it was permissible under international law to deny State immunity where the claim involved an international crime in violation of *jus cogens* in respect of which no other form of redress existed ("the human rights exception").

89. Entitlement to State immunity as between Germany and Italy derived from customary international law. The ICJ therefore examined whether there was a "settled practice" together with *opinio juris* as to the existence of immunity. It considered that the rule of State immunity had been adopted as a general rule of customary international law and occupied an important place in international law and international relations.

90. The court rejected the territorial tort principle invoked by the Italian government. As to the human rights exception, the court considered that this presented a logistical problem as it required an inquiry into the merits in order to determine the question of jurisdiction. Aside from this problem, the court observed that there was almost no State practice which might be considered to support the proposition that a State was deprived of its entitlement to immunity in such a case; nor did such an exception appear in the Basle Convention or the UN Jurisdictional Immunities Convention (see, respectively, paragraphs 70-73 and 75-80 above). It also referred to the findings of the 1999 ILC working group and the fact that no amendments to the 1991 Draft Articles had been proposed before the adoption in 2004 of the above-mentioned UN Convention (see paragraph 79 above).

91. On the other hand, the ICJ observed that there was a substantial body of State practice which demonstrated that customary international law did not treat a State's entitlement to immunity as dependent upon the gravity of

the act of which it was accused or the peremptory nature of the rule which it was alleged to have violated, citing judgments of national courts in Canada, France, Slovenia, New Zealand, Poland and the United Kingdom. It distinguished the *Pinochet (No. 3)* judgment on the ground that the case concerned the immunity of a former Head of State from criminal jurisdiction, and not the immunity of the State itself in proceedings designed to establish its liability for civil damages. The court further pointed to the judgment of this Court in *Al-Adsani*, cited above, and the subsequent decision in *Kalogeropoulou and Others v. Greece and Germany* (dec.), no. 59021/00, ECHR 2002-X, which had found no firm basis for concluding that, as a matter of international law, a State no longer enjoyed immunity from civil suit in cases where allegations of torture were made.

92. The ICJ therefore concluded that, under customary international law as it stood at the time of its judgment, a State was not deprived of immunity by reason of the fact that it was accused of serious violations of international human rights law or the international law of armed conflict. It continued:

> "91. ... In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case."

93. Turning to consider the relationship between *jus cogens* and the rule of State immunity, the court found that no conflict existed. The two sets of rules addressed different matters: the rules of State immunity were procedural in character and were confined to determining whether the courts of one State could exercise jurisdiction in respect of another State; they did not bear upon the question whether the conduct in respect of which the proceedings were brought was lawful or unlawful. Furthermore, there was no basis for the proposition that a rule which was not of the status of *jus cogens* could not be applied if to do so would hinder the enforcement of a *jus cogens* rule. In this respect the court cited, *inter alia*, its judgment in the "*Arrest Warrant*" case (see paragraphs 83-85 above), the House of Lords judgment in the present case and this Court's judgment in *Al-Adsani*, cited above.

94. Finally, the court rejected the argument that immunity could be denied where all other attempts to secure compensation had failed. It found no basis in State practice for the assertion that international law made the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress. It further pointed to the practical difficulties to which such an exception would give rise.

4. Work of the ILC on the immunity of State officials from foreign criminal jurisdiction

95. In 2007, the ILC decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr Kolodkin as Special Rapporteur. Mr Kolodkin submitted three reports, in which he established the boundaries within which the topic should be considered, analysed a number of substantive issues in connection with the immunity of State officials from foreign criminal jurisdiction, and examined the procedural issues related to this type of immunity. His reports were considered by the ILC and by the Sixth Committee of the General Assembly of the United Nations in 2008 and 2011. On 22 May 2012 Ms Hernández was appointed as Special Rapporteur to replace Mr Kolodkin, who was no longer a member of the ILC. Ms Hernández submitted a preliminary report on the immunity of State officials from foreign criminal jurisdiction, which the ILC considered in 2012. She submitted a second report in 2013.

96. In his second report, Mr Kolodkin considered the different views regarding the immunity of State officials from foreign jurisdiction. He explained:

> "18. Despite the existence in the doctrine of a different point of view, it is fairly widely recognized that immunity from foreign jurisdiction is the norm, i.e. the general rule, the normal state of affairs, and its absence in particular cases is the exception to this rule. ... What is important is that if a case concerns senior officials, other serving officials or the acts of former officials performed when they were in office, in an official capacity, then the existence of an exemption from or an exception to this norm, i.e. the absence of immunity, has to be proven, and not the existence of this norm and consequently the existence of immunity. Since immunity is based on general international law, its absence ... may be evidenced either by the existence of a special rule or the existence of practice and *opinio juris*, indicating that exceptions to the general rule have emerged or are emerging ..."

97. On the question of the applicability of *ratione materiae* immunity to illegal acts, he said:

> "31. ... The assertion that immunity does not extend to such acts renders the very idea of immunity meaningless. The question of exercising criminal jurisdiction over any person, including a foreign official, arises only when there are suspicions that his conduct is illegal and, what is more, criminally punishable. Accordingly, it is precisely in this case that immunity from foreign criminal jurisdiction is necessary ..."

98. Mr Kolodkin also reviewed the debate surrounding the possibility of a *jus cogens* exception, stating:

> "56. The need for the existence of exceptions to immunity is explained, above all, by the requirements of protecting human rights from their most flagrant and large-scale violations and of combating impunity. The debate here is about the need to protect the interests of the international community as a whole and, correspondingly, the fact that these interests, as well as the need to combat grave international crimes, most often perpetrated by State officials, dictate the need to call them to account for

> their crimes in any State which has jurisdiction. This, in turn, requires that exceptions to the immunity of officials from foreign criminal jurisdiction exist. Exceptions ... are reasoned in various ways. The principal rationales boil down to the following. Firstly, as already noted, the view exists that grave criminal acts committed by an official cannot under international law be considered as acts performed in an official capacity. Secondly, it is considered that since an international crime committed by an official in an official capacity is attributed not only to the State but also to the official, then he is not protected by immunity *ratione materiae* in criminal proceedings. Thirdly, it is pointed out that peremptory norms of international law which prohibit and criminalize certain acts prevail over the norm concerning immunity and render immunity invalid when applied to crimes of this kind. Fourthly, it is stated that in international law a norm of customary international law has emerged, providing for an exception to immunity *ratione materiae* in a case where an official has committed grave crimes under international law. Fifthly, a link is being drawn between the existence of universal jurisdiction in respect of the gravest crimes and the invalidity of immunity as it applies to such crimes. Sixthly, an analogous link is seen between the obligation *aut dedere aut judicare* and the invalidity of immunity as it applies to crimes in respect of which such an obligation exists. ..." (footnotes omitted)

99. He observed that the view that grave crimes under international law could not be considered as acts performed in an official capacity, and that immunity *ratione materiae* therefore did not protect from foreign criminal jurisdiction exercised in connection with such crimes, had become fairly widespread. In her preliminary report, Ms Hernández summarised the ILC's discussion of this point as follows:

> "35. The members of the Commission also expressed their views concerning the concept of an 'official act' from the point of view of its scope and of its relationship to the international responsibility of States. Some members considered that any act that had been, or appeared to have been, carried out by an 'official' must be defined as an official act for which immunity was enjoyed. However, other members supported a restrictive definition of an 'official act', excluding conduct that might, for example, constitute an international crime. Some members were in favour of treating the concept of an 'official act' differently depending on whether the act was attributed to the State in the context of responsibility or to individuals in the context of criminal responsibility and immunity."

100. In her second report, Ms Hernández published a first group of Draft Articles, covering definitions and the scope of immunity *ratione personae* in criminal proceedings. A third report covering immunity *ratione materiae* in criminal proceedings, including discussion of the concept of "official acts" and relevant Draft Articles, is expected to be submitted to the ILC for consideration at its 2014 session.

101. All five reports focus on the immunity of State officials from foreign criminal, and not civil, jurisdiction.

5. The 2009 Resolution of the Institute of International Law

102. The Institute of International Law was founded in 1873 by leading international law scholars and aims to promote the progress of international law. It adopts resolutions of a normative character which are brought to the

attention of governmental authorities, international organisations and the scientific community. In this way, the Institute seeks to highlight the characteristics of the existing law in order to promote its respect. Sometimes it makes determinations *de lege ferenda* (that is, with a view to future law) in order to contribute to the development of international law.

103. At its Naples session in 2009, the Institute of International Law adopted a resolution on the immunity from jurisdiction of the State and State officials in cases concerning international crimes. Article I of this resolution defines "jurisdiction" as meaning the criminal, civil and administrative jurisdiction of national courts, and "international crimes" as including torture.

104. Article II of the resolution sets out the principles. It explains that, pursuant to treaties and customary international law, States have an obligation to prevent and suppress international crimes, and that immunities should not constitute an obstacle to the appropriate reparation to which victims of such crimes are entitled. It urges States to consider waiving immunity where international crimes are allegedly committed by their agents.

105. Article III of the resolution, entitled "Immunity of persons who act on behalf of a State", provides:

> "1. No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.
>
> 2. When the position or mission of any person enjoying personal immunity has come to an end, such personal immunity ceases.
>
> 3. The above provisions are without prejudice to:
>
> (a) the responsibility under international law of a person referred to in the preceding paragraphs;
>
> (b) the attribution to a State of the act of any such person constituting an international crime."

106. Article IV, entitled "Immunity of States", provides:

> "The above provisions are without prejudice to the issue whether and when a State enjoys immunity from jurisdiction before the national courts of another State in civil proceedings relating to an international crime committed by an agent of the former State."

C. State responsibility

107. The ILC promulgated the Draft Articles on Responsibility of States for Internationally Wrongful Acts ("the Draft Articles on State Responsibility") in 2001. Article 4 provides for the responsibility of the State for the conduct of its organs:

> "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any

other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

108. Pursuant to Article 5, the conduct of a person or entity which is not an organ of the State under Article 4 but which is "empowered by the law of that State to exercise elements of the governmental authority" shall be considered an act of the State under international law, provided the person or entity is "acting in that capacity" in the particular instance. Article 7 provides that acts of State agents in excess of authority or contravention of instructions shall be considered acts of the State under international law.

109. Finally, Article 58 clarifies the position in respect of simultaneous individual responsibility:

"These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State."

IV. RELEVANT COMPARATIVE LAW MATERIALS

110. The respondent State sought comments on the extent of State immunity provided by national law from the member States of the Council of Europe. Twenty-one responses were received (Albania, Azerbaijan, Belgium, Bosnia and Herzegovina, the Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Lithuania, the former Yugoslav Republic of Macedonia, the Netherlands, Norway, Poland, Russia, Sweden, Switzerland and Turkey). The responses disclosed that few States had been required to confront in practice the particular problem of whether there was, under national or customary international law, immunity in civil proceedings for torture. None had considered the specific situation of State officials. The responses were therefore largely hypothetical and analytical, rather than evidence-based. The issue of jurisdiction also arose in a number of replies: several States confirmed that their courts would have no jurisdiction in a case involving torture committed abroad by third-party nationals; as a consequence, the question whether there would be immunity for the State officials responsible would not arise in practice.

111. The respondent State, the applicants and the third-party interveners also provided other comparative materials demonstrating the law and practice of a number of States worldwide. Several have put in place legislation governing State immunity and several national courts have issued judgments in the context of civil and criminal cases against State officials. The following review of national legislation and case-law focuses principally on civil cases and is not exhaustive.

A. Civil claims for alleged torture

1. The United States of America

(a) Jurisdiction

112. The US Alien Tort Statute of 1789 ("the 1789 Statute") established federal jurisdiction over all cases where an alien sued for a tort committed in violation of the law of nations or a treaty of the United States.

113. In *Filártiga v. Peña-Irala* (1980) 630 F.2d 876, the Court of Appeals (Second Circuit) found that the 1789 Statute bestowed jurisdiction in respect of a claim against a police officer in Paraguay for torture. It seems that the question of State immunity was not raised before the court, although the defendant did seek to argue on appeal that if the conduct complained of was alleged to be the act of the Paraguayan government, the suit was barred by the act of State doctrine. In response, the court said:

> "... This argument was not advanced below, and is therefore not before us on this appeal. We note in passing, however, that we doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state ... Paraguay's renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority ..."

114. Following that judgment, the Torture Victim Protection Act of 1991 was enacted to codify the cause of action recognised in *Filártiga v. Peña-Irala* and to extend it to US citizens. It provides in section 2(a)(1) that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation ... subjects an individual to torture shall, in a civil action, be liable for damages to that individual".

115. In *Sosa v. Alvarez-Machain* 542 US 692 (2004), the US Supreme Court examined a claim brought under, *inter alia*, the 1789 Statute against a Mexican national for abduction, allegedly carried out on behalf of the US government. The court rejected the plaintiff's claim because it considered that there was no support for the proposition that abduction constituted a "violation of the law of nations" and thus there was no jurisdiction in the case. The question of State immunity did not arise, but in his concurring opinion Justice Breyer considered whether the exercise of jurisdiction under the 1789 Statute was consistent with the principle of international comity. He observed:

> "Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior ... That subset includes torture, genocide, crimes against humanity, and war crimes ....
>
> The fact that this procedural consensus exists suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity. That is, allowing every nation's courts to adjudicate foreign

> conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening ... That is because the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself ... Thus, universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well." (references omitted)

(b) Immunities

(i) Immunity for the State

116. The Foreign Sovereign Immunities Act of 1976 (FSIA) sets out the extent to which foreign States can be sued in the courts of the United States. In order to benefit from immunity, a defendant must establish that it is a "foreign State" within the meaning of the FSIA. The term "foreign State" is defined as including political subdivisions, agencies and instrumentalities of foreign States.

117. In a number of cases, the US courts of appeals concluded that the FSIA did not include an implied exception to its general grant of sovereign immunity where a foreign State was accused of violating *jus cogens* norms (see *Siderman de Blake v. Argentina* (1992) 965 F.2d 699 (Ninth Circuit); *Princz v. Germany* (1994) 26 F.3d 1166 (DC Circuit); *Smith v. Libya* (1997) 101 F.3d 239 (Second Circuit); and *Sampson v. Germany* (2001) 250 F.3d 1145 (Seventh Circuit)).

(ii) Immunity ratione personae *for senior State officials*

118. In *Ye and Others v. Zemin and Falun Gong Control Office* (2004) 383 F.3d 620 (Seventh Circuit), the applicants appealed against the finding of the district court that the then serving President of China benefited from immunity *ratione personae*, on the basis of an assertion to that effect by the executive, in a civil claim alleging breaches of *jus cogens* norms. They argued that the executive had no power, under customary international law, to propose immunity in the case of violations of *jus cogens* norms. The Court of Appeals noted that the FSIA did not govern the question of immunity for foreign heads of State and that the general practice was to accept the executive's assertion in such cases. It referred to its finding in *Sampson* (see paragraph 117 above) that there was no *jus cogens* exception in the FSIA, and concluded that as the legislator's decision to grant immunity could not be challenged in the court, neither could the decision of the executive to do so. It referred to the significant implications of a decision to grant immunity for the State's relations with other nations.

(iii) Immunity ratione materiae *for other State officials*

119. In *Chuidian v. Philippine National Bank and Daza*, (1990) 912 F.2d 1095, the Court of Appeals (Ninth Circuit) found that the term "foreign State" where it appeared in the FSIA covered an individual who was a member of an executive agency of that State. However, it accepted that the FSIA would not shield an official acting beyond the scope of his authority. On this basis, US federal district courts subsequently refused to accord immunity to State officials in *Xuncax v. Gramajo*, (1995) 886 F Supp 162 (a claim, for acts of torture, against a Guatemalan senior army officer who served as minister of defence); and *Cabiri v. Assasie-Gyimah*, (1996) 921 F Supp 1189 (SDNY) (a claim against a Ghanaian security adviser for torture). The courts commented, respectively, that the acts in *Xuncax v. Gramajo* "exceed[ed] anything that might be considered to have been lawfully within the scope of Gramajo's official authority" and that the defendant in *Cabiri v. Assasie-Gyimah* had not claimed that the acts of torture fell within the scope of his authority and had not argued that such acts were not prohibited by the laws of Ghana, nor could he so argue.

120. In *Belhas v. Ya'alon* (2008) 515 F.3d 1279 (DC Cir.), the appellants argued that the defendant had committed violations of *jus cogens* norms in the course of his duties as Head of army intelligence. The Court of Appeals found that the FSIA applied and that there were no unenumerated exceptions to the FSIA (referring to its judgment in *Princz v. Germany*, see paragraph 117 above). The defendant therefore benefited from State immunity.

121. In *Matar v. Dichter* (2009) 563 F.3d 9 (Second Circuit), the appellant brought a claim against the former Head of the Israeli Security Agency alleging violations of *jus cogens* norms. The executive asserted that immunity *ratione materiae* applied. The Court of Appeals held that even if the FSIA did not apply because the defendant was a former, and not a serving, official, he would be immune under common law. It noted that prior to the enactment of the FSIA, the courts deferred to the executive on the question whether to recognise immunity of foreign sovereigns and their instrumentalities under the common law. These principles had survived the enactment of the FSIA. As to the existence of a *jus cogens* exception, the court referred to its finding in *Smith v. Libya* (see paragraph 117 above) that there was no such exception to the FSIA and to the finding in *Ye and Others v. Zemin and Falun Gong Control Office* (see paragraph 118 above) that there was no such exception as regards immunity of foreign leaders in the common-law context. It concluded that the claim here similarly failed.

122. In *Samantar v. Yousuf* (2010) 130 S Ct 2278, the Supreme Court unanimously held that officials of foreign States were not covered by the FSIA and that their immunities were governed by common law. It therefore remitted to the lower courts the question whether officials of foreign States could nonetheless rely on any common-law immunity. Before the District

Court and subsequently the Appeals Court, Mr Samanter argued that he enjoyed both Head of State and foreign-official immunity under common law. On 2 November 2012 the Court of Appeals found that he did not enjoy common-law immunity in respect of civil claims alleging torture (699 F.3d 763 (Fourth Circuit)). It held, firstly, that the courts were required to defer to pronouncements by the executive as to whether a person enjoyed Head of State (*ratione personae*) immunity; the executive here had found that Mr Samanter was not entitled to such immunity. Secondly, on the question of foreign-official (*ratione materiae*) immunity, the Court of Appeals said:

> "Unlike private acts that do not come within the scope of foreign official immunity, *jus cogens* violations may well be committed under color of law and, in that sense, constitute acts performed in the course of the foreign official's employment by the Sovereign. However, as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign."

123. It observed that there was an increasing trend in international law to abrogate foreign-official immunity for individuals who committed acts, otherwise attributable to the State, that violated *jus cogens* norms. It considered that there were a number of decisions from foreign national courts which had reflected a willingness to deny official-act immunity in the criminal context for alleged *jus cogens* violations, citing *Pinochet (No. 3)* (see paragraphs 44-56 above) in particular. It continued:

> "... Some foreign national courts have pierced the veil of official-acts immunity to hear civil claims alleging *jus cogens* violations, but the *jus cogens* exception appears to be less settled in the civil context. Compare *Ferrini v. Germany* ... with *Jones v. Saudi Arabia* ..."

124. The court found:

> "American courts have generally followed the foregoing trend, concluding that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity but still recognizing that head-of-state immunity, based on status, is of an absolute nature and applies even against *jus cogens* claims ... We conclude that, under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity."

125. The plaintiff has filed a petition for certiorari with the Supreme Court. The petition is currently pending.

2. Canada

126. The State Immunity Act of 1985 ("SIA") establishes the extent to which foreign States can be sued in Canadian courts. It is drafted in terms similar to the US legislation. In particular, in order to benefit from immunity, a defendant must establish that it is a "foreign State" within the meaning of the Act and the term "foreign State" includes any sovereign or other Head of the foreign State, any government of the foreign State or of

any political subdivision of the foreign State, including any of its departments, and any agency of the foreign State.

127. In *Jaffe v. Miller* 5 OR (2d) 133, the Ontario Court of Appeal held that employees of a foreign State acting in the course of their duties were covered by the notion of "State" in the SIA and thus enjoyed immunity. The fact that the impugned acts were allegedly of an illegal and malicious nature did not take them outside the scope of State immunity.

128. In *Bouzari v. Islamic Republic of Iran* (2004) 71 OR (3d) 675, the plaintiff brought a claim against Iran for damages in respect of torture he suffered which was carried out in an Iranian prison. The Ontario Court of Appeal upheld the lower court's finding that the claim was barred by the SIA. The court found that Article 14 of the Convention against Torture (see paragraph 63 above) did not extend to providing the right to a civil remedy against a foreign State for torture committed abroad. The same was true of customary international law: despite the *jus cogens* nature of the prohibition on torture, no exception to the principle of State immunity existed in respect of torture.

129. In *Hashemi v. Islamic Republic of Iran and Others*, the plaintiff was the son of a dual Iranian and Canadian citizen who had been tortured in Iran and had died as a result of her injuries. He sought to bring a civil claim against Iran, the Ayatollah Sayyid Ali Khamenei and two officials whom he named as having participated in the torture of his mother. His claim was dismissed at first instance on the basis that the State of Iran, its Head of State and the two officials all enjoyed State immunity under the SIA.

130. The Quebec Court of Appeal upheld the first-instance judgment on 15 August 2012 ((2012) QCCA 1449). The judge examined the judgment of the ICJ in *Germany v. Italy* (see paragraphs 88-94 above) and accepted on the basis of the ICJ's findings that State immunity could apply even in cases involving acts of torture. He further found that in Canada, unlike in the United States, the legislation was a complete codification of the law on State immunity.

131. As to whether State immunity was also enjoyed by the two officials under the SIA, the judge said:

> "[93] In light ... of a number of persuasive authorities from other jurisdictions, I am satisfied that the motion judge was correct in holding that the SIA applies to individual agents of a foreign state. Already, this question has been thoroughly examined ... in *Jaffe*, decided by the Court of Appeal for Ontario in 1993. In *Jones*, decided thirteen years later, the House of Lords reversed a judgment of the Court of Appeal of England which had adopted the line of argument now developed by the plaintiffs in this case ..."

132. On the argument that the actions of the officials, by their nature, prevented them from claiming the benefit of State immunity, the judge said:

> "[95] I believe, again, that this point is already well settled by relevant authorities, the most recent of which is, once more, the *Jones* case."

133. He considered that the argument was identical to the one previously raised in *Jaffe v. Miller* and that it did not sit well with the notion of torture as defined in various legal instruments, including the Convention against Torture. He concluded that Lord Hoffmann's opinion in the House of Lords in the applicants' case offered a complete and cogent refutation of the argument that the impugned treatment was "so illegal that it must fall outside the scope of official activity".

134. Leave to appeal to the Supreme Court has been granted and a hearing is expected in March 2014.

3. New Zealand

135. On 21 December 2006 the High Court handed down judgment in *Fang v. Jiang* ([2007] NZAR 420). The plaintiffs had sought leave to serve proceedings against former members of the Chinese government, alleging, *inter alia*, torture. They contended that State immunity did not protect officials from civil claims in respect of torture. The court referred extensively to the House of Lords judgment in the present case and to the relevant international instruments. It held that State immunity incidentally conferred immunity *ratione materiae* on individuals, including former heads of State and anyone else whose conduct in the exercise of the authority of the State was later called into question. There was no exception to State immunity in claims against individuals for torture because the Convention against Torture created an exception for criminal cases only; the UN Jurisdictional Immunities Convention did not contain an exception for torture; and New Zealand common law reflected international law. The court concluded:

> "71. There may be occasions when New Zealand Courts will take the lead in recognising new trends in international law but ... I am satisfied it would be wholly inappropriate for New Zealand to adopt an approach which differs from that so recently established in the House of Lords after an extensive review of the traditional sources of international law ...
>
> 72. Nor am I persuaded that it would be appropriate to depart from the persuasive reasoning of the House of Lords in *Jones*, a case I consider to be directly in point."

136. Leave to serve proceedings was therefore refused.

4. Australia

137. The Foreign States Immunities Act 1985 ("the Immunities Act") establishes the extent to which foreign States can be sued in Australian courts. Section 9 of the Immunities Act provides for immunity from jurisdiction; sections 10 to 20 identify exceptions to section 9. In order to benefit from immunity, a defendant must establish that it is a "foreign State" within the meaning of the Act. Section 3(3) clarifies that the term "foreign State" includes the Head of a foreign State or of a political subdivision of a

foreign State in his public capacity; and the executive government or part of the executive government of a foreign State or a political subdivision of a foreign State.

138. On 5 October 2010 the Court of Appeal of New South Wales handed down its judgment in *Zhang v. Zemin* ([2010] NSWCA 255), a civil claim for torture lodged against the former President of China, a department of the Chinese government and a member of the politburo of the Communist Party of China. It held that individual officers were covered by the Immunities Act, observing that they were entitled to immunity at common law and that the Immunities Act did not change the common law in this respect. As the purposes of the Immunities Act would not be served if civil claims could be lodged against former officials in respect of their conduct while in office, the Act applied to former officials also.

139. In respect of the claimants' argument that there was a *jus cogens* exception under international law, including the argument that acts in violation of *jus cogens* could not be done in a public or official capacity for the purposes of immunity, the court explained that Australian courts were obliged to apply local statutes even where they conflicted with international law. The Immunities Act clearly established a definitive statement of the immunity afforded and a comprehensive statement of exceptions. It was not possible to infer additional exceptions from international law.

5. Italy

140. In *Ferrini v. Germany* (Decision No. 5044/2004, ILR Vol. 128, p. 658), the Italian Court of Cassation allowed a civil claim brought against Germany in respect of war crimes committed in 1944-45 and rejected immunity as a bar to the claim. The court found that principles of State immunity had to be interpreted in accordance with the universal values embodied in international crimes and *jus cogens* norms. This Court's judgment in *Al-Adsani*, cited above, was distinguished on the basis that in *Ferrini* the crimes were alleged to have taken place on Italian territory. Other similar judgments were also adopted by Italian courts.

141. On 23 December 2008 Germany instituted proceedings before the International Court of Justice, alleging that the *Ferrini* judgment, subsequent decisions upholding it and various enforcement measures against German property in Italy failed to respect Germany's jurisdictional immunity under international law. Judgment was handed down in favour of Germany in 2012 (see paragraphs 88-94 above).

6. Greece

142. The Greek Court of Cassation (*Άρειος Πάγος*) in *Prefecture of Voiotia v. Germany*, No. 11/2000, 4 May 2000 found that in cases involving

gross violations of international law, the State did not enjoy immunity from civil suit.

143. The Supreme Court later refused to enforce the judgment against Germany on the basis that Germany enjoyed State immunity. It referred, *inter alia*, to this Court's judgment in *Al-Adsani*, cited above. The Supreme Court judgment was challenged before this Court but the complaint was declared inadmissible in *Kalogeropoulou*, cited above.

7. Poland

144. In *Natoniewski v. Germany* (Ref. No. IV CSK 465/09, 29 October 2010, translated into English in *Polish Yearbook of International Law* 30 (2010) pp. 299-303), the claimant commenced civil proceedings in respect of injuries suffered because of the actions of German armed forces during the Second World War. The Polish Supreme Court dismissed the claim on the basis that Germany enjoyed State immunity. The court explained:

> "The specificity of the causes of armed conflicts suggests the applicability of State immunity for actions arising in the course of these conflicts. Armed conflicts – with victims on a large-scale and an enormity of destruction and suffering – cannot be reduced to the relationship between the state/perpetrator and the injured person; the conflicts exist mainly between states. Traditionally, property claims arising from the events of war shall be settled in peace treaties, aimed at a comprehensive – at the international and individual level – regulation of the consequences of war. In such cases, jurisdictional immunity provides international law means for regulating property claims resulting from the events of war. The removal from court jurisdiction a whole range of civil claims (caused by the war) is designed to counteract the situation, when the normalization of relation between states may face obstacles as a result of a large number of proceedings instituted by individuals ..."

145. As to the argument that State immunity did not apply where there had been an alleged violation of *jus cogens* norms, the court said:

> "... There appears to be a trend in international and domestic law towards limiting State immunity in respect of human rights abuses, but this practice is by no means universal."

146. On the compatibility of the granting of State immunity with Article 6 § 1, the court said:

> "According to the established case law of European Court of Human Rights, this exclusion does not violate the right of access to domestic courts guaranteed by Article 6 § 1 ... It cannot be said that State immunity imposes a disproportionate restriction on the right of access to court, when the applicants have available to them reasonable alternative means to protect effectively their rights (see ECHR judgment of 18 February 1999 in *Waite and Kennedy v. Germany* case)."

8. France

147. In *Bucheron v. Germany*, the applicant lodged a civil claim in the employment tribunal for alleged forced labour during the Second World War. His claim was dismissed on the basis that Germany enjoyed immunity.

In 2003, the Court of Cassation upheld the dismissal of the claim (No. 02-45961, 16 December 2003). The same result was reached by the Court of Cassation in *Grosz v. Germany* (No. 04-475040, 3 January 2006), a judgment later upheld by this Court in *Grosz v. France* (dec.), no. 14717/06, 16 June 2009.

9. Slovenia

148. In *A.A. v. Germany* (No. IP-13/99, 8 March 2001), the Slovenian Constitutional Court dismissed a civil claim lodged in respect of actions by Germany during the Second World War. The applicant had argued that there was, under customary international law, a *jus cogens* exception to the rules on State immunity. The court accepted that there was evidence of a trend in the future development of international law towards the limitation of State immunity before foreign courts in cases of alleged human rights violations. However, the evidence was not demonstrative of general State practice recognised as a law and thus creating such a rule of international customary law.

149. As regards the specific complaint under Article 6 § 1 of the Convention, the court referred to this Court's decision in *Waite and Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999-I. It concluded that the restriction on the claimant's right of access to a court pursued a legitimate aim and was proportionate, referring to the possibility for the applicant to commence a civil claim in Germany.

B. Criminal prosecutions for torture

1. France

150. In the criminal case of *Ould Dah*, the defendant, a Mauritanian State official, was prosecuted for and ultimately convicted by a French Assize Court of acts of torture committed in Mauritania. An appeal on points of law was subsequently rejected (No. 02-85379, 23 October 2002). On 1 July 2005 the Assize Court awarded damages to the various civil parties to the case. A similar result was reached in the subsequent criminal case of *Khaled Ben Saïd*.

2. The Netherlands

151. In the *Bouterse* case, Mr Bouterse claimed immunity from criminal prosecution on the ground that the alleged acts of torture were committed while he was Head of State of Suriname. On 20 November 2000 the Amsterdam Court of Appeal refused to grant immunity on the basis that the commission of very serious offences, as was the case here, could not be considered to be one of the official duties of a Head of State.

3. Switzerland

152. In a judgment of 25 July 2012 in *A. v. Attorney General and Others*, the Federal Criminal Court refused to uphold a claim of immunity in a criminal case against an Algerian national for war crimes, including acts of torture, committed in Algeria. The defendant had formerly served as defence minister and had been part of the junta that ruled Algeria at the relevant time. The case therefore concerned the residual *ratione materiae* immunity of an individual who had benefited from *ratione personae* immunity while in office. The court explained that the aim of *ratione materiae* immunity was both to protect officials from the consequences of acts attributable to the State for which they acted and, by doing so, to ensure respect for State sovereignty.

153. The court referred to the House of Lords judgment in *Pinochet (No. 3)* and to the evolution in favour of an increasing number of exceptions to *ratione materiae* immunity highlighted in legal doctrine. It acknowledged the debate regarding whether illegal acts could be considered official acts for the purposes of that immunity. It concluded that the legal doctrine and case-law no longer unanimously confirmed that residual *ratione materiae* immunity covered all acts committed while in office where allegations of serious violations of human rights had been made. It would therefore be paradoxical to affirm the intention to prevent grave violations of human rights while at the same time accepting a wide interpretation of rules on State immunity *ratione materiae* to the benefit of State officials, thus hindering any investigation into such allegations.

4. Belgium

154. The Law of 16 June 1993 on the punishment of serious violations of international humanitarian law defines certain acts, including torture and genocide, as international crimes punishable in accordance with the Law's provisions. Section 5 of the Law was amended in 1999 to provide expressly that:

> "[t]he immunity attached to the official capacity of a person shall not bar the application of this law ...".

THE LAW

I. JOINDER OF THE APPLICATIONS

155. Given their similar factual and legal background, the Court decides that the two applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

II. *LOCUS STANDI*

156. The applicant Mr Sampson died in March 2012 while the case was pending before the Court. One of his closest surviving relatives and the representative of his estate, Ms Jane Mayfield, expressed a wish to pursue the application on his behalf.

157. The Court reiterates that in a number of cases in which an applicant died in the course of the proceedings, it has taken into account statements from the applicant's heirs or close family members expressing their wish to pursue the proceedings before the Court (see for example *Dalban v. Romania* [GC], no. 28114/95, § 39, ECHR 1999−VI; *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII; and *Asadbeyli and Others v. Azerbaijan*, nos. 3653/05, 14729/05, 20908/05, 26242/05, 36083/05 and 16519/06, § 106, 11 December 2012). In the present case, the Government did not challenge the right of Ms Mayfield to pursue the application on Mr Sampson's behalf. The Court notes that Mr Sampson died over five years after his application had been lodged with this Court and that he had spent years, following his release from detention in Saudi Arabia, seeking progress in his civil claim and accountability for his alleged torturers. The Court therefore accepts the right of the representative of his estate to pursue the application on his behalf. It will continue to refer to Mr Sampson as the applicant in the case.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

158. Mr Jones complained that granting immunity to the Kingdom of Saudi Arabia and the individual defendant in his case was a disproportionate violation of his right of access to a court.

159. The other applicants complained that the granting of immunity to the individual defendants in their case was a disproportionate violation of their right of access to a court.

160. The applicants relied on Article 6 § 1 of the Convention, the relevant part of which provides as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

1. The parties' submissions

161. The Government emphasised that each State had a duty under customary international law to grant immunity to other States. The starting position was that there was a general rule of immunity to which certain

exceptions were admitted. These exceptions were reflected in the Basle Convention and the UN Jurisdictional Immunities Convention. The courts of one State were therefore not free to modify the immunities at will. The State Immunity Act 1978 ("the 1978 Act") implemented the obligations owed by the respondent State to other States under public international law. The position set out in the 1978 Act was clear: Saudi Arabia was entitled to immunity unless one of the exceptions set out in sections 2 to 11 applied. It was evident here that none of the exceptions applied.

162. In light of this, the Government invited the Court to reconsider its finding in *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI that Article 6 § 1 was engaged in cases concerning State immunity. They argued that Article 6 could only be directed to the exercise of powers of jurisdiction possessed under international law. It could not require a State to arrogate to itself powers of adjudication which, under international law, it did not possess. As a consequence, a State could not be considered to have denied access to a court where it had no access to give.

163. The applicants contended that Article 6 § 1 was plainly engaged in the circumstances of the case, relying on this Court's judgment in *Al-Adsani*.

2. The Court's assessment

164. The Court held in *Al-Adsani*, cited above, §§ 46-49, that Article 6 § 1 was applicable to a claim against a State for damages for personal injury. It found that the grant of immunity did not qualify the substantive right but acted as a procedural bar on the national courts' power to determine the right. There is no reason to hold otherwise in the present case. Article 6 § 1 is accordingly applicable.

165. The Court further notes that the applications are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

(i) Mr Jones

166. Mr Jones submitted that any restriction on his right of access to a court had to pursue a legitimate aim and be proportionate. On the latter question, he emphasised that the broader an immunity, the more compelling its justification had to be: broad exclusions from civil claims required strong justification (citing *Fayed v. the United Kingdom*, 21 September 1994, § 65,

Series A no. 294-B). In the present case, the importance of the right of access to a court was heightened because the context was a civil claim for torture, the prohibition of which was *jus cogens* under international law.

167. Mr Jones considered that the approach followed by the Court in *Al-Adsani*, cited above, was wrong. He pointed out that in *Waite and Kennedy*, cited above, § 68, the Court had relied on the fact that the applicants had other reasonable means of redress available to them in concluding that the immunity granted to the European Space Agency was not a disproportionate interference with the applicants' right of access to a court. However, the Court in *Al-Adsani* had failed to consider whether alternative means of redress existed. As a consequence, its reasoning in that case was fatally flawed. The applicant was unable *de jure* and *de facto* to bring a claim in Saudi Arabia, as he was not able to return to the country where he had been tortured and the courts there were neither independent nor impartial. He further argued that the respondent State was in a minority of States which provided total immunity to State officials, according to the data provided by the Government, arguing that only the Czech Republic, Germany, Ireland and the Russian Federation appeared to provide a similar level of immunity.

168. Relying also on the submissions of the other applicants, the applicant concluded that it was disproportionate to apply a blanket immunity in order to block completely the judicial determination of a civil right without balancing the competing interests, namely those connected with the particular immunity and those relating to the nature of the specific claim which was the subject matter of the proceedings.

(ii) Mr Mitchell, Mr Sampson and Mr Walker

169. The applicants argued that no rule of international law mandated the application of immunity in the case, so the majority analysis in *Al-Adsani,* cited above, did not lead to the conclusion that the interference was proportionate. In so far as immunity could be identified as a rule of international law, it was of a nature and status that was insufficient to amount to a proportionate interference with Article 6 § 1 rights because there were more nuanced and proportionate means of controlling and restricting claims which allowed an appropriate balance to be struck.

170. The applicants disagreed with the Government's argument that the officials fell within the notion of "State" and that the applicants were in reality seeking to bring a claim against Saudi Arabia. The definition of "State" in the 1978 Act was not determinative of the question under customary international law. They referred to the US Supreme Court's conclusion in *Samantar* (see paragraph 122 above) that State officials were not covered by the definition of State in the FSIA, which adopted a definition identical in substance to the 1978 Act. They further argued that Article 2 § 1 of the Jurisdictional Immunities Convention, which

encompasses "representative of the State acting in that capacity" within the notion of "State", was intended to cover representatives of the State who enjoyed immunity *ratione personae*. They relied in this respect on the commentary of the ILC to support this assertion.

171. According to the applicants, there was no symmetry between international rules on State immunity and State responsibility. The fact that the act of a State official was attributable to the State itself as a matter of international law did not mean that the State alone was responsible for the act as a matter of municipal law. There were many instances where damages for a civil wrong in municipal law and reparation against a State for an internationally wrongful act had been pursued simultaneously. The assumption in the House of Lords appeared to have been that the purpose of the law of immunity was to provide a procedural defence to the forum State's exercise of jurisdiction over any act which, in international law, would be attributable to the State. This was an unorthodox and disquieting justification for State immunity. It was clear from the Draft Articles on State Responsibility that the definition of State was solely for the purpose of attribution and not for any other reason. This was demonstrated by the fact that a breach of contract by a State organ constitutes an act of the State for the purposes of State responsibility, pursuant to the Draft Articles, but conduct related to commercial activities does not generally attract State immunity in civil proceedings, pursuant to the broadly accepted *jure gestionis* exception to that principle. Similarly, acts of torture committed on the territory of the forum State engaged State responsibility but did not benefit from State immunity. Further, the applicants emphasised that there was no obligation on States in international law to satisfy a judgment properly rendered against their individual officials. There were therefore no grounds for contending that an action against an official in these circumstances indirectly impleaded the State itself. Damages awarded in domestic proceedings would be taken into account by an international tribunal in its evaluation of appropriate remedies, to prevent double recovery.

172. Once it was accepted that the rules on State responsibility and State immunity served fundamentally different purposes, it was clear that there could be no assumption that the definition of "official acts" was the same in both contexts. The dichotomy was not between official acts and private acts, but between official acts entitled to State immunity, and official acts not so entitled. The applicants disputed the suggestion that there was an inconsistency between this approach and the definition of torture in the Convention against Torture: Article 1 of that Convention was the gateway to the primary obligations under the Convention against Torture; it was not a rule of attribution for the purposes of State responsibility. The applicants pointed to a series of cases supporting the proposition that, where a State official engaged in acts amounting to a violation of a peremptory norm,

there was no immunity from jurisdiction (citing, *inter alia*, *Prefecture of Voiotia*, *Ferrini* and *Furundžija*, all cited above). This approach was particularly clear in the United States (citing, *inter alia*, *Filártiga* and *Samantar*, cited above). The recent judgment of the ICJ in *Germany v. Italy*, cited above, was only relevant to claims against the State itself: it had no application to the applicants' claims against State officials. As regards the rejection of a *jus cogens* exception by the ICJ in that case, the applicants criticised the judgment for the lack of any real engagement with the actual principles underlying the doctrine of State immunity. They also criticised the court for its formalistic approach to the question of the alleged conflict between *jus cogens* rules and the rule of State immunity and invited this Court to decline to follow the ICJ's example in deciding how to strike the balance between the two sets of norms in the context of Article 6.

173. Finally, the applicants argued that the distinction between civil and criminal proceedings was irrelevant and did not justify a different approach to the immunity of State officials in civil and criminal cases. Criminal courts in a number of countries, including the United Kingdom, were empowered to award compensation to victims. The applicants referred to the French *Ould Dah* case, where civil parties in criminal proceedings were awarded compensation and the question of immunity was not considered. Furthermore, the applicants contended that it would be inconsistent to suggest that criminal responsibility was abrogated by the Convention against Torture but not civil. Article 4 § 2 of that Convention required States to make the offence of torture punishable by appropriate penalties, which clearly encompassed the payment of compensation, and Article 14 on compensation was not territorially limited. The proposal during the negotiations to limit Article 14 by reference to territory under a State's jurisdiction had been deleted from the final version of the text and, according to the applicants, the clear implication was that no territorial limitation was intended. Thus, principles of State immunity could not prohibit the courts of the forum State from ordering a foreign official to pay compensation to victims of torture.

(b) The Government

174. The Government argued that the grant of immunity to the State of Saudi Arabia in the case of Mr Jones pursued the legitimate aim of complying with international law so as to promote comity and good relations between States through the respect of each State for the other's sovereignty. They argued that there was a margin of appreciation as regards access to a court, which permitted States to act on their own views, provided that they were reasonably tenable, as to the extent of their obligations under public international law. In the present case, it could not be said that the approach of the United Kingdom conflicted with general principles of international law or fell outside any generally accepted international

standards. The Government distinguished *Waite and Kennedy*, cited above, in so far as it required examination of the alternative means of redress on the ground that there was an important difference between cases involving the immunity of international organisations in which there was no alternative forum, and cases of State immunity where jurisdiction over a particular claim lay with another State. A municipal court could not, contrary to the rules of customary international law, create an exception to State immunity in order to remedy the substantive failing of a foreign court which had jurisdiction but chose not to exercise it. They added that the consular support and assistance which the Government had afforded to the applicants in Saudi Arabia and since their release from detention was not to be overlooked.

175. In respect of the grant of immunity to the State officials in both cases, the Government's primary submission was that it was well-established as a principle of international law that a State was entitled to the same immunity in respect of the official acts of its officials in cases where the named defendant in the proceedings was one of those officials as it was in a case where the named defendant was the State itself. The question, therefore, was not whether State immunity extended to such officials, but whether the official was part of the State such that State immunity automatically applied. Acts of State officials acting in that capacity were not attributable to them personally but only to the State. There was therefore a symmetry between the international law on State immunity and that on State responsibility. The 1978 Act reflected obligations owed by the respondent State to other States under public international law. This was supported by the definition of "State" in international agreements, including the UN Jurisdictional Immunities Convention and the Draft Articles on State Responsibility; in domestic legislation and case-law; and in the decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Blaškić*. Accordingly, if an act was attributable to the State so that the State bore responsibility for it on the international plane, the same act was to be treated as the State's act for the purposes of the international law right of State immunity in proceedings in a municipal court. This reflected the practical reality of the situation. If the official of the State was sued in the domestic courts of another State for acts performed in the exercise of his official functions, then, in practice, the State was indirectly impleaded, for not only were its acts called into question but it would be expected to satisfy any award of damages and, in all probability, would be the only source from which such an award of damages could be satisfied.

176. The Government submitted that both the Court of Appeal and the House of Lords were right to reject the argument that it followed from the *jus cogens* status of the prohibition against torture that States were required not to accord immunity in actions against foreign States concerning alleged

breaches of that prohibition. The argument was unsound for several reasons. Firstly, the rule of State immunity did not authorise or condone torture and was therefore not incompatible with the prohibition of torture. It merely diverted any breach to a different method of settlement. Secondly, the argument had been rejected whenever it had been raised before an international court (citing, *inter alia*, the "*Arrest Warrant*" case and *Al-Adsani*, cited above). Thirdly, the question whether there ought to be State immunity for torture had been raised in the negotiations on the UN Jurisdictional Immunities Convention and it had been decided that based on the current state of customary international law no exception could be made. Lastly, the argument had been rejected by most national courts which had been faced with the question (citing, *inter alia*, *Bucheron*, *Siderman de Blake*, *Princz* and *Bouzari*, all cited above). Although some national courts in Greece and Italy had accepted the *jus cogens* argument, these cases were not persuasive and did not establish an accepted generalised practice in international law. Reliance on isolated judgments was not enough to establish a change in customary law. This view was endorsed by the ICJ in its *Germany v. Italy* judgment, which was carefully reasoned and based on an extensive review and analysis of State practice. The Government added that case-law in the United States, where jurisdiction had been asserted over major violations of international law perpetrated by non-nationals overseas, did not express principles widely shared and observed among other nations.

177. The Government further rejected the applicants' argument that torture was not an "official act" which could attract State immunity. It was clear that the allegations of torture could not be considered to relate to acts *jure gestionis* as they fell within the concept of an exercise of sovereign power. No authority had been provided to support the suggestion that certain types of sovereign act did not attract State immunity. The Government also pointed out that the definition of torture in the Convention against Torture required that the act be carried out by a public official or person acting in an official capacity. This was reflected in the international law rules on State responsibility, which provided for the engagement of State responsibility where one of its officials, under colour of its authority, tortured a national of another State.

178. As to the obligation to provide redress imposed by Article 14 of the Convention against Torture, the Government were of the view that it required States to ensure redress in respect of torture committed within their territories only. This view was supported by national legislation on civil jurisdiction for torture and State immunity and by State practice. The draft text of Article 14 had been clarified during negotiations to reflect the intention that the Article be restricted to the territory of the State but, for reasons which were not explained, the clarification was omitted when the draft was sent forward. The Government's view was that this omission was

a mistake, and they referred in this regard to the US declaration on the Convention against Torture concerning its understanding of the territorial scope of Article 14.

179. The Government acknowledged that the State officials in question could be prosecuted in the United Kingdom for their conduct. However, there were good reasons for distinguishing between criminal and civil proceedings in this context. Firstly, the Convention against Torture contained explicit provision requiring the States Parties to prosecute officials of foreign States in respect of acts of torture committed outside the forum State; there was no comparable provision for civil proceedings. Secondly, in the House of Lords judgment in *Pinochet (No. 3)* the majority reasoned that there was no immunity in respect of criminal prosecution for torture on the basis of the Convention against Torture and the fact that all three countries involved in that case were parties to the Convention against Torture. Thirdly, criminal responsibility of the individual was not, as a matter of international law, part and parcel of the responsibility of the State but something which was separate from that responsibility. Finally, civil liability for acts performed in an official character was necessarily bound up with the responsibility of the State itself as, in practice, the State could be expected to meet any award of damages made against the official and the satisfaction of any such award of damages would, in its turn, affect the liability of the State to make compensation in any proceedings which might be taken against it. It was noteworthy that the ICJ had also made a clear distinction between civil and criminal proceedings in its *Germany v. Italy* judgment, referring to the *Pinochet (No. 3)* judgment.

(c) The third-party interveners

180. REDRESS, Amnesty International, Interights and JUSTICE submitted joint third-party written comments on the question of the State immunity of officials.

181. The third-party interveners emphasised that where a suit was brought against a State and its officials, a separate determination of each immunity was required as they were not coterminous. Their different rationales and purposes meant that it did not logically follow that if the State enjoyed immunity, so too did its officials.

182. Torture gave rise to both individual and State responsibility under international law. 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 impleaded. Such a claim was about the personal responsibility of the official and any eventual award of compensation would only be enforceable against the individual and not against the State or its assets.

183. The third-party interveners argued that immunity *ratione materiae*, in issue in the present case, did not apply where torture was alleged. Pointing out that the object and purpose of the Convention against Torture was to ensure accountability and to prevent impunity for torture, they contended that the grant of immunity to State officials in torture cases was inconsistent with this goal, particularly where no alternative means of redress existed. There was clear evidence of State practice of refusing State immunity to both current and former officials charged with crimes under international law in France, Italy, the Netherlands and Spain. There was no distinct dividing line between civil and criminal proceedings: in a number of member States of the Council of Europe, courts were permitted to entertain civil claims in an *action civile* in criminal cases. There were several examples of French courts convicting foreign officials of torture or other criminal offences and awarding reparation to victims who had constituted themselves *parties civiles*.

184. In cases where State immunity was granted to officials in civil proceedings concerning allegations of torture, the interveners contended that the limitation on access to a court did not pursue a legitimate aim and was not proportionate. State immunity in this context did not contribute to the proper functioning of the State and, as the State was not impleaded, the arguments used to justify State immunity did not arise here. The purpose of immunity *ratione materiae* was to prevent suits against State officials when they incurred no independent responsibility but merely acted as the mouthpiece of the State. That aim did not apply where torture was alleged, as it fell within the personal responsibility of the official. The only role played by the grant of immunity *ratione materiae* in this case was to prevent the official being held to account, which could not be considered a legitimate aim under Article 6 § 1.

185. The interveners emphasised that the broader an immunity, the more compelling its justification had to be (citing *Kart v. Turkey* [GC], no. 8917/05, § 83, ECHR 2009). The Court had adopted a narrow interpretation of immunity in cases concerning parliamentary immunity. It has also indicated that it would not be consistent with the rule of law in a democratic society if a State could, without restraint or control by the Court, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities on categories of persons (see *Fayed*, cited above, § 65, and *Cordova v. Italy (no. 1)*, no. 40877/98, § 58, ECHR 2003-I). The nature of the wrong in respect of which access to a court was sought – namely torture – required an even more restrictive approach to any limitations imposed. It was also relevant to proportionality whether there were alternative means of redress; in the applicants' cases, there were not. In particular, there was no effective remedy – as required by Article 14 of the Convention against Torture – in Saudi Arabia for allegations of torture since torture was not a defined crime under Saudi law and there was no specific

punishment stipulated. The Committee Against Torture had found that there were no effective mechanisms for investigating claims of torture in Saudi Arabia. Diplomatic protection could not constitute an effective remedy: although the respondent State made reference to its availability in *Al-Adsani*, cited above, there was no evidence that they had ever provided Mr Al-Adsani with any such protection. Diplomatic protection was wholly within the discretion of the State of nationality and the Government could not be compelled to espouse a claim on behalf of its nationals.

2. The Court's assessment

(a) General principles on access to a court in the context of State immunity

186. Article 6 § 1 secures to everyone the right to have any legal dispute ("*contestation*" in the French text of Article 6 § 1) relating to his civil rights and obligations brought before a court. The right of access to a court is not, however, absolute. It may be subject to limitations since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Fogarty v. the United Kingdom* [GC], no. 37112/97, §§ 32-33, 21 November 2001; *McElhinney v. Ireland* [GC], no. 31253/96, §§ 33-34, 21 November 2001; *Al-Adsani*, cited above, §§ 52-53; *Kalogeropoulou and Others v. Greece and Germany* (dec.), no. 59021/00, ECHR 2002-X; *Manoilescu and Dobrescu v. Romania and Russia* (dec.), no. 60861/00, §§ 66 and 68, ECHR 2005-VI; *Cudak v. Lithuania* [GC], no. 15869/02, §§ 54-55, ECHR 2010; and *Sabeh El Leil v. France* [GC], no. 34869/05, §§ 46-47, 29 June 2011).

187. Convention rights must be guaranteed in a manner that is practical and effective, particularly where the right of access to a court is concerned, given the importance in a democratic society of the right to a fair trial. It would not, therefore, be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on categories of persons. In cases where the application of the principle of State immunity from jurisdiction restricts the exercise of the right of access to a court, the Court is accordingly required to ascertain whether the circumstances of the case

justified such restriction (see *Al-Adsani*, §§ 47-48; *Cudak*, §§ 58-59; and *Sabeh El Leil*, §§ 50-51, all cited above).

188. The Court has previously explained that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty (see *Fogarty*, § 34; *McElhinney*, § 35; *Al-Adsani*, § 54; *Kalogeropoulou and Others*; *Cudak*, § 60; and *Sabeh El Leil*, § 52, all cited above).

189. As to the proportionality of the restriction, the need to interpret the Convention so far as possible in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity, has led to the Court to conclude that measures taken by a State which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1. The Court explained that just as the right of access to a court is an inherent part of the fair-trial guarantee in Article 6 § 1, so some restrictions must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity (see *McElhinney*, § 36-37; *Fogarty*, §§ 35-36; *Al-Adsani*, §§ 55-56; *Kalogeropoulou and Others*; *Manoilescu and Dobrescu*, §§ 70 and 80; *Cudak*, §§ 56-57; and *Sabeh El Leil*, §§ 48-49, all cited above).

(b) Application of the principles in previous State immunity cases

190. The Court has examined compliance with the right of access to a court enshrined in Article 6 § 1 in the context of the grant of State immunity in a number of different civil claims, including disputes concerning: employment at embassies (see *Fogarty*; *Cudak*; and *Sabeh El Leil*, all cited above); personal injury incurred in the forum State (see *McElhinney*, cited above); personal injury incurred as a result of torture abroad (see *Al-Adsani*, cited above); crimes against humanity carried out in wartime (see *Kalogeropoulou and Others*, cited above); service of process (see *Wallishauser v. Austria*, no. 156/04, 17 July 2012); and complaints of an allegedly private-law nature (see *Oleynikov v. Russia*, no. 36703/04, 14 March 2013). Each of these cases concerned the extent to which the former absolute notion of State immunity had given way to a more restrictive form of immunity. In particular, the Court examined whether the respondent State's actions "[fell] outside any currently accepted international standards" (see *Fogarty*, § 37, and *McElhinney*, § 38, both cited above); were "inconsistent with [the] limitations generally accepted by the community of nations as part of the doctrine of State immunity" (see

Al-Adsani, cited above, § 66, and, by implication, *Kalogeropoulou and Others*, cited above); or were potentially contrary to an exception to State immunity established by a rule of customary international law that applied (see *Cudak*, § 67; *Sabeh El Leil*, § 58; *Wallishauser*, § 69; and *Oleynikov*, § 68, all cited above).

191. In *Al-Adsani* (cited above) decided in 2001, the Court found that it had not been established that there was as yet acceptance in international law of the proposition that States were not entitled to immunity in respect of civil claims for damages concerning alleged torture committed outside the forum State. There was therefore no violation of Article 6 § 1 where the domestic courts had struck out the applicant's claim against Kuwait for civil damages for torture in application of the rules of State immunity contained in the 1978 Act. The same conclusion was reached in 2002 in *Kalogeropoulou and Others*, cited above, in respect of the refusal of the Greek Minister of Justice to grant leave to the applicants to expropriate German property in Greece following a judgment in their favour concerning crimes against humanity committed in 1944. However, the Court there indicated that its finding in *Al-Adsani* did not preclude a development in customary international law in the future.

192. In a number of later cases concerning State immunity, the Court found a violation of Article 6 § 1 on the basis that the provisions of the UN Jurisdictional Immunities Convention applied to the respondent State under customary international law and that the grant of immunity was not proportionate as it was either not compatible with the customary international law rule or was ordered without proper consideration by the domestic courts of the rule in question (see *Cudak*, §§ 67-74; *Sabeh El Leil*, §§ 58-67; *Wallishauser*, §§ 69-72; and *Oleynikov*, §§ 68-72, all cited above).

(c) Should the approach in *Al-Adsani* be revisited?

193. The applicants argued that the Court should depart from the approach of the Grand Chamber in *Al-Adsani* (cited above) to the extent that the latter had failed to conduct a substantive proportionality assessment, including an assessment of the circumstances and merits of the individual case, and in particular to consider whether alternative means of redress existed.

194. In *Al-Adsani* the decisive question when assessing the proportionality of the measure was whether the immunity rules applied by the domestic courts reflected generally recognised rules of public international law on State immunity (see ibid., §§ 55-56 and 66-67). While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see, for example, *Christine Goodwin v. the United Kingdom*

[GC], no. 28957/95, § 74, ECHR 2002-VI; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 104, 17 September 2009; and *Sabri Güneş v. Turkey* [GC], no. 27396/06, § 50, 29 June 2012). Where the precedent in question is a relatively recent and comprehensive judgment of the Grand Chamber, as in the present case, a Chamber which is not prepared to follow the established precedent should propose relinquishment of the case before it to the Grand Chamber. None of the parties to the present case has proposed relinquishment to the Grand Chamber and in any event it would remain for the Chamber to decide whether to act on any such request (see, for example, *Hartman v. the Czech Republic*, no. 53341/99, § 8 *in fine*, ECHR 2003-VIII, and *Kuznetsova v. Russia*, no. 67579/01, § 5, 7 June 2007).

195. Having regard to the precedent established in *Al-Adsani* and the detailed examination in that judgment of the relevant legal issues by reference to this Court's case-law and international law, the Court does not consider it appropriate to relinquish the present case to the Grand Chamber. In developing the relevant test under Article 6 § 1 in its *Al-Adsani* judgment, the Court was acting in accordance with its obligation to take account of the relevant rules and principles of international law and to interpret the Convention so far as possible in harmony with other rules of international law of which it forms part (see *Al-Adsani*, cited above, § 55; see also *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 126, ECHR 2010; *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, § 136, ECHR 2012; *Nada v. Switzerland* [GC], no. 10593/08, §§ 171-72, ECHR 2012; and Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 1969). The Court is therefore satisfied that the approach to proportionality set out by the Grand Chamber in *Al-Adsani* (see paragraph 194 above) ought to be followed.

(d) Application of the principles in the claim against the Kingdom of Saudi Arabia

196. Mr Jones's complaint concerning the striking out of his claim against Saudi Arabia is identical in material facts to the complaint made in *Al-Adsani*, cited above. As the Court found in *Al-Adsani*, the grant of immunity pursued the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty. It was compatible with Article 6 § 1 because it reflected generally recognised rules of public international law on State immunity at that time. The sole question for the Court is whether there had been, at the time of the decision of the House of Lords in 2006 in the applicants' case, an evolution in the accepted international standards as regards the existence of a torture exception to the doctrine of State immunity since its earlier judgment in *Al-Adsani* such as to warrant the

conclusion that the grant of immunity in this case did not reflect generally recognised rules of public international law on State immunity.

197. In recent years, both prior to and following the House of Lords judgment in the present case, a number of national jurisdictions have considered whether there is now a *jus cogens* exception to State immunity in civil claims against the State (for example, *Siderman de Blake*, *Princz*, *Smith* and *Sampson* in the United States at paragraph 117 above; *Bouzari* and *Hashemi* in Canada at paragraphs 128-34 above; *Ferrini* in Italy at paragraph 140 above; *Prefecture of Voiotia* in Greece at paragraph 142 above; *Natoniewski* in Poland at paragraphs 144-46 above; *Bucheron* and *Grosz* in France at paragraph 147 above; *A.A. v. Germany* in Slovenia at paragraphs 148-49 above; and *Al-Adsani* in the United Kingdom).

198. However, it is not necessary for the Court to examine all of these developments in detail since the recent judgment of the ICJ in *Germany v. Italy* (see paragraphs 88-94 above) – which must be considered by this Court as authoritative as regards the content of customary international law – clearly establishes that, by February 2012, no *jus cogens* exception to State immunity had yet crystallised. The application by the English courts of the provisions of the 1978 Act to uphold the Kingdom of Saudi Arabia's claim to immunity in 2006 cannot therefore be said to have amounted to an unjustified restriction on the applicant's access to a court. It follows that there has been no violation of Article 6 § 1 of the Convention as regards the striking out of Mr Jones's complaint against the Kingdom of Saudi Arabia.

(e) Application of the principles in the claim against the State officials

199. All four applicants complained that they were unable to pursue civil claims for torture against named State officials. The Court must examine whether the refusal to allow these claims to proceed was compatible with Article 6 § 1 of the Convention, applying the general approach set out in *Al-Adsani* (cited above).

200. As regards the legitimacy of the aim pursued by the restriction on access to a court, it is relevant to note that in the cases concerning State immunity previously examined by the Court, the civil claim in question had been lodged against the State itself and not against named individuals. However, the immunity which is applied in a case against State officials remains "State" immunity: it is invoked by the State and can be waived by the State. Where, as in the present case, the grant of immunity *ratione materiae* to officials was intended to comply with international law on State immunity, then, as in the case where immunity is granted to the State itself, the aim of the limitation on access to a court is legitimate.

201. Since measures which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court, the sole matter for consideration in respect of the applicants' complaint is

whether the grant of immunity *ratione materiae* to the State officials reflected such rules. The Court will therefore examine whether there was a general rule under public international law requiring the domestic courts to uphold Saudi Arabia's claim of State immunity in respect of the State officials; and, if so, whether there is evidence of any special rule or exception concerning cases of alleged torture.

(i) The existence of a general rule

202. The first question is whether the grant of immunity *ratione materiae* to State officials reflects generally recognised rules of public international law. The Court has previously accepted that the grant of immunity to the State reflects such rules. Since an act cannot be carried out by a State itself but only by individuals acting on the State's behalf, where immunity can be invoked by the State then the starting-point must be that immunity *ratione materiae* applies to the acts of State officials. If it were otherwise, State immunity could always be circumvented by suing named officials. This pragmatic understanding is reflected by the definition of "State" in the UN Jurisdictional Immunities Convention of 2004 (see paragraph 76 above), which provides that the term includes representatives of the State acting in that capacity. The ILC Special Rapporteur, in his second report, said that it was "fairly widely recognised" that immunity of State officials was "the norm", and that the absence of immunity in a particular case would depend on establishing the existence either of a special rule or of practice and *opinio juris* indicating that exceptions to the general rule had emerged (see paragraph 96 above).

203. There is also extensive case-law at national and international level which concludes that acts performed by State officials in the course of their service are to be attributed, for the purposes of State immunity, to the State on whose behalf they act. Thus in *Propend Finance Pty Ltd v. Sing and another* (1997, 111 ILR 611), the English Court of Appeal held that immunities conferred on the State pursuant to the 1978 Act must be read as affording to individual State officials "protection under the same cloak as protects the State itself" (see paragraphs 42-43 above). In Canada, the Court of Appeal in *Jaffe* concluded that the notion of "State" in the SIA covered employees of the State acting in the course of their duties (see paragraph 127 above). In *Fang*, the High Court in New Zealand held that State immunity incidentally conferred immunity *ratione materiae* in claims against individuals whose conduct in the exercise of the authority of the State was called into question (see paragraph 135 above). In *Zhang*, an Australian Court of Appeal held that individual officers were covered by Australia's Immunities Act since they were entitled to immunity at common law and this had not been changed by the Act (see paragraph 138 above). Although the US Supreme Court in *Samantar* held that officials did not fall under the notion of "State" within the meaning of the FSIA, it clarified that

their immunities were governed by common law, as the statute was deemed to be only a partial codification of immunity rules in the United States (see paragraph 122 above). The Court of Appeals (Fourth Circuit) subsequently accepted that, in principle, State officials could enjoy immunity for acts performed in the course of their employment by the State (see paragraphs 122-24 above). In *Blaškić*, the ICTY described State officials acting in their official capacity as "mere instruments of a State" and explained that they enjoyed "functional immunity" (see paragraph 81 above). In *Djibouti v. France*, the ICJ referred to the possibility open to the Djibouti government to claim that the acts of two State officials were its own acts, and that the officials were its organs, agencies or instrumentalities in carrying them out (see paragraphs 86-87 above).

204. The weight of authority at international and national level therefore appears to support the proposition that State immunity in principle offers individual employees or officers of a foreign State protection in respect of acts undertaken on behalf of the State under the same cloak as protects the State itself.

(ii) The existence of a special rule or exception in respect of acts of torture

205. It is clear from the foregoing that individuals only benefit from State immunity *ratione materiae* where the impugned acts were carried out in the course of their official duties. The UN Jurisdictional Immunities Convention refers to representatives of the State "acting in that capacity" (see paragraph 76 above). The fact that there is no general *jus cogens* exception as regards State immunity rules is therefore not determinative as regards claims against named State officials.

206. The Convention against Torture defines torture as an act inflicted by a "public official or other person acting in an official capacity". This definition appears to lend support to the argument that acts of torture can be committed in an "official capacity" for the purposes of State immunity. It is true that the reasoning of Lord Justice Mance in the Court of Appeal in the present case was to the effect that he was doubtful whether public officials had to be "acting in an official capacity" in order to commit torture within the meaning of Article 1 of the Convention against Torture (see paragraph 16 above). However, after an extensive review of the sources of international law, this reasoning was rejected by a unanimous House of Lords. Lord Bingham, in particular, pointed out that the only case-law relied upon by the applicants to support this argument, which came from the United States, did not express principles widely shared and observed among other nations (see paragraph 28 above).

207. The Draft Articles on State Responsibility, for their part, provide for attribution of acts to a State, on the basis that they were carried out either by organs of the State as defined in Article 4 of the Draft Articles (see paragraph 107 above) or by persons empowered by the law of the State to

exercise elements of the governmental authority and acting in that capacity, as defined in Article 5 of the Draft Articles (see paragraph 108 above). The applicants do not seek to deny that the acts of torture allegedly inflicted on them engaged the responsibility of the State of Saudi Arabia. However, it should be noted that the Draft Articles only concern the question whether a State is liable for the impugned acts, because once a State's liability has been established, the obligation to provide redress for the damage caused may arise under international law. There is no doubt that individuals may in certain circumstances also be personally liable for wrongful acts which engage the State's responsibility, and that this personal liability exists alongside the State's liability for the same acts. This potential dual liability is reflected in Article 58 of the Draft Articles, which provides that the rules on attribution are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of the State (see paragraph 109 above). It is clearly seen in the criminal context, where individual criminal liability for acts of torture exists alongside State responsibility (see paragraphs 44-56, 61 and 150-54 above). Thus, as the existence of individual criminal liability shows, even if the official nature of the acts is accepted for the purposes of State responsibility, this of itself is not conclusive as to whether, under international law, a claim for State immunity is always to be recognised in respect of the same acts.

208. It has been argued that any rule of public international law granting immunity to State officials has been abrogated by the adoption of the Convention against Torture which, it is claimed, provides in its Article 14 for universal civil jurisdiction. This argument finds support from the Committee Against Torture, which may be understood as interpreting Article 14 as requiring that States provide civil remedies in cases of torture no matter where that torture was inflicted (see paragraphs 66-68 above). However, the applicants have not pointed to any decision of the ICJ or international arbitral tribunals which has stated this principle. This interpretation has furthermore been rejected by courts in both Canada and the United Kingdom (see paragraphs 15, 29-30 and 128 above). The United States has lodged a reservation to the Convention against Torture to express its understanding that the provision was only intended to require redress for acts of torture committed within the forum State (see paragraph 64 above). The question whether that Convention has given rise to universal civil jurisdiction is therefore far from settled.

209. International law instruments and materials on State immunity give limited attention to the question of immunity for State officials for acts of torture. The matter is not directly addressed in the Basle Convention or in the UN Jurisdictional Immunities Convention. Prior to the adoption of the latter, a working group of the ILC acknowledged the existence of some support for the view that State officials should not be entitled to plead immunity for acts of torture committed in their own territories in either civil

or criminal actions, but did not propose an amendment to the Draft Articles (see paragraph 79 above). While some movement towards the establishment of an exception to State immunity in this respect was thus identified, there was acknowledged not to be any consensus as yet. It is noteworthy that three of the fourteen States that are parties to the UN Jurisdictional Immunities Convention made declarations that the Convention was without prejudice to developments in international law concerning human rights protection (see paragraph 80 above). A 2009 resolution of the Institute of International Law urged States to consider waiving immunity where international crimes were allegedly committed by their agents; but it also declared that no *ratione materiae* immunity from jurisdiction, defined as including civil jurisdiction, applied with regard to international crimes. The resolution was expressed to be without prejudice to rules on attribution of acts to the State and rules on the immunity of the State itself (see paragraphs 103-06 above). In *Furundžija* (cited above), discussing the effect of the *jus cogens* nature of the prohibition on torture, the ICTY commented that the victim of a State measure authorising or condoning torture or absolving perpetrators "could bring a civil suit for damage in a foreign court" (see paragraph 82 above); what precisely the court intended to convey by this sentence is not clear from the judgment. Judges Higgins, Kooijmans and Buergenthal, in their joint separate opinion in the ICJ "*Arrest Warrant*" case, also referred to growing claims that serious international crimes could not be regarded as official acts and observed that the view was gradually finding expression in State practice (see paragraph 85 above), although in the House of Lords ruling in the present case both Lord Bingham and Lord Hoffmann offered legal reasons why they were not convinced by such claims (see, notably, paragraphs 30 and 35 above).

210. There appears to be little national case-law concerning civil claims lodged against named State officials for *jus cogens* violations. Few States have been confronted with this question in practice. The responses received by the respondent State from other Council of Europe States (see paragraph 110 above) were largely hypothetical and do not permit the drawing of any conclusions as to the extent to which national laws recognise the official nature of acts of torture for the purposes of State immunity. There are, however, some other examples from other common-law jurisdictions. In Canada, in the case of *Hashemi*, the Quebec Court of Appeal found that the SIA applied to individual agents of a foreign State even in a case concerning allegations of torture. It relied on the definition of torture in the Convention against Torture, its previous ruling in *Jaffe* and Lord Hoffmann's opinion in the House of Lords in the applicants' case (see paragraphs 129-33 above). However, the case is currently pending before the Supreme Court (see paragraph 134 above). In New Zealand, the High Court in *Fang* also relied on the House of Lords judgment in the applicants' case to reject the arguments in favour of an exception to State immunity in

cases against State officials for torture, considering it inappropriate for the courts of New Zealand to "take the lead" in recognising new trends in international law (see paragraph 135-36 above). In Australia, the Court of Appeal of New South Wales in *Zhang* refused to accept the argument that *jus cogens* violations could not be official acts for the purpose of State immunity, relying on the unambiguous nature of the national legislation and the Australian courts' obligation to give effect to that law (see paragraphs 138-39 above).

211. There has been more extensive consideration of the question in the United States. Following the Court of Appeals finding in *Chuidian* that the term "State" in the FSIA could cover officials but that the legislation would not shield an official acting beyond the scope of his authority, federal district courts have denied immunity in cases involving torture on the basis that the acts could not be considered as falling within the scope of the officials' lawful authority (see paragraph 119 above). Subsequent courts of appeals in *Belhas* and *Matar* granted immunity *ratione materiae* in cases concerning alleged violations of *jus cogens* norms (see paragraphs 120-21 above). However, the authority of these judgments is now in doubt following the Supreme Court's subsequent finding in *Samantar* that the FSIA did not extend to State officials at all and that the matter was governed solely by common law (see paragraph 122 above). The recent judgment of the Court of Appeals concerning the extent of common-law immunities in *Samantar* denied immunity *ratione materiae* to State officials on the ground that *jus cogens* violations were not legitimate official acts (see paragraphs 122-24 above). At the date of adoption of the present judgment, the matter was pending before the Supreme Court (see paragraph 125 above).

212. Outside the civil context, some support can be found for the argument that torture cannot be committed in an "official capacity" in criminal cases. In *Pinochet (No. 3)*, Lord Browne-Wilkinson and Lord Hutton considered there to be strong grounds for saying that following the entry into force of the Convention against Torture the implementation of torture could not be a State function (see paragraphs 47-48 and 51 above), although this was not the approach preferred by the other judges in the case (see, in particular, the opinion of Lord Hope at paragraph 49 above). In *Bouterse*, the Amsterdam Court of Appeal held that the commission of very serious offences (in this case, torture) could not be considered to be one of the official duties of a Head of State (see paragraph 151 above). The matter was discussed by the Swiss Federal Criminal Court in *A. v. Attorney General and Others*, although the rejection of the immunity plea did not directly rest on a finding that torture could not be an "official act" (see paragraphs 152-53 above). Mr Kolodkin, appointed as Special Rapporteur by the ILC in the context of its study of the immunity of State officials from foreign criminal jurisdiction, referred in his second report to the "fairly

widespread" view that grave crimes under international law could not be considered as acts performed in an official capacity (see paragraph 99 above). However, the statement did not meet with unanimous agreement in the ILC and further comment on the issue is expected from the new Special Rapporteur, Ms Hernández, by 2014 (see paragraph 100 above). It is clear that in light of the possibility for victims in some States to lodge a civil claim for damages in the context of criminal proceedings, any difference in the approach to immunity *ratione materiae* between civil and criminal cases will have an impact on the degree to which civil compensation is available in the different States. However, while this is a matter which no doubt requires some further reflection in the context of judicial decisions on immunity or activities of international law bodies, it is not in itself sufficient reason for this Court to find that the grant of immunity in the present case did not reflect generally recognised rules of public international law.

213. Having regard to the foregoing, while there is in the Court's view some emerging support in favour 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 2006 House of Lords judgment, to the effect that the State's right to immunity may not be circumvented by suing its servants or agents instead. Taking the applicants' arguments at their strongest, there is evidence of recent debate surrounding the understanding of the definition of torture in the Convention against Torture; the interaction between State immunity and the rules on attribution in the Draft Articles on State Responsibility; and the scope of Article 14 of the Convention against Torture (see paragraphs 206-08 above). However, State practice on the question is in a state of flux, with evidence of both the grant and the refusal of immunity *ratione materiae* in such cases. At least two cases on the question are pending before national Supreme Courts: one in the United States and the other in Canada (see paragraphs 125 and 134 above). International opinion on the question may be said to be beginning to evolve, as demonstrated recently by the discussions around the work of the ILC in the criminal sphere. This work is ongoing and further developments can be expected.

214. In the present case, it is deemed clear that the House of Lords fully engaged with all of the relevant arguments concerning the existence, in relation to civil claims of infliction of torture, of a possible exception to the general rule of State immunity (compare and contrast *Sabeh El Leil*, §§ 63-67; *Wallishauser*, § 70; and *Oleynikov*, §§ 69-72, all cited above). In a lengthy and comprehensive judgment (see paragraphs 24-38 above), it concluded that customary international law did not admit of any exception – regarding allegations of conduct amounting to torture – to the general rule of immunity *ratione materiae* for State officials in the sphere of civil claims where immunity is enjoyed by the State itself. The findings of the House of Lords were neither manifestly erroneous nor arbitrary, but were based on

extensive references to international-law materials and consideration of the applicants' legal arguments and the judgment of the Court of Appeal, which had found in the applicants' favour. Other national courts have examined in detail the findings of the House of Lords in its 2006 judgment and have considered those findings to be highly persuasive (see paragraphs 131-33 and 135 above).

215. In these circumstances, the Court is satisfied that the grant of immunity to the State officials in this case reflected generally recognised rules of public international law. The application of the provisions of the 1978 Act to grant immunity to the State officials in the applicants' civil cases did not therefore amount to an unjustified restriction on the applicants' access to a court. There has accordingly been no violation of Article 6 § 1 of the Convention in this case. However, in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States.

FOR THESE REASONS, THE COURT

1. *Decides*, unanimously, to join the applications;

2. *Declares*, unanimously, the applications admissible;

3. *Holds*, by six votes to one, that there has been no violation of Article 6 § 1 of the Convention as regards Mr Jones's claim against the Kingdom of Saudi Arabia;

4. *Holds*, by six votes to one, that there has been no violation of Article 6 § 1 of the Convention as regards the applicants' claims against the named State officials.

Done in English, and notified in writing on 14 January 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Registrar

Ineta Ziemele
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) the concurring opinion of Judge Bianku;
(b) the dissenting opinion of Judge Kalaydjieva.

I.Z.
F.E.-P.

CONCURRING OPINION OF JUDGE BIANKU

It is with great hesitation that I voted in favour of the majority's conclusions in the present judgment. Although the developments in the area under consideration are presented in a very balanced way, I think that almost thirteen years after delivery, with a very narrow majority, of the judgment in *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI, during which the matter in issue has been the subject of very significant developments, the present case should have been relinquished to the Grand Chamber in order to give it the opportunity to consider whether *Al-Adsani* still remains good law.

DISSENTING OPINION OF JUDGE KALAYDJIEVA

The applicants in the present case sought to begin civil proceedings in the United Kingdom against the Kingdom of Saudi Arabia and against named State officials of that country for damage caused by acts of torture committed by those officials. The House of Lords unanimously held that their claims could not be allowed to proceed because Saudi Arabia benefited from State immunity, and that immunity also extended to the named officials.

The essence of the majority's conclusion – that granting immunity from suit to States as well as to State officials in respect of such a claim constitutes a legitimate and proportionate restriction on the right of access to a court which cannot be regarded as incompatible with Article 6 § 1 of the Convention – follows the conclusions of the narrow majority in *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI and what the majority view as the current state of public international law.

To my regret, I find myself unable to agree.

While it may be correct to conclude that by February 2012 (see paragraph 198 of the judgment), and prior to General Comment No. 3 (2012) of the Committee Against Torture (see paragraph 67), no *jus cogens* exception to State immunity had yet crystallised and that – in view of when the event in the present case occurred – it is not necessary for the Court to examine subsequent developments such as the recent judgment of the International Court of Justice in *Germany v. Italy* (see paragraphs 88-94), that conclusion concerns only State immunity. On this point I not only share the doubts of some of the numerous dissenting judges in the case of *Al-Adsani* (cited above), but also find it difficult to accept that this Court had no difficulties in waiving the automatic application of State immunity and finding violations of the right of access to a court concerning disputes over employment (see *Cudak v. Lithuania* [GC], no. 15869/02, ECHR 2010, and *Sabeh El Leil v. France* [GC], no. 34869/05, 29 June 2011), but not concerning redress for torture – as in the present case.

Like Lord Justice Mance (see paragraph 17), I find it difficult to "accept that general differences between criminal and civil law justif[y] a distinction in the application of immunity in the two contexts", especially in view of developments in this field, not least following the findings of the House of Lords in the case of *Pinochet (No. 3)* that there would be "no immunity from criminal prosecution in respect of an individual officer who had committed torture abroad in an official context." I also find it "not easy to see why civil proceedings against an alleged torturer could be said to involve a greater interference in the internal affairs of a foreign State than criminal proceedings against the same person" and also "incongruous that if an alleged torturer was within the jurisdiction of the forum State, he would be prosecuted pursuant to Article 5 § 2 of the Convention against Torture ...

and no immunity could be claimed, but the victim of the alleged torture would be unable to pursue any civil claim".

The present case raises for the first time the question whether State officials can benefit from State immunity in civil torture claims, which has not yet been examined by the Court.

I am not convinced that this question should or could reasonably and necessarily be examined "applying the general approach set out in *Al-Adsani*" (see paragraph 199), in which this Court's scrutiny was limited to State immunity and did not concern the compatibility of extending it to named State officials with the right of access to a court. In that regard I disagree with the somewhat declaratory nature of the majority's following findings: "the immunity which is applied in a case against State officials remains 'State' immunity: it is invoked by the State and can be waived by the State. Where, as in the present case, the grant of immunity *ratione materiae* to officials was intended to comply with international law on State immunity, then, as in the case where immunity is granted to the State itself, the aim of the limitation on access to a court is legitimate" (see paragraph 200).

I find the conclusions of the majority on this issue regrettable and contrary to essential principles of international law concerning the personal accountability of torturers that is reflected unequivocally in Article 3 of the European Convention on Human Rights taken in conjunction with Article 1; in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and in the very concept establishing the International Criminal Court. Contrary to the view of the majority, in my understanding these principles were intended and adopted specifically as special rules for *ratione materiae* exceptions from immunity in cases of alleged torture (see paragraph 201).

In that regard I find myself unable to agree with the findings of the majority that "[s]ince an act cannot be carried out by a State itself but only by individuals acting on the State's behalf, where immunity can be invoked by the State then the starting-point must be that immunity *ratione materiae* applies to the acts of [torture committed by] State officials" (see paragraph 202). This appears to suggest that torture is by definition an act exercised on behalf of the State. That is a far cry from all international standards, which not only analyse it as a personal act, but require the States to identify and punish the individual perpetrators of torture – contrary to the "pragmatic understanding" of the majority that "[i]f it were otherwise, State immunity could always be circumvented by suing named officials". I fear that the views expressed by the majority on a question examined by this Court for the first time not only extend State immunity to named officials without proper distinction or justification, but give the impression of also being capable of extending impunity for acts of torture globally.

To use the words of one of the dissenting judges in *Al-Adsani*: “What a pity!”