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# De-immunizing Torture: Reconciling Human Rights and State Immunity

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Craig Forcese\*

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In May 2005, the United Nations Committee Against Torture expressed “its concern at ... the absence of effective measures to provide civil compensation [in Canada] to victims of torture in all cases.” The committee was responding to a ruling of the Ontario Court of Appeal holding that the federal *State Immunity Act* barred the plaintiff from bringing a civil suit in Ontario for torture inflicted upon him by, and in, Iran. The committee’s views place Canada on the horns of a dilemma: If Canada relaxes its state immunity law to allow such lawsuits in order to comply with the Committee Against Torture’s recommendations, it may run afoul of the international law of state immunity. Yet, if it persists with its current understanding of state immunity rules, it will fail to take the steps the committee views as necessary to comply with the *Torture Convention*. This article concludes that state torturers are not necessarily invulnerable to civil remedies in the courts of other states. First, while courts have resisted efforts to de-immunize *states* themselves, courts may be able to limit state immunity for *officials* engaging in acts of torture. Second, the international law of countermeasures offers an avenue out of Canada’s dilemma. So long as the prerequisites for countermeasures are met, international law permits Canada to limit state immunity for acts of torture. The article suggests amendments to Canada’s *State Immunity Act* that would accomplish exactly this objective.

En mai 2005, le Comité contre la torture des Nations Unies exprimait son inquiétude vis à vis de l’absence au Canada de mesures adéquates visant à pourvoir une compensation civile aux victimes de la torture dans toutes les instances. Le comité réagissait à une décision de la Cour d’Appel de l’Ontario qui avait déterminé que, selon les termes de la *Loi sur l’Immunité des États*, le requérant ne pouvait entamer une action au civil en Ontario à la suite de tortures subites en Iran. L’avis du comité met le Canada devant un dilemme : si le Canada assouplit ses lois sur l’immunité de l’État afin de permettre de telles actions, il se heurtera peut-être aux principes de l’immunité de l’État en droit international. Or, si le Canada maintient sa conception actuelle des règles de l’immunité de l’État, il n’arrivera pas à prendre les mesures que le comité juge nécessaires afin de se conformer avec la *Convention contre la torture*. L’auteur en conclut que les tortionnaires à la solde d’états ne sont pas nécessairement à l’abri de sanctions civiles imposées par les tribunaux étrangers. De prime abord, quoique les tribunaux aient résisté aux atteintes à l’immunité de l’État, ils seraient peut-être en mesure de limiter l’immunité des *fonctionnaires* ayant pris part à la torture. En second lieu, les règles de droit international portant sur les contre-mesures offrent au Canada une solution possible au dilemme. Lorsque les conditions des contre-mesures sont satisfaites, le droit international permettrait au Canada de limiter l’immunité étatique en ce qui a trait à la torture. En vue de cet objectif, l’auteur propose certains amendements à la *Loi sur l’Immunité des États* du Canada.

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## Introduction

In May 2005, the United Nations Committee Against Torture placed Canada on the horns of a dilemma. In its fifth report on Canada's compliance with the UN *Torture Convention*,<sup>1</sup> the committee expressed "its concern at ... [t]he absence of effective measures to provide civil compensation to victims of torture in all cases,"<sup>2</sup> an obligation under article 14 of the treaty. While the committee did not expressly identify the case in its report, it was clearly responding to *Bouzari v. Iran*,<sup>3</sup> a recent ruling of the Ontario Court of Appeal. In that case, the appeal court held that the federal *State Immunity Act*<sup>4</sup> barred the plaintiff from bringing a civil suit in Ontario for torture inflicted upon him by, and in, Iran.

The *State Immunity Act* codifies the international legal doctrine of the same name. At international law, the courts of one sovereign state have no competence to judge the actions of another sovereign state. This doctrine was recently affirmed by the International Court of Justice ("ICJ") in *Congo v. Belgium*.<sup>5</sup> In that matter, the ICJ held that state immunity barred prosecution in one country's courts of a high official of another country, even when the charges concerned crimes against humanity. Yet, in its assessment of Canada's compliance with the *Torture Convention*, the Committee Against Torture manifested no sympathy for state immunity. The concept went unmentioned in its conclusions in its report, which stated that Canada "should review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture."<sup>6</sup>

This wording is opaque. The committee does not squarely call upon the government of Canada to relax state immunity in cases of alleged torture. The implications of its conclusions are obvious, however, given the context in which they were issued. Insofar as the committee is concerned, Canada's obligations under the *Torture Convention* include the provision of civil remedies against torturers, even foreign torturing states.

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<sup>1</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 113, U.K.T.S. 1991 No. 117 (entered into force 26 June 1987) [*Torture Convention*].

<sup>2</sup> *Conclusions and recommendations of the Committee against Torture: Canada*, UN CAT, 34th Sess., UN Doc. CAT/C/CR/34/CAN (July 2005) at 2-3 [mimeo.] [Committee Against Torture Conclusions].

<sup>3</sup> (2004), 71 O.R. (3d) 675, 243 D.L.R. (4th) 406 (C.A.) [*Bouzari* (C.A.) cited to O.R.], aff'g [2002] O.J. No. 1624 (QL), 114 A.C.W.S. (3d) 57 (Sup. Ct.) [*Bouzari* (Sup. Ct.)], leave to appeal to S.C.C. refused, [2005] 1 S.C.R. vi [*Bouzari* (S.C.C.)].

<sup>4</sup> R.S.C. 1985, c. S-18.

<sup>5</sup> *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, [2002] I.C.J. Rep. 3 at para. 51, 41 I.L.M. 536 [*Congo v. Belgium* cited to I.C.J. Rep.].

<sup>6</sup> *Supra* note 2 at 4.

Canada's dilemma is as follows: If it relaxes its state immunity law to allow such lawsuits in order to comply with the Committee Against Torture's recommendations, it may run afoul of the international law of state immunity. Yet, if it persists with its current understanding of state immunity rules, it will fail to take the steps the committee views as necessary to comply with the *Torture Convention*. This is no small conundrum. On the one hand, torture is a horrific, unprincipled practice for which recompense should be extracted. On the other hand, state immunity is the oil that lubricates international relations. If national courts were empowered to judge other states (and seize their local assets), the resulting tit-for-tat could impair diplomatic relations and exacerbate international tensions. For this reason, state immunity is a robust principle of international law, binding on Canada.

This article addresses Canada's dilemma. Part I briefly defines state immunity, situating it within the concept of state sovereignty and identifying popular justifications for its existence. Part II examines the scope of state immunity, focusing on its two subcategories: immunity *ratione personae* (immunity by reason of the person) and immunity *ratione materiae* (immunity by reason of the matter). In relation to the latter category, this part focuses particular attention on the question of state agency and human rights abuses. Finally, Part III examines exceptions to state immunity, both those that have received ready acceptance and, more controversially, a putative exception for human rights violations. This part pays particular attention to *Bouzari* (C.A.) and similar cases, and to the Committee Against Torture's position.

This article concludes that international courts examining the issue and courts in Canada, the United Kingdom, and the United States asked to apply state immunity have been unwilling to limit state immunity on a human rights theory. Most notably, they have rejected arguments that the *Torture Convention* compels such a limitation. From this conclusion, however, it does not follow that state torturers are necessarily invulnerable to civil remedies in the courts of other states. Specifically, the international law of countermeasures offers an avenue out of the dilemma posed by the Committee Against Torture's criticism of Canada. So long as the prerequisites for countermeasures are met, international law permits Canada to limit state immunity for acts of torture that violate obligations owed to Canada as a member of the international community and as a party to the *Torture Convention*. This article suggests amendments to Canada's *State Immunity Act* that would accomplish exactly this objective.

## I. The Concept of State Immunity

### A. Sovereignty and Jurisdiction

State sovereignty is the cornerstone of international law.<sup>7</sup> In simple terms, it is the right to exercise in relation to a state's territory the functions of a state, independently

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<sup>7</sup> See e.g. *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, art. 2(1), 59 Stat. 1031 (the United Nations "is based on the principle of the sovereign equality of all its Members").

of any other state.<sup>8</sup> The principle of non-intervention in the sovereign affairs of states is a concept reflected in the UN General Assembly's influential *Declaration on Principles of International Law concerning Friendly Relations and Co-operation*. This instrument declares that “[e]very State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State,” and that “[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”<sup>9</sup>

Sovereignty is a meaningless concept if it does not include the right to exercise independent legislative, judicial, and executive authority over state territory. A necessary expression of sovereignty is thus the exercise of jurisdiction over people, events, and things found or occurring within the territory of the state. The scope of this jurisdiction and the manner in which state power may be exercised even within state territories are matters constrained by other doctrines of international law. Modern international human rights law, for instance, precludes acts by states that violate human rights guarantees, even acts on the state's own territory and in relation to its own nationals.<sup>10</sup>

Other considerations closely tied to the concept of sovereignty also limit state jurisdiction. The modern world is not a checkerboard of hermetically sealed states. States, for instance, send diplomats and consular officials abroad, facilitating peaceful international relations. Since the early days of international law, these emissaries have enjoyed immunity from the jurisdiction of the states to which they are accredited, a principle now codified in the *Vienna Convention on Diplomatic Relations*<sup>11</sup> and the *Vienna Convention on Consular Relations*.<sup>12</sup>

Further, diplomats and consuls do not constitute the only state presence in other states. To facilitate diplomatic exchanges or for other reasons, state agencies and branches often conduct affairs or own property in the territory of another state. Meanwhile, heads of state and governments, foreign and other ministers, and more

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<sup>8</sup> See *Island of Palmas Case (Netherlands v. United States)* (1928), 2 R.I.A.A. 829 at 838 (Permanent Court of Arbitration).

<sup>9</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/RES/2625 (XXV) 121 at 123 [*Declaration on Friendly Relations*]. While not binding in its own right, the declaration “elaborates the major principles of international law in the UN Charter, particularly on use of force, dispute settlement, nonintervention in domestic affairs, self-determination, duties of cooperation and observance of obligations, and ‘sovereign equality.’ ... [I]t has become the international lawyer’s favorite example of an authoritative UN resolution” (Oscar Schachter, “United Nations Law” (1994) 88 A.J.I.L. 1 at 3).

<sup>10</sup> See especially *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 2, Can. T.S. 1976 No. 47 (entered into force 23 March 1976).

<sup>11</sup> 18 April 1961, 500 U.N.T.S. 95, arts. 29, 23, U.S.T. 3227 (entered into force 24 April 1964).

<sup>12</sup> 24 April 1963, 596 U.N.T.S. 261, art. 41, Can. T.S. 1974 No. 25 (entered into force 19 March 1967).

junior officials regularly interact with their counterparts in the territory of another state. They do so confident that they are generally not amenable to judicial proceedings in the courts of that state by virtue of another doctrine of international law: state immunity.

## **B. Overview of State Immunity**

### **1. Definition**

State immunity “prevents a foreign State being made party to a suit ... and thereby prevents the subjection of an independent State to proceedings in another country relating to a dispute about its exercise of governmental power.”<sup>13</sup> As Lord Browne-Wilkinson observed in his speech in the U.K. House of Lord’s *Pinochet* decision, “It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability.”<sup>14</sup>

While state immunity flows from customary international law,<sup>15</sup> it has recently been the subject of codification efforts. In 1977, the UN General Assembly charged the International Law Commission (“ILC”)—the UN’s international law codification body—with compiling draft articles of the law of state immunity.<sup>16</sup> The product of this work was a draft *Convention on Jurisdictional Immunities of States and Their Property*, which was adopted by the General Assembly in 2004<sup>17</sup> and opened for signature by states in 2005. The *Immunities Convention* will come into force when ratified by thirty states.

Subject to certain exceptions discussed below, the *Immunities Convention* extends immunity to “a State and its property from the jurisdiction of the courts of another State.”<sup>18</sup> For this reason, each state must refrain “from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that

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<sup>13</sup> Hazel Fox, *The Law of State Immunity* (Oxford: Oxford University Press, 2002) at 11.

<sup>14</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3)* (1999), [2000] 1 A.C. 147, [1999] 2 All E.R. 97 at 111, [1999] 2 W.L.R. 827 (H.L.) [*Pinochet* cited to All E.R.].

<sup>15</sup> See *Report of the International Law Commission on the work of its thirty-second session*, UN GAOR, 35th Sess., Supp. No. 10, UN Doc. A/35/10 (1980) (“in the general practice of States as evidence of customary law, there is little doubt that a general rule of State immunity has been firmly established as a norm of customary international law” at 344).

<sup>16</sup> *Report of the International Law Commission*, GA Res. 32/151, UN GAOR, 32d Sess., Supp. No. 45, UN Doc. A/RES/32/151 (1977) 214.

<sup>17</sup> *United Nations Convention on Jurisdictional Immunities of States and Their Property*, GA Res. 59/38, UN Doc. A/RES/59/38 (December 2004) [mimeo.] [*Immunities Convention*].

<sup>18</sup> *Ibid.*, art. 2.

its courts determine on their own initiative that the immunity of that other State ... is respected.”<sup>19</sup>

## 2. Justifications

Several justifications exist for state immunity. Among the most important is the principle of sovereign equality. Sovereign equality means that whatever its military or economic power, no state has legal primacy over another.<sup>20</sup> In this universe of equally sovereign entities, the courts of one state are in no position to adjudicate the liabilities of another state. As the Supreme Court of Canada has observed, “An equal has no authority over an equal” in public international law.<sup>21</sup> An early expression of this doctrine was articulated by the U.S. Supreme Court in *The Schooner Exchange v. McFaddon*: “One sovereign being in no respect amenable to another ... by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only ... in the confidence that the immunities belonging to his independent sovereign station ... are reserved ... and will be extended to him.”<sup>22</sup>

State immunity is sometimes defended on a more prosaic basis. Commentators have suggested that the practical impossibility of enforcing judgments against foreign states justifies state immunity.<sup>23</sup> After all, the foreign state’s assets are generally located outside the forum state. That said, there are instances where the foreign state’s agents and assets are within the physical jurisdiction of the forum state. For this reason, it is now a regular practice for a state imposing economic sanctions on another state to freeze the latter’s assets located within the territory or jurisdiction of the sanctioning state.

The occasional prospect of attachment of foreign state assets, however, is usually tempered by political considerations.<sup>24</sup> For one state to impose economic sanctions on

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<sup>19</sup> *Ibid.*, art. 6.

<sup>20</sup> See e.g. *Declaration on Friendly Relations*, *supra* note 9 (“sovereign equality includes the following elements: ... States are juridically equal” at 124).

<sup>21</sup> *Schreiber v. Canada*, 2002 SCC 62, [2002] 3 S.C.R. 269 at para. 13, 216 D.L.R. (4th) 513 [Schreiber].

<sup>22</sup> 11 U.S. (7 Cranch) 116 at 136 (1812). See also *Athabasca Chipewyan First Nation v. Canada (Minister of Indian Affairs and Northern Development)*, 2001 ABCA 112, 281 A.R. 38, 199 D.L.R. (4th) 452 (“The rationale for sovereign immunity is that, since states are equal, one cannot exercise jurisdiction over another” at para. 45). Some courts have also invoked international comity as a justification for immunity. See e.g. *Dole Food v. Patrickson*, where the U.S. Supreme Court held that “[f]oreign sovereign immunity ... is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business but to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns” (538 U.S. 468 at 479 (2003)).

<sup>23</sup> See discussion in Fox, *supra* note 13 at 28ff.

<sup>24</sup> The United States, for example, has urged its allies to respond to Iran’s nuclear ambitions by imposing economic sanctions, including freezing Iranian assets held in U.S. and European financial accounts. Such a move, however, would mark a shift toward economic coercion and away from

another is a significant rupture of normal international relations and a matter of high politics. States are generally loath to see de facto sanctions imposed via domestic execution of judgments issued by their courts. Sensitivity on this point has prompted the evolution in common law jurisdictions of the act-of-state doctrine. Closely related to the international state immunity concept, the act-of-state doctrine extends deference to the executive branch in the conduct of foreign affairs by discouraging, if not outright precluding, courts from adjudicating the legitimacy of a foreign act.<sup>25</sup>

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diplomatic efforts to persuade Iran to abandon its nuclear program. It could also jeopardize the willingness of Iran to sell oil to sanctioning nations. These political considerations have muted the enthusiasm among other states for the U.S. plan. See e.g. Dafna Linzer, "U.S. Urges Financial Sanctions on Iran" *Washington Post* (29 May 2006) A01.

<sup>25</sup> See e.g. *Underhill v. Hernandez*, in which the U.S. Supreme Court described the act-of-state doctrine as follows:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves (168 U.S. 250 at 252 (1897)).

The act-of-state doctrine is not a jurisdictional limitation so much as "a prudential doctrine designed to avoid judicial action in sensitive areas" (*International Association of Machinists and Aerospace Workers v. Organization of the Petroleum Exporting Countries*, 649 F.2d 1354 at 1359 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982)). In the United States, the doctrine has a constitutional dimension, stemming from separation of powers considerations and judicial deference to "the primary role of the President and Congress in [the] resolution of political conflict and the adoption of foreign policy" (*ibid.*). See also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 at 423 (1964). Courts in the United Kingdom have adopted a similar principle, sometimes labelled "non-justiciability". See Malcolm Shaw, *International Law*, 5th ed. (Cambridge, U.K.: Cambridge University Press, 2003) at 162ff. See also *Kuwait Airways v. Iraqi Airways*, [2002] UKHL 19, [2002] 2 A.C. 883, [2002] 3 All E.R. 209 [*Kuwait Airways* cited to All E.R.], in which Lord Hope of Craighead noted that

[t]here is no doubt as to the general effect of the rule which is known as the act of state rule. It applies to the legislative or other governmental acts of a recognised foreign state or government within the limits of its own territory. The English courts will not adjudicate upon, or call into question, any such acts. They may be pleaded and relied upon by way of defence in this jurisdiction without being subjected to that kind of judicial scrutiny. The rule gives effect to a policy of "judicial restraint or abstention" (*ibid.* at para. 135).

For a critique of the act-of-state jurisprudence, with a particular eye to the torture issue, see Martin Bühler, "The Emperor's New Clothes: Defabricating the Myth of 'Act of State' in Anglo-Canadian Law" in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart, 2001) 343. Bühler concludes from a review of the case law that "Anglo-Canadian courts can and should examine ... foreign laws and actions for formal validity within the foreign legal system and be alert to the possibility that public policy, informed by the norms and principles of public international law, may require that no effect be given to certain foreign laws and actions" (*ibid.* at 370). The House of Lords came to exactly this conclusion in *Kuwait Airways v. Iraqi Airways*, [1995] 3 All E.R. 694, [1995] 1 W.L.R. 1147, [1995] 2 Lloyd's L.R. 317 (H.L.) [*Iraqi Airways* cited to All E.R.].



A related practical justification for state immunity is simple reciprocity. Were a state to ignore the dictates of state immunity, it might precipitate a like response from other states, placing its own overseas assets and officials at risk of seizure. Tit-for-tat retaliation of this sort would obviously impair international diplomacy.<sup>26</sup>

Read together, these justifications support a strong doctrine of state immunity that countenances few, if any, exceptions. Yet, exceptions and limitations do exist, in part as a function of the difficulty in defining the “state” that is subject to state immunity.

## II. Scope of State Immunity

The definition of “State” in the *Immunities Convention* includes “the State and its various organs of government,” “constituent units of a federal State or political subdivisions of the State,” and its agencies.<sup>27</sup> The state as corporate entity is therefore prima facie entitled to immunity. This interpretation was affirmed by the ILC’s commentaries to the draft convention.<sup>28</sup>

In addition, the *Immunities Convention* is not intended to replace fully customary international rules of state immunity, including certain customary immunities accorded to certain state officials. In drafting the convention, the ILC clearly conflated “State” with senior state officials.<sup>29</sup> Moreover, by its own terms the convention “is without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*.”<sup>30</sup>

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<sup>26</sup> The political justification for state immunity has been noted by several courts. See e.g. *Al-Adsani v. The United Kingdom* [GC], no. 35763/97, [2001] XI E.C.H.R. 79, 34 E.H.R.R. 273 [*Al-Adsani* (E.C.H.R.) cited to E.C.H.R.] (“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” at para. 54 [emphasis added]); *Controller and Auditor-General v. Davison*, [1996] 2 N.Z.L.R. 278, [1996] N.Z.A.R. 145 (C.A.) [*Controller and Auditor-General* cited to N.Z.L.R.] (“Public policy justifications for allowing a degree of immunity for foreign states and their agencies from the jurisdiction of domestic Courts derive from general principles of territorial sovereignty, the equality and independence of states, notions of comity and reciprocity and an assessment of the risk to foreign relations of excessive claims to jurisdiction” at 300, Richardson J. [emphasis added]).

<sup>27</sup> *Supra* note 17, art. 2(1)(b).

<sup>28</sup> *Report of the International Law Commission on the work of its forty-third session*, UN GAOR, 46th Sess., Supp. No. 10, UN Doc. A/46/10 (1991) [ILC Commentary on Draft Articles] (“State” “includes the State itself, acting in its own name and through its various organs of government, however designated ...” at 15).

<sup>29</sup> “[S]overeigns and heads of State in their public capacity” and “[o]ther representatives includ[ing] heads of Government, heads of ministerial departments, ambassadors, heads of mission, diplomatic agents and consular officers, in their representative capacity” fall within the definition of “State” (*ibid.* at 18).

<sup>30</sup> *Supra* note 17, art. 3(2). The ILC envisaged this reservation as preserving customary international law that extends immunity to sovereigns or other heads of state acting in their *private* capacity (ILC Commentary on Draft Articles, *supra* note 28 at 22).

### A. Immunity Ratione Personae

The precise scope of customary immunity *ratione personae* was at issue in a recent ICJ decision, *Congo v. Belgium*.<sup>31</sup> There, the ICJ declared that efforts by Belgium to secure the arrest of the Congolese foreign minister for crimes against humanity transgressed the immunity accorded him by virtue of his high office in another state. The court noted that “in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.”<sup>32</sup>

Discussing foreign ministers specifically, the court reasoned that this immunity protects the official “against any act of authority of another State which would hinder him or her in the performance of his or her duties,” including criminal proceedings.<sup>33</sup> The scope of the immunity is sweeping:

[N]o distinction can 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”, or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office.<sup>34</sup>

The court concluded that immunity of this sort ceases once the foreign minister leaves office; it is time limited, in other words.<sup>35</sup> However, where a current foreign minister is sought for acts undertaken while (or even before becoming) a minister, his or her functions as a high representative of a state (often requiring international travel) would be impeded unless he or she is protected by an absolute immunity that extends to alleged war crimes and crimes against humanity.<sup>36</sup>

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<sup>31</sup> *Supra* note 5.

<sup>32</sup> *Ibid.* at para. 51. Note, however, the narrower interpretation of state immunity *ratione personae* offered by Lord Millett in *Pinochet*, which limits personal immunity to heads of state: “It is not available to serving heads of government who are not also heads of state, military commanders and those in charge of the security forces, or their subordinates. It would have been available to Hitler but not to Mussolini or Tojo” (*supra* note 14 at 171).

<sup>33</sup> *Congo v. Belgium, ibid.* at para. 54.

<sup>34</sup> *Ibid.* at para. 55.

<sup>35</sup> *Ibid.* at para. 61. See also “Jurisdictional Immunities of States and Their Property”, which noted that with immunity *ratione personae*, “immunities follow the person of the head of State only so long as he remains in office. Once he is divested of that office and becomes an ex-sovereign or ex-head of State, he may be sued like any ex-ambassador for all the personal acts performed during his office that were unconnected with the official functions ... ” ((UN Doc. A/CN.4/388) in *Yearbook of the International Law Commission 1985*, vol. 2, part 1 (New York: UN, 1987) at 44 (UN Doc. A/CN.4/SER.A/1985/Add.1 (Part 1)) [ILC 1985]). As this passage suggests, high officials will continue to enjoy immunity in relation to acts committed during their tenure in their official capacity, a result necessarily flowing from the immunity *ratione materiae* discussed in Part II.B, below.

<sup>36</sup> *Congo v. Belgium, ibid.* at para. 55ff. Notably, the ICJ’s approach to immunity *ratione personae*—built on customary law—is more sweeping than that discussed by the ILC in developing the

The functional reason for state immunity *ratione personae* echoes the justification for diplomatic and consular immunity: “[T]he purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.”<sup>37</sup> This rationale provides, however, an uncertain limit on the concept’s scope. Heads of state, heads of government, and foreign ministers have a presumptive capacity to bind their states in international law, justifying their immunity.<sup>38</sup> In modern international relations, however, other high state officials, such as ministers of finance, may enter into international negotiations and may, in certain venues, speak for their states. Whether these officials are also accorded immunity *ratione personae* appears unsettled in customary law.<sup>39</sup>

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*Immunities Convention*. The ILC’s early analysis of immunity *ratione personae* emphasized that a head of state’s immunity for *personal* actions was not absolute and did not extend to “a proceeding relating to private immovable property situated in the territory of the State of the forum” or to “a proceeding relating to any professional or commercial activity outside his sovereign or governmental functions” (ILC 1985, *ibid.* at 45).

<sup>37</sup> *Vienna Convention on Diplomatic Relations*, *supra* note 11 at 96. See also *Vienna Convention on Consular Relations*, which contains nearly identical language in relation to consular officials: “[T]he purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States” (*supra* note 12 at 262).

<sup>38</sup> See Fox, *supra* note 13 (“The recognition of a head of State as the prime representative of his State in international law provides the justification for affording the holder of that office immunities before the national courts of other States” at 426-27). The power to bind the state is readily recognized in international law. See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* [1996] I.C.J. Rep. 595 (“According to international law, there is no doubt that every Head of State is presumed to be able to act on behalf of the State in its international relations” at para. 44); *Vienna Convention on the Law of Treaties*, which reads:

7(2) In virtue of their functions and without having to produce full powers [i.e., official documents according to their powers to represent the state], the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty (23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force 27 January 1980)).

<sup>39</sup> See Fox, *ibid.* (“It remains to be seen whether other ministers, by reason of representing and committing their States in respect of major international obligations, will also be recognized as enjoying such a privileged status” at 423). The *Immunities Convention*, *supra* note 17, speaks of *ratione personae* only in relation to heads of state. The ILC, in its commentaries on the draft convention, acknowledged that such immunity could extend beyond heads of state, but declined to list the other high officials entitled to this privilege, largely because of the difficulty in doing so (ILC Commentary on Draft Articles, *supra* note 28 at 22). In a 2001 resolution, the Institut de droit international left open this question, specifying that provisions in the resolution endorsing state immunity for heads of government were “without prejudice to such immunities to which other members of the government may be entitled on account of their official functions” (*Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law* (2000-2001) 69 Ann. inst. dr. int. 742, art. 15(2)).

## B. Immunity Ratione Materiae

In practice, uncertainty over the scope of immunity *ratione personae* may have little significance. All ministers, like all government officials, may be insulated from judicial process in a foreign state by a second species of immunity: immunity *ratione materiae*.

### 1. Definition

While immunity *ratione personae* protects “an individual personifying [the] state” from being impleaded in a foreign lawsuit,<sup>40</sup> immunity *ratione materiae* allows the state to “extend the cloak of its own immunity” to lesser officials sued for conducting its affairs.<sup>41</sup>

Immunity *ratione materiae* was scrutinized most famously in the U.K. House of Lord’s *Pinochet* decision. At issue was whether Chile’s former dictator, Augusto Pinochet, enjoyed state immunity from prosecution for, *inter alia*, torture committed during his tenure as head of state. The Law Lords concluded that though a former head of state enjoys no immunity *ratione personae*, he or she may continue to enjoy immunity *ratione materiae* (i.e., “immunity in relation to acts done as part of his official functions when head of state”).<sup>42</sup> This subject-matter immunity “applies not only to ex-heads of state ... but to all state officials who have been involved in carrying out the functions of the state.”<sup>43</sup>

This immunity *ratione materiae* of government officials before at least civil courts is anticipated by the *Immunities Convention*. The definition of “State” in that instrument supplements the list of corporate state entities with “representatives of the State acting in that capacity.”<sup>44</sup> Notably, domestic enactments of state immunity are less extensive. Canada’s *State Immunity Act* extends to a “foreign state”, defined as “any sovereign or other head of the foreign state ... while acting as such in a public capacity,” that state’s government, or any political subdivision of the state.<sup>45</sup> Lower officials are not explicitly identified as attracting immunity. Nevertheless, in *Jaffe v.*

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<sup>40</sup> *Jones v. Ministry of Interior of Saudi Arabia*, [2004] EWCA Civ 1394, [2005] Q.B. 699 at para. 104 [*Jones* (C.A.)], rev’d [2006] UKHL 26, [2006] 2 W.L.R. 1424 [*Jones* (H.L.)].

<sup>41</sup> *Jones* (C.A.), *ibid.* at para. 105.

<sup>42</sup> *Supra* note 14 at 113, Lord Browne-Wilkinson. In another relevant section, Lord Goff of Chieveley noted that “a head of state will, ... at international law, enjoy state immunity *ratione personae* so long as he is in office, and after he ceases to hold office will enjoy the concomitant immunity *ratione materiae* ‘in respect of acts performed [by him] in the exercise of his functions [as head of state]’” (*ibid.* at 119), citing Sir Arthur Watts, “The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers” (1994) 247 *Rec. des Cours* 8 at 56.

<sup>43</sup> *Ibid.* at 114.

<sup>44</sup> *Supra* note 17, art. 2(1)(b)(iv). The ILC regarded the reference to representative capacity as “intended to clarify that such immunities are accorded ... *ratione materiae*” (ILC Commentary on Draft Articles, *supra* note 28 at 18).

<sup>45</sup> *Supra* note 4, s. 2.

*Miller*, the Ontario Court of Appeal interpreted the *State Immunity Act* as extending immunity to officials acting “within the scope of their duties as functionaries of the State.”<sup>46</sup> To conclude otherwise would vitiate the protections offered the state itself: “[A] plaintiff would have only to sue the functionaries who performed the acts. In the event that the plaintiff recovered judgment, the foreign state would have to respond to it by indemnifying its functionaries, thus, through this indirect route, losing the immunity conferred on it by the Act.”<sup>47</sup>

## 2. Scope of Agency

Both *Jaffe* and the language in the *Immunities Convention* limit the scope of immunity for individual state agents to circumstances where they are acting in an official capacity or scope. This approach was echoed in *Pinochet*. For Lord Millett, immunity *ratione materiae* is immunity available to any state official “from the civil and criminal jurisdiction of foreign national courts, *but only in respect of governmental or official acts*.”<sup>48</sup> Language from some of the other Law Lords in that

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<sup>46</sup> (1993), 13 O.R. (3d) 745 at 759, 103 D.L.R. (4th) 315 (C.A.) [*Jaffe* cited to O.R.].

<sup>47</sup> *Ibid.* The English Court of Appeal followed *Jaffe* in relation to the *State Immunity Act 1978* (U.K.), 1978, c. 33 in *Propend Finance Pty Ltd. v. Sing*, where it noted that

[t]he protection afforded by the Act of 1978 to States would be undermined if employees, officers (or as one authority puts it, “functionaries”) could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity. Section 14(1) [which defines the scope of immunity in the U.K. act] must be read as affording to individual employees or officers of a foreign State protection under the same cloak as protects the State itself ((1997), 111 I.L.R. 611 at 669 (C.A.)).

The American jurisprudence under the U.S. *Foreign Sovereign Immunities Act*, 28 U.S.C. § 1602 (2000) [*FSIA*] is more divided. Many courts have extended sovereign immunity to officials. See e.g. *Herbage v. Meese*, 747 F. Supp. 60 (D.C. 1990) [*Herbage*] (holding that “[n]owhere does the FSIA discuss the liability or role of natural persons, whether governmental officials or private citizens. Nonetheless, ... the sovereign immunity granted in the FSIA does extend to natural persons acting as agents of the sovereign” at 66); *Chuidian v. Philippine National Bank*, 912 F.2d 1095 at 1100-103 (9th Cir. 1990) [*Chuidian*] (holding that the *FSIA* grants immunity to lower foreign government officials for acts committed in their official capacity); *Re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 at 496 (9th Cir. 1992), cert. denied, *Marcos-Manotoc v. Trajano*, 508 U.S. 972 (1993); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668 at 671 (D.C. Cir. 1996); *Byrd v. Corporacion Forestal y Industrial de Olancho S. A.*, 182 F.3d 380 at 388 (5th Cir. 1999) [*Byrd*]. But see *Tachiona v. United States*, 386 F.3d 205, 221 (2d Cir. 2004) (suggesting, without holding, that perhaps the U.S. law does not extend to individuals). In *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004), the court concluded that as the *FSIA* did not emphatically mention heads of state, any head-of-state immunity had to flow from a source other than the act (at 625). The court in *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005) concluded that as the *FSIA* did not expressly mention heads of state and thus included no head of state immunity, logically it could not extend such to lesser officials (at 881).

<sup>48</sup> *Supra* note 14 at 171 [emphasis added].

case suggests that the focus should be on whether the official's "conduct was engaged in under colour of or in ostensible exercise of the [official's] public authority."<sup>49</sup>

This approach creates an inevitable paradox. The purpose of sovereign immunity is to preclude the courts of one state from adjudicating the legality of actions taken by officials of another state. And yet the parameters of state immunity *ratione materiae* are established with reference to whether that foreign official acted "officially". The only way this analysis can be completed is by considering the scope of the foreign official's legal mandate, most logically under the law of the foreign state. A close review of the case law of the United Kingdom, Canada, and the United States reveals a jurisprudence that weaves an uncertain path in its approach to immunity *ratione materiae*, perhaps reflecting an unconscious response to this paradox.

#### a. *Strict Application*

Some jurists have urged that in assessing the scope of immunity *ratione materiae*, even illegality under the law of the foreign official's state is irrelevant. As Lord Millett put it in his speech in *Pinochet*, "The immunity is available whether the acts in question are illegal or unconstitutional or otherwise unauthorised under the *internal law of the state*, since the whole purpose of state immunity is to prevent the legality of such acts from being adjudicated upon in the municipal courts of a foreign state."<sup>50</sup>

Lord Millett's position honours the ultimate rationale of state immunity, but does so at the expense of a clear understanding of the reach of immunity *ratione materiae*. It is not immediately clear how a willingness to extend immunity even to acts that are illegal under the foreign state's laws can be reconciled with the very definition of state immunity *ratione materiae*: immunity where state agents act in their official capacity or scope. Certainly, there are instances where an official clearly acts in a private capacity, such as while driving home from work or while on vacation. Other than these and similar "off-duty" scenarios, however, it is difficult to imagine an act by an official that would not attract immunity if Lord Millett is correct. Since even domestic illegality is no bar to immunity, an act an official is able to accomplish *because* of his or her official position, no matter how perverse and no matter how *ultra vires* his or her domestic legal authority, putatively attracts immunity. An official in the finance ministry with official access to state funds, for example, acts in an

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<sup>49</sup> *Ibid.* at 119, Lord Goff of Chieveley, dissenting, citing Watts, *supra* note 42.

<sup>50</sup> *Ibid.* at 172 [emphasis added]. In the same case, Lord Phillips of Worth Matravers noted that [i]t is contended on behalf of the respondent that the question of whether an official is acting in a public capacity does not depend upon whether he is acting within the law of the state on whose behalf he purports to act, or even within the limits of international law. His conduct in an official capacity will, whether lawful or unlawful, be conduct of the state and the state will be entitled to assert immunity in respect of it. In the field of civil litigation these propositions are supported by authority (*ibid.* at 187).

official capacity in ordering those funds to be placed in a Swiss bank account even if the official's objective is to defraud his or her government in violation of domestic law.<sup>51</sup>

Despite its evident difficulties, this strict position finds some support in the jurisprudence. In *Jaffe*, the Ontario Court of Appeal concluded that functionaries of a foreign state, “whether acting legally or illegally [under the law of their state,] ... attract immunity in the same way as the state itself.”<sup>52</sup> Applying the U.S. *Foreign Sovereign Immunities Act*,<sup>53</sup> the U.S. District Court for the District of Columbia asserted a similar rule: where “the activity complained of is governmental in nature and performed by officials of that government, this Court does not have jurisdiction over a foreign sovereign ... no matter how heinous the alleged illegalities.”<sup>54</sup>

More recently, the strict approach was adopted in 2006 by the House of Lords in *Jones* (H.L.): “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.”<sup>55</sup> The House of Lords was content to extend immunity so long as there was a sufficient connection between the functionary's action and the state: functionaries must act “in discharge or purported discharge of their public duties.”<sup>56</sup> The Law Lords saw nothing in the particular facts of the case—acts of torture in violation of international law—that would change their view. Indeed, they pointed to the definition of torture in the *Torture Convention* to bolster their conclusion that the torturing individuals were wrapped in the blanket of state immunity. That definition depends on the acts of pain or suffering being “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.”<sup>57</sup> Claimants were therefore confronted with a paradox: “[T]o bring themselves within the *Torture Convention* they must show that the torture was ... official; yet they argue that the conduct was not official in order to defeat the claim to immunity.”<sup>58</sup>

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<sup>51</sup> See e.g. *Jones* (C.A.), *supra* note 40 (“Where a state official infringes the law of the state in the course of carrying out the business of the state, the state is not thereby precluded from claiming immunity *ratione materiae*” at para. 106).

<sup>52</sup> *Supra* note 46 at 760.

<sup>53</sup> *Supra* note 47.

<sup>54</sup> *Herbage*, *supra* note 47 at 67.

<sup>55</sup> *Supra* note 40 at para. 12.

<sup>56</sup> *Ibid.* at para. 11.

<sup>57</sup> *Torture Convention*, *supra* note 1, art. 1.

<sup>58</sup> *Jones* (H.L.), *supra* note 40 at para. 19. Of course, that same paradox existed in *Pinochet*, discussed below at Part II.B.2.c, where the House of Lords rejected the extension of *ratione materiae* immunity to torturing officials in the criminal context. Lord Hoffman concluded in *Jones* (H.L.), however, that the paradox was immaterial in *Pinochet* because the *Torture Convention* had, by necessary implication, removed immunity for criminal proceedings by criminalizing official torture (*ibid.* at paras. 80-81). See also Lord Bingham, *ibid.* at para. 32, who also notes the important distinction between criminal and civil proceedings.

However, this paradox exists only where one applies the strict approach of extending immunity to functionaries for any acts “in discharge or purported discharge of their public duties,”<sup>59</sup> no matter how ultra vires. A more tempered approach that denies state immunity where the official’s acts lie beyond his or her legal mandate obviates the paradox: the acts are still those of a public official, and thus torture within the meaning of the *Torture Convention*, but they are so far outside the permissible limit of the official’s agency that they are denied immunity. The *Torture Convention* does not demand that the official’s actions be intra vires or duly and legally authorized to constitute torture. Indeed, if it did, torture would be defined out of existence, since few are the states that unabashedly authorize torture. Under a tempered approach to immunity *ratione materiae*, therefore, few would be the officials cloaked in immunity for acts of torture. As the following section outlines, such a tempered approach has been applied in some cases.

#### b. *Tempered Application*

Several U.S. federal courts of appeals have repeatedly refused to extend the protections of the *FSIA* where a foreign government official transgresses limits on his or her power imposed by a foreign statute. To this end, the Ninth Circuit has applied earlier Supreme Court language to the context of the *FSIA*: “[W]here the officer’s powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do ...”<sup>60</sup> At first blush, this ultra vires analysis is simply the inverse of the *Jones* (H.L.) doctrine: it provides certainty on the scope of immunity *ratione materiae*, but only by empowering courts to probe foreign illegalities. Nevertheless, several justifications exist for the U.S. approach. First, and most evidently, any doctrine of state immunity that by definition extends only to officials acting officially must include rules on what it means to act officially.

Second, U.S. courts have noted that officials per se are not named as immunity-bearing entities in the *FSIA* (an omission replicated in the Canadian and U.K. statutes). The extension of immunity to these actors is therefore a piece of federal common law-making.<sup>61</sup> What the common law gives, the common law may circumscribe and take away.

U.S. courts are, however, alive to the paradox of querying foreign illegalities in the name of preserving state immunity. The U.S. jurisprudence distinguishes between the official’s *motives* and *actions*. Several U.S. courts have held that it is immaterial

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<sup>59</sup> *Ibid.* at para. 11.

<sup>60</sup> *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 at 689 (1949) (determining whether the actions of a U.S. government official were those of the government), cited in *Chuidian*, *supra* note 47 at 1106 (concerning the application of the *FSIA*).

<sup>61</sup> See *Velasco v. Indonesia*, 370 F.3d 392 (4th Cir. 2004) (“This narrow, judicially-created expansion of foreign sovereign immunity [under the *FSIA*] models federal common law relating to derivative U.S. sovereign immunity” at 399).



whether an official acted for improper motives. Rather, the question of entitlement to immunity turns on whether the *physical acts* committed lay within the official's legal mandate.<sup>62</sup>

*c. Tempered Application in Response to Competing International Norms*

In *Pinochet*, a majority of the House of Lords also pursued a tempered approach to state immunity. There, they held that torture could not attract immunity *ratione materiae*. Of this total majority, a minority of the Law Lords accepted that torture—a customary international crime with *jus cogens* status in international law<sup>63</sup>—is per se incapable of being an official act of state. The remaining judges (constituting a majority of the court) based their decision on immunity on Chile's ratification of the *Torture Convention*. That ratification constituted an acknowledgement that torture was incompatible with the legitimate official exercise of public authority. After all, the *Torture Convention* is explicitly directed at barring torture by government officials.<sup>64</sup> For both of these sets of Law Lords, it was the *international* illegality of torture that determined the outcome.

Recent state immunity jurisprudence grappling with grave and heinous abuses by government officials also focuses on international illegality. As noted above, the ICJ's judgment in *Congo v. Belgium* hinged on an analysis of immunity *ratione personae*.

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<sup>62</sup> See *Chuidian*, where the plaintiff

contend[ed] that [the government official's] personal motive renders his actions ultra vires even though the actions themselves were fully authorized. Under [the plaintiff's] view, every otherwise proper sovereign action would be subject to judicial examination to ensure that the acting officer did not derive some personal satisfaction from the commission of his official duty. There is no authority to support such a radical expansion of the exceptions to sovereign immunity (*supra* note 47 at 1107).

See also *Byrd*, *supra* note 47 at 389.

<sup>63</sup> A *jus cogens*, or peremptory, norm "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" (*Vienna Convention on the Law of Treaties*, *supra* note 38, art. 53). For a discussion of the *jus cogens* nature of the prohibition on torture, see e.g. *Report of the International Law Commission*, which noted:

Although not specifically listed in the Commission's commentary to article 53 of the Vienna Convention, the peremptory character of certain other norms seems also to be generally accepted. This applies to the prohibition against torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984. The peremptory character of this prohibition has been confirmed by decisions of international and national bodies (UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001) at 284 [ILC 2001]).

<sup>64</sup> *Supra* note 1, art. 1 ("'[T]orture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for" certain enumerated purposes "when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a *public official or other person acting in an official capacity*" [emphasis added]).

For this reason, the majority opinion in that case did not explore the confines of immunity *ratione materiae*. However, Judges Higgins, Kooijmans, and Buerenthal, concurring, observed that immunity *ratione materiae* extends only to “official” acts. They then qualified this term by noting 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.”<sup>65</sup>

Applying a very similar distinction, the English Court of Appeal in *Jones (C.A.)*<sup>66</sup> concluded that individual Saudi government officials possessed no immunity *ratione materiae* in the courts of the United Kingdom for alleged acts of torture committed on the plaintiff overseas. Extending *Pinochet’s* logic to the civil context, the Court of Appeal held that systematic torture, a clear violation of international law, could not be an act of government clothed in immunity *ratione materiae*.<sup>67</sup>

Several points recommend the English Court of Appeal’s conclusions in *Jones (C.A.)*. First, as a matter of simple logic, a state’s breach of its international commitments cannot lie within a state agent’s official functions for immunity purposes. An official acting ultra vires an international commitment is a very different creature than an official acting outside the scope of his or her domestic jurisdiction. This is most acutely the case where the international rule either is *erga omnes*—and thus is a matter of concern for the entire international community<sup>68</sup>—or gives rise to

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<sup>65</sup> *Supra* note 5 at para. 85 [emphasis added].

<sup>66</sup> *Supra* note 40.

<sup>67</sup> Mance L.J. noted that “it can no longer be appropriate to give 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” (*ibid.* at para. 92). Whether this would be true even if the foreign state—in this case Saudi Arabia—had not ratified the *Torture Convention* is unclear from the Court of Appeal decision. Mance L.J. did not appear to limit his holding to circumstances where the foreign state was a party to the treaty. Phillips L.J. was equivocal on the point:

It was held [in *Hatch v. Baez*, 7 Hun. 596 (1876)] that under international law the courts of one country were bound to abstain from sitting in judgment on the acts of another government done within its own territory. I would now comment that this principle loses its relevance once it is held that torture cannot constitute an act of government. I would add that, were torture to be treated as an act of government, the principle would, so far as torture is concerned, be abrogated by the *Torture Convention* (*ibid.* at para. 129).

Neuberger L.J. simply concurred with both judgments, without adding his own views.

<sup>68</sup> An obligation *erga omnes* is a duty that “all States can be held to have a legal interest in [protecting]” (*Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, [1970] I.C.J. Rep. 3 at para. 33, 9 I.L.M. 227 [*Barcelona Traction* cited to I.C.J. Rep.]). In dicta in *Barcelona Traction*, the ICJ listed two examples of obligations *erga omnes*: the bars on aggression and genocide, and rules concerning “basic rights” of human beings, including the prohibition on slavery and racial discrimination (*ibid.* at para. 34). See also Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: Clarendon Press, 1997) at 139. The *Restatement (Third) of the Foreign Relations Law of the United States* § 702 (1987) lists the following as additional *erga omnes* obligations: murder or disappearing of individuals; “torture or other cruel,

an obligation owed particularly to the forum state. In either instance, the international transgression engages the forum state's interests in a fashion utterly unlike a claim of domestic illegality would.<sup>69</sup> A functionary's internationally illicit actions create a situation roughly analogous to that arising where a foreign state causes an injury to a person in the forum state itself: it constitutes an international delict that may properly prompt a countermeasure from the offended state. Denying immunity *ratione materiae* in these circumstances is a modest form of countermeasure.<sup>70</sup>

Second, whether a state agent complies with his or her state's international obligations is a matter that does not require a forum state to delve into foreign law. It is entirely a question of international law, a body of principles that any forum state's courts might reasonably be expected to apply authoritatively.<sup>71</sup>

Third, there is no reason to conclude that a lawsuit directed against a torturing individual is simply a proxy attack on a sovereign state. As noted above, the Ontario Court of Appeal worried in *Jaffe* that a lawsuit against state agents would necessarily prompt a defence mounted by the state itself and, if that were unsuccessful, indemnification by the state. *Jaffe* did not concern, however, an egregious violation of human rights such as torture. The latter situation presents very different considerations, as noted by Lord Justice Mance in *Jones (C.A.)*:

I am not impressed, in the context of claims for systematic torture, by suggestions that the relevant state would have to indemnify its officers. A state may well feel obliged to investigate for itself any allegations of torture. But this

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inhuman, or degrading treatment or punishment"; "prolonged arbitrary detention"; and "a consistent pattern of gross violations of internationally recognized human rights."

<sup>69</sup> In a different procedural context involving the act-of-state/non-justiciability concept and not state immunity per se, the House of Lords made a similar point. At issue in *Kuwait Airways* was whether the House of Lords should recognize the legitimacy of an Iraqi decree expropriating Kuwaiti aircraft during the 1990 invasion of Iraq. The majority of the Law Lords concluded that it should not because "Iraq's invasion of Kuwait and seizure of its assets were a gross violation of established rules of international law of fundamental importance. A breach of international law of this seriousness is a matter of deep concern to the worldwide community of nations. ... Enforcement or recognition of this law would be manifestly contrary to the public policy of English law" (*supra* note 25 at para. 29, Lord Nicholls of Birkenhead).

<sup>70</sup> These issues are addressed more fully in Part III.D, below.

<sup>71</sup> Some courts, in at least the common law tradition, treat international law as a fact to be pleaded, rather than simply taking judicial notice of international law. It is the case, however, that in countries like Canada, customary international law, at least, is considered part of the common law and thus of direct effect like any other doctrine of common law. See e.g. *Jose Pereira E Hijos, S.A. v. Canada (A.G.)*, in which the court observed:

The principles concerning the application of international law in our courts are well settled ... One may sum those up in the following terms: accepted principles of customary international law are recognized and are applied in Canadian courts, as part of the domestic law unless, of course, they are in conflict with domestic law. In construing domestic law, whether statutory or common law, the courts will seek to avoid construction or application that would conflict with the accepted principles of international law ((1996), [1997] 2 F.C. 84 at para. 20, 126 F.T.R. 167 (F.C.T.D.)).

it should in any event do pursuant to the Torture Convention. A state is of course also always free to fund the defence of any claim. It is implausible to suppose that it would do so on the basis that it had authorised or condoned systematic torture. And if torture by one of its officials was confirmed it would presumably disown the official's conduct. There is no basis on which the state could be made liable to indemnify one of its officials proved to have committed systematic torture.<sup>72</sup>

Fourth, as Lord Justice Mance also observed, lawsuits against individual functionaries do not have the same implications for execution against foreign-state property as do lawsuits against states themselves.<sup>73</sup> The monetary risk is borne by the official, not the state.<sup>74</sup> Of course, in many instances that official will not have assets in the forum state. Any judgment in favour of the plaintiff would not, therefore, be amenable to enforcement, creating the prospect of moral rather than pecuniary victories. That fact is not, however, material to the question of whether state immunity is warranted or not. At any rate, the importance of moral victories in the progressive development of international law should not be underestimated.

It is also possible that the foreign official would not be present in the forum jurisdiction and is thus potentially not amenable to service in the lawsuit. Again, this hurdle for plaintiffs is inconsequential to the immunity issue. As discussed further below, if anything, it answers the objection that a relaxation of immunity rules would produce a flood of cases with no connection to forum states.

The English Court of Appeal in *Jones* (C.A.) invoked many of these reasons in deciding to strip the cloak of state immunity from the individual defendants. Its reasoning proved unpersuasive, however, to the House of Lords on appeal. There, as discussed above, the Law Lords preferred the strict-application approach to state immunity and functionaries in the civil (as opposed to *Pinochet's* criminal) context; they looked only at whether the foreign official was discharging or purporting to discharge a public duty.

The House of Lords also concluded, as had the Court of Appeal, that immunity extended to Saudi Arabia itself. Key to this holding were the express provisions of the U.K. *State Immunity Act 1978* that accord immunity to states and incorporate only limited exceptions. A full explanation of this portion of the *Jones* (H.L.) holding must

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<sup>72</sup> *Supra* note 40 at para. 76.

<sup>73</sup> *Ibid.* at para. 77.

<sup>74</sup> Indeed, if actions against state functionaries were used as a proxy to extract damages from states, article 6(2)(b) of the new *Immunities Convention* might be offended. It reads:

A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:

...

(b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State (*supra* note 17).

therefore be prefaced with a detailed discussion of common exceptions to state immunity in both public international and domestic statutory law.

### III. Exceptions to State Immunity

As noted above, state immunity extends to states qua states, plain and simple. In its application to states, it is best viewed as a form of immunity *ratione personae*<sup>75</sup> and thus not dependent on the complicated questions of scope of agency raised by immunity *ratione materiae*. Even so, there are recognized exceptions to a state's immunity.

#### A. Waiver

Most significantly, waiver by the foreign state itself negates state immunity. This waiver may be implied or express. Thus, in the *Immunities Convention*, no immunity is available where a state instituted the proceeding or, generally speaking, intervened in the matter.<sup>76</sup> In a similar vein, state counterclaims in a proceeding brought against the state also extinguish state immunity in relation to the principal claim.<sup>77</sup> Waiver also exists where a state expressly consents to jurisdiction via “a declaration before the court or by a written communication in a specific proceeding,” in “a written contract”, or by “international agreement”.<sup>78</sup>

Notably, a pre-existing treaty is an “international agreement”, and “if consent [to the exercise of jurisdiction] is expressed in a provision of a treaty,” jurisdiction may be exercised by other state parties to the convention.<sup>79</sup> How express this waiver via treaty must be has been a matter of contention. In a different procedural context in *Pinochet*, a majority of the House of Lords viewed Chile's ratification of the *Torture Convention* as negating any claims to immunity *ratione materiae*. The theory justifying that position was not clearly articulated. For some Law Lords, the convention simply trumped inconsistent immunity principles.<sup>80</sup> For at least one other, Chile's ratification of the *Torture Convention* was an act of waiver.<sup>81</sup>

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<sup>75</sup> See *Jones* (C.A.), in which Mance L.J. describes “a state's own immunity *ratione personae*” (*supra* note 40 at para. 91).

<sup>76</sup> *Supra* note 17, art. 8. An intervention does not waive immunity if undertaken for the sole purpose of:

(a) invoking immunity; or

(b) asserting a right or interest in property at issue in the proceeding (*ibid.*, art.

8(2)).

<sup>77</sup> *Ibid.*, art. 9.

<sup>78</sup> *Ibid.*, art. 7(1).

<sup>79</sup> ILC Commentary on Draft Articles, *supra* note 28 at 27.

<sup>80</sup> Lord Hope of Craighead, for example, noted that

### **B. Broadly Accepted Subject-Matter Exceptions**

Certain subject-matter exceptions to state immunity also exist. At some level, these subject-matter exceptions stem from similar considerations to those that arise with immunity *ratione materiae*: they constitute circumstances where a state is not viewed as acting in a state capacity. At common law, the state capacity issue has most often been discussed as the difference between, on the one hand, *jure imperii* and, on the other, *jure gestionis*. Activities undertaken by a state *jure imperii* are those done “in the exercise of sovereign authority.”<sup>82</sup> Examples include virtually any assertion of a state’s coercive police power.<sup>83</sup> In comparison, activities *jure gestionis* are those involving “transactions of the kind which might appropriately be undertaken by private individuals instead of sovereign states.”<sup>84</sup> The obvious intent is to single out commercial activities by states or, in the words of the U.S. Supreme Court, actions undertaken “in the manner of a private player within the market.”<sup>85</sup> Adjudication of

as a matter of general customary international law a head of state will personally be liable to be called to account if there is sufficient evidence that he authorised or perpetrated such serious international crimes. ...

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 art 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 (*supra* note 14 at 152).

<sup>81</sup> Lord Saville of Newdigate remarked:

It is also said that any waiver by states of immunities must be express, or at least unequivocal. I would not dissent from this as a general proposition, but it seems to me that the express and unequivocal terms of the Torture Convention fulfil any such requirement. To my mind these terms demonstrate that the states who have become parties have clearly and unambiguously agreed that official torture should now be dealt with in a way which would otherwise amount to an interference in their sovereignty (*ibid.* at 170).

Note also the fierce reaction to this approach by Lord Goff of Chieveley, dissenting, who argued that waiver by treaty must be express, a standard not met by the *Torture Convention*.

<sup>82</sup> *Alcom Ltd. v. Columbia*, [1984] A.C. 580 at 597, [1984] 2 Lloyd’s L.R. 31 (H.L.).

<sup>83</sup> See e.g. *Saudi Arabia v. Nelson*, where the U.S. Supreme Court noted that “[t]he conduct [complained of in the case] boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state’s exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature” (507 U.S. 349 at 361 (1993)). See also H. Lauterpacht, “The Problem of Jurisdictional Immunities of Foreign States” (1951) 28 Brit. Y.B. Int’l L. 220. The author notes that actions *jure imperii* must include “executive and administrative acts of the foreign state within its territory, such as alleged unjustified expulsion or exaction of dues or wrongful imprisonment or, generally, denial of justice” (*ibid.* at 237).

<sup>84</sup> *Alcom Ltd. v. Columbia*, *supra* note 82 at 598, Lord Diplock.

<sup>85</sup> *Saudi Arabia v. Nelson*, *supra* note 83 at 360 [citations omitted].

such matters is “neither a threat to the dignity of that state, nor any interference with its sovereign functions.”<sup>86</sup>

The distinction between these two functions “obtained growing recognition in European countries as sovereign states began increasingly to engage, either directly or through separate entities that were emanations of the executive government of the state, in commercial and trading transactions with private citizens of other states.”<sup>87</sup> This change in state behaviour precipitated the so-called “restrictive” theory of state immunity, pursuant to which national courts could exercise jurisdiction “over foreign states in claims against them that arose out of commercial or trading transactions into which they had entered with private individuals.”<sup>88</sup>

The restrictive approach, applied by the common law of England,<sup>89</sup> Canada,<sup>90</sup> and, to a lesser extent, the United States,<sup>91</sup> was codified in the state immunity legislation of all of these jurisdictions by the late twentieth century. It also now figures prominently in the *Immunities Convention*. Under the convention, state immunity does not attach to a proceeding involving a commercial transaction between a state and a natural or juridical person, a contract of employment between the state and an individual for work performed in the forum state, or immovable property situated in the forum state.<sup>92</sup> Each of these examples, which have an evident

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<sup>86</sup> *Playa Larga v. I Congreso del Partido* (1981), [1983] 1 A.C. 244 at 262, [1981] 2 All E.R. 1064 (H.L.), Lord Wilberforce.

<sup>87</sup> *Alcom Ltd. v. Columbia*, *supra* note 82 at 598.

<sup>88</sup> *Ibid.* See also *Saudi Arabia v. Nelson*, in which Souter J. wrote that “[u]nder the restrictive, as opposed to the ‘absolute,’ theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*)” (*supra* note 83 at 359-60). In *Iraqi Airways*, Lord Mustill wrote:

The rationale of the common law doctrine of the restricted immunity ... is that where the sovereign chooses to doff his robes and descend into the marketplace he must take the rough with the smooth and having condescended to engage in mundane commercial activities he must also condescend to submit himself to an adjudication in a foreign court on whether he has in the course of those activities undertaken obligations which he has failed to fulfil (*supra* note 25 at 718).

<sup>89</sup> See e.g. *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria*, [1977] Q.B. 529, [1977] 1 All E.R. 881, [1977] 2 W.L.R. 356, [1977] 1 Lloyd’s L.R. 581 (C.A.).

<sup>90</sup> See e.g. *Lorac Transport Ltd. v. The Atra*, [1987] 1 F.C. 108, 28 D.L.R. (4th) 309 (F.C.A.) (endorsing the restrictive immunity approach even prior to the *State Immunity Act*). But see *Congo v. Venne*, [1971] S.C.R. 997, 22 D.L.R. (3d) 669 (showing little sympathy for the restrictive immunity doctrine at common law).

<sup>91</sup> Prior to the *FSIA*, the U.S. courts applied restrictive immunity, but almost always at the behest of the U.S. State Department and not through the independent application of judicial discretion. See discussion in *Chuidian*, *supra* note 47 at 1099ff.

<sup>92</sup> *Supra* note 17, arts. 10-11, 13.

commercial nexus, is addressed in the state immunity laws of Canada, the United Kingdom, and the United States.<sup>93</sup>

Another notable exception to immunity is set out in article 12 of the *Immunities Convention*: there is no state immunity in proceedings for pecuniary compensation “for death or injury to the person” or damage to tangible property.<sup>94</sup> However, before this exception applies, several additional criteria must be met. First, the act or omission by the defendant state that occasioned the proceeding must have “occurred in whole or in part in the territory”<sup>95</sup> of the forum state. Second, “the author of the act or omission”—state agents or officials acting in their official capacity<sup>96</sup>—must have been “present in that territory at the time of the act or omission.”<sup>97</sup> Put another way, the personal injury exception requires a strong territorial nexus between the wrongful act and the forum state. In the ILC’s view, article 12 does not apply to “transboundary injuries or trans-frontier torts or damage” or to “shooting or firing across a boundary.”<sup>98</sup>

Article 12 would not therefore extend to a lingering tort (i.e., a tort whose elements are completed overseas, but whose deleterious effects continue to be felt by the victim residing at some future point in the forum state).<sup>99</sup> Such an approach was essentially ruled out for Canada’s *State Immunity Act* by the Supreme Court of Canada in *Schreiber*<sup>100</sup> and its lower-court progeny. The Canadian statute limits state immunity in matters concerning “any death or personal injury ... that occurs in Canada.”<sup>101</sup> Interpreting this provision, the Court reasoned that it was “restricted to a class of claims arising out of a physical breach of personal integrity ...”<sup>102</sup> The Court acknowledged that “[t]his type of breach could conceivably cover an overlapping area between physical harm and mental injury, such as nervous stress.”<sup>103</sup> However, subsequent lower-court decisions have pointed to *Schreiber* in requiring that “the physical breach of personal integrity giving rise to the claim take place in Canada.”<sup>104</sup>

This approach is consistent with Hersch Lauterpacht’s admonishment in a seminal 1952 article on restrictive immunity: “[N]o action should lie with regard to torts committed by foreign states and their organs in their own territory. These must

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<sup>93</sup> See *State Immunity Act*, *supra* note 4, ss. 5, 8; *State Immunity Act 1978* (U.K.), *supra* note 47, ss. 3, 4, 6; *FSLA*, *supra* note 47 §1605.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> ILC Commentary on Draft Articles, *supra* note 28 at 46.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.* at 45.

<sup>99</sup> Other observers have reached the same conclusion. See e.g. David P. Stewart, “The UN Convention on Jurisdictional Immunities of States and their Property” (2005) 99 A.J.I.L. 194 at 202.

<sup>100</sup> *Supra* note 21.

<sup>101</sup> *Supra* note 4, s. 6(a).

<sup>102</sup> *Supra* note 21 at para. 80.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Bouzari* (C.A.), *supra* note 3 at para. 47.



be left either to judicial remedies within that foreign state or to appropriate diplomatic action in accordance with the accepted practice of diplomatic protection of citizens abroad.”<sup>105</sup> It is also in keeping with the state immunity laws of such countries as the United Kingdom<sup>106</sup> and the United States.<sup>107</sup>

For the ILC, the rationale for this exception is simple: since the injuries covered by the exception occur within the forum state, that state is the most convenient forum, and foreign courts—including those of the injuring state—might therefore decline jurisdiction over the matter on a theory of *forum non conveniens*. The injured individual would then be “without recourse to justice had the [injuring] State been entitled to invoke its jurisdictional immunity” in the forum state.<sup>108</sup>

An even more compelling reason for the exception is suggested by James Crawford:

Deliberately to cause such harm or damage on the territory of another State by an act of “public power” is, in the absence of some special exception, a plain violation of international law ... The exercise of local jurisdiction in such cases is an assertion of the forum’s right, acknowledged by international law, to deal with the consequences of unlawful acts on its territory.<sup>109</sup>

Put another way, the courts of the forum state need not pull any jurisdictional punches when foreign states commit torts on the forum state’s soil.

<sup>105</sup> *Supra* note 83 at 237-38.

<sup>106</sup> See *State Immunity Act 1978* (U.K.), *supra* note 47:

5. A State is not immune as respects proceedings in respect of—

(a) death or personal injury; or

(b) damage to or loss of tangible property, caused by *an act or omission in the United Kingdom* [emphasis added].

<sup>107</sup> See 28 U.S.C. § 1605(a)(5) (2000) (denying immunity in certain circumstances where “money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States ... ”); *Olsen (Guardian ad litem of) v. Mexico*, 729 F.2d 641 at 646 (9th Cir. 1984) (it is not enough that injury is experienced in the United States for the exception to apply; at least one entire tort must occur within the United States); *Persinger v. Iran*, 729 F.2d 835 at 842 (D.C. Cir. 1984).

<sup>108</sup> ILC Commentary on Draft Articles, *supra* note 28 at 44.

<sup>109</sup> “International Law and Foreign Sovereigns: Distinguishing Immune Transactions” (1983) 54 *Brit. Y.B. Int’l L.* 75 at 111. For similar language, see *Controller and Auditor-General*, *supra* note 26, in which the court determined that state immunity should be refused in circumstances where a state had acted to impede the tax collection activities of New Zealand. Richardson J. asserted that immunity would not apply “where the alleged conduct of the foreign state is directed in a real sense against the forum state or so directly affects it and is so outrageous that the protection international law would otherwise give to the foreign state in matters properly within the jurisdiction of the forum state should not be allowed” (*ibid.* at 306).

A variation on this theme arose in *Ferrini v. Germany*,<sup>110</sup> a 2004 decision of the Italian Court of Cassation. At issue was a lawsuit brought by an Italian citizen against Germany for deportation and forced labour during the Second World War. The court declined to extend state immunity to Germany, not only because the events occurred at least in part in Italy, but also because of the international criminal nature of the acts. With respect to the latter issue, the court placed substantial emphasis on the fact that the acts in question breached *jus cogens* rules of international law (i.e., peremptory norms of such significance as to trump all competing international laws of lesser status).

*Ferrini* followed a similar decision of the Hellenic Supreme Court in *Voiotia v. Germany*.<sup>111</sup> At issue was Germany's liability for atrocities committed by Nazi occupiers during the Second World War in Greece, here the forum state. Reasoning that the acts in question were *jus cogens* violations, the court held that Germany was not entitled to state immunity.

The reasoning of these two courts was clearly influenced by the internationally egregious nature of the German actions. Given their facts, however, these decisions leave open an important question: does a separate exception to state immunity tied to a *jus cogens* human rights violation exist, even absent a territorial nexus between the forum state and the wrongdoing? This is a question to which the next section turns.

### C. Human Rights Exceptions to State Immunity

Neither the *Immunities Convention* nor the domestic state immunity laws of countries like Canada, the United Kingdom, and the United States include an express exception for human rights violations. Accordingly, substantial judicial ink has been spilled recently over whether a human rights limitation on state immunity can be derived either from a sweeping read of existing exceptions or, impliedly, as part of treaty or customary international law. Most of these cases involve lawsuits brought in response to acts of torture, and many turn on an understanding of the *Torture Convention*. A full discussion of the jurisprudence must therefore be prefaced by an overview of that convention's provisions on civil remedies.

#### 1. Right to Civil Redress Under the *Torture Convention*

Article 14(1) of the *Torture Convention* reads, in part, "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an

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<sup>110</sup> The treatment of this case that follows in this article relies on the translated summary found in Andrea Bianchi, Case Comment on *Ferrini v. Germany*, (2005) 99 A.J.I.L. 242 [*Ferrini*]. For the original judgment in Italian, see Cass., sez. un., 11 March 2004, 87 *Revista di Diritto Internazionale* 539.

<sup>111</sup> The treatment of this case that follows in this article relies on the translated summary found in Maria Gavouneli & Ilias Bantekas, Case Comment on *Voiotia v. Germany* (2001) 95 A.J.I.L. 198 [*Voiotia*]. For the original judgment in Greek, see Areios Pagos [Supreme Court] 11/2000 (Greece).

enforceable right to fair and adequate compensation ... ”<sup>112</sup> Article 14(2) adds a caveat: “Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.”<sup>113</sup>

The precise jurisdictional scope of article 14 is not set out expressly. Early drafts of the provision specified that compensation was owed by a state in relation to treatment “committed by or at the instigation of *its* public officials.”<sup>114</sup> Later versions indicated that compensation was owed by states for torture “committed in any territory under its jurisdiction.”<sup>115</sup> Both of these limiters were omitted in the final version, creating uncertainty as to whether the right to compensation was available in states other than those whose agents had performed torture and/or on whose territory the torture had occurred.

In recent submissions to the Committee Against Torture, the International Coalition against Torture (“INCat”), a non-governmental organization based in Canada, argued that the absence of limiting language in the final article 14 was intentional, reflecting a change of heart as to the scope of the compensation principle. In INCat’s words, “[T]he negotiating states must have intended, by dropping an express geographical limitation which they had considered, to intend no geographical limitation.”<sup>116</sup>

This view is not shared by others. The United States, for its part, has taken the view that article 14 was intended to have territorial limitations. At the time that the Reagan administration submitted the *Torture Convention* for ratification by the U.S. Senate, the State Department’s summary and analysis of the treaty noted the following:

The negotiating history of the Convention indicates that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in its territory, not for acts of torture occurring abroad. Article 14 was in fact adopted with express reference to “the victim of an act of

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<sup>112</sup> *Supra* note 1.

<sup>113</sup> *Ibid.*

<sup>114</sup> UN ESC, Commission on Human Rights, *Draft International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, submitted by Sweden, UN. Doc. E/CN.4/1285 (January 1978) [mimeo.], art. 12, cited in J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (The Hague: Martinus Nijhoff, 1988) at 68 [emphasis added].

<sup>115</sup> *Ibid.* at 74.

<sup>116</sup> David Matas, *InCAT Submission on Canada to the UN Committee against Torture* (9 April 2005) at para. 23, on file with author. For other discussions of the reach of article 14, see Wendy Adams, “In Search of a Defence of the Transnational Human Rights Paradigm: May *Jus Cogens* Norms be Invoked to Create Implied Exceptions in Domestic State Immunity Statutes?” in Scott, *supra* note 25, 247 at 260ff; Andrew Byrnes, “Civil Remedies for Torture Committed Abroad: An Obligation under the Convention against Torture?” in Scott, *ibid.*, 537.

torture committed in any territory under its jurisdiction.” The italicized wording appears to have been deleted by mistake [in the final Convention].<sup>117</sup>

The State Department urged that its interpretation was the only plausible explanation as there had been no discussion during the treaty’s negotiations of a “universal” right to sue, and such a right would have been hotly contested by the participants.<sup>118</sup> To underscore its view, the United States entered a declaration upon ratification of the treaty: “[I]t is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.”<sup>119</sup>

## 2. Civil Redress for Torture and State Immunity

On the whole, courts that have addressed the issue have shared the U.S. view on the scope of the *Torture Convention*. The most widely cited case to date is *Al-Adsani v. The United Kingdom*,<sup>120</sup> a decision of the European Court of Human Rights. A joint Kuwaiti/U.K. national brought suit against Kuwait in a U.K. court for torture suffered at the hands of senior Kuwaiti officials. The English Court of Appeal dismissed the case, concluding that Kuwait was protected by state immunity.<sup>121</sup> The plaintiff complained that this denial of civil remedies for torture on a state immunity theory violated the United Kingdom’s obligations under the *European Convention on Human Rights*.<sup>122</sup>

This question was adjudicated by the European Court of Human Rights. The majority held for the United Kingdom on the basis that state immunity was a valid, persisting international rule, even where torture was alleged. In the majority’s words, “[T]he grant of sovereign immunity to a State in civil proceedings pursues the

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<sup>117</sup> Reagan Administration Summary and Analysis of the Convention, reproduced in U.S., Senate Committee on Foreign Relations, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (S. Exec. Rep. No. 30) (1990) at 23-24 [emphasis in original]. The Reagan Administration Summary and Analysis was relied upon, with some amendments in relation to other provisions of the *Torture Convention*, by the elder Bush administration when the treaty was finally ratified.

<sup>118</sup> *Ibid.* at 24. See also Byrnes, who reviews the drafting history of the *Torture Convention* and notes that “it is difficult to argue unequivocally that article 14 of the CAT must be interpreted as requiring States parties to provide the same civil right to redress for torture which occurs outside its jurisdiction as it is obliged to provide for torture which is alleged to have occurred within its territorial and other jurisdiction” (*supra* note 116 at 549).

<sup>119</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Ratification and Accession, United States, 21 October 1994, 1830 U.N.T.S. 320, para. II(3), 136 Cong. Rec. S17486-01 (daily ed. 27 October 1990) (effective from 20 November 1994).

<sup>120</sup> *Supra* note 26 at para. 66.

<sup>121</sup> *Al-Adsani v. Kuwait* (1996), 107 I.L.R. 536 (Eng. C.A.) [*Al-Adsani* (C.A.)].

<sup>122</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5 (entered into force 3 September 1953) [*European Convention on Human Rights*].

legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty."<sup>123</sup> While the prohibition on torture itself was especially robust in international law—reaching *jus cogens* status and thus trumping lesser principles—the court was “unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.”<sup>124</sup> The court distinguished *Pinochet* on two grounds: first, *Pinochet* concerned a criminal matter; second, *Pinochet* dealt with the immunity *ratione materiae* of a former head of state, not the immunity *ratione personae* of the state itself.<sup>125</sup>

Neither of these considerations persuaded the dissenting judges. In a dissenting opinion joined by four others, Judges Rozakis and Caflisch underscored the *jus cogens* nature of the prohibition of torture. By definition, a *jus cogens* norm “is hierarchically higher than any other rule of international law, be it general or particular, customary or conventional, with the exception ... of other *jus cogens* norms.”<sup>126</sup> Logically, therefore, “the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions.”<sup>127</sup> Because the *jus cogens* quality of the prohibition on torture “acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere,” the “criminal or civil nature of the domestic proceedings is immaterial.”<sup>128</sup> Put another way, for the dissent, a violation of a human rights obligation having *jus cogens* applicability robs a state of its special jurisdictional protections, whatever the venue in which they are claimed.

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<sup>123</sup> *Al-Adsani* (E.C.H.R.), *supra* note 26 at para. 54.

<sup>124</sup> *Ibid.* at para. 61. The ECHR repeated this same point in relation to crimes against humanity in *Kalogeropoulou v. Greece and Germany* (dec.), no. 59021/00, [2002] X E.C.H.R. 415 at 428-29. Here, the plaintiffs in *Voiotia*, *supra* note 111, were refused enforcement of the Hellenic Supreme Court award in their favour in Germany. They appealed this decision to the ECHR as a violation of the *European Convention on Human Rights*, *supra* note 122. In dismissing their case, the ECHR made these comments:

[T]he applicants appeared to be asserting that international law on crimes against humanity was so fundamental that it amounted to a rule of *jus cogens* that took precedence over all other principles of international law, including the principle of sovereign immunity. The Court does not find it established, however, that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity (*Kalogeropoulou v. Greece and Germany*, *ibid.* at 428-29).

<sup>125</sup> *Al-Adsani* (E.C.H.R.), *ibid.* at para. 61ff.

<sup>126</sup> *Ibid.*, Joint Dissenting Opinion of Judges Rozakis and Caflisch Joined By Judges Wildhaber, Costa, Cabral Barreto and Vajíc at para. 1.

<sup>127</sup> *Ibid.* at para. 3.

<sup>128</sup> *Ibid.* at para. 4.

The dissent's approach has an obvious appeal. Significantly, it resolves a moral incongruity in the current law of state immunity: state immunity does not attach to state commercial activities, but it does apply to state barbarity. If state immunity can be limited in the interests of wronged contractors, surely the physical and dignity interests of victims of human rights violations are equally deserving.

The dissent's approach also puts courts in the business of adjudicating the propriety of foreign state activities, not as measured against that court's own law or even the law of the foreign state itself, but according to *international* law (which, in this case, is both binding on all states as customary international law and elevated to peremptory, *jus cogens* status). Admittedly, the concept of *jus cogens* is uncertain, and the list of international infractions constituting a violation of *jus cogens* norms contested.<sup>129</sup> Nevertheless, it is a finite list, and not an open invitation to national courts to adjudicate every banal wrong committed by states in conducting their affairs.

At first blush, the dissent's approach appears to deputize national courts as venues in which the international wrongs of foreign sovereigns are remedied. It is exactly this possibility that animates objections to eroded state immunity voiced by the English Court of Appeal in *Al-Adsani* (C.A.):

A vast number of people come to this country [the United Kingdom] each year seeking refuge and asylum, and many of these allege that they have been tortured in the country whence they came. Some of these claims are no doubt justified, others are more doubtful. Those who are presently charged with the responsibility for deciding whether applicants are genuine refugees have a difficult enough task, but at least they know much of the background and surrounding circumstances against which the claim is made. The court would be in no such position. The foreign State would be unlikely to submit to the jurisdiction of the United Kingdom court, and in its absence the court would have no means of testing the claim or making a just determination.<sup>130</sup>

This view, however, ignores other legal and prudential limitations on national court jurisdiction over transnational lawsuits against foreign sovereigns. Incorporating a *jus cogens*, human rights exception to state immunity would not automatically permit court jurisdiction over the dispute. Not least, conflict of law rules would persist, governing the territorial nexus that must exist between an alleged harm and the national courts.<sup>131</sup> Also pertinent would be common law doctrines such

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<sup>129</sup> See e.g. *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, 208 D.L.R. (4th) 1 ("Peremptory norms develop over time and by general consensus of the international community. This is the difficulty in interpreting international law; it is often impossible to pinpoint when a norm is generally accepted and to identify who makes up the international community" at para. 61).

<sup>130</sup> *Supra* note 121 at 544.

<sup>131</sup> Most notable of these in Canada is the "real and substantial connection" requirement. See e.g. *Uninet Technologies v. Communication Services*, which summarized the rule as follows:

as *forum non conveniens*. This doctrine would enable courts, at their discretion, to dismiss suits in exactly the circumstances described by the English Court of Appeal in *Al-Adsani* (C.A.): where the subject matter of the lawsuit is better heard somewhere else.<sup>132</sup>

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Since the enunciation and evolution of the “real and substantial connection” principle by the Supreme Court of Canada in the seminal cases of (*inter alia*) *Moran v. Pyle National (Canada) Ltd.* (1973), [1975] 1 S.C.R. 393 (S.C.C.), *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.), and *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 (S.C.C.), the *only* test for jurisdiction *simpliciter* is ... “whether the plaintiff has established there is a ‘real and substantial connection between the court and either the defendant or the subject-matter of the litigation’” (2005 BCCA 114, 38 B.C.L.R. (4th) 366 at para. 20 [references omitted]).

In *Bouzari* (Sup. Ct.), *supra* note 3, the Ontario Superior Court of Justice named this test as a potential impediment to the plaintiff’s tort-for-torture lawsuit, but suggested that since it seemed likely that the plaintiff would not have a fair trial in Iran, the test should probably be relaxed (at paras. 15-17). In *Bouzari* (C.A.), *supra* note 3, the Ontario Court of Appeal suggested that the plaintiff’s inability to obtain relief in Iran might have a bearing on the test, but declined to answer the question since the case could be decided on state immunity grounds (at para. 23ff). Further discussion of the *Bouzari* case will be found at Part III.C.3, below.

<sup>132</sup> The *forum non conveniens* test has been summarized by the Supreme Court of Canada as follows: “the court must determine whether there is another forum that is clearly more appropriate. ... [W]here there is no one forum that is the most appropriate, the domestic forum wins out by default and refuses a stay, provided it is an appropriate forum” (*Amchem Products v. British Columbia*, [1993] 1 S.C.R. 897 at 931, 102 D.L.R. (4th) 96). In *Frymer v. Brettschneider*, Arbour J.A., as she then was, writing for the majority of the Court of Appeal, summarized this test as follows: “In all cases, the test is whether there clearly is a more appropriate jurisdiction than the domestic forum chosen by the plaintiff in which the case should be tried. The choice of the appropriate forum is designed to ensure that the action is tried in the jurisdiction that has the closest connection with the action and the parties. All factors pertinent to making this determination must be considered” ((1994), 19 O.R. (3d) 60 at 79 (C.A.)). For a discussion of *forum non conveniens* in the context of torture, see Anne C. McConville, “Taking Jurisdiction in Transnational Human Rights Tort Litigation: Universality Jurisdiction’s Relationship to *Ex Juris Servico*, *Forum Non Conveniens* and the Presumption of Territoriality” in Scott, *supra* note 25, 157. It is also noteworthy that even where actions are not accorded state immunity, courts may still decline to exercise jurisdiction over a dispute on act-of-state (or the related non-justiciability) grounds. It is unlikely, however, that non-justiciability concepts would apply to a flagrant violation of international human rights law. In *Kuwait Airways*, Lord Nicholls of Birkenhead noted that

[w]hen deciding an issue by reference to foreign law, the courts of this country must have a residual power, to be exercised exceptionally and with the greatest circumspection, to disregard a provision in the foreign law when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country. Gross infringements of human rights are one instance, and an important instance, of such a provision (*supra* note 25 at para. 18).

Lord Nicholls further claimed that “the ‘non-justiciable’ principle [does not] mean that the judiciary must shut their eyes to a breach of an established principle of international law committed by one state against another when the breach is plain and, indeed, acknowledged” (*ibid.* at para. 26).

The minority position in *Al-Adsani* (E.C.H.R.) proved persuasive to the Italian Court of Cassation in its 2004 decision in *Ferrini*, discussed above.<sup>133</sup> The dissent's logic has not, however, found fertile ground in other cases either before or since. In a 1999 report, the ILC's working group on state immunity noted the importance of the issue, but, pointing to cases like *Al-Adsani* (E.C.H.R.), it concluded that most claims advancing a *jus cogens* exception to state immunity had failed.<sup>134</sup> As noted above, the final *Immunities Convention* is silent on a human rights exception to state immunity.

More heed was paid to *jus cogens* norms by the U.S. Court of Appeals for the Ninth Circuit in *Siderman de Blake v. Argentina*.<sup>135</sup> At issue was whether plaintiffs could bring suit in U.S. federal court against Argentina for torture suffered in that country. The Ninth Circuit observed that

the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*. The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. To subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being. That states engage in official torture cannot be doubted, but all states believe it is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens.<sup>136</sup>

Nevertheless, the court was bound by the express terms of the *FSIA*. Noting that the act “does not specifically provide for an exception to sovereign immunity based on *jus cogens*,” it held that “if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so. The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the *FSIA*.”<sup>137</sup>

The difficulty confronted by the U.S. federal court in *Siderman* is slightly different than that at issue in other common law jurisdictions: U.S. federal courts are courts of limited, rather than inherent, jurisdiction, and must almost always find a statutory basis for their subject-matter jurisdiction. Where, as here, no such basis existed in the *FSIA*, the court was robbed of jurisdiction. In comparison, it is conceivable that common law courts with inherent jurisdiction might find creative ways to embellish state immunity statutes that are silent on human rights and *jus cogens* issues. This possibility has not, however, come to pass.

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<sup>133</sup> *Supra* note 110 at 246.

<sup>134</sup> International Law Commission, *Report on the work of its fifty-first session (3 May–23 July 1999)*, UN GAOR, 54th Sess., Supp. No. 10, UN Doc. A/54/10 at 415.

<sup>135</sup> 965 F.2d 699 (9th Cir. 1992) [*Siderman*].

<sup>136</sup> *Ibid.* at 717.

<sup>137</sup> *Ibid.* at 718-19. *Siderman* predates legislative changes to the *FSIA* in 1996. These amendments, discussed in greater detail in Part III.D.1, below, opened the door to civil lawsuits in U.S. federal courts against state sponsors of terrorism for acts that include torture.



In *Iraqi Airways*,<sup>138</sup> the U.K. House of Lords extended state immunity to Iraqi Airways in relation to its seizure (at the direction of the Iraqi government) of Kuwaiti civil aircraft during the 1990 Iraqi invasion. It was apparently immaterial to the Law Lords that Iraq was engaged in an act of international aggression in flagrant violation of (probably *jus cogens*) international law. Indeed, the very fact that the seizure comprised part of an act of aggression was cited by one Law Lord as evidence that it did not fall within the commercial exception under the U.K. *State Immunity Act 1978*.<sup>139</sup>

As noted above, the English Court of Appeal in *Jones* (C.A.) and then the House of Lords in *Jones* (H.L.) declined to roll back the cloak of immunity for Saudi Arabia in a lawsuit alleging torture in that country. Pointing to *Kuwait Airways* and relying on the European Court of Human Rights' position in *Al-Adsani* (E.C.H.R.), Lord Justice Mance at the Court of Appeal reasoned that a *jus cogens* prohibition on torture and the availability of civil relief before the courts of another state were quite different things:

The recognition under general principles of international law of civil immunity on the part of a state from civil suit in a state other than that of the alleged torture does not sanction the torture or qualify the prohibition upon it. It qualifies the jurisdictions in which and means by which the peremptory norm may be enforced. There is a distinction between principles of substantive international law and other issues, such as jurisdiction and immunity in civil proceedings in any particular jurisdiction.<sup>140</sup>

Lord Justice Mance carefully parsed the *Torture Convention*, focusing particular attention on article 14 of that treaty. Observing that this language says nothing about the jurisdictional competence of courts to offer redress for torture committed in other states, he concluded that

article 14(1) is dealing with (no more than) a right of redress in the legal system of the state (state A) by whose official ... the alleged act of torture was committed ... State A is, in short, the responsible state, and it must ensure proper civil redress. Article 14(1) is not designed to *require* every other state (state B) to provide redress in its civil legal system for acts of torture committed in state A, although under article 14(2) it remains *permissible* for state B to provide redress in state B for acts of torture committed ... by officials ... of state A.<sup>141</sup>

The Court of Appeal's conclusions on the immunity of states themselves were upheld on appeal by the House of Lords. The Law Lords agreed that article 14 of the *Torture Convention* "does not provide for universal civil jurisdiction."<sup>142</sup> The Law Lords were fortified in their views by three facts: the unwillingness of the ICJ in *Congo v. Belgium* to limit immunity (there in relation to senior officials), even with

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<sup>138</sup> *Supra* note 25.

<sup>139</sup> *Ibid.* at 722, Lord Slynn.

<sup>140</sup> *Supra* note 40 at para. 17.

<sup>141</sup> *Ibid.* at para. 21 [emphasis added].

<sup>142</sup> *Supra* note 40 at para. 25, Lord Bingham. See also *ibid.* at para. 46, Lord Hoffman.

respect to *jus cogens* violations; the failure of the new *Immunities Convention* to offer up such an exception; and the dearth of state practice accepting a *jus cogens* constraint on immunity.<sup>143</sup>

### 3. *Bouzari v. Iran*

The question of *jus cogens* and the exact scope of the *Torture Convention* was also taken up recently by the Ontario Court of Appeal in *Bouzari* (C.A.).<sup>144</sup> At issue in that case was the maltreatment of the plaintiff Bouzari while an Iranian citizen and resident by the Iranian government. Bouzari alleged that his torture at the hands of Iranian government agents was designed to blackmail him for payments drawn against a commission he was earning from Iran's state oil company. He launched his lawsuit against Iran in Ontario court, having arrived in Canada as a refugee several years after the torture. At the Ontario Superior Court of Justice and the Ontario Court of Appeal, his case foundered on state immunity grounds.

In both courts, Bouzari argued unsuccessfully that his case fell within either the tort or commercial activity exceptions found in Canada's 1982 *State Immunity Act*. Both courts disagreed, concluding that the tort exception applied only where "the physical breach of personal integrity giving rise to the claim take[s] place in Canada."<sup>145</sup> In relation to the commercial activity exception, the Court of Appeal reasoned that

apart from their purpose, the acts of torture underpinning the appellant's action cannot be said to have anything to do with commerce. They are nothing more than unilaterally imposed acts of brutality. The appellant believes that they were committed with a purpose of affecting his involvement in the commercial activity of the South Pars [oil] project. Even if this is taken to include an intention to affect the commercial activity of Iran, that is not enough to turn the acts of torture themselves into the commercial activity of Iran.<sup>146</sup>

Bouzari also mounted an assault on the *State Immunity Act* itself, on a public international law theory. Specifically, he argued that Canada's treaty obligations under article 14 of the *Torture Convention* oblige access to a civil remedy in Canadian courts for torture, wherever it is committed. Both courts rejected this position. In so doing, both noted that article 14 and its negotiating history provide no definitive guidance on the issue, but pointed to expert testimony in concluding that no state has interpreted "Article 14 to require it to take civil jurisdiction over a foreign state for acts committed outside the forum state."<sup>147</sup>

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<sup>143</sup> *Ibid.* at paras. 25-27, Lord Bingham. For a similar list of considerations, see *ibid.* at para. 47ff.

<sup>144</sup> *Supra* note 3.

<sup>145</sup> *Ibid.* at para. 47.

<sup>146</sup> *Ibid.* at para. 53.

<sup>147</sup> *Ibid.* at para. 78.

Further, neither court was persuaded by the plaintiff's argument that the prohibition on torture is a *jus cogens* principle and thus trumps any inconsistent, lesser rule of international law, including state immunity. Neither court disagreed that the prohibition on torture was a *jus cogens* norm. They were not persuaded, however, that there existed a *jus cogens* obligation to remedy an act of torture civilly, irrespective of where the torture took place.<sup>148</sup>

*Bouzari* (C.A.) was appealed to the Supreme Court of Canada, but leave was refused.<sup>149</sup> For at least the time being, the Ontario Court of Appeal's decision will be the final Canadian word on lawsuits against foreign states for extraterritorial torture. For instance, a lawsuit brought by Maher Arar against Syria alleging overseas torture was dismissed by the Ontario Superior Court of Justice in 2005.<sup>150</sup> Noting the holding in *Bouzari*, the court in *Arar v. Syria* made pointed comments about the proper role of the courts in immunity cases:

Should Parliament determine that current public policy requires that state sponsored torture should no longer be accorded immunity in Canadian civil courts, undoubtedly the *S.I.A.* [*State Immunity Act*] will be amended accordingly. To "read into" the *S.I.A.* a previously unstated exclusion, would be an unmerited and inappropriate expression of judicial activism.<sup>151</sup>

The court also warned that it "would put Canada out of step with the international order at this time."<sup>152</sup>

#### 4. The UN Committee Against Torture

The court's admonishment of Canada's compliance with international law proved prescient, though not in the way intended. The Ontario courts' judgments in *Bouzari* and *Arar* do toe the same firm line as other courts on the question of human rights and state immunity. Nevertheless, their interpretation of article 14 of the *Torture Convention* has sparked a reaction from the Committee Against Torture, the international body tasked with monitoring implementation of the treaty. As a state party to the convention, Canada is obliged to submit periodic reports on its performance under the treaty. In May 2005, its most recent reports were scrutinized

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<sup>148</sup> *Ibid.* at para. 84ff. The plaintiff also argued that the state immunity principle, as enacted in the *State Immunity Act*, violated s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 by constituting a deprivation of life, liberty, or security of the person not in accordance with the principles of fundamental justice. This position was rejected by both levels of court. No causal link could be established between the state immunity rule and the deprivation via torture (*Jones* (C.A.), *ibid.* at para. 96ff).

<sup>149</sup> *Bouzari* (S.C.C.), *supra* note 3.

<sup>150</sup> *Arar v. Syria* (2005), 127 C.R.R. (2d) 252, 28 C.R. (6th) 187 (Ont. Sup. Ct.) [*Arar*].

<sup>151</sup> *Ibid.* at para. 31.

<sup>152</sup> *Ibid.*

by the Committee Against Torture. Addressing the question of state immunity during these proceedings, the Canadian representative urged that

article 14 established an obligation to ensure redress where an act of torture took place within the State's own jurisdiction but did not modify the well-established principles of State immunity.

... It did not require States to assert jurisdiction in their domestic courts over acts occurring outside the forum State. ...

... The States participating in the drafting would have indicated the fact had there been any intention to modify or override the fundamental principle of State immunity. In the absence of any such indication, the provision must be interpreted in a manner which permitted States to comply with that principle.<sup>153</sup>

At least some committee members expressed dissatisfaction with this reasoning, noting, “[G]iven that there was an exception to State immunity in legislation for business deals, it seemed unclear why an exception could not be considered for torture.”<sup>154</sup> Further, committee members urged that “as a countermeasure permitted under international public law, a State could remove immunity from another State—a permitted action to respond to torture carried out by that State.”<sup>155</sup> The merits of this countermeasures observation are discussed more fully below.

In its concluding observations, the Committee Against Torture as a whole appeared unmoved by Canada's position. It listed as a matter of concern “[t]he absence of effective measures to provide civil compensation to victims of torture in all cases,” and recommended that Canada “review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture.”<sup>156</sup>

These observations do not compel a response from Canada. They do, however, raise the prospect that Canada may continue to be criticized during subsequent reviews of its performance, which could be a matter of embarrassment to the government. The Committee Against Torture's findings therefore raise an important question: what response to the torture–state immunity conundrum is available to Canada?

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<sup>153</sup> UN CAT, *Summary Record of The Second Part (Public) Of The 646th Meeting*, UN Doc. CAT/C/SR.646/Add.1 (May 2005) at paras. 41-43 [mimeo.].

<sup>154</sup> *Ibid.* at para. 63.

<sup>155</sup> *Ibid.* at para. 67.

<sup>156</sup> Committee Against Torture Conclusions, *supra* note 2 at 3-4.

#### D. Reconciling Human Rights and State Immunity

##### 1. The Obstacles

As this article has suggested, courts and international tribunals have resisted efforts to craft a human rights or even a *jus cogens* violation exception to a state's own immunity before the courts of another state. As the contending views at the European Court of Human Rights in *Al-Adsani* (E.C.H.R.) and the Committee Against Torture's comments to Canada suggest, there are different opinions on this issue. Nevertheless, there is no incontrovertible legal reason to reject the ultimate conclusion of most courts: the *Torture Convention* does not compel civil remedies against torturing states in the courts of other states. A fortiori, there is no compelling evidence that the availability of civil remedies for torture in that second state is itself a *jus cogens* obligation. An act of torture in violation of a *jus cogens* prohibition should not, as a matter of common sense, be entitled to immunity in civil court. However, the *Torture Convention* itself does not codify that common sense.

The *Immunities Convention* and the domestic state immunities statutes of Canada, the United Kingdom, and the United States are equally silent.<sup>157</sup> Indeed, the very failure of the *Immunities Convention* to grapple with the issue has prompted some commentators to call for a human rights protocol to the treaty.<sup>158</sup> Moreover, no general state practice suggests a *jus cogens* exception to state immunity, recent soft-law developments concerning reparations for human rights abuses notwithstanding.<sup>159</sup>

Those injured by a state's human rights abuses may therefore be left to the tender mercies of the courts of torturing nations or (non-existent) international tribunals competent to adjudicate such matters and award compensation.<sup>160</sup> In such

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<sup>157</sup> Nor is there a compelling argument to be made that art. 14 of the *Torture Convention* constitutes a waiver of such immunity by ratifying states, permitting other states to assert civil jurisdiction. On its face, art. 14 instructs each state party to "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..." (*supra* note 1 [emphasis added]). To extract from this passage a waiver of immunity in the courts of another state would reach too far.

<sup>158</sup> See e.g. Christopher Keith Hall, "UN Convention on State Immunity: The Need for a Human Rights Protocol" (2006) 55 I.C.L.Q. 411; Lorna McGregor, "State Immunity and Jus Cogens" (2006) 55 I.C.L.Q. 437.

<sup>159</sup> See e.g. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res. 60/147, UN GAOR, 60th Sess., Supp. No. 49, UN Doc. A/RES/60/147 (2006). However, these instruments do not directly address the state immunity doctrine.

<sup>160</sup> The Committee Against Torture, established by the *Torture Convention*, may be empowered to issue "views" in response to individual complaints where the state party being scrutinized has agreed to let it do so (*supra* note 1, art. 22(7)). These views are merely recommendations, however, and not at all analogous to binding court judgments. Similar comments apply to the UN Human Rights Committee, established by the *International Covenant on Civil and Political Rights*, *supra* note 10, and entitled to hear individual complaints in relation to states that have ratified that treaty's first

circumstances, a violation of rights is quite likely without a remedy. As Amnesty International's Christopher Keith Hall has lamented, "Civil suits in foreign national courts against states and their officials and agents are often the only effective alternative to the fundamentally flawed classical international law methods which have largely failed to provide full or, indeed, any reparations to victims of crimes under international law."<sup>161</sup> This difficult reality lies at the heart of state immunity. As Justice LaForest noted for the Supreme Court of Canada in *Re Canada Labour Code*, the fact that a plaintiff might be denied rights otherwise available to them "is a necessary consequence of Canada's commitment to policies of international comity and reciprocity. Any time sovereign immunity is asserted, the inevitable result is that certain domestic parties will be left without legal recourse. This is a policy choice implicit in the Act itself."<sup>162</sup>

Some states have made slightly different policy choices. The U.S. *FSIA* was amended in 1996 to give U.S. federal courts jurisdiction over foreign states in claims "in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... for such an act" where done by "an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency."<sup>163</sup> This apparently sweeping exemption for immunity is confined to only those states designated by the U.S. government as state sponsors of terrorism, and to circumstances in which the claimant or victim was a U.S. national when injured.<sup>164</sup> It is, therefore, a limited exemption that is best viewed as an extra penalty or sanctioning mechanism directed against state sponsors of terrorism. Even so, according to expert testimony heard by the Ontario Superior Court in *Bouzari* (Sup. Ct.), it remains the closest thing to a statutory human rights exception to state immunity in existence.<sup>165</sup>

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optional protocol, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 302, Can. T.S. 1976 No. 47 (entered into force 23 March 1976). For a determination by a Canadian court that a view rendered by the UN Human Rights Committee is not binding, see *Ahani v. Canada* (2002), 58 O.R. (3d) 107 (C.A.). Meanwhile, if the torture victim is a national of another state, that second state is competent to step into the shoes of its national and extend "diplomatic protection", up to and including an "espousal of claims" before an international tribunal. Such a claim depends, of course, on that second state being willing to do so and there existing an international tribunal with jurisdiction over the defendant state. The ICJ often lacks this jurisdiction. For a discussion of diplomatic protection and espousal of claims, see Craig Forcece, "Shelter from the Storm: Rethinking Diplomatic Protection of Dual Nationals in Modern International Law" (2005) 37 *Geo. Wash. Int'l L. Rev.* 469.

<sup>161</sup> *Supra* note 156 at 415.

<sup>162</sup> [1992] 2 S.C.R. 50 at para. 67, 91 D.L.R. (4th) 449.

<sup>163</sup> 28 U.S.C. § 1605(a)(7) (2000).

<sup>164</sup> *Ibid.*

<sup>165</sup> Swinton J. summarized the testimony heard in *Bouzari* (Sup. Ct.) as follows:

Mr. Greenwood [of the London School of Economics] provided a survey of legislation on state immunity which shows that no state has enacted legislation which includes an exception for human rights or jus cogens violations occurring outside the

The U.S. law has provoked efforts at imitation in Canada. In the 38th Parliament, then-opposition Member of Parliament Stockwell Day introduced a private member's bill amending the *State Immunity Act* to preclude immunity "in any proceedings that relate to any terrorist activity that the foreign state conducted on or after January 1, 1985."<sup>166</sup> This law project died on the order paper in 2005. It remains to be seen whether it will be resuscitated by the Conservative government with Day as the minister of public safety. If it is, it will necessarily raise issues of public international law—not least, the fact that, like *jus cogens* exceptions for torture, no express terrorism exception to state immunity appears to be part of customary international law.

## 2. A Possible Solution

The final focus on this section is therefore on the gauntlet thrown down by the Ontario Superior Court in *Arar*: if state immunity in relation to torture is too limiting, it is for Parliament to respond with an amended *State Immunity Act*. In the real world, however, Parliament's enthusiasm for such a law project would depend on the international consequences it might precipitate. Not least, would a response from Parliament that broadened the exceptions to state immunity to include torture be consistent with international law?

The answer to this question is, quite possibly, provided it is done carefully. Comments made by the Committee Against Torture in its questioning of Canada's policy and the anti-terrorism amendments to the *FSIA* point the way. A state committing an act of torture violates a *jus cogens* principle of international law. Moreover, because the bar on torture is best viewed as an obligation *erga omnes*,<sup>167</sup>

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forum. ... The closest example to an assertion of jurisdiction over acts outside the forum state is [the 1996 amendment to the U.S. *FISA*]. ... [T]his is not directed broadly at acts of torture, but rather terrorism. It does not support the proposition that there is general or even emerging state practice accepting a departure from the principle of state immunity from civil action for acts of torture outside the forum (*supra* note 3 at para. 72).

<sup>166</sup> Bill C-394, *An Act to Amend the State Immunity Act and the Criminal Code (terrorist activity)*, 1st Sess., 38th Parl., 2005, cl. 1. A parallel private member's bill was introduced in the Senate (Bill S-35, 1st Sess., 38th Parl., 2004-2005).

<sup>167</sup> See *Restatement (Third) of the Foreign Relations Law of the United States* § 702(o) (1987). See also UN ESC, Commission on Human Rights, *Report of the Special Rapporteur, Mr. P. Kooijmans, pursuant to Commission on Human Rights resolution 1992/32*, which noted:

The Special Rapporteur's mandate is a reflection of the fact that the international community has come to the conclusion that the prohibition of torture is an obligation for all States, whether or not they have ratified a treaty which explicitly contains this prohibition. This conclusion is based, *inter alia*, upon the view of the International Court of Justice which in 1970 stated that the obligation to respect the basic human rights, to which the right not to be tortured belongs beyond any doubt, is an obligation *erga omnes* for each and every State, an obligation which a State has *vis-a-vis* the

this breach infringes obligations owed to the entire international community. Alternatively, the act of torture constitutes a violation owed by a state party to the *Torture Convention* to other state parties. Either way, the violation sparks international rules of state responsibility. State responsibility is, loosely speaking, international law's general remedy law.<sup>168</sup> Among other things, the rules of state responsibility authorize countermeasures by states wronged by a breach of international obligations.

Countermeasures are steps taken by one state to induce compliance with international law by another state that "would otherwise be contrary to the international obligations of an injured State vis-à-vis the responsible State."<sup>169</sup> They "are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act."<sup>170</sup>

Countermeasures are not limited to suspending performance of the same or a closely related obligation to that breached.<sup>171</sup> They are, however, subject to certain prerequisites. The ICJ listed these preconditions in *Gabčíkovo-Nagymaros Project*:

In order to be justifiable, a countermeasure must meet certain conditions ...

In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State. ...

Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. ...

In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.<sup>172</sup>

This approach was adopted by the ILC's draft articles on state responsibility.<sup>173</sup> Under the draft articles, countermeasures are permissible so long as they are proportional to the original breach, are limited in time until the target state again

community of States as a whole (UN Doc. E/CN.4/1993/26 (December 1992) at para. 10 [mimeo.]).

<sup>168</sup> See I.A. Shearer's definition of state responsibility: "Frequently action taken by one state results in injury to, or outrage on, the dignity or prestige of another state. The rules of international law as to state responsibility concern the circumstances in which, and the principle whereby, the injured state becomes entitled to redress for the damage suffered" (I.A. Shearer, ed., *Starke's International Law*, 11th ed. (London: Butterworths, 1994) at 264).

<sup>169</sup> ILC 2001, *supra* note 63 at 324.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.* at 326.

<sup>172</sup> (*Hungary/Slovakia*), [1997] I.C.J. Rep. 7 at paras. 83-85.

<sup>173</sup> With regard to countermeasures, these draft articles likely codify existing customary international law. See Daniel Bodansky & John R. Crook, "The ILC's State Responsibility Articles" (2002) 96 A.J.I.L. 773 (noting that the ILC draft articles "accept the lawfulness of countermeasures but make them subject to significant substantive and procedural qualifications that seem largely to reflect existing customary law" at 786).



conforms to its obligations, and do not themselves violate certain listed, core principles of international law.<sup>174</sup> While diplomatic and consular immunity are included among the latter, state immunity is not.<sup>175</sup> Certain procedural requirements concerning notice must also be met. Specifically, the state imposing countermeasures must “[c]all on the responsible State ... to fulfil its obligations [that are being breached]” and must “[n]otify the responsible State of any decision to take countermeasures and offer to negotiate with that State.”<sup>176</sup>

It follows that Canada would be free to relax state immunity rules in response to a violation of the prohibition on torture by another state for so long as those violations persist. Opening the door to lawsuits seeking compensation for acts of torture would be a step clearly directed at deterring the violation, and would be more than proportional to the offence. Civil liability is, after all, largely about compensation for injury done.

Of course, in order to comply with rules on countermeasures, Canada would have to call upon the violating state to meet its obligations, and then give notice of its intent to introduce the countermeasure. A blanket waiver of rules of state immunity for torture in Canada’s *State Immunity Act* would not satisfy these requirements. However, Canada could adopt an approach analogous to the *FSIA* rules allowing litigation against state sponsors of terrorism. As noted above, this *FSIA* exception to immunity is triggered only when the state is designated by the U.S. government as a supporter of terrorism. Put another way, the abrogation of state immunity is dependent on executive branch approval. Likewise, Canadian rules allowing lawsuits against states for torture could condition the removal of state immunity on certification by the Canadian government.

This proposed system walks a thin line between Canada’s international obligations. Most notably, this certificate prerequisite would enable the government to ensure that the removal of state immunity in individual cases complied with international countermeasures notice rules. It would also answer objections that erosion of state immunity might complicate Canada’s diplomatic relations by prompting courts to meddle in areas attracting retaliation from other states. Where diplomatic sensitivities are particularly acute, the government might choose not to issue the requisite certificate.

Of course, there is an obvious political flaw to this proposed system. Obtaining the blessing of a reluctant Canadian foreign service for lawsuits against foreign states might be difficult, even when permissible under the law of countermeasures and desirable for assorted other reasons. If this is a real concern, nothing precludes Parliament from limiting the government’s discretion to reject certification

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<sup>174</sup> ILC 2001, *supra* note 63 at 341, 345.

<sup>175</sup> *Ibid.* at 333. For a discussion of countermeasures and state immunity, see Adams, *supra* note 116 at 272-74.

<sup>176</sup> ILC 2001, *ibid.* at 345.

applications under an amended *State Immunity Act* by, for example, imposing clear decision-making criteria and transparency requirements. With clear criteria, decisions by the government to extend (or not) the required certification would then be amenable to potentially searching judicial review under standard Canadian administrative law doctrines.

## Conclusion

Sometime before Canada submits its sixth periodic report to the Committee Against Torture in 2008, it will have to consider how best to respond to the committee's position on civil remedies for torture victims. Ideally, its response should amount to more than a simple reassertion of its present position on state immunity. This article suggests that while the government is right that state immunity remains an important consideration in domestic litigation concerning foreign acts of torture, it is far from an absolute barrier. There is a compromise position lying between the horns of the dilemma presented by the Committee Against Torture in its criticisms of Canada.

First, this article urges that not all forms of state immunity are equal and that the scope of immunity *ratione materiae* should not be confused with that of its *ratione personae* counterpart. Specifically, immunity *ratione materiae* is, by definition, limited to matters sufficiently affiliated with a state as to merit immunity as official acts. This definitional prerequisite creates room for a human rights exception to immunity where lawsuits are brought against individuals, as opposed to states themselves. Put simply, state agents violating fundamental international human rights norms do not act within the scope of their agency, not only where the state itself has ratified the treaty giving rise to the norm, but also where that norm has customary status in international law. In these circumstances, there should be no question of state immunity. This is a conclusion supported by the House of Lord's *Pinochet* holding and the English Court of Appeal's decision in *Jones* (C.A.), but one that did not attract the support of the House of Lords on appeal in *Jones* (H.L.). The matter has not clearly been addressed in Canada to date.

Second, the international law of countermeasures opens the door to a modest rethinking of Canada's existing *State Immunity Act* in relation to the immunity of states themselves. So long as the prerequisites for countermeasures are met, international law permits Canada to limit state immunity for acts of torture that violate obligations owed to Canada as a member of the international community and as a party to the *Torture Convention*.

Generally speaking, Canada is not *obligated* to level these countermeasures. If the Committee Against Torture is correct, however, Canada must do something to give article 14 of the convention full form, even in relation to foreign torture by foreign states. The countermeasure option strikes a compromise between an aggressive interpretation of article 14 and an unflagging commitment to state immunity. By requiring certification by the government, Canada could relax state immunity for violations of the ban on torture without placing its foreign policy in the hands of courts. Nor would relaxation under these terms open the floodgates. Left

intact would be conventional jurisdictional limitations on Canada's courts and the *forum non conveniens* doctrine.

In summary, the countermeasure option would deploy Canada's courts in denouncing torture without undermining the essence of state immunity. It is a plausible route out of an otherwise impossible dilemma.

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