IN THE COURT OF APPEAL (CIVIL DIVISION) **2014/0596**
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (THE HONOURABLE MR JUSTICE SIMON)
High Court Ref: [2013] EWHC 4111 (QB)

BETWEEN:

(1) ABDUL-HAKIM BELHAJ
(2) FATIMA BOUDCHAR

Appellants

-and-

(1) RT HON JACK STRAW MP
(2) SIR MARK ALLEN CMG
(3) THE SECRET INTELLIGENCE SERVICE
(4) THE SECURITY SERVICE
(5) THE ATTORNEY GENERAL
(6) THE FOREIGN AND COMMONWEALTH OFFICE
(7) THE HOME OFFICE

Respondents

SUBMISSIONS OF THE INTERNATIONAL COMMISSION OF JURISTS, JUSTICE, AMNESTY INTERNATIONAL AND REDRESS

A. INTRODUCTION

1. In this appeal, the Court will have to consider the scope of two distinct sets of principles limiting the jurisdiction of the domestic courts and the justiciability of issues placed before them - the foreign act of state doctrine and the law of state immunity. Both have significant implications for access to the court. The context involves allegations of torture and other gross violations of international human rights law.

2. In particular, the Court is asked to consider the limits which should be placed on the domestic courts when hearing allegations against *UK officials* in circumstances where the relevant acts are alleged to have been carried out in partnership or collaboration with officials of other States or in circumstances where the conduct of a third State may be

materially relevant to the determination of the claim. The International Commission of Jurists ('the ICJ'), JUSTICE, Amnesty International and REDRESS (together, 'the Interveners') are grateful for the Court's permission to intervene in these proceedings by way of written submissions (Order dated 16 June 2014).

3. Save insofar as the claims rely on allegations of negligence, the foreign act of state doctrine was determined to operate as a bar to these claims. In summary, the Interveners submit that:
    a. Simon J's approach is inconsistent with previous domestic law on the scope of the foreign act of state doctrine and the requirements of the Human Rights Act 1998;
    b. Simon J's approach is further inconsistent with comparative law on the scope of the foreign act of state doctrine;
    c. The foreign act of state doctrine does not derive from any accepted international law standard or norm. On the contrary, the expansion of the doctrine so as to create, in effect, an immunity for UK officials whenever they act in tandem with officials from other States is inconsistent with the UK's obligations under accepted domestic and international law standards on the right of access to a court, the right to an effective remedy and specific rights accorded to torture victims to secure redress – remedy and reparation - pursuant to the European Convention on Human Rights, the UN Convention against Torture and the International Covenant on Civil and Political Rights. The construction of domestic bars to jurisdiction based on comity – beyond the requirements of state immunity – serves to undermine not only the domestic law commitment to remedies for common law wrongs, but also fatally weaken the global commitments made by states to ensure access to an effective remedy and reparation for gross violations of human rights.
    d. In circumstances where the foundation or scope of a domestic law doctrine which limits access to a court are uncertain, a narrow interpretation is required; the comparative and international law framework also points in this direction.

4. So far as the Government's cross-appeal is concerned, while the principle of state immunity **is** a principle of international law, it does not justify – let alone require – an over-broad concept of "*indirect impleading*" which shields the actions of UK officials from the jurisdiction of the Court. This approach would, again, be inconsistent with domestic law and the international obligations of the United Kingdom.

5. The practical implication of a broad interpretation of the foreign act of state doctrine would be to undermine the international law framework which governs both the right to access to a court and to an effective remedy. The application of the state immunity rule to facts such as these would confer an immunity considerably wider than that required by international law. An order striking out the claim on either basis, would set a precedent unparalleled in other jurisdictions.

B. THE FOREIGN ACT OF STATE DOCTRINE

6. In his judgment, Simon J noted his "*residual concern that… what appears to be a potentially well-founded claim that the UK authorities were directly implicated in the extra-ordinary rendition of the Claimants, will not be determined in any domestic court; and that Parliamentary oversight and criminal investigations are not adequate substitutes for access to, and a decision by, the Court*".[1]

7. This disquiet is well founded. The Interveners submit that the broad interpretation of act of state is inconsistent with earlier domestic authority, out of step with comparative jurisprudence and incompatible with the UK's broader obligations under international law.

(a)"Foreign act of state" distinguished from State immunity

8. At its core, the principle underlying the foreign act of state doctrine is that English courts should not pass judgment upon the acts of the government of another state done *within its own territory*: see *Lucasfilm v Ainsworth* [2012] 1 AC 208 at [81] *et seq* per Lords Walker and Collins. In *Yukos Capital v OJSC Rosneft*[2], the Court of Appeal stated that *"the doctrine is confined to acts of state within the territory of the sovereign but in*

[1] *Belhaj & Anor v Straw & Ors* [2013] EWHC 4111 (QB) (20 December 2013), at [151]
[2] [2012] 2 CLC 549 at [66]

special and perhaps exceptional circumstances such as in the Buttes Gas[3] *case itself, may even go beyond territorial boundaries."*[4]

9. In *Yukos*, Rix LJ noted the similarity between the act of state doctrine and immunity *ratione materiae*.[5] However, it is plain that the two doctrines are distinct. As noted by Fox and Webb, the foreign act of state doctrine permits exceptions where the impugned act is contrary to public policy, whereas, by contrast, State immunity *"aims at a value-free assessment, an objective ascertainment as to which of the two States is the appropriate one to exercise jurisdiction*".[6] Thus, in the *Germany v Italy* case, the ICJ rejected the argument that State immunity permitted exceptions in relation to gross violations of human rights, whereas the Court of Appeal in *Yukos* noted that the act of state doctrine will not apply to "*a breach of international law which is a matter of deep concern to the worldwide community*".[7]

10. Thus, even in cases falling within its narrow boundaries, the act of state doctrine clearly permits exceptions where fundamental human rights are in play: see *R (Abassi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598.

11. *Noor Khan v Secretary of State for Foreign and Commonwealth Affairs*[8] represented a departure from this line of case law in that the act of State doctrine was applied in relation to acts of state that occurred outside the territory of the United States. However, the Court of Appeal's decision may be distinguished on the basis that the asserted unlawfulness in *Noor Khan* (of drone strikes) was contested, and the question whether international law provided the defence of combatant immunity in the circumstances of the case was to some extent a controversial question. This appears to be the basis on which the Court distinguished the Supreme Court's decision in *Rahmatullah v Secretary of State for Defence*.[9] Lord Dyson MR held that, in the latter case:

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[3] *Buttes Gas and Oil Co v Hammer (No 3) [1982] AC 888; [1981] 3 WLR 787*
[4] As above, at fn 2, at [66].
[5] As above.
[6] H. Fox QC & P. Webb, *The Law of State Immunity* (3rd ed.) at p. 71.
[7] As above, at fn 2, at [69].
[8] [2014] EWCA Civ 24
[9] [2012] UKSC 48, [2013] 1 AC 614

> *There was clear prima facie evidence that the applicant was being unlawfully detained. But that conclusion depended on the effect of the Geneva Conventions, not on an examination of the legal basis on which the US might claim to justify the detention: see para 53. The court applied well-established principles to an unusual situation.*[10]

12. The situation in the present case is analogous to *Rahmatullah* in that there is little doubt that the acts complained of here, if they occurred, were unlawful as a matter of both domestic and international law.

(b) Comparative jurisprudence and commentary

13. The narrow scope of the foreign act of state doctrine, and the exceptions to it, are reflected in comparative jurisprudence. For instance, in *Doe I v Unocal Corp,* the United States Court of Appeals for the Ninth Circuit considered claims for damages against a private corporation and the Myanmar military for human rights violations allegedly perpetrated during the construction of an oil pipeline.[11] The Court held that, in view of the high degree of international consensus about the illegality of the alleged acts, the foreign act of state doctrine did not bar the claim against Unocal, even though the Myanmar military was protected by sovereign immunity.[12]

14. The approach adopted in a number of US authorities is to find that an act which constitutes breach of a fundamental human right cannot constitute an act of state. For instance, in *Sarei v Rio Tinto PLC*,[13] the US Court of Appeals held that alleged racial discrimination did not constitute an official act because international law does not recognise an act that violates *jus cogens* principles as a sovereign act.

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[10] As above, at [43].
[11] 395 F. 3d 932 (9th Cir. 2002).
[12] It should be noted that in February 2003, the Ninth Circuit Court vacated the panel decision and agreed to rehear the appeal before an eleven-judge *en banc* panel, but the case was subsequently settled. However, the 2002 judgment continues to be cited in academic commentary such as Alterton "*The Act of State Doctrine: questions of validity and abstention from Underhill to Habib*" in MelbJIL, (2012) Vol 12(1). at p 9, as well as other cases such as *Habib v The Commonwealth*, [2010] FCAFC 12 at [95].
[13] 456 F 3d 1069 (9th Cir, 2006).

15. In *Habib v Commonwealth of Australia*, the Federal Court of Australia rejected the argument that the act of state doctrine prevented it from considering claims against the Commonwealth for complicity in gross violations of international human rights law, including torture. Giving the leading judgment, Jagot J set out the US and UK authorities and concluded that "*The weight of authority discussed above does not support the protection of such conduct from judicial scrutiny other than in the face of a valid claim of sovereign immunity*".[14] Black CJ said that:

> *when the common law, in its development, confronts a choice properly open to it, the path chosen should not be in disconformity with moral choices made on behalf of the people by the Parliament reflecting and seeking to enforce universally accepted aspirations about the behaviour of people one to another*[15]

16. Black CJ further noted the "*consensus of the international community that torture can never be justified by official acts or policy...".*[16] On the other hand, Perram J ultimately reached the same conclusion by focusing on the *source* of the doctrine rather than its *scope*[17], holding that *"no doubt comity between the nations is a fine and proper thing but it provides no basis whatsoever for this Court declining to exercise the jurisdiction conferred on it by Parliament".*[18]

17. As noted by Perram J, it is plain that the foreign act of state doctrine is not required by international law. Thus, even in *Banco Nacional de Cuba v Sabbatino,* the US Supreme Court held:

> *That international law does not require application of the doctrine is evidenced by the practice of nations. Most of the countries rendering decisions on the subject fail to follow the rule rigidly. No international arbitral or judicial decision suggests that international law prescribes recognition of sovereign acts of governments, and apparently no claim has ever been raised*

[14] [2010] FCAFC para [112]
[15] *Ibid.*, para [7].
[16] *Ibid.*, para [9].
[17] See Batros and Webb, "*Accountability for Torture Abroad and the Limits of the Act of State Doctrine*" in *J Int Criminal Justice* (2010) 8(4): 1153 at p 1161
[18] *Habib*, as above, at fn 10, para 37

> *before an international tribunal that failure to apply the act of state doctrine constitutes a breach of international obligation.*[19]

18. The US Supreme Court went on to hold that "*if international law does not prescribe use of the doctrine, neither does it forbid application of the rule even if it is claimed that the act of state in question violated international law."* The context of that case was far removed from the current context, given it was concerned with confiscation of property. In any event, it is clear that US jurisprudence has been developed in later cases, such as *Unocal* and *Sarei*, set out above at paragraphs12 - 13.

19. The act of state doctrine's predominantly American domestic character is affirmed by Weil:

> *Ainsi, loin d'être imposée par le droit international, l'attitude de retenue à l'égard du contrôle des actes étrangers, qui est l'essence de la doctrine de l'Act of State, est inspirée par le souci d'assurer « the primacy of the Executive in the conduct of foreign relations » et constitue le reflet de la distribution des fonctions entre les branches judiciaire et politique à l'intérieur du système américain.*[20]

20. Similarly, Carreau and Marrella, in *Droit International* (2012), comment:

> *[…] la politique de retenue que les tribunaux américains ont longtemps pratiquée au nom de la théorie de l' « Act of State » est étrangère au droit international et n'est nullement dictée par lui. Elle relève de considérations tenant à une certaine conception de l'ordonnancement constitutionnel interne, en l'espèce au désir de respecter une stricte séparation des pouvoirs entre le « judiciaire » et « l'exécutif ».*[21]

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[19] 376 US 398 (1964) (emphasis added).

[20] Weil P, "*Le contrôle par les tribunaux nationaux de la licéité des actes des gouvernements étrangers*" in *Annuaire Français de Droit International*, volume 23, 1977, pp 9 – 52, p 30. Our translation: "*Thus, far from being imposed by international law, the restrained approach to the oversight of foreign actions, which is the essence of the Act of State doctrine, stems rather from the concern to ensure 'the primacy of the Executive in the conduct of foreign relations' and reflects the respective functions of the judicial and political branches inside the American system.*"

[21] Carreau D and Marrella F, *Droit International* (11ème éd.) 2012, p.701. Our translation: "[…] *the policy of restraint, which has long been adopted by American courts under the 'Act of State' theory, is unknown in international law and is in no way directed by it. This policy is based on concerns that reflect a certain*

21. In *Regina v Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No 3),* Lord Millet emphasised the domestic nature of the act of state doctrine:

> *As I understand the difference between [state immunity ratione materiae and the act of state], state immunity is a creature of international law and operates as a plea in bar to the jurisdiction of the national court, whereas the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state.*[22]

22. In *Yukos,* Rix LJ gave an overview of the act of state doctrine, describing it as *"a long-standing doctrine of Anglo-American jurisprudence"* and noted a comment from Hamblen J that there is nothing similar in civil law jurisdictions.[23]

23. The absence of the doctrine civil law jurisdictions is noted by Mann, who states that "*there is no trace of an act of state doctrine in any continental country; in particular both France and Germany have not had the slightest hesitation in treating confiscation by foreign States as null and void*".[24]

(c) Article 6 ECHR

24. The case law of the Strasbourg Court on Article 6 establishes that any limitation on the right of access to a court (i) must not impair the very essence of the right,[25] (ii) must pursue a legitimate aim and (iii) must be proportionate.[26] It is plain that the application of the act of state doctrine to the claims under consideration constitutes an interference with Article 6(1) ECHR and the question before the Court is whether this interference is proportionate. The Interveners submit that the nature of the act of state doctrine is crucial to that assessment.

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conception of the internal constitutional order, in this case the aim to respect the strict separation of powers between the 'judiciary' and the 'executive'."

[22] [2000] 1 AC 147 *per* Lord Millet at 269 (emphasis added).

[23] [2012] EWCA Civ 855; [2014] QB 458; at [40].

[24] F.A. Mann, *The Foreign Act of State,* 11 *Holdsworth L. Rev.* 15 1986, para 2, See also F.A. Mann, *Further Studies in International Law*, (1990) Clarendon Press, Oxford.

[25] See *Mihailov v Bulgaria*, App. No. 52367/99 (2005), para 38.

[26] *Ernst and Ors v Belgium*, App. No. 3340/96 (2003), para 48.

25. The Grand Chamber of the ECtHR stated in *Al-Adsani v United Kingdom* that *"[t]he Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity."* [27] On that basis, the Court held that measures taken *"which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1*." [28]

26. Similarly, in *Jones v United Kingdom*, the ECtHR held that the House of Lords' assessment that customary international law did not admit of any exception to the general rule of immunity *ratione materiae* for State officials in the sphere of civil claims where immunity is enjoyed by the State itself were "*neither manifestly erroneous nor arbitrary but were based on extensive references to international law materials and consideration of the applicant's legal arguments* …" In those circumstances, and taking into account the fact that other national courts have considered the House of Lords' findings to be highly persuasive, the ECtHR concluded that *"the grant of immunity to the State officials in the present case reflected generally recognised principles of public international law*" and that *"there has accordingly been no violation of Article 6 § 1 of the Convention in this case"*.[29]

27. The reasoning of the ECtHR in *Jones* relies expressly and heavily on the fact that the doctrine under consideration there is grounded in international law.[30]

28. In contrast, as set out above, the foreign act of state doctrine does not *"reflect generally recognised rules of public international law*". This means that the feature held to justify the State immunity rule is entirely absent in the case of the foreign act of state doctrine. On the contrary, there are generally recognised rules of public international law in relation to the right to an effective remedy as well as the right to redress for victims of torture, set out in *section C* below*,* that militate *against* a broad application of the foreign act of state doctrine. The application of the doctrine in a case such as the present one is

[27] App. No. 35763/97 (2001)
[28] *Ibid.*, as above, paras 55 - 56.
[29] *Jones v UK,* no. 34356/06 and 40528/06 (2014), para 215 (emphasis added).
[30] The Interveners consider that the scope of State Immunity remains unsettled. At its highest, *Jones* determined that the UK courts, in that case, acted within their margin of appreciation under the Convention. That decision makes no definitive statement on the scope of immunity in public international law. See below paras 61 - 62.

plainly disproportionate, taking into account the following factors found to be relevant by the ECtHR:

a. the seriousness of the violations to be addressed by the victims; [31]

b. the absence of adequate alternative means of redress; [32] and

c. the operation of the doctrine to provide blanket protection when state officials act in tandem with the officials of foreign states. The ECtHR has emphasised that the broader an immunity, the more compelling must be its justification.[33] It has adopted a narrow interpretation of the concept of proportionality in cases involving parliamentary immunity, asking whether '*the immunity [was] kept within well-defined limits, apt to achieve the purposes for which it is required without erring into unnecessarily blanket protection'*.[34] It has gone on to hold that '*it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6(1) – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities on categories of persons'*.[35]

C. THE INTERNATIONAL FRAMEWORK: REDRESS AND GROSS VIOLATIONS OF HUMAN RIGHTS

29. The guarantees of the ECHR must be interpreted within a wider international law context. For example, in *Neulinger v Switzerland*, the Strasbourg Court observed that *"the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken . . . of 'any relevant*

[31] See *Osman v. UK*, no.23452/94 (1998), paras 150-152.
[32] *Waite and Kennedy v. Germany*, no. 26083/94 (1999), §68-74; *De Jorio v. Italy*, no. 73936/01 (2004), §45 and 56; *Ielo v. Italy*, no. 23053/02 (2005) paras 44 and 53.
[33] See *Kart v. Turkey*, no. 8917/05 (2009), para 83.
[34] *Zollman v. UK*, App. No. 62902/00 (27 Nov. 2003) (Dec.) at section 2. See also *Cordova v. Italy* (no. 1) no. 40877/98 (2003), No. 1, § 63-64; and *De Jorio v. Italy*, as above, at fn 55, para 54.
[35] See, e.g. *Fayed v. the United Kingdom*, no. 17101/90 (1994), §65; *Cordova v. Italy* (No. 1), *id,* §58.

rules of international law applicable in the relations between the parties' and in particular the rules concerning the international protection of human rights".[36]

(a)The prohibition of torture

30. The present case concerns the denial of access to a court in cases involving common law claims based on allegations of torture and other gross violations of international human rights law. The requirements of Article 6(1) in this context must be read in the context of the relevant international law applicable in relation to the prohibition of torture.

31. The special status of the absolute prohibition of torture is well established in international law, including under the Convention.[37] It is reinforced by the fact that the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment ('the CAT') has 146 states parties, including all 47 member states of the Council of Europe. In addition, the International Covenant on Civil and Political Rights, Article 7 of which prohibits torture and cruel, inhuman or degrading treatment or punishment and Article 4 of which establishes this provision as one not subject to any derogation, has 168 State parties, including all 47 member States of the Council of Europe.

32. Torture is widely recognised as a crime under international law for which individuals are liable and states have responsibility on the international level. The Strasbourg Court, together with other international bodies and domestic courts, has further recognised that the prohibition against torture has attained the status of a peremptory norm of international law.[38] Indeed all virtually all States, in multiple consensus resolutions of the UN General Assembly, recognise the absolute and peremptory character of the prohibition against torture.[39]

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[36] (2010) 28 BHRC 706, at [131], referred to by Lady Hale, with whom Lords Brown and Mance agreed, in *ZH (Tanzania) (FC) v Secretary of State for the Home* Office [2011] UKSC 4 at [21]. This approach was also adopted by Lady Hale, with whom Lord Sumption agreed, in *P v Cheshire West and Chester Council* [2014] UKSC 19, at [36].

[37] See, e.g. *Shamayev and Others v. Georgia and Russia*, no. 36378/02 ECtHR (2005), para 335.

[38] See, e.g. *Demir and Baykara v Turkey* [GC], no. 34503/97, ECtHR (2008), § 73. See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (2012), ICJ Judgment of 20 July 2012, para 99.

[39] See, *e.g.*, UN GA Res 68/156 of 18 December 2013, UN GA Res 67/161 of 20 December 2012.

33. The CAT expressly prohibits torture, as well as complicity in torture,[40] which states are required to investigate and prosecute, including where committed outside their jurisdiction.[41] The International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* ("ILC Draft Articles"), which were annexed to the UN's General Assembly resolution 56/83 of 12 December 2001 and are widely considered to reflect customary international law, recognise that internationally wrongful conduct often results from the collaboration of more than one State rather than one State acting alone.[42] Article 16 of the *ILC Draft Articles* deal with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter.

34. Thus the Joint Committee on Human Rights, considering the international law applicable to a number of domestic cases concerning the conduct of the United Kingdom, concluded:

> *for the purposes of State responsibility for complicity in torture..., 'complicity' means simply one State giving assistance to another State in the commission of torture, or acquiescing in such torture, in the knowledge, including constructive knowledge, of the circumstances of the torture which is or has been taking place.*[43]

(b) The right to redress (remedy and reparation)

35. The UK has also assumed obligations to provide for an effective remedy and reparation for torture under all three treaties: the ECHR (Articles 3 and 13), the ICCPR (Articles 2(3) and 7) and the CAT.

36. The absolute prohibition of torture entails certain positive obligations, which include the duty to investigate and prosecute those responsible and to provide victims with an

[40] Article 4(1) CAT: "…*ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture*" (emphasis added).
[41] Articles 4-7 and 12, 13 of CAT.
[42] Ollesen S., *the Impact of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Preliminary Draft (British Institute of International and Comparative Law, 2007).
[43] See Twenty-third Report of Session 2008-09, *Allegations of UK Complicity in Torture,* HC 230/HLA Paper 152, para 35.

effective remedy and full and adequate reparation.[44] The Strasbourg Court has held that the European Convention on Human Rights is "*intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective*"."[45] This reflects the UN Human Rights Committee's conclusion that even where a State's legal system may provide appropriate avenues for seeking remedy, such remedies must "*function effectively in practice.*"[46] In other words, such remedies must be "*accessible, effective and enforceable*" to satisfy the right the requirements of the article 2(3) ICCPR.[47] There can be no question that a rule of domestic law which prevents a court from hearing a claim which is otherwise justiciable would inhibit the effectiveness of that judicial remedy, that is, rendering it incapable of redressing the violation in question.

37. Article 13 of the CAT enshrines the right of every victim of torture to complain and to have his or her case promptly and impartially examined. The "*right of complaint afforded to victims of torture or ill treatment*" under the CAT is "*a fundamental guarantee that must be upheld in all circumstances*".[48] Article 14 of the CAT requires 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. The UN Committee against Torture ("UN Committee") has found a breach of Article 14 in a number of cases where the absence of criminal investigations and proceedings has prevented victims from bringing a civil suit for compensation.[49]

38. The UN Committee, in General Comment 3 stresses that :

> "*The obligations of States parties to provide redress under article 14 are two-fold: procedural and substantive. To satisfy their procedural obligations, States parties shall enact legislation and establish complaints mechanisms, investigation bodies and*

[44] *Ilhan v Turkey*, no. 22277/93 (2000), para 97.
[45] See *Airey v Ireland,* no 6289173 (1979), para 24: "*The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective*". On Article 13, see e.g. *Kudla v Poland* no. 30210/96, § 152 – 160.
[46] Human Rights Committee, General Comment 31, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, paras 15 and 20.
[47] See, for example, *George Kazantzis v. Cyprus*, Comm. No. 972/2001, UN Doc CCPR/C/78/D/972/2001, para 6.6 (Aug. 7, 2003); *Yasoda Sharma v. Nepal*, Comm. No. 1469/2006, UN Doc CCPR/C/94/D/1469/2006, para 9.6 (Oct. 28 2008).
[48] Nowak and Macarthur, *The United Nations Convention against Torture* (2009), page 442.
[49] See*, e.g.*, *Dimitrijevic v Serbia and Montenegro,* CAT/C/33/D/207/2002 (2004), para 5.5; AND *Dimitrijevic v Serbia and Montenegro,* CAT/C/35/D/172/2000 (2005), para. 7.4.

institutions, including independent judicial bodies, capable of determining the right to and awarding redress for a victim of torture and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims. At the substantive level, States parties shall ensure that victims of torture or ill-treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible."[50]

39. The UN Committee also identifies a number of "[s]*pecific obstacles that impede the enjoyment of the right to redress and prevent effective implementation of article 14" which "include, but are not limited to: inadequate national legislation, discrimination in accessing complaints and investigation mechanisms and procedures for remedy and redress; inadequate measures to secure the custody of alleged perpetrators, state secrecy laws, evidential burdens and procedural requirements that interfere with the determination of the right to redress; statutes of limitations, amnesties and immunities; the failure to provide sufficient legal aid and protection measures for victims and witnesses; as well associated stigma, and the physical, psychological and other related effects of torture and ill-treatment.*"[51]

40. The UN Committee has also criticised states which fail to provide or which restrict civil remedies for torture, irrespective of where the torture was carried out.[52] For example, the UN Committee recommended that Canada review its position under Article 14 to ensure the provision of compensation through its civil jurisdiction to all victims of torture.[53] Most recently, albeit in connection with conduct of UK forces in Iraq, the UN Committee has recommended that the UK should take steps to implement Article 14 CAT in accordance with General Comment 3, to:

> "*also ensure that all victims of torture, cruel, inhuman or degrading treatment obtain redress and are provided with effective remedy and reparation,*

[50] See UN Committee against Torture, General Comment 3, UN Doc. CAT/C/GC3, 19 November 2012, para 5.
[51] *Ibid.*, para 38.
[52] See*, e.g.*, Concluding Observations on Japan, CAT/C/JPN/CO/1 (2007), § 23 and on Nicaragua CAT/C/NIC/CO/1 (2009), § 25.
[53] Concluding Observations on Canada, CAT/C/CR/34/CAN (2005), para 5(f).

including restitution, fair and adequate financial compensation, satisfaction and appropriate medical care and rehabilitation."[54]

41. The importance of access to a court for redress in torture cases is reflected in broader international practice. In addition to the General Comments and Observations of the Treaty bodies, for example, in 2005, the UN General Assembly adopted The *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. It reaffirmed that the right of victims to equal and effective access to justice and redress mechanisms should be fully respected 'irrespective of who may ultimately be the bearer of responsibility for the violation'.[55] Paragraph 23 of General Assembly Resolution 68/156 provides that the General Assembly:

> "*Calls upon States to provide redress for victims of torture or other cruel, inhuman or degrading treatment or punishment, encompassing effective remedy and adequate, effective and prompt reparation, which should include restitution, fair and adequate compensation, rehabilitation, satisfaction and guarantees of non-repetition, taking into full account the specific needs of the victim;*"[56]

42. The increased focus on access to justice is indicative of the international recognition of the close causal relationship between the lack of accountability for torture and its continuing incidence. As the UN Special Rapporteur on Torture has noted, "*the single most important factor in the proliferation and continuation of torture is the persistence of impunity*" and that "*measures relieving perpetrators of torture of legal liability*" are a key factor therein.[57] As the *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity* provide, *"States should adopt and*

[54] Concluding Observations on United Kingdom CAT//C/GBR/CO/5 (2013), § 16. See also, § 22, which reinforces a recommendation of the JCHR that the UK Parliament should make specific provision for torture redress: *"the State party fill the "impunity" gap identify by the Human Rights Joint Committee in 2009 (HL 153/HC 553) in adopting the draft legislation (Torture (Damages) No. 2), that would provide universal civil jurisdiction over some civil claims*".

[55] *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*; UN G.A. Res 60/147 (2005), Principle II(3)(c). See also See UN Human Rights Committee, General Comment 20 (1992).

[56] UN General Assembly Resolution 60/147 (2005), Principle II(3)(c).

[57] UN General Assembly, A/56/156 (2001), at para 26.

enforce safeguards against any abuse of rules such as those pertaining to prescription, amnesty, right to asylum, refusal to extradite, non bis in idem, due obedience, official immunities … that fosters or contributes to impunity".[58] Any domestic doctrines that operate to prevent access to court for victims of torture should be viewed against this background.

43. The Inter-American Court of Human Rights has also noted that laws that lead to impunity, including by denying access to court, violate rights including Article 8 of the American Convention on Human Rights (comparable to ECHR Article 6) as they 'lead to the defencelessness of victims and perpetuate impunity' and 'prevent victims and their next of kin from knowing the truth and receiving the corresponding reparation'.[59] The Inter-American Court of Human Rights has further held that 'judicial guarantees', including access to a court, are non-derogable where these are linked to ensuring the protection of non-derogable rights.[60]

44. The Council of Europe Committee of Ministers' *Guidelines on eradicating impunity for serious human rights violations* provides that:

> *"States should take all appropriate measures to establish accessible and effective mechanisms which ensure that victims of serious human rights violations receive prompt and adequate reparation for the harm suffered. This may include measures of rehabilitation, compensation, satisfaction, restitution and guarantees of non-repetition."*[61]

D. STATE IMMUNITY

(a) Indirect impleading

45. As set out above, the operation of the principle of state immunity so as to prevent access to a court can only be justified under Article 6(1) ECHR if it goes no further than what is

[58] Report of the independent expert to update the Set of Principles to Combat Impunity, Diane Orentlicher, Addendum, UN Doc E/CN.4/2005/102/Add.1, 8 February 2005 recommended to all State and UN authorities by the UN Human Rights Commission, Resolution 2005/81.
[59] *Barrios Altos* case (*Chumbipuma Aguirre et al*. v. *Peru*), Merits (2001) IACtHR, *Series C*, No. 75, para 43.
[60] *Ibid.*, paras 41–44.
[61] Council of Europe (CM), *Guidelines on eradicating impunity for serious human rights violations,* March 2011, XVI (Reparation)

mandated by international law. The Interveners submit that the doctrine of state immunity does neither require nor justify an unduly broad definition of indirect impleading.

46. The doctrine of state immunity shields foreign states from having to submit to the jurisdiction of the courts of other states. Common law courts have recognised that in some circumstances a claim directed at agents of a foreign state or targeting its assets amounts to an indirect impleading of the foreign state. However, if the Respondents' broader principle were correct, it would follow that a victim could not bring proceedings against the UK Government or its agents either, because to determine the issues arising in those proceedings, the Court would have to make findings on the actions of the agents of the foreign Government. The UK Government could escape the consequences of its illegality, under its own legal system and in its own Courts, simply by virtue of the fact that it acted in concert with a foreign Government, which is immune from suit in those courts. The Interveners submit that there is not, and has not ever been, any principle of State immunity so broad.

47. This concept of impleading is addressed in Article 6(2)(b) of the UN Convention on the Jurisdictional Immunities of States and their Property (2004) (the UN Convention), which states:

> "2. *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.*"

48. Responsibility for drafting the UN Convention lay with the International Law Commission, which produced its draft Articles, together with a commentary on them, in 1991, which were placed before the UN General Assembly. Article 6(2)(b) of the 1991 draft is in identical terms to the final version of the Convention adopted in 2004. The Commentary makes plain that Article 6(2)(b) is concerned with "*actions involving seizure or attachment of public properties or properties belonging to a foreign State or in its possession or control*". That is because:

The Court should not so exercise its jurisdiction as to put a foreign sovereign in the position of choosing between being deprived of property or else submitting to the jurisdiction of the Court. [62]

49. The Commentary also explains that the words "*to bear the consequences of a determination by the court which may affect*" were removed from the last part of the sentence in subparagraph (b):

> "*… because it appeared to create too loose a relationship between the procedure and the consequences to which it gave rise for the State in question and could thus result in unduly broad interpretation of that paragraph. To make the text more precise in that regard, those words have therefore been replaced by the words "to affect".*"[63]

50. In their commentary on the Convention, O'Keefe, Tams and Tzanakopoulos state that:

> "*…[A]lthough the verb 'to affect' was introduced in order to narrow the scope of Article 6(2)(b), it is not a verb denoting clear limits. Limits nonetheless are necessary if the provision is to preserve a rational scheme of jurisdiction. …*
>
> *The uncertainty, perhaps, is addressed by saying that the effect with which Article 6(2)(b) is concerned is a specifically legal effect, such as the imposition of a lien or a declaration of title, as distinguished from a social, economic, or political effect. Interpreted and applied this way, the provision would afford a meaningful scope of protection to States while also recognizing that immunity from jurisdiction cannot serve as a means by which a foreign State can bar any proceeding the prospective outcome of which may not be to its liking.*"[64]

51. This narrow interpretation of indirect impleading is reflected in the case law. In *The Cristina*, Lord Atkin stated:

> "*The first is that the courts of a country will not implead a foreign sovereign, that is they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.*
>
> *The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.*"[65]

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[62] O'Keefe, Tams & Tzanakopoulos, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A commentary* (2013), at pp 109 – 112 (emphasis added).
[63] *Ibid.*
[64] *Ibid.*, at pp 109 – 112 (emphasis added).
[65] [1938] AC 485 , at p 490 (emphasis added)

52. Lord Atkin held that in relation "*a writ in rem issued by our Admiralty Court in a claim for collision damage against the owners of a public ship of a sovereign State in which the ship is arrested, both principles are broken. The sovereign is impleaded and his property is seized.*"[66] Similarly, Lord Wright said that if the action were allowed to proceed "*the independent sovereign is thus called upon to sacrifice its property or its independence*", but he inclined to the view that the action *in rem* directly impleaded the Spanish Government.[67]

53. Lord Atkin's aforementioned formulation is widely cited in the Canadian Courts when stating the basic principles of state immunity.[68] In Canada, states have been held to be indirectly impleaded where (i) the subject matter of the dispute is beneficially owned by or in the possession of the State;[69] or (ii) a suit of an agent or official is seen as the practical equivalent of a suit against the state itself,[70] and/or would otherwise *directly* affect its legal interests.[71]

54. However, where claims have not been directed at a state's property or its officials, but have affected the "*interests*" of a state in a broader sense, the Canadian courts have not found them barred by state immunity.[72] Thus, for example, the British Columbia Supreme

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[66] *Ibid.*, p 491.

[67] *Ibid.*, p 505.

[68] See for e.g. *Flota Maritima Browning de Cuba v. "Canadian Conquerer" (The)* [1962] SCR 598, 34 DLR (2d) 628, 1963 AMC 1071 at [12] and [25]; *Lorac Transport Ltd. v. Iran* [1987] 1 FC 108, 28 DLR (4th) 309, 69 NR 183 , 69 NR 183, at [12]; *Jaffe v Miller* [1993] OJ No. 1377, at [15]; *United Mexican States v British Columbia (Labour Relations Board)*, 2014 BCSC 54 (15 January 2014), at [73]; and *White v. "Frank Dale" (The)* [1946] Ex CR 555

[69] See e.g. *Flota Maritima Browning de Cuba v. The "Canadian Conquerer", ibid* (ship owned by a state); *Saint John (City) v. Fraser-Brace Overseas Corp.* [1958] S.C.R. 263, 13 D.L.R. (2d) 177 (taxation of property held in trust for a state); *Royal Bank of Canada v. Corriveau et al.* (1980) 17 C.P.C. 290, 30 O.R. (2d) 653, 117 D.L.R. (3d) 199 (moneys in bank account in the possession of the foreign sovereign state); *Hsiung v. Toronto (City)* [1950] O.R. 463, [1950] 4 D.L.R. 209 (taxation of property of a foreign State, occupied by its consul and used by him as a consulate-general); *White v. The "Frank Dale"* [1946] Ex CR 555(ship owned by a state).

[70] See *Jaffe v Miller*, as above, note [36], at [31]; *Smith v Canadian Javelin Ltd* (1976) 12 OR (2d) 244, at [23]; *Kazemi (Estate) v. Islamic Republic of Iran* 2012 QCCA 1449, EYB 2012-210131, J.E. 2012-1653, 220 A.C.W.S. (3d) 313, [2012] R.J.Q. 1567, 354 D.L.R. (4th) 385, 254 C.R.R. (2d) 265, at [93].

[71] See *Jaffe v Miller*, as above, note [36], at [32]; *Smith v Canadian Javelin Ltd*, *supra* note [38].

[72] So, *e.g.* in *Chateau-Gai Wines Ltd. v. France (Republic)* (1967) 35 Fox Pat. C. 135, 61 D.L.R. (2d) 709, [1967] 2 Ex. C.R. 252, 52 C.P.R. 39, France's interest as owner in a trademark was not sufficient to prevent the Court from exercising its jurisdiction to expunge the registration of the trademark. See in particular at [7]: "*The question as to what is the essential nature of the matter remains to be considered. The relief sought is neither a judgment that the applicant is entitled to any relief from the Government of the Republic of France nor a judgment that would in any way affect any property that belongs to or is in the possession of the Government or in which the Government has any interest*."

Court held in *United Mexican States v British Columbia (Labour Relations Board)*[73] that a case requiring it to make findings as to wrongdoing by a third state was **not** barred by state immunity. After citing Lord Atkin in *The Cristina*, the Court went on to place reliance on Lord Denning's dictum in *Buttes Gas and Oil Co. v Hammer* that the doctrine of sovereign immunity did not apply because no foreign sovereign was impleaded in that case.[74] The Court recalled that:

> "*In his analysis, Lord Denning used an example of a newspaper publishing an article alleging that a foreign state had been bribed by an oil company. He explained that the doctrine would not extend to prevent a defamation suit by the oil company against the newspaper even though the litigation would require the court to inquire into the conduct of the foreign state. Similarly, he explained the doctrine of foreign sovereign immunity would not prevent the defendants from pursuing their conspiracy counterclaim because they were not suing a foreign state but rather claiming damages from a private party for the consequences of the foreign state's conduct.*"[75]

55. Although the House of Lords later decided that the claims in *Buttes* were not justiciable, Lord Wilberforce expressly confirmed Lord Denning's conclusion regarding the inapplicability of the doctrine of sovereign immunity. In this regard, he stated:

> "*The doctrine of sovereign immunity does not in my opinion apply since there is no attack, direct or indirect, upon any property of any of the relevant sovereigns, nor are any of them impleaded directly or indirectly.*" [76]

56. The British Columbia Supreme Court concluded that:

> "[T]*he objective of the restrictive theory of sovereign immunity …. is not to preserve the dignity of foreign states or prevent their embarrassment in a colloquial sense, but rather to protect foreign states from domestic proceedings that would stand to interfere with their autonomy in performing their sovereign functions.*"[77]

57. In the Court's view, the Canadian courts could therefore not "*embark upon proceedings that could affect a foreign state's legal rights, by impleading the state, directly or*

[73] 2014 BCSC 54 (15 January 2014)
[74] *Buttes Gas & Oil Co. v Hammer (No. 2)* (1974), [1975] Q.B. 557.
[75] *United Mexican States v British Columbia (Labour Relations Board)*, ibid, at [78].
[76] *Ibid.*, at 926.
[77] As above at 73, at [90].

indirectly, or attacking its property".[78] However, after a review of Canadian, UK and ICJ jurisprudence, the Court concluded that:

> "*it is not the mere review of sovereign conduct by the court that interferes with the foreign state's autonomy. It is the subjection of that conduct to the control of a foreign court that is precluded*."[79]

58. Similarly, Australian courts adopt a narrow approach to impleading. Thus immunity has been found to bar claims when ships or other property of the state are at issue in the proceedings,[80] or a suit against a foreign state's official or agent is considered in effect a suit against that state.[81] A recent statement of the definition of impleading is set out in *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission,*[82] in which the High Court of Australia stated that:

> "*The notion expressed by the term "immunity" is that the Australian courts are not to implead the foreign State, that is to say, will not by their process make the foreign State against its will a party to a legal proceeding. Thus, the immunity may be understood as a freedom from liability to the imposition of duties by the process of Australian courts.*"[83]

59. In *Habib v Commonwealth,*[84] a case that is factually analogous to the present one, the Commonwealth argued that the operation of the analogous doctrine of sovereign immunity was "*instructive*" but did not seek to argue that the case was itself barred by stated immunity. The Australian Federal Court stated:

> "*The Commonwealth has no claim for sovereign immunity in respect of a claim brought against it in an Australian court. The fact that the foreign officials could claim sovereign immunity if sued in an Australian court, and the Australian officials if sued in a foreign court, may disclose some incoherence in underlying principle. The same situation, however, arose in*

[78] *United Mexican States v British Columbia (Labour Relations Board*), above note [41] at [98].
[79] *Ibid.*, at [121].
[80] See, *e.g.*, *Australian Federation of Islamic Councils Inc v Westpac Banking Corporation* (1988) 17 NSWLR 623.
[81] See for e.g. *Zhang v Zemin & Ors* (2010) 243 FLR 299 (New South Wales Court of Appeal), at [66]-[77], [108]; *Grunfeld v United States* [1968] 3 NSWR 36.
[82] [2012] HCA 33 at [17], per French CJ, Gummow, Hayne and Crennan JJ.
[83] As above, at [17] (emphasis added).
[84] [2010] FCAFC 12

> *Unocal when the perpetrators were protected by sovereign immunity but the company on whose behalf the violations were said to have been perpetrated was not protected by the act of state doctrine.*"[85]

60. In *Unocal*, referred to at paragraph 13 above, the Court held that the Myanmar military was immune by reason of sovereign immunity, but that the private Corporation was not. There was no suggestion that Myanmar was indirectly impleaded because, as the Court accepted, the case required the Court to decide whether the Myanmar military had violated international law.

61. Likewise, US jurisprudence does not support a wide reading of "*indirect impleading*". Where indirect impleading is held to arise, the cases normally involve the property of the foreign state or has legal effect on it, such as an order for discovery[86], or a declaration barring it from taking certain action.[87] On the other hand, in *Patrickson v Dole Food Company Inc*[88] the Court held that a claim against a corporation formerly owned by a State would not be barred by FSIA, even though "[b]*y adjudicating that claim, the court may have to pass judgment on the acts or decisions of a foreign sovereign. But the merits of such acts may well be insulated from judicial scrutiny by the act of state doctrine and, in any event, the affront to the foreign sovereign will be remote and indirect if it is not held answerable for the harm it may have caused*."[89] It is notable that the Restatement on Foreign Relations contains no rule to support a wide reading of indirect impleading.

(b) Recent developments on state immunity in relation to claims of torture militate against any widening of its application

62. Recent decisions, including that of the Strasbourg Court in *Jones v United Kingdom*,[90] do not change the analysis above, but rather reinforce the importance of ensuring that the application of state immunity is kept within the limits of international law as

[85] *Per* Jagot J at [113]. The case referred to is *Doe I v Unocal Corp* 395 F. 3d 932 (9th Cir. 2002)..
[86] See for e.g. *Petroleos Mexicanos v Paxson*, 786 S.W.2d 97, 99
[87] *Virtual Countries, Inc v Republic of South Africa*, 148 F.Supp.2d 256, 264, judgment affirmed 300 F.3d 30 (2d Cir.2002).
[88] 251 F.3d 795
[89] As above.
[90] Supra at [26]

demonstrated by state practice, taking into account evolving standards towards greater protection of human rights. In *Jones* the court considered *direct* impleading of foreign officials, and recognised that even in such cases "*State practice on the question is in a state of flux, with evidence of both the grant and the refusal of immunity ratione materiae* …".[91]

63. It found that the approach taken by the House of Lords, based on an analysis of extensive international materials, "*was neither manifestly erroneous nor arbitrary*".[92] However, it stressed that "*in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States*".[93]

E. CONCLUSION

64. The outcome of this appeal has significant potential to determine the availability of an effective remedy to victims of gross violations of human rights both in the United Kingdom and other common law jurisdictions in circumstances where officials act in concert with officials from other states.

65. . The Strasbourg jurisprudence makes clear that limiting access to a court amounts to an interference under Article 6(1), which must be proportionate. The denial of access to a court for victims of torture has only been upheld by the Strasbourg court where it is clearly mandated by international law, a justification that is unavailable in relation to the foreign act of state, which has no basis in international law.

[91] *Ibid.*, at [213] (emphasis added).
[92] *Ibid.*, at [214].
[93] *Ibid.*, at [215]. In the United States, immunity was not applied in a case brought against a former official: *Samantar v Yousuf,* 699 F. 3d 763 (Fourth Circuit), referred to in the European Court's judgment in *Jones*. In that case the Court held that "*Under international and domestic law, officials from other countries are not entitled to foreign official immunity for* jus cogens *violations, even if the acts were performed in the defendant's official capacity"*. Certiorari on the interlocutory decision before the Supreme Court was denied on 13 January 2014. See paragraphs 112-154 for a survey of other recent developments in domestic jurisprudence, and note the UN CAT General Comment No. 3, see above, at [22] and [45].

66. Further, the wider international context and comparative jurisprudence militate against an interpretation of the foreign act of state doctrine as preventing access to a court in the context of gross violations of human rights, including the absolute prohibition on torture.

67. The outcome of the cross-appeal has similarly stark consequences for access to justice and the rule of law. As set out above, the scope of the doctrine of state immunity has never been so broad as to prevent claims being brought against *UK officials* in the *UK courts*.

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BRICK COURT CHAMBERS

30 June 2014