

JONES v. UNITED KINGDOM (Application Number 34356/06)

MITCHELL AND OTHERS v. UNITED KINGDOM (Application Number 40528/06)

**WRITTEN COMMENTS BY
REDRESS, AMNESTY INTERNATIONAL, INTERIGHTS AND JUSTICE**

INTRODUCTION

1. The Redress Trust ('REDRESS'), Amnesty International, the International Centre for the Legal Protection of Human Rights ('INTERIGHTS') and JUSTICE [collectively, 'the Organisations'] make these submissions pursuant to leave granted by the President of the Chamber on 14 January 2010 in accordance with Rule 44§2 of the Rules of the Court.¹

2. These cases involve three nationals and one dual national of the respondent state who attempted to sue a foreign state and its officials allegedly responsible for their torture abroad and were denied access to a court in the respondent state on the basis that the defendants enjoyed immunity. These cases directly engage Article 6(1) of the European Convention on Human Rights [hereinafter the 'Convention'] which requires an assessment as to whether the restriction on access to a court pursues a legitimate aim and is proportionate.

3. Without prejudice to the issue of state immunity, the Organisations intervene in these cases in order to address whether and to what extent immunity is enjoyed at the level of officials in these cases. In doing so, the intervention focuses on the following:

- a) The absolute prohibition of torture enjoys a special status under international law and gives rise to a positive obligation to provide an effective remedy and full and adequate reparation to all victims of torture, including access to a court;
- b) The only immunity potentially available to the officials in these cases is immunity *ratione materiae* (subject-matter immunity); the state is not impleaded in suits against officials in which torture is alleged;
- c) Subject-matter immunity does not apply in cases in which torture is alleged;
- d) The application of subject-matter immunity to cases involving allegations of torture does not pursue a legitimate aim and the restriction on access to a court is disproportionate, taking into account a number of factors, including the special status of torture and the lack of alternative means of redress in the foreign state and by way of diplomatic protection.

A. VICTIMS OF TORTURE HAVE A RIGHT TO AN EFFECTIVE REMEDY, INCLUDING ACCESS TO A COURT, UNDER INTERNATIONAL LAW

4. The present cases concern denial of access to justice in cases in which torture is alleged. As will be indicated in the sections that follow, the underlying nature of the wrong is relevant to an assessment of whether the immunities in question in these cases apply and to an assessment of whether any interference under Article 6(1) can be justified.

¹ Letters sent by the Section Registrar of the Court to L. McGregor of REDRESS on 14 and 25 Jan. 2010. Details of the Organisations are set out in the Annex to these comments.

5. The special status of the absolute prohibition of torture is well established in international law, including under the Convention.² It is reinforced by the fact that the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment ('CAT') has to date been ratified by 146 states, including all 47 member states of the Council of Europe. Torture is widely recognised as a crime under international law³ for which individuals, as well as states, have responsibility on the international level. This 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.⁴

6. The absolute prohibition of torture entails certain positive obligations which this Court has also held are of an absolute nature.⁵ Positive obligations in relation to torture, as emphasised by this Court, include the duty to provide victims with an effective remedy and full and adequate reparation.⁶ The importance of access to a court for torture is reflected across international norms and practice.⁷ For example, in 2005, the UN General Assembly adopted basic principles on the right to a remedy and reparation for human rights violations, including torture. 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'.⁸ It has also been held that 'judicial guarantees' including access to a court are of a non-derogable nature where these are linked to ensuring the protection of non-derogable rights.⁹

7. 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'.¹⁰ Article 14 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.¹¹ The UN Committee has also criticised states which fail to provide or restrict civil remedies for torture, irrespective of where the torture was carried out.¹² 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 victim of torture.¹³

8. The increased focus on access to justice is indicative of the international recognition of the link 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.¹⁴ The Inter-American Court of Human Rights

² See, e.g., *Shamayev and Others v. Georgia and Russia*, no. 36378/02 ECtHR (2005), §335.

³ E.g. Arts. 4-9 of CAT and Arts. 7(1)(f) and 8(2)(a)(ii) of the Rome Statute Establishing the International Criminal Court ('Rome Statute').

⁴ See *Demir and Baykara v Turkey* [GC], no. 34503/97, ECtHR (2008), § 73.

⁵ See *Chahal v UK*, no. 22414/93 ECtHR (1996), § 80.

⁶ *Ilhan v Turkey*, no. 22277/93 (2000), § 97.

⁷ See, UN Human Rights Committee, General Comment 20 (1992).

⁸ 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).

⁹ See, e.g. *Barrios Altos case (Chumbipuma Aguirre et al. v. Peru)*, Merits (2001) IACtHR, Series C, No. 75, § 41-4.

¹⁰ Nowak and Macarthur, *The United Nations Convention against Torture* (2009) at page 442.

¹¹ See, e.g. *Dimitrijevic v Serbia and Montenegro*, CAT/C/33/D/207/2002 (2004) at para. 5.5; *Dimitrijevic v Serbia and Montenegro*, CAT/C/35/D/172/2000 (2005) at para. 7.4.

¹² See, e.g., Concluding Observations on Japan, CAT/C/JPN/CO/1 (2007), § 23 and Nicaragua CAT/C/NIC/CO/1 (2009), § 25.

¹³ Concluding Observations on Canada, CAT/C/CR/34/CAN (2005), § 5(f).

¹⁴ UN General Assembly, A/56/156 (2001), at para 26.

has also noted that laws that lead to impunity, including by denying access to court, violate rights including Article 8 of the American Convention (comparable to Article 6) as they ‘lead to the defenselessness of victims and perpetuate impunity’ and ‘prevent victims and their next of kin from knowing the truth and receiving the corresponding reparation’.¹⁵

9. This Court has consistently referred to the ‘living’ nature of the Convention, which must be interpreted in the light of present-day conditions. In so doing, it has taken account of evolving norms of national and international law in its interpretation of the Convention.¹⁶ The application of Article 6(1) in these cases should be viewed against a background of significant developments during the last two decades which have sought to combat impunity for torture¹⁷ and prioritise the rights of victims to an effective remedy, including through the rejection of procedural obstacles, such as amnesties¹⁸, statutes of limitations¹⁹ and, as set out below, subject-matter immunity.

B. THE ONLY INDIVIDUAL IMMUNITY AT ISSUE IN THIS CASE IS SUBJECT-MATTER IMMUNITY

10. When making an Article 6(1) assessment in these cases, the only immunity that the Court must consider in relation to the officials in this case is immunity *ratione materiae* (‘subject-matter immunity’). Immunity *ratione personae* (‘personal immunity’) does not apply as it is a status-based immunity which can only be asserted by very senior officials, such as heads of state or heads of government or diplomats stationed abroad. None of the officials in these cases can make a claim to personal or diplomatic immunity.

11. Likewise, as set out below, the immunity of the state and subject-matter immunity are distinct legal issues that should be considered separately due to their different purposes and content. The rationale for state immunity is often cited as the sovereign equality and non-intervention in the affairs of other states; international relations, comity and reciprocity.²⁰ By contrast, subject-matter immunity is purely functional. It is justified in situations in which responsibility for the commission of official acts is solely attributable to the state and not to the official personally,²¹ who acts as the ‘mere instrument’ or mouthpiece of the state. It can generally be asserted by all current and former officials for acts that are solely attributable to the state and that carry no individual responsibility. Where a suit is brought against the state and its officials, a separate determination of each immunity is required as they are not coterminous. Their different rationales and purposes mean that it does not logically follow that if the state enjoys immunity, the individual also enjoys immunity and vice versa.²²

12. In certain cases in which the state enjoys immunity, the official is also granted immunity in order to prevent any immunity that the state enjoys being circumvented. Some courts have determined that the state is impleaded if ‘a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly’.²³ In order for a suit against an

¹⁵ *Barrios Altos*, *supra* note 9, §43.

¹⁶ *See*, e.g. *Soering v. the United Kingdom*, Series A no. 161 (1989), § 102.

¹⁷ This is one of the key objectives of the CAT, e.g. Arts. 4-9 concern universal jurisdiction over torture and Arts. 13 and 14 guarantee the right to complain and to a remedy.

¹⁸ *See*, e.g. Concluding Observations on Senegal, A/51/44 (1996) §§112 and 117.

¹⁹ *See*, e.g. Concluding Observations on Spain, CAT/C/ESP/CO/5 (2009), § 22.

²⁰ *Al-Adsani v. the United Kingdom*, no. 35763/97 (2001), § 54.

²¹ *Prosecutor v. Blaškić* (Objection to the Issue of *Subpoena duces Tecum*) IT-95-14-AR108 (1997), 110 I.L.R. 607, 707, §38 (finding that ‘officials cannot suffer the consequences of wrongful acts which are not attributable to them personally’).

²² Article IV of Institut de Droit Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes (2009) (confirming this distinction of crimes under international law). *See also*, Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008) at 106.

²³ *See*, e.g. *Chuidian v. Philippine National Bank* 912 F.2d 1095 (9th Cir. 1990).

official to constitute the 'practical equivalent' of a suit against the state itself, the state's 'property, rights, interest, or activities' must be affected.²⁴ The central cases in which impleading has arisen have involved claims against officials in possession or in control of the state's assets.²⁵ In such cases, immunity is provided not in order to protect the individual but in recognition that the state's assets are the subject-matter of the dispute. In these cases, the state was therefore considered the proper or de facto defendant which could not be sued because of the availability of an immunity under the relevant national law. In contrast, courts have also previously found that where a claim only involves the assets of the individual and not the state, no question of impleading arises and therefore no immunity is afforded.²⁶

13. These cases can also be distinguished from the cases presently before this Court as torture gives rise to both individual and state responsibility under international law; not just state responsibility.²⁷ Thus, a claim against an official for his or her role in the commission of torture is in no way 'the practical equivalent' of a case against the state; it is precisely the opposite as it is about the personal responsibility of the official. In *Pinochet*, Lord Browne-Wilkinson affirmed this point by stating that, 'I believe there to be strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function'. Quoting Sir Arthur Watts, he noted that, "[f]or international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal state and not to the individuals who ordered or perpetrated it is both unrealistic and offensive to common notions of justice".²⁸

14. As regards any eventual award of compensation made against an individual, this will only be enforceable against that individual and not against the state or its assets as a matter of international law. While the state may choose to pay the damages awarded on behalf of the official, it is not obliged to do so as the decision only binds 'the appellant personally'.²⁹

15. Therefore, the only relevant immunity for the purposes of an Article 6(1) assessment is subject-matter immunity which as set out in the next section, does not apply in cases in which torture is alleged.

C. SUBJECT-MATTER IMMUNITY DOES NOT APPLY IN CASES IN WHICH TORTURE IS ALLEGED

16. The object and purpose of the CAT is to ensure accountability and to prevent impunity for torture. A grant of immunity to officials in cases in which torture is at issue is inconsistent with this object and purpose, particularly in situations such as the present cases where no alternative means of redress exist.³⁰ The CAT arose out of the recognition that the state may not

²⁴ Article 6(2)(b) UN Convention on the Jurisdictional Immunities of States and their Properties (2004) (not yet in force).

²⁵ See, e.g. *Twycross v. Dreyfus* (1877) LR 5 Ch D 605, p618 (where the defendants held bonds owned and issued by the state of Peru which were the subject of the litigation before the Court) and *Rahimtoola v. Nizam of Hyderabad*, [[1958] AC 379, 402 (involving litigation over funds held on the official's bank account which he had been expressly authorized to hold on behalf of the state).

²⁶ *Saorstat and Continental Steamship Co. v Rafael de las Morenas* [1945] IR 291 reprinted in ILR 97 98 (SC). Other examples of a finding of impleading include *Blaskic*, *supra* note 21 (where the ICTY found that the state and not the individual was the proper defendant as the state would be subject to sanction for the official's failure to comply with a subpoena). *Propend Finance Pty Ltd & Ors v. Sing and Anr* [1997] EWCA Civ 1433, often cited on impleading, is also distinguishable from the ones presently before the Court in that the commissioner was not sued in his personal capacity (he was not even in office at the time of the underlying wrong (contempt of court)). On this basis, the Court found that by suing the commissioner, the plaintiffs were actually attempting to sue the state which enjoyed immunity.

²⁷ See developments since Art 7 of the Charter of the International Military Tribunal at Nuremberg (1945) 82 UNTS 279, e.g. Arts. 27(1) of the Rome Statute and Arts. 4(1), 5 and 7 of the CAT firmly establishing individual responsibility for crimes under international law. See also, the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) (noting that the articles are 'without prejudice to the individual responsibility under international law of anyone acting on behalf of a State').

²⁸ *R v Bow Street Stipendiary Magistrate and ors ex p Pinochet Urarte (No 3)* [1999] 2 WLR 827, §113 – 115.

²⁹ *Saorstat*, *supra* note 26.

³⁰ See Part D below.

take the same action under its criminal law in relation to torture ‘committed on behalf of, or at least tolerated by, the public authorities’ than in relation to torture committed by private persons.³¹ It is for this reason that the CAT imposes a range of positive obligations flowing from the absolute prohibition as set out in section A above in order to ensure that ‘no safe haven for torturers’ exists.³² If the element of official capacity within the definition of torture under Article 1 of the CAT was to be interpreted to extend subject-matter immunity to current and former officials, this would defeat the very purpose of Article 1 and the CAT as a whole.³³

17. The question of the application of subject-matter immunity to crimes under international law such as torture has most commonly arisen in the context of criminal trials. Many – but not all – of the cases in which subject-matter immunity has been denied are therefore criminal cases.³⁴ The rationale that underpins the denial of subject-matter immunity in the criminal sphere – namely that subject-matter immunity only covers acts which are solely attributable to the state which torture is not³⁵ – applies with equal force to civil suits against officials. This is particularly the case in the majority of member states in which it is possible to bring a claim for damages within criminal proceedings demonstrating a lack of a clear dividing line between criminal and civil proceedings. Rather, all proceedings – both criminal and civil – are aimed at ensuring accountability for the underlying act of torture and providing an effective remedy for victims. Indeed, at common law, torts were considered the civil counterparts of crimes and both criminal and civil proceedings can contribute to the fulfilment of this objective. This is reflected by Lord Phillips’ separate opinion in these cases before the English Court of Appeal. He expressly departed from his previous *obiter dicta* comments in *Pinochet* that a state would be impleaded in civil but not criminal proceedings against a (former) official where torture was alleged. He found that the state would not be impleaded in civil proceedings involving an official as ‘[i]t is the personal responsibility of the individuals, not that of the state, which is in issue’.³⁶

(1) Subject-Matter Immunity does not Bar National Court Proceedings against Current or Former Officials for Crimes under International Law

18. Subject-matter immunity has not presented a barrier to proceedings in the significant number of national prosecutions in member states of current and former foreign state officials for crimes under international law committed since the Second World War.³⁷ None of the cases in which courts have accepted claims of immunity from criminal prosecution have involved claims of subject-matter immunity, at issue here, but only claims of personal immunity by virtue of the official’s position as a head of state, head of government and minister of foreign affairs.³⁸ As discussed below, in a number of these prosecutions, civil claims have been made and awarded against current or former officials.

19. In *Pinochet*, where Spain, Switzerland, France and Belgium sought the extradition of the former head of state of Chile, the House of Lords expressly determined that he could not assert

³¹ Burgers and Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988) at 45.

³² E/CN.4/1984/72

³³ See also, Institut de Droit International, *supra* note 22.

³⁴ See, subsection (2) below.

³⁵ See Section B above.

³⁶ *Jones v Al-Mamlaka Al-Arabiya As Saudiya (The Kingdom of Saudi Arabia) Ministry of Interior & Anor* [2004] EWCA Civ 1394 (28 October 2004) § 128.

³⁷ For the thousands of former Axis officials prosecuted for crimes during the Second World War. See, Cryer et al., *An Introduction to Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007) Chapter 4.

³⁸ See, *Ghaddafi* case, Arrêt no. 1414 (2001), 125 I.L.R. 456; *Castro* (Spain: Audencia Nacional, 1999); *Re Sharon & Yaron*, 42 I.L.M. 596 (2003); *Democratic Republic of the Congo v. Belgium*, ICJ Rep. (2002). Although the Paris prosecutor, misinterpreting this ICJ judgment, declined to investigate torture allegations against a former defence minister, Donald Rumsfeld, that decision has never been validated by a court.

subject-matter immunity with respect to torture (he could not claim personal immunity since he was out of office).³⁹ Courts in France, Italy, the Netherlands and Spain have convicted current and former foreign officials of crimes under international law.⁴⁰ Other courts in states such as France, Italy, Spain and Sweden have issued arrest warrants for current and former officials for such crimes without immunity presenting an obstacle to their issuance.⁴¹

(2) The Same Rationale that Precludes Subject Matter Immunity for Criminal Prosecutions Applies to Civil Cases

20. As US Supreme Court Justice Breyer noted in *Sosa v. Alvarez-Machain*, many member states, including Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden permit their courts to entertain civil claims in an *action civile* in criminal cases.⁴² In Spain, for example, this procedure operates as an alternative to initiating an independent civil suit once criminal proceedings have ended.⁴³

21. Courts in civil law countries have awarded civil reparations in the context of criminal prosecutions of current and former foreign officials in which subject-matter immunity has not presented an issue. For example, on 16 March 1990, a French court convicted and sentenced a serving Argentine naval officer *in absentia* to life imprisonment for torture and enforced disappearance and awarded the *parties civiles* damages.⁴⁴ In March 1999, a French court sentenced six Libyan officials *in absentia* to life imprisonment for the bombing of a French plane and awarded the *parties civiles* up to FRF 200,000.⁴⁵ On 1 July 2005, a French court convicted Ely Ould Dah of Mauritania for torture after a trial *in absentia* and awarded reparation to victims who had constituted themselves *parties civiles*.⁴⁶ The case has since been referred to a civil court for a final determination of the civil damages. There have been numerous other pending or settled cases in which courts in civil law countries have permitted *parties civiles* to pursue civil claims in criminal prosecutions in France, Spain and Senegal.⁴⁷

³⁹ *Pinochet*, *supra* note 28.

⁴⁰ **France**: Ordonnance de mise en accusation de Khaled Ben Saïd devant la Cour d'assises du Bas Rhin, No. J.20009/01, No. 5/02/12, 15 décembre 2008 (http://www.fidh.org/IMG/pdf/Bensaid512fr2008_FINAL.pdf); *see also* footnote 47; **Italy**: *See*, Amnesty International, Report 2001, AI Index: POL 10/001/2001 at 139 (conviction by Rome Court of Assizes of seven former Argentine officials for murder and abduction of seven Italian citizens); **Netherlands**: Case BG1476, 07/10063, Supreme Court (2008) (upholding conviction of former senior intelligence official for torture); **Spain**: Conviction of former Argentine naval officer, Adolfo Scilingo, for kidnapping and murder, *Tribunal Supremo, Sala de lo Penal, Sentencia N°:798/2007*, (2007).

⁴¹ **France**: *see* footnote 47; **Italy**: Van Auker, 'Italian judge seeks trial of 140 over Operation Condor repression' *Global Research* (2008) (arrest warrants issued for current and former officials in Argentina, Bolivia, Brazil, Chile, Peru and Uruguay suspected of committing torture and enforced disappearances); **Spain**: Spanish courts have issued arrest warrants for current and former officials from Argentina, Chile, Guatemala, *Audiencia Nacional, Juzgado Central de Instruccion Uno, D. Previa 331/1999* (2008); Israel and Rwanda, *Audiencia Nacional, Juzgado Central de Instruccion No. 4, Sumario 3/2.008 – D. Auto* (2008) (arrest warrants against 40 Rwandese citizens, some of them current or former officials, for crimes against humanity, exempting President based on personal immunity); **Sweden**: International arrest warrant and extradition request issued in November 2001 for an Argentine naval officer for the enforced disappearance of a Swedish citizen, Decision by Chief Prosecutor, Tomas Lindstrand, (2001), C9-1-405-01.

⁴² *Sosa v. Alvarez Machain* 124 S. Ct. 2739 (2004) (Breyer, J., concurring), citing the Brief of *Amicus Curiae* the European Commission Supporting Neither Party, *Sosa v. Alvarez-Machain*, No. 03-339, U.S. Sup. Ct., 23 January 2004, 21 n. 48. This Court has noted the importance of this procedure. *Ernst v Belgium* § 54.

⁴³ Spanish Criminal Code, Art. 109.2; Spanish Criminal Procedure Code, Arts 111, 112.1, and 114.1. *See also*, Amnesty International, *Universal jurisdiction: The scope of universal civil jurisdiction* (2007) for a discussion of some of the many other states beyond member states that routinely permit their courts to entertain civil claims in criminal cases.

⁴⁴ *See* REDRESS, *Universal Jurisdiction in Europe* (2002).

⁴⁵ *See Association SOS Attentats and De Boëry v France*, Decision on Admissibility, No. 76642/01 (2006), 19.

⁴⁶ *Arrêt sur l'action civile de la Cour d'assises du Gard, 1 juillet 2005*, 3, reprinted in *Groupe d'action judiciaire de la FIDH, Mauritanie: Affaire Ely Ould Dah, Annex 4, novembre 2005*.

⁴⁷ **France**: Arrest warrant issued in November 2006 for eight current Rwandan officials (but not the President on the ground of personal immunity) and one former official for killings and various terrorist acts in case with eight *parties civiles* seeking civil reparations. *Deliverance de mandats d'arrêt internationaux, Ordonnance de soit-communié, Tribunal de grande instance, Paris, Jean-Louis Bruguière, Premier Vice-Président, 17 novembre 2006*, at 61. Germany arrested Rose Kabuye, the Rwandan chief of protocol, named in this warrant and extradited her to France. James Karuhanga and Felly Kimenyi, 'Rwanda: Rose Kabuye Arrives in France' (2008); **Spain**: Order issued in civil proceeding joined to criminal one freezing funds of former President Pinochet of Chile to

22. Civil judgments have also been obtained in common law countries against current and former foreign officials for crimes under international law without subject-matter immunity presenting a barrier to proceedings. In *Al-Adsani v. Kuwait*, a deputy High Court judge on 8 July 1993 *ex parte* gave the applicant leave to serve proceedings on the individual officials, which was confirmed in chambers on 2 August 1993,⁴⁸ and after effecting service, a default judgment was obtained. Under US legislation, some of which dates back more than two centuries, civil suits have been possible for torts in violation of the law of nations, even where committed by officials.⁴⁹ Although occasionally suits have been dismissed because of personal immunity, US courts have denied subject matter immunity for torture and extrajudicial killing, and have not found these suits to be barred by the US Foreign Sovereign Immunities Act ('FSIA'). The US Supreme Court has endorsed the line of cases beginning with *Filartiga v. Pena-Irala*, which found a former Paraguayan official liable for torture committed in Paraguay.⁵⁰

D. SUBJECT-MATTER IMMUNITY DOES NOT PURSUE A LEGITIMATE AIM AND IS A DISPROPORTIONATE RESTRICTION IN THIS CASE

23. In cases such as the present in which Article 6(1) is engaged, the Court has held that any limitation on access to court must not impair the very essence of the right,⁵¹ must pursue a legitimate aim and must be proportionate.⁵² The Convention is not intended to guarantee rights that are theoretical or illusory, but those that are practical and effective. This is particularly true of the right of access to the courts, in view of the prominent place held in a democratic society by the right to access to justice.⁵³ This Court will take a range of factors into account in making an Article 6(1) assessment, including the seriousness of the violations seeking to be addressed by the victims⁵⁴ and whether alternative means of redress are available.⁵⁵

(1) Subject-Matter Immunity for Torture does not Pursue a Legitimate Aim

24. Subject-matter immunity serves no legitimate purpose, such as the attribution of privileges and immunities to international organisations as an essential means of ensuring their proper functioning.⁵⁶ As the state is not impleaded through an action against an official, the arguments sometimes used to justify the application of state immunity also do not arise. It is the personal responsibility of the official that is at issue, regardless of any concurrent responsibility of the state. The purpose of subject-matter immunity is to prevent suits against officials when they incur no independent responsibility but merely act as the mouthpiece of the state. This aim does not apply in cases in which torture is alleged as it is the personal responsibility of the official

permit recovery by victims. Proceedings Summary 19/1997 C, Crime: Terrorism and Genocide, Separate Proceeding III, Operation Condor, 16 September 2004 (resulting in a settlement of US \$ 8 million to 22,073 victims on 25 February 2005) (http://www.elclarin.cl/fpa/pdf/p_250205.pdf); *Senegal*: See, e.g. Decision on the Hissene Habre case, Doc. Assembly/AU/12 (XIII) Rev. 1, adopted by the 13th Ord. Sess. Of the Assembly, Sirte, Libya, 3 July 2009 (requesting all AU member states to fund trial and Senegal, the African Commission and the European Union to consider holding a donors conference).

⁴⁸ *Al-Adsani v. Kuwait*, *supra* note 20, §. 15.

⁴⁹ Alien Tort Statute, 28 U.S.C. § 1350; Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (reproduced at 28 U.S.C. § 1350 note); Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1605A(a)(2)(A)(i)(I), 1605A(a)(2)(A)(ii) (terrorist crimes).

⁵⁰ See, *Sosa v. Alvarez Machain*, *supra* note 42. The US Supreme Court has recently granted *certiorari* to decide whether the statutory immunity of states in US courts under the FSIA applies to current and former foreign officials *Samantar v. O'Brien*, No. 08-1555 (2009).

⁵¹ See, *Mihailov v. Bulgaria*, no. 52367/99 (2005), §38.

⁵² *Ernst and Ors v. Belgium*, no. 33400/96 (2003), §48.

⁵³ See *Ait-Mouhoub v. France*, no. 22924/93 (1998), §52. See also, *Ahmed and others v HM Treasury* [2010] UKSC 2 at para 146 (characterising '[a]ccess to a court to protect one's rights is the foundation of the rule of law')

⁵⁴ See *Osman v. UK*, no.23452/94 (1998), §1150-152.

⁵⁵ *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) §44 and 53;

⁵⁶ *Waite and Kennedy v. Germany*, *id.*, §63 and 72.

that is at issue. Therefore, the only role subject-matter immunity plays is to prevent the official being held to account which cannot be considered a legitimate aim under Article 6(1). By contrast, as highlighted in section A above, ensuring accountability and victims' right to access to justice in respect of torture pursues a key aim of the international community and conforms to the object and purpose of the Convention and the CAT.

(2) Subject Matter Immunity for Torture and 'Disproportionate' Interference

25. Any interference that does pursue a legitimate aim, must also have a rational association to that aim, and be proportionate to it. This Court has emphasised that the broader an immunity, the more compelling must be its justification.⁵⁷ 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'.⁵⁸ 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'.⁵⁹

26. The nature of the wrong in respect of which access to a court is sought is relevant to the proportionality analysis under Article 6(1). Given the status of the prohibition of torture and as set out in Section A above, the positive obligations that flow from it and the broader object and purpose of the prohibition, where what is at stake is access to justice and accountability for torture, the importance of the Article 6(1) right is heightened and a restrictive approach to the permissibility of any interference with it justified.

(3) No Alternative Means of Redress Exist

27. In assessing proportionality under Article 6(1), an important factor to be taken into account is whether reasonable alternative means to effectively protect the applicants' rights under the Convention exist.⁶⁰ In the cases currently before this Court, there are no reasonable alternative means of redress available.

a) No Effective Remedies Exist for Foreign Nationals Tortured in Saudi Arabia

28. Before the English Court of Appeal in the cases presently before this Court, Mance LJ held that it would be disproportionate to automatically apply subject-matter immunity if the state in which the torture is alleged to have occurred does not provide an effective remedy in conformity with the requirements of Article 14 of the CAT. He found that, 'this must on any view weaken its position in insisting on a claim to state immunity in respect of such a claim against one of its officials elsewhere'.⁶¹

29. In Saudi Arabia, the state in which the torture was allegedly committed, the Code of Criminal Procedures, which was issued by a Royal Decree No. M/39 of 16 October 2001

⁵⁷ See *Kart v. Turkey*, no. 8917/05 (2009), § 83.

⁵⁸ *Zollman v. UK*, App. No. 62902/00 (27 Nov. 2003) (Dec.) at section 2. See *Cordova v. Italy* (no. 1) no. 40877/98 (2003), No. 1, § 63-64; *De Jorio v. Italy*, *supra* note 55, §54.

⁵⁹ See *Fayed v. the United Kingdom*, no. 17101/90 (1994), §65; *Cordova v. Italy* (No. 1), *id.*, §58.

⁶⁰ *Ernst and Ors v. Belgium*, *supra* note 52, §53-57; *Cordova v. Italy* (No. 1) *id.*, §65-66; *Cordova v. Italy* (No. 2), no. 45649/99 (2003), §66-67.

⁶¹ Court of Appeal, *supra* note 36 at §85 – 86.

prohibits torture and degrading treatment (Articles 2 and 35) and requires interrogations not to affect the will of the accused in making a statement (Article 102). The Code does not provide that torture, which is not defined at all and therefore is not consistent with Article 1 of the CAT (which Saudi Arabia has ratified), or other degrading treatment are crimes under Saudi Arabian law. There is no specific punishment for the crime of torture. Judges rely on Shari'a law, which is not all written, to decide if torture has been committed and to determine the punishment. This is further aggravated by the lack of openness and transparency of the criminal justice system and the lack of independence of judges and prosecutors.⁶²

30. The Committee against Torture has found that there are no effective mechanisms for investigating claims of torture or ill-treatment in Saudi Arabia, including claims made before courts.⁶³ Courts readily accept 'confessions' which a number of defendants allege they were forced to make under torture or other ill-treatment.⁶⁴ The main avenue for complaints regarding human rights violations committed by the state and its public servants is a Court of Grievances established in 1982.⁶⁵ The law establishing the Court provides for hearing claims for compensation in relation to actions by an administrative body (Article 13c) through the Court of Grievances, which can hear claims and give its ruling. However, it cannot hear claims that relate to acts of 'sovereignty' (Article 14), a concept that is used in the law without definition. The interveners are not aware of cases of torture being successfully investigated and prosecuted and punishment proportionate to the gravity of the crime of torture being imposed by the Court of Grievances.

31. The Committee against Torture has expressed concern over '[t]he different regimes applicable, in law and in practice, to nationals and foreigners in relation to their legal rights to be free from, and their ability to complain of, conduct in violation of the Convention'.⁶⁶

32. Effectively, there is no independent and impartial avenue of launching a civil case against any member of government for compensation for cases of human rights violations, and therefore there is a *de facto* general state of impunity for human rights violations including torture.

b) Diplomatic Protection does not Constitute an Effective or Alternative Remedy in Conformity with Article 6(1)

33. In *Al-Adsani v. United Kingdom*, the respondent state submitted that, '[t]here were other, traditional means of redress for wrongs of this kind available to the applicant [a dual national of Kuwait and the UK], namely diplomatic representations or an inter-State claim.'⁶⁷ As the claimant alleges that he was tortured in Kuwait, he could not access diplomatic protection from that state. To the knowledge of the Organisations there is no evidence that the UK has ever provided Mr. Al-Adsani with diplomatic protection or espoused his claim against Kuwait and he remains without a remedy.

⁶² See Amnesty International, *Saudi Arabia: Assaulting Human Rights in the name of Counter-Terrorism*, (2009).

⁶³ Concluding Observations on Saudi Arabia CAT/C/CR/28/5 (2002), para. 4 (i).

⁶⁴ See Amnesty International, *supra* note 62.

⁶⁵ Royal Decree Number M/78, September/October 2007 (amending a previous law concerning the establishment of such a Court). The law provides that an administrative judicial system runs in parallel to the criminal court system which is connected to the Executive and under the direct authority of the King.

⁶⁶ CAT, *supra* note 63, para. 4 (c).

⁶⁷ *Al-Adsani v. United Kingdom*, *supra* note 20 §50.

34. Under current English⁶⁸ and international law,⁶⁹ diplomatic protection does not constitute an alternative means of redress as the state enjoys discretion as to whether and on what grounds to espouse a claim taking into account a range of factors, including but not limited to the situation of the individual, such as foreign policy interests, the broader relationship between the two governments and the underlying subject matter.⁷⁰ A British citizen cannot compel the executive to espouse his or her claim. Even if the state does choose to take up the case, the claim becomes one of the state and not the individual⁷¹ and the state may but is not obliged to pass on any damages obtained to the individual.⁷² Accordingly, diplomatic protection does not present an alternative means of redress due to its discretionary nature and unpredictable availability and application.

CONCLUSION

35. The Organisations submit that the application of subject-matter immunity in the present cases does not pursue a legitimate aim. Alternatively, even if the restriction on access to a court is considered to pursue a legitimate aim, it is plainly disproportionate in light of: (i) the special status of torture in international law, reflecting the egregious nature of the violations it seeks to address; (ii) the importance associated with the positive obligations that flow from it including the right to access justice; (iii) the significant developments that have occurred during the last two decades in combating impunity, particularly in ensuring that no safe havens for torturers exist and restricting procedural obstacles to access to justice such as amnesties and immunities; (iv) the absence of any clear connection between the restriction and the aim it purports to serve and (v) the lack of any alternative means of securing redress for victims.

36. In circumstances where torture victims are precluded from bringing civil claims against individual perpetrators solely based on the latter's claim to subject-matter immunity for torture and where there are no other means to secure redress then, it is submitted, there is a breach of the right to access court under Article 6(1).



Lorna McGregor
International Legal
Adviser,
REDRESS



Widney Brown, Law
and Policy Director,
Amnesty International



Helen Duffy, Litigation
Director, INTERIGHTS



Eric Metcalfe, Legal
Director, JUSTICE
P.P. Lucy Moxham
REDRESS

⁶⁸ *R (on the Application of Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs and another*, [2002] EWCA Civ 1598.

⁶⁹ *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, ICJ Reports (1970) 3 at paras 78-79.

⁷⁰ *Id.* at para. 7; International Law Commission, Draft Articles on Diplomatic Protection (2006) art. 2.

⁷¹ PCIJ, Series A/B, No. 61, *Appeal from a Judgment of the Hungaro-Czechoslovakia Mixed Arbitral Tribunal*, 231 (1933).

⁷² *Chorzow Factory Case (Pol v. FRG)* 1927 PCIJ Series A, No. 9.

ANNEX 1: DETAILS OF ORGANISATIONS

REDRESS is an international human rights non-governmental organisation, based in London, with a mandate to assist torture survivors to seek justice and other forms of reparation. It fulfills its mandate through a variety of means, including casework, law reform, research and advocacy. It has accumulated a wide expertise on the various facets of the right to reparation for victims of torture under international law. REDRESS regularly takes up cases on behalf of individual torture survivors and has wide experience with interventions before national and international courts and tribunals. At the domestic level, REDRESS assists lawyers representing survivors of torture seeking some form of remedy such as civil damages, criminal prosecutions or other forms of reparation including public apologies. At the international level, REDRESS represents individuals who are challenging the effectiveness of domestic remedies for torture and other forms of ill-treatment, including the scope and consequences of the prohibition of torture in domestic law, the State's obligation to investigate allegations, prosecute and punish perpetrators, as well as the obligation to afford adequate reparations to the victims.

AMNESTY INTERNATIONAL is a worldwide movement of people working for respect and protection of internationally-recognised human rights principles. The organisation has over 2.8 million members and supporters in more than 150 countries and territories and is independent of any government, political ideology, economic interest or religion.

INTERIGHTS is an international human rights law centre, based in London, which has held consultative status with the Council of Europe since 1993. It is a registered charity, independent of all governments. It works to promote the effective application of international human rights standards and procedures. A critical aspect of INTERIGHTS' activities involves human rights litigation, including the filing of *amicus curiae* briefs before national and international courts and tribunals on points of law of key importance to human rights protection on which our knowledge of international and comparative practice might assist the court. INTERIGHTS has submitted *amicus curiae* briefs before this Court in many cases including *Al-Skeini and Others v the United Kingdom* (Appl. 55721/07), *Izvebekhai v Ireland* (Appl. 43408/08), and *Baysakov v Ukraine* (Appl. 54131/08).

JUSTICE, founded in 1957, is a UK-based human rights and law reform organisation. Its mission is to advance human rights, access to justice and the rule of law. It is also the UK section of the International Commission of Jurists. It has intervened in many of the leading UK cases concerning the domestic and international prohibition against torture, including *A and others v Secretary of State for the Home Department (No 2)* (2006) 2 AC 221, *RB (Algeria) and others v Secretary of State for the Home Department* (2009) UKHL 10, and *Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65.