test is therefore unworkable. Another problem is that the courts do not have a coherent theory (or, indeed, any theory) as to when a particular issue forms part of the claimant's cause of action or is a defence. Frequently, issues seem to be randomly allocated as between these categories, and, thus, the outcomes produced by the reliance test would generally be a matter of luck. The difficulties with the test do not end here. Most fundamentally, no reason has ever been given for why it should matter that the claimant needs to rely on his or her own illegality. The reliance test should be condemned.

Our fourth concern with *Hounga* relates to the endorsement of the inextricable link test. It is unclear what that test actually involves. Does it entail an enquiry as to whether the claimant caused his or her own damage? Lord Wilson evidently thought that it was separate from a causal enquiry (he supported the inextricable link test and criticised the causal approach). But if the test is not a purely causal one, what does it involve? No answer to this question was given in *Hounga*. Both Lord Wilson and Lord Hughes simply stated that the link between the claimant's offence and the tort committed against her was not inextricable. A further problem with the test is that it has never been explained why it should matter that the claimant's illegality was *inextricably* linked to the damage. Why should not the test be more demanding or less demanding? Indeed, why should it matter whether there was a link at all? We are not suggesting that these crucial questions cannot be given persuasive answers, but, rather, noting that they remain unanswered.

The law concerning the illegality defence in tort is unsatisfactory. Its condition has not been helped by *Hounga*. Arguably, it has been worsened. As such, the Law Commission's prediction that the common law in this area was gradually being rendered more satisfactory has been falsified, or at least is one in which no confidence should be had. We believe that the entire corpus of the law in this area urgently needs to be re-examined *de novo* by the Law Commission. As Diplock L.J. put it in a different context, the illegality defence "has passed beyond redemption by the courts": *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 179 (CA).

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THE TORTURE EXCEPTION TO IMMUNITY FROM CIVIL SUIT

THE European Court of Human Rights' (ECtHR) judgment in *Jones and others v U.K.* (2014) 59 E.H.R.R. 1 is the latest word on a long-running

https://doi.org/10.1017/S000819731500015X Published online by Cambridge University Press

debate about whether public international law excludes foreign State immunities before domestic courts in civil proceedings relating to the violation of *jus cogens* norms, particularly the prohibition against torture. The case joined applications by Mr. Jones and Messrs. Mitchell, Sampson and Walker, all British (or dual) nationals, alleging that the UK's grant of immunity to Saudi Arabia (in Mr. Jones's case) and to Saudi Arabian public officials (in both cases) amounted to a disproportionate interference with their right of access to court under Article 6 of the European Convention on Human Rights (ECHR). The ECtHR decided, by six votes to one, that the House of Lords' judgment in *Jones v Ministry of Interior Al-Mamlaka Al-Arabyia AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 26; [2007] 1 A. C. 270) ("*Jones* [HL]") was correct in finding that public international law did not recognise a "torture" exception to the general rule of State immunity in civil proceedings and, consequently, did not infringe Article 6 of the ECHR.

A few decisions, including the House of Lords' judgment in *R. v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International intervening) (No. 3)* [2000] 1 A.C. 147 ("Pinochet No. 3"), the International Criminal Tribunal for former Yugoslavia's decision in *Prosecutor v Anto Furundzija* (1999) 38 I.L.M. 317, a separate opinion by three judges of the International Court of Justice (ICJ) in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium*) (2002) ICJ Rep 3, some Italian and Greek cases, a slew of US cases, and the ECtHR's own divided (9–8) judgment in *Al-Adsani v U.K.* (2002) 34 E.H.R.R. 11, provide some — if indirect — support for the view that such an exception is in development. But this view is being buried under the weight of opposing authorities. Notably, *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (2012) ICJ Rep 99 clarified that a foreign State remains immune from suit in domestic courts in cases concerning the violation of *jus cogens* norms. *Jones* echoes this position and, further, follows *Jones* [HL] in finding that foreign State *officials* also remain immune from civil proceedings in such cases.

A brief review of the case's procedural history in the UK is in order. The two applications were initially rejected by a Master of the High Court on the grounds that Saudi Arabia and its officials were immune under the State Immunity Act 1978. The Court of Appeal [2004] EWCA Civ 1394; [2005] Q.B. 699 upheld Saudi Arabia's immunity but found that its officials were not immune, Lord Mance arguing that the judgment in *Pinochet No.3* in the context of criminal proceedings could also be extended to civil suits. The House of Lords found both Saudi Arabia and its officials to be immune from civil proceedings. Lord Bingham argued that in civil proceedings, a State could plead the immunity *ratione materiae* of its officials as a fundamental aspect of its own immunity. A failure to respect the former was tantamount to a circumvention of the latter, indirectly impleading the

State itself. Thus the very reasons that justified the immunity of the State as a restriction upon Article 6 ECHR also supported the immunity of its officials. In this respect, a distinction was to be maintained between civil and criminal proceedings; following *Pinochet No.3*, criminal proceedings could be initiated against the officials.

The ECtHR recalled that States may limit the right of access to justice outlined in Article 6, provided such limitations did not impair the very essence of the right, pursued a legitimate aim, and represented a proportionate means to that aim. In principle, the grant of immunity to a State in civil proceedings did pursue legitimate aims "of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty" (at para. [188]). Moreover, it followed the Grand Chamber in *Al-Adsani*, which had stated that the "decisive question when assessing the proportionality of the measure was whether the immunity rules applied by the domestic courts reflected generally recognised rules of public international law" (at para. [194]). The Court chose not to diverge from the *Al-Adsani* test, declining to undertake a substantive proportionality review — to assess the merits and circumstances of the case, and particularly the availability of alternative means of redress. The Court's brief explanation was that the *Al-Adsani* test accorded with its "obligation to take account of the relevant rules and principles of international law and to interpret the Convention so far as possible in harmony with other rules of international law of which it forms a part" (at para. [195]).

Having adopted the *Al-Adsani* test, the ECtHR considered the scope of immunity enjoyed by Saudi Arabia, and by its individual officials. With respect to the former, it relied on *Jurisdictional Immunities* to find that by the date of *Jones* [HL], public international law did not recognise an exception to foreign States' immunity in proceedings concerning torture or other *jus cogens* violations. The scope of immunity of the officials had not been addressed by the ICJ. The ECtHR noted that the House of Lords had given this issue comprehensive consideration and, although there was "some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture", it upheld the Lords' conclusion that "the bulk of the authority is . . . to the effect that a State's right to immunity may not be circumvented by suing its servants or agents instead" (at para. [213]).

The ECtHR set out the following line of reasoning: State immunity in principle protects officials in respect of official acts "under the same cloak" as the State itself (at para. [204]); torture may be regarded as an official act by virtue of Article 1 of the Convention Against Torture (CAT); ergo acts of torture qualify for immunity and there is no basis in public international law for excepting torture.

The thrust of the ECtHR's judgment was that the House of Lords' judgment was neither manifestly erroneous nor arbitrary, and was based on an

extensive review of the legal materials, which indicated the absence of consensus on the torture exception for immunity from civil suits. Given these facts, the ECtHR could not declare the judgment as in violation of the ECHR. In this respect the Court's position is correct and in keeping with the margin of appreciation afforded to States party to the ECHR. However, the Court should have taken a more decisive position on the chain of developments prior and subsequent to *Jones* [HL] that suggest the emergence of a torture exception vis-à-vis individual officials — going beyond merely noting the trends (cf. paras [213], [215]).

In particular, the Court should have offered a more substantive consideration of the second step in its line of reasoning: the status of torture as an official act. It limited its discussion to noting the various authorities for and against this proposition, and did not offer an opinion on which is the better view. In a context where the position is clearly in flux — with growing recognition that granting immunity to State officials in cases of torture and other offences that attract individual international criminal responsibility is incompatible with the unequivocal prohibition on such offences in international law — this must count as a missed opportunity for the Court to weigh in on which view is most "in harmony with other rules of international law". Moreover, given the House of Lords' own decision in this respect in *Pinochet No. 3*, it is regrettable that the ECtHR did not give express consideration to whether a distinction between civil and criminal proceedings is material to the qualification of torture as an "official" act. Indeed, given that the civil/criminal distinction is not rigidly drawn in a number of ECHR States, the Court may have found that the better view would be that it is not a material distinction. This would not have affected the conclusion that, given the indeterminacy of the law on this point at the time, *Jones* [HL] was not a violation of the ECHR. But such consideration by an international court could greatly influence the development of international law on a key issue.

At any rate, for all its non-committal approach, *Jones* supplies the seeds of its own subversion: acknowledgement of recent legal developments, a pithy dissent by Judge Kalaydjieva, references to cases on point pending before the Supreme Courts of Canada and the US, and to the evolving international opinion reflected in discussions surrounding the International Law Commission's work on immunities in criminal proceedings. These may succeed in clarifying the scope of the exception that should operate in claims relating to torture, and other *jus cogens* violations, and allow for greater access to civil remedies in future cases. However, it must not be forgotten that in the present case, the four applicants are left without relief.

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https://doi.org/10.1017/S000819731500015X Published online by Cambridge University Press