UN CONVENTION ON STATE IMMUNITY: THE NEED FOR A HUMAN RIGHTS PROTOCOL

The United Kingdom (UK) signed the UN Convention on Jurisdictional Immunities of States and their Property (Convention) less than a year after it was adopted by the UN General Assembly.[1] The signature came only a few months after an open, but not well publicized, consultation with academics and civil society,[2] and several months before a crucial appeal, in which the Secretary of State for Constitutional Affairs is a party, is heard by the House of Lords of a decision permitting a civil suit to proceed against foreign government officials for torture committed abroad.[3] Despite the signature, the UK has not yet announced whether it will ratify the Convention and, if so, whether it intends to do so with an understanding, declaration or reservation.[4] As discussed below, it appears that the Convention might preclude victims of genocide, crimes against humanity, war crimes, torture and other crimes under international law, as well as other human rights violations, committed abroad from recovering civil reparations in UK courts against states or their current or former officials or agents. In the light of the numerous ambiguities in the Convention and the risk that it will be interpreted by national courts as barring such reparations in those courts, the UK should not ratify it until a protocol is adopted expressly guaranteeing victims and their families the right to recover reparations in such cases.

I. BACKGROUND

The Convention seeks to codify a rapidly evolving and complex area of international law concerning litigation over commercial matters engaged in by states and their organs or instrumentalities and civil suits seeking reparations for personal injuries and property damage caused by states and their officials and agents. In the light of the wide divergences in national legislation and jurisprudence and views of scholars, adoption of the Convention after a quarter century of effort was a diplomatic triumph, for which

[1] UNGA Res A/59/38 (2004), 2 Dec 2004. The United Kingdom signed the Convention on 30 Sept 2005. The author is grateful for thoughtful comments on an early draft by Andrew Dickinson, Lady Hazel Fox, Lorna Mcgregor, Kate Parlett and Elizabeth Wilmshurst.

[2] The Foreign and Commonwealth Office invited submissions from selected persons and organizations and on the question whether the UK should sign the Convention with or without an understanding or reservation. In addition to a meeting organized by the British Society of International Law in Nov 2004, there had been a meeting and a conference at Chatham House on the Convention, on 20 Jan 2005 and on 5 Oct 2005. See The new state immunity convention: commercial transactions, human rights, summary of discussion at International Law Programme Discussion Group, 20 Jan 2005, and State immunity and the new UN Convention, Chatham House, 5 Oct 2005, Transcripts and summaries of presentations and discussions (Chatham House Transcript) available at <http://www.riia.org>.

[3] *Jones v Ministry of the Interior Al-Mamlaka Al-Arabiya as Saudiya (The Kingdom of Saudi Arabia) (Judgment)* Case No A2/2004/0489 Court of Appeal (16 May 2005) appeal to be argued 25–27 April 2006.

[4] Lord Falconer has stated in response to a request by Lord Archer of Sandwell for a full parliamentary debate on whether protocols or reservations would be necessary before the United Kingdom decides whether to ratify the Convention that 'there should be a proper debate before ratification occurs'. Hansard (12 Oct 2005) col 376.

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chall@amnesty.org

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Dr Gerhard Hafner, a member of the International Law Commission (ILC) and the Chair of the Ad Hoc Committee established by the General Assembly to propose solutions to a number of issues that arose with respect to the 1991 ILC draft Convention, deserves great credit.

However, whether it was a triumph for victims of crimes under international law is quite another matter. It is true that the long-term erosion of state immunity in civil cases leading to the adoption of the Convention has largely been in the field of private international law matters, such as commercial contracts and torts involving insurable conduct, such as car accidents. However, the drafters had the opportunity, which they twice rejected, apart from a handful of possible narrow exceptions, to accept proposals reflecting developments in the field of human rights and international humanitarian law.[5] As explained below, if the Convention were ratified, there is a serious risk that it could prevent victims of human rights violations committed outside the forum state in peace time, including genocide, crimes against humanity, extra-judicial executions, enforced disappearances and torture, from obtaining reparations. If such human rights violations were committed abroad in a situation involving an armed conflict, it might also prevent victims in that situation from obtaining reparations. In addition, the Convention could prevent victims and their families from obtaining reparations from the state or from its officials or agents for many violations of international humanitarian law committed outside the UK, including war crimes during international and non-international armed conflict. Immunity would become impunity from civil accountability. In addition, the Convention would restrict the scope of reparations in the rare case when they were obtainable against states, their officials and their agents to compensation. This restriction would be inconsistent with international law and standards guaranteeing victims of human rights violations their right to a remedy and their right of access to a court. It would also deny victims and their families their right to obtain other forms of reparations for such violations, including restitution, rehabilitation, satisfaction and guarantees of non-repetition. The Convention would also so limit the ability to enforce any award of reparations against the property of a state as to make the award a largely symbolic one.

A. The right of victims of crimes under international law and their families to recover reparations

The right of victims and their families to recover reparations for crimes under international law, whether during peace or armed conflict, has been confirmed in provisions of a number of international instruments adopted over the past two decades. These

[5] The Chair of the Ad Hoc Committee, responding to criticism of the Convention 'on the ground that it does not remove immunity in cases involving claims for civil damages against States for serious violations of human rights', noted that this issue had been raised and dropped in the ILC and raised and dropped again in the General Assembly because 'it was concluded that there was no clearly established pattern by States in this regard'. Chatham House transcript (5 Oct 2005) 9. He added that 'it was recognized that any attempt to include such a provision would, almost certainly[, have] jeopardize[d] the conclusion of the Convention' ibid. The Chair also said that it would have been difficult to define the concept of 'serious violations of human rights', but did not discuss similar terms in other instruments, such as 'internationally recognized norms and standards' and 'internationally recognized human rights' (Rome Statute of the International Criminal Court, Art. 21 (1) (c) and (3)) or crimes under international law. ibid.

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instruments, none of which suggest that this right is restricted or abrogated by state or official immunities, include the 1984 UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,[6] the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[7] the 1998 Rome Statute of the International Criminal Court[8] and two instruments co-sponsored by the UK adopted in April 2005 by the Commission on Human Rights, the first of which was adopted subsequently in December of that year by the UN General Assembly, 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 international humanitarian law (Van Boven-Bassiouni Principles)[9] and the UN Set of principles for the protection and promotion of human rights through action to combat impunity (Joinet-Orentlicher Principles).[10] Both instruments have been cited by Pre-Trial Chamber I of the International Criminal Court in its determination that the harm suffered by victims of crimes under international law includes emotional suffering and economic loss.[11] Most recently, a working group of the UN Commission on Human Rights including the UK, adopted by consensus the UN Draft Convention on Enforced Disappearances with a

[6] UNGA Res 39/46 (10 Dec 1984) Article 14 (1) states: 'Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.' The Committee against Torture has recently indicated when it considered the report of Canada in the light of the decision by the Ontario Court of Appeal in *Bouzari v Islamic Republic of Iran* (2004) that a civil suit for torture against Iran was barred by state immunity that Art 14 requires states parties to the Convention against Torture to permit victims to recover for torture in civil suits against states and their officials. Committee against Torture, Conclusions and recommendations, 34th Sess, 2–20 May 2005 UN Doc CAT/C/CR/34/CAN (7 July 2005) paras 4 (g) (expressing concern about '[t]he absence of effective measures to provide civil compensation to victims of torture in all cases'); 5 (f) (recommending that Canada 'review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture'). See also L McGregor 'Questioning the Impact of the UN Convention on State Immunity on the Evolving Relationship between State Immunity and *Jus Cogens* Norms Under International Law (2006) 55 ICLQ 437–45.

[7] UNGA Res 40/34 (29 Nov 1985).

[8] Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference on the Establishment of an International Criminal Court, Rome UN Doc A/CONF.183/9* (17 July 1998) as corrected by the *process-verbaux* UN Doc C.N.577.1998.TREATIES-8 (10 Nov 1998) and UN Doc C.N.604.1999.TREATIES-18 (12 July 1999) Art 75.

[9] UN Comm'n Hum Rts Res E/CN.4/2005/L.48 (13 Apr 2005), adopting the 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 (Van Boven-Bassiouni Principles) and recommending that they be adopted by ECOCOC and the General Assembly, which adopted them in Resolution A/RES/60/147 (16 Dec 2005).

[10] UN Comm'n Hum Rts Res E/CN.4/2005/L.93 (15 Apr 2005), endorsing the Set of Principles for the protection and promotion of human rights through action to combat impunity (Joinet-Orentlicher Principles) and recommending that they be widely disseminated by the UN High Commissioner for Human Rights and 'to take them into account in relevant United Nations activities, especially in the framework of United Nations missions, field presences, as well as human rights, institutionbuilding and capacitybuilding activities, in cooperation with other parts of the United Nations system, States and other relevant actors'.

[11] *Situation of the Democratic Republic of the Congo* Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Case No ICC-01/04, Pre-Trial Chamber I (17 Jan 2006) para 115.

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very broad definition of the right to reparations.[12] This right is inherent in the right to a remedy, as guaranteed in Article 2 of the International Covenant on Civil and Political Rights, adopted four decades ago in 1966. Indeed, the international community recognized the rights of victims to civil recovery directly against foreign states for war crimes a century ago in Article 3 of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.[13] The scope of these instruments and the jurisprudence of international and national courts and the interpretation by international treaty bodies concerning the right to reparations, which includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, are discussed in the article by Lorna McGregor in this issue.[14]

The apparent bar in the Convention on recovery in civil suits seeking reparations against a state or its officials and agents on crimes under international law committed abroad (discussed below) is also at odds with the fundamental rule of state responsibility for internationally wrongful acts and omissions by their officials and agents.[15] As a general rule, classical 19th century methods of asserting claims against states for internationally wrongful acts, such as diplomatic interventions, which are usually made only on behalf of a state's own nationals whose rights were violated by another state, have not been effective techniques for victims of crimes under international law to obtain the full reparations to which they are entitled under international law.[16] They are rarely made on a bilateral basis on behalf of foreign nationals or stateless persons, and states parties to treaties with state complaint mechanisms rarely use them even when their own nationals are involved. States where crimes under international law have been or are being committed have largely failed to fulfil their obligations to investigate or prosecute such crimes. In addition, although international law permits and, in some cases, requires states to commence criminal investigations and prosecutions on the

[12] UN Doc E/CN.4/2005/WG.22/WP.1/Rev 4 (23 Sept 2005) Art 24.

[13] 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, reprinted in Adam Roberts & Richard Guelff *Documents on the Laws of War* 67 (3rd edn OUP Oxford 2000).

[14] McGregor (n 6) 437.

[15] Article 5 of the International Law Commission's Articles on State Responsibility, which does not by any means exhaust the full scope of state responsibility for state officials or agents, provides: 'The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.'

[16] The International Law Commission draft Articles on Diplomatic Protection do not include an obligation to exercise diplomatic protection, leaving it to the complete discretion of states. International Law Commission Report on the work of its fifty-sixth session (3 May to 4 June and 5 July to 6 August 2004) UNGAOR 59th Sess Supp No 10, A/59/10 (2004) 17.

Even when diplomatic interventions are made on behalf of a state's own nationals seeking reparations for crimes under international law against another state, they are generally an ineffective means for victims and their families to obtain reparations for such crimes. They are largely dependent on the political, economic and military power of the state of the victim's nationality and its political will. That state will be asserting the claim on its own behalf for the harm to its interests, not as an agent for the victim, and it will often sacrifice the legal rights of the victim to competing political considerations, such as maintaining friendly relations with the state responsible for the wrong. For example, the Allies often settled claims with former Axis countries for crimes committed during the Second World War against their own nationals, such as torture of prisoners of war or sexual enslavement, for derisory awards of compensation. See, for example Amnesty International *Japan: Still waiting after 60 years—Japan's Military Sexual Slavery System* AI Index: ASA 22/012/2005 (28 Oct 2005).

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basis of universal jurisdiction or to extradite for such crimes when a suspect is in the state, states still commonly fail to take either step. The International Criminal Court and other international criminal courts have restricted jurisdictions over individuals, not states, and limited resources. Therefore, they are only able to investigate and prosecute a small number of those suspected of these crimes. Civil suits in foreign national courts against states and their officials and agents are often the only effective alternative to the fundamentally flawed classical international law methods which have largely failed to provide full or, indeed, any reparations to victims of crimes under international law and their families.[17] It is regrettable that the Convention appears to undermine this effective alternative.[18]

B. Why The UN Convention Appears To Preclude Civil Recovery Of Reparations For Many Crimes Under International Law Committed Abroad

(i) General rule of immunity and scope of the Convention's coverage

The Convention establishes a broad general rule of immunity, subject to a number of limited exceptions. As explained below, the provisions of the Convention and the limited exceptions appear to preclude recovery for many crimes under international law, as well as other human rights violations, committed abroad.

Article 1 states that the Convention 'applies to the immunity of a State and its property from the jurisdiction of the courts of another State'. Article 5 provides that '[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention'.[19] Article 6 (1) requires states parties to 'give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under Article 5 is respected'.

On its face, Article 5 appears to suggest that foreign states must be accorded immunity under the Convention from jurisdiction in *all* proceedings, civil and criminal, seeking reparations for personal injuries or property damage regardless of where they were committed and regardless of whether they were crimes under international law, even if those crimes involved violations of *jus cogens* prohibitions, absent an express exception in the Convention itself. However, despite the clear and unequivocal wording of Article 5, as discussed below in Part II.C, how national courts will interpret the scope of the Convention is not entirely clear because of a number of statements and understandings

[17] Claims commissions require either the consent of the state responsible for the crimes of its officials or agents or a decision of the Security Council acting in response to a situation involving a threat to or a breach of international security, they do not always make individualized determinations and they are usually limited to awards of compensation, which often are much lower than awards in national courts. Arbitration between states is suitable for claims by a state based on the injury it suffered when its nationals were the victims of crimes, but this procedure also requires the consent of the state responsible.

[18] Oddly, the ILC recognized the inadequacy of diplomatic negotiations with respect to personal injuries and damage in the forum state by including Art 12 (see discussion below).

[19] It is regrettable that Art 5 omits the requirement in the 1991 ILC draft Convention that the general rule of immunity was subject 'to relevant rules of international law'. A similar, but more limited, provision was included in Art 33 of the European Convention on State Immunity 1972, ETS No 74, that '[n]othing in the present Convention shall affect existing or future international agreements in special fields which relate to matters dealt with in the present Convention.'

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made outside the Convention and a preambular paragraph in the General Assembly resolution adopting the Convention suggests that there may be a few situations where there are exceptions to the general rule.

Definition of state. Article 2 provides a broad definition of state and leaves room for states parties to define this term even more broadly under their internal law. Article 2 (3) states that the provisions in this paragraph 'regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State'. The ILC indicated in its 1991 commentary on the draft Convention that '[t]he term "State" should be understood in light of its object and purpose . . . as comprehending all types or categories of entities and individuals so identified which may benefit from the protection of State immunity'.[20]

Immunity of state officials. The title of the Convention would suggest that its effects on civil litigation seeking recovery for crimes under international law were limited to immunities of states, not their officials or other agents. However, Article 2, Article 6 and other provisions of the Convention suggest that state officials and other state agents may benefit from the immunity of the state afforded by the Convention, even with respect to civil suits seeking to recover pecuniary compensation for crimes under international law, such as genocide, crimes against humanity, torture, extrajudicial executions and enforced disappearances, and, possibly, war crimes.

Paragraph 1 (b) (iv) of Article 2 (Use of terms) of the Convention defines the term 'State', '[f]or the purposes of the present Convention', as including, in addition to institutional components, 'representatives of the State acting in that capacity'. It could be argued that the concept of representatives of a state acting that capacity is limited to their representative capacity *rationae materiae* or that it applies to officials only to the extent that they are sued in their representative capacity at the time the suit is initiated. However, the matter is not entirely free from doubt. Andrew Dickinson has claimed that the immunities under the Convention may extend beyond high-ranking officials to agents 'in respect of acts which they performed in respect of their official functions'.[21]

In view of the above, there is a serious risk that Article 2 (1) (b) (iv) could be interpreted in national law or jurisprudence as defining a state enjoying immunity from civil suit for crimes under international law committed by its officials as including not only government officials, such as serving heads of state, prime ministers, foreign ministers, other ministers, but also any government employee, including soldiers, or any agents of a state, such as private contractors carrying out security, intelligence, interrogation or detention functions or even paramilitary death squads. Andrew Dickinson has contended that it may be possible to bring claims against government officials and members of the armed forces of states parties to the Convention for war crimes committed abroad on the ground that such crimes cannot be regarded either as official acts or as actions of representatives of the state within the meaning of this provision.[22]

[20] ILC Final Draft Articles and Commentary on Jurisdictional Immunities of States and their Property (1991 ILC Commentary) 43rd Sess YB Int'l Law Comm'n 13 (1991), reprinted in Andrew Dickinson, Rae Lindsay and James P Loonam *State Immunity: Selected Materials and Commentary* (OUP Oxford 2005) 81.

[21] Andrew Dickinson Chatham House transcript (5 Oct 2005) 12.

[22] ibid 12–13 (not official acts); Andrew Dickinson 'Status of Forces under the UN Convention on State Immunity' (2006) 55 ICLQ 427–35, 35 (not actions as representatives of the state).

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It is also true that some judges in *Pinochet I* and *III* concluded that the infliction of torture was not an official function.[23] However, not all judges expressly concurred on this point and various formulations of this concept were used.[24] In addition, there is a risk that national courts in a state party to the Convention in a civil suit might follow the approach of the International Court of Justice (ICJ) in its severely criticized judgment in *Democratic Republic of the Congo v Belgium* (even though it involved criminal proceedings), which suggests that former senior government officials could be prosecuted for crimes under international law committed during their term of office only if committed 'in a private capacity'.[25]

(ii) Broad scope of tort suits governed by the Convention

The broad wording of the Convention would appear to govern all proceedings, civil and criminal, based on conduct amounting to crimes under international law, unless the Convention expressly excludes them. However, as explained below, the Convention was not intended to apply to criminal proceedings, but the scope of civil proceedings in tort governed by the Convention is exceedingly broad and the number of exceptions very limited.

Proceedings seeking to affect the interests or activities of a state. Even if Article 2 (1) (b) (iv) were interpreted to exclude from the definition of a state its officials and agents carrying out crimes under international law, Article 6 (Modalities for giving effect to State immunity) is so broadly drafted that there is a risk that it could be interpreted to give such officials and agents the benefit of the state's immunity from civil suits under the Convention for such crimes. Article 6 (2) (b) expressly 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.

[23] *R v Bow Street Metropolitan Stipendiary Magistrates and others, ex parte Pinochet Ugarte (Amnesty International and others intvervening) (No 3)* [1999] 2 All ER 97 per Lord Browne-Wilkinson, 115; Lord Hope, 152; Lord Hutton, 163; Lord Saville, 169–70; Lord Millett, 179; and Lord Phillips, 190; see also *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International and others intervening)* [1998] 4 All ER 897, per Lord Steyn, 109A. This view is consistent with decisions of United States Federal Courts: see, for example, *Re Estate of Ferdinand Marcos, Human Rights Litigation* 25 F. 3d. 1467 (9th Cir 1994); *Cabiri v Assasie-Gyimah* 921 F. Supp 1188 (SDNY 1996); and *Kadic v Karadzic* 70 F.3d 232 (2d Cir 1995),

[24] For example, Lord Browne-Wilkinson and Lord Hope focused on the Convention against Torture (115 and 152 respectively), while Lord Hutton focused on the *jus cogens* status of the prohibition of torture (163).

[25] *Democratic Republic of the Congo v Belgium (Judgment)* ICJ Rep (2001) para. 61. Art 3 of the Convention states that the Convention is without prejudice to the immunities enjoyed by a state under international law in relation to the exercise of the functions of its diplomats (para 1) and the immunities accorded under international law to heads of state *rationae personae* (para 2). This article leaves open the question whether and to what extent these officials do enjoy immunities under customary international law from civil and criminal proceedings in a foreign court for genocide (a question not decided by the ICJ in *Democratic Republic of the Congo v Belgium*), crimes against humanity, war crimes or torture (also not decided by the ICJ) and, if they do enjoy such immunities, whether the state of nationality has a duty either to waive them with respect to such crimes or to submit the case to its own prosecuting authorities.

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It is difficult to envisage a situation in which a state would not argue that a civil tort suit against its officials—including former officials—or agents accused of crimes under international law would not affect its property, rights, interests or activities, unless it had expressly waived any supposed immunity for such crimes or disclaimed any responsibility for the conduct of its officials or agents.

However, Andrew Dickinson has argued that a broad construction of this provision should be rejected since the commentary to the ILC's 1991 draft convention indicates that it was included to cover only proceedings involving seizure or attachment of public properties or properties belonging to or in possession or control of a state.[26] This argument may well be correct, but the commentary and the text are open to a broad interpretation since paragraph 2 (b) appears to be an explanation of the term 'proceeding' in paragraph 2 (a), which is not expressly restricted to enforcement proceedings.

(iii) Proceedings that might be permitted under terms of the Convention

The terms of the Convention would permit, expressly or implicitly, proceedings seeking recovery of reparations for some crimes under international law in a limited number of situations. First, Article 12 expressly permits civil suits based on conduct committed wholly in the forum state resulting in death or personal injury. Second, in a number of other instances, matters are, or probably are, excluded from Convention coverage. In those instances, the final preambular paragraph of the General Assembly resolution provides that 'the rules of customary international law continue to govern matters not regulated by the provisions of the present Convention', thus leaving room for the continuing long-term erosion under customary international law of state and official immunities.[27] The resolution does not form a part of the Convention itself and it is not clear what weight national courts will give to it.

The most significant possible exception to the general rule of immunity in the Convention is for criminal proceedings, since it would permit reparations claims to be made against individual accused in such proceedings by *parties civiles* in those civil law countries that permit such alternatives to civil proceedings. It is also possible that civil suits based on military activities, whether during peacetime or armed conflict, were intended not to fall within the Convention's general rule of immunity but, as described below, this view is controversial and it may not apply to situations involving armed conflict. In addition, the Convention is not intended to undermine existing treaty obligations, but only in a limited and unclear manner. Finally, regardless whether the terms of the Convention apply to a particular situation or not, it should not be read to bar recovery of reparations for crimes under international law involving breaches of *jus cogens* prohibitions.[28]

*Tort suits under Article 12 against states and their officials for crimes in the forum state***.** Article 12 expressly provides for a limited exception to the general rule in the Convention of immunity. This article appears to permit victims of some acts of genocide, crimes against humanity, war crimes, torture and other crimes under international

[26] Chatham House transcript (5 Oct 2005) (n 2) 13.

[27] Article 3 expressly excludes three immunities from the scope of the Convention, which would leave them, if the preamble of the General Assembly resolution is binding, subject to evolving customary international law: diplomatic immunities, immunities *rationae personae* of heads of state and immunities with respect to government aircraft and space objects.

[28] See generally McGregor (n 6).

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law, as well as other human rights violations, committed in the forum state or their families to recover compensation from states, their officials and agents. However, as noted below, this view has been contested by one of those closely involved in the drafting of the Convention.

Article 12 (Personal injuries and damages to property) provides:

> Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

The exception in Article 12 to the general rule of immunity in the Convention for civil suits against states, officials and their agents seeking monetary compensation for death or personal injury or damage to or loss of tangible property is extremely limited.

To the extent that Article 12 belatedly confirms long-standing national jurisprudence and legislation in certain countries that permits recovery of compensation against a foreign state or its agents for personal injuries caused in the forum state, it is to be welcomed.[29] Although this exception grew out of jurisprudence concerning traffic accidents, as the *travaux préparatoires* confirm, it would permit suits in important cases, such as killings by embassy personnel in London, political assassinations in Washington, DC, extrajudicial execution, torture of persons suspected of involvement in 'terrorist' activities by foreign intelligence agents operating in the forum state, including the transfer of persons through the forum state to facilitate such crimes, and crimes committed during a military occupation of the forum state.[30] By doing so, Article 12 confirms that there is no conceptual problem from the perspective of state sovereignty in permitting civil suits against states or their officials and agents for crimes under international law. However, depending on the applicability of the Convention to crimes resulting from military activities or involving a situation of armed conflict (see discussion below), the terms of the Convention would preclude recovery against a foreign state or its officials and agents for genocide, crimes against humanity, war crimes, torture, extrajudicial executions or enforced disappearances committed abroad, even if the victim was a national of the forum state or suffered the harm in the forum state.

The exception in Article 12 to the general rule of immunity from tort suits in the Convention is limited to an 'act or omission occurred in whole or in part in the territory of that other State [the forum state] . . . [when] the author of the act or omission

[29] See, eg, *Holubek v The Government of the United States* (*Judgment*), Austrian Supreme Court (10 February 1961) 40 Int'l Law Rep 73 (1970). This limited exception reflects a generally accepted exception, which is incorporated in the European Convention on State Immunity 1972 and was accepted by the European Court of Human Rights in *Kalogeropoulou and others v Greece and Germany* Application no 59021/00 Admissibility decision (12 Dec 2002); see also K Bartsch and B Eberling 'Jus Cogens vs State Immunity: Round Two' (2003) 5(4) German Law Journal 477.

[30] The commentary to Art 12 of the 1991 ILC draft Convention stated that in addition to insurable risks, such as traffic accidents, 'the scope of Art 12 is wide enough to cover also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination' (citing *Letelier v Republic of Chile* 488 F Supp 665 (DDC 1980) (denying state's claim of immunity for political assassination in forum state).

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was present in that territory at the time of the act or omission'. This limitation would preclude civil suits against states and officials or their agents under national legislation in certain countries permitting recovery against state officials and agents under national law for crimes under international law committed abroad under such legislation as the US Alien Tort Claims Act and the subsequent Torture Victim Protection Act and against certain states sponsoring 'terrorism' under the US Foreign Sovereign Immunities Act.[31]

The forum state limitation would also preclude civil suits for torture committed abroad for which continuing harm, including psychological harm, is suffered in the forum state, even though national courts have permitted such suits, as in the *Jones* case, and even when the state was required under a treaty to permit such suits. As noted above, the Committee against Torture recently made clear that Article 14 of the Convention against Torture requires states to authorize such suits for torture committed abroad against foreign states.[32]

Although some of the problems with Article 12 noted above could be addressed by the phrase '[u]nless otherwise agreed between the States concerned', there is a risk that this phrase could be read to apply only to expressly worded provisions in bilateral or multilateral treaties. Although such treaty provisions could provide for a broader exception to immunity, as in Article 14 of the Convention against Torture, there is a risk that the restrictive phrase 'between the States concerned' could be interpreted as requiring that the state being sued or whose officials or agents were being sued have expressly agreed to such a suit. When Article 12 is read together with the general rule of immunity in the Convention, there is a danger that it could be interpreted to exclude contrary rules of customary international law, general principles of law, *jus cogens* prohibitions and *erga omnes* obligations.

Article 12 restricts the scope of recovery of reparations to 'pecuniary compensation'. By doing so, it denies victims of crimes under international law committed abroad and their families their right to obtain all other forms of reparations from those who were responsible for the crimes recognized in international law and standards, such as Article 75 (1) of the Rome Statute of the International Criminal Court and the recently adopted the Van Boven-Bassiouni Principles and the Joinet-Orentlicher Principles, including restitution, rehabilitation, satisfaction and guarantees of non-repetition. Although there might be practical limitations in the scope of injunctive relief that a court might be able to award against a foreign state, as opposed to its officials or agents, or in the willingness of other states to recognize the judgment, there are no *conceptual* problems in declaratory relief, such as a determination that real or personal property abroad that was unlawfully seized as part of a forcible transfer of population amounting to a crime against humanity or pillaging amounting to a war crime, belonged to the victim or the victim's family.

Article 12 limits the torts for which recovery against a state or its agents is permit-

[31] The only reason cited by the ILC commentary to Art 12 of the 1991 draft Convention for this bar is that 'the basis for the assumption and exercise of jurisdiction in cases covered by this exception is territoriality'. This statement, however, ignores the numerous examples of state practice permitting civil recovery for crimes under international law committed abroad, including Art 3 of the Hague Convention IV respecting the Laws and Customs of War on Land and its 1977 equivalent in Protocol I, the extensive jurisprudence over the past quarter century in civil cases in the USA and *partie civile* proceedings in civil law countries based on universal jurisdiction.

[32] (n 5).

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ted to 'death or injury to the person, or damage to or loss of tangible property'. There is a serious risk that this restriction could be expansively interpreted to exclude a wide range of harm such as mental pain or suffering caused by torture, for example, by families of 'disappeared' persons, although this form of suffering was expressly recognized by the Bow Street Magistrate's Court in the *Pinochet* case as a form of torture subject to criminal prosecution.[33] Regrettably, there is some ambiguity in the drafting history of Article 12 on the question whether it permits recovery for mental pain or suffering.[34] In addition, the limit to death or injury to the person could be read to exclude many acts of genocide, crimes against humanity and war crimes not involving death or personal injury.[35]

The express wording of Article 12 limits the scope of damage and loss for which recovery is permitted to 'damage or loss of tangible property', thus excluding recovery for seizure of financial assets and other intangible property expropriated in violation of international law. For example, it would exclude restitution of such intangible property seized as part of the crime against humanity of deportation or forcible transfer of population, a not unusual occurrence since the end of the Cold War. The phrase 'which is otherwise competent' must not be read restrictively. It should be interpreted to mean competent under either national or international law.[36]

Criminal proceedings and partie civile actions in criminal proceedings in civil law countries. In addition to permitting suits based on torts committed in the forum state under Article 12, the Convention may not apply to criminal proceedings, although this is not expressly stated in the Convention itself. The General Assembly when adopting the Convention agreed with an understanding reached in the Ad Hoc Committee that the Convention did not apply to criminal proceedings.[37] Whether the General

[33] The court found that '[t]he effect on the families of those who disappeared can amount to mental torture.' *Kingdom of Spain v Pinochet* Judgment, Bow Street Magistrates' Court (8 Oct 1999) (Bartle, J) 38 Int'l Leg Mat 135, 140 (2000).

[34] Virginia Morris *The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property* 17 Denv J Int'l L & Pol'y 395, 425 (1988–9). The Commentary to the 1991 International Law Commission's draft Convention states that 'the scope of Article 12 is wide enough to cover . . . intentional physical harm', but it does not say that mental harm is excluded.

[35] Crimes under international law which do not necessarily involve death or personal injury include the acts of genocide of forcibly transferring children from a protected group to another group and imposing measures to prevent births within a protected group; crimes against humanity of enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, enforced disappearances and the crime of apartheid; and the war crimes of destroying or seizing property, declaring abolished, suspended or inadmissible in court the rights of enemy nationals, pillaging and conscripting or enlistment of child soldiers.

[36] The broad scope of extraterritorial jurisdiction in civil cases is evidenced by the recent decision of the United States Supreme Court in *Sosa v Alvarez-Machain* Docket No 03-339 (US Sup Ct 29 June 2004), and the decision of the Court of Appeal in the *Jones* case. Similarly, the broad scope of universal jurisdiction in criminal cases (including those involving *partie civile* claims for reparations) is evidenced by the Amnesty International study of state practice at the international and national level in 125 countries, *Universal jurisdiction: The duty of states to enact and enforce legislation* AI Index: IOR 53/002-018/2001 (Sept 2001) and the International Committee of the Red Cross study, Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (CUP and International Committee of the Red Cross Cambridge 2005).

[37] In operative paragraph 2 of Resolution A/RES/59/38, the General Assembly states that it '*[a]grees* with the general understanding reached in the Ad Hoc Committee that the [Convention] does not cover criminal proceedings.'

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Assembly resolution constitutes an agreement or instrument within the meaning of Article 31 of the Vienna Convention on the Law of Treaties is an open question and its effect on the interpretation of the Convention remains to be seen.[38] Assuming, as does Lady Fox, that this understanding is determined to reflect a legally binding interpretation, it would mean that the Convention does not apply to claims of reparations by victims of crimes under international law or their families in a criminal case in a civil law country where the individual or a group acting on behalf of victims had instituted criminal proceedings as a *partie civile* or as an *acusador particular* or *acusador popular* and were seeking obtain reparations.[39] The Convention could, therefore, restrict permanently the scope of recovery of reparations in civil proceedings for crimes under international law committed in the forum state in common law countries, but it would not preclude recovery of reparations in criminal proceedings in those civil law countries where such relief is possible, leaving the law free to evolve. This exclusion is to be welcomed, but there is no basis for a treaty provision discriminating against victims of crimes under international law and their families who are in common law countries such as the UK. Apparently, states gave no thought to this question during the drafting of the Convention.

Suits related to military activities and suits based on crimes committed during armed conflict. There is considerable controversy as to whether there is an exception to the general rule of immunity for 'military activities' and the separate question of whether that possible exception is offset by the possible exclusion of crimes committed in the forum state during situations involving armed conflict. The Chair of the Ad Hoc Committee said in his 25 October 2004 statement to the Sixth Committee that he believed that 'a general understanding has always prevailed' that military activities are not covered by the Convention.[40] Experts are not in accord on the meaning of this phrase 'military activities'.[41] In addition to the exclusion of military activities, the Chair of the Ad Hoc Committee said in his statement to the Sixth Committee that the ILC's commentary on Article 12 stated that this article did not 'apply to situations involving armed conflicts', a significantly different and, in some respects, a far broader concept.[42] He then observed that 'the preamble stated that the rules of customary inter-

[38] There is a clear distinction between the reference in the General Assembly resolution to the understanding with respect to the scope of proceedings covered and the understandings related to specific articles in the Annex to the Convention, which, according to Article 25, 'forms an integral part of the Convention'.

[39] Hazel Fox 'In Defence of State Immunity: Why the UN Convention on State Immunity is Important' (2006) 55 ICLQ 399–406. The *action civile* procedure or its equivalent is accepted and practiced in a number of civil law countries, including Austria, Belgium, Denmark, France, Luxembourg, the Netherlands, Portugal and Sweden and is possible in Finland, Germany, Greece, Italy and Spain. See Yves Donzallaz *La Convention de Lugano du 16 septembre 1998 concernant la compétence judiciaire et l'exécution des decisions en matire civile et commerciale* Vol III, No 5203–5272 (1998).

[40] The Chair subsequently explained that '[t]he ILC in its Commentary had already identified military activities in a situation of armed conflict as exempted from the Convention', and that it was his impression that all military activities were covered, but that it was up to states to determine whether the exemption extended that far. Chatham House transcript (5 October 2005) (n 2) 8.

[41] See Fox (n 39) 401. Whether peace-keeping operations are covered by the term 'military activities' is not entirely free from doubt.

[42] 1991 ILC Commentary Convention, Art 12, para 10.

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national law continued to govern matters not regulated by the provisions of the Convention'.

Assuming that the Chair's statement to the Sixth Committee is correct, the Convention's general rule of immunity would appear to be inapplicable to any crimes under international law committed in the course of 'military activities' committed by members of armed forces in peace or during armed conflict, leaving the question whether victims of such crimes committed abroad could recover against states or their officials or agents to evolving customary international law. However, if genocide, crimes against humanity, torture, extra-judicial executions and enforced disappearances or other human rights violations were committed 'in situations involving armed conflict' by any government official or agent but were not committed during the course of military activities (the bulk of such crimes committed in Rwanda in 1994 were committed outside areas of direct hostilities by civilians) then the general rule of immunity in the Convention would apply. Article 12 would not be available to permit recovery for such crimes when they were committed in the forum state, for example, during a military occupation.

In marked contrast to the understanding with respect to criminal proceedings, the General Assembly resolution merely took into account the statement to the Sixth Committee of the Chair of the Ad Hoc Committee in general terms and did not endorse this specific understanding in that statement concerning 'military activities' or 'situations involving armed conflicts', suggesting that a definitive answer will have to await a judicial determination. Andrew Dickinson has argued that the wording of the Convention, supported by the *travaux préparatoires*, demonstrate both that the Convention governs military activities and that Article 12 may permit suits based on conduct in situations in the forum state involving armed conflicts.[43] However, as mentioned above, he has also suggested that notwithstanding the foregoing, it may be possible to obtain civil recovery for war crimes.[44]

As part of the *travaux préparatoires*, this part of the Chair's statement can only be cited pursuant to Article 32 of the Vienna Convention as an aid to interpretation to confirm a meaning or to determine the meaning when an interpretation pursuant to Article 31 is ambiguous or obscure or would lead to a result that was manifestly absurd or unreasonable.

On the one hand, it could be asserted that there does not appear to be anything in the text of the Convention that would even suggest ambiguity or obscurity about its application both in peace and in armed conflict. On the other, it would be unreasonable to say that the Convention's general rule of immunity barred civil suits seeking reparation for personal injuries committed in a situation involving armed conflict that were the result of crimes under international law or other human rights violations. Indeed, the UN Commission on Human Rights has just adopted two resolutions cosponsored by the UK adopting the Van Boven-Bassiouni and the Joinet-Orentlicher Principles, which reflect current international law and standards by reaffirming the right of victims to reparations for war crimes and other crimes under international law, without any limitation to violations committed only in peacetime. Similarly, the International Committee of the Red Cross study of customary international humanitarian law confirmed that '[a] State is responsible for violations of international humanitarian law

[43] See Dickinson 'Status of Forces' (n 22) 430, 431–432.
[44] ibid 435.

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attributable to it' and that '[a] State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.'[45]

Therefore, the Convention should be interpreted as not barring civil suits seeking reparations for crimes under international law or other human rights violations committed in a situation involving any armed conflict, international or national, regardless where they were committed. However, as the controversy over the applicability of the Convention to military activities and of Article 12 to situations involving armed conflict indicates, there simply is no guarantee that all national courts in states parties to the Convention will interpret it in this way. Moreover, even if the general rule of immunity in the Convention were not to apply to such violations, it is a matter of concern that there would still be many crimes under international law and other human rights violations committed abroad not involving death or personal injury that would be subject to immunity from civil suit under the terms of the Convention.

Existing international agreements. Another exclusion from the coverage of the Convention is found in Article 26, which provides that '[n]othing in the present Convention shall affect the rights and obligations of States Parties under existing international agreements which relate to matters dealt with in the present Convention as between the parties to those agreements'. However, given the restrictive approach of the European Court of Human Rights in the *Al-Adsani* case, one cannot be confident that Article 26 would effectively address all of the above concerns with regard to the conventional law obligations of states to provide reparations.[46] In addition, this article applies only to existing agreements, giving the Convention priority over human rights or international humanitarian law treaties or protocols recognizing reparations obligations ratified after entry into force of the Convention for the state party, and it does not apply to customary international obligations. A considerable number of states have yet to ratify all of the treaties with reparations obligations. Moreover, there is a risk that this provision could be restrictively interpreted to apply to specific relationships between states parties to each other on a bilateral basis rather than to their general obligations under the treaty to individuals.[47]

Jus cogens prohibition trumps Convention. As Lorna McGregor has convincingly demonstrated, independently of the exceptions to the general rule of immunity in the Convention, to the extent that the Convention seeks to give states and their officials and agents immunity from civil actions for conduct that constitutes a violation of *jus cogens* prohibitions, such as genocide, crimes against humanity, war crimes and torture; the Convention is contrary to Article 53 of the Vienna Convention on the Law of Treaties and it would be null and void.[48] Courts have the duty to scrutinize even Security Council resolutions to ensure that they do not violate *jus cogens* prohibitions concerning human rights.[49]

[45] Henckaerts and Doswald-Beck 1 *Customary International Humanitarian Law: Rules* (Rule 149) 530; (Rule 150) 537.

[46] Application no 35763/97 123 ILR 24 (2001).

[47] Indeed, the Deputy Legal Adviser of the US State Department, who played a major role in the drafting of the Convention, has interpreted Art 26 in a manner that focuses on obligations of states to respect the sovereign rights and obligations of other states rather than the obligations of parties to the Convention to respect the rights of individuals under human rights and international humanitarian law treaties. David P Stewart 'The UN Convention on Jurisdictional Immunities of States and Their Property' (2005) 99 Am J Int'l L 194, 209–10.

[48] See McGregor (n 5) 437. For an alternative view, see Dapo Akande's remarks, Chatham House Transcript (n 2) 18–20.

[49] *Yassin Abdullah Kadi v Council of the European Union* Case no T-315/01, Court of First

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Problems with enforcement provisions. Despite a number of improvements in the Convention regarding the enforcement of judgments and pre-trial measures provisions over current law, the chances in the limited number of cases where victims or their families obtain a judgment against a state or its officials or agents of recovering are limited.[50] It is useful, however, to note that the US Foreign Sovereign Immunities Act permits much broader enforcement measures against state property in certain cases than permitted under the Convention.

C. The need for a human rights protocol

As demonstrated above, the Convention appears to preclude many civil suits for reparations for crimes under international law and other human rights violations. There appear to be a number of potential problems with seeking to repair the ambiguities and flaws in the Convention with an interpretative declaration or a reservation and it would be more effective to adopt a human rights protocol instead.

Given the plain wording of the Convention's general rule of immunity in Article 5, the broad wording of Article 6 and the narrow exception in Article 12 (the scope of which is contested by different drafters and commentators), it is difficult to imagine an interpretative declaration that would convince a national court that the Convention permitted civil suits against states and their officials and agents for crimes under international law committed abroad. It should also be noted that one state has already suggested that Article 12 should be interpreted *restrictively* to apply only to commercial acts and to exclude governmental acts in the forum state.[51] There are numerous questions that would have to be resolved to ensure that the problems identified above could be effectively addressed by an interpretive declaration or reservation. In the light of the numerous problems and ambiguities in the text, it would be a considerable challenge to word a declaration convincingly to permit civil suits against states and their officials and agents for crimes committed abroad without it being seen as a reservation. As a declaration, it might have limited legal and practical effect in national courts, which probably would not be bound by it. If a reservation were made, it is possible that it would be subject to objections as inconsistent with the objects and purposes of the Convention of uniformity, of certainty and of providing states with immunities.

Independently of the legal issues, one can doubt the political feasibility of solving the problems in the Convention with declarations or reservations. As a general rule,

Instance of the European Communities, Second Chamber, Extended Composition (21 Sept 2005) para 231.

[50] See Hazel Fox *The Law of State Immunity* (OUP Oxford 2004) x–xi (paperback edition) 244–50.

[51] The Deputy Legal Counsel of the United States Permanent Mission to the UN suggested on 2 Dec 2005, that 'Article 12 should be interpreted to apply only to commercial, not governmental acts (presumably excepting torture)'. He did not mention any other crimes under international law. Similarly, the Deputy Legal Adviser of the US State Department recently stated in relation to the scope of Article 12 that '[i]t is debatable, however, whether the traditional "public/private" distinction has entirely lost its vitality or its relevance in the area of non-commercial torts'. Stewart (n 1) 203. However, this restrictive interpretation is inconsistent with the plain language of the Convention, considerable state practice (including a number of US cases, such as *Letelier*, permitting civil suits for personal injuries for other governmental acts than torture), the drafting history and commentary by international law scholars during the drafting of the Convention and after its adoption.

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few states parties would be likely to agree to make such declarations or reservations or to agree on identical texts. Certain states might well make declarations interpreting the Convention *restrictively*, for example, to permit suits only based on commercial acts and to preclude suits based on governmental acts in the forum state. Unless all states parties were to make identical declarations or reservations, they would be of limited effectiveness in preventing impunity in national courts for genocide, crimes against humanity, war crimes, torture and other crimes under international law committed abroad.

A more effective technique to address the ambiguities and fundamental flaws in the Convention, which has been recommended by Amnesty International and Redress, would be adoption of a protocol that expressly recognized that national courts can entertain suits, both civil suits and actions in criminal proceedings commenced by *parties civiles*, against states, their organs and instrumentalities and their officials and agents for any harms caused by genocide, crimes against humanity, war crimes, torture and other crimes under international law, regardless where they were committed.[52] Given that states have just adopted the Convention after a quarter century of work, it is unlikely that a protocol along these lines could be quickly drafted, adopted and ratified widely, but it would appear to the most effective way to ensure justice for victims of the worst possible crimes in the world.

II. CONCLUSION

In the light of the above, the UK should not ratify the Convention, unless all these concerns are effectively addressed and all of the ambiguities in that instrument can be decisively clarified. Neither a declaration nor a reservation by the UK would appear to be sufficient to address these concerns and clarify the ambiguities in the Convention. In any event, none of these steps would be an effective solution unless all or most states parties to the Convention were to do the same. Therefore, the most effective solution remains a decision by the UK not to ratify the Convention until a protocol is adopted that ensures that victims of genocide, crimes against humanity, war crimes, torture and other crimes under international law committed abroad can recover reparations in the UK, coupled with a diplomatic effort to urge other states to do the same.

CHRISTOPHER KEITH HALL*

[52] Amnesty International letter to Emily Willmott, Assistant Legal Adviser, Foreign and Commonwealth Office (5 May 2005); Redress *Immunity v Accountability: Considering the Relationship between State Immunity and Accountability for Torture and Other Serious International Crimes* (Dec 2005).

* Senior Legal Adviser, International Justice Project, Amnesty International.

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