Playing the Ace? *Jus Cogens* Crimes and Functional Immunity in National Courts

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ABSTRACT

In *Pinochet (No. 3)*, the UK House of Lords ruled that former Heads of State can be held accountable for the *jus cogens* crime of torture in foreign domestic courts, notwithstanding their pre-existing functional immunity. Since then, national courts have been seen as an avenue not only for prosecuting alleged torturers but also for seeking compensation for their victims. In a spate of cases before regional and national courts, including the House of Lords, claimants have argued that foreign States and their officials are no longer immune from private suits alleging torture. These arguments have been consistently rejected, with judicial majorities stressing that the longstanding right of State immunity from civil proceedings can only be overridden by positive law or impermissible conflict with a *jus cogens* norm. This article seeks to demonstrate that the international law principles and methodology the courts applied in deciding the civil claims cases are also applicable to *Pinochet (No. 3)* and irreconcilable with its outcome. When the way in which legal argument is framed determines the result, the real dispute is revealed to lie between competing methodologies of legal argument and competing concepts of justice and State consent in international law.

Introduction

Hostis humani generis, the torturer is a violator of a *jus cogens* norm of international law, a common enemy of all mankind.[1] The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*Torture Convention*'), which most States have signed or ratified, has established torture to be an international crime and provided the machinery for universal jurisdiction over the offence.[2] In *Pinochet (No. 3)*[3] the House of Lords held that even

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[1] *Prosecutor v Furundzija* (1999) ILM 38, 349 [155] IT-95-17/1-T (Dec. 10, 1998); *Demjajuk v Petrovsky* (1985) 603 F. Supp 1468.

[2] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (10 December 1984) 1465 UNTS 85.

former Heads of State may be prosecuted for this offence before the domestic courts of another country, notwithstanding the doctrine of functional immunity. Although *Pinochet (No. 3)* was actually decided on a narrow point of treaty interpretation, it has been mythologised as 'a milestone in the history of international law',[4] symbol and evidence of a far broader rule: that a State agent's immunity from prosecution will no longer be recognised 'when the acts alleged constitute a crime under international law'[5]. *Pinochet (No. 3)* seemed to strike a blow for the ability of national courts to enforce international human rights law.

It is a development that sits uneasily with States' customary right of immunity from the jurisdiction of foreign domestic courts. The argument put in *Pinochet (No. 3)* was that the *jus cogens* status of the prohibition on torture, or the enforcement provisions in the *Torture Convention*, or both, have 'trumped' immunity from prosecution. Most proponents of the *jus cogens* restriction on immunity confine their argument to the overriding of 'functional' immunity—meaning 'former' senior officials and all other past and present officials are subject to prosecution for torture before foreign domestic courts, but holders of personal immunity (such as diplomats and current heads of state) are exempt until they leave office. The continued recognition of personal immunity from foreign domestic jurisdiction has virtually unassailable support from the practice of national courts[6] and the ICJ itself.[7]

Since *Pinochet (No. 3)*, a growing body of civil jurisprudence from regional[8] and national courts[9] has rejected the *jus cogens* 'ace' altogether, ruling that the prohibition on torture has no interaction with and so no impact on State immunity. The International Court of Justice ('ICJ') has also taken a narrow view of the relationship between immunity and *jus cogens* prohibitions.[10] Unlike the House of Lords in *Pinochet (No. 3),* these later judgments have employed a formalistic approach to the normative interaction between immunity and the *jus cogens* status of the prohibition on torture. Court majorities have emphasised that the claimant bears the burden of establishing, through clear, 'positive' evidence of international law, that functional immunity may no longer be recognised in proceedings arising from torture.

The purpose of this article is to demonstrate that the legal principles and methodology these courts employed are applicable to *Pinochet (No. 3)* and irreconcilable with its outcome. Consequently, either *Pinochet (No. 3)* or the subsequent jurisprudence is incorrect. A

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[3] *R v Bow Street Metropolitan Stipendiary Magistrate and Ors; Ex parte Pinochet Ugarte (No. 3)('Pinochet (No. 3)')* [2000] 1 AC 147.

[4] Brigitte Stern, 'Immunities for Heads of State: Where Do We Stand?', in Mark Lattimer and Philippe Sands QC (eds), *Justice for Crimes against Humanity*, (Hart Publishing, 2003) 73.

[5] See the *Resolution on Immunities from Jurisdiction and Execution of Heads of State and Governments in International Law*, adopted by the Institut de droit international at the session of Vancouver (August 2001), article 13(2).

[6] For example, *Tachiona v Mugabe* (SDNY 2001) 169 FSupp.2d ((District Court for the Southern District of New York), 259, 297; *Re Bo Xilai* (2005) ILR 128, 714-5; *Pinochet (No. 3)*, above n 3, 201-2.

[7] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2000] ICJ Rep 3 ('Arrest Warrant').

[8] *Al-Adsani v United Kingdom* (2001) 34 EHRR 273 ('Al-Adsani').

[9] *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675 (Ontario Court of Appeal) (*'Bouzari v Iran'*); *Jones v Saudi Arabia* [2007] 1 AC 270 (*'Jones v Saudi Arabia'*); *Belhas et Others v Moshe Ya'Alon*, United States D.C. Circuit Court of Appeals [February 15 2008] (*'Belhas v Ya'Alon'*).

[10] *Arrest Warrant*, above n 7, 21-2.

secondary aim is to show that the outcomes of both *Pinochet (No. 3)* and the civil claims cases were determined by the legal methodology the courts chose to use, and to highlight the real controversy underlying the debate about the relationship between functional immunity and the *jus cogens* prohibition on torture. This is the tension between theories of justice, expressed here by our abhorrence of torture and our desire to hold torturers accountable, and the role of State consent in legitimising international law.

1. Uncertainty in the Jurisprudence

A. The Proceedings against General Pinochet

Few international law cases are as well-known as the *Pinochet (No. 3)* proceedings before the House of Lords.[11] Formerly Chile's head of state, General Pinochet seized power in a military *coup d'état* in 1973 and maintained dictatorial control for decades. During this time, his government allegedly engaged in widespread human rights abuses, including torture. In 1990, General Pinochet stepped down as President of Chile and in March 1998 relinquished military command in exchange for the freshly-minted office of Senator-for-life, an office that ostensibly gave him permanent immunity from domestic prosecution in Chile. Later in 1998, General Pinochet entered the United Kingdom and underwent medical treatment. Meanwhile, Spain's Judge Garzón indicted Pinochet for a vast list of crimes, including torture, and requested, via Interpol, his extradition to Spain. Pinochet was arrested in London on 16 October 1998, pursuant to a warrant issued by a metropolitan magistrate.[12] On 17 October, and again on 23 October, the Chilean Government formally protested the exercise of jurisdiction over Pinochet as a violation of Chile's sovereign immunity. The British Government refrained from involving itself in the proceedings.

In *Pinochet (No. 1)*, in a 3:2 decision, a majority of the House of Lords rejected General Pinochet's claim to former Head of State immunity from extradition for torture, because torture, being an international crime, 'would not be regarded by international law as a function of a head of state',[13] and was therefore outside the scope of functional immunity.

Lords Slynn and Lloyd did not accept this argument, which essentially meant that torture should be considered a *private* act.[14] As Lord Lloyd wrote in dissent:

> Of course it is strange to think of murder or torture as "official" acts or as part of the head of state's "public functions". But if for "official" one substitutes

[11] *R v Bow Street Metropolitan Stipendiary Magistrate and Ors; Ex parte Pinochet Ugarte (No.1)('Pinochet (No. 1)')* [2000] 1 AC 61; *R v Bow Street Metropolitan Stipendiary Magistrate and Ors; Ex parte Pinochet Ugarte (No.2) ('Pinochet (No. 2)')* [2000] 1 AC 119; 'Pinochet (No. 3)', above n 3.

[12] The warrant was reissued on 23 October 1998 to include extraditable crimes of genocide and torture.

[13] *Pinochet (No.1)*, above n 11, 109 (Lord Nicholls), see also Lord Steyn at 115 (Lord Hoffmann agreed with Lords Nicholls and Steyn at 118).

[14] Ibid 74 (Lord Slynn), 96 (Lord Lloyd).

> "governmental" then the true nature of the distinction between private acts and official acts becomes apparent.[15]

Pinochet (No. 1) has shaped much of the commentary on the Pinochet proceedings and many subsequent cases, although it is not good law in the United Kingdom. *Pinochet (No. 1)* was set aside in *Pinochet (No. 2)* due to apprehended bias on the part of Lord Hoffmann, who heard the case despite close links to Amnesty International (which appeared as *amicus curiae* and made submissions against General Pinochet). As such, the House of Lords was called upon once more to make a pronouncement on this area of international law.

In *Pinochet (No. 3)*, this time with a 6:1 majority, the House of Lords again ruled that General Pinochet could not be granted immunity. The majority gave six separate judgments, however three common themes emerge from the tangle.

First, torture 'cannot be a state function', indeed, '[h]ow can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?'[16] This position received support from three of the seven Law Lords but the remaining four expressly recognised torture to be a public and official act.[17]

Secondly, immunity from prosecution before foreign domestic courts cannot coexist with the status of torture as a *jus cogens* crime. This argument emerges more clearly in the later jurisprudence (examined below) but it was alluded to in the reasoning of four of the majority Law Lords.[18] The argument relied on the rejection of immunity for *jus cogens* crimes before international tribunals such as Nuremberg. Lord Goff, in dissent, emphasised the distinction between holding an official 'internationally' responsible and prosecuting that official before a 'national' court, arguing that there was no settled practice that functional immunity was unavailable before foreign domestic courts.[19]

Thirdly, and unanimously across the six Law Lords in the majority, States Parties to the *Torture Convention* have, as a necessary implication to the operation of its provisions, consented to the overriding of functional immunity. This is the true *ratio* of *Pinochet (No. 3)*.

Lord Browne-Wilkinson held that this implication must be made to allow the *Torture Convention* to operate, for if it is not, 'the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive.'[20]

The other Law Lords also ruled in favour of an implication to the *Torture Convention* but did so in order to give effect to its object and purpose rather than to avoid the inoperability of its express provisions. Lord Hutton considered that 'the clear intent of the provisions is that an official of one state who has committed torture should be prosecuted if he is present

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[15] Ibid 96.

[16] *Pinochet (No. 3)*, above n 3, 203, 205 (Lord Browne-Wilkinson)

[17] Ibid, in support see 205 (Lord Browne-Wilkinson); 261 (Lord Hutton); 289 (Lord Phillips). See opposing: 242 (Lord Hope); 266 (Lord Saville); 270 (Lord Millett); 217 (Lord Goff).

[18] Ibid 199 (Lord Browne-Wilkinson); 289 (Lord Phillips); 248 (Lord Hope); 254-5 (Lord Hutton); 272-4 (Lord Millett); 266-7 (Lord Saville).

[19] Ibid 210-1, 224.

[20] Ibid 205.

in another state'.[21] Lord Millett held that 'no rational system of criminal justice can allow an immunity which is coextensive with the offence.'[22]

These Law Lords also rejected the argument accepted by Lord Goff in dissent,[23] that Article 5(2) of the *Torture Convention* would have some limited operation through State waiver on a case-by-case basis. Lord Millett stated that such an interpretation 'is entirely inconsistent with the aims and object of the Convention' and went on to assert that '[t]he evidence shows that other states were to be placed under an obligation to take action precisely because the offending state could not be relied upon to do so.'[24]

An odd variation came from Lord Saville, who also found that immunity was inconsistent with Articles 5 to 7 of the *Torture Convention*, which establishes jurisdiction and the obligation to exercise it. He reached this conclusion '[not] by implying terms into the *Torture Convention*, but simply by applying its express terms',[25] which is interesting given the express terms of the Convention are silent on the question of immunity.

Lord Hope's reasoning was also unusual and seemed to draw from *jus cogens*-based arguments on the gravity of the crime. He held that the *Torture Convention* must have been intended to override functional immunity for torture conducted on a scale that amounted to a crime against humanity, but that it was not intended to override functional immunity from prosecution for *isolated* acts of torture.[26]

Lord Goff, in dissent, challenged the reasoning of the other Law Lords, arguing first that there was no operative inconsistency and second that the 'clear intent' discerned by the majority could be located in neither the express words of the *Torture Convention* nor the *travaux préparatoires* of the drafting process.[27] As he writes of the majority's reasoning:

> It must follow, if the present argument is correct, first that it was so obvious that it was the intention that immunity should be excluded that a term could be implied in the Convention to that effect, and second that, despite that fact, during the negotiating process none of the states involved thought it right to raise the matter for discussion. This is remarkable.[28]

The precedential value of *Pinochet (No. 3)* is in doubt. There are a number of reasons for this, not least the force and cogency of the dissenting judgments[29] and the tendency of scholarly supporters to undermine the actual grounds for the judgment by approving the

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[21] Ibid 262.
[22] Ibid 277.
[23] Ibid 219.
[24] Ibid 278.
[25] Ibid 266-7.
[26] Ibid 248.
[27] Ibid 213-21.
[28] Ibid 221.
[29] Eileen Denza, 'Ex parte Pinochet: Lacuna or Leap?' (1999) 48 *International and Comparative Law Quarterly* 949, 955.

outcome of *Pinochet (No. 3)* 'if not the reasoning set out in its support'.[30] However, the chief attack upon the *Pinochet (No. 3)* precedent comes from the judgment of the ICJ in the *Arrest Warrant* case, and the approach to *jus cogens* prohibitions in the torts jurisprudence.

B. The Impact of the Arrest Warrant Judgment

In 2002, shortly after the *Pinochet (No. 3)* judgment was handed down, the ICJ gave judgment on the interrelationship between State immunity and *jus cogens* crimes, in the course of which it deliberately or inadvertently rejected the *Pinochet (No. 3)* exception. The *Arrest Warrant* case between Belgium and Congo concerned Belgium's purported exercise of universal criminal jurisdiction over the incumbent Foreign Minister of Congo for crimes against humanity, notwithstanding his personal immunity. Although the decision concerned only personal immunity, the Court also made a pronouncement about the scope of functional immunity.

The Court stated that personal immunity from foreign domestic jurisdiction was a *procedural* immunity and did not constitute a substantive defence to torture. This is because:

> Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law.[31]

Nor, the Court said, could incumbent Ministers for Foreign Affairs be said to enjoy impunity, as they may still be prosecuted in the following circumstances:

> First, such persons enjoy no criminal immunity under international law in their own countries, and thus may be tried in accordance with the relevant rules of domestic law.
>
> Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.
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> Thirdly, after a person ceases to hold [office] … Provided that it has jurisdiction under international law, a court of one State may try a former Minister of Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.
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> Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international courts, where they have jurisdiction.[32]

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[30] As Lady Hazel Fox QC observes in 'The Resolution of the Institute of International Law on the Immunities of Heads of State and Government' (2002) 51 *International and Comparative Law Quarterly* 119, 121.

[31] *Arrest Warrant*, above n 7, 25 (Judgment of the Court).

[32] Ibid.

In what appears to be an exhaustive list, there is no mention of the *Pinochet (No. 3)* exception for prosecutions pursuant to the *Torture Convention* in foreign national courts. The third category recognises the continuation of immunity for acts committed during an official's period of office and in official capacity, and so would only include the *Pinochet (No. 3)* exception if torture is considered a 'private act', a dubious proposition.[33] At the least, *Arrest Warrant* casts doubt on the correctness at international law of *Pinochet (No. 3)*.[34] At its highest, it can—and has—been used as conclusive authority for the continuation of functional immunity from the exercise of jurisdiction under Articles 5 to 7 of the *Torture Convention*.[35]

However, although ICJ judgments ordinarily command great persuasive value, the Court's brief treatment of functional immunity is not determinative of the question posed by this paper. It was not part of the *ratio* for the decision in that case, and even if it were, the Court is not bound by its previous judgments.[36] Other members of the court dissented on this point,[37] it has been criticised by scholars,[38] and former President Higgins has commented that the scope of functional immunity was not fully explored in *Arrest Warrant* and should by no means be considered closed.[39] Dame Higgins noted also that there has been an upsurge in court activity since *Arrest Warrant*, further chipping away at immunity for *jus cogens* crimes.[40]

Indeed, the *opinio juris* is simply too mixed to permit so perfunctory a ruling. For example, both Spain and the United Kingdom sought to exercise criminal jurisdiction over General Pinochet, and Belgium and the Netherlands were also willing to prosecute Chile's former head of State before their national courts. These four States therefore evidenced their belief that functional immunity did not extend to criminal jurisdiction over alleged torturers. The United States, in an *amicus* brief, has likewise recognised the absence of immunity from

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[33] Antonio Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case' (2002) 13 *European Journal of International Law* 853, 867-70.

[34] Marina Spinedi, 'State Responsibility v. Individual Responsibility for International Crimes: *Tertium Non Datur*?' (2002) 13 *European Journal of International Law*, 895-9; Ed Bates, 'State Immunity for Torture', (2007) 7 *Human Rights Law Review* 4.

[35] 'France in Violation of Law Grants Donald Rumsfeld Immunity, Dismisses Torture Complaint' (Press Release: Centre for Constitutional Rights, 26 November 2007) accessed online at <http://ccrjustice.org/newsroom/press-releases/france-violation-law-grants-donald-rumsfeld-immunity%2C-dismisses-torture-comp>.

[36] Statute of the International Court of Justice, art 59.

[37] *Arrest Warrant*, above n 7, 86, (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) ('Joint Separate Opinion'); 97-8 (Dissenting Opinion of Judge Al-Khasawneh); 161 (Dissention Opinion of Judge van den Wyngaert).

[38] For example, Cassese, above n 33; Steffen Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v Belgium* Case' (2002) 13 *European Journal of International Law* 877-93; Paola Gaeta, '*Ratione materiae* Immunities of Former Heads of State and International Crimes: The *Hissène Habré* Case' (2003) 1 *Journal of International Criminal Justice*, 89-96.

[39] Dame Rosalyn Higgins QC, President of the International Court of Justice, 'After Pinochet: Developments on Head of State and Ministerial Immunities', 2006 Incorporated Council of Law Reporting for England and Wales Annual Lecture, 17.

[40] Higgins, above n 39, 2.

criminal prosecutions.[41] Even States traditionally jealous of their officials' immunity rights in foreign domestic courts, such as Djibouti, have allowed that such an exception is at least debatable.[42]

These examples alone are not sufficient to prove the existence of a customary exemption to immunity in cases of *jus cogens* crimes, but they do cast doubt on the conclusiveness of the ICJ's brusque treatment of functional immunity, unsupported as it is by reasoning from first principles or the evidence of State practice and *opinio juris*. The availability of functional immunity from prosecution for torture remains an open question.

C. State Immunity and the Tort of Torture

Since the *Pinochet (No. 3)* proceedings, a number of respected courts have given judgment on the relationship between State immunity and civil suits against alleged torturers. These include the European Court of Human Rights,[43] the United Kingdom's House of Lords, [44] the Ontario Court of Appeal (with special leave to appeal to the Canadian Supreme Court denied)[45] and the D.C. Circuit Court of Appeals in the United States.[46] Each of these courts has found in favour of the continued immunity of State officials and the State itself from proceedings arising out of torture.

1. Drawing an Analogy between Civil and Criminal Proceedings

These judgments concerned State immunity from *civil* procedure—the immunity of States and State officials from actions in tort by individual plaintiffs. The doctrinal difference between functional immunity from civil proceedings and functional immunity from criminal proceedings derives from the concept of 'impleading the State'. Determining an office holder's individual liability for his or her official acts conjointly determines the international liability of the State for the actions of its organs.[47] This violates the absolute immunity of that State from foreign domestic courts.[48]

The argument is made that States cannot be impleaded by the prosecution of their officials because States have no criminal 'guilt' to be determined. States are not responsible

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[41] US Statement of Interest (11.17.06) at 30, filed in *Matar v. Dichter* (SDNY 2001) 500 FSupp.2d (District Court for the Southern District of New York), 05 Civ 10270 (WHP).

[42] Oral argument of Djibouti: Public sitting held on Tuesday 22 January 2008, at 3 pm, at the Peace Palace, President Higgins presiding, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, CR/2008/3, para 30, accessed online at <http://www.icj-cij.org/docket/files/136/14419.pdf?PHPSESSID=4e6e078919a28f23d4d67112635ecd0f>.

[43] *Al-Adsani*, above n 8, 273.

[44] *Jones v Saudi Arabia*, above n 9, 270.

[45] *Bouzari v Iran* [2005] SCCA No. 410 Docket No. 30523.

[46] *Belhas v Ya'Alon*, above n 9.

[47] *UN Convention on State Immunity* 2004, art 6(2)(b); this reading endorsed in *Jones v Saudi Arabia*, above n 9, 281.

[48] *Al-Adsani*, above n 8, para 65.

for 'crimes', only 'delicts'.[49] This system of 'duality of responsibility'[50] means that States are responsible for the internationally wrongful acts committed by their agents and are impleaded by proceedings concerning the agent's *tortious* liability, but the *criminal* responsibility of the agent who committed the wrongful act can be determined without impleading the State.[51]

The validity of this doctrinal distinction was questioned by Mance LJ in England's Court of Appeal, who wrote:

> It is not easy to see why civil proceedings against an alleged individual torturer should be regarded as involving any greater interference in or a more objectionable form of adjudication upon the internal affairs of a foreign state.[52]

Although the House of Lords overturned Mance LJ on this point,[53] UN Special Rapporteur, Roman Anatolevich Kolodkin, has expressed support for it. Whilst a criminal prosecution may *legally* concern a physical person, 'it essentially concerns the exercise of sovereign prerogatives of one State in relation to another.' Indeed, the exercise of criminal jurisdiction 'often involves extremely intrusive actions of investigations', meaning 'these sovereign interests may be affected to a much greater degree than in the exercise of civil jurisdiction.'[54]

In any event, the consequence of continuing to observe this distinction goes no further than limiting the direct precedential value of civil proceedings for criminal proceedings, and vice versa. It does not prevent an analogical assessment of the way three common principles have been addressed in the civil claims cases.

First, can an act of torture, which is an international crime, be claimed to fall within the definition of State 'official functions' to which immunity would apply? Second, is immunity inconsistent with and so 'trumped' by the hierarchically superior *jus cogens* prohibition?

The third point concerns the interpretive relationship between immunity and the *Torture Convention*. Here, the analogy is more imperfect, as the *Pinochet (No. 3)* decision turned on the interpretation of articles 5 to 7 of the *Torture Convention*, and the civil claims cases concerned entirely different provisions. The relevance of these subsequent pronouncements on the interaction in US domestic law between the *Torture Victims Protection Act 1991* and the *Foreign*

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[49] See International Law Commission, *Report on State Responsibility* (1998), UN Doc A/53/10, [331], tabling Article 19 of the Draft Articles. Article 19 concerned State responsibility for international crimes and was excised from the final Articles on State Responsibility.; *Jones v Saudi Arabia,* above n 9, 290 (Lord Bingham).

[50] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment 26 February 2007 (ICJ) ('Genocide case'), para 173.

[51] Hazel Fox, *The Law of State Immunity* (Oxford University Press, Oxford, 2002) 514-5; *Bouzari v Iran*, above n 9, para 91 (Goudge JA).

[52] *Jones v Saudi Arabia* [2005] QB 699, paras 75-6 (Mance LJ).

[53] *Jones v Saudi Arabia*, above n 9, 290.

[54] *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, Special Rapporteur Roman Anatolevich Kolodkin (60th session of the ILC (2008), A/CN.4/601, 29 May 2008 ('Preliminary Report of the Special Rapporteur'), para 53.

Sovereign Immunities Act 1974,[55] or between the Basle Convention and access to justice[56] lies in these courts' pronouncements on both the 'threshold of inconsistency' required in order for immunity to be impliedly overridden by a later norm and the need for 'positive evidence' of State practice in establishing this.

2. Surveying the Post-Pinochet Compensation Cases

(a) *Al-Adsani v United Kingdom*

In 2002, the European Court of Human Rights ('ECtHR') provided the first major consideration of the relationship of immunity to the prohibition on torture since *Pinochet (No. 3)*. Mr Al-Adsani alleged a senior official in Kuwait had subjected him to torture, an ordeal in which he sustained serious burns to 25 per cent of his body. After his return to the United Kingdom, he instituted civil proceedings for compensation against the individual official and the State of Kuwait. The English courts ruled Kuwait was immune from suit. Al-Adsani applied to the ECtHR for relief, arguing that the recognition of state immunity from a claim arising out of the violation of a *jus cogens* norm was an impermissible limitation on his right of access to the courts under Article 6 of the *European Convention on Human Rights*.[57]

By just nine votes to eight, the ECtHR rejected the applicant's claim, holding that limiting Article 6(1) by recognising immunity 'pursues the legitimate aim of complying with international law.'[58] The majority's reasoning included three key points:

First, that immunity from the jurisdiction of a national court did not conflict with the *jus cogens* prohibition on torture, as '[t]he grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right'.[59]

Secondly, the onus was on the applicant to demonstrate a new customary rule removing state immunity from civil proceedings for torture.[60]

Thirdly, rules of international law:

> ... cannot be interpreted in a vacuum … The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.[61]

The minority judges based their decision on the *jus cogens* status of the prohibition on torture, the acceptance of which (they argued):

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[55] *Belhas v Ya'Alon*, above n 9.
[56] *European Convention for the Protection of Human Rights and Fundamental Freedoms* ('ECHR') (4 November 1950) art 6, considered in Al-Adsani, above n 8.
[57] *Al-Adsani*, above n 8, paras 1-19.
[58] Ibid, para 54.
[59] Ibid, para 48.
[60] Ibid, para 61.
[61] Ibid, para 55.

> ... entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions.[62]

Unfortunately, the Joint Dissenting Opinion misconstrues the majority opinion as arguing that *jus cogens* rules apply differently to immunity from civil and criminal proceedings.[63] The minority judgement did not therefore engage with the true obstacle raised by the Court to these 'normative hierarchy'[64] arguments: that the *jus cogens* prohibition on torture does not conflict with the 'procedural bar' of immunity at all.[65] However, in his separate dissent, Judge Ferrari Bravo did allude to how the *jus cogens* prohibition on torture might affect immunity by asserting that the scope of the *jus cogens* included an active duty to enforce the prohibition:

> It follows [from State acceptance of the jus cogens prohibition] that every State has a duty to contribute to the punishment of torture and cannot hide behind formalist arguments to avoid having to give judgment.[66]

(b) *Bouzari v Iran*

In *Bouzari v Iran,*[67] the Ontario Court of Appeal considered the relationship between the *jus cogens* prohibition on torture and State immunity from civil proceedings. The appellant had been abducted, imprisoned and tortured by agents of the Iranian state over six months from June 1993 until his ransom in January 1994. He escaped Iran and eventually immigrated to Canada, where he brought a civil action against the State of Iran. His action was barred by State immunity.[68]

The main point of interest to draw from the judgment is the Ontario Court of Appeal's consideration of the consequences of the *jus cogens* prohibition on torture. Justice Goudge, who wrote the court's judgment, accepted that the prohibition on torture was *jus cogens* and that *jus cogens* norms were hierarchically superior to other norms (such as immunity). The true point of contention was 'the scope of that norm'.[69]

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[62] Ibid, para 3 (Joint Dissenting Opinion).
[63] Ibid, para 4 (Joint Dissenting Opinion).
[64] The term coined by Lee Caplan, see 'State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory' (2003) 97 *American Journal of International Law*, 741-81.
[65] *Al-Adsani*, above n 8, para 48.
[66] Dissenting Opinion of Judge Ferrari Bravo (Translation), above n 8.
[67] *Bouzari v Iran,* above n 9, 675.
[68] Ibid, paras 1-2 (Goudge JA). Iran did not defend and therefore is deemed by Canadian law to have admitted the truth of the allegations: [5].
[69] Ibid, para 87 (Goudge JA).

> The extent of the prohibition against torture as a rule of *jus cogens* is determined not by any particular view of what is required if it is to be meaningful, but rather by the widespread and consistent practice of states.[70]

The Court held that the *jus cogens* prohibition on torture did not affect State immunity from civil actions concerning torture. First, as a matter of principle, barring a civil action did not conflict with the *jus cogens* prohibition on torture, as there were other means of enforcing the prohibition. Secondly, the Ontario Court of Appeal found that there was no widespread and consistent State practice to support the *jus cogens* rule having the effect of overriding State immunity from civil proceedings.[71]

(c) *Jones v Saudi Arabia*

In 2005, England's Court of Appeal heard a conjoined appeal concerning the validity of granting State immunity to the Kingdom of Saudi Arabia and individual Saudi officials whom the claimants alleged subjected them to torture.[72] The Court of Appeal held that *Pinochet (No. 3)* was precedent for overriding the immunity of the foreign officials (though not of the foreign State itself) from civil actions concerning torture.

The decision was appealed to the House of Lords, which reversed the judgment and took the opportunity to 'clarify' *Pinochet (No. 3)*:

> The essential ratio of the [*Pinochet (No. 3)*] decision … was that international law could not without absurdity require criminal jurisdiction to be assumed and exercised where the ` conditions were satisfied and, at the same time, require immunity to be granted to those properly charged.[73]

Consequently,

> The *Torture Convention* withdrew the immunity against criminal prosecution but did not affect the immunity for civil liability.[74]

In *Jones*, the House of Lords once again considered the *Al-Adsani* issue: whether recognising State immunity from civil actions for torture was inconsistent with the *jus cogens* prohibition on torture and therefore an illegitimate denial of access to the courts.[75]

The Law Lords noted first that torture was an 'official function' for the purpose of immunity.[76] The Court then rejected the *jus cogens* claim with reference to Lady Hazel Fox QC:[77]

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[70] Ibid, para 90.
[71] Ibid, paras 93-4.
[72] *Jones v Saudi Arabia*, above n 52, 699.
[73] *Jones v Saudi Arabia*, above n 9, 286 (Lord Bingham).
[74] Ibid 299 (Lord Hoffmann).
[75] Ibid 284 (Lord Bingham).
[76] Ibid 286 (Lord Bingham), 300-2 (Lord Hoffmann).

> State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in *a jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of state immunity upon which a jus cogens mandate can bite.[78]

Having established this, Lord Hoffmann went on to explain that:

> To produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary procedural rule … contrary to the assertion of the minority in *Al-Adsani,* [such a rule] is not entailed by the prohibition of torture.[79]

Lord Hoffmann considered the Torture Convention's provision of universal criminal jurisdiction sufficient to generate this ancillary procedural rule overriding immunity from prosecution,[80] but found that the absence of a universal civil jurisdiction article in the *Torture Convention*, and the lack of State practice and positive judicial decisions meant that the overriding of immunity from civil action could not be established. Critically, 'this lack of evidence is not neutral; since the rule on immunity is well-understood and established, and no relevant exception is generally accepted, the rule prevails.'[81]

(d) *Belhas v Ya'alon*

Belhas v Ya'alon,[82] heard before the D.C. Circuit Court of Appeal, was a civil action brought by relatives of victims of the 1996 Israeli shelling of Qana, a UN compound in southern Lebanon. The defendant, the retired General Ya'alon, was served personally during a visit to the United States.

General Ya'alon moved to dismiss the case at first instance, claiming State immunity. His motion included a letter from the Ambassador of the State of Israel to the United States affirming that General Ya'alon had been acting 'in the course of [his] official duties, and in furtherance of official policies of the State of Israel. To allow a suit against [General Ya'alon] is to allow a suit against Israel itself'.[83] At first instance, the district court applied the *Foreign State Immunities Act 1976* ('FSIA'), which bars the jurisdiction of United States courts over foreign States, and dismissed the case.

The plaintiffs put three propositions on appeal. First, that as war crimes are a *jus cogens* violation, General Ya'alon acted outside the scope of his lawful authority, and so immunity

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[77] Ibid 288-9 (Lord Bingham), 293 (Lord Hoffmann).
[78] Fox, above n 51, 525.
[79] *Jones v Saudi Arabia*, above n 9, 293.
[80] Ibid 294.
[81] Ibid 289 (Lord Bingham).
[82] *Belhas v Ya'alon*, above n 9.
[83] Ibid, Opinion of the Court, 4.

under the FSIA never arose.[84] This argument, which is essentially that a violation of a *jus cogens* norm can never be an official act, was rejected.[85]

Second, that General Ya'alon's immunity ceased after he left office. The Court gave this argument short shrift also, stating that such an approach 'makes no practical sense', and that '[i]t is difficult to say how [the State] could act within its immunity without being able to extend that immunity to the individual officials who acted on its behalf.'[86]

The third proposition, and the most interesting for the purposes of this article, concerns a unique law of the United States, the *Torture Victim Protection Act 1991* ('TVPA'). It was that giving effect to this recent and specific law must, by necessary implication, abrogate the earlier and more general FSIA.

The TVPA grants universal civil jurisdiction over wrongful death actions comparable to the criminal jurisdiction granted under the *Torture Convention*. The TVPA confers civil liability for damages on '[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation… subjects an individual to extrajudicial killing'.[87]

Similar to the Article 1 definition of torture in the *Torture Convention*, an individual's liability under the TVPA will necessarily involve that individual acting in governmental capacity and so being entitled to a 'co-extensive immunity' under the FSIA. The plaintiffs argued that the FSIA therefore conflicted with the TVPA, and that the TVPA, as a later and more specific law, must abrogate the FSIA to be given effect.[88]

The Court held that the TVPA could still be given (limited) effect without abrogating the FSIA. This is because a TVPA suit could fall under one of the exceptions to the FSIA, such as a State waiver of immunity.[89]

Senior Circuit Judge Williams, in a separate concurring opinion, emphasised that the TVPA deliberately created the liability of individuals only and not of States, and quoted from the Senate Report from the drafting stages:

> The committee does not intend [FSIA, diplomatic, and head-of-state] immunities to provide former officials with a defense to a lawsuit brought under [the TVPA]. To avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state, which would require that the state admit some knowledge or authorisation of relevant acts.[90]

So, the TVPA does operate, unless and until the defendant national's State admits an agency relationship with the individual being sued, at which time immunity will bar the

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[84] Ibid, addressed by concurring Senior Circuit Judge Williams, 5.
[85] Ibid.
[86] Ibid, Opinion of the Court, 9, 11.
[87] *Torture Victim Protection Act 1991*, 28 USC §1350 sec.2(a).
[88] *Belhas v Ya'alon*, above n 9, Opinion of the Court, 15.
[89] Ibid 15-6.
[90] Senate Report (1991) No. 102-249, 8, cited by Senior Circuit Judge Williams, *Belhas v* Ya'Alon, above n 9, 7. This intention was reiterated in Congress, see 138 Cong. Rec. S2668 (3 March 1992) (statement of Senator Specter on passage of the TVPA), cited in Opinion of the Court, 7.

action. This parallels the international law requirement that a State effectively concedes attribution in order to satisfy foreign national courts of the official's functional immunity.[91]

2. Applying this Reasoning and Methodology to *Pinochet*-Type Situations

A. Whether Torture is an Official Act which Functional Immunity Protects

Judicial authority on this issue is all one way: the scope of functional immunity includes all governmental acts, lawful or otherwise—even alleged international crimes.[92] The overview of immunity provided above indicated the general rule: that functional immunity extends to all acts purportedly committed in the course of official functions, including acts outside the official's domestically lawful authority, and even criminal acts. This is therefore taken as the starting point, and the onus of persuasion has been placed on those who assert that international crimes fall outside the scope of functional immunity.

The argument generally put is that torture, being an international crime, is so illegal that it cannot be committed even under 'colour of law';[93] indeed, all States Parties to the *Torture Convention* are under an obligation to pass domestic legislation criminalising it.[94] It is neither a private act nor a governmental act; it is in a third category.

This is unpersuasive, for three reasons. First, if torture was not committed within an official capacity, it would not be the action referred to in the *Torture Convention*, and thus impossible to discuss with reference to it. Article 1, which defines 'torture', includes as an element of the offence that it be committed 'with the consent or acquiescence of a public official or other person acting in an official capacity', clearly indicating that international crimes are also committed within official capacity.[95]

Secondly, if international crimes were not committed in official capacity, it would produce an asymmetry between the rules of State immunity and State responsibility.[96] State responsibility requires the *attribution* of a human agent's conduct. For a State official's conduct to be attributed, that official must be acting within actual or apparent official capacity, which can include unauthorised or unlawful conduct.[97] Violations of *jus cogens* are within official

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[91] *Djibouti v France*, above n 42, para 196.

[92] *Pinochet (No. 3)*, above n 3, Lord Hope, 242, Lord Saville, 266, Lord Millett, 270, Lord Goff, 213, 217 (dissent); *Arrest Warrant*, above n 7, Judgment of the Court, 25; *Jones v Saudi Arabia* , above n 9, 286 (Lord Bingham), 300-2 (Lord Hoffman).

[93] *Jones v Saudi Arabia*, above n 9, 300 (Lord Hoffmann).

[94] *Torture Convention*, art 2(1).

[95] Wirth, above n 38, 891; Cassese, above n 33, 869; Ernest K Bankas, *The State Immunity Controversy in International Law* (2005), 259; Hazel Fox, 'State Immunity and the International Crime of Torture' (2005) 2 *European Human Rights Law Review* 142, 148.

[96] *Jones v Saudi Arabia*, above n 9, 301 (Lord Hoffmann).

[97] *Articles on State Responsibility,* GA Res 56/83, UN GAOR, 56th sess, Annex, Agenda Item 162, UN Doc A/Res/56/83 (2001), arts 4 and 7;James Crawford, *The International Law Commission's Articles on State Responsibility*

[footnote continued on the next page]

capacity for the purpose of State responsibility.[98] It follows that such crimes are also within official capacity for the purpose of State immunity.[99]

Thirdly, criticism by scholars[100] and the weight of State practice indicate that crimes of *jus cogens* are thought to fall within the scope of functional immunity. For example, France recognised Donald Rumsfeld's functional immunity from prosecutions for torture; [101] the United Kingdom supported the State immunity of Saudi Arabian officials from civil claims arising from torture;[102] and the USA has intervened in support of the immunity of Israeli officials from proceedings regarding war crimes.[103]

It can therefore be concluded that torture is within official capacity for the purpose of functional immunity from prosecution.

B. Whether Immunity for Torture is Consistent with its Jus Cogens Status

The second major argument for the *Pinochet (No. 3)* outcome is the 'normative hierarchy' argument. If functional immunity from prosecutions for torture is inconsistent with the *jus cogens* norm prohibiting torture, then immunity can be neither claimed nor granted without violating *jus cogens*.[104] This argument has many facets and several issues arise. First, whether claiming functional immunity for torture is a claim of impunity and is thus 'directly' inconsistent with the *jus cogens* prohibition. Secondly, in the alternative, whether granting functional immunity for torture amounts to *de facto* impunity and is overridden for 'substantial' inconsistency with or impediment of a *jus cogens* prohibition. Thirdly, in the further alternative, whether 'enforcement' of the prohibition is ancillary or incidental to the prohibition and so also of *jus cogens* status.

1. Direct Inconsistency of Norms

Certain classes of rules are well-established as directly conflicting with the *jus cogens* prohibition on torture. Most obviously, an act of torture directly conflicts with the prohibition, and so any domestic or international law that purported to authorise torture

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(Cambrige University Press, Cambridge, 2002) 106-9; *Democratic Republic of Congo v Uganda* (unreported) (2005) ICJ, paras 213-4; Denza, above n 29, 951; Bates, above n 34, 652.

[98] *Genocide Case*, above n 50, para 385.

[99] *Jones v Saudi Arabia*, above n 9, 301 (Lord Hoffmann); Spinedi, above n 34, 897; Wirth, above n 38, 891.

[100] Cassese, above n 33, 869; Professor Andrea Gattini, 'War Crimes and State Immunity in the *Ferrini* Decision' (2005) *Journal of International Justice* 3 224-42, 234, fn 41; Hazel Fox QC, 'Where Does the Buck Stop? State Immunity from Civil Jurisdiction and Torture' (2005) 121 *Law Quarterly Review* 353-9, 355.

[101] 'France in Violation of Law Grants Donald Rumsfeld Immunity, Dismisses Torture Complaint', above n 35.

[102] *Jones v Saudi Arabia*, above n 9; see also (2006) 683 HC Debs, col.786, (Question 7).

[103] *US Statement of Interest*, above n 41.

[104] Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 33 ('VCLT 1969'), art 53; International Law Commission, Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, (Adopted by the ILC at its 58th session, 2006, submitted to GA as part of Commission's report covering the work of that session: A/61/10, para 251) ('ILC Report, 2006'); Conclusion (42).

would be invalid.[105] The next class of directly conflicting activity can be drawn from article 2(2) of the *Torture Convention*, which stipulates that 'no exceptional circumstances whatsoever' may be invoked to justify torture, and article 2(3), which provides that '[a]n order from a superior officer or a public authority may not be invoked as a justification of torture.' Because the prohibition on torture is absolute, any attempt by a State or an individual to justify torture or defend against a charge of torture on the *merits* must be rejected as inconsistent with the *jus cogens* prohibition. The shorthand for this second class of inconsistent norms is 'impunity'.[106]

(a) Distinguishing Functional Immunity from Impunity

Superficially, the prosecution of senior State officials before the international military tribunals at Nuremberg and Tokyo is evidence for the argument that functional immunity directly conflicts with the *jus cogens* norm. For example, Principle 3 of the Nuremberg Principles provided that for the accused to have acted in official capacity in committing international crimes was no defence to criminal liability nor grounds for mitigation of his sentence before any court, domestic or international.[107] Additionally, Article 27(1) of the *Rome Statute for the International Criminal Court* (ICC)[108] provides that the accused's official capacity or rank at the time of committing the acts is no defence to criminal responsibility. Given that functional immunity from prosecution is granted on precisely this basis – the fact that the accused was acting in his or her official capacity – it might appear that such a grant constitutes an impermissible defence to torture.

The difference is between relying upon official capacity as a defence before an international court (which is impermissible), and using official capacity to claim functional immunity from the jurisdiction of a foreign domestic court. This is the 'extremely important distinction … between 'substantive' and 'procedural' immunity'.[109]

'Substantive' immunity is a defence 'on the merits'. If the fact that the accused acted in governmental capacity is claimed as a defence to his or her individual criminal responsibility for torture, then it is a purported defence to torture and conflicts with the *jus cogens* prohibition. By contrast, 'procedural' immunity, at a doctrinal level, does not seek to deny or defend against the accused's individual criminal responsibility. Rather, it is characterised as a 'procedural bar' to the jurisdiction of a particular court to make that determination. This means that a State, in asserting the functional immunity of its officials, is not making the impermissible claim that the commission of torture falls within official duties or is a matter of

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[105] *Furundzija*, above n 1, para 155; VCLT n 36, art 53.

[106] *Arrest Warrant*, above n 7, 25.

[107] *Nuremberg Principles*, Geneva, 29 July 1950, Official Records of the General Assembly, Fifth Session, Supplement No. 12, United Nations doc.A/1316 (1950).

[108] *Rome Statute for the International Criminal Court* (17 July 1998) 2187 UNTS 90.

[109] Commentary to Principle 5 of *The Princeton Principles on Universal Jurisdiction,* 23 July 2001, with a foreword by Mary Robinson, United Nations High Commission for Human Rights, accessed online at <http://lapa.princeton.edu/hosteddocs/unive_jur.pdf>, 48.

State policy. Instead, it is protesting the power of a foreign domestic court to sit in judgment upon the conduct of its agents in the course of their public duties.[110]

Although this distinction between procedure and substance has been criticised,[111] State practice aligns with the 'strong evidence'[112] of the correctness of this view provided by the ICJ and other courts' reasoning discussed above. To return to the example of the *Rome Statute*, although article 27 precludes the use of official capacity as a defence, article 98(1) expressly acknowledges and allows parties to recognise the customary diplomatic and State immunities of the officials of third States. This is so even though the ICC's jurisdiction is only for *jus cogens* crimes. The 108 States party to the ICC therefore recognise and accept a doctrinal distinction between criminal responsibility and immunity from criminal jurisdiction.

Finally, to test the opposing view against its natural consequences, if a claim of functional immunity based on official capacity is considered a 'direct defence on the merits' to the jus cogens prohibition, then a claim of personal immunity based on incumbent and senior official capacity must also constitute an impermissible defence.[113] This would mean that it would be possible for a State to, at its prosecuting body's discretion,[114] arrest and prosecute foreign incumbent Heads of State, ministers for foreign affairs, diplomats, ambassadors and members of special missions on allegations of torture and other jus cogens crimes. Such a situation could have disastrous ramifications for sovereign equality and 'the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system.'[115]

2. Functional Immunity and De Facto Impunity

There is an alternative way in which the *jus cogens* status of torture could be interpreted as abrogating functional immunity (and only functional immunity). This argument raises the real-world consequences of drawing this *cordon sanitaire* between substance and procedure, between criminal responsibility and the forum in which responsibility is determined. As Judge van den Wyngaert wrote in *Arrest Warrant:*

> In theory, the Court may be right: immunity and impunity are not synonymous and the two concepts should therefore not be conflated. In practice, however, immunity leads to *de facto* impunity.[116]

Consequently, the immunity/impunity distinction is criticised as 'formalistic'[117] and for employing 'an existing but artificially drawn distinction' to 'circumvent the morally

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[110] *Al-Adsani*, above n 8, para 48; *Arrest Warrant*, above n 7, 25 (Judgment of the Court); 60 (Separate Opinion of Judge Koroma).

[111] See *Report of the International Law Commission* on the work of its forty-eighth session, 6 May-26 July 1996, U.N. GAOR, 51st Sess., Supp. No. 10, at 41, U.N. Doc. A/51/10 (1996).

[112] Caplan, above n 64, 758.

[113] *Jones v Saudi Arabia*, above n 9, 288 (Lord Bingham).

[114] *Torture Convention*, art 7(1).

[115] *Arrest Warrant,* above n 7, 85 (Joint Separate Opinion).

[116] Ibid 159 (Dissenting Opinion of Judge van den Wyngaert).

embarrassing issue' of *de facto* impunity for *jus cogens* crimes.[118] According to McGregor, courts applying this distinction between procedural immunity and impunity avoid the core question: 'does immunity *contribute* to impunity?'[119]

The 'de facto impunity' argument can be summarised as follows: the formalistic approach frames immunity as a procedural bar diverting settlement of a claim (or punishment of a culprit) to a different forum. This, however, assumes a situation which does not exist, namely that there are alternative forums available.[120] Domestic action is often unlikely against State abusers, diplomatic protection is discretionary and unreliable, *ad hoc* international criminal tribunals have only limited, specified jurisdiction, and the ICC does not have jurisdiction over single acts of torture or crimes committed before its establishment.[121] Consequently, foreign national courts will often be the only place in which these State officials can be held to account.[122] In such circumstances, a grant of functional immunity may well 'lead to impunity for perpetrators of serious human rights violations'.[123] Therefore, permitting immunity as a procedural defence to torture 'implicitly establishes a hierarchy between the rules':[124] it allows functional immunity to form 'a barrier tantamount to the acceptance of torture.'[125]

(a) The Suppressed Premise

Unlike the 'formalistic' approach, the 'de facto impunity' approach is openly cognisant of the unjust consequences of a grant of immunity, and initially the argument itself might seem logical. There is, however, a suppressed premise at its heart which requires some scrutiny. The premise is that 'impunity', defined at its broadest as 'exemption from punishment or penalty',[126] is, of itself, inconsistent with the *jus cogens* prohibition on torture.

As noted in the previous section, it is certain that 'impunity' contradicts *jus cogens*, but that is 'impunity' defined as exempting a perpetrator from criminal responsibility for torture by allowing the perpetrator directly to defend against or justify torture.[127] The reason this

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[117] Ibid 155 (Dissenting Opinion of Judge van den Wyngaert); Lorna McGregor, Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty (2007) 18 European Journal of International Law, 903-19, 905, 907.

[118] *Arrest Warrant*, above n 7, 97 (Dissenting Opinion of Judge Al-Khasawneh).

[119] McGregor, above n 117, 907 (emphasis added).

[120] Ibid 907-8; Alexander Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong' (2007) 18 *European Journal of International Law,* 955, 970.

[121] Peter Burns and Sean McBurney, 'Impunity and the United Nations Convention against Torture: a Shadow Play without an Ending', in Craig Scott (ed) *Torture as Tort* (Hart Publishing, Oxford, 2001), 288.

[122] McGregor, above n 117, 908-11; *Arrest Warrant*, above n 7, 98 (Dissenting Opinion of Judge Al-Khasawneh), 176 (Dissenting Opinion of Judge van den Wyngaert).

[123] Secretary-General of the Council of Europe, 'Follow-Up to the Secretary General's Reports under Article 52 ECHR on the Question of Secret Detention and Transport of Detainees Suspected of Terrorist Acts, Notably by or at the Instigation of Foreign Agencies' (SG/Inf (2006)5 and SG/Inf(2006)13) para 2, cited in McGregor, above n 177, 903.

[124] *Arrest Warrant*, above n 7, 155 (Dissenting Opinion of Judge van den Wyngaert).

[125] McGregor, above n 117, 912.

[126] Burns and McBurney, above n 121, 277.

[127] *Arrest Warrant*, above n 7, 25 (Judgment of the Court).

narrow definition of 'impunity' conflicts with the *jus cogens* rule is not because it prevents the enforcement of the prohibition on torture against those of rank or status but because it 'defies the absolute nature of the prohibition'; it necessarily involves the claim that torture can be defended against or justified.

De facto impunity, by contrast, claims a conflict between the 'probability' that a perpetrator will not be punished for torture and the prohibition itself. It is premised on one of two assumptions: either 'enforcement' of the prohibition on torture is also of *jus cogens* status, or such a 'probability' is sufficient to create a conflict with the *jus cogens* prohibition.

(b) The Probability of Impunity does not Constitute Doctrinal Impunity

When assessing whether a grant of functional immunity can constitute doctrinal impunity, it is beside the point whether it hinders or impedes the 'enforcement' of the prohibition on torture. In order to conflict with the *jus cogens* prohibition on torture, a grant of functional immunity must, like doctrinal impunity, inherently defy the prohibition. For procedural immunity to equate to a substantive defence, the forum court would need to be satisfied that there is no other means, however far-fetched, by which the accused could be held accountable.

Judicial authorities provide strong evidence that this 'definitional' threshold of impunity is the correct one, and that it simply cannot be met with a *de facto* argument.[128] For example, in *Al-Adsani*, the remoteness of the United Kingdom pursuing a diplomatic action against Kuwait was irrelevant: the abstract possibility was sufficient to prevent immunity for Kuwait from constituting impunity, even though the United Kingdom had in fact already rejected the victim's request for such an action against Saudi Arabia.[129]

To apply this to a hypothetical criminal prosecution, there is the possibility of the alleged perpetrator being arraigned before the ICC, or a yet-to-be-created *ad hoc* international tribunal, such as the ICTY or the Special Court for Sierra Leone.[130] Perhaps the domestic courts of the perpetrator will one day hear the matter—regimes change and amnesty laws can be repealed. The accused's State might be prevailed upon to waive immunity from proceedings in foreign courts,[131] or in the case of civil claims, to make a discretionary settlement with the individual claimants or the claimants' State.[132] If the perpetrator's national court fails to prosecute, and the haven State is party to the *Torture Convention*, any of the States

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[128] Ibid 25 (Judgment of the Court); *Al-Adsani*, above n 8, paras 50 and 55.

[129] *Al-Adsani*, above n 8, paras 50 and 55; McGregor, above n 117, 910.

[130] Which is considered an international court, and so before which State immunity is not observed: *Prosecutor v Charles Ghankay Taylor*, Appeals Chamber, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-1, 31 May 2004, para 51.

[131] 'L'immunité de Hissène Habré definitivement levee', *Lettre de M. Koudji-Gaouà M. Fransen*, 7 October 2002, accessed online at <http://www.hrw.org/french/press/2002/tchad1205a.htm>.

[132] See the political outcome of plaintiff's failure in *Princz v Germany*, 26 F 3d 1166 (DC Cir, 1994); see Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning Final Benefits to Certain United States Nationals who were Victims of National Socialist Measures of Persecution, Entered into Force September 19, 1995.

Parties could take that State before the ICJ, requiring it to fulfil its article 7(1) obligation to prosecute the alleged perpetrator.[133] If the offending State is utterly recalcitrant, the victim's State or any other State might elect to ignore immunity as a countermeasure in response to the violation of international law.[134]

When considering the prospect of enforcement at this abstract level, as the immunity jurisprudence does, provided individual criminal responsibility attaches, there will always remain open some theoretical method of punishment other than prosecution before a foreign domestic court.

3. Whether the Enforcement of a *Jus Cogens* Norm also has *Jus Cogens* Status

The last issue is whether the *enforcement* of the *jus cogens* prohibition shares its peremptory status. As a starting point, the scope of the *jus cogens* prohibition on torture certainly extends to invalidate laws that purport to authorise torture, and likewise overrides *substantive* immunity for torture. This is the uncontroversial heartland of the norm.

The minority in *Al-Adsani* sought to define the scope of the *jus cogens* prohibition more broadly, asserting that it 'entails' the overriding of functional immunity.[135] By contrast, in *Jones v Saudi Arabia* the House of Lords emphasised the necessity of showing State practice in order to establish this ancillary rule, for 'it is not entailed by the prohibition of torture.'[136] By placing this onus on the claimant, the consequence of a lack of evidence is that immunity prevails.[137]

(a) Determining the Scope of a *Jus Cogens* Norm

Legitimacy is of key importance. For a norm to attain *jus cogens* status, it must be 'accepted and recognised by the international community of States as whole.'[138] State consent is the foundation of the international legal system and has special significance here given that *jus cogens* norms have non-derogable status. However, there is an intrinsically non-consensual element to a *jus cogens* norm, in that once a rule is established to be of that status it binds all States absolutely, even persistent objectors.[139]

Further, it can be legitimate for courts to interpret the scope of the *jus cogens* prohibition on torture with reference only to the logical operation of that norm, even over State

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[133] See article 30 of the *Torture Convention* (noting that only 12 of 145 States have made reservation to this article).

[134] Committee Against Torture, 'Summary Record of the Second Part (Public) of the 646th Meeting, 6 May 2005, CAT/C/SR.646/Add.1, para 67; McGregor, above n 117, 919; Wendy Adams, 'In Search of a Defence of the Transnational Human Rights Paradigm: May *Jus Cogens* Norms be Invoked to Create Implied Exceptions in Domestic State Immunity Statutes?' in Craig Scott (ed) *Torture as Tort* (Hart Publishing, Oxford, 2001), 247-74.

[135] *Al-Adsani,* above n 8 (Joint Dissenting Opinion) para 3.

[136] *Jones v Saudi Arabia*, above n 9, 293 (Lord Hoffman).

[137] Ibid 289 (Lord Bingham).

[138] VCLT, above n 104, art 53.

[139] Marti Koskenniemi, *From Apology to Utopia* (2005), 323-5; Orakhelashvili, above n 120, 967.

objections. This happened in *Saadi v Italy,*[140] where the ECtHR ruled that the non-derogable status[141] of Convention article 3's prohibition on torture extended also to the duty of non-*refoulement*, and that States violated the prohibition by returning a person to a State where they faced a 'real risk' of torture, even if the person had not in fact been tortured.[142]. This was over the objections of Italy and the intervening United Kingdom, which had argued that sending a person to another State where they may or may not be tortured is distinct from directly committing torture. (Other States, such as Canada,[143] share this view of the scope of the *jus cogens* prohibition.) Even so, *Saadi v Italy* still concerned the scope of the *substantive* prohibition, and the ECtHR did not extend the *jus cogens* status of the norm beyond the prohibition itself.

It is theoretically possible for the *jus cogens* prohibition to 'entail' ancillary rules, such as the absolute ban on the use of evidence derived from torture—having regard also to the deterrence effect of banning the use of such evidence.[144]

Even so, with respect to the minority in *Al-Adsani,* it is doubtful that enforcement of the prohibition on torture can be so entailed. The Court in *Arrest Warrant* disregarded dissenting opinions about the 'effective combating'[145] of international crimes, emphasising that the substantive prohibition on torture does not encompass its enforcement.[146] This distinction has since been reiterated in the 2006 *Democratic Republic of Congo v Rwanda* case, in which the ICJ upheld the validity of Rwanda's reservation to Article IX of the *Genocide Convention*.[147] If even the *jus cogens* prohibition on genocide does not 'entail' its enforcement, it is difficult to see that the *jus cogens* prohibition on torture does. Additionally, the *Al-Adsani* minority interpretation is contrary to the principles of harmonisation of international law[148] in that it 'chooses' an interpretation conflicting with the pre-existing doctrine of functional immunity.

(b) Has State Practice Carved Out an Exception to Immunity?

Those who seek to establish the *jus cogens* status of the 'enforcement' of the prohibition of torture or the existence of a customary rule repealing immunity from prosecutions for torture[149] bear the onus of proof.[150] Claimants must show that this *jus cogens* status is 'accepted and recognised' by the whole international community,[151] or else that the existence

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[140] *Saadi v Italy*. Appl. No. 37201/06, Grand Chamber, ECtHR, Judgment, 28 February 2008 ('*Saadi v Italy*').
[141] ECHR, above n 5, art 15(2)6.
[142] *Saadi v Italy*, above n 140, paras 138-40.
[143] *Immigration and Refugee Protection Act 2001* (Canada) s 113(d); see also *Suresh v Canada* [2002] 1 SCJ 3 and CAT/C/SR.646/Add.1, para 8.
[144] *A v Secretary of State for the Home Department (No. 2)* [2006] 2 UKHL 71, para 39, with reference to Burgers and Danelius, Handbook on the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Martinus Nijhoff Publishers, Dordrecht, 1988), 148.
[145] *Arrest Warrant*, above n 7, 98 (Dissenting Opinion of Judge Al-Khasawneh).
[146] Ibid, above n 7, 20-5.
[147] *Democratic Republic of Congo v Rwanda* (unreported) ICJ, 3 February 2006, paras 64-9.
[148] ILC Report 2006, above n 104, Conclusion (4).
[149] For example, Cassese, above n 33, 870.
[150] *Jones v Saudi Arabia,* above n 9, 289 (Lord Bingham); *Bouzari v Iran,* above n 9, para 94 (Goudge JA).
[151] VCLT 1969, above n 104, art 53.

of a customary rule is supported by 'consistent and near uniform' State practice and 'settled *opinio juris*'.[152] This burden of providing 'clear, 'positive' evidence of the loss of immunity at international law ... was arguably the central theme of *Jones*'.[153]

There are two chief sources of evidence for a crystallised rule of custom repealing functional immunity for torture. One is the legal framework of international enforcement created by the *Torture Convention*.[154] This is addressed at length below, but in summary, it is argued that the obligations created by the *Torture Convention* are technically consistent with functional immunity, and so do not evidence the new rule.

The second source of evidence is widespread acceptance of the stripping of immunity before international criminal courts and tribunals, and also occasionally before national courts.[155] However, this evidence is insufficient to establish a rule of custom.

Exercises of jurisdiction by 'international' courts over State officials are clearly distinguishable from the exercise of jurisdiction by 'domestic' courts. The law of State immunity is derived from the sovereign equality of States. The principle that an equal cannot sit in judgment on an equal 'has no relevance to international criminal tribunals which are not organs of a State but derive their mandate from the international community'.[156] The rules concerning immunity in the legal instruments creating international tribunals are 'specifically applicable' to them and do not evidence a customary rule overriding functional immunity before foreign domestic courts.[157]

Cassese lists cases in which foreign State officials were prosecuted for international crimes before the national courts of another State.[158] However, these are equivocal. All but a handful of the examples concerned prosecutions arising out of the Second World War, in circumstances where the foreign State did not protest.[159] Of the remainder, *Bouterse*,[160]

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[152] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3, 44.

[153] Bates, above n 34, 19.

[154] *Jones v Saudi Arabia*, above n 9, 294 (Lord Hoffman); Adams, above n 134, 264.

[155] See Cassese, above n 33, 870-1.

[156] *Prosecutor v Charles Taylor*, above n 130, para 51.

[157] *Arrest Warrant*, above n 7, 24 (Judgment of the Court).

[158] Cassese, above n 33, 870-1.

[159] Ibid, fns 49-55: *Rauter,* Special Court of Cassation of 12 January 1949, in *Annual Digest 1949*, 526-48; *Albrecht*, Special Court of Cassation of 11 April 1949 in *Nederlandse Jurisprudentie 1949,* 747-51 (in Dutch), summarised in *Annual Digest 1949*, 397-8; *Barbie*, 78 ILR, 125 in seq; *Kappler,* Judgment of 25 October 1952, *Tribunal Supremo Militare,*in 36 *Rivista di diritto internazionale* (1953) 193-9; *Priebke,* Decision of Rome Military Court of Appeal of 7 March 1998, *L'Indice Penale* (1999), 959 *et seq*; *von Lewinski* in *Annual Digest 1949,* 523-4; *Kesserling* in *Law Reports of Trials of War Criminals* (1947), vol 8 at 9 ff; *Yamashita,* judgment of the US Supreme Court in L Friedman, *The Law of War, A Documentary History,* vol 2 (1972) 1599; *Buhler, Annual Digest 1948*, 682.

[160] *Desi Bouterse*, Decision of the Court of Appeal of Amsterdam in the case of Desi Bouterse, 3 March 2000, translated by Peter Kell, published in H. Fischer and Avril McDonald eds, *Yearbook of International Humanitarian Law*, Vol 3: 2000, (TMC Asser Instituut, 2002), 682; cited in Cassese, above n 33, 871 fn 51.

Scilingo[161] and *Miguel Cavallo*[162] had the prosecution take place with the express or tacit consent of the accused's State.

The fact of State consent or failure to protest is a crucial distinguishing point. In *Djibouti v France*, the ICJ indicated that a domestic court's obligation to respect State immunity is not engaged unless there is evidence before the court that the individual is entitled to that immunity. As a right belonging to States alone,[163] it is not enough that the plea be made by the arraigned individual. It appears from *Djibouti v France* that it must also be confirmed by the State itself.[164] To apply this, for example, to *Eichmann*: although Eichmann's claim of immunity was rejected by the Israeli courts,[165] on a strict view this would only have true precedential value if *Germany* had sought immunity for Eichmann, and had its claim rejected.

This interpretation of the obligation is further supported by the UN Special Rapporteur's analysis of *Blaskič*,[166] which was read as entitling the State:

> ...to request that acts performed by its official in an official capacity should be considered as acts of the State itself ... [however] this does not preclude the possibility of such acts being attributed not only to the State but also to the official, unless the *State* concerned *insists that they should not*.[167]

Therefore, with the sole exception of the *Pinochet (No. 3)* proceedings, to which the State of Chile did indeed protest most strongly, Cassese's examples of domestic prosecutions are not evidence of a customary rule stripping State officials of functional immunity for crimes of *jus cogens* in circumstances when the official's State protests.

As for the evidential value of *Pinochet (No. 3)* itself, as the House of Lords said of the *Ferrini* case,[168] 'one swallow does not make a rule of international law'.[169] This is particularly so given the conflicting State practice and *opinio juris*. For example, in direct contrast to *Pinochet (No. 3)*, France granted Donald Rumsfeld, former Secretary of Defense of the United States, functional immunity from prosecution for torture pursuant to the *Torture Convention*.[170]

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[161] *Adolfo Francisco Scilingo*, Audiencia Nacional (National Court of Spain), Order of 4 November 1998 (no. 1998/22604); cited in Cassese, above n 33, 860, fn 20.

[162] *Miguel Cavallo*, Audiencia Nacional (National Court of Spain) decision of 12 January 2001, delivered by Judge Jesus Guadalupe Luna, accessed online at <http:www.derechos.org/nizkor/arg/espana/mex.html>; cited in Cassese, above n 33, 871 fn 57.

[163] *Arrest Warrant*, above n 7, Judgment of the Court, 25.

[164] *Djibouti v France*, above n 91, para 196.

[165] *Eichmann*, Judgment of the Supreme Court of Israel of 29 May 1962, in 36 ILR, 277-342; cited in Cassese, above n 33, 870, fn 48.

[166] *Prosecutor v Blaskič*, Appeals Chamber, Judgment on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para 41: 'each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that individual organ may not be held accountable for those acts or transactions'.

[167] *Preliminary Report of the Special Rapporteur*, above n 54, 42, fn 174 (emphasis added).

[168] *Ferrini v Federal Republic of Germany* (2004) Cass sez un 5044/04, an isolated example of judicial acceptance of the 'normative hierarchy' argument for a civil claim, which is now being challenged in the ICJ.

[169] *Jones v Saudi Arabia,* above n 9, 288 (Lord Bingham).

[170] Above n 35.

At Belgium's request, Chad expressly waived the State immunity of Hissène Habré, its ousted former dictator, from foreign criminal jurisdiction[171]—a step which would have been redundant if there were a customary rule automatically removing immunity.

Consequentially, it does not appear possible to establish that the enforcement of the *jus cogens* norm has either *jus cogens* or customary status. There is insufficient evidence to show that functional immunity can no longer be claimed for *jus cogens* crimes.

The operation of the *jus cogens* norm prohibiting torture is not a "'silver bullet" solution' to the continuation of immunity.[172] The *jus cogens* prohibition on torture does not conflict with functional immunity, and so has no impact on the continued exemption of State officials from the criminal jurisdiction of foreign domestic courts.

C. Whether the Torture Convention has Necessarily Abrogated Functional Immunity

The final argument against the continuation of functional immunity from prosecutions for torture is drawn from the actual ratio of *Pinochet (No. 3)*;[173] the *Torture Convention* must, by necessary implication, have overridden functional immunity from prosecutions for torture. There are three key issues. First, what is the correct threshold or test at which a necessary implication to an international covenant can be made? Secondly, can the *Torture Convention* operate consistently with functional immunity? Thirdly, do the provisions or *travaux préparatoires* of the *Torture Convention* demonstrate the 'clear intent' of States Parties to override functional immunity?

1. The Threshold of Inconsistency that Warrants a 'Necessary Implication'

(a) The House of Lords' Approach

The majority of the House of Lords in *Pinochet (No. 3)* concluded that the *Torture Convention* abrogates functional immunity. However, at no point did the Law Lords explicitly discuss the international law test for implying terms into international covenants and thereby silently overriding another rule of international law.

Some of the Law Lords used terms and tests such as 'the clear intent of the provisions'[174] and 'the aims and object of the Convention'.[175] Lord Browne-Wilkinson based his decision on the inability of the treaty to function without this implied abrogation of immunity:

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[171] 'L'immunité de Hissène Habré definitivement levee', above n 132.

[172] Bates, above n 34, 18.

[173] *Pinochet (No. 3)*, above n 3, 205 (Lord Browne-Wilkinson), 262 (Lord Hutton), 277-8 (Lord Millett), 248 (Lord Hope), 266-7 (Lord Saville); *Jones v Saudi Arabia*, 286 (Lord Bingham), 299 (Lord Hoffmann).

[174] Ibid 262 (Lord Hutton).

[175] Ibid 278 (Lord Millett).

> The whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the *Torture Convention* – to provide a system under which there is no safe haven for torturers – will have been frustrated.[176]

Lord Goff, in dissent, challenged the reasoning of the other Law Lords, arguing that national courts should be cautious in implying terms into an international treaty drafted over a period of years by a substantial number of States.[177] He emphasised that the *Torture Convention* could operate consistently with functional immunity and that the 'clear intent' discerned by the majority could be located in neither the express words of the *Torture Convention* nor the *travaux préparatoires*.[178]

(b) The International Law Test for Overriding Immunity by Treaty

The law of State immunity requires that waiver of immunity be express.[179] There is no express waiver of functional immunity in the *Torture Convention*, a silence which, if not decisive, at the least gives rise to the strong presumption that States continue to retain the right to assert the immunity of their officials.[180] For the *Torture Convention* to be deemed to have silently overridden a longstanding principle of international law it is not enough that the implied abrogation of immunity would make the *Torture Convention* function more expansively or more smoothly. The implication must be *necessary* to give effect to its provisions.[181]

In addition to this high threshold, there is a presumption of normative consistency between rules of international law.[182] Specifically in relation to treaties, the ILC concluded that, '[i]n entering into treaty obligations, the parties do not intend to act inconsistently with generally recognised principles of international law.'[183] Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* states that, in interpreting treaties and conventions, courts should take account of 'any relevant rule of international law applicable in the relations between the parties.' As the ECtHR noted in *Al-Adsani*—concerning the interaction between the *Basle Convention* and the *European Convention on Human Rights,* this means that human rights conventions 'cannot be interpreted in a vacuum', rather, such conventions 'should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.'[184]

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[176] Ibid 205 (Lord Browne-Wilkinson).
[177] Ibid 218 (Lord Goff).
[178] Ibid 219-21.
[179] *Argentine Republic v Amerada Hess Shipping Corporation* (1989) 488 US 428; *Jennings and Watts, Oppenheim's International Law* (9th ed, Oxford University Press, Oxford, 1992) 353; *United Nations Convention on Jurisdictional Immunities of States and Their Property*, art 7; *Marcos and Marcos v Federal Department of Police*, 102 ILR 198, 203.
[180] *Pinochet (No.1),* above n 11, 81 (Lord Slynn); *Pinochet (No. 3)*, above n 3, 856-8 (Lord Goff).
[181] *Certain Expenses of the United Nations Case* [1962] ICJ Rep 151, 159; South West Africa Cases (Second Phase) [1966] ICJ Rep 6.
[182] ILC Report, above n 104, Conclusion (4).
[183] Ibid, Conclusion (19)(b).
[184] *Al-Adsani*, above n 8, para 55.

Consequently, the object and purpose of the *Torture Convention* may properly be read down in order to read the treaty provisions consistently with functional immunity. In the absence of express words, the *Torture Convention* will not be interpreted as implicitly overriding a pre-existing rule of international law unless its ability to operate or its 'clear intent' is 'clearly irreconcilable' with the continued availability of functional immunity.[185]

2. Is Functional Immunity Inconsistent with the Operation of the Torture Convention?

The House of Lords concluded in *Pinochet (No. 3)* that the continued availability of functional immunity 'render[s] abortive' the system of international criminal jurisdiction created by the *Torture Convention*.[186] But is subsisting immunity actually inconsistent with a grant of universal jurisdiction?

(a) Characterising 'Immunity' and 'Jurisdiction'

Article 5 of the *Torture Convention*, which provides States Parties with universal criminal jurisdiction over torture, 'was fundamental to that [*Pinochet (No. 3)*] decision'.[187] The relationship between immunity and jurisdiction, and the House of Lords' own conceptions of that relationship, therefore warrants very close scrutiny.

Judges Higgins, Kooijmans and Buergenthal argued in *Arrest Warrant* that the two concepts are 'inextricably linked'.[188] 'Immunity', they wrote, 'is the common shorthand phrase for "immunity from jurisdiction"'. They criticised the Court for having 'given the impression that "immunity" is a free-standing topic of international law. It is not.'[189] They added later:

> By focusing exclusively on the immunity issue, while at the same time bypassing the question of jurisdiction, the impression is created that immunity has value per se, whereas in reality it is an exception to a normative rule which would otherwise apply.[190]

The House of Lords appears to conceptualise Article 5 jurisdiction and functional immunity in a similarly interlinked way. The rule in the United Kingdom is that 'where state

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[185] Wilfried Jenks, 'The Conflict of Law-Making Treaties' (1951) 30 *British Yearbook of International Law* 401, 429, quoted in Orakhelashvili, above n 120, 957.

[186] *Pinochet (No. 3)*, above n 3, Lord Browne-Wilkinson, 205.

[187] *Jones v Saudi Arabia,* above n 9 290 (Lord Bingham).

[188] *Arrest Warrant*, above n 7, 64 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal ('Joint Separate Opinion')).

[189] Ibid.

[190] Ibid 84.

immunity is applicable, the national court has no jurisdiction to exercise'.[191] This approach equates the 'presence' of jurisdiction with the 'absence' of immunity, and vice versa.[192]

As a consequence, the House of Lords may have erroneously viewed Article 5 as a freshly given grant of jurisdiction, of its nature incompatible with and so unencumbered by the customary rules of immunity. This would explain why Lord Saville could have found that immunity was inconsistent with Article 5 of the *Torture Convention*, 'simply by applying its express terms.'[193]

On a conceptual level, this approach to jurisdiction and immunity is intrinsically flawed. If the presence of immunity removes jurisdiction altogether rather than simply barring its exercise, then in circumstances where a foreign State elects to waive immunity, courts would have no jurisdiction to exercise.

Further, this approach is quite contrary to the international approach. Indeed, the House of Lords recognised that the domestic UK understanding of the relationship between immunity and jurisdiction conflicts with that of the ECtHR.[194] It is also directly at odds with the ICJ in *Arrest Warrant*. The ICJ entirely separated the concepts of jurisdiction and immunity, writing:

> The rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction.[195]

Indeed, in what may well be a reference to *Pinochet (No. 3)* and a rejection of its interpretation of the Torture Convention, the Court wrote:

> Although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law … These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.[196]

So far, it can be concluded that Article 5(2) of the *Torture Convention* does not preclude functional immunity simply by bestowing jurisdiction on torture committed abroad. The next issue that arises is whether the continued existence of an immunity supposedly 'coextensive with the offence'[197] frustrates the operation of the *Torture Convention*.

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[191] *Jones v Saudi Arabia,* above n 9, 289 (Lord Bingham).
[192] Ibid 283, para 14 (Lord Bingham), citing *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1588 (Lord Millett).
[193] *Pinochet (No. 3)*, above n 3, 267; a view shared by Adams, above n 134, 264.
[194] *Al-Adsani,* above n 8, para.48; *Jones v Saudi Arabia*, above n 9, 283.
[195] *Arrest Warrant*, above n 7, 24 (Judgment of the Court).
[196] Ibid 25.
[197] *Pinochet (No. 3)*, above n 3, 277 (Lord Millett).

(b) Whether Functional Immunity can coexist with the Torture Convention

Lord Browne-Wilkinson held that the *Torture Convention* impliedly overruled immunity on the basis of its 'operative' inconsistency with the 'machinery of accountability' over foreign officials created by the *Torture Convention*.[198] However, the 'machinery of accountability' (expressed in Articles 5(2), 6(1) and 7(1), concerning the establishment and exercise of domestic jurisdiction over foreign nationals) is not rendered otiose by the continuing right of States to claim functional immunity on behalf of their officials.

First, not all foreign nationals charged with torture will be State officials entitled to functional immunity. 'Torture' is defined as being 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'[199] This means that jurisdiction established under Article 5(2) is exercisable over 'private persons' who are alleged to have committed torture with the acquiescence of a State official.

Secondly, the jurisdiction established over foreign nationals entitled to functional immunity can still be exercised when that immunity is waived. This mirrors the ruling in *Belhas v Ya'alon,* in which the DC Circuit Court of Appeals concluded that, although the FSIA fettered the potential operation of the TVPA, the TVPA still had scope to operate through waiver and so the two statutes could be read consistently.[200]

Thirdly, it appears from *Djibouti v France* and *Blaškič* that the judicial organs of States Parties may exercise criminal jurisdiction over an alleged torturer under Articles 6(1) and 7(1) unless and until the accused's State intervenes and claims immunity on his or her behalf.[201] After a State has arrested an alleged torturer, Article 6(4) obliges it to notify other States with jurisdiction over the suspect, and it would only be in 'unusual cases'[202] that the official's own State would at this time choose to bear the opprobrium of actively claiming an agency relationship with the arraigned official. As the United States Senate Judiciary Committee noted when considering the prospective interaction between the TVPA and the FSIA, 'no State commits torture as a matter of public policy'.[203] This argument is borne out by State practice. Several prosecutions have taken place pursuant to Articles 5(2) and 7(1) in circumstances where States have either actively waived the functional immunity of their nationals, or have simply failed to assert immunity.[204] By contrast, on an occasion when a

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[198] Ibid 203-5 (Lord Browne-Wilkinson). The jurisdictional framework is also outlined in detail in Part I of this paper.

[199] *Torture Convention*, art 1(1).

[200] See *Belhas v Ya'alon*, above n 9, Opinion of the Court, 15-6; see 'L'immunité de Hissène Habré definitivement levee', above n 132.

[201] *Djibouti v France,* above n 91, para 196; *Blaskič*, above n 166, para 41; *Preliminary Report of Special Rapporteur*, above n 54, 42, fn 170.

[202] *Pinochet (No. 3),* above n 3, 219 (Lord Goff).

[203] Senate Report No 249 (1991), 102d Congress, 1st Session, 8.

[204] 'L'immunité de Hissène Habré definitivement levee', above n 132; *Sebastian N* (2004) NILR 440 (Netherlands, Rotterdam District Court); *R v Faryadi Sarwar Zardad* [2007] EWCA Crim 279 (UK Court of Appeal); *Ely Ould Dah* (2005) (France, Cour d'assise of Nimes, unreported); accessed online at <http://www.haguejusticeportal.net/eCache/DEF/8/891.html> (in French); *Charles Taylor Jr,* convicted of torture in a US Federal Court on 31

[footnote continued on the next page]

State did claim the immunity of its former official from criminal prosecution for torture, domestic authorities respected the claim and dismissed the indictment.[205] This was an incident subsequent to *Pinochet (No. 3)*, and indeed, *Pinochet (No. 3)* was the first[206] (and to this date, the only) case in which a foreign domestic court has refused to grant a former Head of State immunity from the exercise of criminal jurisdiction despite the formal protests of his State.

3. The Clear Intention of the Torture Convention

The sole remaining issue is whether the 'clear intent' of the States Parties was to override functional immunity from prosecution for torture. 'Clear intent' would be discerned from the object and purpose of the *Torture Convention*, its 'machinery of accountability', and evidence derived from the *travaux préparatoires*.[207]

The Preamble to the *Torture Convention* states its purpose: 'to make more effective the struggle against torture… throughout the world'.[208] This would certainly support a broad reading of the accountability provisions. However, according to the methodology employed in the civil immunity jurisprudence, the intention to override functional immunity must be so clear that it not only 'rebuts' the presumption that States Parties intend to act consistently with existing laws when they enter into treaties,[209] it must also support the silent repeal of the longstanding principle of functional immunity. This threshold of unambiguous intent cannot be met here, as there is an alternative reading available.

The *travaux préparatoires* suggest that the accountability provisions were intended to target 'safe havens', which exist when an alleged torturer finds exile in a State that lacks domestic jurisdiction over extra-territorial crimes and either will not, or under domestic laws, cannot extradite the alleged torturer to face prosecution elsewhere. The *Torture Convention* was therefore directed at preventing torturers from escaping justice by simply leaving the jurisdiction after a regime change.[210] For example, Chad's ousted former dictator, Hissène Habré, found safe haven in Senegal for a number of years because Senegal had failed to fulfil its Article 5(2) obligation to establish domestic jurisdiction over extra-territorial torture.[211] Precisely because Article 5(2) envisages former State officials living in exile, it is difficult to see how this provision could be deemed to be 'clearly intended' to override immunity. It

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October 2008, accessed online at <http://www.cnn.com/2008/CRIME/10/30/taylor.torture.verdict/index.html?eref=rss_topstories>.

[205] 'France in Violation of Law Grants Donald Rumsfeld Immunity, Dismisses Torture Complaint', above n 35.

[206] *Pinochet (No. 3),* above n 3, 201 (Lord Browne-Wilkinson).

[207] VCLT 1969, art 31, above n 104; *South West Africa Cases (Second Phase)*, above n 181, 48; *Oppenheim,* above n 179, 1271; Jenks, above n 185, 429.

[208] *Torture Convention*, Preamble; Burgers and Danelius, above n 144, 1.

[209] ILC Report 2006, above n 104, Conclusion (19)(b).

[210] Burgers and Danelius, above n 144, 58, referring to the Comments of Sweden, Commission Working Group 1980, E/CNB4/1367.

[211] CAT, Communication No. 181/2001: Senegal, 19 May 2006, CAT/C/36/D/181/2001 (Jurisprudence).

would be rare that a new government would wish to extend State immunity to a member of a forcibly ousted regime.[212] Thus, Burgers and Danelius write that Article 5:

> ... must be seen as a cornerstone in the Convention, an essential purpose of which is to ensure that a torturer does not escape the consequences of his acts by going to another country.[213]

The mischief, which it was the clear intent of the *Torture Convention* to address, might not then be 'immunity' but rather the problem of safe havens.

Indeed, the only reference to immunity in Burgers and Danelius is a cryptic line in the comment to Article 5; that 'immunities may be accepted insofar as they apply to criminal acts in general and are not unduly extensive'.[214] The *travaux préparatoires*, like the express provisions of the *Torture Convention* itself, are otherwise silent on this purported intention to override functional immunity. Although Article 5 repeatedly arose for discussion and debate by the drafting committees, these debates centred on the formulation of the universal jurisdiction provision and the difficulties extra-territorial jurisdiction raised with the domestic legal systems of several States. Not once does a discussion of immunity appear in the records.[215] This means that if it is correct that the *Torture Convention* was intended to override immunity, this intent was not only so obvious to the States Parties that they did not consider it necessary to expressly say so in the *Torture Convention*, but further, 'none of the states involved thought it right to raise the matter for discussion' over the five years of the drafting process.[216]

The unlikeliness of this is compounded when one considers the number of States Parties to the *Torture Convention*; 116 at the time of *Pinochet (No. 3)* and at present 146, a quantity which gave Lord Goff the 'strong impression' that many of these States would not have agreed to the *Torture Convention* had they been aware that they were silently waiving their right to functional immunity.[217]

Further, not a single State has made a reservation to this silent clause, even though its effect would be to allow foreign national courts to adjudicate the conduct of State officials. By comparison, 12 States have made reservations to Article 30 of the *Torture Convention*, which vests jurisdiction in the ICJ to adjudicate disputes arising from the application and enforcement of the *Torture Convention*. Given the importance of the principle of sovereign

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[212] Comments of Sweden, Commission Working Group 1980, E/CNB4/1367 in Burgers and Danelius, above n 144, 58.

[213] Burgers and Danelius, above n 144, 131.

[214] Ibid.

[215] Ibid 58, 72, 78, 85, 94-95, referring to Commission Working Group 1980, E/CN.4/367 (1980), Commission Working Group 1981, E/CN.4/L.1567 (1981), Commission Working Group 1982, E/CN.4/1982/L.40 (1982), Commission Working Group 1983, E/CN.4/1983/63 (1983), and Commission Working Group 1984, E/CN.4/1984/72 (1984) respectively.

[216] *Pinochet (No. 3)*, above n 3, 221 (Lord Goff).

[217] Ibid 222 (Lord Goff).

equality upon which immunity itself is based, and the fact that 'perceptions of bias are always present when a national court adjudicates the government policy of another jurisdiction',[218] it would be remarkable if the 12 States which 'rejected' the jurisdiction of the ICJ would nonetheless have 'silently consented' to the jurisdiction of 'foreign national courts'—and moreover that they would do so without discussion or negotiation in the drafting stages.[219]

Having regard to all these factors, the unequivocal intent necessary for the *Torture Convention* to have abrogated a longstanding principle of international law in utter silence cannot be established.

D. Summary of Conclusions

From this analysis, the relationship between immunity from criminal jurisdiction and the *jus cogens* status of torture can be summarised as follows:

> Torture is committed within official capacity and so is protected by functional immunity;
>
> Functional immunity does not directly conflict with the *jus cogens* prohibition on torture. Functional immunity is not in *de facto* conflict with the *jus cogens* prohibition. There is no established obligation to enforce the *jus cogens* prohibition on torture by overriding functional immunity;

The terms, operation and intent of the *Torture Convention* cannot be shown to be 'clearly irreconcilable' with the right of States to claim functional immunity, and it is therefore consistent with immunity.

Conclusion: The Justice/Consent Tension in International Law

This article has sought to dispel the myths surrounding *Pinochet (No. 3)* and to demonstrate the irreconcilability of its outcome with the approach to normative interaction and evidentiary thresholds taken by respected international, regional and domestic courts in *Arrest Warrant*, *Al-Adsani*, *Bouzari v Iran*, *Belhas v Ya'alon* and *Jones v Saudi Arabia*. In these cases, judicial majorities recognised and welcomed the trend toward the enforcement of human rights norms and individual accountability. Nevertheless, they emphasised that it is unsound

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[218] Robert Wai, 'The Commercial Activity Exception' in Craig Scott (ed) *Torture as Tort*. (Hart Publishing, Oxford, 2001), 213, 224.

[219] None of the States that joined the *Torture Convention* after *Pinochet (No. 3)* have made reservations to or interpretative declarations regarding its effect on functional immunity, although very little can be drawn from this silence, given that prior to *Jones v Saudi Arabia, Pinochet (No. 3)* was widely understood to be based upon the *jus cogens* status of torture, not the *Torture Convention*: *Arrest Warrant,* above n 7, 23. Also, *Arrest Warrant* has been taken as authority for the continuation of functional immunity despite *Pinochet (No. 3)*: see, e.g., the French, Swiss and Norwegian delegates in the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI) (2002) 8, 23rd meeting, Strasbourg, 4 and 5 March 2002, Meeting Report, Secretariat Memorandum, drafted by the Directorate Generale of Legal Affaire, accessed online at <http://www.coe.int>, cited in Gaeta, above n 38, 195.

and beyond the legitimate scope of the judiciary to allow as a consequence that longstanding principles of international law can be overridden, not by express words or demonstrable normative inconsistency, but through the expansive and values-based interpretation of other principles. Having applied these principles to *Pinochet (No. 3)*, it is submitted that the House of Lords was incorrect, and States may still claim the functional immunity of their officials from foreign domestic prosecution.

In demonstrating the irreconcilability of *Pinochet (No. 3)* with later jurisprudence, this article also sought to illustrate the decisive significance of the legal methodology employed in determining the interaction between immunity and *jus cogens*. The heated academic and minority critiques of the majority judgments all-too-frequently fail to engage with the underlying 'reason' for the decisions of the various courts, which is not a failure to understand the moral or legal importance of *jus cogens* norms but rather a direct result of the way in which legal argument is framed.

The post-*Pinochet (No. 3)* judgments employ a methodology vulnerable to charges of formalism, apologism and the *de facto* favouring of immunity over fundamental human rights norms.[220] This methodology emphasises the need for 'positive' evidence of international norms. It employs high thresholds and as its starting point is the legal status quo, it is inherently conservative. It places the onus of discharging these thresholds upon those seeking to override or restrict immunity. It does not give consequence to the context in which legal argument is being made, including the likelihood that impunity will result if immunity is granted, or the trend toward accountability, or the tension between immunity for acts of torture and the 'worldwide aversion to these crimes'.[221] In short, it is an application of the dominant positivist view that international law 'can take account of moral principles only in so far as these are given a sufficient expression in legal form'.[222]

A different methodology was offered by Judges Higgins, Kooijmans and Buergenthal in *Arrest Warrant*. Rather than searching for the doctrinal inconsistency or newly-established customary rule that would allow one norm to 'trump' the other, they recognised the international community's interest in both State immunity and the enforcement of human rights norms and sought to interpret these competing interests in a way that harmonised the cores of each.[223] By focusing on the process of 'interpretation' of norms the Judges avoided the high threshold of evidence required to establish the existence of a crystallised norm overriding functional immunity. The problem with this approach is that it allows the substantial limiting of an existing legal right—the right of State immunity—by reference to a non-conflicting norm of international law, yet fails to present a theory of legitimacy for these kinds of judicial choices.

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[220] *Arrest Warrant*, above n 7,185 (Dissenting Opinion of Judge van den Wyngaert); Koskenniemi (2005) above n 139, 324-5.

[221] Ibid 85-7 (Joint Separate Opinion).

[222] *South West Africa Cases* (Second Phase), above n 181, 34.

[223] *Arrest Warrant*, above n 7, 86.

These methodologies derive from fundamentally different paradigms about sources of law and the legitimate role of international and national courts in the determination and development of international law. The conservative methodology is certainly open to criticism for its lack of responsiveness to changing values, but caution must also be taken with the liberal approach based upon concepts of balance and flux, which relies for its legitimacy upon the values and will of 'an ill-defined "international community"', as President Guillaume sceptically put it in *Arrest Warrant*.[224]

This familiar tension between theories of justice and State consent has been well-encapsulated by Koskenniemi:

> Any obligation must derive its force and meaning from beyond the State will [or else it does not constitute a legal bond]… On the other hand, any obligation must also be referred back to such will – for otherwise it would appear as an objective morality, existing outside consent and thus indefensible in liberal-democratic terms.[225]

It is this quality of international law as distinct from domestic legal systems that weighs towards a more conservative approach. A 'self-assured judicial activism'[226] concerning the development of human rights may be within the function of national courts interpreting domestic law, but:

> ... the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.[227]

Lord Hoffmann wrote in *Jones v Saudi Arabia* on the *jus cogens*-based arguments for the overriding of State immunity from civil actions for torture, but his words ring true as a criticism for the House of Lords' own precedent in the *Pinochet (No. 3)* proceedings. Even international human rights law must refer back to State will and State consent. The legitimacy of international law and the human rights project can only be undermined if national courts unilaterally rewrite the parameters of existing laws, and treat other States as subjects rather than partners in the pursuit of better outcomes for all people.

As a matter of policy, it would certainly be desirable for functional immunity from both criminal and civil proceedings to be removed. But if this is to be more then *de lege ferenda* or 'human rights imperialism',[228] then such a development must take place with the consent and

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[224] Ibid 43, (Separate Opinion of President Guillaume). This 'international community's' lack of consensus on the appropriateness of Belgium's violation of Congo's sovereign rights is demonstrated by the Separate Opinion of Judge Bula-Bula, *ad hoc* Judge for the Congo. He charged Belgium with 'abusing the humanitarian argument for the purposes of political domination': 117.

[225] Koskenniemi, above n 139, 584.

[226] Gattini, above n 100, commenting on *Ferrini* (n 168), 242.

[227] *Jones v Saudi Arabia,* above n 9, 298 (Lord Hoffman).

[228] *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [78] (Lord Rodger).

cooperation of the States it purports to bind. The most desirable way forward would be through a treaty regime providing a *jus cogens*-based exception to functional immunity.[229]

In the meantime, domestic political authorities and courts may choose to act unilaterally to propel this customary rule forward, but should seek to justify their actions with 'natural law imperatives rather than by existing positive international law'.[230] Alternatively, domestic States could argue that they are prosecuting officials of recalcitrant States as a valid countermeasure for their commission of torture and subsequent failure to prosecute perpetrators.

What should not be accepted are legal arguments based on the 'trap for the unwary' of a treaty that *sub silentio* overrides immunity,[231] or notions that the *jus cogens* prohibition can be expanded to include whatever national courts believe it ought to include. Such an approach disregards the role of State consent in legitimising norms of international law and so undermines the legitimacy of international norms—a quixotic attempt to advance human rights by stealth.

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[229] Eileen Denza, *The 2005 UN Convention on State Immunity in Perspective* (2006) 55 ICLQ 395-398, 396; Lorna McGregor, *State Immunity and* Jus Cogens, (2006) 55 ICLQ 437-446, 445.

[230] Adams, above n 134, 274.

[231] *Pinochet (No. 3)*, above n 3, 223, (Lord Goff).