JONES V MINISTRY OF INTERIOR OF KINGDOM OF SAUDI ARABIA:
AN EXERCISE IN INTERPRETATION

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The judgment of the House of Lords in Jones v Ministry of Interior of Kingdom of Saudi Arabia [2006] 2 WLR 1424 has stirred passionate debate. English nationals and residents were barred from suing individual Saudi officials, whom they accused of torture, on the ground of state immunity. Emotive as the circumstances were, the correctness of the judgment must not be treated reflexively. It requires analysis, as a matter of statutory and treaty interpretation. This article suggests that, once this task is performed, it becomes clear that the judgment was unconvincing and, as the Court of Appeal had decided, the claimants should have been allowed to proceed.

I. INTRODUCTION

The judgment of the House of Lords in Jones v Ministry of Interior of Kingdom of Saudi Arabia1 (“Jones”) will enter legal history as one of the most prominent decisions of the English courts on international law. It will doubtless become familiar to generations of students and lawyers worldwide, alongside decisions such as Trendtex Trading Corp v Central Bank of Nigeria,2 the Tin Council Case,3 Fothergill v Monarch Airlines4 and the Pinochet litigation.5 However, the result disappointed those committed to the plight of victims of violations of international law. The judgment has also been sharply criticised by some international lawyers, who hoped for more activism in the development of international law by domestic courts.6 Whether this criticism is excessive or not, it remains true that, once appraised as an exercise in statutory and treaty interpretation, Jones is unconvincing.

II. ALLEGATIONS OF TORTURE

Allegations in a case would rarely be as harrowing as those of Jones. The first claimant, Ronald Grant Jones,7 was a British subject. He had been working in Saudi Arabia as an

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1 [2006] 2 WLR 1424 (“Jones – HL”).
3 [1990] 2 AC 418.
5 R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [2000] 1 AC 1; R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147.
7 Not a known relative of the author.
international tax adviser. In 2001, he was mildly injured in a bomb blast in Riyadh and was admitted to a hospital for treatment. He alleged that agents of the Saudi government removed him from the hospital and wrongly placed him in solitary confinement. Thereafter, according to the claimant, he was systematically abused and tortured for 67 days.

This treatment was alleged to consist of:

- beatings on the palms of the hands, the arms, the buttocks, the lower legs and the soles of the feet with various wooden instruments;
- cuffing of the hands and their suspension above the head, as well as shackling of the ankles;
- regular punches and slaps to the face, together with other random beatings;
- sleep deprivation through partial suspension of the body and disturbance by noise; and
- the administration of mind-affecting drugs and other substances.8

The allegations of the other claimants were no less disturbing. Two of those, Sandy Mitchell and Leslie Walker, were Britons. The remaining claimant, William Sampson, was Canadian. They were alleged to have been subjected to patterns of torture broadly similar to those of Mr Jones in prison in Saudi Arabia. The purpose of the torture was supposedly the extraction of confessions. Those confessions were eventually made and, in the case of Mr Mitchell and Mr Walker, apparently led to sentences of death being passed by the Saudi courts. However, all three claimants alleged that the confessions were entirely false.9

Mr Jones and each of the other claimants were eventually released in Saudi Arabia and returned to the United Kingdom (UK). Each allegedly suffered ongoing psychological trauma following their return to Britain. Indeed, Mr Jones claimed to be severely psychologically disabled and unable to work.

III. THE FAILURE OF THE CLAIMANTS IN THE LONDON HIGH COURT

The claimants initially brought separate proceedings for personal injury in the High Court in London. Mr Jones brought the first case against the Ministry of Interior for the Kingdom of Saudi Arabia, together with one of the alleged torturers, Lieutenant-Colonel Abdul Aziz. Master Whittaker gave Mr Jones permission to serve his claim form on the Ministry and the Lieutenant-Colonel. While Mr Jones was able to serve the former, attempts to serve the latter were unsuccessful. Mr Jones applied for an order that service on the Lieutenant-Colonel be achieved by another method, namely service on the Minister of the Interior, Prince Naif. Around the same time, the Ministry applied for the striking out of the claim against it on the basis of the State Immunity Act 1978 (UK) (SIA).10

Both applications came before Master Whittaker once again. He decided to deal with the applications together, foreshadowing the possibility that the result of the Ministry’s application for a strike-out would be determinative of the application by Mr Jones for alternative service.11 It was here that battlelines characteristic of the remainder of the litigation were drawn. Section 1(1) of the SIA gives a state immunity from the jurisdiction of the UK courts. In this context, the term “state” is amplified by Section 14(1) of the SIA to include “(a) the sovereign or other head of that state in his public capacity; (b) the government of that state; and (c) any department of that government”.

8 Jones v. Ministry of Interior of Kingdom of Saudi Arabia (unreported, High Court of England and Wales, Master Whitaker, 30 July 2003) (“Jones – HC”), paras. 4-5.
9 These details are taken from the judgment of the Court of Appeal (infra, note 18). The text of Master Whitaker’s actual decision, Mitchell v. Al-Dali (unreported, High Court of England and Wales, 18 February 2004) is not readily available.
10 Supra note 8 at para. 2.
11 Ibid. at para. 3.
The foregoing immunity is subject to exceptions set out in Sections 2-7 of the SIA. The first of these applied where the state submitted to the jurisdiction of the UK courts. Another, found in Section 5, concerned conduct causing personal injury, where that conduct occurred at the hands of a state in the UK itself.12 Lastly, by Section 16(1) of the SIA, the immunity and its exceptions did not apply to criminal proceedings.

Mr Jones conceded that none of the exceptions in the SIA applied and that, given the extended definition of “state” in Section 14(1)(c) of the SIA, the Ministry was prima facie entitled to immunity from suit under Section 1(1) of the SIA. However, he submitted that Section 1(1) of the SIA should be read down so as not to bar a civil claim involving allegations of torture, as prohibited by international law. It seemed Mr Jones could not seek to achieve this by ordinary principles of statutory interpretation. As Master Whittaker noted, those principles would not permit English courts to restrict a broad command of Parliament, especially one already subject to express exceptions.13

Accordingly, Mr Jones focused on the Human Rights Act 1998 (UK) (HRA), with its more radical powers of remedial statutory interpretation. He alleged that Section 1(1) of the SIA violated his right of access to court under Art 6(1) of the European Convention of Human Rights (European Convention).14 Master Whittaker rejected this submission, essentially on the basis that he was bound by the rejection of a corresponding submission by a narrow majority of the European Court of Human Rights in Al-Adsani v United Kingdom (Al-Adsani).15 Mr Jones could not, therefore, pass through the gateway to remedial interpretation of Section 1(1) of the SIA under the HRA. The provision stood unimpeded, depriving the High Court of jurisdiction against the Ministry, and Mr Jones’s claim against it was struck out.

This left Mr Jones’s application for alternative service of the Lieutenant-Colonel. Master Whittaker followed the judgment of the Court of Appeal in Propend Property Ltd v Singh,16 which had held that the general immunity in Section 1(1) of the SIA, when read with the definition of “state” in Section 14(1) of that Act, extended to officers of a state for matters of state conduct. Accordingly, the Lieutenant-Colonel had the same immunity as the Ministry itself and the case against him was similarly struck out.

Master Whittaker granted Mr Jones leave to appeal to the Court of Appeal.

The other claimants took a slightly different course. They did not attempt to sue the Saudi Arabian government or any part thereof. Rather, they only sought to bring proceedings against the individual Saudi officials whom they claimed had inflicted the alleged mistreatment upon them. To this end, they applied to the High Court for permission to serve the officials out of jurisdiction, in Saudi Arabia. This application also came before Master Whittaker. Interestingly, the Master seemed to regret aspects of the judgment he had earlier given in relation to Mr Jones. He indicated that, having heard fuller argument, he now thought the SIA might not preclude claims regarding torture against officers of a state, as opposed to the state itself or its departments. However, the earlier judgment was already before the Court of Appeal. The Master left the question of its correctness to be resolved there and, in the interim, applied it to the other claimants. He also granted those claimants leave to appeal to the Court of Appeal.17

12 See further Al-Adsani v. Government of Kuwait (No 2) (1996) 107 ILR 536 at 540 (Stuart-Smith LJ) and 544 (Ward LJ).
13 Supra note 8 at paras. 15, 17-20.
16 (1997) 111 ILR 611 (“Propend”).
17 See supra note 10.
The Court of Appeal, consisting of Lord Phillips of Worth Matravers MR, Mance and Neuberger LJJ (as their Lordships then were) heard both appeals together. Mance LJ delivered the principal judgment, with which the other members of the Court agreed.18

A. Claims Against the Ministry of Interior

His Lordship dismissed Mr Jones’s appeal so far as it concerned claims against the Saudi Ministry of Interior. In essence, there could be no remedial interpretation of Section 1(1) of the SIA under the HRA. The judgment of the European Court in Al-Adsani on Article 6 of the European Convention was not strictly binding.19 However, it reflected the judgment given by the Court of Appeal in that case, which was itself binding.20

Further, the judgment of the European Court had been based on international law. The European Court had held that the Court of Appeal’s refusal of access to the courts by reference to the SIA engaged Article 6 of the European Convention and its requirements of a legitimate aim and proportional means. However, the SIA itself reflected the European Convention on State Immunity21 (Immunity Convention) and compliance by a domestic court with that Convention must, in principle, satisfy those requirements. Mance LJ indicated that there had been no change in the international law relevant to the judgment of the European Court, nor any decisive consideration not appreciated by that judgment, providing an additional reason for its continued application.22

Mance LJ also rejected a submission by Mr Jones that Section 1(1) of the SIA should, apparently under ordinary principles of statutory interpretation, be restricted to some notion of the functions of the state, which were said not to include torture. His Lordship held that there was no warrant for this in international or common law, as the immunity of the state was an immunity ratione personae. In other words, it was absolute and could not be selectively applied according to the presence or absence of particular matters. The SIA should not, therefore, be read in this way.23

B. Claims Against Individual Defendants

However, when it came to the Lieutenant-Colonel in Mr Jones’s appeal and the individual defendants in the proceedings brought by Mr Mitchell, Mr Walker and Mr Sampson, Mance LJ did an about-face. His Lordship rejected any immunity for those defendants and allowed the appeals. This was subject to the claimants limiting their case to an action for torture, without the pursuit of regular tortious claims for assault, battery, negligence and false imprisonment. This part of Mance LJ’s judgment is complex. Nonetheless, the essence seems to be that the question of whether or not proceedings against state officials alleging torture should be allowed was to be answered by judicial assessment of their appropriateness and proportionality on a case by case basis. This would be undertaken at the same time as the consideration of other jurisdictional issues, including discretion and forum non conveniens.24

19 Human Rights Act 1998 (Cap 42), Section 2(1)(a).
20 Supra note 18 at 715.
22 Supra note 18 at 716-720.
23 Ibid. at 718-719.
24 Ibid at 750, 752.
For each assessment, all potentially relevant factors had to be considered and balanced. They include whether or not an effective remedy was available in the state where the torture was allegedly committed.\textsuperscript{25} They also include, at least to some extent, the principles underpinning state immunity, namely the need not to interfere in the domestic affairs of a foreign state or impede that sovereign indirectly.\textsuperscript{26} The latter consideration is especially relevant in cases having little on their face to do with England and would potentially justify a refusal to exercise jurisdiction.\textsuperscript{27} Mance LJ also indicated that, where there was an adequate remedy in the state of commission, the assessment would generally result in a refusal to exercise jurisdiction.\textsuperscript{28}

On the other hand, it appears that Mance LJ felt that where there was no adequate remedy in the state of commission and the case had some connection with the UK, such as the victim’s nationality, it might well be appropriate for English courts to proceed. It seems his Lordship also felt the same result might obtain where the proceedings, though not bearing any connection with the UK, could not have been brought in the state of commission or that of the victim. However, these factors might be offset by any unlikelihood of the defendant playing any part in any proceedings in the UK or being amenable to any type of enforcement there or elsewhere.\textsuperscript{29}

Despite the foregoing points, Mance LJ expressed no view on what the result of the assessment should be in relation to Mr Jones and the other claimants. His Lordship preferred to remit this question to Master Whittaker.\textsuperscript{30}

It is somewhat difficult to pin down the precise reasons that led Mance LJ to these conclusions. There are many threads to this part of his Lordship’s judgment and they are challenging to absorb, especially in terms of their relationship with one another. The essence, though, seems to be the following:

First, Mance LJ did not strictly decide whether case–by-case assessment should exist as a result of remedial interpretation of the SIA under the HRA or ordinary statutory interpretation of that legislation. His Lordship even suggested that any immunity being invoked by individual defendants in fact existed at common law, which could be judicially adjusted to accommodate his Lordship’s conclusions.\textsuperscript{31}

Secondly, to the extent that Mance LJ utilised remedial interpretation,\textsuperscript{32} his Lordship did so by distinguishing Al-Adsani. As indicated, the linchpin of that judgment was a conventional rule of international law conferring state immunity. By reference to state practice in the form of domestic court judgments, particularly from the United States, Mance LJ concluded that the rule did not extend to individual defendants.\textsuperscript{33} Without such support, a blanket refusal of access to the courts in cases alleging torture against individual defendants could not necessarily satisfy Article 6(1) of the European Convention, with its requirements of a legitimate aim and proportionality. Rather, those requirements could only be satisfied through the case-by-case assessment already described.\textsuperscript{34}

Thirdly, insofar as Mance LJ resorted to ordinary statutory interpretation, his Lordship indicated that it was doubtful whether the SIA dealt with the position of officials. However, assuming it did so, it must be understood as only conferring immunity on officials ratione materiae.\textsuperscript{35} In other words, the immunity was limited to their official functions. Unlike the

\textsuperscript{25} \textit{Ibid} at 750.
\textsuperscript{26} \textit{Ibid} at 713; 750. Compare at 743, 744.
\textsuperscript{27} \textit{Ibid} at 746, 750, 753.
\textsuperscript{28} \textit{Ibid} at 748.
\textsuperscript{29} \textit{Ibid} at 748.
\textsuperscript{30} \textit{Ibid} at 753.
\textsuperscript{31} \textit{Ibid} at 751-752.
\textsuperscript{32} \textit{Ibid} at 750.
\textsuperscript{33} \textit{Ibid} at 747.
\textsuperscript{34} \textit{Ibid} at 748, 750, 751.
\textsuperscript{35} \textit{Ibid} at 721.
conduct under consideration in cases such as Propend, those functions did not extend to the conduct to which this case would be confined: torture. Accordingly, there was no relevant immunity in cases alleging torture against individual defendants. Instead, it was appropriate for a court to undertake case-by-case assessment.

C. Remarks of Lord Phillips MR

Lord Phillips MR made some additional remarks, with the concurrence of Neuberger LJ. The focus of these remarks was Pinochet (No 3). Mance LJ had indicated that, despite some remarks favourable to his Lordship’s conclusions in Pinochet (No 1), Pinochet (No 3) had involved three members of the House of Lords, Lord Hutton, Lord Millett and Lord Phillips MR, “assuming or maintaining the continued existence of immunity ratione materiae in respect of a former head of state or other official in civil proceedings (even proceedings based on systematic torture)”. This was, of course, obiter. The ratio of Pinochet (No 3) was that, for one reason or another, the statutory immunity of a former head of state from criminal proceedings did not extend to prosecutions for torture. On this basis, Mance LJ felt free to refuse to apply their Lordships’ obiter in the present case. Mance LJ had, therefore, disagreed with remarks made by Lord Phillips MR in Pinochet (No 3) and the latter now felt compelled to explain why he had changed his mind. In essence, his Lordship concluded that torture simply could no longer fall within official functions, with the result that individual immunity in civil proceedings could not apply.

V. The House of Lords’ Unanimous Restoration of the Master’s Decision

Victory for Mr Jones and the other claimants was short-lived. Mr Jones appealed against the Court of Appeal’s dismissal of his claims against the Ministry of Interior. It, in turn, appealed against the Court’s allowing of claims against the individual defendants, who were not separately represented. Mr Jones’s appeal was unanimously dismissed, while that of the Ministry was unanimously allowed. Lord Bingham and Lord Hoffman each delivered reasons. Their Lordship expressly agreed with each other. Further, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe and Lord Carswell adopted the reasons of both Lord Bingham and Lord Hoffmann.

A. Reasons of Lord Bingham of Cornhill

It appears that the claimants did not press the case for ordinary statutory interpretation of the SIA in the House of Lords. Nor did they appear to assert that any immunity being invoked by individual defendants was the product of the more malleable common law. Thus, Lord Bingham took as his starting point that the SIA would, in the ordinary course, bar the case against the individual defendants.

Unlike Mance LJ, his Lordship did not find it necessary to explore if, and to what extent, the SIA engaged individual defendants. He simply indicated that (a) those defendants were

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36 Ibid at 722, 725, 747.
37 Ibid at 742.
38 Ibid at 747.
39 Ibid at 734.
40 Ibid at 729-732, 743.
41 Ibid at 742, 743.
42 Ibid at 733.
43 Ibid at 758, 759.
acting or purporting to act as servants or agents of Saudi Arabia; (b) as such, their conduct was attributable to Saudi Arabia under the international law of state responsibility; (c) in such a case, there was no distinction between suing a state and individual defendants; and, (d) for this reason, and in the absence of satisfaction of express exceptions in the SIA, its general state immunity applied. This was, apparently, a wealth of English, foreign and international authority consistent with this result.

This made the scope for remedial interpretation of the SIA under the HRA the primary concern of Lord Bingham’s reasons. In this respect, Lord Bingham doubted whether Article 6 of the European Convention was engaged at all. According to his Lordship, the SIA represented an external rule barring court proceedings in the relevant cases. Thus, English courts could not be said to be denying access to justice, contrary to Article 6, as they had no such access to give.

It should be noted, in passing, that this argument is defective. By external rule, his Lordship obviously meant the rule of international law embodied in the Immunity Convention. Its relationship with another such rule, Article 6, is a question of the interaction of treaty obligations. Of course, a state is free to create one treaty obligation which, properly interpreted, overrides another, either beforehand or afterwards.

However, courts should be slow to infer contrariety between treaty obligations. So far as possible, it should ensure that those obligations apply harmoniously. This is precisely what the European Court did in Al-Adsani. There was no inconsistency between the Immunity Convention and Article 6 because a denial of access to the courts in pursuit of that Convention, with its sound rationale of international comity and respect for state sovereignty, satisfied the Article 6 test of a legitimate aim and proportional means. Clearly, though, in a case where a treaty rule regarding non-access could not be reconciled with Article 6 in this way, it would be right to say that Article 6 had been overridden and could not apply.

In any event, Lord Bingham later proceeded on the assumption that Article 6 was operative and endorsed the conclusions in Al-Adsani, as a matter of precedent and principle.

What, though, was the position of the individual defendants? In the first place, the claimants needed to show that the rule of international law relied on in Al-Adsani did not extend to such defendants. However, Lord Bingham had essentially indicated that the Immunity Convention, like the SIA, provided for immunity in a case such as the present. His Lordship was unpersuaded by the argument that the immunity was ratione materiae and did not cover allegations of torture, on the basis they were outside the official capacity of the defendants.

Lord Bingham conceded that this was supported by the reasons given by some of the Law Lords for the ratio in Pinochet (No 1). However, his Lordship held that case to be wholly distinguishable, as it concerned criminal proceedings. This was reflected in the Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment (Torture Convention). On the one hand, the definition of torture in Article 1 of that instrument gave the act an indelibly official character. On the other, it departed from this position only to the extent necessary to enable universal criminal jurisdiction. Thus, in the civil context, the claimants

44 Supra note 1 at 1430-1432.
45 Ibid. at 1430.
46 Ibid. at 1433.
47 Al-Adsani v United Kingdom (2001) 34 EHRR 273 at para. 54.
48 Supra note 1 at 1434-1435.
49 Ibid. at 1439.
50 Ibid. at 1430.
51 Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
simply could not simultaneously argue that they had been tortured, for the purposes of their claim, and yet argue that torture was not official, for the purposes of immunity.52

His Lordship bolstered this result by demonstrating that universal civil jurisdiction in cases of torture had no established place elsewhere in international law, notably under the terms of the Torture Convention and the draft United Nations Convention on Jurisdictional Immunities of States and their Property (draft UN Convention).53 In this regard, the conclusions in the United States and other foreign cases referred to by the Court of Appeal were variously non-judicial, atypical, obiter or incorrect.54

Finally, Lord Bingham emphasised the established revulsion of the common law, and the international community, to torture. It clearly had the status of jus cogens – a non-derogable norm that states could never avoid, by treaties or otherwise. However, this was a question of its substantive character. It did not go to the procedural issue of which courts were entitled to enforce it. Domestic courts were not suited to enforce the jus cogens prohibition against torture, a position confirmed by the International Court of Justice in a number of cases.55

As a result, Lord Bingham concluded that the appeal by the Ministry in relation to the immunity of individual defendants should be allowed and the judgment of the Court of Appeal overturned.

B. Reasons of Lord Hoffmann

Lord Hoffmann’s judgment was broadly similar to that of Lord Bingham. His Lordship also primarily attended to remedial interpretation of the SIA under the HRA, rather than subjecting it to ordinary statutory interpretation.56 In doing so, his Lordship followed Al-Adsani.57 His Lordship also relied on the fact that the jus cogens status of torture was irrelevant, in that it represented a question of substance, whereas immunity was a purely procedural issue.58 Much like Lord Bingham, Lord Hoffmann then concluded that international and foreign law, in the form of the Torture Convention and the draft UN Convention, revealed no agreement upon the existence of universal civil jurisdiction in cases alleging torture.59 His Lordship also agreed with Lord Bingham’s view that Article 6 might not be engaged,60 which is subject to the difficulties already stated.

Lord Hoffmann proceeded on the basis that the international law of state responsibility meant that, charges against individual officials, were in fact charges against the state.61 Further, as a matter of ordinary statutory and treaty interpretation, his Lordship appeared to conclude that the SIA and the Immunity Convention should be understood to extend to individual officials, without any limit ratione materiae.62 Consistently with Lord Bingham’s reasons, Lord Hoffmann concluded that torture, within the meaning of the Torture Convention, had an official character, which meant that it could not be taken outside governmental

52 Supra note 1 at 1435-1436.
54 Supra note 1 at 1436-1439.
55 Ibid at 1428, 1433, 1438. See further Arrest Warrant case, ICJ Reports 2002 at 3; Democratic Republic of Congo v Rwanda (unreported, 3 February 2006).
56 Supra note 1 at 1441.
57 Ibid. at 1442, 1445.
58 Ibid. at 1442.
59 Ibid. at 1442-1448, 1449, 1454-1455.
60 Ibid. at 1447-1448.
61 Ibid. at 1448-1449, 1450-1451.
62 Ibid. at 1449-1450.
functions for the purposes of state immunity. Lastly, his Lordship similarly distinguished the various comments in the *Pinochet* litigation.

VI. INTERPRETATION IS THE KEY

It is best to start with an appraisal of the reasoning of the Court of Appeal. Let us put aside the fact that the judgment is initially difficult to understand. It is ultimately possible to comprehend the essence. Further, the judicial assessment exercise it mandated was elegant and sensitive. At least as a matter of legal policy, it seemed like the best compromise between the interests at issue in the case: the plight of the claimants which, if true, cried out for redress; the legitimate principles underpinning state immunity and the somewhat alarming notion of English courts becoming the forum of choice for any and every alleged victim of torture in the world. Of course, the discretion at its heart could be accused of uncertainty and this could not have been immediately gratifying for practitioners or their clients. However, with the accumulation of precedents, the principles that may guide the exercise of discretion would become relatively clearer, much like *forum non conveniens*.

The Court of Appeal instead fell short by failing to identify the precise basis on which it was allowing claims against the individual defendants to proceed. Reliance on the common law should have been abandoned at the outset. The SIA aims “to make new provision” for immunity. It was always going to be much easier to conclude that it had abolished the prior common law. Indeed, this had already been judicially recognised. Relying on the common law also had shades of a sleight of hand. Using it would look far too much like the Court of Appeal sidestepping an inconvenient statute, in favour of something far more flexible. As a route to a conclusion as contentious as that of Court of Appeal, this was unwise, and probably wrong.

The resort to remedial interpretation was little better. In the first place, it is subordinate to ordinary statutory interpretation. If, under such interpretation, the SIA did not provide immunity and thus barred access to court, there would be no occasion for the application of Article 6 and any consequent remedial interpretation. In any event, *Al-Adsani* was a minefield for the Court of Appeal. It was credibly distinguishable, in the manner Mance LJ indicated. However, it was risky to attempt this in the context of remedial interpretation. The case had been decided by the slimmest of margins and was obviously controversial. For the Court of Appeal to be seen, no matter how defensibly, to limit its reach in the context of Article 6 would have looked far too much like an endorsement of dissentients whose views were not the law.

But was ordinary statutory interpretation of the SIA the answer? In isolation, it all seems so credible. The SIA does not expressly extend to ordinary individual officials. However, it is no affront to principles of statutory interpretation to read the various references to the “state” in Section 14 to include the individuals through whom they act. Further, there is an obvious limit on how far Section 14 engages individuals in this way. It only does so to the extent those individuals are indeed acting as part of the state. In other words, the SIA only confers immunity on individuals when they are performing the functions of government. This has the advantage of according with common law and international law which, as Mance LJ pointed out, has always only given ordinary individual officials immunity ratione materiae.

It is then possible to examine the scope of this limitation on the immunity of individual officials. Does it embrace conduct such as torture? In this context, should torture be

65 To the extent that the latter remains part of English law: see *Owusu v Jackson* [2005] QB 801.
66 See long title to SIA.
67 *Supra* note 8 at para. 14 and authority cited there.
considered a function of government? It is hard not to feel instinctively appalled at the suggestion. We know, from British and Commonwealth constitutional settings, that genocide and conduct that now amounts to crimes against humanity should not enliven powers such as those to make laws “for the peace, order and good government.”

Surely, in the context of immunity, no one could give torture any greater legitimacy. This is the least that the long-held revulsion of English courts and the world to torture should dictate. To this limited extent, the status of torture as *jus cogens* is supportive. That status may be a matter of substance, but it is surely relevant to whether or not torture can be described as “governmental”.

Of course, as implementing legislation, the SIA must be interpreted in light of its parent instrument, the Immunity Convention. However, its terms are sufficiently similar to leave apparent scope, at least in isolation, for the same answer. This would represent an entirely legitimate exercise in treaty interpretation.

Let us imagine, then, that the Court of Appeal rested its judgment on ordinary statutory interpretation of the SIA alone. The question is whether that result should have been displaced by anything that was said by the House of Lords. Ordinary statutory interpretation was in the minor key in Lord Bingham’s reasons. The cornerstone of his Lordship’s conclusion was that the SIA barred the current proceedings because the conduct of individual officials accused of torture would be attributable to a state under the international law of state responsibility. It followed that suing the individuals and suing the state was one and the same. Thus, the immunity of the state itself under the SIA, which in the civil context was absolute or ratione personae, would apply.

Lord Bingham overstates the significance of the rules of state responsibility. They are not primary rules of international law. They are merely secondary. In other words, they have no application until there emerge proceedings for the enforcement of a primary norm. In determining whether a state is in breach of such a norm, the conduct of individual officials is attributable to that state, regardless of whether those officials acted within their actual authority or merely in an apparently official capacity or under colour of authority.

However, until such proceedings arise, the rules have no application. If English courts allow civil proceedings against individual officials in cases of torture, the relevant state will not suffer any prejudice. It is free to refrain from any involvement whatsoever in the proceedings. Further, if there were subsequent proceedings against the state itself before an international tribunal, a number of procedural devices would protect it, including prohibitions on double recovery of compensation and even a principle such as res judicata.

There is no broader question of the state being indirectly impleaded in torture cases against individual officials. Foreign states cannot ordinarily be sued in English courts, because they enjoy a general immunity. Individual officials can be sued, to the extent that they do not enjoy immunity. The disconnect is all the greater once it is recognised that the conduct in respect of which the individual officials are on trial is not a function of government.

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68 *Kruger v Commonwealth* (1997) 190 CLR 1 at 106-107 (Gaudron J), compare at 72 (Dawson J), 159 (Gummow J); *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 at 1103-1104 (Laws LJ), 1107 (Gibbs J). See also *Secretary of State for Foreign and Commonwealth Affairs v R (Bancoult)* [2007] EWCA Civ 498 at paras. 46, 50-54, 63-64 (Sedley LJ).


70 *Supra* note 1 at 1431.


The authorities relevant to the ordinary statutory interpretation of the SIA cited by Lord Bingham as broadly supporting his approach were not decisive. As Mance LJ indicated, none addressed the question of whether the immunity of an official ratione materiae extended to conduct as serious as torture. Accordingly, they were distinguishable.

Further, there was nothing in Lord Bingham’s analysis of remedial interpretation of the SIA under the HRA to interfere with an ordinary interpretation of the SIA to deny individual officials immunity in cases of torture. In the first place, Article 6 is definitely not engaged in a situation where a domestic statute is interpreted to grant, rather than deny, access to the courts. Further, there was nothing in Al-Adsani to suggest that the Immunity Convention was not amenable to a corresponding interpretation. The judgment concerned states, not individual officials.

Lord Bingham was probably correct to suggest that little was to be gained from trying to derive support from the Pinochet litigation, which was easily distinguishable. However, his Lordship was wrong to suggest that the Torture Convention precluded a denial of immunity to individual officials in civil cases. The first point Lord Bingham made was that the definition of torture in Article 1 gave that act an official character. Yet, as Mance LJ indicated, Article 1 does nothing of the sort. It simply identifies the fact that the perpetrators of torture will be official persons of one form or another. This merely recognises the situations in which torture arises. However, it does not dignify such conduct with the status of a function of government, nor does it even mention state immunity.

It is, of course, true that Article 14 of the Torture Convention does not require states to exercise universal civil jurisdiction. However, as indicated, the nuanced approach taken by the Court of Appeal specifically avoids asserting any such jurisdiction. In any event, the significance of its absence from the Torture Convention must not be exaggerated. It simply means that the international community has yet to agree that states must entertain civil proceedings regarding torture wherever it is alleged to have occurred. This does not mean that the Torture Convention prohibits a state from allowing proceedings involving torture occurring overseas, especially where the allegations have some connection with the state, such as the nationality of the alleged victim. This is consistent with the settled principle of international law, namely that what is not specifically prohibited is permissible for states to perform.73

An analysis of the build-up to the draft UN Convention can be subjected to the same analysis. The only point of distinction is that, unlike the SIA and the Immunity Convention, Article 6(2)(b) of the draft UN Convention deems a proceeding to be instituted against a state where, although the state is not named as a party, “the proceeding in effect seeks to affect the property, rights, interests or activities of that other state”. This does not preclude civil proceedings alleging torture against individual officials. No state should be able to assert that it is relevantly affected where individual officials are accused of torture, which cannot form part of governmental functions. Indeed, the only interest a state should be permitted in this regard is the accountability of the officials concerned. If it is willing to do so itself, the model propounded by the Court of Appeal would almost certainly foreclose a case in the English courts. If not, the state should be content to see allegations of such reprehensible conduct, forming no part of any understanding of what should constitute government, tested and resolved.

There is also no barrier in the various overseas and international authorities cited by Lord Bingham. None had implications for the SIA by directly concerning the interpretation of the Immunity Convention. Some, of course, represented a conclusion consistent with the suggested construction. To the extent, though, that those decisions concerned an alternative

73 See, for example, Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996 at paras. 21-22.
context, were decided by non-judicial bodies, represented conclusions stated by the by or were arguably incorrect, they are easily and inconsequentially distinguishable.

Lastly, there is nothing in the foregoing that is contradicted by the reasons of Lord Hoffmann.

A brief postscript is required. It would have been fascinating to see which law the Court of Appeal would have applied to the case, had it gone further.\(^74\) If English law were selected, it seems as if the claimants would have been compelled to plead an English tort of torture, flowing from the automatic incorporation of international customary law onto the domestic plane.\(^75\) The extent of that incorporation was recently addressed by the House of Lords in the “other Jones case”, i.e., \(R\ v\ Jones\).\(^76\) There, the House held that the doctrine of automatic incorporation could no longer apply to customary crimes. The creation of crimes under English law was a task so weighty that it now had to be within the exclusive domain of Parliament. The judiciary could not, through the device of international law, arrogate that task to itself.

It is worth noting that, on reflection, this holding actually justifies the abolition of automatic incorporation in its entirety. Of course, the separation of powers premise underlying the requirement of implementing legislation for treaties is less easily applied to custom.\(^77\) However, it is significant that automatic incorporation gives the Executive some law-making role, in the form of contributing to state practice grounding customary rules and exercising a veto role on the content of English law where it is able to and chooses to engage in persistent objection to a particular rule. More fundamentally, though, automatic incorporation undermines the democratic system of government embodied by Parliament, as it introduces rules into English law with no input from the representatives of the people. For this reason, had the House of Lords decided otherwise in Jones, the status of automatic incorporation could have received further scrutiny and, potentially, abolition.

This conclusion would be unproblematic for the lifting of immunity in civil cases alleging torture against individual officials. In order to evoke such lifting of immunity, claimants would simply need to indicate that a case of battery was so severe that it rose to the level of what would be regarded as torture under international law. There would be no need, though, for automatic incorporation to be invoked.

\textbf{VII. Conclusion}

One inevitably feels a sense of futility in endorsing a judgment of the Court of Appeal that has been overturned by the House of Lords, even if each judge in the case has subsequently been promoted. However, this reaction is worth overcoming. The Court of Appeal deserves criticism for being difficult to understand, as well as indecisive about the precise basis on which it reached its decision. Nonetheless, upon analysis, the judgment contains a solid approach. As a matter of ordinary statutory and treaty interpretation, the SIA, read with its parent Convention, can be understood to deny individual officials immunity in civil cases alleging torture. There is also everything to be said for the tactful exercise in judicial discretion for such cases mandated by the Court of Appeal.

These propositions should have survived an appeal to the House of Lords. Each consideration mentioned by Lord Bingham, and to like effect by Lord Hoffmann, cannot displace an entirely legitimate construction of the SIA, in association with the Immunity Convention. The rules of state responsibility have no impact until an international proceeding arises, in


\(^76\) [2007] 1 AC 136. This case also did not involve known relatives of the author.

\(^77\) \textit{Walker v Baird} [1892] AC 491.
which event procedural rules would relieve a state from any prejudice that could flow from
a decision by the English courts. Further, a state cannot, by reference to Article 6(2)(b)
of the draft UN Convention, be heard to say that it is affected by English cases alleging
 torture against individual officials. It can easily avoid proceedings in the English courts by
providing an adequate remedy of its own. Otherwise, it should be glad to see them proceed.

Likewise, the other considerations invoked by the House are inconclusive. The Torture
Convention merely identifies the authors of torture as officials. It says nothing of the char-
acter of torture as a governmental function, much less for the purposes of state immunity.
Further, the fact that the international community has yet to agree on universal civil jurisdic-
tion, wherever the torture is alleged to have occurred, simply means that such cases are yet
to be comprehensively stipulated. Under a settled principle of international law, this does
not mean that the admirably nuanced exercise adopted by the Court of Appeal, potentially
involving English claimants, is prohibited. None of the foregoing is directly or decisively
excluded by any authority.

In short, Mr Jones and the other claimants should have been allowed to proceed.