
State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong

Alexander Orakhelashvili*

Abstract

The proper way of addressing the impact of normative hierarchy on state immunity is to adopt the normative-evidentiary approach cleansed of preconceptions motivated by certain risk factors that possess only theoretical significance. The European Court stated in Al-Adsani on the hierarchy of norms issue without properly examining most of its crucial aspects. The Joint Dissenting Opinion of six judges has exposed the weaknesses in the Court's reasoning. Still, some national courts, especially the House of Lords in Jones v. Saudi Arabia, have taken the Al-Adsani ruling as axiomatic, and accepted its outcome without enquiring into whether the line of reasoning the European Court had pursued was consistent or supported with evidence. The outcome is an unfortunate thread of judicial decisions, which do not properly examine the impact of the hierarchy of norms on State immunity, and consistently uphold the impunity of the perpetrators of torture as well as the denial to victims of the only available remedy.

1 Introduction

This contribution examines the impact of the hierarchy of norms on state immunity in international law. This question has been dealt with in several cases decided by Canadian, English, German, Greek, and Italian courts, and the European Court of Human Rights.¹ The principal emphasis of this contribution will be on the UK House of Lords' decision in

* LLM *cum laude* (Leiden); PhD (Cantab.); Junior Research Fellow, Jesus College, Oxford. Email: alexander.orakhelashvili@law.ox.ac.uk.

¹ On this see Orakhelashvili, 'State Immunity and International Public Order', 45 *German Yearbook Int'l L* (2002) 227, 'State Immunity in National and International Law: Three Recent Decisions of the European Court of Human Rights', 15 *Leiden J Int'l L* (2002) 703, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', 15 *EJIL* (2003) 529, at 551–567, and 'Case review on Arrest Warrant', 96 *AJIL* (2002) 677, and A. Orakhelashvili, *Peremptory Norms in International Law* (2006), at chs 8 (sect 3.2), 9, 10, and 18 (sects 2 and 3).

Jones v. Saudi Arabia. In this case, following the *Al-Adsani* decision of the European Court of Human Rights, the House of Lords has ruled that the Kingdom of Saudi Arabia was immune for the acts of torture: Article 6 of the European Convention on Human Rights was subject to the exception of immunity; Article 14 of the 1984 Torture Convention was subject to the territoriality limitation and hence irrelevant; and *jus cogens* could not affect immunity because it lacked procedural effect.² Thus, the House of Lords asserts that immunities are not impacted upon by the normative hierarchy. On every instance this issue arises, the House of Lords reads into each norm, the relevance of which it denies in the case at hand, an exception or qualification that allows the upholding of immunity, whether or not this actually accords with the rationale and scope of that norm.

The outcomes reached in these cases require a proper examination of the hierarchy of norms, without preconceived clichés or rather unscientific prejudices and pre-conceptions of risks allegedly likely to follow if the hierarchy of norms is properly implemented in the field of state immunity. There are different schools of thought as to whether the victims of foreign torture must be allowed to litigate before national courts and recover damages from their torturers. There are random, and unsubstantiated, categorizations of those approaches as ‘idealist’ or ‘realist’, ‘liberal’, ‘conservative’, ‘orthodox’, or ‘traditional’. Such labels do not really address the argument but attempt to dispose of it through the jargon. At the same time, the most characteristic feature of the ‘realist’ or ‘orthodox’ school of thought is that it imagines itself as the only sound and rational approach that is capable of seeing the implications of refusing immunity to torturers. It imagines itself as indispensable in guarding stability and avoiding chaos that could ensue if the torture claims were allowed to proceed, and also refers to some practical difficulties that this process can allegedly produce on the ground. On closer inspection, however, both those risks and difficulties prove to be more imaginary than real, and the implementation of the accountability of foreign torturers before national courts seems to be a perfectly doable task.

Among the risks that are feared in the case of denial of immunity is the possibility of the deterioration of bilateral relations between the forum state and the perpetrator state. There is, however, no firm evidence that this is inevitable or even likely. There is no evidence, in the practice of denial of immunity in multiple cases, that the denial of immunity, as such, causes any serious, long-term, or irreparable deterioration of bilateral relations between states.

Another perceived risk is floods of litigation. It is feared that if national courts deny immunity of states for serious human rights violations, then all victims will come to the relevant forum state to sue the perpetrators. This risk, too, is merely theoretical. The denial of immunity would in practice have a preventive impact by deterring the governments with assets abroad from torturing individuals. Less torture naturally means less litigation abroad.

But most importantly, national legal systems possess enough safeguards to ensue that no flood of litigation materializes. There is the avoidance tool known as *forum non*

² *Jones v. Ministry of Interior Al-Mamlaka Al-Arabyia AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 16 (hereinafter *Jones* (HL)).

conveniens, using which courts are to ask the plaintiffs a really simple question: can they litigate the same case in their own country, in the country where the breach was allegedly committed, or before an international body which can consider the case and award remedies? If the answer is yes, then the courts in the forum state will decline to adjudicate. But if the answer is no, they will have to proceed to make available to the victims the only possible means of redress. No litigation flood worthy of the name could materialize in these conditions.

It is clear that the *Al-Adsani*, *Bouzari*, and *Jones* victims cannot count on getting any remedy from the Kuwaiti, Iranian, and Saudi authorities, which authorities are also not subjected to the jurisdiction of any international human rights mechanism. Access to English and Canadian courts has been the only way for victims to obtain justice. When such victims without any other means of redress are faced with proceedings, national courts have to act responsibly as the fora upon which the enforcement of the fundamental international prohibition of torture in the specific instance crucially depends. Impunity is the implication of the deprivation of the only available remedy, and it is at those most deprived that the rulings upholding the immunity of torturers strike most severely.

Thus, there is no scientific or intellectual value in attempts to influence the hierarchy of norms debate by invoking the hypothetical risks examined above. The issue of hierarchy of norms is an issue of legal science. Its merits depend on evidence, as opposed to perception and pre-conception, and it has to be examined from this angle. On the other hand, any sound perception of the hierarchy of norms has to accept that such hierarchy is designed to make the difference on the ground.

As is generally known, there is normative conflict if one rule impedes the operation of another, whether or not the first rule expressly refers to the second, or *vice versa*. As the Arbitral Tribunal pointed out in *Loewen*, the intention to override the customary norm by a treaty norm 'may be exhibited by express provisions which are at variance with the continued operation of the relevant rules of international law'.³ Some factors could obviously favour the construction of treaty obligations in accordance with general law. But this approach could be viable only if the text of treaty clauses as they stand did not require an outcome different from that provided under general international law. The primacy of *lex specialis* is the direct implication of the role of the will of states parties to the relevant treaty as the basis of legal obligations. As Wilfried Jenks observes:

the presumption against conflict is not, however, of an overriding character. It is one of the elements to be taken into account in determining the meaning of a treaty provision, but will not avail against clear language or clear evidence or intention. Such a presumption will not suffice to reconcile clearly irreconcilable provisions.⁴

As Pauwelyn further comments, 'the presumption against conflict is a presumption in favour of continuity, not a prohibition of change. It ought not to lead to a restrictive interpretation of the new, allegedly conflicting, norm'.⁵ The further analysis will work

³ *The Loewen Group, Inc and Raymond L. Loewen and United States of America* (Award, Case No. ARB(AF)/98/3), 26 June 2003, 42 *ILM* (2003), 811, 837, paras 159 and 162.

⁴ Jenks, 'The Conflict of Law-Making Treaties', 30 *BYIL* (1951) 401, at 429.

⁵ J. Pauwelyn, *Conflict of Norms in Public International Law* (2003), at 242.

out the impact of the principles of normative hierarchy in the contexts of Article 6 of the European Convention on Human Rights; Article 14 of the UN Torture Convention; and *jus cogens*.

2 Article 6 of the European Convention on Human Rights

The *Jones* litigation witnessed the treatment of Article 6 ECHR, providing for the right of the access to a court in different ways. The Court of Appeal accepted that Article 6 can require disregarding the immunity of individual state officials if the victim cannot pursue his claims in the state where torture occurred. Otherwise, the right of access to a court would be deprived of its real meaning.⁶ But Article 6 was deemed irrelevant where states as such were sued. Presumably, allowing some defendants to be sued while giving other defendants immunity does not completely foreclose legal remedies to victims and therefore does not amount to complete impunity.

The House of Lords asserted, pursuant to the European Court's decision in *Al-Adsani*, that sovereign immunity, reflecting 'the generally recognised rules of public international law' could not be regarded as a disproportionate restriction on the right of access to a court under Article 6.⁷ *Al-Adsani* suggests that the European 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'.⁸ Such principle of interpretation is not part of international law. A treaty shall be interpreted, as Article 31 of the 1969 Vienna Convention on the Law of Treaties affirms, in terms of its plain meaning and its object and purpose. This is the primary method of interpretation. Article 31(3)(c) suggests that the relevant rules of international law shall be taken into account, but does not require the treaty to be interpreted so as to make it compatible with those rules, among others, by restricting the meaning of their provisions.

Article 6 of the European Convention guarantees its due process rights to 'everyone'. This definitionally includes persons that sue foreign states and their agents. This is the outcome required by the plain meaning of Article 6, whatever the alleged position under general international law, and it has to be respected. Article 6 does not state any exception to due process rights that could even remotely accommodate the concept of state immunity. Article 6, unlike Articles 8 to 11 of the Convention, does not include any reference to the margin of appreciation – conditions like public safety, national security, or protection of morals – and even if it did, state immunity would not be subsumable within any of those conditions. There is an implied exception that excludes minors and persons of unsound mind from the scope of Article 6, because they are themselves in no position to make use of their due process rights.⁹ But nothing justifies excluding from the ambit of Article 6 cases involving persons who can make

⁶ *Jones v. Saudi Arabia* [2004] EWCA Civ 1394 (CA), (per Mance LJ).

⁷ *Jones* (HL), *supra* note 2, at para. 39 (per Lord Hoffmann).

⁸ *Al-Adsani v. UK* (2002) 34 EHRR (2002) 280, at para. 55.

⁹ *Golder v. UK*, Judgment of 21 Feb. 1975, ECHR Ser. A, No. 18, 57 *Int'l LR* 201, at 219; *Winterwerp v. The Netherlands*, Judgment of 24 October 1979, ECHR Ser. A, No. 33, 58 *Int'l LR* 653, at 681–682.

use of their due process rights. In the *Golder* case, the European Court determined the criteria that can qualify the scope of Article 6. The exceptions to the right of access to a court shall not injure the essence of the right itself nor cause its total absence.

The European Court's jurisprudence also elaborates upon the further category of cases in which the rights under Article 6 can be set aside, such as the cases where the individual is guaranteed the alternative means of protection. For instance, in *Beer and Regan* and *Waite and Kennedy*, the Court held that the European Space Agency (ESA) was entitled to immunity before German courts. The individuals could instead resort to the ESA Appeals Board.¹⁰ In *Al-Adsani*, however, the Court, without respecting the previous determinations of criteria that govern the possible exceptions to Article 6, admitted the blanket exception to Article 6 in circumstances where the applicant had no other means of protection. This has, to put it the *Golder* way, injured the content of the right and caused its absence. The Court had moreover been aware of the fact that the United Kingdom had refused the applicant diplomatic protection against the state which had tortured him and whose immunity English courts had upheld.¹¹ Thus, the European Court tolerated the fact that the applicant would get no justice or remedy whatsoever. That is the position of absolute impunity. As Judge Loucaides rightly remarked:

Any form of blanket immunity, whether based on international law or national law, which is applied by a court in order to block completely the judicial determination of a civil right without balancing the competing interests, namely those connected with the particular immunity and those relating to the nature of the specific claim which is the subject matter of the relevant proceedings, is a disproportionate limitation on Article 6§1 of the Convention and for that reason it amounts to a violation of that Article.¹²

The *Al-Adsani* treatment of Article 6 is incompatible with the principle, repeatedly affirmed in the European Court's jurisprudence, that the Convention must be interpreted so as to make its safeguards practical and effective, and not illusory.¹³ The House of Lords in *Jones*, although having all the relevant material and argument before it, did not address this issue at all.

In conceptual and normative terms, the alleged conflict with customary law should not be preventing the fully fledged application of the Convention provisions. The European Convention in general, and Article 6 in particular, are meant to operate even when they are contradicted by other norms of international law. As the European Court determined in *Capital Bank v. Bulgaria*, compliance with other international obligations does not justify restricting the Convention safeguards.¹⁴ For instance, the Convention provisions will operate even though they may hamper international co-operation through international organizations, as affirmed in a number of cases such

¹⁰ App. No. 28934/94, *Beer and Regan v. Germany* [GC], 18 Feb. 1999, available at: hudoc.echr.coe.int/hudoc; App. No. 2608394, *Waite and Kennedy*, 18 Feb. 1999 [1999] I ECHR, available at: hudoc.echr.coe.int/hudoc.

¹¹ *Al-Adsani*, 34 EHRR (2002) 280, at 288, paras 19, 51.

¹² *Ibid.*, at 301 (Dissenting Opinion).

¹³ App. No. 14038/88, *Soering v. UK*, Judgment of 7 July 1989, Series A, No. 161, at paras 87–88; App. No. 6604/74, *Artico v. Italy*, Judgment of 13 May 1980, Series A, No. 37, at para. 33.

¹⁴ App. No. 49429/99, *Capital Bank v. Bulgaria*, 24 Nov. 2005, at para. 111, available at: hudoc.echr.coe.int/hudoc.

as *M & Co v. Germany*, *Waite & Kennedy*, *Matthews*, and *Bosphorus*.¹⁵ In all these cases, the Convention was deemed to prevail over the requirements allegedly following from the charters of international organizations. Now, if the need for international institutional co-operation cannot upset or restrict the Convention standards, it is unclear how the grant of state immunity 'to promote comity and good relations between States through the respect of another State's sovereignty'¹⁶ can justify reading limitations into the Convention. This would mean that institutional co-operation is not important enough to restrict the Convention's scope, while the need 'to promote comity and good relations' allegedly is. What are the criteria that govern such distinctions and who ought to be determining them? Such determination implies the legislative aspiration and shall not be made by a judicial organ. The better, and the only acceptable, approach is to respect the plain meaning of treaty clauses such as Article 6 and enable them to make the difference in terms of the position of the individual that they are designed to make.

This demonstrates that the House of Lords ought not to have followed *Al-Adsani* blindly, but to have examined the propriety of this decision, and also where this decision stands in the broader framework of the system of, and jurisprudence under, the European Convention on Human Rights. The pick-and-choose approach to the requirements of this system can only produce justice of sub-standard quality.

3 Article 14 of the UN Torture Convention

According to Article 14 of the Torture Convention, '[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation'. In some cases it is simply stated that Article 14 is limited to the acts of torture committed within the territorial state,¹⁷ without explaining what makes Article 14 so limited when such limitation does not appear in its text. Doubts are admitted whether Article 14 grants civil jurisdiction in the same way as Articles 5 and 7 of the Torture Convention grant criminal jurisdiction. It is also suggested that the parties would not have lightly agreed to the assumption of broad jurisdictional obligations.¹⁸ While it is true that the criminal jurisdiction provisions of the Torture Convention are more detailed and Article 14 is stated in simpler and more straightforward terms, this is by no means an ambiguity, because a treaty provision does not have to be drafted in a complex way to produce a foreseeable effect. It does not make much sense to speculate on what states parties would have lightly agreed to, as the text of Article 14 demonstrates to what they have actually agreed.

¹⁵ App. No. 45038/98, *Bosphorus Hava Yollari Turizm v. Ireland* (Merits), 30 June 2005, available at: hudoc.echr.coe.int/hudoc; App. No. 24833/94, *Matthews v. the United Kingdom* [GC], [1999] IECHR, available at: hudoc.echr.coe.int/hudoc; App. No. 26083/94, *Waite and Kennedy v. Germany* [GC], *supra* note 10; *Beer and Regan v. Germany* [GC], *supra* note 10; App. No. 13258/87, *M & Co v. FRG*, 9 Feb. 1990, 33 YB ECHR (1990) 51.

¹⁶ *Al-Adsani*, *supra* note 11, at para. 54.

¹⁷ H Fox, *The Law of State Immunity* (2002), at 525.

¹⁸ Byrnes, 'Civil Remedies for Torture Committed Abroad: An Obligation under the Convention Against Torture?', in C. Scott (ed.), *Torture as Tort* (2001), at 536, 542.

The textual interpretation of Article 14 produces clear results, evidences a contrast to similar provisions in other treaties, and proves that if states parties to a treaty wish to provide for a territorially restricted jurisdiction they will do so expressly.¹⁹ In terms of the object and purpose of the Convention, the universality requirement is conducive to the accountability for torture and has to be preferred to the narrow territorial reading of Article 14, which prevents rather than endorses such accountability. In terms of preparatory work, Byrnes acknowledges that during the drafting process what is now Article 14 was indeed qualified in terms of territoriality, but the limitation of jurisdiction to the acts of torture committed under the jurisdiction of the state party was dropped. The US Government maintained that this happened by mistake.²⁰ But it is unjustified to attribute to a mistake the change of a normative provision which substantially modifies the jurisdiction of states parties, transforming it from territorial into extraterritorial. Such line of reasoning implies that states parties did not know what they were doing while drafting the Convention.

Thus, the use of normal methods of treaty interpretation excludes viewing Article 14 as not extending to the acts of torture committed beyond the forum state's territory. But the jurisprudence of national courts perverts the clear meaning of Article 14. In *Bouzari v Iran* Canadian courts found Article 14 inapplicable to the acts of torture of a foreign national committed abroad. They accepted that the text of Article 14 contains no territorial limitation, but nevertheless subscribed to the exclusively territorial character of jurisdiction under Article 14 by reference to the practice of certain states. In particular, the US attitude on territoriality which was met by the German response – which can only ambiguously, if at all, be considered as the acceptance of the US view – the silence of other states parties, and Canada's own attitude before the Committee against Torture. They further approved this understanding of state practice as crucially influencing the meaning of Article 14 by reference to Article 31(3)(b) of the 1969 Vienna Convention regarding the relevance of subsequent practice in treaty interpretation.²¹

At the same time, Canadian courts did not make any effort to prove that such limited practice was meant, and can suffice, to establish the agreement to reduce the scope of Article 14 to the provision that provides merely for territorial jurisdiction. While they referred to the 1969 Vienna Convention to justify their interpretative approach, they did not bother to enquire into whether the same Convention had anything to say on the relevance of the plain meaning of the treaty text as understood in terms of its object and purpose.

¹⁹ Cf Art. 6 of the 1968 Convention on the Elimination of All Forms of Racial Discrimination obligating states parties to provide remedies for racial discrimination in territories under their jurisdiction. This is noted by Byrnes (*supra*, note 18, at 548), but without acknowledgment of the implications.

²⁰ Byrnes, *supra* note 18, at 546.

²¹ *Bouzari v. Islamic Republic of Iran* (Ontario Superior Court of Justice), [2002] OJ No. 1624, Court File No. 00-CV-201372 (hereinafter *Bouzari* (OSCJ)), at paras 49–51 (*per* Swinton J); *Bouzari v. Islamic Republic or Iran* (Court of Appeal for Ontario), 30 June 2004, Docket: C38295 (hereinafter *Bouzari* (CA)), at paras 72–82 (*per* Goudge JA).

Like Canadian courts, the House of Lords referred to the above-mentioned US statement, the German response, and the silence of other states. Lord Bingham pointed out that after this it was unlikely that the US would now subscribe to universal civil jurisdiction over the acts of torture committed outside the forum's territory.²² He added that the natural reading of Article 14 confirmed this territoriality view.²³ But the terms of Article 14, as can be seen, do not include any limitation. As for the doubts that the US would endorse the concept of universal civil jurisdiction, the answer is that it does, and quite regularly and systematically, as is repeatedly affirmed in its jurisprudence.²⁴

What the US–German exchange can show at best is the possible bilateral agreement reached between the two states parties to interpret restrictively, as between themselves, the jurisdictional clause contained in Article 14. The silence of other parties cannot be seen as acceptance or acquiescence, because this would require proof that all other states parties have remained silent as a matter of their legal obligation, to the exclusion of any other motivation. This would furthermore leave unexplained the situation with regard to states parties that acceded to the Convention subsequently and were possibly unaware of the US–German exchange.

There is thus no evidence whatsoever that the restrictive territorial reading of Article 14 is justified. The House of Lords would have been well advised to consider the attitude of the Permanent Court of International Justice in the *Polish Nationality* case that when the text of a treaty clause is clear, the court 'is bound to apply this clause as it stands, without considering whether other provisions might with advantage have been added to or substituted for it. ... To impose an additional condition not provided for ... would be equivalent not to interpreting the Treaty, but to reconstructing it.'²⁵

The House of Lords dealt with Article 14 after the compliance of Canada with its obligations under Article 14 of the Torture Convention was raised before the UN Committee against Torture. The representatives of Canada defended the attitude of Canadian courts by insisting that Article 14 requires the establishment of jurisdiction only over the acts of torture committed in the forum state's territory.²⁶ The Committee did not share this approach as it dealt with it in the context of 'subjects of concern', one of which is 'the absence of effective measures to provide civil compensation to victims of torture *in all cases*'. It furthermore insisted that 'the State party should review its position under Article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction *to all victims of torture*'.²⁷ Thus the Committee clearly

²² *Jones* (HL), *supra* note 2, at paras 20 (*per* Lord Bingham), 46 (*per* Lord Hoffmann).

²³ *Ibid.*, at para. 25 (*per* Lord Bingham).

²⁴ *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2nd Cir. 1980), 77 *Int'l LR* 169; *Trajano v. Marcos*, 878 F. 2d 1439 (9th Cir. 1992), 103 *Int'l LR* 521, at 526–527, 530; *Hilao v. Marcos*, 25 F. 3d 1467 (9th Cir. 1994), 104. *Int'l LR* 119, at 126–128; See also *Forti v. Suarez-Mason*, 697 F Supp. 707 (ND Cal. 1987), 81 *Int'l LR* 624, at 631–633; *Xuncax v. Gramajo*, 886 F. Supp. 726 (DC Mass. 1995), 104 *Int'l LR* 165, at 183–184

²⁵ *Acquisition of Polish Nationality*, Advisory Opinion of 15 Sept. 1923, PCIJ Series B, No. 7, at 6, 20

²⁶ UN Committee against Torture, Summary Record of the 646th Meeting, CAT/C/SR.646/Add. 1, at 8, 13, paras 41–44, 74.

²⁷ UN Committee against Torture, Observations of the Report of Canada, CAT/C/CO/34/CAN, at paras 4(g) and 5(f) (*emphasis added*).

and effectively disapproved the approach of Canadian courts in viewing Article 14 as restricted to territorial jurisdiction or as excluding universal jurisdiction.

Lord Bingham noted the attitude of the UN Committee, but refused to engage with the argument in substantive terms, merely pointing out that the Committee's conclusions had no binding force and their legal authority was 'slight'.²⁸ Lord Hoffmann added that the Committee had no legislative powers.²⁹

Therefore, *Jones* presents with the conflict of interpretation made by the individual state party to the Convention, and that produced by the Committee that has been designated under the Convention as the body responsible for interpreting and implementing the Convention. In this sense, *Jones* displays a lack of respect for the United Nations system. The real question is not whether the Committee can issue binding decisions but whether, being an organ authoritatively entrusted with the task of interpretation and application of the Convention, it can interpret the Convention better than states. If the interpretation made by the supervisory organ can be rejected just because it is not binding, then there can be more than one 'permissible' interpretation, and this undermines the interpretation regime under the 1969 Vienna Convention. Interpretation is about the meaning of the treaty clause, not about the binding nature of institutional powers. Moreover, in this case the Committee's interpretation of Article 14 was perfectly in accordance with its textual meaning, as well as the Convention's object and purpose. The approach of the House of Lords is to assert the power of auto-interpretation of treaties, and it undermines not only the effectiveness of human rights treaties but the stability of treaty obligations in general.

4 Peremptory Norms

Peremptory norms (*jus cogens*) refer to the fundamental public order of the international community that trumps all inconsistent norms and instruments. Even as originally envisaged as an element of the law of treaties in Article 53 of the 1969 Vienna Convention on the Law of Treaties, *jus cogens* now extends to a variety of other fields. The International Criminal Tribunal for the Former Yugoslavia and the Special Court for Sierra Leone have affirmed that amnesties that contradict *jus cogens* have no legal effect.³⁰ The UN International Law Commission has affirmed the extension of *jus cogens* in the law of state responsibility, especially by postulating and affirming the duty not to recognize the breaches of *jus cogens*, in terms of the situation following the breach.³¹ Although recognition is normally considered in terms of the emergence of states, it is, as Brownlie puts it, a more general concept related to the 'evaluation of State conduct

²⁸ *Jones* (HL), *supra* note 2, at para. 23 (*per* Lord Bingham).

²⁹ *Ibid.*, at para. 57 (*per* Lord Hoffmann).

³⁰ *The Prosecutor v. Furundzija*, Judgment of 10 Dec. 1998, IT-95-17/I-T, at para. 155; *Prosecutor v. Morris Kallon & Brimma Bazzy Kamara*, SCSL-2004-15-AR72(E) & SCSL-2004-16-AR72(E), Decision of 13 Mar. 2004, at para. 71; *Prosecutor v. Augustine Gbao*, SCSL-2003-01-I, Decision of 31 May 2004, at para. 9.

³¹ ILC, *Arts 40–41 on State Responsibility, Report of the International Law Commission* (2001), Official Records of the General Assembly, Fifty-sixth session, Supp. No. 10 (A/56/10). According to Art. 41, states shall not 'recognise as lawful a situation created by a serious breach' of *jus cogens*.

in face of facts which may relate to legal titles, liabilities or immunities'.³² Therefore, the duty of non-recognition of the breaches of peremptory norms extends to every kind of illegality. It refers to the general duty to refrain from acts and actions, or from taking attitudes, that imply the recognition of the acts offending against peremptory norms in a variety of international legal relations. Therefore, even though it is argued that granting immunity is not in itself a violation of *jus cogens*,³³ it may well be such violation if it results in recognizing and consolidating the situation produced by the breach of the relevant peremptory norm.

The function of peremptory norms in the field here under consideration is preventing impunity for serious breaches of human rights and humanitarian law. There is solid doctrinal support for the approach that *jus cogens* trumps state immunity before national courts, and this has been the case throughout the whole period in which this issue has been arising in practice. In fact, this approach is supported by at least as many scholars as it is contradicted by.³⁴ It is no longer possible, if it ever was, to consider that the view of primacy of *jus cogens* is an isolated trend of the small minority, while the majority of scholars support the 'traditional' or 'orthodox' blanket understanding of state immunity.

There is, on the other hand, another doctrinal trend, represented by the group of authors who argue that while peremptory norms regulate substantive conduct, immunities are based on procedural norms. The peremptory status of a rule does not, according to this school of thought, carry with it the peremptory obligation on the forum state to provide the victim with civil remedies for acts committed abroad and by the foreign state.³⁵ This simple and easy construct of the distinction between various

³² Brownlie, 'Recognition in Theory and Practice', 53 *BYIL* (1982) 197, at 200–201.

³³ Tomuschat, 'Concluding Remarks', in C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order* (2006), at 425, 433.

³⁴ Belsky, Merva and Roht-Ariaza, 'Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law', 77 *California L Rev* (1989) 365; Bianchi, 'Denying State Immunity to Violators of Human Rights', 46 *Austrian J Public Int'l L* (1994) 195; Clapham, 'National Action Challenged: Sovereignty, Immunity and Universal Jurisdiction before the International Court of Justice', in M. Lattimer and P. Sands (eds.), *Justice for Crimes Against Humanity* (2003), at 303; Reinmann, 'A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Prinz v Federal Republic of Germany*', 16 *Michigan J Int'l L* (1995) 403; Karagiannakis, 'State Immunity and Fundamental Human Rights', 11 *Leiden J Int'l L* (1998) 9; A. Cassese, *International Law* (2005), at 105–108; Reece Thomas and Small, 'Human Rights versus State Immunity: Is there Immunity from Civil Liability for Torture?', 50 *Netherlands Int'l L Rev.* (2003), 1; Bartsch and Elberling, 'Jus Cogens vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the *Kalogeropoulou et al. v. Greece and Germany* Decision', 4 *German LJ* (2003) 477; Pingel, 'L'immunité des Etats', in Tomuschat and Thouvenin (eds.), *supra* note 33, 239; Hall, 'UN Convention on State Immunity: The Need for a Human Rights Protocol', 55 *ICLQ* (2006) 411; McGregor, 'State Immunity and Jus Cogens', 55 *ICLQ* (2006) 437; see also the comprehensive report prepared by REDRESS, *Immunity v Accountability: Considering the Relationship between State Immunity and Accountability for Torture and other Serious International Crimes* (Dec. 2005), at 28–41.

³⁵ H. Fox, *The Law of State Immunity* (2002), at 524–525; Tomuschat, 'L'immunité des états en cas de violations graves des droits de l'homme', 109 *RGDIP* (2005) 51; Zimmermann, 'Sovereign Immunity and Violations of International Jus Cogens – Some Critical Remarks', 16 *Michigan J Int'l L* (1995) 433; Giegerich, 'Do Damages Arising from Jus Cogens Violations Override State Immunity from the Jurisdiction of Foreign Courts?', in Tomuschat and Thouvenin, *supra* note 33, at 203; Caplan, 'State Immunity, Human Rights and Jus Cogens', 97 *AJIL* (2003) 741; Akande, 'International Law Immunities and the International Criminal Court', 98 *AJIL* (2004) 407.

categories of norms is easy to grasp when one is inclined to view the international legal system as the system that is concerned only with bilateral relations between states and does not consider the position of individual victims. But on closer analysis of its content and implications, this 'distinction' argument becomes unsustainable.

It will be recalled that the European Court in *Al-Adsani* did not base its decision on the alleged difference between the substantive norm and its procedural enforcement. It rather took the evidence-based attitude, suggesting that while in terms of criminal proceedings *jus cogens* can have procedural effect, in civil proceedings it cannot.³⁶ In doing so, the Court did not answer the question why the norm that can prevail over 'procedural' norms in some fields cannot achieve the same result in other fields, and who is to determine the outcomes in various fields. If the Court meant that national and international courts are competent to do this, such argument sins against the basic nature of international law. Courts are not legislators and it is not up to them to decree that, while in principle one norm prevails over another in some fields, it does not do so in other fields. The alternative is instead the consistent application of the established norm and the application to specific legal relations of the general hierarchical primacy that this norm possesses.

The Joint Dissenting Opinion of six judges in *Al-Adsani* indeed adopts such a straightforward approach, by affirming that

the basic characteristic of a *jus cogens* rule is that . . . it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule.³⁷

Consequently, the Joint Dissenting Opinion observes that:

The acceptance therefore of the *jus cogens* nature of the prohibition of torture 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. In the circumstances of this case, Kuwait cannot validly hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction; and the courts of that jurisdiction (the United Kingdom) cannot accept a plea of immunity, or invoke it *ex officio*, to refuse an applicant adjudication of a torture case. Due to the interplay of the *jus cogens* rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect.³⁸

The Dissenting Opinion also criticizes the majority for asserting the ill-conceived distinction between criminal and civil proceedings:

In the circumstances of this case, Kuwait cannot validly hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction; and the courts of that jurisdiction (the United Kingdom) cannot accept a plea of immunity, or invoke it *ex officio*, to refuse an applicant adjudication of a torture case. Due to the interplay of

³⁶ *Al-Adsani*, *supra* note 11, at para. 61.

³⁷ Joint Dissenting Opinion in *ibid.*, at para. 1.

³⁸ *Ibid.*, at para. 3.

the *jus cogens* rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect.

The response of the Dissenting Opinion is that projecting such distinction between criminal and civil proceedings

is not consonant with the very essence of the operation of the *jus cogens* rules. It is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule. The prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere. The criminal or civil nature of the domestic proceedings is immaterial. The jurisdictional bar is lifted by the very interaction of the international rules involved, and the national judge cannot admit a plea of immunity.³⁹

This reasoning has indeed been accepted in some national jurisdictions. The Greek and Italian courts have recognized the primacy of *jus cogens* over immunities. The Court of Leviaia provided the conceptual explanation of the approach it adopted. A state committing the breach of *jus cogens* waives the entitlement of sovereign immunity for those breaches. Such acts are null and void and cannot generate legal benefits for the wrongdoer, such as immunity pursuant to the general principle *ex injuria jus non oritur*. The court further affirmed that ‘the recognition of immunity for an act contrary to peremptory international law would amount to complicity of the national court to the promotion of an act strongly condemned by the international public order’.⁴⁰ The Greek Supreme Court affirmed this judgment and its underlying principle that breaches of peremptory norms attract no immunity.⁴¹ This reasoning provides a coherent argument which considers all relevant factors, including the hierarchy of norms and the inherent limits on the scope of state immunity. This decision has been overruled by the Special Supreme Court in rather dubious circumstances and with heavy reference to the 1972 European Convention on State Immunity which possessed no relevance in this case.⁴²

The Italian Supreme Court has elaborated on the nature of normative conflicts and disapproved the view that the norms of state immunity build a separate set of norms which does not conflict with *jus cogens*. Instead, legal norms are not ‘to be interpreted independently of one another, because they complete and integrate each other, influencing one another in their application’. Such interaction with other norms causes recognition of the exceptions to immunity, among which is that of giving ‘priority to hierarchically superior norms’ of *jus cogens*, because this is necessary to safeguard the

³⁹ *Ibid.*, at para. 4

⁴⁰ Case No. 137/1997, *Distorno Massacre*, Multi-member Court of Leviaia, 30 Oct. 1997, 50 *Revue Hellenique de droit international* (1997) 599.

⁴¹ Case No. 11/2000, *Prefecture of Voiotia v. Federal Republic of Germany*, not yet reported in English case note by Gavouneli and Bantekas, 95 *AJIL* (2001) 198.

⁴² Case No. 6/2002, *Distorno Massacre*, Special Supreme Court, 17 Sept. 2002, 56 *Revue Hellenique de droit international* (2003) 56.

values essential to the entire international community. In addition, the Court viewed the denial of immunity as compliance with the requirement embodied in the ILC's Article 41 not to recognize breaches of peremptory norms and not to assist the state that has committed the breach.⁴³

Thus, both courts have combined the issue of normative hierarchy with the effect of *jus cogens* in the field of recognition. Upholding immunity would certainly mean recognizing the outcome of the breach and assisting the wrongdoer state in consolidating that outcome. The ILC's Article 41 requires states not to recognize as lawful the situation produced by the breach of *jus cogens*, and the state of impunity and lack of redress is clearly such a situation. Hence, *jus cogens* directly required both courts to deny immunity and they complied with that requirement. Although the *Ferrini* decision is criticized as allegedly exercising jurisdiction over the state without its consent,⁴⁴ this criticism is unsustainable, because the alternative for the Court would have been to recognize the effects of the serious breach of peremptory norms. After all, the denial of immunity for commercial acts can also take place without the consent of the relevant state. Yet, nobody has yet suggested that the factor of consent should obstruct adjudication.

The Canadian Court of Appeal affirmed in *Bouzari* that *jus cogens* prevails over conflicting customary law to which, in the court's view, state immunity belonged, but maintained that in view of state practice customary law still provides immunity for acts of torture.⁴⁵ In dealing with the *jus cogens* exception to state immunity, the House of Lords in *Jones* asserted that the peremptory prohibition of torture does not automatically override all other rules of international law.⁴⁶ Lord Hoffmann accepted that the prohibition of torture is peremptory, but asserted that by granting immunity to Saudi Arabia the United Kingdom 'is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture. It is objecting in limine to the jurisdiction of the English court to decide whether it used torture or not.' Furthermore, to produce a conflict with state immunity, it was 'necessary to show that the prohibition of torture has generated an ancillary procedural rule which, by way of exception to State immunity, entitles or perhaps requires States to assume civil jurisdiction over other States in cases in which torture is alleged'. Such rule was not, according to Lord Hoffmann, entailed by the prohibition of torture.⁴⁷

Lord Hoffmann also acknowledged the recognition of the peremptory status of the prohibition of torture in the ICTY *Furundzija* decision, but interpreted it as providing only for the possibility that the state whose national has been tortured can claim redress before a tribunal which has the necessary jurisdiction, and as saying nothing about state immunity in domestic courts.⁴⁸ Lord Hoffmann's reasoning misconstrues *Furundzija* both in conceptual and empirical perspective. In conceptual terms, it is

⁴³ De Sena and De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case', 16 *EJIL* (2005) 89; Bianchi, Case-note on *Ferrini*, 99 *AJIL* (2005) 242.

⁴⁴ Fox, 'State Immunity and the International Crime of Torture' [2006] *EHRLR* 142, at 144.

⁴⁵ *Bouzari* (CA), *supra* note 21, at paras 86–88 (per Goudge JA).

⁴⁶ *Jones* (HL), *supra* note 2, at para. 24 (per Lord Bingham).

⁴⁷ *Ibid.*, at paras 44–45 (per Lord Hoffmann).

⁴⁸ *Ibid.*, at para. 51 (per Lord Hoffmann).

inconceivable, without showing further evidence, that the Tribunal would have recognized the peremptory status of the norm and then proclaimed its implementation dependent on diplomatic protection. In empirical terms the Tribunal did, as a matter of fact, point out that when an individual has been tortured and cannot get remedies in the country in which he has been tortured, he can go to another country to claim remedies. After acknowledging the passage from *Furundzija* that the tortured 'victim could bring a civil suit for damage in a foreign court' and the passage that the peremptory prohibition of torture 'serves to internationally de-legitimise' contrary national legislative instruments, Lord Hoffmann still proceeded arguing that *Furundzija* does not address the field of state immunity,⁴⁹ even though the text of the decision suggests completely the opposite.

The House of Lords noted the Italian Supreme Court's decision in *Ferrini*, but dismissed its relevance merely by pointing out that while one academic commentator had approved its reasoning, the other commentators had criticized it.⁵⁰ There is no substantive consideration of the Supreme Court's arguments. Similarly, Lord Hoffmann failed to address the *Ferrini* arguments on their merits: he dismissed the relevance of this case merely by agreeing with the conclusion suggested in the article by academic commentators that *Ferrini* was based on the priority of values as opposed to norms.⁵¹ But *Ferrini* expressly refers to the normative primacy of *jus cogens* over immunity as a matter of the hierarchy of norms, which makes Lord Hoffmann's interpretation of this decision questionable.

In general, it seems that the House of Lords falls short of properly addressing the impact of peremptory norms, merely reiterating the ill-conceived distinction between substantive peremptory rules and the procedural rule of immunity. For several reasons, such alleged distinction is not based on consistent conceptual and normative grounds.

First, international law knows of no straightforward distinction between 'substantive' and 'procedural' norms. All international norms derive from the agreement of states or acceptance by the international community as a whole, and there are neither established criteria nor a recognized agency to split them into such categories. Even as immunity is procedural at the level of national law, under international law it is a norm just like any other and can conflict with peremptory norms such as the prohibition of torture. This latter norm must be enabled to operate as a norm; that is, to produce legal consequences among which accountability occupies the principal place. There is no need to search for the additional specific procedural peremptory rule requiring domestic judicial accountability of the perpetrators of torture, because the peremptory prohibition of torture and the existence of jurisdiction in the particular case already imply that there is an obligation incumbent on the forum to enforce that prohibition. If a court holds that it cannot enforce the prohibition of torture, it

⁴⁹ *Ibid.*, at para. 53 (*per* Lord Hoffmann).

⁵⁰ *Ibid.*, at para. 22 (*per* Lord Bingham).

⁵¹ *Ibid.*, at para. 63 (*per* Lord Hoffmann), referring to De Sena and De Vittor, 'State Immunity and Human Rights: the Italian Supreme Court Decision on the *Ferrini* Case', 16 *EJIL* (2006) 89.

effectively holds that for the purposes of the given case and the given forum there is no prohibition of torture.

Secondly, *jus cogens*, contrary to some doctrinal arguments, is not limited to the substantive regulation, but its principal rationale is to impact on the legal consequences of the breach of the relevant substantive peremptory norm. Articles 53 and 71 of the 1969 Vienna Convention are not about substantive requirements not to breach peremptory norms, but about the peremptory consequences applicable to the breach that has already happened. The same holds true for the duty not to recognize the breaches of *jus cogens* as reflected in the ILC's Article 41 on State Responsibility.

Thirdly, as is broadly accepted, the 'procedural' character of the immunities cannot prevent criminal prosecution for *jus cogens* crimes. It is unclear why such a 'procedural' rule can achieve the result in civil proceedings which it cannot achieve in criminal proceedings. If a 'substantive' peremptory norm cannot prevail over 'procedural' immunities, then *Pinochet* would not have been decided the way it was. And it was decided not just on the basis of the Torture Convention, but also on the alternative, and independent, basis of the consequential effect of *jus cogens* with regard to conflicting immunities.⁵²

Fourthly, if it is accepted that acts like torture, disappearance, or war crimes, either because of being prohibited under *jus cogens* or because of their horrendous nature, cannot constitute acts *jure imperi*, or acts of sovereignty, the alleged distinction between 'substantive' and 'procedural' rules becomes simply irrelevant. For such activities immunity is not available as a matter of principle and the constructed differences between the norms cannot upset this position.

Finally, the so-called distinction between 'substantive' and 'procedural' norms must be rejected as necessarily leading to impunity. Although there is a doctrinal argument that immunity is not the same as impunity, because 'the former is a procedural matter while the latter is a substantive one',⁵³ the reality proves exactly the opposite because individuals who face the hurdle of state immunity have no other option to vindicate their rights. The cases of *Al-Adsani*, *Bouzari*, and *Jones* have acknowledged that the victims of torture will get no remedy whatsoever and, by upholding the scope of immunity as they did, the courts in these cases have, unlike the Greek and Italian courts, endorsed the legal position of impunity.

Thus, although it is argued that the procedural rule of state immunity 'does not go to substantive law ... but merely diverts any breach of it to a different method of settlement',⁵⁴ the plain reality is that immunity only leaves the wrongs without redress and does not divert, and certainly has not in the above-mentioned cases diverted, the breach to any different method of settlement. Before following this thesis in *Jones*, the learned Lords ought to have clarified what were those 'different methods of settlement' in the case before them or what they had been in the previous cases of *Al-Adsani*

⁵² *R. v. Bow Street Stipendiary Magistrate, ex p Pinochet Ugarte* [1999] 2 All ER 000, at 158 (per Lord Hutton), 179 (per Lord Millett), and 189–190 (per Lord Phillips).

⁵³ Yang, 'State Immunity in the European Court of Human Rights: Reaffirmations and Misconceptions', 74 *BYIL* (2003) 333, at 343.

⁵⁴ Fox, *supra* note 17, at 525.

and *Bouzari*, by the reasoning of which they were guided. The plain truth is that there were no other methods of settlement in any of those cases, the only outcome having been leaving the relevant individuals without any remedy whatsoever.

Therefore, the perception of immunities as ‘procedural’ norms unaffected by substantive peremptory norms is based on an inarticulate and inconsistent thesis. The argument of Lord Hoffmann that granting immunity for torture is not the same as justifying torture is unsustainable. Recognizing torture as a sovereign act, granting the torturer state and its officials absolute legal security, and refusing the victims the only available remedy are facts of life that cannot be rebutted by statements of policy. In addition, Canadian and English courts, by endorsing impunity, have effectively recognized as lawful the situation produced by the breach of a peremptory norm, contrary to the requirements of Article 41 on state responsibility. *Jones* thus represents the classical illustration of breach of *jus cogens* through granting immunity for torture.

Apart from endorsing the position of impunity, the House of Lords’ decision in *Jones* contradicts its previous decision in which the issue of *jus cogens* was dealt with. In *A. v. Secretary of State* the House of Lords affirmed that the peremptory status of the prohibition of torture ‘requires member states to do more than eschew the practice of torture’.⁵⁵ Therefore, the House of Lords refused to accept that evidence obtained abroad through torture can be recognized as valid evidence before English courts. Thus, this case unequivocally affirms the consequential profile of *jus cogens*, mainly by reference to the ICTY’s decision in *Furundzija* and the ILC’s Article 41. This contrasts with the refusal in *Jones* to view *jus cogens* as having procedural effect.

5 Conclusion

The issues examined in this contribution demonstrate that the only effect of upholding immunity for torture is reassuring the torturers, and this is not the outcome that the modern international legal system can accept. The House of Lords’ treatment of the hierarchy of norms follows the ill-argued and inconsistent reasoning of previous judicial decisions, without focusing on the flaws in them and the issues they do not address. By stretching the relevance of state immunity to its extremes, the House of Lords’ approach exposes the increasing disrepute of the so-called traditional or orthodox view of state immunity, which can protect states only through securing impunity for perpetrators. This, together with attempts to censure foreign courts and the lack of respect for the United Nations system, deprives *Jones* of any quality of a decision representing the accepted international legal position. The House of Lords’ decision is by itself an instance of failure to enforce the applicable international law and cannot constitute a constructive step in the further development of the law of state immunity.

⁵⁵ *A (FC) and others (FC) v. Secretary of State* [2005] UKHL 71, at para. 34 (per Lord Bingham).