STATE IMMUNITY: AN UPDATE IN THE LIGHT OF THE JONES CASE

A summary of the Chatham House International Law discussion group meeting held on Tuesday 21 November 2006.

The meeting was chaired by Elizabeth Wilmshurst. Participants included legal practitioners, academics, NGOs and government representatives.

The event was sponsored by Clifford Chance.

Main Speaker: Joanne Foakes – Legal Counsellor, Foreign & Commonwealth Office, who spoke in her personal capacity.

Ms Foakes covered the key issues arising from the House of Lords judgment in the *Jones v. Saudi Arabia* case of August 2006, and explored general issues about the judgment and the legal and political background; the key conclusions of the case; and the wider legal context and relevance to the concept of universal civil jurisdiction.

The *Jones* case is one of the most significant recent developments in the field of state immunity, although there is news of new cases coming through judicial systems in the near future – such as the proposed case against former US Defence Secretary Rumsfeld in German courts, and ongoing actions against senior Chinese officials in New Zealand courts.

Background to *Jones*

The significant issue at hand in *Jones* was whether State immunity could be relied upon in civil proceedings against a State and its officials in respect of torture outside the UK. The issues turned on the relationship between two principles of international law:

- The principle that a sovereign State will not, save in certain specified instances, assert its judicial authority over another State;
- The principle which condemns and criminalizes the official practice of torture and requires States to suppress this practice and punish those guilty of it.

Jones was an appeal against the controversial Court of Appeal decision which dismissed the claim against the Kingdom of Saudi Arabia on grounds of State immunity but allowing claims to proceed against various Saudi State officials. A few months before the Jones appeal, the Lords had ruled in a case involving the issue of torture (*A v Secretary of State for Home Department*) in which Lord Bingham had affirmed the importance of prohibition of torture in international law. A few years previously the Lords had dismissed the claim of immunity in criminal proceedings of a former head of State in respect of acts of torture outside the UK, in the ground-breaking *Pinochet (No3)* case.

The broader context of *Jones* has been a growing reassessment of the relative weight attached to the principles of State sovereignty and the protection of fundamental human rights. In parallel with legal and academic reassessment, there appears to be growing public hostility to immunities generally. General public perception of international law tends to be rather positive: a limitation on sovereignty which obliges States to respect the sovereignty of other States and the rights of individuals, and a valuable halter on what would otherwise be the unfettered conduct of States. However, this positive perception tends to break down when viewing the rules on State immunity, which are seen as an 'old-world' perk enjoyed by States and officials at the expense of citizens.

It was therefore not surprising that the hearing was preceded by negative publicity around the UK Government intervention, seen as supporting the defendants and being inconsistent with UK commitments against torture. There was little appreciation that the defendants' State immunity derived from rules of international law with which UK government is obliged to comply, and no recognition that the rules of immunity are intended to impose restrictions on the unfettered exercise of State sovereignty in the same manner as other international rules.

The judgment considered the question of State immunity in the wider context of international legal rules pertaining to sovereignty, jurisdiction and State responsibility. The decision showed a very high level of "trans-judicial dialogue" by examining case law in a number of jurisdictions (Canada, Germany, Greece, Italy and US), the decisions of international courts (ECtHR, ICJ and ICTY), State practice in ratification of the Torture Convention, comments of the International Committee on Torture and academic articles from a variety of sources.

Main Conclusions in *Jones* Decision

The speaker examined the decision by considering what the claimants sought to establish in order to achieve success against the individual defendants and then to extend it to defeat the Kingdom's plea of immunity. The claimants had to establish a conflict or clash between two inconsistent rules of international law of such a nature that the usual rules on immunity had to give way.

1. Decision casts Doubt on Engagement of Article 6 and Necessary Conflict with ECHR

The starting point was Article 6 ECHR. This appeared to have been a safe departure point because of previous decisions (*Al Adsani, Kalogeropolou*) that pointed to Article 6 being engaged on the ground that a successful plea of immunity, whether on behalf of State or individuals, would result in denial by the UK of access to its courts, and consequently in a prima facie breach of Article 6. But even at this elementary level the Lords decision disappointed the claimants. Firstly, Lord Bingham had difficulty in accepting that a State can deny access when it has no access to give. He quoted Lord Millett in *Holland v Lampen Wolfe* to say that State immunity is not a "self imposed restriction" but a "limitation imposed from without". A State cannot make available a jurisdiction it does not possess. Although interesting, the importance of this conclusion was limited because the House went on to assume for purposes of the judgment that Article 6 was engaged. Given the uncompromising terms in which both judges expressed their views on this, it is difficult to regard the issue as settled and it will be likely to be litigated in future. (The issue will be

dealt with again in the ECtHR in the likely event of the claimants taking the case to Strasbourg)

2. Breach of *ius cogens* rule not in itself sufficient to confer jurisdiction

Even if Article 6 was engaged, this was not sufficient for the claimants to succeed as the majority in *Al Adsani* took the view that the right of access to justice was not absolute, and infringement could be justified if it pursued a legitimate aim of complying with international law but went no further than strictly necessary. So the claimants had to show the refusal of access no longer pursued a legitimate aim because international law no longer required immunity to be granted for breach of a *ius cogens* rule. This is the 'trumping argument' – the grant of immunity was inconsistent with a peremptory norm of international law on the prohibition of torture.

The House was not impressed with this argument. In the *Arrest Warrant case (DRC v Belgium)*, the ICJ was clear that State immunity *ratione personae* can be claimed by a Foreign Minister accused of crimes against humanity. The Lords considered two issues in this; on one hand a procedural rule going to jurisdiction of the court and on the other hand a substantive rule – and there was no clash between the two. The former does not contradict the prohibition contained in the *ius cogens* norm but merely diverts it to a different method of settlement. Moreover, the ICJ made it clear in *DRC v Rwanda* that breach of an *ius cogens* rule does not in itself confer jurisdiction on a Court. Lord Hoffman said this case showed the *ius cogens* nature of the rule breached does not provide a general or automatic answer for the question of immunity.

The claimants tried to bolster their argument on this issue by reference to two ECtHR cases but the Lords rejected *Distomo* (*Greece v. Germany;* decision later effectively overruled) and criticized *Ferrini v Germany* (commenting that the decision may have been influenced by the fact that initial unlawful acts were committed in forum state). The Lords found no general recognition of the trumping argument and preferred *Al Adsani* and more the closely reasoned *Bouzari v Islamic Republic of Iran*.

The trumping argument came in for particular criticism. The argument rested on a judicial technique based on the ordering of competing legal principles according to the importance they embody. This may be an acceptable legal technique in a domestic context but was not appropriate in international law which is based on common consent of nations. It was not for a national court to develop law by unilateral action no matter how desirable such development might be.

3. Article 14 of the Torture Convention Does Not Require States to provide for universal civil jurisdiction in respect of torture.

The claimants' next argument was based on the Torture Convention itself. Two different strands of argument were followed; the first applied to the immunity of States and individuals, and the second to individual defendants only. Both arguments relied on the contention that Torture Convention is *sui generis* and has changed the position on State immunity, effectively generated its own procedural rule by way of exception to State immunity which requires States to assume civil jurisdiction over other States in cases in which torture is alleged.

Both strands of the argument centered on the construction of Article 14 of the Convention:

> "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible."

The claimants argued that this provision meant that States must provide an enforceable right of compensation for any victim within its territory, regardless of where the torture took place. The Lords took the view that, although the wording was not entirely clear, a natural reading conformed to a declaration made by US that Article 14 required a private right of action for damages only for acts of torture committed in a forum State. This interpretation was consistent with the understanding and practice of a majority of States.

The Lords were not impressed by US practice (the assumption of extraterritorial civil jurisdiction) under the Alien Tort Claims Act and the Torture Victims Protection Act. Lord Bingham quoted from the Joint Separate Opinion of three of the judges in ICJ *Arrest Warrant* case: "While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally." He referred to US practice as "unilateral extension of jurisdiction … which is not required and perhaps not permitted by customary international law."

The greatest scorn was reserved for comments of the UN Committee against Torture. Lord Bingham described the legal authority of its recommendation that Canada review its position under Article 14 as "slight". Lord Hoffman was even more dismissive, regarding it as "having no value" as statement of international law or interpretation of Article 14.

> 4. The definition of "State" in the State Immunity Act 1978 must be construed so as to include any individual representative of the State acting in their official capacity and such individuals must be entitled to immunity under the same cloak of protection as the State itself.

The second argument based on Torture Convention was the most awkward argument and was designed to defeat any claim to immunity by the individual defendants rather than the State itself. State officials are entitled to immunity for all acts carried out in the exercise or purported exercise of their official authority – immunity *ratione personae*. There was no dispute between the Parties that the defendants were acting in the exercise of such official authority. But the claimants alleged that the fundamental nature of the international prohibition on torture means that torture is so illegal that it cannot be an official act for the purpose of claiming immunity *ratione personae*.

There are a number of problems to this argument. Firstly, an internal contradiction exists, because under Article 1 of the Torture Convention the act in question must be inflicted by or with the connivance of a public official or someone acting in an official capacity in order to qualify as 'torture'. Secondly, the idea that torture is so illegal as to be unofficial contradicts a long line of authority. There is well-established principle that a State remains responsible for acts done under State authority no matter how heinous or disgraceful such acts may be, and whether authorised or lawful.

Thirdly, a contradiction exists between rules on liability under international law and immunity under domestic law. Lord Hoffman spoke of asymmetry between circumstances in which State is liable for acts of officials under international law (State responsibility) and circumstances in which that official will be immune under foreign domestic law. The argument ignores the fact that a State can only act through its servants and agents. Their acts are acts of the State and any civil action against individual torturers based on acts of official torture must implied against the State since their acts are attributable to it. The Court noted these problems and rejected the conclusions of Mance LJ from the Court of Appeal decision, reaffirming the earlier judgment of the Court of Appeal in the *Propend* case.

The key findings of the Lords in upholding the immunity of the defendant State and the individual defendants were mentioned above, but two other general points worth noting were made in the decision

The Lords comment on *Pinochet (No 3)* was the first decision to examine the essential ratio of that case. As the scope of *Pinochet (No 3)* was so broad, all parties in *Jones* claimed the earlier case supported their arguments. The number of judgments involved and the lack of unanimity between the judges on a number of the issues has made the case a fertile source of argument. The *Jones* judgment placed *Pinochet* firmly in the context of the Torture Convention which was described as its “mainspring.” A narrow interpretation of the ratio was put forward. International law could not without absurdity require criminal jurisdiction to be assumed and exercised and at same time require immunity to be granted to those properly charged.

In allowing the case to proceed against individuals, the Court of Appeal had recognized that such an approach would not be without practical difficulty and therefore suggested that any exercise of jurisdiction by a court should be governed by “appropriate use or development of discretionary principle.” This approach reduced immunity to a privilege, and was criticized by the Lords as incompatible with State immunity as an absolute procedural bar. Either immunity applies or it does not. There was no scope for the exercise of discretion. The rules of international law must be applied without discrimination from one State to another. Lord Hoffman felt it was highly invidious for courts to have such discretion because the “safety lies only in universal rejection.” If States choose to exercise such an intrusive jurisdiction, there must be very clear agreed limits on that exercise.

The significance of the new UN Convention on State Immunity should not be under-estimated, with 22 signatures and 3 ratifications to date. There is no indication that the case would have been decided differently if the Convention had not been adopted but the Convention did give the judges firm ground on the subject (in terms of international legal consensus) and may have contributed to a more robust decision as a result. The decision could have included a specific human rights exception but it did not .This does not mean that the Convention precludes development of such an exception and the judges in *Jones* stressed this, although they emphasised that there is as yet no evidence that such an exception exists in international law.

Universal Civil Jurisdiction – Practice and Problems

What are the prospects for the future, and why did the Government intervene in the Jones case?

According to the speaker, the UK Government felt obliged to intervene in *Jones* to ensure the rules on international law were fully and accurately presented to Court. To do otherwise would risk a decision which could have put UK in breach of its international obligations. .

The argument of all parties in *Jones* focused on legalities, and did not address issues of public policy implicit in the extension of the UK Courts' civil jurisdiction and the removal of immunity in the manner envisaged by claimants. The claimant's assumption that courts' universal civil jurisdiction needs to be aligned with its universal criminal jurisdiction ignores the fundamental differences between the two – particularly the restricted level of public authority input in civil as compared with criminal proceedings. There is a reduced degree of State control over initiation and conduct of civil proceedings, and an increased risk of frivolous or politically motivated claims. The "partie civile" system which exists in some civil law jurisdictions is specifically linked to a successful criminal prosecution. The existing doctrines of *forum non conveniens*, non-justiciability, act of State, etc. are uncertain and do not equate to prosecutorial discretion where important and competing considerations of public policy can be weighed. While criminal prosecutions usually rely on the presence of the accused in the forum State, civil cases do not require the presence of the parties to proceed therefore creating a potential danger of multiple actions in different jurisdictions

The principle of complementarity, which would give priority to the State with the most natural jurisdictional link, is useful to overcome the jurisdictional issue in some contexts, but in this context it would place the Courts involved in the invidious position of making judgments about the conduct of individual State officials acting in their public capacity and also about a foreign State's system of justice and investigatory procedures. For example, if a State had declared an amnesty for the acts concerned or set up some form of alternative justice, such as truth and reconciliation procedures, or simply awarded remedies which the claimant considered derisory or inadequate, the foreign Court would be called on to decide on jurisdiction in light of another State's domestic measures.

Criminal justice is primarily about punishment and deterrence while civil is mainly concerned with compensation, yet in the majority of civil cases of this kind a claimant is unlikely to be able to enforce any award against a State.

General Discussion and Points Raised

There was some discussion of the possibility of the claimants taking the case to the ECtHR, but the decisions of the Court in Al Adsani and Kalogeropolou suggest that there is little scope for further development of the law in this area in the absence of significant change in state practice.

It was noted that Article 14 had been argued purely on whether it required a State to assume jurisdiction, but this could have been expressed as whether Article 14 *permitted* a State to assume jurisdiction.

There seems little prospect of development in domestic courts of the *Jones* issues. The Lords held that it is not for a domestic Court to progress this issue, as it is an issue for the international community developed through agreement and State practice.

Both the *Ferrini* and *Distomo* cases were rejected by Germany and Greece with respect to enforcement issues, so there is little precedent for any award, if made, to be enforced against the State defendant.

Jones v. Kingdom of Saudi Arabia and others. Decision available at http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones-1.htm

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