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STATE PRACTICE REGARDING STATE IMMUNITIES

Secretariat Memorandum
prepared by the Directorate General of Legal Affairs

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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2004-404-5843

BETWEEN	SAM FANG First Plaintiff
AND	YIQING (JANET) GAO Second Plaintiff
AND	WEIGUO ZHU Third Plaintiff
AND	LEO LIAN Fourth Plaintiff
AND	JINGFANG YU Fifth Plaintiff
AND	FENGYING WEI Sixth Plaintiff
AND	CHUNYAN CHEN Seventh Plaintiff
AND	JINMEI DOU Eighth Plaintiff
AND	FENG CHEN Ninth Plaintiff
AND	YUJIE PEI Tenth Plaintiff
AND	JENNY LEE Eleventh Plaintiff
AND	ZEMIN JIANG First Defendant
AND	LANGQING LI Second Defendant
AND	GAN LUO Third Defendant

AND THE ATTORNEY-GENERAL
Intervenor

Counsel: C Lawrence for Plaintiffs
V Hardy and B Keith for Attorney-General as Intervenor
R E Harrison QC appointed as Amicus

Judgment: 21 December 2006

RESERVED JUDGMENT OF RANDERSON J

This judgment was delivered by me on 21 December 2006
at 3 pm, pursuant to r 540(4) of the High Court Rules

Registrar/Deputy Registrar

Solicitors: J Bioletti, PO Box 105 546, Auckland

Counsel: C C Lawrence, 18 Boardman Lane, Auckland
R E Harrison QC, PO Box 1153, Auckland
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Introduction

[1] The eleven plaintiffs in this proceeding are now all residents of New Zealand. They allege they were tortured by state authorities while living in the People's Republic of China (PRC) between 1999 and 2002. They say this occurred as part of a systematic campaign adopted and implemented by the PRC Government against practitioners of the Falun Gong movement.

[2] The first defendant is the former President of the PRC; the second defendant is the former Vice-Premier of the State Council; and the third defendant is and was a member of the Politburo of the Central Committee and Secretary of the Political and Judiciary Committee of the Central Committee. All are said to have been involved in directing or implementing the campaign and to bear responsibility for the alleged acts of torture.

[3] Damages and declaratory relief are claimed for unlawful arrest and detention, assault and battery, malicious abuse of office, and conspiracy to injure.

[4] The proceeding has not been served because leave is required to serve out of the jurisdiction under r 220 High Court Rules. The plaintiffs applied ex parte for such leave but Associate Judge Faire declined the application in a judgment delivered on 17 June 2005. The Judge considered the claim lacked any real or substantial connection with New Zealand and was doubtful that the supporting evidence then available was sufficiently cogent to establish a good arguable case. He also declined to reach any conclusion as to whether the plaintiffs could obtain justice in the PRC.

[5] Importantly, Judge Faire was not asked to decide whether the defendants would be entitled to invoke state immunity should leave be granted to serve them. That has now emerged as the key issue I have to decide.

[6] The plaintiffs now seek to review Judge Faire's decision under r 61C High Court Rules but there have been several developments since Judge Faire's decision

which compel me to deal with the application for review as if it were a fresh application for leave under r 220. The plaintiffs have since filed an amended statement of claim and each has filed an affidavit confirming the acts of torture to which they claim to have been subjected. As well, I granted leave to the Attorney-General to intervene given the ex parte nature of the application for leave to serve overseas and the need to consider the difficult issue of state immunity. I also appointed Mr Harrison QC as *amicus* to assist the Court generally.

[7] When this matter was heard before me in April this year, the plaintiffs relied heavily on the decision of the English Court of Appeal in *Jones v Saudi Arabia* [2004] EWCA 1394. The Court held in *Jones* that although the Kingdom of Saudi Arabia was entitled to claim state immunity in respect of a civil claim brought in the English Courts for alleged torture, there was no blanket immunity for the individuals involved. It was known this decision was under appeal to the House of Lords. So I reserved my decision, subject to all counsel having the right to file further submissions after the decision of the House of Lords was received. On 14 June 2006, the House delivered its decision reversing the Court of Appeal and finding state immunity was available to the individuals involved as well as the Kingdom: [2006] UKHL 26.

[8] All counsel have since filed further submissions, the last of which were received on 25 September 2006.

[9] Without expressing a view on the merits of the plaintiffs' claims, the Attorney-General informed the Court that the New Zealand Government condemns acts of torture wherever committed. The Attorney intervened to make submissions on the issue of state immunity and on the jurisdictional requirements of r 220. It was submitted on the Attorney's behalf that the defendants were entitled to claim state immunity against the plaintiffs' claims and that it was not appropriate to grant leave to serve the defendants under r 220.

Application for leave under r 220 – principles

[10] Where leave is sought under r 220, the onus is on the applicant to show that New Zealand is clearly the most appropriate forum: *Hyslop v Society of Lloyd's* (1993) 6 PRNZ 220 at 235 (CA). The applicant must establish a good arguable case since foreigners are not lightly to be subjected to the jurisdiction of the Court: *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 513 (PC). The Court also considers whether the case has any real and substantial connection with New Zealand. Ultimately, the Court has a discretion whether to grant leave and issues of *forum conveniens* and overall justice are relevant: r 220(4) and *Spiliada Maritime Corporation v Cansulex Ltd "The Spiliada"* [1987] AC 466 (HL).

[11] There was some discussion before me about the meaning of the phrase in r 220(1) "In any other proceeding which the Court has jurisdiction to hear and determine …". This was discussed by Hardie Boys J in *Cockburn v Kinzie Industries Inc* (1998) 1 PRNZ 243 where the Judge held that r 220 is to be read as enabling the Court to grant leave, and so assume jurisdiction, in every proceeding not covered by r 219 that it would be entitled to hear and determine were the defendant in New Zealand. I accept there are potential difficulties with this formulation but, on the view I take of this case, I need not venture further into that issue.

Matters Not Challenged

[12] The Attorney-General did not express any view on the substance of the plaintiffs' claims but I am willing to assume for present purposes that the plaintiffs have a good arguable case based on the material presently before the court. Subject, of course, to the issue of immunity. Tortious claims of the kind pleaded are actionable in New Zealand and in the PRC. Mr Lawrence for the plaintiffs relied on Articles 33, 35, 36, 37, 38, 39 and 41 of Chapter II of the PRC Constitution "The Fundamental Rights and Duties of Citizens" and Articles 5, 8, 10, 119, 120 and 121

of the General Principles of the Civil Law of the PRC. As well, the plaintiffs rely on Article 14 of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 1984 (The Torture Convention) which is referred to below. On this basis, I accept the plaintiffs' claim meets the "double actionability" rule: 8(3) Halsbury *Laws of England* 4th ed para 375. That rule requires that a tortious claim may be brought only where it is actionable as a tort in the state where the claim is brought and is also actionable, although not necessarily as a tort, in the place where the wrongful acts are alleged to have occurred.

[13] Nor was it challenged, at least for present purposes, that the plaintiffs were unlikely to obtain justice in the courts of the PRC given the nature of their allegations and the personal risks to their liberty should they return to the PRC for the purposes of hearing. It was not suggested the plaintiffs could conveniently or justly bring their claim in any forum other than New Zealand.

[14] Against this background, the critical issue for determination is whether the defendants (if served) would be entitled to claim state immunity. Unless the plaintiffs are able to demonstrate they have a good arguable case that the defendants could not invoke state immunity, leave must inevitably be refused: *Al-Adsani (No 1)* (1994) 100 ILR 465 at 467.

State Immunity – General Principles

[15] I have no doubt that it is appropriate to consider the issue of state immunity now even though, technically, it has not yet been invoked or claimed. I take that view because I regard it as inevitable that the defendants would claim state immunity if leave were granted and the proceeding served.

[16] The basic principle of state immunity (also known as sovereign immunity) was described by Cooke P in *Governor of Pitcairn v Sutton* [1995] 1 NZLR 426 at 428:

> Sovereign immunity is a doctrine applying to sovereign states or, as it is sometimes expressed, independent sovereign states. In general at common law, reflecting international law, such a state will not be impleaded in the

> Courts of another country (in this instance New Zealand) against its will and without its consent; the exercise of jurisdiction is seen as incompatible with the dignity and independence of the foreign state.

[17] The principle is grounded upon broad considerations of public policy, international law and comity, not on any technical rules of law: 18 Halsbury's *Laws of England* (4th ed) para 1548.

[18] As Lord Millett said in *Reg. v Bow Street Magistrate* Ex parte Pinochet (No 3) [2000] 1 AC 147, there are two overlapping immunities recognised by international law which are quite different in nature: immunity *ratione personae* and immunity *ratione materiae*. The differences between these two are set out in the following passages from the speech of Lord Millett at 268, 269:

> Immunity *ratione personae* is a status immunity. An individual who enjoys its protection does so because of his official status. It enures for his benefit only so long as he holds office. While he does so he enjoys absolute immunity from the civil and criminal jurisdiction of the national courts of foreign states. But it is only narrowly available. It is confined to serving heads of state and heads of diplomatic missions, their families and servants. It is not available to serving heads of government who are not also heads of state, military commanders and those in charge of the security forces, or their subordinates. It would have been available to Hitler but not to Mussolini or Tojo. It is reflected in English law by section 20(1) of the State Immunity Act 1978, enacting customary international law and the Vienna Convention on Diplomatic Relations (1961).
>
> The immunity of a serving head of state is enjoyed by reason of his special status as the holder of his state's highest office. He is regarded as the personal embodiment of the state itself. It would be an affront to the dignity and sovereignty of the state which he personifies and a denial of the equality of sovereign states to subject him to the jurisdiction of the municipal courts of another state, whether in respect of his public acts or private affairs. His person is inviolable; he is not liable to be arrested or detained on any ground whatever. The head of a diplomatic mission represents his head of state and thus embodies the sending state in the territory of the receiving state. While he remains in office he is entitled to the same absolute immunity as his head of state in relation both to his public and private acts.
>
> …
>
> Immunity *ratione materiae* is very different. This is a subject-matter immunity. It operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another, and only incidentally confers immunity on the individual. It is therefore a narrower immunity but it is more widely available. It is available to former heads of state and heads of diplomatic missions, and any one whose conduct in the exercise of the authority of the state is afterwards called into question, whether he acted as head of government, government

> minister, military commander or chief of police, or subordinate public official. The immunity is the same whatever the rank of the office-holder. This too is common ground. It is an immunity from the civil and criminal jurisdiction of foreign national courts but only in respect of governmental or official acts. The exercise of authority by the military and security forces of the state is the paradigm example of such conduct. The immunity finds its rationale in the equality of sovereign states and the doctrine of non-interference in the internal affairs of other states: see *Duke of Brunswick v. King of Hanover* (1848) 2 H.L.Cas. 1; *Hatch v. Baez* (1876) 7 Hun. 596 U.S.; *Underhill v. Hernandez* (1897) 168 U.S. 456. These hold that the courts of one state cannot sit in judgment on the sovereign acts of another. The immunity is sometimes also justified by the need to prevent the serving head of state or diplomat from being inhibited in the performance of his official duties by fear of the consequences after he has ceased to hold office.

[19] In the present case, any claim for state immunity would be based upon immunity *ratione materiae* which is available to former heads of state, former government ministers or subordinate public officials.

[20] Over time, exceptions to state immunity have been recognised in international law and, in some states, the law affecting state immunity has been codified by statute. For example, the United Kingdom has enacted the State Immunity Act 1978 (the SIA). No comparable statute exists in New Zealand. The position here is governed therefore by international law. Although there are a number of exceptions to state immunity, one well recognised exception applies in respect of the commercial activities of foreign states: *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529, adopted in New Zealand in *Governor of Pitcairn v Sutton* (above).

[21] The plaintiffs' argument, bolstered at the time of hearing by the Court of Appeal's decision in *Jones*, was that state immunity was not available to the individual officials sued in this case in the face of allegations of torture. Reliance was placed particularly on two arguments:

a) The prohibition of systematic torture in international law has the status of a *jus cogens* (or peremptory norm) from which no derogation is permitted.

b) State immunity could not prevail in the face of the Torture Convention.

[22] Both these issues were canvassed extensively in the Court of Appeal and in the House of Lords in *Jones*. Faced with the adverse decision of the House of Lords, Mr Lawrence submitted that *Jones* could be distinguished (given that its context was the SIA) or that New Zealand should be free to develop its own response to the recognised evils of torture.

Jones v Saudi Arabia

[23] The court was considering appeals in two separate actions. In the first, Mr Jones claimed damages in the English courts against the Ministry of Interior of the Kingdom of Saudi Arabia and a senior army officer, sued as a servant or agent of the Kingdom. The claim was for assault and battery, trespass to the person, false imprisonment and torture allegedly committed in the Kingdom. In the second claim, three claimants issued proceedings claiming damages for assault, negligence and torture against four defendants. The first two defendants were sued as officers in the Kingdom's police force; the third was sued as a colonel in the Ministry of Interior and Deputy Governor of a prison in which the claimants were confined; and the fourth was sued as head of the Ministry of Interior. In each case the claimants alleged they were tortured by state officials. The issue in each case was whether it was appropriate to grant leave to serve out of the jurisdiction. That involved consideration of the issue of state immunity both for the Kingdom itself and the individual defendants.

[24] The outcome in the Court of Appeal was that the Kingdom itself was entitled to invoke state immunity under the SIA but there was no blanket immunity for state officials alleged to have committed acts of systematic torture. Instead, it was held that the Court had a discretion to grant leave to serve out of the jurisdiction after balancing relevant factors including the availability of adequate remedies in the responsible state. Immunity would only persist in cases where it served a proportionate and legitimate function. Otherwise, it could deprive a claimant to the right of access to the Court under Article 6 of the European Convention on Human Rights.

[25] The House of Lords reversed the Court of Appeal's decision, holding that state immunity applied not only to the Kingdom but also to the individual officials. Lord Bingham and Lord Hoffman delivered the leading speeches. The other three Law Lords agreed with them but did not add reasons of their own.

The Issues

[26] It does not appear to have been disputed in *Jones* that the prohibition of torture was a *jus cogens* as defined in Article 53 of the Vienna Convention of the Law of Treaties 1969:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

[27] As Lord Hoffman observed in *Jones* at [43], the prohibition on torture has been recognised as such a norm in the United Kingdom in *Pinochet (No 3)*. Lord Hoffman said torture could not be justified by any rule of domestic or international law, a proposition with which no-one could justifiably cavil.

[28] The central issue as Lord Bingham put it in his speech at [1]:

> … turns on the relationship, in these circumstances, between two principles of international law. One principle, historically the older of the two, is that one sovereign state will not, save in certain specified instances, assert its judicial authority over another. The second principle, of more recent vintage but of the highest authority among principles of international law, is one that condemns and criminalises the official practice of torture, requires states to suppress the practice and provides for the trial and punishment of officials found to be guilty of it.

[29] The relationship between these two principles depended initially on the proper construction of the SIA. If the SIA provided state immunity for both the Kingdom and the officials, then the plaintiffs needed to establish a means of overriding or displacing that immunity. Lord Bingham found that the SIA entitled

both the Kingdom and the officials to claim immunity and that none of the exceptions in the SIA applied.

[30] The argument for the plaintiffs however, was that to apply the SIA according to its natural meaning by upholding the claim to immunity would be incompatible with the plaintiffs' right of access to a court implied in Article 6 of the European Convention on Human Rights. For that purpose, the plaintiffs needed to establish that the restriction in the SIA was not directed to a legitimate objective and was disproportionate. They sought to do that by submitting that the grant of immunity would be inconsistent with the prohibition on torture at international law.

The Relevance of International Law

[31] While the argument undoubtedly took place in the context of the SIA, it was necessary for both Lord Bingham and Lord Hoffman to conduct an extensive review of international law to determine the underlying issue of whether the principle of state immunity should give way to a civil claim for alleged torture.

[32] Both confirmed that the resolution of the conflict between the two principles of international law was to be resolved by reference to international law. As Lord Bingham put it at [1]:

> Thus, like the Court of Appeal of Ontario in *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675, para 95, the House must consider the balance currently struck in international law
>
> > "between the condemnation of torture as an international crime against humanity and the principle that states must treat each other as equals not to be subjected to each other's jurisdiction."

[33] Lord Hoffman's approach focussed more on the procedural nature of the state immunity principle. He cited at [44] the following passage from a text by Hazel Fox QC *The Law of State Immunity* (2002) at 525:

> State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive

> content in the procedural plea of state immunity upon which a jus cogens mandate can bite.

[34] Lord Hoffman considered at [45] it was necessary to show that the prohibition on torture had generated an ancillary procedural rule which, by way of exception to state immunity, entitled (or possibly required) states to assume civil jurisdiction over other states in cases in which torture was alleged. Lord Hoffman then stated at [46]:

> Whether such an exception is now recognised by international law must be ascertained in the normal way from treaties, judicial decisions and the writings of reputed publicists.

[35] This approach is consistent with that adopted by Cooke P in *Governor of Pitcairn v Sutton* (refer [16] above).

[36] Both Lords Bingham and Hoffman agreed with the Court of Appeal that the Kingdom itself had state immunity under the SIA. But since neither the SIA nor the 1972 European Convention expressly provided for the case where a suit was brought against the servants, agents, officials or functionaries of the foreign state in respect of acts done by them as such in the foreign state, it was necessary to examine the state of international law on that point. Both Law Lords agreed that no material distinction could be drawn between the immunity of the state and its officials or servants. Lord Hoffman concluded at [10] that:

> There is, however, a wealth of authority to show that in such case the foreign state is entitled to claim immunity for its servants as it could if sued itself. The foreign state's right to immunity cannot be circumvented by suing its servants or agents.

[37] That conclusion was reached after an extensive review of case law and the United Nations Convention on Jurisdictional Immunities of States and their Property (adopted by the General Assembly on 16 December 2004).

[38] Lord Bingham observed at [11] that there may be some borderline cases where there could be doubt whether the conduct of an individual, although a servant or agent of the state, had a sufficient connection with the state to enable it to claim immunity for the conduct at issue. But he did not consider the cases before the House to be borderline in nature. And, at [12] he held that international law did not

require, as a condition of a state's entitlement to immunity, that the servant or agent should have been acting in accordance with instructions or authority. It was sufficient if the conduct in question was in discharge or purported discharge of the public duties of the servant or agent in question.

[39] Lord Hoffman's discussion of this issue commences at [66], adopting at [68] the conclusion of Leggatt LJ in *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611 at 669 that state immunity affords individual employees or officers of a foreign state "protection under the same cloak as protects the state itself".

The Torture Convention

[40] The plaintiffs in *Jones* relied on the Torture Convention and submitted that it enabled or required states party to the Convention to provide a universal civil remedy against the perpetrators of torture, regardless of where the allegedly tortious acts occurred. The Court of Appeal had found it would be anomalous for the Torture Convention to provide for universal criminal jurisdiction but not for civil remedies. Dealing with the Torture Convention, Lord Bingham stated at [15]:

> As the House recently explained at some length in *A v Secretary of State for the Home Department (No 2)* UKHL 71, [2005] 3 WLR 1249, the extreme revulsion which the common law has long felt for the practice and fruits of torture has come in modern times to be the subject of express agreement by the nations of the world. This new and important consensus is expressed in the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment 1984 (1990) (Cm 1775), which came into force in June 1987 and to which both the UK and the Kingdom (with the overwhelming majority of other states) are parties. It is common ground that the proscription of torture in the Torture Convention has, in international law, the special authority which the claimants ascribe to it. The facts pleaded by the claimants, taken at face value, like other accounts frequently published in the media, are sufficient reminder, if such be needed, of the evil which torture represents.

[41] I pause here to note that both New Zealand and the PRC are signatories to the Torture Convention. Neither has entered any reservations relevant to the present proceeding.

[42] It was not in dispute in *Jones* that the conduct complained of in the present case fell within the definition of torture in Article 1:

> For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity …

[43] Lord Bingham noted at [16] that, for Convention purposes, torture must be inflicted or connived at for one of the specified purposes by a person, who, if not a public official, is acting in an official capacity.

[44] The Torture Convention requires all member states to assume and exercise criminal jurisdiction over alleged torturers. Subject to certain conditions, this jurisdiction was said by Lord Bingham to be "fairly described as universal".

[45] Article 2 obliges states party to take effective measures to prevent acts of torture in any territory under its jurisdiction. Articles 4 to 9 are concerned with criminal jurisdiction. A state party must ensure that acts of torture are offences under its domestic law (Article 4) and is obliged to establish jurisdiction over those offences when the offences are committed in any territory under its jurisdiction; when the alleged offender is one of its nationals; and when the victim is one of its nationals, if it considers it appropriate to do so. Importantly, a state party must establish jurisdiction over such offences where the alleged offender is present in its territory. Subject to being satisfied it is appropriate, a state party must then refer the matter to the appropriate authorities to take into custody and prosecute the alleged offender under Articles 6 and 7, unless extradited under Article 8.

[46] In respect of civil claims however, the relevant provision is Article 14:

> 1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
>
> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

[47] Lord Bingham stated at [25] that Article 14 does not provide a universal civil jurisdiction. Rather:

> … the natural reading of the article as it stands in my view conforms with the US understanding noted above, that it requires a private right of action for damages only for acts of torture committed in territory under the jurisdiction of the forum state. This is an interpretation shared by Canada as its exchanges with the Torture Committee make clear. The correctness of this reading is confirmed when comparison is made between the spare terms of Article 14 and the much more detailed provisions governing the assumption and exercise of criminal jurisdiction.

[48] Support for this conclusion in Lord Bingham's view came from the decision of the Grand Chamber of the European Court of Human Rights in *Al-Adsani v United Kingdom* (2001) 34 EHRR 273 in which the majority were unable to discern in the international instruments, judicial authorities or other materials before the Court any firm basis for concluding that, as a matter of international law, a state no longer enjoyed immunity from civil suit in the courts of another state where acts of torture were alleged. A further factor was the acceptance by the claimants that, in the light of the *Arrest Warrant* decision of the International Court of Justice [2002] ICJ Rep 3, state immunity *ratione personae* can be claimed for a serving foreign minister accused of crimes against humanity. Lord Bingham noted that even crimes against humanity (which have the same standing as the prohibition against torture) do not prevail against a claim to immunity *ratione personae*.

[49] Next, it was noted that the United Nations Immunities Convention of 2004 does not provide an exception from immunity where civil claims are made based on acts of torture. Lord Bingham said in that respect at [26]:

> Despite its embryonic status, this Convention is the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases, and the absence of a torture or jus cogens exception is wholly inimical to the claimant's contention.

[50] Lord Bingham's conclusions follow at [27] and [28]:

> … there is no evidence that states have recognised or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law, nor is there any consensus of judicial and learned opinion that they should. This is significant, since these are sources of international law. But this lack of evidence is not neutral: since the rule on immunity is well-understood and

> established, and no relevant exception is generally accepted, the rule prevails.
>
> It follows, in my opinion, that Part 1 of the 1978 Act is not shown to be disproportionate as inconsistent with a peremptory norm of international law, and its application does not infringe the claimants' Convention right under article 6 (assuming it to apply). It is unnecessary to consider any question of remedies.

[51] Lord Hoffman reached the same conclusion at [64], rejecting the plaintiffs' proposition that the prohibition of torture as a peremptory norm or *jus cogens* takes precedence over other rules of international law, including the rules of state immunity. Of importance is Lord Hoffman's clear statement that it is not for a national or state court to "develop" international law, which depends upon the common consent of nations. He observed at [63]:

> As Professor Dworkin demonstrated in *Law's Empire* (1986), the ordering of competing principles according to the importance of the values which they embody is a basic technique of adjudication. But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states. (See *Al-Adsani* 34 EHRR 273, 297, para O-II9 in the concurring opinion of judges Pellonpää and Bratza).

[52] Both Lords Bingham and Hoffman roundly rejected the argument relied upon in the Court of Appeal that incongruity would be created if the Torture Convention were interpreted to afford universal jurisdiction in criminal cases for individuals but to retain immunity in respect of civil liability. Lord Bingham considered the Court of Appeal had misread *Pinochet (No 3)* in which the House of Lords had found that Senator Pinochet was not entitled to immunity from extradition to face criminal proceedings for alleged systematic torture. In particular, it was considered that the Court of Appeal wrongly interpreted *Pinochet* as authority for the proposition that torture cannot be a legitimate "official function" for the purposes of immunity *ratione materiae*.

[53] Lord Bingham considered that the distinction between criminal proceedings (which were the subject of universal jurisdiction under the Torture Convention) and civil proceedings (which were not) was fundamental to the *Pinochet* decision: at [32]. And, at [34], he said the Court of Appeal in *Jones* had asserted what was, in

effect, a universal tort jurisdiction in cases of official torture "for which there was no adequate foundation in any international convention, state practice or scholarly consensus, and apparently by reference to a consideration (the absence of a remedy in a foreign state) … which is, I think, novel. Despite the sympathy that one must of course feel for the claimants if their claims are true, international law, representing the law binding in other nations and not just our own, cannot be established in this way".

[54] Lord Hoffman considered that the most satisfactory explanation of the outcome in *Pinochet (No 3)* was on the basis of Lord Millett's conclusion in that case that the Torture Convention must, by necessary implication, have removed the immunity which would ordinarily attach to an act of an official governmental character:

> In my opinion there was no immunity to be waived. The offence is one which could only be committed in circumstances which would normally give rise to the immunity. The international community had created an offence for which immunity ratione materiae could not possibly be available. International law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose. (at 278)

[55] And at [81] Lord Hoffman stated in *Jones*:

> In my opinion, this reasoning is unassailable. The reason why General Pinochet did not enjoy immunity ratione materiae was not because he was deemed not to have acted in an official capacity; that would have removed his acts from the Convention definition of torture. It was because, by necessary implication, international law had removed the immunity.

[56] Lord Hoffman was responding here to the reasoning adopted by Mance LJ in the Court of Appeal in *Jones* that torture is so illegal that it must fall outside the scope of official activity and cannot therefore be the subject of immunity. Lord Hoffman considered at [74] that:

> It has until now been generally assumed that the circumstances in which a state will be liable for the act of an official in international law mirror the circumstances in which the official will be immune in foreign domestic law.

[57] That assumption was seen to be logical because "the state is liable for acts done under colour of public authority, whether or not they are actually authorised or lawful under domestic or international law".

[58] Lord Hoffman concluded at [78] on this issue that:

> To hold that for the purposes of state immunity he was not acting in an official capacity [in carrying out acts of torture] would produce an asymmetry between the rules of liability and immunity.

[59] His Lordship added at [79]:

> Furthermore, in the case of torture there would be an even more striking asymmetry between the Torture Convention and the rules of immunity if it were to be held that the same act was official for the purposes of the definition of torture but not for the purposes of immunity.

[60] He concluded at [84] by rejecting the argument that torture or some other contravention of a *jus cogens* cannot attract immunity *ratione materiae* because it cannot be an official act.

[61] Finally, dealing with the suggestion that the immunity of individuals from civil suit could be decided as a matter of discretion, Lord Hoffman adopted Lord Millett's observations in *Holland v Lampen-Woolfe* [2000] 1 WLR 1573 at 1588 to the effect that state immunity is not a:

> … self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt and which it can, as a matter of discretion, relax or abandon. It is imposed by international law without any discrimination between one state and another. It would be invidious in the extreme for the judicial branch of government to have the power to decide that it will allow the investigation of allegations of torture against the officials of one foreign state but not against those of another. As Kingsmill Moore J said in a different but not wholly unrelated context, "safety lies only in universal rejection": see *Peter Buchanan Ltd v McVey* [1955] AC 516, 529.

Conclusions on Jones v Saudi Arabia

[62] The House of Lords has comprehensively and persuasively rejected the proposition that the practice of torture may be an exception to the principle of state immunity for the purposes of the potential civil liability of individual officials or

servants of the state. The House of Lords reached this conclusion on the basis of a thorough examination of the traditional sources of international law. The decision did not depend upon the existence of the SIA. Rather, it was essential to the decision that the House consider international law in this area in order to reject the arguments advanced for the claimants.

[63] It follows that there is no valid basis to distinguish the decision in *Jones v Saudi Arabia*. It was not suggested that the defendants' actions in the present case were insufficiently related to state activities so that they might fall outside the ambit of official acts for immunity purposes. I agree with the conclusions of the House of Lords for the reasons given. I do not find there to be unjustified asymmetry between criminal and civil proceedings arising from the Torture Convention and *Pinochet (No 3)*. There are obvious grounds for distinction between criminal and civil proceedings in respect of alleged acts of torture. Criminal proceedings may only be brought against the individuals responsible and are ordinarily brought by the state. In contrast, civil proceedings may be brought against both the state and the individuals and may be brought by private persons.

[64] Importantly, the Torture Convention provides very carefully for universal criminal jurisdiction in cases of alleged torture but does not do so for civil proceedings. Even in criminal cases, the actual exercise of criminal jurisdiction depends upon the alleged offender being within the jurisdiction of the state exercising such jurisdiction or upon the ability to seek extradition under the Convention or an extradition treaty. The absence of such detailed provisions for civil liability under Article 14 of the Torture Convention points strongly towards the proposition, accepted by the House of Lords, that it is aimed at providing civil remedies for acts of torture committed within the territory of the forum state.

[65] Finally, I agree with the House of Lords that the absence of a torture or *jus cogens* exception to state immunity in the United Nations Immunities Convention 2004 speaks powerfully against the plaintiffs' argument. This Convention is a very recent expression of the consensus of nations on this topic.

Should New Zealand take a Different Course?

[66] Of course, as Mr Lawrence submitted, the courts in New Zealand are not bound by the decision of the House of Lords. As Mr Lawrence pointed out, New Zealand is not only a party to the Torture Convention but is also a signatory to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, both of which provide that no-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Articles 5 and 7 respectively). And, the New Zealand Bill of Rights Act 1990 recognises similar rights in ss 8 and 9.

[67] New Zealand has also enacted the Crimes of Torture Act 1989 to give effect to the Torture Convention. It establishes criminal offences for acts of torture by public officials (s 3) and establishes jurisdiction under s 4 where the person to be charged is a New Zealand citizen; or is present in New Zealand; or where the act or omission constituting the offence is alleged to have occurred in New Zealand or on board a ship or aircraft registered in New Zealand. Any prosecution under the Act require the consent of the Attorney-General (s 12). The Act also provides for extradition (s 8). These provisions largely echo the detailed criminal provisions in the Torture Convention and reinforce the contrast with the civil provisions of Article 14 of the Convention.

[68] But the real point at issue is whether the undoubted principles of international law relating to the condemnation of torture override the state immunity from civil suit which would ordinarily apply to those officials or servants of a foreign state who are alleged to have instigated or perpetrated acts of torture.

[69] In that respect, I do not accept Mr Lawrence's proposition that New Zealand is free to "develop" an exception to the well-recognised immunity principles in a way similar to that adopted by courts in respect of domestic or state law. International law necessarily develops and evolves over time: see the discussion in *Chamberlains v Lai* [2006] NZSC 70 at [1] and [2] of the judgment of Elias CJ, Gault and Keith JJ and the observation of the Privy Council in *In re Piracy Jure*

Gentium [1934] A.C. 586 at 597 that international law has not become a crystallised code at any time, but is a living and expanding branch of the law. But New Zealand's common law on this subject will usually be reflective of international law gathered from the established sources of international practice, treaties, conventions, judicial decisions and scholarly writings.

[70] Mr Harrison referred to the Wine Box decision (*Controller and Auditor General v Davison* [1996] 2 NZLR 278) where the Court of Appeal declined a claim to state immunity by the Cook Islands in respect of documents held by the Auditor-General of the Cook Islands which were sought by a New Zealand Commission of Inquiry into alleged tax evasion. While the majority based their decision on the recognised exception for commercial transactions, there was substantial support for the development of an iniquity exception to state immunity on the basis there had been a blatant attempt to evade taxation in New Zealand.

[71] There may be occasions when New Zealand courts will take the lead in recognising new trends in international law but whatever view may be taken of the Wine Box case, I am satisfied it would be wholly inappropriate for New Zealand to adopt an approach which differs from that so recently established in the House of Lords after an extensive review of the traditional sources of international law. Mr Lawrence did not advance any reasons to justify the development of a different approach in New Zealand based on regional differences in this part of the world.

[72] Nor am I persuaded that it would be appropriate to depart from the persuasive reasoning of the House of Lords in *Jones*, a case I consider to be directly in point.

The present case

[73] I am satisfied there is no arguable prospect of the plaintiffs establishing an exception to the principle of state immunity which I find would protect the defendants from responsibility if the plaintiffs were granted leave to serve out of the jurisdiction. It follows that the application for review of the decision of Judge Faire's decision must be dismissed. The result is that leave to serve the defendants out of the jurisdiction is declined.

[74] Before leaving this case, I record two things. First, my sympathy for the plaintiffs who, on the face of their affidavits, have suffered severely for their beliefs as practitioners of the Falun Gong movement. Whether one agrees with their views or not is beside the point. The international community (including New Zealand) rightly condemns acts of torture whenever they occur. An important part of a state's responsibility is to protect its citizens and it is a matter of regret that I am constrained by the present state of international law to find that the courts of this country are unable to provide the remedy they seek.

[75] Secondly, I express my gratitude to all counsel for the extensive and helpful submissions each presented. They have all been of real assistance.

[76] Mr Harrison QC as *amicus* should submit his costs to the Registrar for approval. Otherwise, costs are to lie where they fall.

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A P Randerson, J
Chief High Court Judge