



## **Torture (Damages) Bill**

### **Briefing for House of Lords Second Reading**

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## Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. JUSTICE is pleased to support the Torture (Damages) Bill, a Private Members' Bill introduced in the House of Lords by Lord Archer of Sandwell QC on 5 February 2008. JUSTICE was one of a group of NGOs, together with REDRESS, INTERIGHTS and Amnesty International, that intervened in the case of *Jones v Interior Ministry of Saudi Arabia*<sup>1</sup> in 2006 to argue that the doctrine of state immunity should not prevent individuals from bringing suit against foreign government officials for acts of torture.
3. In *Jones*, the Appellate Committee of the House of Lords held unanimously that the terms of the State Immunity Act 1978 meant that UK courts had no jurisdiction to hear a civil claim against a foreign government in respect of torture committed outside territory under UK control. As Lord Hoffman noted in his judgment in *Jones*:<sup>2</sup>

The short answer is that an exception for acts *jure gestionis* is recognised by international law and an exception for torture is neither recognised by international law nor required by article 14 [of the Torture Convention]. ***Whether it should be is another matter. [This] committee has no legislative powers.***

4. Whether or not the Committee was in fact correct in its analysis of the relevant international law, it nonetheless falls to Parliament to amend the terms of the 1978 Act to enable victims of torture abroad to obtain justice in British courts. Just as the United States Torture Victim Protection Act 1992 allows individuals in the US to sue foreign governments responsible for torture, so too would this Bill allow UK victims to seek redress here. In our view, such a step would not only be a just and proportionate exception to the general rule of state immunity but – by holding governments that torture to account for their actions – it would also prove to be among the most effective weapons in the fight to abolish the practice of torture at the international level. The 2007 FCO Annual Human Rights Report describes torture as ‘one of the worst violations of human rights and human dignity’, and proclaims that the UK ‘continue[s] to be one of the most active countries in the world in the fight to eradicate it’.<sup>3</sup> If the UK is to show true leadership in this fight, however, Parliament must not allow those responsible for torture to shelter behind the doctrine of state immunity in British courts any longer.

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<sup>1</sup> [2006] UKHL 26.

<sup>2</sup> *Ibid*, paragraph 57. Emphasis added.

<sup>3</sup> FCO, *Human Rights Annual Report 2007* (March 2008: Cm 7340), pp 15, 120.

## Article 14 of the Torture Convention

5. Article 14(1) of the UN Convention Against Torture provides:<sup>4</sup>

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.

6. On its face, this obligation is unqualified and unrestricted, whether or not the torture took place in the state's own territory or was carried out by its agents. Nor has the UN Committee Against Torture, the authoritative body under international law charged with monitoring States parties compliance with Convention, ever concluded otherwise.

## The experience of other common law and civil law jurisdictions

7. For more than 218 years, US law has afforded US federal courts jurisdiction over torts committed by foreign nationals 'committed in violation of the law of nations or a treaty of the United States'.<sup>5</sup> This long-standing domestic exception to the doctrine of state immunity, allowing foreign victims of torture to gain redress against foreign torturers in US courts,<sup>6</sup> was strengthened by the Torture Victim Protection Act 1992. The 1992 Act explicitly provides that any person, whether US citizen or not, may bring a claim against a foreign official for torture in US federal courts, irrespective of where the alleged acts occurred.
8. There is no evidence to show that this exception has proved unworkable for the US courts, nor that it has caused any appreciable harm to US diplomatic relations with other states, or indeed the comity of nations as a whole. More generally, we note that civil law jurisdictions such as France, Germany, Italy and Spain allow for the recovery of damages for foreign victims of torture as part of criminal proceedings brought under universal jurisdiction for torture. Those who would argue against the creation of a similar exception in UK must first explain why the positive experience of foreign jurisdictions is somehow inapplicable. It is difficult to see how the skies would fall here when they have not fallen abroad.

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<sup>4</sup> Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment, 1985.

<sup>5</sup> The Alien Torts Statute, 28 USC, § 1350.

<sup>6</sup> See the decision of the Second Circuit of the US Court of Appeals in *Filártiga v. Peña-Irala* 630 F.2d 876 (2d Cir. 1980).

## The experience of British criminal courts

9. UK criminal law already recognises universal jurisdiction for torture.<sup>7</sup> In 2005, Faryadi Zardad, an Afghani warlord, was successfully prosecuted in the Old Bailey by the then-Attorney General Lord Goldsmith QC for acts of torture committed in Afghanistan against Afghani nationals.<sup>8</sup>
10. If British courts can be used to prosecute foreign nationals for acts of torture committed abroad, we can see no principled case for resisting the coextensive application of civil liability for such acts.

## The 1978 Act and the doctrine of state immunity in civil cases

11. Section 1(1) of the State Immunity Act 1978 provides that:

A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.

12. The 1978 Act sets out a number of exceptions to the state immunity rule, including the following:
  - commercial transactions entered into by the foreign state;<sup>9</sup>
  - actions relating to a contract of employment with a UK resident;<sup>10</sup> and
  - any interest in moveable or immoveable property.<sup>11</sup>

13. It is plain that the state immunity rule is hardly unqualified. On the contrary, a number of exceptions already exist. The question is not whether the state immunity rule can be qualified. Obviously it can and it is. In JUSTICE's view, the question is whether torture is sufficiently serious to qualify as an exception, alongside claims for employment and interests in moveable or immoveable property. If certain commercial interests are deemed to be sufficiently weighty to count as exceptions, it is hard to understand why responsibility for acts of torture could not also qualify.

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<sup>7</sup> Section 134 of the Criminal Justice Act 1988.

<sup>8</sup> See e.g. CPS press release, 'CPS Secures Historic Torture Conviction', 18 July 2005; BBC News, 'Afghan Warlord guilty of torture', 18 July 2005.

<sup>9</sup> Section 3(1)(a).

<sup>10</sup> Section 4.

<sup>11</sup> Section 6.

## The mechanism of the Bill

14. Clause 1 of the Bill establishes that UK courts shall have civil jurisdiction for acts of torture committed both in the UK and abroad, while clause 3 explicitly amends the terms of the 1978 State Immunity Act.

15. However, clause 1(2) qualifies the scope of the UK jurisdiction, providing that:<sup>12</sup>

Where the torture occurs in a State outside of the United Kingdom, this Act shall apply **only when no adequate and effective remedy for damages is available in the State in which the torture is alleged to have been committed**

16. This follows the well-established rule in international law that a claimant must first exhaust their remedies in the state where the act was allegedly committed, unless it is apparent that there is no adequate or effective remedy available, whether because the courts there are not sufficiently independent of the state, are powerless to act, or are otherwise incapable of providing a proper remedy.

17. In JUSTICE's view, this qualification is a proportionate limitation, and follows closely the terms of the US legislation. Clause 2 establishes a six-year time limit within which claims must be brought, while clause 7 establishes a cut-off date of 29 September 1988 (i.e. when universal jurisdiction for torture was established under the Criminal Justice Act 1988). This means that the universal jurisdiction of UK courts in civil and criminal law will be coextensive.

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<sup>12</sup> Emphasis added.