

# **REDRESS**

*Seeking Reparation for Torture Survivors*

## **THE IMPACT OF *AL-ADSANI V. THE UNITED KINGDOM***

*Towards an Effective and Enforceable Civil Remedy for Reparation for  
Torture in the United Kingdom*

**REPORT OF A MEETING CONVENED BY REDRESS AT THE HOUSE OF LORDS  
ON 13 FEBRUARY 2002**

**LONDON, 2002**

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## 1. INTRODUCTION

On 13 February 2002, REDRESS convened a meeting of academics, practitioners, representatives of non governmental organisations and government to assess the recent ruling of the European Court of Human Rights in *Al-Adsani v United Kingdom* and its impact on the draft Redress for Torture Bill. The Bill, if enacted, will provide an effective and enforceable civil remedy for torture survivors in the United Kingdom. This Report provides a summary of this meeting and follow-up discussions that have subsequently taken place. Finally the report analyses a range of options for the way forward having regard to the broader legal context and the growing international jurisprudence in this area.

Mr Al-Adsani, a dual Kuwaiti and British national, first instituted civil proceedings in the UK in August 1992. He claimed compensation against Sheikh Jaber Al-Sabah Al-Saud Al-Sabah and the government of Kuwait for the torture which was inflicted at the instigation of the Sheikh and for the resulting damage to his physical and mental health and the pain and suffering he sustained. The pain and suffering was further aggravated by threatening telephone calls Mr Al-Adsani received once he arrived in the UK warning him not to publicise or to take legal action in relation to the torture. The Court of Appeal upheld the High Court decision that the government of Kuwait was immune from the Court's jurisdiction by virtue of section 1 of the State Immunity Act 1978. Despite Mr Al-Adsani's argument that the *jus cogens* status of the prohibition of torture was capable of overriding the principle of state immunity, the Court of Appeal held that such immunity could not be superseded because torture did not fall within any of the expressed exceptions of the Act.<sup>1</sup>

It is with this background that Mr Al-Adsani took his case to Strasbourg to seek the European Court of Human Rights' decision on whether his right under article 6 of the European Convention on Human Rights, (that is his civil right "to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law") had been violated by the UK.<sup>2</sup> The European Court of Human Rights accepted that article 6 of the Convention applied to Mr Al-Adsani's case firstly, because Mr Al-Adsani's case was essentially a personal injury action for damages which was "a cause of action well known to English law" and therefore was not creating a new substantive civil right under UK law and secondly, if Kuwait had waived its immunity, Mr Al-Adsani's case would have proceeded through the UK Courts. The Court concluded that:

"The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national court's power to determine the right."<sup>3</sup>

<sup>1</sup> *Al-Adsani v. Government of Kuwait* (1996) 107 ILR 536. Ward L.J. stated, at pp. 549-550: "Unfortunately, the Act is as plain as can be. A foreign state enjoys no immunity for acts causing personal injury committed in the United Kingdom and if that is expressly provided for the conclusion is impossible to escape that state immunity is afforded in respect of acts of torture committed outside this jurisdiction."

<sup>2</sup> The claimant further submitted that "the United Kingdom had failed to secure his right not to be tortured" and was therefore in violation of article 3 of the Convention. The Court rejected this submission unanimously. *Al-Adsani v United Kingdom* (No.2) (35763/97) European Court of Human Rights 21 November 2001 paras 35 - 41.

<sup>3</sup> *Ibid*, para 48.

By a slim majority, (9 votes to 8) the Court held that while Article 6 was applicable, there had been no violation of Mr Al-Adsani's right under article 6. While the Court unanimously found that "the prohibition of torture has achieved the status of a peremptory norm in international law," the judges were divided as to whether this status applied to a civil action for damages for torture where state immunity could be invoked.<sup>4</sup> The slim majority found that it did not and considered that a distinction could be made between criminal proceedings (where immunity may not apply to former heads of State as in the *Pinochet* case) and civil claims. However, most of the dissenting opinions considered this distinction flawed on two accounts; firstly, this distinction had not been raised in the proceedings before the UK Courts,<sup>5</sup> and secondly and more importantly, this distinction in relation to torture was: "not consonant with the very essence of the operation of the *jus cogens* rules."<sup>6</sup>

The impact of the *Al-Adsani* ruling and its effect on the Redress for Torture Bill formed the basis for the meeting in the House of Lords on 13<sup>th</sup> February 2002 chaired by Lord Archer of Sandwell. Lord Archer opened the meeting with a summary of the objectives of the Redress for Torture Bill. Mr Geoffrey Bindman, the solicitor acting on behalf of Mr Al-Adsani was then invited to summarise the issues in the *Al-Adsani* case and its implications for the Redress for Torture Bill. After a general discussion, Professor Colin Warbrick assessed possible alternative avenues available to torture survivors in the UK to ensure that their right to fair and adequate compensation under article 14 of the UN Convention Against Torture is recognised, namely the use of diplomatic protection and diplomatic representations. He explored the extent to which these options are based in UK law and the best way of pursuing such avenues.

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<sup>4</sup> Ibid, para 61.

<sup>5</sup> Ibid. See dissenting opinion of judges Rozakis and Caflisch, joined by Wildhaber, Costa, Cabral Barreto, and Vajic, and the dissenting opinions of judge Loucaides and judge Ferrari Bravo.

<sup>6</sup> Ibid, para 4 of dissenting opinion of judges Rozakis, and Caflisch, joined by Wildhaber, Costa, Cabral Barreto, and Vajic. These judges gave the following reasons for this conclusion: "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." Also, see dissenting opinions of judges Ferrari Bravo and Loucaides.

## 2. SUMMARY OF THE MEETING

### Lord Archer of Sandwell

At the opening of the meeting, **Lord Archer of Sandwell** welcomed the ever-increasing concern of the International Community to combat the world-wide practice of torture and to ensure that those who commit torture have no place to hide. Torture was no longer a matter only between the state and the individual perpetrator but it had become the responsibility of the International Community as a whole. He reminded the participants of the meeting that the UN Convention Against Torture had been in existence for more than twenty years. With *Pinochet*, some of the potential strengths of this Convention were brought to light. However in the UK, the 1988 Criminal Justice Act (the Act which implements the UK's obligations under the UN Convention Against Torture and which specifically designates torture as a crime in the UK regardless of where that crime was committed or of the perpetrator's nationality) still leaves gaps that need to be addressed.

In 1994, the idea for a Redress for Torture Bill was conceived to remedy some of the principle gaps in the law. The Bill proposes a formula whereby a State may be held liable in a civil claim for damages when it authorises or condones torture or where it fails to take reasonable steps to prevent it. Added to this, the Bill seeks to address the issues of state immunity and the application of *forum non conveniens*. REDRESS planned to present the Bill to Parliament as a private members bill and on 20 May 1999, a meeting in the House of Lords was held to consider how to proceed. The consequences of that meeting are set out in REDRESS' report: "Law Reform in the Wake of the Pinochet case". In particular, the meeting reviewed the proposed Bill and its merits and identified a number of omissions such as the need to incorporate into the Bill clarifications regarding those circumstances when a State is vicariously liable for acts of individual perpetrators of torture.

Following this meeting, in discussions held with the Lord Chancellor's Department, it was made clear that state immunity was still an issue for the Government. The Government indicated at that time that any possible exception to state immunity where acts of torture and other breaches of *jus cogens* norms were concerned would best be regulated at the EU or international level. It would be difficult for them to support legislation which invoked such an exception unilaterally. The Government also presented the dramatic picture of their fear that survivors who were unable to obtain redress for torture in their own countries would flood to Britain and the Court machinery would break down under the weight of claimants. It also indicated that the *forum non conveniens* doctrine would be important to retain and considered that its application should be left to the Courts. There was also discussion about the merits of any possible defence to lawful authority.

In the end, the Government advised that REDRESS should wait for the decision of the European Court of Human Rights in the *Al-Adsani* case before taking any further steps

with the Bill as they considered that the outcome of this case may trigger important changes to UK legislation.

### **Mr Geoffrey Bindman**

**Mr Geoffrey Bindman**, the solicitor acting on behalf of Mr Al-Adsani commented on the European Court of Human Rights judgment of *Al-Adsani v United Kingdom* and his views on how to move forward.

Mr Bindman outlined the principle objective of taking this case to Strasbourg - namely, to secure a life for Mr Al-Adsani after all that he had endured in Kuwait. He expressed his disappointment that the mass of international human rights law and an army of lawyers were unable to provide a remedy to a man whose life had been virtually destroyed by torture, which is agreed to be one of the most serious international crimes. The facts were very plain. Mr Al-Adsani had suffered a glaring injustice and the law had failed to redress it. Despite this, Mr Bindman did see reason for optimism and outlined a number of avenues still open to Mr Al-Adsani.

Mr Bindman informed the participants that in view of the UK Government's responsibilities towards Mr Al-Adsani, he had requested a meeting with the Right Honourable Jack Straw, Secretary of State for Foreign Affairs to discuss the case and to persuade the British Government to resolve the matter through diplomatic channels. He considered that the Government of Kuwait should have taken a generous attitude to Mr Al-Adsani's case and settled the matter long ago. Moreover, he considered that the British Government could have used a better means of diplomacy and pursued its diplomatic representations more vigorously with the Government of Kuwait.

Mr Bindman stressed the impact this case would have had for torture survivors if Mr Al-Adsani had won - if the decision had recognised the capacity of the prohibition against torture - a peremptory norm, to trump immunity - a great many torture survivors would have benefited by being provided with an effective remedy. However, he considered the approach of the majority in the *Al-Adsani* judgment disappointing, in that it flouted the face of Article 6 of the European Convention of Human Rights - the right to a fair trial. He questioned the Court's interpretation of the right; how a person can have a right to a fair trial when he/she is never given the opportunity to have that trial at all. He stressed that cases must be allowed to go before a court and for that court to be given a chance to make a ruling.

In legal terms, the task is now to examine existing law on state immunity to see whether it is possible to establish a consensus that immunity for torture should not be allowed to continue. In particular, Mr Bindman referred to the argument of the majority - that overriding immunity for torture in practice, would open the floodgates. He considered that this argument overlooked the doctrine of *forum non conveniens* which would apply to such cases. Surely the purpose of this doctrine was to safeguard against any threat of opening floodgates. Mr Bindman considered that in light of the wording of the UN Convention Against Torture, where an individual is unable to find redress elsewhere in

the world, the UK should take on the burden of that case and that it was no excuse that the Courts were too busy to do so.

As for Mr Al-Adsani, the judgment of the European Court of Human Rights is the end of the road for him. Other potential cases should be carefully examined in order to determine whether or not they would be capable of being distinguished from the Al-Adsani ruling and thereby advancing the law. The Redress for Torture Bill should be pursued as vigorously as possible. Mr Bindman ended his address by expressing his hope to participants that REDRESS and others will do everything possible to make the Bill a reality.

In the discussion that followed about the likelihood of passing the Bill in its present form, a representative from the Foreign and Commonwealth Office asked whether there were any other countries looking to introduce a Bill of this kind. The recent decision of the Hellenic Supreme Court in the *Voiotia* case (which concerned reparation for the atrocities, including wilful murder and destruction of private property committed by the German occupation forces in the village of Distomo during the Second World War) was raised. In this case, the Court found that the *jus cogens* norms at issue trumped state immunity.<sup>7</sup> The Belgium law on universal jurisdiction and the US Torture Victim Protection Act and Alien Tort Claims Act were also given as examples that demonstrated the existence of state practice on the provision of a civil remedy for torture survivors regardless of where the torture took place.

The issue of the enforceability of a judgment and the problems of execution against state property was also raised. Mr Bindman was firmly of the view that rules of immunity should not apply to the execution of judgments. Professor Dinah Shelton drew on United States rules which allow for any money owed under a judgment to be deducted from foreign assistance grants.

### **Professor Colin Warbrick**

Following this discussion, **Professor Colin Warbrick** explored the avenues currently open to torture survivors such as Mr Al-Adsani and other UK nationals who wish to pursue their right to an effective remedy for acts of torture that occur outside of the UK.<sup>8</sup>

Professor Warbrick began by drawing the distinction between diplomatic representation and diplomatic protection. Diplomatic representation has no legal connotation - it entails no more than making remarks in order to help resolve a situation; whereas, diplomatic protection is a State's right to claim damages on behalf of its nationals. This is an international minimum legal standard and a primary rule of responsibility.

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<sup>7</sup> *Prefecture of Voiotia v Federal Republic of Germany*, case no 11/2000, Areios Pagos (Hellenic Supreme Court), May 4, 2000, quoted in 95 A.J.I.L. 198, January 2001.

<sup>8</sup> For further discussion see Colin Warbrick, "Diplomatic representations and Diplomatic Protection," in "Current Developments – Public International Law" ICLQ 51.3 (723) July 2002.

A State can only make legal representations when an international standard has been breached inflicting damage on a private individual and only when either the domestic remedies have been exhausted or where those remedies do not apply. The claim is State's own; it takes up the case of the individual as it would pursue the case of a river being polluted - the State acts on its behalf and not as a trustee for the injured party and it is the government who decides how to proceed. It may take a strong position of a prerogative nature. Examples of how the State would raise such matters are through international arbitral bodies or claims commissions or the International Court of Justice (ICJ).

Professor Warbrick commented that recently States have been using human rights mechanisms to bring claims relating to this 'old-style' diplomatic protection to Court - where a case is brought by an individual but where that individual's own government may intervene on the individual's behalf. He gave by way of example the European Court of Human Rights cases of *Denmark v Turkey* and *Selmouni v France*.<sup>9</sup> At the national level, there has been a development of human rights (both the incorporation of substantive rights and establishment of procedures) to allow the individual to become involved in these types of cases. This has led to a distinct overlap in respect of the role between the state and the individual.

In respect of the UK, Professor Warbrick stated that the 'old-style' diplomatic protection remains the norm. The Foreign and Commonwealth Office's policy is expressed in two ways: firstly it makes it clear that the policy is only an exercise of discretion.<sup>10</sup> Secondly, a year ago the government announced new policy regarding trials and convictions of British prisoners abroad. The policy provided that the UK would make "*representations*" in cases where there was evidence of miscarriages of justice, once local remedies had been exhausted.<sup>11</sup> This policy has been extended to other human rights abuses.<sup>12</sup> Professor Warbrick stressed that the individual seeking diplomatic protection would need to demonstrate that every effort was made to seek remedies in the national legal system where the abuse occurred.

Professor Warbrick drew to the attention of the participants the use of the word "*representations*", which is not a legal term, and does not carry any legal obligation that the Government will make a claim on an individual's behalf. Representations are made at the diplomatic level only. It appears from the Government's use of language that it is not expecting its policy to end up in litigation. Although there is indication of some movement in the Foreign and Commonwealth Office's policy regarding prisoners and torture, the resort to representations and diplomatic protection remains discretionary. It would seem, therefore, that despite widening the scope of its stated policy, the government has not added any greater legal weight to its new policy.

<sup>9</sup> (2000) 21 HRLJ 58 and (1999) 7 BHRC 1.

<sup>10</sup> See Warbrick, *supra.*, n. 8. According to the rules for claiming diplomatic protection established by international law, even if individuals comply with the procedures set out in the rules, there is no guarantee that the UK will provide diplomatic protection. However if these rules are not followed then a state cannot assert its prerogative to claim diplomatic protection on behalf of an individual.

<sup>11</sup> United Kingdom Materials on International Law 1999, (1999) LXX BYIL 527.

<sup>12</sup> *Ibid.*, p 528.

Professor Warbrick outlined areas where there was hope for change, namely the International Law Commission's (ILC) draft articles on diplomatic protection (drafted by Professor Dugard).<sup>13</sup> These articles show a progressive development in the law - such as the growing body of human rights laws and legal mechanisms that an individual can use in relation to protection of the person and/or property.

The initial ILC report recognises the right to exercise international protection - but this is a discretionary right of a State and not an individual right. Draft article 4 relating to the competence of international courts and tribunals states that unless the individual can lodge a legal claim, a state has a legal duty to undertake diplomatic protection in cases of human rights violations.

Professor Warbrick views the ILC's draft articles as a potentially big step forward for two reasons; firstly because these articles move towards embracing the principle that the legal duty of a state to undertake diplomatic protection in cases of human rights violations is a *jus cogens* norm. However, this has yet to be properly answered or addressed, as neither state parties nor members of the Committee have shown their support for the draft articles, and consequently the articles have not yet been formally brought before the Commission for adoption. Secondly, Professor Dugard's examination of state practice of diplomatic protection is positive because it revealed a number of important findings. In his analysis, Professor Dugard noted the practice of certain former socialist states of Eastern Europe that required nationals to be protected. In a few other cases such as Germany, States had accepted diplomatic protection as a constitutional duty, but not an unqualified duty in that the individual has a right to an explanation from the State if it will not exercise diplomatic protection.

Professor Warbrick further observed that the *Rapporteur* of the International Law Association also noted the progressive development of the law and that the *Le Grand* case of the ICJ gave further indication that the nature of the right was changing.<sup>14</sup> This case was brought by Germany who alleged that the US failed to honour obligations in relation to consular protection. Professor Warbrick considered Germany's use of the right of a detained national to consular communication as another positive development. The right to consular protection would appear to be a right to be exercised against the incarcerating state but in this case, Germany appeared to recognise that the right gave rise to a duty of the national state to provide consular services.

As to how this change may affect the UK, Professor Warbrick was somewhat pessimistic; without a constitutional basis in the UK for this type of approach, he considered that it would be difficult to persuade the courts to take this view. The UK case law challenging Government activities all seem to go the same way, since the

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<sup>13</sup> ILC Report on the work of its fifty-third session, A/56/10.

<sup>14</sup> Report of the Sixty-Ninth Conference (2000), Professor Francisco Orrego Vicuna, Interim Report on the Changing Law of Nationality of Claims; *Germany v United States*, ICJ no 104 (27.06.01).

1980's. For example, in *Butt*,<sup>15</sup> the Court refused to make an order requiring the Foreign and Commonwealth Office to act. In Professor Warbrick's view, the difficulty in *Butt* lay in the remedy being sought - the claimant asked the Court to order the government to make a plea for presidential clemency. It is very unlikely that any Court would agree to make such an order. Despite the lack of success in these challenges, Professor Warbrick was not without hope and believed that there was scope for a successful challenge in future.<sup>16</sup>

## Discussion

A lively discussion followed. The impact of Mr Al-Adsani's dual nationality was raised in relation to his right to diplomatic protection. Owen Davis QC raised the need to interpret a State's obligations under article 14 of the UN Convention Against Torture, which guaranteed a torture victim's right to an effective remedy, including rehabilitation. The extent of this remedy and the obligations accruing under the article needed to be further explored. Professor Dinah Shelton pointed out that certain jurisdictions have given a broad interpretation to article 14 particularly those where civil remedies are linked to criminal prosecutions through adhesion processes. In her view, the route of diplomatic protection was limited and consequently there is a clear need for additional remedies to be made available to torture survivors.

Lord Archer made reference to the Redress for Torture Bill and its purpose to provide a right of action to torture survivors in the UK, but stated that the right of action would stand or fall on the issue of immunity. He considered that the House of Lords ruling in the *Pinochet* case did not resolve the scope of immunity and how it would apply to diplomats and other state officials other than Heads of State. He further questioned whether the Bill's enforcement provisions needed to be strengthened.

## 3. DEVELOPMENTS SINCE THE MEETING

Following the seminar, REDRESS and Lord Archer of Sandwell met with government officials from the Lord Chancellor's department and the Foreign and Commonwealth Office (following their consultation with the Minister, Dr Denis MacShane, Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs). At the meeting, the government officials stated that the Government supported the general objective of the

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<sup>15</sup> *R v Secretary of State for the Foreign and Commonwealth Affairs, ex parte Butt* (Court of Appeal (unreported) 1999).

<sup>16</sup> Since the meeting, the Court of Appeal has granted the application of Mr Abassi (a British National being held at Camp-Xray, Guantanamo Bay military base in Cuba) to appeal against a High Court decision to refuse permission for judicial review. His application sought to challenge the UK government's failure to make representations to the US government to ensure that his rights (such as access to a lawyer and conditions of detention) were respected. By granting permission, the Court of Appeal has opened the door to allowing independent judicial scrutiny of the UK government's foreign relations. Time will tell how far the Court will intervene in government's foreign relations (an area which it has avoided in the past) where fundamental rights of British nationals are at risk abroad. The case was reported by The Independent: "British terror suspects at Camp X-Ray to get judicial review" by Robert Verkaik on 02.07.02.

draft Bill. They did raise a number of concerns, in particular the exception to State Immunity Act 1978 that the Bill would create, if the Bill were enacted in its present form.

The State Immunity Act is possibly one of the greatest hurdles for the Bill to overcome. The Bill proposes to create an exception to the Act: specifically, the immunity usually afforded to a State will no longer apply in respect of a claim for damages against a Foreign State or its officials for torture. This will ensure that torture victims have a realistic remedy and that survivors like Mr Al-Adsani will be afforded the opportunity to pursue civil claims for damages in UK courts. The government maintained its view from 1999 that it did not wish to pursue such a unilateral step. It indicated that a multilateral initiative, possibly at the European level may be warranted and encouraged REDRESS to initiate this debate.

Since the seminar and the meeting with government officials, a number of judgments concerning state immunity have been handed down: the case of the *Democratic Republic of the Congo v. Belgium* (Yerodia case)<sup>17</sup> before the ICJ, the case of *Tachiona and others v Mugabe and others* of the Southern District Court of New York, USA (Mugabe case)<sup>18</sup> and the *Bouzari and others v the Republic of Iran* of the Superior Court of Ontario, Canada (Bouzari case).<sup>19</sup>

The *Bouzari* case was a civil action for damages for acts of torture against the Islamic Republic of Iran. Unfortunately it adds little to the debate commenced in the *Al-Adsani* case; Judge Swinton adopted the narrow majority finding of the European Court of Human Rights without considering the dissenting judges' criticisms of the majority, in differentiating between criminal and civil actions, when analyzing the impact of the status of the prohibition of torture as a *jus cogens* norm. As in the *Al-Adsani* case, Judge Swinton found that state immunity was a bar to the proceedings.<sup>20</sup>

The *Mugabe* case related to an application made by the US government to intervene in the District Court's decision not to grant immunity to the political party, Zanu-PF in a

<sup>17</sup> Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) International Court of Justice no 121, 14.02.02.

<sup>18</sup> *Tachiona and others v Robert Mugabe in his individual and personal capacity, Zimbabwe African National Union-Patriotic Front, Stan Mudenge, Jonathan Moyo and certain other unknown named senior officers of ZANU-PF*, United States District Court for the Southern District of New York, 14.02.02, 186 F Supp 2d 383 2001 US Dist.

<sup>19</sup> *Bouzari v Islamic Republic of Iran*, Ontario Superior Court of Justice (Court of First Instance) (01.05.02) 114 A.C.W.S. (3d) 57; 2002 A.C.W.S.

<sup>20</sup> *Ibid.* The Judge also rejected the claimant's other arguments on state immunity; that the Court could award punitive as well as compensatory damages and therefore the proceedings were criminal in nature and therefore fell within the exception of section 18 of the State Immunity Act; that his kidnapping, false imprisonment and torture occurred as a result of his refusal to pay money which amounted to a commercial activity and therefore fell within the exception of the Act; that as Canada was a party to the UN Convention Against Torture, which gave rise to an implied exception to the Act; and that the application of the provisions of the State Immunity Act was contrary to the Canadian Charter of Rights and Freedoms which secures the right to life liberty and security of the person and his right to a civil remedy for any breach under the Charter. In addition to his findings on state immunity, the Judge found that under the common law rules the Court did not have jurisdiction over the case because "there was no real and substantial connection between the wrongdoing that gave rise to the litigation and Ontario" and because of the doctrine of *forum non conveniens*. However, given the nature of the allegation and the lack of available remedy in Iran the Judge decided to consider the other arguments.

class action alleging torture and terrorism and to issue a default judgment against the party.<sup>21</sup> Both Mugabe and Mudenge were senior party officials of the Zanu-PF at the time the violations occurred. The District Court granted immunity to President Mugabe and his Foreign Minister, Mudenge. The District Court's decision turned on the basis of the interference that service of documents on an acting head of state would have on US relations with Zimbabwe and it granted the government's application for the following reason:

"A decision affecting, as perceived of the government, the treatment of heads of state or foreign ministers visiting the United States, particularly under the circumstances present here, may have some potential to implicate the United States foreign relations in a manner that the Government could legitimately seek to mitigate by appeal of this Court's decision".<sup>22</sup>

In the *Yerodia* case, the ICJ was asked by the Democratic Republic of Congo to decide on the legality of Belgium's decision to issue an arrest warrant for alleged crimes against humanity committed by the then Minister of Foreign Affairs, Mr Abdulaye Yerodia Ndombasi. The ICJ found that Mr Yerodia was entitled to claim immunity from arrest on account of his status as Minister of Foreign Affairs at the time the arrest warrant was issued.<sup>23</sup>

The applicability of civil remedies for torture was not raised in the *Mugabe* or *Yerodia* decisions; and neither the *Yerodia* case nor the *Mugabe* case addressed the thorny issue of the scope of the prohibition of torture as a peremptory norm and its relationship to the rules of state immunity. Nevertheless, the *Yerodia* and *Mugabe* cases do raise some important questions for torture survivors and their right to a civil remedy. These decisions demonstrate a growing consensus that there will be instances when the principles of territorial sovereignty and state immunity are outweighed; that one state may adjudicate the actions/policy of another state where the action/policy amounts to a serious international crime such as torture.<sup>24</sup>

<sup>21</sup> *Tachiona and others v Mugabe and others*, (dated 30.10.01) 169 F Supp 2d 259 (SDNY 2001).

<sup>22</sup> *Supra* 18, para 41. In its judgment, the Court stressed that: "it is Zanu-PF institutionally, and not Mugabe and Mudenge personally, to which the Court's jurisdiction applies and which is called to answer the process served on Mugabe and Mudenge" (para 28). The full appeal has yet to be heard.

<sup>23</sup> *Supra* 17. The Court found that: "In customary international law, the immunities accorded to Ministers of Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. .... The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the head of State or the Head of Government, he or she is recognised under international law as representative of the State solely by virtue of his or her office" (para 53). (See also paras 54 and 55). However, they did not consider that immunity amounted to impunity and such an individual is not immune from criminal prosecution in the following circumstances: a) where a case is brought in the individual's own domestic Courts; b) where the State concerned decides to waive immunity; c) once the individual ceases to hold office; d) where a person is brought before an international criminal tribunal "in respect of acts committed prior or subsequent to his or her period of office as well as in a private capacity". (para 60) See the separate and dissenting opinions for the criticisms of the Court's reasoning, in particular the separate opinion of Judges, Kooijmans and Buergenthal and the dissenting opinion of Judge Van den Wyngaert.

<sup>24</sup> In the *Congo v Belgium* decision (*supra* 17), the challenge that international human rights law brings to territorial sovereignty and the principle underpinning the doctrine of immunity that one state should not judge the conduct of another State (*par in parem non habet imperium*) was noted at para 5 in the separate opinion of Judges Higgins,

The ICJ confirms that even though “certain holders of high-ranking office in a State, such as Head of State, Head of government and Minister for Foreign Affairs enjoy immunities from jurisdiction in other states both civil and criminal,”<sup>25</sup> such wide reaching immunity does not apply to these officials when they cease to hold office. The Court found that:

“provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.”<sup>26</sup>

Although the main judgment does not define the types of acts which are to be considered to be committed “in a private capacity”, the separate opinion of judges Higgins, Kooijmans and Buergenthal notes that:

“serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a state alone (in contrast to the individual) can perform..... that State-related motives are not the proper test for determining what constitutes public state acts”.<sup>27</sup>

The ICJ leaves open to debate how these rules apply to civil action for damages against a former Head of State and former Minister for Foreign Affairs. However, the Court made it clear in this case that: "it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider" and made no comments as to the application of immunity and civil jurisdiction of former Heads of State or former Ministers for Foreign Affairs.<sup>28</sup> So the question remains: should the same rules apply?

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Kooijmans and Buergenthal: “One of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights”. The separate opinion further noted the trend towards greater application of extra-territorial jurisdiction by states and its balancing factors as: "On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interferences. .... The weights on the two scales are not set for all perpetuity. Moreover, a trend is discernable that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited". (para 75. See also paras 49 and 73-75).

<sup>25</sup> *Supra*, para 51. As set out in the *Pinochet* case, these high ranking officials are afforded such wide reaching immunity - immunity *ratione personae* - on account of their status which stems from the time when heads of state were seen as personifying the state itself. See House of Lords Decision: *R v Bartle and the Commission of Police for the Metropolis and others ex parte Pinochet* 24.03.99, in particular the decision of Lord Phillips of Worth Matravers. See also State immunity and the violations of Human Rights by Jurgen Brohmer, Nijoff publishers 1997, p 30.

<sup>26</sup> *Ibid*, para 61.

<sup>27</sup> *Ibid*, para 85 of the dissenting opinion of Judges Higgins, Kooijmans and Buergenthal.

<sup>28</sup> *Ibid*, para 51. It is unclear from the *Yerodia* case whether the ICJ, if asked to decide immunity would apply to a civil action against a former Minister of Foreign Affairs or former Head of State would follow the obiter findings of the three Law Lords in the *Pinochet* case (*supra* 25), Lord Millet, Lord Phillips of Worth Matravers, and Lord Hutton, all of whom considered that even though Pinochet was not immune from criminal prosecution would be immune from any civil

REDRESS believes that these rules should be applied uniformly both to criminal and civil cases alike, given that torture has been recognized both as a tort and a serious crime under international law<sup>29</sup> and given that the right to reparation is a fundamental principle of general international law and is included in most human rights' conventions.<sup>30</sup> Moreover, without such a uniform application it would leave the state of the law in a disharmonious position in practice. For instance;

- ?? If a successful prosecution for torture is brought against former heads of state or former Foreign Ministers, should not the victims of that torture be able to bring a civil action for damages against this known perpetrator of torture?<sup>31</sup>
- ?? If a distinction is to be made, how would these rules apply in jurisdictions where damages can be awarded by the same court convicting a perpetrator?
- ?? On what basis can an act such as torture which has been deemed not to be an official act of State in relation to individual criminal liability be considered as an official act for a civil claim where the alleged perpetrator involved is the same individual?<sup>32</sup>
- ?? Should such acts suddenly become an official state function when a foreign State and their immunity is brought before a UK Court?

#### 4. CONCLUSIONS

The meeting on the *Al-Adsani* judgment and its impact on the Redress for Torture Bill brings to the fore the existing barriers for torture survivors to obtain an effective civil remedy. It also exposed the major hurdle for the Bill, immunity. The European Court of Human Rights' finding that immunity is a legitimate jurisdictional bar to pursuing a civil claim for damages for acts of torture appears to further entrench the status of immunity.

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claim for damages and that individual criminal responsibility should be differentiated from responsibility in civil claims on the basis that the latter indirectly implicated the state in the civil action.

<sup>29</sup> John F Murphy draws this conclusion on the basis of the findings made by Judge Irving Kaufman in *Filartiga v Pena-Irala* in *Civil liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 Harv. Hum. Rts. J. 1.

<sup>30</sup> *Factory at Chorzow, jurisdiction*, judgment No 8, 1927, PCIJ, Series A no 17 p 29; Reparations for injuries suffered in the service of the United Nations, Advisory Opinion, ICJ Reports 1949, p 184: *Interpretation des traits de paix conclus avec la Bulgarie, La Hongrie et La Roumanie, deuxième phase, avis consultatif*, CIJ Recueil, 1950, p 228. See for example, article 14 of the UN Convention Against Torture and article 2(3) of the International Covenant on Civil and Political Rights.

<sup>31</sup> M Buhler expresses his view that a civil action for damages against General Pinochet could have been brought in the UK in "The Myth of "Act of State" in Anglo-Canadian Law" in *Torture as Tort Comparative Perspectives on the Development of Transnational Human Rights Litigation* edited by Craig Scott, Hart publishing 2001, p 367.

<sup>32</sup> The distinction made between criminal and civil jurisdiction in the *Al-Adsani* case (supra 1) was raised in relation to the scope of *jus cogens* nature of the prohibition against torture and its ability to trump state immunity whereas the distinction here is whether immunity should apply as a result of the act of torture being designated as not an official state act but one which is committed in "a private capacity".

However the fact that the Court's decision was based on such a narrow majority provides hope for change in the future.

The way forward for providing an enforceable and effective remedy for torture survivors in the UK is, in REDRESS' view, to ensure that the laws of immunity do not apply to civil claims for torture. Three possible ways of achieving this are as follows:

- ?? To create an exception to state immunity through UK legislation;
- ?? To set out an exception to state immunity on a multilateral basis within Europe; and/or
- ?? To wait for state practice to develop further.

Given the outcome of the *Al-Adsani* judgment, it is unlikely that the UK Government will support an exception to state immunity during the Bill's passage through Parliament unless developments to restrict immunity are already underway at a regional or international level; new jurisprudence is available to distinguish the *Al-Adsani* judgment and create the need for the exception; or for this exception to find strong support from civil society.

Multilateral solutions through the creation of regional or international instruments is one way forward, and Europe is the practical starting point. Support for such an exception to immunity could be tested within the Council of Europe and/or the European Union. This would be an important first step towards introducing either changes to the European Convention on State Immunity 1972 or formulating a new treaty on immunity and its restrictive application for serious violations of human rights.

It may be difficult to pursue the above alternative courses of action until new case law creates such an exception. However, the wait for new jurisprudence is a precarious option - being without a timeframe and leaving the chances of change to the whim of the Courts, which have of late applied restrictive interpretations.

The meeting further reveals that the current doctrine of diplomatic protection is not capable of providing the effective and enforceable remedy envisaged by article 14 of the UN Convention Against Torture. It is not readily available to all torture survivors. Moreover, diplomatic protection is not a justiciable right of the individual but the prerogative of the UK government exercised at its discretion on behalf of the injured party. Even when the individual concerned can demonstrate that they have exhausted domestic remedies, the UK Government and not the individual decides what course of action it considers appropriate to pursue. This action is unlikely to be open to challenge provided some form of action is taken. Despite its restrictive nature and uncertainty to bring results, more use should be made of diplomatic protection, both by the UK government to exert its prerogative to protect its nationals and by torture survivors to bring violations of torture to the government's attention where and for as long as immunity continues to shield States from the jurisdiction of the UK Courts.

Finally, it is clear from the outcome of the meeting that at present, a certain number of torture survivors may have no avenue whatsoever in which to pursue their right to an effective civil remedy for torture. This applies in circumstances where the country in which the torture was inflicted provides no effective remedy within their national legal system and/or does not submit to the jurisdiction of any regional or international human rights mechanisms and where the torture survivor cannot take advantage of the rules on diplomatic protection. This is the case even in countries that have ratified the UN Convention Against Torture and the International Covenant on Civil and Political Rights, both of which place clear obligations on a state not only to prohibit torture but to provide an effective remedy to victims. Greater international pressure needs to be placed on those States who fail to incorporate these obligations into their domestic law and on those States that have yet to ratify such Conventions.

In short the possibilities which flow from the meeting are multidimensional:

- ?? To encourage Member States of the European Union and/or the Council of Europe to support an unambiguous exception to state immunity through a legal binding instrument;
- ?? To campaign within the UK for changes to the existing laws on state immunity in relation to torture in order to ensure the smooth passage of the Redress for Torture Bill through Parliament;
- ?? To call on the UK Government to improve their record in seeking diplomatic protection for torture survivors, and to encourage more torture survivors to request the government to take up their case; and
- ?? To ensure greater recognition of the responsibility of offending States to provide an effective civil remedy for torture survivors within their own domestic legislation through the use of international mechanisms.

All are inter-linked and need to be targeted with equal energy in order to ensure that the right of every torture survivor to an effective and enforceable civil remedy is guaranteed.

**APPENDIX      DRAFT REDRESS FOR TORTURE BILL**