

REDRESS

Seeking Reparation for Torture Survivors

**JUSTICE FOR TORTURE SURVIVORS IN THE UK:
SUBMISSION TO THE JOINT COMMITTEE ON HUMAN RIGHTS
IN SUPPORT OF THE TORTURE (DAMAGES) BILL
MARCH 2009**

I. INTRODUCTION

1. The Redress Trust (REDRESS) is an international human rights organisation based in London with a mandate to assist torture survivors, to prevent their further torture, and to seek justice and other forms of reparation.
2. The Torture (Damages) Bill, introduced by Lord Archer of Sandwell QC, passed its First Reading in the Lords on 14 January 2009; a Second Reading is yet to be scheduled. In parallel, Andrew Dismore MP presented the Torture (Damages) (No. 2) Bill in the Commons. This Bill passed its First Reading on 26 January 2009; and a Second Reading is scheduled for 19 June 2009. In the last parliamentary session, the Bill passed all five stages in the Lords and received a First Reading in the Commons before the session ended and the Bill lapsed.
3. REDRESS published a Compilation of Evidence following Lord Archer's call for evidence in June 2007. This includes statements from torture survivors and submissions from medical, refugee and human rights organisations in support of the Bill.¹

II. THE RIGHT TO A REMEDY IN INTERNATIONAL LAW

4. Torture survivors, like victims of other human rights and humanitarian law violations, have a right to a remedy and reparation under international law.² The

¹ REDRESS, *The Torture (Damages) Bill 2007-08, A Private Member's Bill to Provide a Remedy for Torture Survivors in the United Kingdom, Compilation of Evidence Received following the Call for Evidence launched by Lord Archer of Sandwell QC* (July 2008), available at: www.redress.org/documents/Evidence%20publication%20-%20FINAL%203%20A4%20saved.pdf.

² International law on this point is codified in the United Nations *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, U.N. Doc. A/RES/60/147 (21 Mar. 2006). The right to a remedy and reparation is enshrined in many international human rights treaties. E.g., Convention

right to a remedy and reparation is itself guaranteed and is applicable at all times, during times of peace and war, and even in times of emergency.³ Those human rights treaties that mention reparations require states parties to provide for this in domestic legislation.⁴ The majority of human rights instruments guarantee both the procedural right to effective access to a fair hearing and the substantive right to reparations (such as restitution, compensation and rehabilitation).⁵

III. THE NEED FOR THE TORTURE (DAMAGES) BILL

5. There are torture survivors living in the UK who have no remedy for the harm they suffered. Many of these individuals have lasting psychological difficulties and continuing trouble reintegrating into society. Many are unable to work.
6. For a variety of reasons, the courts of the state where the torture occurred may not be available.
7. Moreover, diplomatic protection (where a state espouses a claim of a national who has been wronged abroad) remains a discretionary remedy under English

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (art. 14), Universal Declaration of Human Rights (1948) (art. 8), International Covenant on Civil and Political Rights (1966) (arts. 2(3), 9(5) and 14(6)), International Convention on the Elimination of All Forms of Racial Discrimination (1965) (art. 6), Convention of the Rights of the Child (1989) (art. 39), and Rome Statute for an International Criminal Court (1998) (art. 75). It has also figured in regional instruments, e.g. European Convention on Human Rights (1950) (arts. 5(5), 13 and 41), American Convention on Human Rights (1969) (arts. 25, 63(1) and 68), and African Charter on Human and Peoples' Rights (1981) (art. 21(2)). The right has also been recognised and further developed in the jurisprudence of international and regional courts, as well as other treaty bodies and complaints mechanisms (see, e.g., *Velásquez Rodríguez Case*, Inter-Am Ct. H.R. (Ser. C) No. 4 (29 Jul. 1988) at para. 174; and *Papamichalopoulos v. Greece* (Art. 50), Eur. Ct. H.R., App. No. 14556/89, (31 Oct. 1995) at para. 34.

³ Human Rights Committee, General Comment No. 29 on States of Emergency (Art. 4) U.N. Doc. No. CCPR/C/21/Rev.1/Add.11 (2001) at para. 14.

⁴ E.g., UDHR (art. 8), ICCPR (art. 2), UNCAT (art. 13), ICERD (art. 6), and the Declaration on the Protection of all Persons from Enforced Disappearance (1992), U.N. Doc. No. A/RES/47/13 (art. 19). At the regional level see also, ECHR (art. 13); the Charter of Fundamental Rights of the European Union (2000/C 364/01) (art. 47); ACHR (arts. 24 and 25); the American Declaration of the Rights and Duties of Man (1948) (art. XVIII); the Inter-American Convention on Forced Disappearance of Persons (1994) (art. X); the Inter-American Convention to Prevent and Punish Torture (1985) (article 8); African Charter (arts. 3 and 7); and the Arab Charter on Human Rights (1994) (art. 9).

⁵ See Jeremy McBride, 'Access to Justice and Human Rights Treaties' (1998) 17 Civil Justice Q. 235. For further discussion on the right to a remedy and to reparation in international law see REDRESS' Submission at pg. 76 of the 'Compilation of Evidence' supra n. 1, at paras. 4-10.

law and is not an adequate and effective alternative for torture survivors.⁶ Moreover, in many cases known to REDRESS, the UK Government has failed to espouse the cases of nationals tortured abroad. **REDRESS' efforts to seek Government clarification of the exact numbers of espoused cases, have to date failed.**⁷

8. The absence of avenues for legal redress means that the consequences of the suffering can never be repaired by the individuals or bodies responsible for the harm. Further, the lack of acknowledgment of the harm can impede survivors' recovery as the sense of injustice continues.

IV. STATE IMMUNITY

9. To date, state immunity rules have prevented torture survivors from accessing the courts of England and Wales, leaving them without a remedy.⁸
10. By definition, torture is committed by state officials.⁹ However, under the State Immunity Act 1978, as a general rule, foreign states are immune from the jurisdiction of the English courts.¹⁰ The Bill proposes a new exception to the State Immunity Act, in order to clearly enable civil claims for damages for torture, or death caused by torture, to proceed without being barred by claims of state immunity. The State Immunity Act already has exceptions, for example, for

⁶ See further discussion of diplomatic protection in REDRESS' Submission at pg. 76 of the 'Compilation of Evidence' supra n. 1, at paras. 23-27.

⁷ On 17 July 2008, Sir Malcolm Rifkind asked the Secretary of State for Foreign and Commonwealth Affairs "i) How many British nationals have asked the Government to espouse their claims for damages following allegations of torture by officials or agents of foreign governments, or have requested the Government to intervene on their behalf in these matters, since 8 December 1998; ii) How many claims by British citizens of torture abroad have been espoused by the Government since December 1998, and what the criteria are for determining whether to espouse such a claim'. The response detailed the number of allegations raised regarding mistreatment though as records regarding espousal of claims are not collated, it was said that it would incur a disproportionate cost to collate such figures. A subsequent question was posed on 22 July 2008 (and a further question on 2 February 2009). In addition, REDRESS has filed an information request which was rejected on the same basis; a complaint with the Information Commissioner's Office is pending (Case ref. FS50236068). The parliamentary questions and responses and information complaint are appended.

⁸ See discussion of *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya as Saudiya and others* [2006] UKHL 26 (currently pending in the Eur. Ct. H.R.) and *Al-Adsani v. United Kingdom*, Eur. Ct. H.R., App. No. 35763/97 (21 Nov. 2001) in REDRESS' Submission at pg. 76 of the 'Compilation of Evidence' supra n. 1, at paras. 11-13.

⁹ See, e.g., the Criminal Justice Act 1988 (c. 33) (Section 134).

¹⁰ State Immunity Act 1978 (c. 33) (Section 1(1)).

breaches of commercial contracts, and for torts committed in the UK.¹¹ The Bill, therefore does not fundamentally change the character of the State Immunity framework under UK law, it simply adds an additional exception.

V. THE BILL IS A PRACTICAL SOLUTION, SEEKING TO PROVIDE ACCESS TO JUSTICE FOR TORTURE SURVIVORS WITHOUT “OPENING THE FLOODGATES”

11. The Bill seeks to address the specific and limited situation where torture survivors are left without a remedy. It is not aimed at encouraging ‘forum shopping’ but is designed to deal practically with the very real and immediate needs of torture survivors in the UK who are unable to access justice anywhere else. For this reason, the Bill is tightly drafted and offers a practical approach to dealing with this English law issue.¹²

12. **The Bill is limited to torture and does not extend to other international crimes**, such as genocide, crimes against humanity and war crimes, though victims of such crimes are equally entitled to reparation. A broader approach could be regarded as consistent with the UK’s international commitments to combat impunity for such crimes.¹³ However, maintaining the Bill’s present focus on torture will help to alleviate fears of a flood of litigation in the English courts.

13. **The Bill does not extend to “cruel, inhuman and degrading treatment and punishment”**. The inclusion of ill-treatment would be in line with international law, in particular the Convention against Torture,¹⁴ but the Bill’s narrow focus on torture will provide access to justice to a particular category of vulnerable individuals while stemming any concerns that the Bill could result in a flood of

¹¹ See the ‘Exceptions from immunity’ provisions in Sections 2 to 11 of the State Immunity Act 1978. For further discussion of existing exceptions in the State Immunity Act 1978, see REDRESS’ Submission at pg. 76 of the ‘Compilation of Evidence’ supra n. 1, at para. 15.

¹² For further discussion of these limitations on the scope of the Bill, see REDRESS’ Submission at pg. 76 of the ‘Compilation of Evidence’ supra n. 1, at paras. 28-37.

¹³ See Lady Fox CMG QC’s comments that the Bill “attempts too little and will introduce an anomalous situation. Such a proposal should apply to all international crimes for which the UK and the foreign State against whom proceedings are to be brought have entered into obligations to prosecute in their national courts” (Written Comments of Lady Fox CMG QC at pg. 87 of the ‘Compilation of Evidence’ supra n. 1, at para. 11). Lady Fox caveats her submission by noting that, “[b]ut English law can only give effect to such a widened proposal after the necessary modification of international law by international conventions imposing obligations on State to exercise universal civil jurisdiction in respect of proceedings for reparation for the commission of international crimes” (also at para. 11). This issue will be discussed further below.

¹⁴ See UN Convention against Torture (art. 16(1)).

claims given the breadth of acts which could potentially fall within the definition of “ill-treatment”.¹⁵

14. The Bill has retroactive effect, but this is limited to acts of torture occurring on or after 29 September 1988, to reflect the date of entry into force of section 134 CJA; to allow torture survivors currently living in the UK to access justice; and because the Convention against Torture entered into force on 26 June 1987. It has been noted that the Convention against Torture does not restrict the prohibition of torture temporally, and that states should provide for reparations to be recovered by torture victims and their families irrespective of when the torture took place. Therefore, some have recommended that the Bill be amended to permit actions in respect of torture committed since it was recognised as a crime under international law.¹⁶ However, restricting the retrospective effect of the Bill alleviates fears of stale claims and of a flood of litigation.

15. Any danger of stale claims or a flood of litigation is minimised by including a limitation period of six years, beginning with the date when it first became “reasonably practicable” for the person concerned to bring the action.

Under English law, the starting point for actions in tort is a time limit of six years from the date the cause of action accrued.¹⁷ However, there is a special time limit for actions in respect of personal injuries: three years subject to the discretion to exclude or extend this where it would be “equitable to do so”.¹⁸ However, applying a three-year limitation period to claims involving allegations of torture would give rise to serious practical concerns. For example, torture victims are often unable to speak about their experiences for a long time after the event.¹⁹

¹⁵ E.g., it has been suggested that including other types of ill-treatment in the Bill could potentially cover conditions of detention abroad which fall below ECHR standards. This is especially so given that in civil cases the individual victim decides whether to bring a suit (whereas in the criminal sphere, this decision is taken by the Director of Public Prosecutions and/or the Attorney-General).

¹⁶ See Amnesty International’s submission at pg. 56 of the ‘Compilation of Evidence’ supra n. 1, at pp. 3 and 5.

¹⁷ Limitation Act 1980 (c. 58), Section 2.

¹⁸ Limitation Act 1980, Sections 11 and 33. See also, *A (Appellant) v Hoare (Respondent) and related appeals* [2008] UKHL 6.

¹⁹ Lord Hoffman commented in *Hoare*, *ibid.*, that “[t]his does not mean that the law regards as irrelevant the question of whether the actual claimant, taking into account his psychological state in consequence of the injury, could reasonably have been expected to institute proceedings. But it deals with that question under section 33, which specifically says in subsection (3)(a) that one of the matters to be taken into account in the exercise of the discretion is “the reasons for...the delay on the part of the plaintiff” at para. 44. However, Baroness Hale of Richmond stated in *Hoare*, *ibid.*, that: “[t]he abuse itself is the reason why so many victims do not come forward until years after the event. This presents a challenge to a legal

Moreover, unlike other personal injury claims, torture victims need time to find a specialised lawyer. REDRESS would, therefore, favour at least the retention of the six-year limitation period currently provided for in the Bill.

Some have called for the exclusion of a limitation period in line with international law,²⁰ which recognises that statutes of limitation do not apply to certain crimes.²¹ Similarly, REDRESS would favour the extension of the six-year period to reflect the seriousness of torture as a crime.²² However, REDRESS recognises that a limitation period may be necessary to allay fears of a flood of claims in the English courts.

16. Exhaustion of domestic remedies: The Bill only applies when no adequate and effective remedy for damages is available in the foreign state where the torture is alleged to have occurred. This reflects international law standards on the

system which resists stale claims. Six years, let alone three, from reaching the age of majority is not long enough..." at para. 54.

²⁰ See e.g., Amnesty International's submission at pg. 56 of the 'Compilation of Evidence' supra n. 1, at pg. 3. See also, Lord Thomas of Gresford's statement during the Bill's Second Reading in the 2007-2008 parliamentary session, that "[i]t could be argued, frankly, that where torture is concerned there should be no limitation period" (Hansard Transcript, (House of Lords Debates) Volume No. 701, Part No. 94 (16 May 2008) at Column 1203, Lord Thomas of Gresford 10:36 am at Column 1211). It has also been suggested that if the limitation clause is not deleted in its entirety, it should be amended to place the burden of proof on the defendant to show that the victim or their family could reasonably have been expected to bring an action within the time limit (Amnesty International's submission at pg. 56 of the 'Compilation of Evidence' supra n. 1, at pg. 5). However, it is likely that the victim would be in a better position than the state to show when it became reasonably practicable to raise a claim (e.g., by adducing medical reports, psychological reports or statements from their lawyer).

²¹ E.g., the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968); the European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, CETS No.: 082 (Open for signature by the member States of the Council of Europe, in Strasbourg, 25 Jan. 1974 and Entered into force 27 June 2003); and the Rome Statute of the ICC (art. 29). See also, UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, supra n. 2, at Part IV at paras. 6 and 7.

²² See, e.g., the Torture Victims Protection Act (1991) in the United States, which provides for a 10-year limitation period. See also, *Arce et al. v. Garcia and Casanova* (28 Feb. 05), also in the US, where the US Court of Appeals for the 11th Circuit applied a 10-year limitation period to the Alien Tort Claims Act (1789), although this did not contain an express limitation clause. The Court also noted that these statutes of limitation could be subject to equitable tolling. See also, *Arce et al. v. Garcia and Casanova* US Court of Appeals for the 11th Circuit, (5 Jan. 2006) to similar effect; and commenting at pg. 22-23 that "[t]his case, however, exemplifies the kind of "extraordinary circumstances" that, in the interests of justice, require equitable tolling. The remedial scheme conceived by the TVPA and the ATCA would fail if courts allowed the clock to run on potentially meritorious claims while the regime responsible for the heinous acts for which these statutes provide redress remains in power, frightening those who may wish to come forward from ever telling their stories. We therefore find that the district court did not abuse its discretion in holding the plaintiffs' claims to be timely under the doctrine of equitable tolling".

exhaustion of local remedies.²³ It has been argued that the Convention against Torture does not require the exhaustion of domestic remedies and that the provision should either be deleted or amended to place the burden on the defendant state, rather than on victims and their families.²⁴ This would recognise that the defendant state is often better placed to provide evidence about the existence of domestic remedies. However, maintaining this rule may help to alleviate concerns about a flood of litigation in the English courts.

17. The *forum non conveniens* doctrine would operate to stay proceedings, “...where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for trial of the action, i.e. in which the case may be tried more suitably for the interests of all parties and the ends of justice”.²⁵

²³ E.g., the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) (art. 44(b)) and ECHR (art. 35(1)) both set out the exhaustion of local remedies rule. The Eur. Ct. H.R. has stated: “[i]t is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement” (para. 68). The Court continued, “[o]ne such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of” (*Akdivar v. Turkey*, Eur. Ct. H.R., App. No. 21893/93 (16 Sept. 1996) at para. 68). The European Court in *Akdivar* also held that the exhaustion of domestic remedies rule is also “inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective” (para. 67). See also, *Selmouni v. France*, Eur. Ct. H.R., App. No. 25803/94, (28 Jul. 1999), at paras. 74-75.

²⁴ See e.g., Amnesty International’s submission at pg. 56 of the ‘Compilation of Evidence’ supra n. 1, at pg. 3 and 5.

²⁵ *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] AC 460 at 476. See also section 49 of the English Civil Jurisdiction and Judgments Act (1982) (c. 27). One option would be to expressly reference the doctrine of *forum non conveniens* in the Bill, in order to minimise concerns about a flood of claims before the English courts. This was recognised by Lord Thomas of Gresford during the Bill’s Second Reading in the Lords in the 2007-2008 parliamentary session: “Amnesty International has a valid criticism in its suggestion that the argument of *forum conveniens* or *forum non conveniens* should rest with the defendant state; it would be for the state to prove that the forum chosen was not correct. Maybe that is implicit in the clause as drafted, but it could be made rather more explicit” (Hansard transcript, supra n. 20, Lord Thomas of Gresford 10:36 am at Column 1211).

18. Finally, vexatious and frivolous cases would not meet the civil “balance of probabilities” standard of proof required.

VI. RESPONDING TO SOME POLITICAL CONCERNS ABOUT THE BILL

19. State immunity originally developed in order to protect state sovereignty.

However, state sovereignty is not fixed, but rather evolves with time, and this is reflected in the progressive inclusion of exceptions to immunity, as in the UK State Immunity Act for example. So, for example, the absolute prohibition of torture imposes obligations *erga omnes*, meaning that the international community as a whole has a legal interest in protecting such rights. Notions of state sovereignty have, therefore, changed and, as regards the prohibition of torture, an exception to state immunity would actually be consistent with state sovereignty rather than harmful to it.²⁶

20. Threat to international relations. This is difficult to measure; there may be a risk that international relations will be damaged by claims and that states will enact reciprocal legislation.²⁷ However, allegations of torture committed by foreign state officials can be investigated and prosecuted in a criminal context in the courts of England and Wales (and the Attorney-General cannot take international relations into account when deciding whether the case will proceed). So, there appears to be no justifiable basis upon which to deny access to the civil courts for the same underlying crime.²⁸ Further, it should be recognised that the State which tortures British citizens is the cause of any damage to international relations; the UK Government, by enabling civil suits in

²⁶ For further discussion, see REDRESS' Submission at pg. 76 of the 'Compilation of Evidence' supra n. 1 at paras. 38-40.

²⁷ E.g., in other immunity-related cases, states have raised international relations as an issue. See e.g., 'Chile says Pinochet case could damage UK ties', CBC News (28 Nov. 1998): <http://www.cbc.ca/world/story/1998/11/28/pinochet981128.html>. See also, *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, ICJ, Request for the Indication of a Provisional Measure, Summary of the Order of 17 Jun. 2003, (at paras. 22-40); and Keith Sealing, "States Sponsors of Terrorism" Is a Question Not an Answer: The Terrorism Amendment to the FSIA Makes Less Sense Now Than It Did before 9/11', 38 Tex. Int'l L.J., (119-144) (2003) (at 121).

²⁸ In short, international relations may be threatened in some cases where a torture survivor brings a civil claim for damages in the courts of England and Wales against a foreign state or its officials. Firstly however, all states have an obligation not to torture, to prevent torture, and to provide reparations where torture has occurred. In this regard, it must be remembered that all states are bound by the absolute prohibition of torture, irrespective of whether or not they have signed the Convention against Torture, because it is regarded as a higher rule of international law. Secondly, the Bill specifically provides for the exhaustion of domestic remedies and, if foreign states do not wish to be sued in the English courts, they should first, refrain from torturing, and second, open up their own legal systems and provide adequate and effective remedies to torture survivors. Finally, the Bill's coverage is neutral. It does not single out one particular state for attention and, in this way, de-politicises the process.

its Courts would simply be responding to an external situation created by other states' actions in line with the UK's oft-stated position that it abhors torture.

VII. RESPONDING TO SOME LEGAL QUESTIONS ABOUT THE BILL

21. **Damages:** The Bill provides for the award of aggravated and exemplary damages, and damages for loss of income, in a case of torture or death caused by torture. Allowing exemplary damages reflects the heinous nature of torture, which constitutes a particular affront to the dignity of the individual; and would act as a deterrent to perpetrators. However, in line with the UK Government's position that the function of exemplary damages is more appropriate to the criminal law,²⁹ the Bill could be amended to remove the reference to exemplary damages, while retaining the reference to aggravated damages, which compensate for mental distress.³⁰

It has also been recommended that the Bill be amended to provide for a broad range of damages for torture; and should specify that claimants can seek and obtain other reparations.³¹ However, as currently drafted, the Bill's focus is narrow: to provide a civil remedy in damages for torture survivors in the UK, where they would otherwise be left without a remedy. It is arguable that widening the Bill beyond this would not fall within the intended scope of the Bill.

22. Permissibility under International Law:

²⁹ See, Department of Constitutional Affairs, *'The Law on Damages'*, Consultation Paper CP 9/07 (04/05/2007) at para. 198. However, note Lord Archer of Sandwell QC emphasising that, "[t]here are jurisdictions where a right to reparation follows a criminal conviction and there is an almost artificial distinction in discussing whether we are talking about criminal or civil proceedings", Hansard transcript, supra n. 20, Lord Archer of Sandwell QC 12:07pm at Column 1229.

³⁰ If Clause 1(3) is amended to remove the reference to exemplary damages, Clause 1(4) should be amended accordingly. This would also be consistent with the Law Reform (Miscellaneous Provisions) Act 1934 (c. 41), which provides that "[w]here a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person—(a) shall not include—(i) any exemplary damages" (Section 1(2)). Clause 1(4) could also be amended to remove the reference to the 1934 Act: whilst Section 1(2) of the 1934 Act prevents an estate from recovering exemplary damages, it does not exclude aggravated damages.

³¹ E.g., Amnesty International's submission at pg. 56 of the 'Compilation of Evidence' supra n. 1, at pg. 3 and 5. See also, Written Comments of Lady Fox CMG QC at pg. 87 of the 'Compilation of Evidence' supra n. 1 at para. 21, that "[m]oney damages forms a small part in the types of reparation which breach of human rights law requires a State to provide- rehabilitation, provision of housing, employment- none of which under present law apply against a foreign State without its cooperation". See also, UN Convention against Torture, which provides in art. 14(1) that, "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, 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".

State Immunity: It has been suggested that international law obliges the UK to provide state immunity to foreign states and officials where torture is alleged. On this construction of state immunity, immunity is the general rule and is subject to specific, enumerated exceptions.³² Another view however, is that state immunity represents an exception to a general rule of jurisdiction. Indeed, over the years, states have adopted different approaches to state immunity and have transitioned from an absolute rule of state immunity to a restrictive rule,³³ and exceptions to immunity have been recognised progressively in order to deal with new situations. As Lord Woolf commented at the Second Reading last session,

I submit as forcefully as I can that the outcome of the Bill will send a signal to other parts of the world about how this country views the offence of torture. It is perhaps unfortunate that the State Immunity Act was passed in 1978 but that the convention on torture, to which reference has been made, dates from 1984. I wonder whether, if the order had been reversed and the number of states that would ratify the convention on torture had been known, the absence of torture as an exception to the State Immunity Act would have been rectified.³⁴

Reference has also been made to the *United Nations Convention on Jurisdictional Immunities of States and Their Property 2004*, which codifies the restrictive approach to state immunity as currently found in domestic statutes such as the UK State Immunity Act.³⁵ However, the UN Convention has not yet entered into force, as it requires 30 ratifications before it can do so.³⁶ Moreover, international law evolves with time. The Convention cannot entrench or crystallise international law on state immunity for the future; and cannot prevent states from expanding the restrictive approach to state immunity. The UK has always been a leader in this respect.

³² E.g., Lord Hunt of Kings Heath OBE commented that, “[t]he general principle of international law remains that one state is not subject to the jurisdiction of another except in certain recognised circumstances”, Hansard transcript, supra note 20, The Parliamentary Under-Secretary of State, Ministry of Justice (Lord Hunt of Kings Heath) 11:53am at Column 1227.

³³ However, see Written Comments of Lady Fox CMG QC at pg. 87 of the ‘Compilation of Evidence’ supra n. 1, at para. 4: “[a]ny proposal must recognise that the abandonment of absolute immunity from civil proceedings for commercial transactions is very recent in most civil countries and that the restrictive doctrine has only been fully adopted in the US, UK, Australia, Netherlands, and Switzerland and more recently in Germany and France”.

³⁴ Hansard transcript, supra note 20, Lord Woolf 11:24am at Column 1220.

³⁵ E.g., Hansard transcript, supra note 20, The Parliamentary Under-Secretary of State, Ministry of Justice (Lord Hunt of Kings Heath) 11:53am at Column 1227-1228. See, e.g., Written Comments of Lady Fox CMG QC at pg. 87 of the ‘Compilation of Evidence’, supra n. 1, at paras 4-5.

³⁶ United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 Dec. 2004) (Art. 30). As at 5 Mar. 2009, according to the UN Treaty Collection website (<http://treaties.un.org>), there were 28 signatories and 6 parties to the Convention.

Universal Civil Jurisdiction: It has also been questioned whether international law permits the exercise of universal civil jurisdiction in respect of torture.³⁷ However, another view is that Article 14 of the Convention against Torture, at a minimum *permits* the UK to create a civil remedy for torture survivors in the UK, which would be achieved by enacting this Bill, and at a maximum *requires* it do so. In fact, unlike some other provisions in the Convention against Torture, Article 14 is not limited territorially. Such an approach would also be consistent with the right to a remedy under international law, which imposes an independent and continuing obligation on states to provide effective domestic remedies for victims of human rights violations.³⁸

Enforcement: It has been stated that international law would not allow the verdict of an English court to be enforced on a foreign state; and/or that it would likely be impossible to enforce any such judgment without damaging consequences for the UK.³⁹ There are various interpretations of the law on enforcement. Furthermore, for some torture survivors, financial compensation would alleviate the financial difficulties of life after torture; as already noted, many are unable to work in order to finance their medical and living expenses. However, for others, access to justice and a finding of liability would itself provide an acknowledgment of the wrong that was done to them, and would send a clear message that torture will not be tolerated wherever in the world it occurs.

VIII. CONCLUSION

23. REDRESS strongly supports the enactment of the Torture (Damages) Bill. We believe that this is a unique and timely opportunity for the UK to reaffirm its commitment to enforcing the absolute prohibition of torture and to ensuring torture survivors in the UK can obtain justice, where no adequate and effective remedy exists elsewhere.

³⁷ E.g., Hansard transcript, *supra* note 20, The Parliamentary Under-Secretary of State, Ministry of Justice (Lord Hunt of Kings Heath) 11:53am at Column 1227-1228. See also, Written Comments of Lady Fox CMG QC at pg. 87 of the 'Compilation of Evidence', *supra* n. 1, at paras 13-14, and 22.

³⁸ *'State Immunity: Selected Materials and Commentary'*, Andrew Dickinson, Rae Lindsay and James P. Loonam (Clifford Chance LLP) (Oxford University Press, 2004) (para. 4.007 at page 337): "... it is necessary to have regard to the United Kingdom's international obligations, both under customary international law and under international instruments [footnote: For example, the United Nations Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, 10 December 1984 (Cm 1775) (ratified by the United Kingdom on 8 December 1988)]... they may influence the construction of particular provisions or require future amendment of the 1978 Act to ensure its compatibility with treaty obligations".

³⁹ In a national law context, some have pointed to the State Immunity Act 1978's rules relating to immunity from execution (see, e.g., Section 13(2)-(5)).

24. We would be willing to provide further information to the Committee if required.
In these regards please contact Kevin Laue at Kevin@redress.org or 020 7793
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