

**INTERNATIONAL HUMAN RIGHTS**  
**LouvainX online course [Louv2.01x] - prof. Olivier De Schutter**

**READING MATERIAL**

**Related to: section 1, sub-section 3, unit 2: *Jus cogens* status of human rights norms (ex. 3)**

**Example 3. Torture and the duty of the State to provide access to remedies**

**European Court of Human Rights (GC), *Al-Adsani v. United Kingdom* (Appl. No. 35763/97), judgment of 21 November 2001:**

[The applicant, a dual British/Kuwaiti national, went to Kuwait in 1991 as a pilot to serve as a member of the Kuwaiti Air Force and, after the Iraqi invasion, he remained behind as a member of the resistance movement. During that period he came into possession of sex videotapes involving a Sheikh related to the Emir of Kuwait. By some means these tapes entered general circulation, for which the applicant was held responsible by the Sheikh. After the Iraqi armed forces were expelled from Kuwait, in May 1991, the Sheikh and others on two separate occasions took him at gunpoint in a government car and he was beaten and tortured. On 17 May 1991, the applicant returned to the United Kingdom, where he spent six weeks in a hospital recovering from the various ill-treatments inflicted upon him. On 29 August 1992 the applicant instituted civil proceedings in England for compensation against the Sheikh and the State of Kuwait in respect of injury to his physical and mental health caused by torture in Kuwait in May 1991 and threats against his life and well-being made after his return to the United Kingdom on 17 May 1991. The action failed, however, because as a sovereign foreign State, Kuwait could claim immunity of jurisdiction under the State Immunity Act 1978. Article 15 of the 1972 European Convention on State Immunity (Basle Convention), to which the United Kingdom is a party, provides that a Contracting State shall be entitled to immunity if the proceedings do not fall within one of the exceptions exceptions stated in the Convention; Article 11 of the Basle Convention excludes State immunity for proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred: this exception is replicated in section 5 of the 1978 State Immunity Act. In its judgment of 21 November 2001, the majority of the Court takes the view that a) any positive obligation imposed on the basis of Article 3 ECHR, either to prevent violations of this provision or to provide a remedy when a violation does take place, does not extend to such violations which may have been committed outside the jurisdiction of the United Kingdom; and that b) the right of access to a court (under Art. 6 ECHR) may be limited where this is justified by the need to grant sovereign immunity to a State in civil proceedings, in accordance with the generally recognized rules of public international law on State immunity.]

**[The alleged violation of Article 3 of the Convention (prohibiting torture and inhuman or degrading treatments or punishments)]**

40. The applicant does not contend that the alleged torture took place within the jurisdiction of the United Kingdom or that the United Kingdom authorities had any causal connection with its occurrence. In these circumstances, it cannot be said that the High Contracting Party was under a duty to provide a civil remedy to the applicant in respect of torture allegedly carried out by the Kuwaiti authorities.

41. It follows that there has been no violation of Article 3 of the Convention in the present case.

**[The alleged violation of Article 6 of the Convention (right to a fair trial)]**

53. The right of access to a court [implicit in the guarantees of Art. 6 of the Convention (right to a fair trial): see the *Golder v. United Kingdom* judgment of 21 February 1975, Series A No. 18, 13–18, §§28–36] is not [...] absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 §1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy v. Germany* [GC], No. 26083/94, §59, ECHR 1999–I).

54. The Court must first examine whether the limitation pursued a legitimate aim. It notes in this connection that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

55. The Court must next assess whether the restriction was proportionate to the aim pursued. It reiterates that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, and that Article 31 §3 (c) of that treaty indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties'. The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, *mutatis mutandis*, *Loizidou v. Turkey* (merits), judgment of 18 December 1996, *Reports* 1996–VI, 2231, §43). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.

56. It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 §1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.

57. The Court notes that the 1978 Act, applied by the English courts so as to afford immunity to Kuwait, complies with the relevant provisions of the 1972 Basle Convention, which, while placing a number of limitations on the scope of State immunity as it was traditionally understood, preserves it in respect of civil proceedings for damages for personal injury unless the injury was caused in the territory of the forum State. Except insofar as it affects claims for damages for torture, the applicant does not deny that the above provision reflects a generally accepted rule of international law. He asserts, however, that his claim related to torture, and contends that the prohibition of torture has acquired the status of a *jus cogens* norm in international law, taking precedence over treaty law and other rules of international law.

58. Following the decision to uphold Kuwait's claim to immunity, the domestic courts were never required to examine evidence relating to the applicant's allegations, which have, therefore, never been proved. However, for the purposes of the present judgment, the Court accepts that the ill-treatment alleged by the applicant against Kuwait in his pleadings in the domestic courts, namely, repeated beatings by prison guards over a period of several days with the aim of extracting a confession ..., can properly be categorised as torture within the meaning of Article 3 of the Convention ...

59. Within the Convention system it has long been recognised that the right under Article 3 not to be subjected to torture or to inhuman or degrading treatment or punishment enshrines one of the fundamental values of democratic society. It is an absolute right, permitting of no exception in any circumstances ... Of all the categories of ill-treatment prohibited by Article 3, 'torture' has a special stigma, attaching only to deliberate inhuman treatment causing very serious and cruel suffering ...

60. Other areas of public international law bear witness to a growing recognition of the overriding importance of the prohibition of torture. Thus, torture is forbidden by Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights. The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment requires, by Article 2, that each State Party should take effective legislative, administrative, judicial or other measures to prevent torture in any territory under its jurisdiction, and, by Article 4, that all acts of torture should be made offences under the State Party's criminal law ... In addition, there have been a number of judicial statements to the effect that the prohibition of torture has attained the status of a peremptory norm or *jus cogens*. For example, in its judgment of 10 December 1998 in *Furundzija*..., the International Criminal Tribunal for the Former Yugoslavia referred, *inter alia*, to the foregoing body of treaty rules and held that '[b]ecause of the importance of the values it protects, this principle [proscribing torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules'. Similar statements have been made in other cases before that tribunal and in national courts, including the House of Lords in the case of *ex parte Pinochet (No. 3)*...

61. While the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not, as in *Furundzija* and *Pinochet*, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. In particular, the Court observes that none of the primary international instruments referred to (Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Articles 2 and 4 of the UN Convention) relates to civil proceedings or to State immunity.

62. It is true that in its Report on Jurisdictional Immunities of States and their Property ... the working group of the International Law Commission noted, as a recent development in State practice and legislation on the subject of immunities of States, the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition on torture. However, as the working group itself acknowledged, while national courts had in some cases shown some sympathy for the argument that States were not entitled to plead immunity where there had been a violation of human rights norms with the character of *jus cogens*, in most cases (including those cited by the applicant in the domestic proceedings and before the Court) the plea of sovereign immunity had succeeded.

63. The ILC working group went on to note developments, since those decisions, in support of the argument that a State may not plead immunity in respect of human rights violations: first, the exception to immunity adopted by the United States in the amendment to the Foreign Sovereign Immunities Act (FSIA) which had been applied by the United States courts in two cases [this exception, introduced by section 221 of the Anti-Terrorism and Effective Death Penalty Act of 1996, applies in respect of a claim for damages for personal injury or death caused by an act of torture, extra-judicial killing, aircraft sabotage or hostage-taking, against a State designated by the Secretary of State as a sponsor of terrorism, where the claimant or victim was a national of the United States at the time the act occurred]; secondly, the *ex parte Pinochet (No. 3)* judgment in which the House of Lords 'emphasised the limits of immunity in respect of gross human rights

violations by State officials'. The Court does not, however, find that either of these developments provides it with a firm basis on which to conclude that the immunity of States *ratione personae* is no longer enjoyed in respect of civil liability for claims of acts of torture, let alone that it was not enjoyed in 1996 at the time of the Court of Appeal's judgment in the present case.

64. As to the amendment to the FSIA, the very fact that the amendment was needed would seem to confirm that the general rule of international law remained that immunity attached even in respect of claims of acts of official torture. Moreover, the amendment is circumscribed in its scope: the offending State must be designated as a State sponsor of acts of terrorism, and the claimant must be a national of the United States. The effect of the FSIA is further limited in that after judgment has been obtained, the property of a foreign State is immune from attachment or execution unless one of the statutory exceptions applies ...

65. As to the *ex parte Pinochet (No. 3)* judgment the Court notes that the majority of the House of Lords held that, after the UN Convention and even before, the international prohibition against official torture had the character of *jus cogens* or a peremptory norm and that no immunity was enjoyed by a torturer from one Torture Convention State from the criminal jurisdiction of another. But, as the working group of the ILC itself acknowledged, that case concerned the immunity *ratione materiae* from criminal jurisdiction of a former head of State, who was at the material time physically within the United Kingdom. As the judgments in the case made clear, the conclusion of the House of Lords did not in any way affect the immunity *ratione personae* of foreign sovereign States from the civil jurisdiction in respect of such acts (see in particular, the judgment of Lord Millett ...). In so holding, the House of Lords cited with approval the judgments of the Court of Appeal in *Al-Adsani* itself.

66. The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. The 1978 Act, which grants immunity to States in respect of personal injury claims unless the damage was caused within the United Kingdom, is not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity.

67. In these circumstances, the application by the English courts of the provisions of the 1978 Act to uphold Kuwait's claim to immunity cannot be said to have amounted to an unjustified restriction on the applicant's access to a court.

[The Court decided by nine votes to eight that Article 6 §1 ECHR has not been violated. A joint dissenting opinion was filed by Mr Rozakis and Mr Caflisch joined by Mr Wildhaber, Mr Costa, Mr Cabral Barreto and Mrs Vajić. Two separate dissenting opinions were filed, in addition, by Mr Ferrari Bravo and Mr Loucaides. Excerpts of the first dissenting opinion follow.]

**Joint dissenting opinion filed by Mr Rozakis and Mr Caflisch joined by Mr Wildhaber, Mr Costa, Mr Cabral Barreto and Mrs Vajić:**

By accepting that the rule on prohibition of torture is a rule of *jus cogens*, the majority recognise that it is hierarchically higher than any other rule of international law, be it general or particular, customary or conventional, with the exception, of course, of other *jus cogens* norms. For the basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule.

The Court's majority do not seem, on the other hand, to deny that the rules on State immunity; customary or conventional, do not belong to the category of *jus cogens*; and rightly so, because it is clear that the rules of State immunity, deriving from both customary and conventional international law, have never been considered by the international community as rules with a hierarchically higher status. It is common knowledge that, in many instances, States have, through their own initiative, waived their rights of immunity; that in many instances they have contracted out of them,

or have renounced them. These instances clearly demonstrate that the rules on State immunity do not enjoy a higher status, since *jus cogens* rules, protecting as they do the ‘*ordre public*’, that is the basic values of the international community, cannot be subject to unilateral or contractual forms of derogation from their imperative contents.

The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions. In the circumstances of this case, Kuwait cannot validly hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction; and the courts of that jurisdiction (the United Kingdom) cannot accept a plea of immunity, or invoke it *ex officio*, to refuse an applicant adjudication of a torture case. Due to the interplay of the *jus cogens* rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect. In the same vein, national law which is designed to give domestic effect to the international rules on State immunity cannot be invoked as creating a jurisdictional bar, but must be interpreted in accordance with and in the light of the imperative precepts of *jus cogens*.

The majority, while accepting that the rule on the prohibition of torture is a *jus cogens* norm, refuse to draw the consequences of such acceptance.