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# Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty

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## Abstract

*In recent judgments, the claim has been made that immunity, as a procedural rule, does not affect substantive norms but merely diverts the claim to an alternative forum. As such, the claim is made that immunity does not equate to impunity. Yet, within a context in which the courts of the state in which the torture allegedly took place are very often unavailable and diplomatic protection does not amount to an alternative means of settlement, the provision of immunity in foreign courts contributes to, justifies, and may even constitute the resulting impunity. At the same time, the framework within which immunity is addressed tends to lend itself to such a result. Courts routinely cite sovereign equality, *par in parem non habet jurisdictionem*, dignity, and comity as legitimate bases on which to grant immunity without considering the evolution of these doctrines. As a result, the contemporary application of immunity is premised on 1648 understandings of doctrines such as sovereignty, thus positioning the state above the law, a result which renders the prohibition of torture impotent.*

## 1 Introduction

Within the Secretary-General of the Council of Europe's investigation on secret detention and rendition, the impact of immunity on impunity was squarely addressed. As one of three key areas requiring action by member states, the Secretary-General emphasized 'the need to ensure that the rules on State immunity do not lead to impunity for perpetrators of serious human rights violations'.<sup>1</sup> In recommending that the Council

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<sup>1</sup> Secretary-General, 'Follow-Up to the Secretary General's reports under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies' (SG/Inf(2006)5 and SG/Inf(2006)13) at para. 2 (hereinafter *Council of Europe Report*).

of Europe take the lead in adopting an instrument which establishes ‘clear exceptions to State immunity in cases of serious human rights abuses’,<sup>2</sup> the Secretary-General highlighted the importance of ‘a coherent and practical approach, avoiding legal insecurity resulting from differences in the case-law of individual member States’.<sup>3</sup>

In the years since the European Court of Human Rights’ narrow judgment of 9–8 in *Al-Adsani v. United Kingdom*,<sup>4</sup> the availability of state immunity in cases involving allegations of torture and other crimes under international law has become an issue of topicality and contestation. The divergent reasoning and result of recent judicial decisions expose the struggle national courts have faced in attempting to resolve the conflict between the two principles of traditional and contemporary international law.<sup>5</sup> Yet, the Secretary-General’s findings reflect the first direct acknowledgment of the link between a grant of immunity and impunity.

Prior to the Secretary-General’s reports, both the Council of Europe and the International Law Commission (ILC) avoided the question whether immunity should be available in cases concerning allegations of torture and other crimes under international law. Within the Council of Europe’s Pilot Project on State Practice Regarding State Immunities, the relationship of immunity to crimes under international law did not even feature in the questionnaire sent to states parties.<sup>6</sup> Similarly, the drafting history of the new United Nations Convention on the Jurisdictional Immunities of States and Their Property 2005<sup>7</sup> illustrates that no serious consideration of the relationship of immunity to the prohibition of torture took place.<sup>8</sup> Instead, six years before the adoption of the Convention, the Working Group of the International Law Commission surmised that the interaction between immunity and *jus cogens* norms ‘did not seem to be ripe enough for the Working Group to engage in a codification exercise over it’.<sup>9</sup> No further consideration to the relationship was given, despite the long-standing exception to immunity for torts committed in the forum state and a number of developments which indicate a move away from the grant of immunity in cases involving allegations of torture.

<sup>2</sup> *Ibid.*, at para. 17.

<sup>3</sup> *Ibid.*, at para. 18.

<sup>4</sup> *Al-Adsani v. United Kingdom* [2001] ECHR 752.

<sup>5</sup> See *Ferrini v. Federal Republic of Germany* (Cass. Sez. Un. 5044/04) (reproduced in the original Italian text in 87 *Rivista di diritto internazionale* (2004) 539); *Bouzari v. Iran (Islamic Republic)* Ont. CA (2004); *Pre-fecture of Voiotia v. FRG*, Case no. 11/2000, Areios Pagos. Gavouneli and Bantekas, ‘Sovereign Immunity – Tort Exception – Jus Cogens Violations – World War II Reparations – International Humanitarian Law’, 95 *AJIL* (2001) 198, at 200 (translating the judgment of the court); *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya as Saudiya and others* [2006] UKHL 26 (hereinafter *Jones v. Saudi Arabia*).

<sup>6</sup> Committee of Legal Advisers on Public International Law (CADHI), *Pilot Project of the Council of Europe on State Practice Regarding Immunities: Analytical Report* (CADHI, 30th Meeting, Strasbourg, 19–20 Sept. 2005).

<sup>7</sup> The United Nations Convention on Jurisdictional Immunities of States and Their Property, Res A/RES/59/38 adopted by the UN GA Fifty-ninth session (2 Dec. 2004).

<sup>8</sup> See McGregor, ‘State Immunity and Jus Cogens’, 55 *Int’l Comp LQ* (2006) 437 (for a discussion of the drafting history to the Convention).

<sup>9</sup> General Assembly, *Convention on Jurisdictional Immunities of States and their Property: Report of the Chairman of the Working Group*, A/C.6/54/L.12 (12 Nov. 1999) at para. 47.

Moreover, a number of formalistic interpretative techniques are often employed to deny the impact of immunity on impunity. In recent judgments, for example, the claim has been made that immunity, as a procedural rule, does not affect substantive norms but merely diverts the claim to an alternative forum. Such rhetoric enables the affirmation of commitment to the prohibition of torture, despite a reality within which the victim or survivor very rarely enjoys an effective – or, indeed, any – alternative forum in which to seek and obtain his or her right to a remedy and reparation. At the same time, the framework within which immunity is addressed tends to lend itself to such a result. Courts routinely cite sovereign equality, *par in parem non habet jurisdictionem*, dignity, and comity as legitimate bases on which to grant immunity without considering the evolution of these doctrines. As a result, the contemporary application of immunity is premised on 1648 understandings of doctrines such as sovereignty. In this respect, the findings of the Council of Europe's Secretary-General are again particularly illustrative by asserting that '[i]nternational law should not regard it as being contrary to the dignity or sovereign equality of nations to respond to claims against them or their agents'.<sup>10</sup>

## 2 Denying the Impact of Immunity on the Prohibition of Torture

In a recent codification, 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 (Basic Principles on Reparation) aim to provide 'those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice ... irrespective of who may ultimately be the bearer of responsibility for the violation'.<sup>11</sup> In addition, Principle 1 of the United Nations' Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (Impunity Principles) provides that:

Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for

<sup>10</sup> Council of Europe Report, *supra* note 1, at para. 17. The Council of Europe Report appropriately identifies the concurrent responsibility of the individual and the state. For reasons of space, this article only focuses on the responsibility of the state while maintaining the duality, and not exclusivity, of individual and state responsibility in cases involving allegations of torture and other crimes under international law. See Art. 58 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, A/Res/56/83 (28 Jan. 2002). See also Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law', 52 *Int'l Comp LQ* (2003) 615 at 618 (noting, '[a]s of yet, the individualisation of responsibility takes the form of international criminal responsibility. However, there is no principled reason why it could not also manifest itself in international civil responsibility.').

<sup>11</sup> GA Res. 60/147, 16 Dec. 2005, Principle 3(c).

the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.<sup>12</sup>

Against this background, distinctions between the laws of procedure and substance have been employed to justify the grant of immunity to a foreign state when torture is alleged. This article challenges this proposition on two grounds. First, the distinction between laws of procedure and substance attempts to justify the provision of immunity by basing itself on the false premise that a ‘different method of settlement’ exists on the international plane. As diplomatic protection reflects a discretionary remedy of the state rather than the individual concerned, it cannot offer an adequate, effective, available, and predictable alternative means to combat impunity. Secondly, the paper addresses the means by which immunity, framed as a procedural rule, is used to deflect acknowledgment and examination of the impunity which often results by granting immunity to a foreign state.

### A *The Distinction between Procedure and Substance*

In her dissenting opinion in the *Arrest Warrant* case, *ad hoc* Judge van den Wyngaert found that ‘[i]n practice immunity leads to *de facto* impunity’.<sup>13</sup> Where allegations of torture and other crimes under international law have been made in foreign courts to date, a judicial remedy has not been available in the state in which the crime is alleged to have taken place. For example, reflecting on the case of Mr Al-Adsani (a dual national of the United Kingdom and Kuwait, who brought a civil claim against individual officials and the state of Kuwait before the English courts, alleging that he was tortured in Kuwait), Fox acknowledges that ‘local remedies may well be manifestly futile’. She points to the investigation by Kuwaiti courts of Mr Al-Adsani’s ‘complaint against the Sheikh and others and obtaining undertakings from all parties as to their future good behaviour’ to demonstrate the lack of a domestic remedy.<sup>14</sup> Furthermore, in a number of immunity cases such as *Ferrini v. Federal Republic of Germany*<sup>15</sup> in Italy; *Prefecture of Voiotia v. Federal Republic of Germany*<sup>16</sup> in Greece; and *Princz v. Federal Republic of Germany*<sup>17</sup> in the United States, the claimants had attempted to adjudicate their dispute in Germany but were refused access to the courts because they did not fall within the precise

<sup>12</sup> Economic and Social Council, ‘Promotion and Protection of Human Rights: Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher: Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity’, E/CN.4/2005/102/Add.1 (2005).

<sup>13</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment of 14 Feb. 2002, reprinted in 42 ILM (2003) 852, and also available at: [www.icj-cij.org](http://www.icj-cij.org) (hereinafter *Arrest Warrant case*), Dissenting Opinion of Judge van der Wyngaert at para. 34.

<sup>14</sup> H. Fox, *The Law of State Immunity* (2002), at 521.

<sup>15</sup> *Ferrini v. Federal Republic of Germany*, *supra* note 5.

<sup>16</sup> *Prefecture of Voiotia v. Federal Republic of Germany* Case No 137/1997, Court of First Instance of Leivadia, Judgment of 30 Oct. 1997, reprinted in 50 *Revue Hellénique de Droit International* (1997) 595.

<sup>17</sup> *Princz v. Federal Republic of Germany*, 26 F 3d 1166 (DC Cir 1994).

terms of national legislation on compensation for crimes committed during World War II.<sup>18</sup>

However, when faced with the question whether the grant of immunity equates to impunity, the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), and the House of Lords in the United Kingdom have all framed immunity as a procedural bar which only acts to determine the forum in which the claim is heard but which does not remove the petitioner's underlying substantive right or the defendant's underlying (alleged) responsibility. In *Al-Adsani v. United Kingdom*, the ECtHR held that '[t]he grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right'.<sup>19</sup> In the *Arrest Warrant* case, the ICJ found that:

*immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they may enjoy *impunity* in respect of any crimes that they may have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar criminal prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.<sup>20</sup>

Finally, in the recent case of *Jones v. Saudi Arabia* before the House of Lords, both Lord Bingham and Lord Hoffman (in his concurring opinion) held that:

State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite.<sup>21</sup>

In all three cases, the courts employ formalistic language to avoid addressing the question at the core of their analysis: does immunity contribute to impunity? On the day the judgment in *Jones v. Saudi Arabia* was released, the then British Prime Minister also resorted to evasive rhetoric when asked, '[n]ow that Ron Jones and others have lost the right to sue Saudi officials for torture, what meaningful legal redress is there for any Briton tortured abroad in the light of the Law Lords' ruling?', during Prime Minister's Question Time. The Prime Minister responded:

May I point out to the hon. Gentleman that we intervened in this case in order to ensure that the rules of international law and state immunity are fully and accurately presented and upheld? That is important for us as a country and for others. But our strong position against torture remains unchanged: we utterly condemn it in every set of circumstances.<sup>22</sup>

<sup>18</sup> The *Distomo* case in Germany, BGH, Decision of 26 June 2003, Case III ZR 245/98 [2003] NJW 3488; The *Ferrini* case in Germany, BVerfG, 2 BVR 1379/01, 28 June 2004.

<sup>19</sup> *Al-Adsani v. United Kingdom*, *supra* note 4, at para. 48.

<sup>20</sup> *Arrest Warrant* case, *supra* note 13, at para. 60.

<sup>21</sup> *Jones v. Saudi Arabia*, *supra* note 5, at para. 24; *per* Lord Hoffmann at para. 44 (citing Fox, *supra* note 14, at 525). See also Lord Hoffmann at para. 52 noting that *erga omnes* 'presumably means that a state whose national has been tortured by the agents of another state may claim redress before a tribunal which has the necessary jurisdiction'.

<sup>22</sup> HC Debs, vol. 683, col. 786, 14 June 2006 (Question 7).

## B Diplomatic Protection as an Inadequate Alternative Method of Settlement

The first problem with the proposition that the procedural rule of immunity simply diverts the claim to a different form of settlement is that it presupposes that a different form of settlement exists on the international plane. However, diplomatic protection does not properly constitute an alternative means for the victim or survivor to realize the right to a remedy and reparation. Under current international law, diplomatic protection reflects a discretionary process, whereby an individual must first negotiate with his or her state in order to have the claim espoused. The ICJ summarized the traditional international law position in *Barcelona Traction*: ‘the State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease’ and ‘should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law’.<sup>23</sup> As a discretionary process, only a handful of states have ever brought a case against another state for torture.

A number of states provide for a right to diplomatic protection,<sup>24</sup> as permitted by international law.<sup>25</sup> The ILC initially also attempted to move away from the traditional international law position by introducing Article 4 into its draft articles on diplomatic protection as:

Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a *jus cogens* norm attributable to another State.<sup>26</sup> States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority.<sup>27</sup>

However, this provision was subsequently rejected, ‘on the ground that that would have meant engaging in progressive development’.<sup>28</sup>

The English courts maintain that diplomatic protection is a discretionary process, as confirmed by the Court of Appeal in *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*.<sup>29</sup> The Court held that ‘[i]t is clear that international law has not yet recognised that a State is under a duty to intervene by diplomatic or other means

<sup>23</sup> *Barcelona Traction, Light and Power Company, Limited, Second Phase* (Judgment) [1970] ICJ Rep 3, at paras 78–79.

<sup>24</sup> International Law Commission, ‘First Report on Diplomatic Protection by Mr. John R. Dugard, Special Rapporteur’ (7 Mar. 2000) A/CN.4/506, at para. 2 (commentary on Art. 2).

<sup>25</sup> See REDRESS, ‘The Protection of British Nationals Detained Abroad: A Discussion Paper Concerning Consular Diplomatic Protection’ (2005), available at: [www.redress.org/reports.html](http://www.redress.org/reports.html).

<sup>26</sup> ILC, *supra* note 24, at para. 74 (Art. 4(1)).

<sup>27</sup> *Ibid.*, Art. 4(3).

<sup>28</sup> International Law Commission, ‘Report on the Work of Its Fifty-Sixth Session’ (3 May to 4 June and 5 July to 6 Aug. 2004), A/59/10, at para. 241.

<sup>29</sup> *R. (on the Application of Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs and another* [2002] EWCA Civ 1598 (although the Court did note that a decision not to grant diplomatic protection could be judicially reviewed in certain circumstances without explaining what those circumstances might be: see para. 80 of the decision onwards).

to protect a citizen who is suffering or threatened with injury in a foreign State'.<sup>30</sup> In explaining the reach of diplomatic protection the Court concluded that:

These statements reflect the fact that, to use the words of Everett, it must be a 'normal expectation of every citizen', that, if subjected abroad to a violation of a fundamental right, the British government will not simply wash their hands of the matter and abandon him to his fate<sup>31</sup> ... [but] the policy statements that we have cited underline the very limited nature of the expectation. They indicate that where certain criteria are satisfied, the government will "consider" making representations. Whether to make any representations in a particular case, and if so in what form, is left entirely to the discretion of the Secretary of State.<sup>32</sup>

The Court did, however, note that '[t]he expectations are limited and the discretion is a very wide one but there is no reason why its decision or inaction should not be reviewable if it can be shown that the same were irrational or contrary to legitimate expectation; but the court cannot enter the forbidden areas, including decisions affecting foreign policy'.<sup>33</sup> Judicial scrutiny of the discretion afforded to the government in the area of diplomatic protection reflects a positive trend in international law. Indeed, judicial review of decisions not to exercise diplomatic protection is available in a number of national jurisdictions<sup>34</sup> and has also been endorsed by the International Law Association (ILA) in its Resolution on Diplomatic Protection of Persons and Property 'in the context of due process and the prevention of arbitrariness ... and to ensure that the government of nationality considers the position of the particular individual and the extent to which such action might be taken'.<sup>35</sup> The ILA specifically highlighted a lack of access to justice in national courts 'by reason of the absence of local remedies to exhaust in the alleged wrongdoer state and barring of suit against such a state by a plea of state immunity in the courts of other states' as no longer justifying a discretionary approach to diplomatic protection.<sup>36</sup>

While judicial scrutiny reflects a welcome development, the continuing discretionary nature of diplomatic protection nonetheless renders it incapable of offering an alternative remedy for victims and survivors of crimes such as torture under international law. Particularly given the balancing act undertaken between foreign policy interests and the rights of the individual, the victim or survivor has no predictable or controllable means by which to assert a claim, as much of the decision would turn on factors external to the individual, including the broader relationship between the two governments and the underlying subject matter. As the government stated in *Abbasi*, for example, '[a]ssessments of when and how to press another State require very fine

<sup>30</sup> *Ibid.*, at para. 69.

<sup>31</sup> *Ibid.*, at para. 98.

<sup>32</sup> *Ibid.*, at para. 99.

<sup>33</sup> *Ibid.*, at para. 106(iii).

<sup>34</sup> See The International Law Association, 'Diplomatic Protection of Persons and Property: Final Report' (2000), at paras 162 (discussing the availability of administrative or judicial review and in some instances compensation for the failure to provide diplomatic protection in the Spanish, German – particularly the case of *Rudolph Hess*, Case number 2 BVR4 19/80, 90 ILR (1992) 386 – and Swiss courts).

<sup>35</sup> International Law Association, 'Diplomatic Protection of Persons and Property', Res No 5/2006, at para. 2.

<sup>36</sup> International Law Association Report, *supra* note 34, at 167–168.

judgments to be made, based on experience and detailed information gathered in the course of diplomatic business ... In cases where a person is detained in connection with international terrorism, these judgements become particularly complex.<sup>37</sup> The dangers accompanied by this balancing act are illustrated by Amnesty International in noting that the state 'will often sacrifice the legal rights of the victim to competing political considerations, such as maintaining friendly relations with the state responsible for the wrong'.<sup>38</sup>

Thus, in *Al-Adsani v. Kuwait*,<sup>39</sup> the English Court of Appeal acknowledged that Mr Al-Adsani 'had attempted to make use of diplomatic channels but the [UK] government refused to assist him'.<sup>40</sup> However, despite this finding once the case reached the ECtHR, the government argued that '[t]here were other, traditional means of redress for wrongs of this kind available to the applicant, namely diplomatic representations or an inter-State claim'.<sup>41</sup> Despite Mr Al-Adsani's status as a dual national, the UK government cannot have intended to refer to his Kuwaiti nationality since Kuwait was also the defendant in the case. Within this context, the UK's submission that 'traditional means of redress' remained available reflects a disturbing decoy, in that the submission was made after the UK government had already precluded the option of diplomatic protection.

Finally, diplomatic protection essentially presents a claim of the state and not the individual concerned. Thus, the Permanent Court of International Justice (PCIJ) held that, '[b]y taking up the case of one of its subjects and resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right – its right to ensure, in the person of its subjects, respect for the rules of international law'.<sup>42</sup> In the context of the *Al-Adsani case* therefore, Warbrick and McGoldrick note that, '[a]ccording to this view of the law, the individual is simply an object of any wrong, his injury similar, say, to the pollution of a lake or an unlawful incursion into airspace'.<sup>43</sup> If the state is found to have breached international law (thereby invoking the obligations of cessation and reparation<sup>44</sup>) the offending state will only have to pay reparations to the aggrieved state, and again enjoys discretion as to whether to trans-

<sup>37</sup> *Ibid.*, at para. 7.

<sup>38</sup> Amnesty International, 'Letter to the Foreign and Commonwealth on the UN Convention on the Jurisdictional Immunities of States and their Properties', 5 May 2005, at 2 (n. 2).

<sup>39</sup> *Al-Adsani v. Government of Kuwait and Others*, CA, 12 Mar. 1996, 107 ILR (1998) 536.

<sup>40</sup> *Ibid.*, at para. 51. See also The International Law Association, *supra* note 34, at paras 9–23; 70 (noting a move away from the traditional international law position, stating 'it is increasingly the right of the individual that is asserted in its own merits and no longer that of the state of nationality. The state may still act as a conduit, an agent, or on behalf of the individual, but no longer substituting for its own rights').

<sup>41</sup> *Al-Adsani v. United Kingdom*, *supra* note 4, at para. 50.

<sup>42</sup> PCIJ, Series A/B, No. 61, *Appeal from a Judgment of the Hungaro-Czechoslovakia Mixed Arbitral Tribunal*, 231 (1933).

<sup>43</sup> Warbrick and McGoldrick, 'Diplomatic Representations and Diplomatic Protection', 51 *Int'l Comp LQ* (2002) 723 at 726.

<sup>44</sup> ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-Third Session', UN GAOR 56th Sess., Supp. No. 10, UN Doc A/56/10 (2001) at Part II, Ch. 1.



for the reparations made to the victim of the violation.<sup>45</sup> The ILC has so far left ‘the matter open’ as to whether the state is ‘under an obligation to pay over to an injured individual money that it had received by way of compensation for a claim based on diplomatic protection’, in order to ‘allow for further development in the law’.<sup>46</sup> As such, this aspect of diplomatic protection illustrates the incompatibility with the right to a remedy and reparation by avoiding generality and predictability in place of discretion on a case-by-case basis.

### ***C Justifying Impunity through Formal Barriers of Procedure and Substance***

Within a context in which the courts of the state in which the torture allegedly took place are very often unavailable and diplomatic protection does not amount to an alternative means of settlement, the provision of immunity in foreign courts contributes to, justifies, and may even constitute the resulting impunity. Yet, the distinction between procedural and substantive rules of international law operates to present two separate regimes which do not interact and functions to minimize the exposure given to impunity. As such, the broader requirements of international law cannot impact upon immunity as a self-contained regime. The insulation of immunity thus raises the bar which must be overcome to deny its applicability. As will be discussed in the next section, the distinction between procedural and substantive rules within the ambit of state immunity has often gone unchallenged because the immunity of foreign states has traditionally existed within the realms of ‘untouchables’ such as sovereignty, dignity, comity, and deference to foreign policy. In this respect, the ‘excessive formalism’<sup>47</sup> projected on to immunity operates to fix and solidify the reach of immunity and protect it from broader developments in international law which might reduce its scope.<sup>48</sup>

The formal division between procedural and substantive norms as parallel but distinct regimes provides plausible legal language to justify the provision of immunity without directly rejecting the prohibition of torture.<sup>49</sup> In the same sentence, states and judicial bodies can reaffirm their commitment to the prohibition of torture and claim, through the neutralizing rhetoric of the law of procedure, that immunity sits compatibly with the prohibition of torture by not interacting with it at all. Equally, however, attempts to deny the impact of other procedural rules on the prohibition of torture have been exposed and rejected. Thus, in the case of *A and Ors v. Secretary of State for the Home Department*, the House of Lords recently held that:

I am startled, even a little dismayed, at the suggestion . . . that this deeply-rooted tradition and an international obligation solemnly and explicitly undertaken can be overridden by a statute

<sup>45</sup> *Chorzow Factory Case (Pol v. FRG)* [1927] PCIJ Series A, No. 9.

<sup>46</sup> ILC, *supra* note 24, at 240.

<sup>47</sup> M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), at 564.

<sup>48</sup> *Ibid.*, at 564.

<sup>49</sup> *Ibid.*, at 570.

and a procedure rule which make no mention of torture at all ... It trivialises the issue before the House to treat it as an argument about the law of evidence.<sup>50</sup>

By framing immunity as a procedural rule, the pretence of neutrality acts to steer attention away from the deeper question of the legitimacy of immunity when torture is alleged. As Koskenniemi points out, international law 'is constantly directing attention away from important problems by defining them as "political" or "economic" or "technical" and thus allegedly beyond law's grasp'.<sup>51</sup> In effect, the focus on procedure sanitizes immunity, thus legitimizing and denying the impact of immunity on impunity. Containing the fight to combat impunity to the discretionary whims of states contradicts the *Impunity Principles* which require a range of forums before which claims can be made in order to combat impunity.<sup>52</sup> As Hegarty points out, '[t]hat States commit violations of human rights is an undeniable, if much denied, truth',<sup>53</sup> and Asad affirms, the 'modern state use of torture requires the rhetoric of denial'.<sup>54</sup> Equally, however, such conditions are unstable. Once the mythology of the neutrality of immunity is exposed, immunity no longer presents itself as simply a procedural rule, but a barrier tantamount to the acceptance of torture; an acceptance which cannot co-exist with rejection of its prohibition. As such, procedural rules cannot be used to evade substantive obligations, as this would defeat the core basis for *jus cogens* norms such as the prohibition of torture, by facilitating unlawful derogation.<sup>55</sup>

## 2 The Impact of the Evolution of Sovereignty, Dignity, and Comity on the Conception of Immunity

One of the further ways in which immunity has been used as a tool to sustain impunity for torture and other crimes under international law is by restating the traditional justifications for immunity. As such, courts routinely cite sovereign equality, *par in parem non habet jurisdictionem*, dignity, comity, and international relations as legitimate and necessary bases on which to grant immunity. Two effects emerge from the connection of immunity to these traditional bases without further analysis. The close association of immunity with the traditional doctrines such as sovereignty often suggests a higher status in international law than it actually enjoys as an exception to the jurisdiction of the forum state. Secondly, no consideration is given to the contemporary meaning and evolution of such principles. As such, a disjuncture arises between the current status of the underlying principles and immunity under international law. Whereas immunity can only be derivative, not constitutive of these principles, the lack of analysis by

<sup>50</sup> *A. v. Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2005] 3 WLR 1249, at para. 51.

<sup>51</sup> Koskenniemi, *supra* note 47, at 606.

<sup>52</sup> *Impunity Principles*, *supra* note 12.

<sup>53</sup> Hegarty, 'Dealing with the Past: The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland', 26 *Fordham Int'l LJ* (2003) 1148, at 1148.

<sup>54</sup> Talal Asad, 'On Torture or Cruel, Inhuman and Degrading Treatment' in A. Kleinman, V. Das and M. Lock (eds), *Social Suffering* (2000), at 290 (emphasis in the original).

<sup>55</sup> See Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong,' in this Symposium, at 955.

courts results in its enjoyment of a more absolutist position than its root. The depiction of immunity as static contradicts the progressively contracting coverage of immunity, precipitated by the evolution in sovereignty. As Gavouneli points out, immunity is 'a classic subject of international law in perennial need of adjustment to contemporary notions of State and the rule of law'.<sup>56</sup>

### *A Origins of Immunity Entrenched in Impunity*

Before international law emerged as a discipline in the 16th century, the authority of the sovereign ruler was understood as supreme.<sup>57</sup> As such, the sovereign enjoyed absolute immunity from the jurisdiction of his or her own courts.<sup>58</sup> As a matter of reciprocity, sovereign rulers later extended immunity to foreign sovereigns.<sup>59</sup> Within this context, immunity was historically conceived as a means of preventing the sovereign from ever being held accountable for his or her actions; the idea that 'the power of the sovereign is incapable of legal limitation'.<sup>60</sup> On this view, immunity did equate to impunity.

On the emergence of the nation-state, the principle of sovereign equality defined the relationships between states. As each state was understood to have exclusive control and competence over affairs within its own territory, the grant of immunity to foreign states persisted as a demonstration of comity and reciprocity. Equally, immunity had peripheral relevance as states interacted minimally and generally preferred to resolve disputes through diplomatic rather than judicial channels.<sup>61</sup> Moreover, immunity was not consistently applied; the status of the foreign state as an ally or enemy often determined the availability of immunity.<sup>62</sup> As Simpson notes:

the endless debates about humanitarian intervention or anticipatory self-defence or sovereign immunity seemed irresolvable, or at least unfruitful, without a consideration of identity ... States were juridically equivalent on the orthodox view and any analysis of, say, sovereign immunity or humanitarian intervention had to proceed from this assumption ... Immunity was disposable in cases involving outlaws but tenaciously applied to the personnel of the Great Powers themselves.<sup>63</sup>

In this respect, immunity emerged out of the sovereignty of the forum state, rather than – as is often claimed – as a right of the foreign state.

<sup>56</sup> M. Gavouneli, *State Immunity and the Rule of Law* (2001), at 19.

<sup>57</sup> T. Hobbes, *Leviathan* (ed. J.C.A. Gaskin, 1998).

<sup>58</sup> See *R. v. Bow Street Metropolitan Stipendiary Magistrate, exp Pinochet Ugarte (No. 3)* [2000] IAC 147 at 16; see also Bianchi, 'Immunity versus Human Rights: The Pinochet Case', 10 *EJIL* (1999) 237 at 262.

<sup>59</sup> See M.N. Shaw, *International Law* (1997), at 492.

<sup>60</sup> G.M. Badr, *State Immunity: An Analytical and Prognostic View* (1984), at 74 (quoting Lord Wilberforce). See also Hobbes, *supra* note 57, and C. Schmidt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1988).

<sup>61</sup> Caplan, 'State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory', 97 *AJIL* (2003) 741 at 754.

<sup>62</sup> Hill, 'A Policy Analysis of the American Law of Foreign State Immunity', 50 *Fordham L Rev* (1981–82) 155, at 170.

<sup>63</sup> G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004), at p. xiii.

This lack of acknowledgement of the historical background underscores the inflated premise accorded to immunity by judicial bodies. In civil actions brought against a foreign state or its officials, courts tend either to focus on the availability of immunity without first addressing the jurisdictional basis for the case or to conflate both jurisdiction and immunity into a simultaneous and overlapping analysis. Such an approach suggests that immunity constitutes the primary rule instead of reflecting its exceptionality which, but for the foreign state's involvement, would enable the courts of the forum state to exercise jurisdiction.<sup>64</sup> One of the reasons for the consideration of immunity ahead of jurisdiction results from the structure of a number of national statutes which provide for a general rule of immunity subject to specific exceptions.<sup>65</sup> However, as highlighted in the foregoing, consideration of immunity is contingent upon a prior 'jurisdictional anchor to establish the court's competence'.<sup>66</sup> Moreover, at least in the case of the United Kingdom, the introduction of the Human Rights Act 1998 allows greater flexibility in statutory interpretation. In *R v. A*, Lord Steyn found that:

Section 3 of the 1998 Act places a duty on the court to strive to find a possible interpretation compatible with convention rights. Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: [Section] 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: [Section] 3 is more radical in its effect. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it ... Section 3 of the 1998 Act qualifies this general principle because it requires a court to find an interpretation compatible with convention rights if it is possible to do so ... In accordance with the will of Parliament as reflected in [Section] 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so ...<sup>67</sup>

The construction of the coverage of immunity as static has an ossifying effect on the development of the relationship between immunity and the prohibition of torture and crimes under international law because it suggests a greater status and rigidity to immunity than international law recognizes. Indeed, in the *Arrest Warrant* case, judges Higgins, Kooijmans, and Buergenthal pointed out that, by addressing immunity at the outset, '[t]he impression is created that immunity has value *per se*, whereas in reality it is an exception to a normative rule which would otherwise apply'.<sup>68</sup> Indeed,

<sup>64</sup> Higgins, 'Certain Unresolved Aspects of the Law of State Immunity', 29 *Neth Int'l L Rev* (1982) 265, at 271. This contention is also supported by Sinclair, 'The Law of Sovereign Immunity: Recent Developments', 167 *Recueil des Cours* (1980) 113, at 215 (immunity, 'operates by way of exception to the dominating principle of territorial jurisdiction'); Sir Robert Jennings, *The Place of the Jurisdictional Immunity of States in International and Municipal Law* (1987), at 19 (cited in Caplan, *supra* note 61, at 749) (claiming that with regard to state immunity, 'territorial jurisdiction is the dominating principle').

<sup>65</sup> E.g., Foreign Sovereign Immunities Act 1985 (Australia); Foreign Sovereign Immunities Act 1985 (South Africa); State Immunity Act 1985 (Canada); State Immunity Act 1978 (UK).

<sup>66</sup> Caplan, *supra* note 61, at 754.

<sup>67</sup> *R. v. A*. [2001] UKHL 25, at para. 44.

<sup>68</sup> *Arrest Warrant case*, *supra* note 13, Separate Opinion of Judges Higgins, Kooijmans and Buergenthal).

the history of immunity demonstrates a much greater flexibility than is implied in debates specifically related to its availability in cases of torture and crimes under international law. Such adjustability is particularly evident in the move from the absolute rule of immunity to the restrictive theory,<sup>69</sup> which Garnett attributes to the ability of the forum state to exercise its territorial sovereignty. He argues that such an exercise was consistent with the principle of sovereign equality and disabled international law from requiring absolute immunity.<sup>70</sup> Thus, the adoption of the State Immunity Act 1978 in the United Kingdom to embody the restrictive approach to immunity was not contingent on bilateral or multilateral state consent. Rather, as a result of its territorial sovereignty the United Kingdom was able to deny immunity to foreign states in particular cases. Indeed, one of the weightiest factors for the adoption of the Act related to pressure from corporations which wanted a level playing field with states in their contractual relations. As outlined by Dickinson, Lindsay, and Loonam:

it should be noted that the passage of the 1978 Act was not driven purely by matters of international legal theory. Perhaps inevitably, financial and national interests had a part to play. The proposed clarification of United Kingdom law and the contraction of the immunities and privileges of foreign states were seen as wholly beneficial from the point of view of the London financial markets (and, indeed, the English courts) and as averting a wholesale transfer of the state loans market to New York.<sup>71</sup>

In line with Christopher Hall's argument in this Symposium that the forum state enjoys jurisdiction,<sup>72</sup> analysis of the availability of state immunity should only arise at the point at which jurisdiction is determined. Framed in this way, the question becomes: should a state enjoy immunity from jurisdiction when other actors such as corporations which 'are playing international roles previously more or less the exclusive preserve of states'<sup>73</sup> do not? Indeed, Richard Garnett has previously highlighted that, '[g]iven the diminishing role of the state both as a national and international actor, at least relative to the transnational corporation and the individual, a serious question arises as to a state's continued entitlement to any special protection from the domestic jurisdiction of other states'.<sup>74</sup>

## **B Disjuncture between Sovereignty and Immunity**

As discussed above, the connection between the sovereign equality of states and state immunity is often traced to the origins of international law. Sovereignty, as a persistent concern of international law, does not exist in a vacuum but moves and evolves with

<sup>69</sup> Caplan, *supra* note 61, at 754.

<sup>70</sup> Garnett, 'Should Foreign State Immunity be Abolished?; 20 *Australian YB of Int'l Law* (1999) 175, at 177.

<sup>71</sup> A. Dickinson, R. Lindsay and J.P. Loonam (eds), *State Immunity: Selected Materials and Commentary* (2004), at 331.

<sup>72</sup> Hall, 'The Duty of States Parties to the Convention Against Torture to Provide Procedures Permitting Victims to Recover Reparations For Torture Committed Abroad,' in this Symposium.

<sup>73</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, CISS Report (2001), at para. 1.33.

<sup>74</sup> Garnett, *supra* note 70, at 175.

the progression of time. In this sense, public international law defines the parameters of sovereignty and renders its authority contingent on the permissive and restrictive qualities of the international legal regime. Thus, as Simpson notes, sovereignty has undergone ‘ceaseless modification and re-negotiation in the face of material forces in world politics (e.g. war), institution-building inter-disciplinary struggle and theoretical contestation’.<sup>75</sup> If immunity derives from sovereignty, its meaning, extent, and impact must also be contingent on the current scope of sovereignty. Yet, by simply restating the origins of immunity in sovereignty, courts have failed to acknowledge the restrictions on the scope of immunity caused by the evolution of sovereignty over time. As such, judicial decisions in which a state pleads immunity against allegations of torture result in an inevitable clash between the principles of 1648 and those of today. To tie immunity to the 1648 meaning of sovereignty positions the sovereign above the law.<sup>76</sup> As a consequence, immunity renders the prohibition of torture impotent and also frees sovereignty from its own constitutive framework in international law. As with the division between procedural and substantive rules, the masked reliance on a Westphalian sovereignty would accord states the effective freedom to avoid accountability for a crime such as torture, while advancing a rhetorical commitment to its prohibition.

In the case of the commission of crimes under international law, state sovereignty and the principle of *parem non habet jurisdictionem* no longer provide grounds on which to contest external scrutiny. Such crimes are not considered the internal domain of one state, but the concern and responsibility of the international community as a whole. Citing *Barcelona Traction*, the ICJ recently held in *The Wall* that obligations *erga omnes* ‘by their very nature are “the concern of all States”’ and, ‘[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection’.<sup>77</sup> The significance of this decision lies in its illustration of the transformation of the relationship of sovereignty to human rights, affirming that states cannot hide behind the barrier of sovereignty to avoid accountability for crimes under international law.<sup>78</sup> On this reading, public international law has developed on two levels. First, sovereignty cannot be asserted to avoid state responsibility for torture. Secondly, the sovereignty of all states has expanded to allow inquiries into allegations of torture by the offending state. Thus, rather than view sovereignty as a negative shield from accountability, Cryer points out:

As jurisdiction involves one state asserting rights to adjudicate events in (and often involving the officials of) other states, this involves an assertion of sovereignty. Thus international criminal law, by accepting universal jurisdiction and limiting material immunities empowers states,

<sup>75</sup> Simpson, *supra* note 63, at 11.

<sup>76</sup> See Hobbes, *supra* note 57, and Schmidt, *supra* note 60.

<sup>77</sup> *The Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territories (Advisory Opinion)* [2004] ICJ 2004, at para. 155 (citing *Barcelona Traction, Light and Power Company Limited*, Second Phase, Judgment [1970] ICJ Rep at 32).

<sup>78</sup> For a more detailed discussion of this issue see Bennoune, “Sovereignty vs. Suffering” Re-examining Sovereignty and Human Rights through the Lens of Iraq’, 13 *EJIL* (2002) 243.

enabling them to expand their sovereign rights to events beyond their borders ... it also shows that sovereignty is not always the enemy.<sup>79</sup>

A sub-conscious awareness of the internal recession of sovereignty may account for the additional justifications used to support a grant of immunity in the form of the dignity and comity of states. While sovereignty may still occupy a central space in international law, dignity and comity stand outside the legal regime. Although the legal parameters of state sovereignty would naturally fall within the scope of judicial inquiry, the inclusion of extra-legal doctrines to strengthen the justification for immunity indicates a judicial deference to a politicized version of sovereignty. The failure to question the premise on which immunity is based both allows a masked regression to a Westphalian notion of sovereignty and also results in a failure of the judiciary to recognize the impact of such lack of analysis on the resulting impunity.

While statehood was previously bound up in the notion of dignity, Higgins contends that 'the concept of the dignity of the sovereign has altered. International law no longer regards it as being contrary to the dignity of nations to respond to claims against them.'<sup>80</sup> Her position is supported by Lord Denning's statement in *Rahimtoola v. Nizam of Hyderabad* that:

It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality, than by arbitrarily rejecting their jurisdiction.<sup>81</sup>

Arthur Watts adds that, '[f]ormerly, much weight was attached to the dignity of States as an inherent quality of sovereign States which other States were under a duty to respect'. He notes that the absolute jurisdictional immunity of states was based, in part, on dignity, but concludes that 'dignity ... is an elusive notion, although it is still a convenient label', arguing that dignity is only relevant 'in the realms of protocol and State ceremonial. It is there, rather than in rules of international law, that weight may still attach.'<sup>82</sup> Thus, the self-image of states hinges their dignity on the rejection of impunity and the promotion of accountability for crimes under international law, meaning on a restricted understanding of sovereignty. In discussing the constructed nature of state sovereignty, Cryer notes that 'states have begun to internalize those ideas and see their own identity as involving a commitment to the prosecution of international crimes'.<sup>83</sup>

The restriction of sovereignty in this way also supports the extension of sovereignty in the direction of jurisdiction. This was acknowledged by the House of Lords in *A. and Ors v. Secretary of State for the Home Department*, where Lord Bingham clearly stated that 'I am not impressed by the argument based on the practical undesirability of

<sup>79</sup> Cryer, 'International Criminal Law vs. State Sovereignty: Another Round?', 16 *EJIL* (2005) 979, at 987.

<sup>80</sup> Higgins, *supra* note 64, at 271.

<sup>81</sup> *Rahimtoola v. Nizam of Hyderabad* [1958] AC 379, at 609.

<sup>82</sup> Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' [1994-III] *Recueil Des Cours* at 40-41.

<sup>83</sup> Cryer, *supra* note 79, at 995.

upsetting foreign regimes which may resort to torture'.<sup>84</sup> Comity, likewise, is precluded from bolstering the coverage of state sovereignty; because it constitutes merely 'rules of politeness, convenience, and goodwill. Such rules of International conduct are not rules of International Law, as it is distinctly the contrast to the Law of Nations.'<sup>85</sup>

Yet, by citing the traditional justifications for immunity in rote, Westphalian sovereignty is appropriated to prevent the effective enforcement of the prohibition of torture and the right to a remedy and reparation. Thus, Charlesworth and Chinkin capture the function of immunity to privilege certain voices and silence others,<sup>86</sup> finding that:

[t]he international law of immunity sustains the invisibility of women in this area and reinforces the notion of the impermeability of statehood and its recognized agents. The major inroads into the principle of the absolute immunity of the state and its agents has been in the name of commercial enterprise, leaving untouched the structures of domination and subordination within the state.<sup>87</sup>

From this perspective, immunity regresses to its origins: a means to absolve the sovereign of all responsibility, as described by Lauterpacht as:

It is one of the manifestations not so much of the Austinian as of the Hobbesian conception of state – a conception to which Mr. Justice Holmes gave expression in a frequently cited and often criticized passage in *Kawananakoa v. Polyblank* in which he based the immunity of the state 'on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends'.<sup>88</sup>

Thus, the current disjuncture between sovereignty and immunity illustrates that when a grant of immunity is justified on the basis of sovereignty, the sovereignty referred to is that understood at the outset of public international law. In positioning the state above the law through the medium of immunity, courts are not, in fact, basing their decisions on the requirements of sovereignty as defined today. Rather, by simply referring to sovereignty as if amorphous, abstract, and temporally detached, a Westphalian sovereignty is injected, enabling states to stand outside the law while framing the decision within the confines of the law.<sup>89</sup> By analogy, at Rome, sovereignty was also appropriated by states claiming that "'this would intrude on our sovereignty'", when actually they meant "'we don't like this" *per se*'.<sup>90</sup>

<sup>84</sup> *Ibid.*, at para. 50.

<sup>85</sup> Brownlie, *Principles of Public International Law* (2003), at 28 (citing Oppenheim) (Brownlie also characterizes comity as 'a species of accommodation not unrelated to morality but to be distinguished from it nevertheless. Neighbourliness, mutual respect and the friendly waiver of technicalities are involved, and the practice is exemplified by the exemption of diplomatic envoys from custom duties').

<sup>86</sup> H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000), at 125 (citing Koskeniemi, *supra* note 47, at 499).

<sup>87</sup> *Ibid.*, at 147.

<sup>88</sup> Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', 28 *BYBIL* (1951) 220, at 228.

<sup>89</sup> See Koskeniemi, *supra* note 47, at 572 (noting that "'sovereignty" cannot be grasped by examining the "idea of sovereignty" somehow floating autonomously in conceptual space but by studying how that word is invoked in institutional contexts so as to make or oppose particular claims').

<sup>90</sup> Cryer, *supra* note 79, at 981.



### 3 Conclusion

With the adoption of the new United Nations Convention on the Jurisdictional Immunities of States and their Property 2005, proponents claim that the achievement of the treaty lies in its departure from the discretion of individual states towards multilateral certainty. Yet, as discussed in the introduction to this article, the drafting history of the treaty both exposes an avoidance of the relationship of immunity to torture and other crimes under international law and an ossifying structure embodied by a default general rule of immunity subject only to specific exceptions. As such, the Convention attempts to produce a certainty that is inherently unjust and unstable.<sup>91</sup> By projecting a general rule subject to specific exceptions in a context within which international law has already begun to open up the possibility of the inapplicability of immunity in areas ostensibly covered by the Convention's general rule, the treaty's coverage is over-inclusive.<sup>92</sup> Notably, when the Convention was still in draft form, the Chairperson of the United Nations' Committee against Torture in its discussion of Canada's laws on state immunity considered that the terms of the Convention would not preclude Canada from enacting an exception to state immunity for cases of torture. The Chairperson observed that:

as a countermeasure permitted under international public law, a State could remove immunity from another State – a permitted action to respond to torture carried out by that State. There was no peremptory norm of general international law that prevented States from withdrawing immunity from foreign States in such cases to claim for liability for torture.<sup>93</sup>

In this respect, however much immunity is projected as a self-contained regime, the preferences of states cannot operate to avoid interaction and adherence to broader international law.

<sup>91</sup> For a fuller discussion on the implications of the Convention see the symposium entitled 'the 2005 UN Convention on State Immunity in Perspective' at 55 *Int'l Comp LQ* (2006).

<sup>92</sup> Koskeniemi, *supra* note 47, at 591.

<sup>93</sup> Committee Against Torture, 'Summary Record of the Second Part (Public) of the 646th Meeting', 6 May 2005, CAT/C/SR.646/Add.1, at para. 67.