Appeal No. UKSC 2014/0264

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL (CIVIL DIVISION) (ENGLAND & WALES)

Neutral citation: [2014] EWCA Civ 1394; reported: [2015] 2 WLR 1105

B E T W E E N:

(1) THE RT. HON JACK STRAW
(2) SIR MARK ALLEN CMG
(3) THE SECRET INTELLIGENCE SERVICE
(4) THE SECURITY SERVICE
(5) THE ATTORNEY GENERAL
(6) THE FOREIGN AND COMMONWEALTH OFFICE
(7) THE HOME OFFICE

Appellants/Defendants

-and-

(1) ABDUL-HAKIM BELHAJ
(2) FATIMA BELHAJ

Respondents/Claimants

-and-

(1) INTERNATIONAL COMMISSION OF JURISTS
(2) JUSTICE
(3) AMNESTY INTERNATIONAL
(4) REDRESS

NGO Interveners

-and-

(1) THE UNITED NATIONS SPECIAL RAPPORTEUR ON TORTURE
(2) THE UNITED NATIONS CHAIR-RAPPORTEUR ON ARBITRARY DETENTION

UN Interveners

CASE FOR THE INTERNATIONAL COMMISSION OF JURISTS, JUSTICE, AMNESTY INTERNATIONAL AND REDRESS

A INTRODUCTION & SUMMARY

1 The International Commission of Jurists, JUSTICE, Amnesty International and REDRESS are grateful for the Court's permission to intervene in these proceedings by written and oral submissions.

2 These submissions address the following topics:

(a) **The scope of the doctrine of State immunity in English law, in particular the circumstances in which a foreign State is directly or indirectly "impleaded" (Part C)**. A State is only *indirectly* impleaded where its property is in issue but it is not named as a party to the proceedings.

(b) **Whether the act of State doctrine in English law reflects international law, and the scope of the principle that the act of State doctrine cannot be invoked in cases where serious breaches of international law (including international human rights law) are alleged (Part D)**. The act of State doctrine does not reflect any standard accepted as international law, and therefore international law cannot be used to justify any interference with Article 6(1) ECHR rights. In any event, the doctrine cannot be invoked so as to frustrate the adjudication of allegations of what would constitute serious human rights violations, as in the present case.

(c) **The nature of the prohibition of torture and the right to a remedy for serious human rights violations in international law (Part E)**. Any extension of the principles of State immunity or act of State in English law would be inconsistent with the UK's obligations under international law on the right of access to a court, the right to an effective remedy, and specific rights accorded to victims of serious violations of international human rights law. The Appellants' approach would profoundly weaken the global commitments made by States to ensure access to an effective remedy and reparation for gross violations of human rights.

B THE ROLE OF COMPARATIVE AND INTERNATIONAL MATERIAL

3 The comparative and international jurisprudence referred to by the NGO Interveners in this appeal serves four purposes. First, as with any other appeal, it can offer guidance as to how other legal systems have approached similar problems where existing domestic

authority appears inappropriate or yields no clear answer.[1] Secondly, it may demonstrate the existence of customary international law rules on a particular question that must inform the construction of a statute, like the State Immunity Act 1978 (the "1978 Act"), that seeks to implement rules of international law. Thirdly, if an international law rule requires that a claim of a particular type cannot proceed, this *may* provide a basis for justifying an interference with the Respondents' Article 6(1) ECHR rights, if they are found to be engaged either based on principles of State immunity or the act of State doctrine. If those restrictions are not required by international law, then absent some other legitimate aim they will be incompatible with Article 6. Finally, other principles of international law, such as the rights to remedy and reparation in respect of torture and other serious human rights violations, are also relevant and important in demonstrating that any interference with such rights is not justified and demonstrate that a narrow, rather than expansive, reading of the common law should be adopted, as explained below.

C STATE IMMUNITY

(1) The State Immunity Act 1978 and domestic authority

4 The domestic law on the concept of indirect impleading has been canvassed in the Respondents' submissions and is not repeated here. However it is important to emphasise three points.

5 First, the circumstances in which a State will be impleaded were described by Lord Atkin in *Cia Naviera Vascongado v SS Cristina (The Cristina)* [1938] AC 485, at 490:

(a) "…the courts of a country will not… by their process make [a foreign sovereign] against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages"; and

(b) "they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control."

Lord Atkin's reasoning has recently been cited with approval in a number of the comparative materials highlighted below.

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[1] Tom Bingham, *Widening Horizons: the Influence of Comparative Law and International Law on Domestic Law* (CUP, 2010), p. 8.

6 Secondly, claims against foreign State officials are sometimes characterised as "indirectly impleading" the State.[2] It is right to observe that a State's immunity has been held to be engaged where proceedings are brought against officials who act or purport to act on its behalf.[3] However in light of the attributability of the acts of those officials to the State as a matter of international law,[4] the NGO Interveners submit that this should be regarded as a *direct*, rather than an indirect, impleading of the State. "State" in s. 14 of the 1978 Act has been interpreted by English courts to include individual officers of a foreign State.[5] Thus, when proceedings are commenced against a foreign State official they are, for the purposes of the 1978 Act and international law, being commenced against "the State". The State is therefore *directly* impleaded by those proceedings.

7 Thirdly, this has a further legal consequence for the State. Where a judgment is obtained against a part of a State (which would include, for present purposes, an official acting on behalf of a State), then a judgment obtained against such a person or entity would be enforceable against the assets of the State: see, in relation to State-owned companies, *La Generale des Carrieres et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27; [2013] 1 All ER 409 at [3]. In the present case there is of course no question of the court making any award of damages that would be enforceable against the assets of any foreign State.

(2) Canada

8 State immunity in Canada is governed by the State Immunity Act 1985 (the "Canadian Act"). The operative provisions of the Canadian Act are in materially the same terms as the 1978 Act.

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2 See, for example, *Jones v Saudi Arabia* [2007] 1 AC 270 at [31] per Lord Bingham.

3 *Twycross v Dreyfus* (1877) 5 Ch D 605, 618—619; *Zoernsch v Waldock* [1964] 1 WLR 675, 692; *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611, 669; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, 269, 285—286; *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1583.

4 See Articles 4-11 of the ILC's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (the "ILC Draft Articles"). The ILC Draft Articles were annexed to the UN's General Assembly resolution 56/83 of 12 December 2001 and are widely considered to reflect customary international law: Simon Ollesen, *the Impact of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Preliminary Draft (British Institute of International and Comparative Law, 2007), p. 18-19.

5 See *Jones* at [69] per Lord Hoffmann; *Propend Finance Pty Ltd & Ors v Sing & Anr* (1997) 111 ILR 611; 1997 WL 1103759.

9 In Canada, as in England, States have been held to be impleaded (other than when named as a party to proceedings) where (a) the subject-matter of the dispute is property beneficially owned by or in the possession of the State;[6] or (b) a suit against an agent or official of a State is considered to be the practical equivalent of a suit against the State itself.[7] However, where the relevant claim is not directed at a State's property or its officials, but rather can only be said to affect the "interests" of the State in some broader sense, the Canadian courts have refused to hold that State immunity is engaged as set out below.

10 In *Chateau-Gai Wines Ltd v France (Republic)* (1967) 35 Fox Pat C. 135, 61 DLR (2d) 709 [1967] 2 Ex CR 252, 52 CPR 39, the Exchequer Court of Canada was concerned with an action against the Republic of France to expunge the registration of the trade mark for "Champagne". The Court held that France was immune and therefore the matter could not proceed against France, and no relief could be obtained from it. That, however, was not the end of the matter. The Court continued, at [7]:

> "The question as to what is the essential nature of the matter remains to be considered. The relief sought is neither a judgment that the applicant is entitled to any relief from the Government of the Republic of France nor a judgment that would in any way affect any property that belongs to or is in the possession of the Government or in which the Government has an interest".

11 As a consequence, no orders could be obtained against France, but the application to set aside registration could still proceed.

12 Two judgments handed down since the Court of Appeal's decision in this case confirm the correctness of this approach.

13 First, in *United Mexican States v British Columbia (Labour Relations Board)* 2015 BCCA 32, the Court of Appeal for British Columbia considered the question whether a decision by the British Columbia Labour Board that Mexico had improperly interfered with a union representation vote indirectly impleaded Mexico and was thus barred by s. 3(1) of the Canadian Act.

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6 See e.g. *Flota Maritima Browning de Cuba v. "Canadian Conquerer" (The)* [1962] SCR 598, 34 DLR (2d) 628, 1963 AMC 1071 at [12] and [25]; (ship owned by a state); *Saint John (City) v. Fraser-Brace Overseas Corp.* [1958] S.C.R. 263, 13 D.L.R. (2d) 177 (taxation of property held in trust for a state).

7 See, for example, *Jaffe v Miller* (1993) 95 ILR 446 at [31].

14 At first instance, the British Columbia Supreme Court had held that Mexico's immunity was not engaged. In particular, it noted that the proceedings would not have any "legal consequence" for Mexico: [66], [68]. After citing Lord Atkin's judgment in *The Cristina*, the British Columbia Supreme Court went on to place reliance on Lord Denning's dictum in *Buttes Gas and Oil Co v Hammer* [1975] QB 557 that the doctrine of State immunity did not apply because no foreign sovereign was impleaded in that case. The British Columbia Supreme Court's decision was cited with approval by the Court of Appeal in this case: see [39].

15 The decision of the British Columbia Supreme Court was upheld by the British Columbia Court of Appeal on 30 January 2015. In so doing, the latter court endorsed the reasoning of the Court of Appeal in the present case: see [38], [48]. It concluded that the indirect impleading principle was limited to situations in which the proceedings would have some specifically legal effect on the State: [46]. The Court held that a finding of improper interference in the context of that case "has no legal effect" on Mexico's legal interests: [35], [49].

16 A similar approach was taken by the Canadian Federal Court in *Omar Ahmed Khadr v Canada* 2014 FC 1001 (Mosley J, 4 November 2014).[8] The applicant in that case was a former Guantanamo Bay detainee who was seeking to expand his claim against the government (which had previously focused on violations of the Canadian Charter of Rights and Freedoms, as to which see below) to include a claim that Canada had conspired with the US to torture him and otherwise breach his rights. The Canadian government argued that this claim indirectly impleaded the US and thus the amendment should not be allowed because it was barred by the doctrine of State immunity: [29].

17 The Federal Court rejected this argument. It held, citing the decision of the Privy Council in *Sultan of Johore v Abubakar* [1952] 1 All ER 1261, that a State would only be "*impleaded*" where "the *resulting judgment could affect the foreign state's legal interests*": [32], [35], emphasis added.

18 The Federal Court identified three situations where sovereign immunity could be engaged by proceedings: first, where the State was a party to the proceedings; secondly, where the proceedings placed property owned by the foreign State at risk of seizure or

[8] The Federal Court is Canada's national trial court which hears and decides legal disputes arising in the federal domain, including claims against the Government of Canada.

detention; and, thirdly, where the proceedings affected the State's "legal interests": [35], emphasis added. Canada had not argued that either of the first two categories was engaged. Rather, the question was whether the claim affected the US's legal interests in a manner recognised in the case law. The Federal Court concluded, at [38], that it did not:

> "The Defendant fails to show how a potential judgment of this Court holding Canada liable in conspiracy might affect any legal interest of the U.S. government. There is no indication that such a judgment might impose any liability on the United States – a non-party to the action – and lead to enforcement against its assets. The ability of the United States to freely perform its sovereign functions would not be hindered in any way. While the Defendant suggests that a judgment rendered by this Court would influence judicial bodies in the United States, it does not explain how this might occur. Quite plainly, the Plaintiff could not ask any American court to enforce a judgment imposing liability on *Canada* against the United States. Nor could he present such a judgment as definitive proof of misconduct perpetrated by the American government before any U.S. court. If an American court were ever to rely on a finding made by this Court, it would be by choice. There is no way for this Court to usurp the jurisdiction of its American counterparts and impose binding conclusions upon them."[9]

19 The Federal Court concluded that it was well-established that a court may evaluate the conduct of a foreign State in the circumstances of that case provided the judgment did not affect the foreign State's legal interests: [39].

(3) Australia

20 State immunity in Australia is governed by the Foreign State Immunities Act 1985 (the "Australian Act"). The operative provisions of the Australian Act are in materially the same terms as the 1978 Act, which was an important influence on the Australian Act.[10]

21 Australian courts have, as with those of this jurisdiction and Canada, adopted a narrow approach to the concept of "impleading". Immunity has been found to bar claims when

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9 This has parallels in English law. A judgment of a foreign tribunal to which a person is not a party is not binding on that person in England. This was confirmed by the English Court of Appeal in *Rogers v Hoyle* [2014] 3 WLR 148 at [39] *per* Christopher Clarke LJ.

10 See the report of the Australian Law Reform Commission, "Foreign State Immunity", No. 24, 1984, which recommended the adoption of the Australian Act (the "ALRC Report"), at pp. (xv)-(xvi).

ships or other property in which the State has an interest are at issue in the proceedings,[11] or a suit against a foreign State's official or agent is advanced.[12] Indeed, both concepts were expressly considered in the Law Reform Commission paper that preceded the Australian Act:[13]

> "With respect to individuals, once it is shown that a person acted 'for the purposes of the foreign state itself' rather than in a personal capacity, immunity can be claimed. In the same way, where an agent or bailee is in possession of property of the foreign state, any action against the agent or bailee in respect of that property will implead the foreign state".

The Law Reform Commission did not identify any other example of impleading.

22 The rationale underpinning the concept of "impleading" was recently confirmed by the Australian High Court in *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* [2012] HCA 33. *Garuda* was cited with approval by the Court of Appeal in *Belhaj*: [39].

23 That case concerned whether Garuda was an emanation of the Republic of Indonesia and whether it was entitled to immunity. The Court articulated the scope of the "impleading" principle as follows, at [17]:

> "…The notion expressed by the term "immunity" is that the Australian courts are not to implead the foreign State, that is to say, will not by their process make the foreign State against its will a party to a legal proceeding. Thus, the immunity may be understood as freedom from liability to the imposition of duties by the process of Australian courts".

24 The decision in *Garuda* was recently considered and approved by the New South Wales Court of Appeal in *Firebird Global Master Fund II Ltd v Republic of Nauru* [2014] NSWCA 360 (judgment of 23 October 2014). That case concerned (amongst other things) an application to register a Japanese judgment against Nauru. The NSW Court of Appeal concluded that the application engaged Nauru's immunity. Its reasons for doing so indicate the correct parameters of the indirect impleading doctrine:

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11 See, for example, *Australian Federation of Islamic Councils Inc v Westpac Banking Corporation* (1988) 17 NSWLR 623.

12 See, for example, *Zhang v Zemin & Ors* (2010) 243 FLR 299 (NSW Court of Appeal), at [66]-[77], [108].

13 See ALRC Report, paragraph 20.

> "The registration of a judgment in this case has the effect of exposing Nauru to execution against its property in the event that judgment is not met. In this sense, it impleads the foreign State even though the *Foreign Judgments Act* does not require or command an appearance."[14]

25 The limitations of the principle of "indirect impleading" are also evident from the decision of the Full Federal Court in *Habib v Commonwealth* [2010] FCAFC 12. That case was concerned with an allegation that Australian officials had committed a series of torts of a similar kind to those alleged in these proceedings, with the involvement of foreign State agents, while Mr Habib was detained in Pakistan, Egypt, Afghanistan and Guantanamo Bay.

26 Unlike in the present case, the Commonwealth did not seek to argue that the claim was barred by State immunity at all; its case was that sovereign immunity would only be engaged if agents of the other foreign States involved – Pakistan, Egypt and the USA – "were sued directly in an Australian court for the alleged acts inflicted on Mr Habib…" (at [85], see also Jagot J at [113]).

(4) The United States

27 State immunity in the United States is governed by the Foreign Sovereign Immunities Act 1976 (the "US Act"). The US Act was a leading precursor of the 1978 Act and has previously been considered by this Court when considering the correct construction and scope of the 1978 Act.[15]

28 US jurisprudence also supports a narrow reading of the "impleading" doctrine. As with the other jurisdictions considered above, no court has ever found that State immunity is engaged in factual circumstances analogous to those of this appeal. Rather, State immunity in the US has been found to be engaged where the proceedings have legal effect on the State, such as an order for discovery made against the State as a non-party.[16]

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14 At [62]. Leave to appeal to the High Court from the decision of the NSW Court of Appeal was granted on 13 February 2015. The appeal was heard on 2-3 September 2015. Judgment is pending.

15 *SerVaas Inc v Rafidain Bank* [2013] 1 AC 595 at [23].

16 *Petroleos Mexicanos v Paxson,* US Court of Appeals for the Eight District, 7 March 1990, 786 S.W.2d 97. The Court observed that "[t]he unprecedented component of this case is that the foreign sovereign is not a party to the suit in question, but is merely an accessory to the subject matters in dispute" (at 97-98).

29 For example, in *Doe I v Unocal Corp,* US Court of Appeal for the Ninth Circuit, 395 F. 3d 932 (9th Cir. 2002), to which the Australian Full Federal Court referred in *Habib*, the Court held that the Myanmar military was immune by reason of sovereign immunity (at 957-958), but that the action could nevertheless proceed against a private corporation (Unocal) alleged to have been involved with the abuses that were the subject matter of the claim (at 958-959). There was no suggestion, in that context, that Myanmar was indirectly impleaded because the case required the Court to decide whether the Myanmar military had violated international law (as the Court accepted that it did).[17]

(5) Singapore

30 In *Republic of the Philippines v Maler Foundation and Others* [2008] SGCA 14, the Supreme Court of Singapore, Court of Appeal, considered the question of what level of interest was necessary for a foreign State to assert or hold in order to engage its State immunity pursuant to the Singapore Act. The case concerned interpleader proceedings in respect of certain funds which had been found to be the ill-gotten gains of the former President of the Philippines, the late Ferdinand Marcos, and Mrs Imelda Marcos. The Philippines sought a stay of the proceedings on grounds of State immunity.

31 The Court cited, with approval, the statement of Lord Atkin in *The Cristina* that a foreign State could, as a matter of State immunity, be impleaded whether by making it a party to proceedings or seeking to seize or detain property in which the State has an interest (at [35]). However the Court held that it was necessary for the State to show that the interest was not merely arguable but existed (see at [41]-[43]).[18] The Court noted with apparent approval the consensus among English judges that sovereign immunity is not absolute and should not be extended unnecessarily (at [37], [46]). It concluded that the doctrine of sovereign immunity should "not be extended to a case involving debts or choses in action in the possession or control of a third party in respect of which the claimant state is yet to prove its ownership" (at [53]).

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17 It should be noted that in February 2003, the Ninth Circuit Court vacated the panel decision and agreed to rehear the appeal before an eleven-judge en banc panel (*Doe v Unocal,* 395 F 3d 978 (9th Cir. 2003), but the case was subsequently settled. Nevertheless, in the NGO Interveners' submission the reasoning of the Court of Appeals remains correct.

18 In this respect, the Court held that it was not sufficient for the Philippines to show that its interest was "not merely illusory", as had been suggested by the Privy Council in *Juan Ysmael & Company Incorporated v Government of the Republic of Indonesia* [1955] AC 72, and is also implicit in the terms of s. 6(4) of the 1978 Act.

(6) The UN Convention

32 The comparative material set out above is inconsistent with the Appellants' interpretation of the UN Convention on the Jurisdictional Immunities of States and their Property (the "UN Convention"). The NGO Interveners adopt, but do not repeat, the submissions of the Respondent as to why the UN Convention and the State practice on which it is based supports the narrow reading of State immunity set out above.

D FOREIGN ACT OF STATE

33 In light of the fact that the domestic and international law principle of State immunity is not engaged by the present claim, the next question is whether the domestic doctrine of act of State could nevertheless perform a similar role and bar the claim. The NGO Interveners submit that the broad interpretation of act of State advanced by the Appellants is inconsistent with earlier domestic authority and out of step with comparative jurisprudence. It is also inconsistent with the UK's international obligations, as explained in Section E below.

34 The NGO Interveners do not repeat the submissions made by the Respondents on this issue. Rather, two distinct areas are addressed below: first, the status of the act of State doctrine in international law and, secondly, the application of the act of State doctrine to claims of serious violations of international law principles.

(1) The status of the act of State doctrine in international law

35 The act of State doctrine is not a rule, principle or other standard of international law, and is not required by international law. This has consistently been recognised in domestic and international jurisprudence, and in academic commentaries. Rather, it arises from the domestic legal arrangements of a relatively small number of States. As explained above, there is no rule of international law that can be invoked by the Appellants in relation to the act of State doctrine in order to justify a restriction with the claimants' Article 6(1) ECHR rights. It also means that the Court should be cautious when considering any invitation to extend the scope of the doctrine as a matter of domestic common law.

36 In *R v Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147, Lord Millet described the act of State doctrine as an "Anglo-American doctrine" (at 269). Lord Phillips also observed that, where State

immunity did not apply, it was "the English and American" courts that had, nonetheless, held themselves not competent to adjudicate certain other types of dispute (at 286).

37 Similarly, in *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2014] QB 458 Rix LJ (giving the judgment of the Court) observed, at [40] that "[t]he act of state doctrine is a long-standing doctrine of Anglo-American jurisprudence (Hamblen J commented that there is nothing similar in the civil law)." Similarly, at [66], the Court described act of State as "a domestic doctrine of English (and American) law".[19]

38 The same point was made by the US Supreme Court in *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964), which held (at 421) that the fact that "… international law does not require application of the [act of State] doctrine is evidenced by the practice of nations." There is nothing in any subsequent US jurisprudence to suggest that the view of the US courts on this issue has changed.

39 The same view has been taken in Australia. In *Habib* both Perram J (at [36]) and Jagot J (at [82], [135]) characterised the doctrine as "Anglo-American".

40 This view is also confirmed by the leading commentators. Weil observes that:

> "…far from being imposed by international law, the restrained approach to the oversight of foreign actions, which is the essence of the Act of State doctrine, stems rather from the concern to ensure 'the primacy of the Executive in the conduct of foreign relations' and reflects the respective functions of the judicial and political branches inside the American system".[20]

41 Similarly, Carreau and Marrella say:

> "[…] the policy of restraint, which has long been adopted by American courts under the 'Act of State' theory, is unknown in international law and is in no way directed by it. This policy is based on concerns that reflect a certain conception of the internal constitutional order, in

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19 This passage is cited with approval by the Appellants in their written case: ¶39.

20 Weil P, "Le contrôle par les tribunaux nationaux de la licéité des actes des gouvernements étrangers" in Annuaire Français de Droit International, volume 23, 1977, pp 9 - 52, p 30. The quoted text is a translation of the original French, prepared by the NGO Interveners.

this case the aim to respect the strict separation of powers between the 'judiciary' and the 'executive'." [21]

42 The absence of the doctrine in civil law jurisdictions was also confirmed by Professor F.A. Mann,[22] who states that:

> "there is no trace of an act of state doctrine in any continental country; in particular both France and Germany have not had the slightest hesitation in treating confiscation by foreign States as null and void".[23]

43 In light of the weight of authority set out above, the Appellants concede (correctly) that they cannot ask the Court to find "that the foreign act of state doctrine forms part of customary international law".[24] However they nevertheless assert that it is not confined to "common law jurisdictions". As to this:

(a) The Appellant's rely on a statement by Fox and Webb that in civil law jurisdictions "*the jurisdictional requirement of international competence covers some of the same ground*" as the act of State doctrine.[25] But the statement is made in the context of the authors' confirmation that "*civil countries do not have*" the act of State doctrine.

(b) The Appellants also rely on comments of the ILC Special Rapporteur, Professor Sucharitkul during the drafting of the UN Convention. However these observations again confirm that the act of State doctrine is a United States doctrine.[26] There is nothing in Professor Sucharitkul's comments to support the proposition that civil law jurisdictions have something analogous to the act of State doctrine.

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21 Carreau D and Marrella F, Droit International (11ème éd.) 2012, p.701. The quoted text is a translation of the original French, prepared by the NGO Interveners.

22 The views of Professor Mann have been frequently cited with approval by English courts when considering questions of State immunity: see, for example, *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495 at [125].

23 F.A. Mann, The Foreign Act of State, 11 Holdsworth L. Rev. 15 1986, para 2.

24 Appellant's written case ¶224.

25 See Fox and Webb, p. 60.

26 UN Doc.A/CN.4/340 at, for example, para. 21; "In the practice of some States, notably the United States of America, another ground has developed…"

44 From all this, it is clear that the act of State doctrine is not part of international law. As a consequence, compliance with international law could not be invoked by a Contracting State as a legitimate aim for restricting an individual's right of access to the Court pursuant to Article 6(1) ECHR, where that Article is engaged.[27] Absent some other justification, which the Appellants have not identified, such a restriction is prohibited.

(2) Application of the act of State doctrine to serious human rights violations

45 It appears to be common ground between the parties that the act of State doctrine cannot be invoked where to do so would be contrary to public policy. The allegations in this case involve serious violations of some of the most important and widely accepted rights protected under international human rights law, including, *inter alia*, the prohibition of torture and cruel, inhuman or degrading treatment,[28] the right to liberty and security of person,[29] and the right to a fair trial.[30] However the Appellants contend that this principle does not apply to "mere" allegations of such violations, but only (in essence) where the breach of the relevant rule has been "clearly established" or is not in dispute.[31]

46 The Appellants' argument is contrary to the approach of other jurisdictions that have considered this question, as set out below. The correct position, in the NGO Interveners' submission, is that the exception applies wherever there are arguable allegations that serious violations of international law have occurred. Were it otherwise, it would be nearly impossible for those allegations ever to be authoritatively substantiated or, for that matter, refuted.

(a) Domestic case law

47 In *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 the Court was concerned with a violation of international law by Iraq that it regarded as "plain beyond argument" (at [20] per Lord Nicholls). But Lord Nicholls expressly noted that

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27 See the approach of the Court of Appeal in *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33 at [20]. The NGO Interveners concur with the Respondents' analysis of the engagement of Article 6(1) ECHR by both State immunity and the act of State doctrine.

28 See, for example, Article 3 ECHR, Article 7 ICCPR, Convention against Torture (as discussed below).

29 See, for example, Article 5 ECHR, Article 9 ICCPR.

30 See, for example, Article 6 ECHR, Article 14 ECHR.

31 Appellants' written case ¶¶146-148.

the English court was not disabled from "ever taking cognizance of international law or from ever considering whether a violation of international law has occurred" (at [26], emphasis added).

48 In *R (Abassi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 the Court of Appeal cited Lord Nicholl's observations in *Kuwait Airways* at [26] with approval: see [51]. Having referred to *Oppenheimer v Cattermole* [1976] AC 249, the Court confirmed, at [53], "where fundamental human rights are in play, the courts of this country will not abstain from reviewing the legitimacy of the actions of a foreign sovereign state."

49 Similarly, the Court of Appeal in *Yukos* noted that the act of State doctrine "will not apply to foreign acts of state which are in breach of clearly established rules of international law or are contrary to the English principles of public policy, as well as where there is a grave infringement of human rights" (at [69]). There was no reference to any need for the breach (as opposed to the rule) to be "clearly established". Indeed, at [72] Rix LJ appeared to endorse the observation of Hamblen J at first instance that, when determining whether the public policy exception was engaged, "all the allegations made by Yukos Capital must be assumed to be true and that the issue would be whether, on that basis, its claim should be struck out" (emphasis added).

(b) US case law

50 It has been consistently held in the US that where allegations of breaches of serious violations of international law are made, the act of State doctrine does not operate to block the claim.

51 In *Doe v Unocal*, the US Court of Appeals held that, in view of the high degree of international consensus about the illegality of the human rights abuses alleged in that case, the foreign act of State doctrine did not bar the claim against Unocal. It said at 959:

> "Regarding the first factor – international consensus – we have recognised that murder, torture and slavery are *jus cogens* violations, i.e., violations of norms that are binding on nations even if they do not agree with them… rape can be a form of torture and thus also a *jus cogens* violation. Similarly… forced labor is a modern form of slavery thus likewise a *jus cogens* violation. …Because *jus cogens* violations are, by definition, internationally

> denounced, there is a high degree of international consensus against them, which severely undermines Unocal's argument that the alleged acts by the Myanmar Military and Myanmar Oil should be treated as acts of state…"

52 Similarly, in *Sarei v Rio Tinto PLC*, US Court of Appeals for the Ninth Circuit, decision of 25 October 2011, it was held that allegations of breaches of *jus cogens* norms were exempt from the act of State doctrine because they were norms from which no derogation is possible (at [20]).[32]

53 More recently, the same reasoning was applied by the US District Court in *Warfaa v Ali* 33 F. Supp 3d 653, where it was held that a Torture Victim Protection Act claim was not barred by the act of State doctrine because it was premised on alleged acts constituting violations of *jus cogens* norms. For the purposes of determining whether the act of State doctrine applied, it was necessary to *assume* that the allegations made were true (see at 662).

(c) Australian case law

54 In *Habib*, the Commonwealth relied on the same distinction between "established" and "alleged" violations advanced by the Appellants in this case, but the Court rejected that distinction. Jagot J said at [110]:

> "…the cases do not support a distinction between known and alleged violations. Moreover, there is no principled basis for such a distinction. As Mr Habib submitted, there is no requirement apparent in the jurisprudence that the violations of international law and human rights alleged be "established at some indeterminate level of confidence at an interlocutory stage". This must be so. The effect of the Commonwealth's invocation of the act of state doctrine, if accepted, is to preclude the truth or otherwise of the allegations founding the claim from being tested and determined. The essence of the

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32 On 22 April 2013 the US Supreme Court vacated the Court of Appeals decision such that the claim could be reconsidered in light of the US Supreme Court's decision in *Kiobel v Royal Dutch Petroleum Co.,* 133 S.Ct. 1659 (2013) in relation to the scope of the Alien Tort Claims Act in the US (which is not relevant to the present appeal). On 28 June 2013 the Court of Appeals subsequently dismissed the appeal on that basis: see 722 F.3d 1109. Nevertheless, the reasoning of the Court of Appeals remains relevant to the scope of the act of State doctrine in this jurisdiction.

allegations founding the claim as ones involving grave breaches of international law and contraventions of Australian law, remain…"[33]

(d) Canadian case law

55 A series of Canadian decisions have shown, in this context, that the need to respect and uphold binding international standards, especially in the realm of fundamental human rights, must outweigh any concerns in relation to comity that may be said to underpin the act of State doctrine.

56 As the Canadian Supreme Court observed in *R v Hape* [2007] 2 SCR 292 (when considering the extraterritorial application of the Canadian Charter of Rights and Freedoms) at [51]:

> "The principle of comity does not offer a rationale for condoning another state's breach of international law. Indeed, the need to uphold international law may trump the principle of comity [citing *Abbasi*]".

57 In *Canada (Justice) v Khadr* [2008] 2 SCR 125, the Canadian Supreme Court followed *Hape* and again reaffirmed at [2] that:

> "The principles of international law and comity of nations, which normally require that Canadian officials operating abroad comply with local law, do not extend to participation in processes that violate Canada's international human rights obligations".

58 As a result, the Court concluded that the Charter applied to the conduct of the Canadian officials who interviewed Mr Khadr in Guantanamo Bay, and proceeded to assess the legality of that conduct. This approach was upheld in the subsequent Supreme Court decision of *Khadr v Canada (Prime Minister*) [2010] 1 SCR 44.[34]

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[33] See also [135]. This decision finds support in *Hicks v Ruddock* (2007) 156 FCR 574, in which Tamberlin J refused to strike out a claim by Mr Hicks in relation to his unlawful detention in Guantanamo Bay on the basis of the act of State doctrine: see, in particular, [21]-[22], [34], [91].

[34] The suggestion by the Appellants that the Canadian Supreme Court only did so because of "the fact that the process in place at Guantanamo Bay at the material time had already been held by the US Supreme Court to violate US domestic law and international human rights law" (Appellants written case ¶150) does not (even if a correct characterization, which the NGO Interveners do not accept) answer the point. There had been no prior determination of the legality of Mr Khadr's treatment, which was the subject matter of the claim in the Canadian courts.

E GROSS HUMAN RIGHTS VIOLATIONS AND THE RIGHT TO A REMEDY

59 The Appellants' case, if accepted, would involve the denial of access to a court in cases involving common law claims based, *inter alia*, on allegations of torture and cruel, inhuman or degrading treatment, enforced disappearance and arbitrary detention. These would represent gross violations of international human rights law.

60 The expansion of either the domestic law of State immunity or the act of State doctrine so as to create, in effect, an immunity for UK officials whenever they act in tandem with officials from other States is inconsistent with the UK's obligations under accepted domestic and international law standards on the right of access to a court, the right to an effective remedy and specific rights accorded to torture victims to secure redress – remedy and reparation – pursuant to the European Convention on Human Rights, the UN Convention against Torture and the International Covenant on Civil and Political Rights. The construction of domestic bars to jurisdiction based on comity – beyond the requirements of State immunity – serves to undermine not only the domestic law commitment to remedies for common law wrongs, but also significantly weaken the global commitments made by states to ensure access to an effective remedy and reparation for gross violations of human rights.

61 The international law prohibition on torture, and right to redress in relation to it and other serious human rights violations, is outlined below. As explained above, the NGO Interveners rely on these principles to demonstrate that any expansion of the domestic law of State immunity or the act of State doctrine is unwarranted and contrary to international law, and that any interference with the claimants' Article 6(1) ECHR rights arising from such an expansion could not be justified as either necessary or proportionate.

(1) The prohibition of torture

62 The special status of the absolute prohibition of torture is well established in international law, including under the ECHR.[35] This special status is reflected by the fact that the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the "CAT") has 146 states parties, including all 47 member states of the Council of Europe. In addition, the International Covenant on Civil and

[35] See, for example, *Shamayev and Others v. Georgia and Russia*, no. 36378/02 ECtHR (2005), para 335.

Political Rights (the "ICCPR"), Article 7 of which prohibits torture and cruel, inhuman or degrading treatment or punishment and Article 4 of which establishes this provision as one not subject to any derogation, has 168 State parties, including all 47 member States of the Council of Europe.

63 Torture is a crime under international law for which individuals are liable, which States have a responsibility to investigate and prosecute, and for which States can be held accountable in regional and international courts and before expert human rights bodies. The Strasbourg Court, together with other international bodies and domestic courts, has further recognised that the prohibition against torture has attained the status of a peremptory norm of international law (*jus cogens*).[36]

64 The CAT expressly prohibits torture, as well as complicity in torture,[37] which provides that States are required to investigate and prosecute unlawful conduct, including where committed outside their jurisdiction.[38] Indeed, the ILC Draft Articles recognise that responsibility for internationally wrongful conduct may be engaged by multiple States, particularly where such conduct consists in the collaboration of more than one State rather than one State acting alone.[39]

65 The Joint Committee on Human Rights, considering the international law of torture applicable to a number of domestic cases concerning the conduct of the UK, concluded that "for the purposes of State responsibility for complicity in torture..., 'complicity' means simply one State giving assistance to another State in the commission of torture, or acquiescing in such torture, in the knowledge, including constructive knowledge, of the circumstances of the torture which is or has been taking place".[40]

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36 See, for example,. *Demir and Baykara v Turkey* [GC], no. 34503/97, ECtHR (2008), §73. See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (2012), ICJ Judgment of 20 July 2012, para 99.

37 Article 4(1) CAT: "…*ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture*" (emphasis added).

38 Articles 4-7 and 12, 13 of CAT.

39 Article 16 of the ILC Draft Articles provides that "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State".

40 See Twenty-third Report of Session 2008-09, *Allegations of UK Complicity in Torture,* HC 230/HLA Paper 152, para 35.

(2) The right to redress (remedy and reparation)

66 The UK has also assumed obligations to provide for an effective remedy and reparation for torture under all three treaties: the ECHR (Articles 3 and 13), the ICCPR (Articles 2(3) and 7) and the CAT. This includes the right to civil remedies.[41]

67 The Strasbourg Court has confirmed, in this vein, that the absolute prohibition of torture entails certain positive obligations, which include the duty to investigate and prosecute those responsible and to provide victims with an effective remedy and full and adequate reparation,[42] as well as the right to truth.[43] The remedy required by Article 13 "must be available in practice as well as in law".[44]

68 Similarly, the Council of Europe Committee of Ministers' *Guidelines on eradicating impunity for serious human rights violations* provides that:

> "States should take all appropriate measures to establish accessible and effective mechanisms which ensure that victims of serious human rights violations receive prompt and adequate reparation for the harm suffered. This may include measures of rehabilitation, compensation, satisfaction, restitution and guarantees of non-repetition."[45]

69 This reflects the UN Human Rights Committee's conclusion that, even where a State's legal system may provide appropriate avenues for seeking remedy, such remedies must "function effectively in practice."[46] Such remedies must be "accessible, effective and enforceable" to satisfy the requirements of Article 2(3) ICCPR.[47]

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41 Member States have been criticised for preventing victims of torture from bringing civil proceedings in the absence of criminal investigations: see *Bairamov v Kazakstan*, CAT/C/52/D/497/2012 (2014), para. 8.9; *Nouar Abdelmalek v Algeria*, CAT/C/52//D402/2009 (2014), paras. 3.7, 11.7, 11.8.

42 *Ilhan v Turkey*, no. 22277/93 (2000), para 97.

43 *El-Masri v Macedonia* 39630/09, Judgment of 13 December 2012, para. 191; *Al Nashiri v Poland* 28761/11, Judgment of 24 July 2014; *Husayn (Abu Zubaydah) v Poland* 7511/13, Judgment of 24 July 2014.

44 *MSS v Belgium & Greece*, no. 30696/09, para. 290.

45 Council of Europe (CM), *Guidelines on eradicating impunity for serious human rights violations,* March 2011, XVI (Reparation)

46 Human Rights Committee, General Comment 31, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, paras 15 and 20.

47 See, for example, *George Kazantzis v. Cyprus*, Comm. No. 972/2001, UN Doc CCPR/C/78/D/972/2001, para 6.6 (Aug. 7, 2003); *Yasoda Sharma v. Nepal*, Comm. No. 1469/2006, UN Doc CCPR/C/94/D/1469/2006, para 7.10 (Oct. 28 2008).

70 Article 13 of the CAT enshrines the right of every victim of torture to complain and to have his or her case promptly and impartially examined. The "right of complaint afforded to victims of torture or ill-treatment" under the CAT is "a fundamental guarantee that must be upheld in all circumstances".[48] Article 14 of the CAT requires each State Party to 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 through civil proceedings.[49]

71 The UN Committee against Torture ("UNCAT"), in General Comment 3, has stressed that "States parties shall ensure that victims of torture or ill-treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible.[50]

72 Relevant to the present case, UNCAT has also identified a number of "[s]pecific obstacles that impede the enjoyment of the right to redress and prevent effective implementation of article 14" which "include, but are not limited to: inadequate national legislation, … procedural requirements that interfere with the determination of the right to redress; statutes of limitations, amnesties and immunities…"[51]

73 UNCAT has also criticised States that fail to provide or restrict civil remedies for torture, irrespective of where the torture was carried out.[52] For example, UNCAT recommended that Canada review its position under Article 14 to ensure the provision of compensation through its civil jurisdiction to all victims of torture.[53] Most recently, in connection with the conduct of UK forces in Iraq, UNCAT has recommended that the UK should take steps to implement Article 14 CAT in accordance with General Comment 3, to:

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48 Nowak and Macarthur, *The United Nations Convention against Torture* (2009), p. 442.

49 UNCAT has found a breach of Article 14 in a number of cases where the absence of criminal investigations and proceedings has prevented victims from bringing a civil suit for compensation: see, for example, *Dragan Dimitrijevic v Serbia and Montenegro,* CAT/C/33/D/207/2002 (2004), para 5.5; *Danilo Dimitrijevic v Serbia and Montenegro,* CAT/C/35/D/172/2000 (2005), para. 7.4; *Bairamov v Kazakstan*, CAT/C/52/D/497/2012 (2014), para. 8.9.

50 See UN Committee against Torture, General Comment 3, UN Doc. CAT/C/GC3, 19 November 2012, para 5.

51 UN Committee against Torture, General Comment 3, para 38.

52 See, for example, Concluding Observations on Japan, CAT/C/JPN/CO/1 (2007), §23 and on Nicaragua CAT/C/NIC/CO/1 (2009), §25.

53 Concluding Observations on Canada, CAT/C/CR/34/CAN (2005), para 5(f).

> "…also ensure that all victims of torture, cruel, inhuman or degrading treatment obtain redress and are provided with effective remedy and reparation, including restitution, fair and adequate financial compensation, satisfaction and appropriate medical care and rehabilitation."[54]

74 In its response to the list of issues adopted by UNCAT, the UK Ministry of Justice stated that "the UK Government does not operate any programme of compensation for individuals who have been tortured or ill-treated by other sovereign nations. If an individual alleges that the UK Government is liable in relation to their alleged torture or mistreatment overseas, it is open to them to bring a civil damages claim against the UK Government".[55]

75 The importance of access to a court for redress in cases involving serious violations of international human rights law is reflected in broader international practice. For example, in 2005, the UN General Assembly adopted The *UN 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*. This instrument, agreed by consensus of all UN Member States, including the UK, spells out the scope and nature of the principle under general international law. It reaffirmed that the right of victims to equal and effective access to justice and redress mechanisms should be fully respected "irrespective of who may ultimately be the bearer of responsibility for the violation".[56] Paragraph 24 of the Principles sets out the "right to truth" and provides that victims should be entitled to "seek and obtain information" on the "causes and conditions pertaining to gross violations of international human rights law" and "learn the truth in regard to these violations".

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54 Concluding Observations on United Kingdom CAT//C/GBR/CO/5 (2013), § 16. See also, § 22, which reinforces a recommendation of the JCHR that the UK Parliament should make specific provision for torture redress: "*the State party fill the "impunity" gap identify by the Human Rights Joint Committee in 2009 (HL 153/HC 553) in adopting the draft legislation (Torture (Damages) No. 2), that would provide universal civil jurisdiction over some civil claims*".

55 Ministry of Justice, "United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment: Response to the list of issues adopted by the Committee during its 49th session by the United Kingdom of Great Britain and Northern Ireland", 27 March 2013, para. 29.1.

56 *UN 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*; UN G.A. Res 60/147 (2005), Principle II(3)(c). See also See UN Human Rights Committee, General Comment 20 (1992).

76 In this context, it is all the more important to ensure that any *new* restrictions are opposed. As the UN Working Group on Arbitration Detention has observed, "[i]t is contrary to the rule of law and the requirements of an effective international legal order to accept new restrictions effectively barring remedies in domestic courts …".[57] In a similar vein, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has stated that:

> "Judges of national courts and tribunals are equally bound by the State's international law obligations, and are under a duty to ensure the unfettered right of access to court for the vindication of any cause of action arguably recognised under domestic law".[58]

77 The increased focus on access to justice is indicative of the international recognition of the close causal relationship between the lack of accountability for torture and its continuing incidence. As the UN Special Rapporteur on Torture has noted, "the single most important factor in the proliferation and continuation of torture is the persistence of impunity" and that "measures relieving perpetrators of torture of legal liability" are a key factor therein.[59]

78 Finally, the Inter-American Court of Human Rights has also noted that laws that lead to impunity, including by denying access to court, violate rights including Article 8 of the American Convention on Human Rights (comparable to ECHR Article 6) as they "lead to the defencelessness of victims and perpetuate impunity" and "prevent victims and their next of kin from knowing the truth and receiving the corresponding reparation".[60] The Court has further held that "judicial guarantees", including access to a court, are non-derogable where these are linked to ensuring the protection of non-derogable rights.[61]

(3) The possibility of litigation in the US against US officials

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57 Opinion No. 52/2014 (Australia and Papua New Guinea), A/HRC/WGAD/2014/52, para. 52. The UN Working Group specifically referred to the "act of State doctrine" in this context: see para. 51.

58 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, "Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives" (1 March 2013) A/HRC/22/52, para. 38.

59 UN General Assembly, A/56/156 (2001), at para 26.

60 *Barrios Altos* case (*Chumbipuma Aguirre et al*. v. *Peru*), Merits (2001) IACtHR, *Series C*, No. 75, para 43.

61 *Barrios Altos.*, paras 41–44.

79 The Appellants implicitly recognise that it would be unsatisfactory if victims of torture and other serious human rights violations had no means of redress against UK officials in UK courts. They therefore suggest that the appropriate way to proceed in the present case would be for actions to be brought first in the relevant foreign court against the relevant foreign agent (e.g. an action in the US against the US officials allegedly involved in the Respondents' mistreatment) and then, when those allegations have been determined, for separate proceedings to be brought against the UK officials in the UK.[62]

80 This argument has a logical flaw. If this claim is barred by the (Anglo-American) act of State doctrine because a UK court must avoid making factual findings in respect of the acts of US and other foreign State agents, it is difficult to see why the same logic should not also apply to a claim brought in a US court against US officials. Acceptance of the Respondents' case against those officials would necessarily involve factual findings in respect of the conduct of agents of other States. If the Appellants are right about the scope of the act of State doctrine in English law, there is no reason to think that such findings would not also be precluded in a US court.[63]

81 It has never been necessary for the US courts to consider the scope of the act of State doctrine in circumstances analogous to those in the present proceedings, because no rendition to torture case against US officials has, to the knowledge of the NGO Interveners, ever succeeded in a US court since September 11. Such actions are commonly blocked by various other US doctrines to which the Appellants refer in their written case, in particular the "political questions doctrine" and the "state secrets doctrine".[64] As Professor Jonathan Hafetz has observed:

> "…Federal courts have repeatedly dismissed actions by noncitizens against U.S. officials seeking damages for arbitrary detention, torture, and other mistreatments. The dismissals, which rest on various grounds, including the "state secrets" privilege, *Biven's* "special factors," and qualified immunity, typically cite the twin concerns of separation of powers and limited judicial capacity as reasons for denying litigants a federal forum. The

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62 Appellants' written case ¶¶168, 227.

63 This flaw cannot be solved by any distinction between "primary" and "secondary" actors. Such a distinction is impossibly vague, and lacks any basis in principle.

64 Appellants' written case ¶186(2).

decisions portray federal courts as unable to provide remedies for even the most egregious rights violations…"[65]

82 For example, in *Mohamed v Jeppesen Dataplan Inc*, US Court of Appeals for the Ninth Circuit, 614 F. 3d 1070, the Court upheld the dismissal on state secrets grounds of an action brought by five individuals who had been subjected to the CIA's detention and interrogation programme, which started in late 2001.[66] Indeed, the US has recently been criticised by UNCAT for failing to provide effective remedies and redress to victims, including fair and adequate compensation, including in relation to victims of torture.[67]

83 The stark reality is that, if the present claim does not proceed here, the allegations made by the Respondents will not be tried by any court.[68] Given the nature of those allegations, and the UK's duty to provide redress if they are substantiated, it would be a matter of considerable concern if this Court held that the common law dictated such an outcome.

F CONCLUSION

84 For these reasons, the International Commission of Jurists, JUSTICE, Amnesty International and REDRESS invite the Court to find that, on the facts here pleaded, neither State immunity nor the act of State doctrine is engaged.

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MARTIN CHAMBERLAIN QC **OLIVER JONES**

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65 Jonathan Hafetz, "Reconceptualizing Federal Courts in the War on Terror", *St. Louis University Law Journal*, Vol. 56, 2012, p. 21.

66 See also *El-Masri v United States*, United States Court of Appeals for the Fouth District, 479 F. 3d 300.

67 CAT, Concluding Observations on the combined third to fifth periodic reports of the United States of America, CAT/C/USA/CO/3-5 (19 December 2014), paras 12-15, 29.

68 A point also made by the Australian Full Federal Court in *Habib*, at [114].

……..…….

ZAHRA AL-RIKABI

1 October 2015