Limiting Sovereign Immunity in the Age of Human Rights

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Ron Jones stopped for a cigarette outside a bookstore in central Riyadh on March 15, 2001, when a trash can exploded.[1] His wounds and one-night hospital visit, however, were probably the least painful part of the nightmarish chapter of his life that then unfolded. From his hospital bed, Saudi officials seized and imprisoned Jones on suspicion that he planted the bomb.[2] Officials held the fifty-year-old British tax specialist in a Saudi prison for sixty-seven days, during which Jones says he was beaten on his hands, buttocks, and the soles of his feet with a cane and axe handle; deprived of sleep; cuffed and shackled; and threatened with execution.[3]

> They punched me, kicked me, bounced me off the walls. Then the caning started. They caned the soles of my feet and then they started caning my hands, sometimes with pickaxe handle. They told me they had arrested my wife and son and that they were doing all this to them as well.[4]

"The pain of the torture you forget about," Jones told the *Globe and Mail*, a Canadian newspaper. "The psychological effects of it are a lot more difficult to recover from."[5]

After returning home to England, Jones, a British national, sued Saudi Arabia in British court, seeking damages for assault and battery, trespass to the person, false imprisonment, and torture.[6] Jones' case pits the staunch international condemnation of torture against the sovereign immunity that has been a cornerstone of the international legal system for centuries. By

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1. Alan Freeman, *Saudis Arrested Second Canadian, Colleague Says*, Globe and Mail (Toronto), July 9, 2003, at A12; Paul Kelso, *Saudi Bomb Victim's Torture Ordeal—and Britain's Silence,* Guardian (London), Jan. 31, 2002, *available at* http://www.guardian.co.uk/saudi/story/0,11599,642109,00.html.
2. Kelso, *supra* note 1.
3. Alan Freeman, *Briton Fails in Bid to Sue Saudi Arabia for Alleged Torture*, Globe and Mail (Toronto), July 31, 2003, at A18.
4. Kelso, *supra* note 1.
5. *Id.*
6. Jones v. Saudi Arabia, [2006] UKHL 26 (appeal taken from E.W.C.A.).

filing his case in the United Kingdom, Jones forced the House of Lords to decide whether it would develop an exception to the default rule of civil sovereign immunity for egregious acts that violate settled principles of international law—in this case, the prohibition against torture. In the summer of 2006, the House of Lords decided that the principle of sovereign immunity remained an inviolable tenet of international law subject to no exceptions for grave international crimes, and dismissed Jones' suit against the Kingdom and the police officers who tortured him.[7]

The House of Lords relied both on Britain's Sovereign Immunity Act and the breadth of international decisions supporting a blanket sovereign immunity from civil suit.[8] Lord Bingham noted that the prohibition against torture is likely a *jus cogens* norm of international law, but said he found no compelling evidence to demonstrate that states allow allegations of torture to overcome the presumption of sovereign immunity.[9] Instead, the applicable law seemed to confirm that the principle of sovereign immunity remains impenetrable when a state faces civil suit in a foreign court. Lord Bingham extended sovereign immunity to the individual Saudi police officials accused of torture by arguing that these individuals are merely agents of the state, and therefore become folded into the cloak of immunity that protects Saudi Arabia.[10]

The House of Lords missed the larger import of the decision and ignored developments in international law that should have shaped their approach to Jones' request. The *Jones* decision poses a significant setback for international human rights lawyers working to ensure that survivors of torture can seek reparations for the atrocities they endured. Ironically, the United Kingdom's own decision to extradite Augusto Pinochet despite perceptions that this might violate sovereign immunity is one in a series of cases that developed space to bring suit against perpetrators of torture.[11] The United States, the United Kingdom, Italy, and international tribunals have all taken small but significant steps toward ensuring that torture victims have access to their courtrooms.[12]

Although a world where all victims have the guarantee of judicial recognition of their claims is far from realized, human rights activists remain increasingly optimistic that foreign courts are ready to litigate torture claims when state courts and international law have failed.[13] Head of state

7. *Id.*
8. *Id.*
9. *Id.* ¶ 27.
10. *Id.* ¶ 10.
11. R v. Bow Street Magistrate and others, ex parte Pinochet Ugarte [2000] 1 A.C. 147 (H.L. 1999) (appeal taken from Q.B.).
12. *Id.*; Siderman De Blake v. Argentina, 965 F.2d 699 (9th Cir. 1991); Prosecutor v. Furund_ija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998); Andrea Bianchi, *Ferrini v. Federal Republic of Germany*, 99 Am. J. Int'l L. 242, 244 (2005).
13. *See, e.g.*, Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 Harv. Int'l L.J. 141, 156–57 (2001);

immunity has been significantly derailed as an impenetrable defense in torture claims. In 1997, the United States amended its Foreign Sovereign Immunities Act,[14] under which torture victims can now bring civil suits against governments in federal court.[15] The International Criminal Tribunal for the Former Yugoslavia ("ICTY") emphasized that grave breaches of international criminal law, like torture, can never be official acts for purposes of immunity.[16] Sovereigns can no longer rely on immunity when facing criminal charges of horrific human rights abuses. The next logical space would be to pave the way for the civil suits upon which many victims rely for personal restitution. The *Jones* decision is a drastic blow to that hope.

In this paper, I will analyze the international legal context of the concept of state sovereignty to frame a discussion of the *Jones* decision. The ultimate dismissal of Jones' claims was flawed on several grounds. First, the judges conflated the definition of torture as an "official" state act with the protection of legitimate state behavior afforded by sovereign immunity, ignoring the numerous tribunals that have found torture can never be a legitimate official act for immunity purposes. Second, the Lords relied on an overly technical distinction between civil and criminal immunity to avoid determining when the *jus cogens* prohibition of torture overcomes sovereign immunity, ignoring the important purpose served by civil reparations in cases of grave human rights abuse. Third, the Lords significantly underestimated the degree of growth and movement in case law, particularly coming out of international criminal tribunals, that has begun to restrict the concept of sovereign immunity. Recent case law indicates that the protection is not as ironclad as Lord Bingham and his colleagues argued.

The second part of this paper will discuss an alternate understanding of state sovereignty more appropriate for an international legal order concerned with human rights and individual security. The importance of human rights today cannot be divorced from the evolution of natural law in centuries past, and exploring the moral and ethical demands of natural law theory will help outline why human rights deserve paramount respect. Natural law helps shape human rights as *ethical,* not purely legal, demands around which the court must shape positive law. The *Jones* case demonstrates how absolute notions of sovereign immunity can preempt adherence to these ethical demands. Sovereign immunity should not be viewed as an unbending rule, but instead should be approached with an eye toward the purpose of immunity. Immunity emerged to ensure comity between states; state sovereign immunity is thus rooted in the idea that legal rules should

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Human Rights Watch, The Pinochet Precedent: How Victims can Pursue Human Rights Criminals Abroad, http://www.hrw.org/campaigns/chile98/precedent.htm (last visited Dec. 18, 2006).

14. 28 U.S.C. § 1602 (2006).

15. *See, e.g.*, Regier v. Islamic Republic of Iran, 281 F. Supp. 2d 87 (D.D.C. 2003).

16. *Furundžija*, Case No. IT-95-17/1-T, ¶ 148.

promote international peace and equity.[17] Sovereignty is a functional, practical idea, and should be adapted to the functions and purposes of the twenty-first century legal order and the shift toward individual rights. Sovereign immunity should apply only to acts that are consistent with our global legal ideals, and should be denied for acts that directly contravene mandates of international law.

I. State Sovereignty and Human Rights

Jones brought squarely in front of the court the tension between long-standing principles of state sovereignty and the newer human rights norms that formed the basis for the petitioners' claims. State sovereignty is the right of a state to independently order its domestic affairs without the intervention of a third-party state.[18] Deriving force from the idea that states are equal members of the international legal community,[19] sovereignty was the bedrock principle of the Westphalian system in the seventeenth century. In that system, sovereignty was defined as a state's exclusive internal competence and the external equality of all states.[20] A principle contributor to the idea was Thomas Hobbes; his Leviathan—the sovereign state to which all individuals owed their loyalty—became a central part of the concept of sovereignty.[21] Hugo Grotius argued that the law of nations generated force from the mutual consent of state sovereigns, who divined the sole power to make laws for their subjects from God.[22]

The importance of state sovereignty in generating decades of peace and stability cannot be underestimated. One scholar calls sovereignty the "*grundnorm* of international law"[23] while another claims that today's international system is founded on a "reverence of sovereignty."[24] On the basis of state sovereignty, states promised not to intervene in the business of other states so long as sister states pledged to do the same.[25] As Ernest Bankas explains, "But one question that must be grappled with is whether an equal can exercise dominion over another equal. Certainly, no! A sover-

17. Ernest K. Bankas, The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts 41 (2005).

18. *Id.* at 34.

19. Oppenheim's International Law 339 (Sir Robert Jennings ed., 1992).

20. Hazel Fox, The Law of State Immunity 24 (2002).

21. Mark W. Janis, An Introduction to International Law 163 (2003).

22. *Id.* at 166–67. Grotius also put forth a secular notion of natural rights; he felt natural law could not even be changed by God. "Human rights from this secularized perspective would be considered as nonarbitary, natural, self-evident principles based on the insight of all natural beings." Alan S. Rosenbaum, *Introduction: The Editor's Perspective*, *in* The Philosophy of Human Rights: International Perspectives 3, 12 (Alan S. Rosenbaum ed., 1980).

23. William J. Aceves, *Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation,* 25 Hastings Int'l & Comp. L. Rev. 261, 261 (2002).

24. Jackson Nyamuya Maogoto, State Sovereignty and International Criminal Law: Versailles to Rome 1 (2003).

25. *Id.* at 30.

eign state, given its attributes, has jurisdiction over every individual living under its protection and over all acts that take place within its territorial boundaries."[26]

Sovereign states were thus immune from suit in the courts of other states. On a practical level, sovereign immunity recognizes that a national court has no power to enforce a verdict against a foreign state, rendering its judgments null and void.[27] More theoretically, sovereign immunity maintains the independence of states to administer internal policies without outside interference. Sovereign immunity is deemed necessary to maintain comity between states and ensure that each state has the independence to direct its own domestic policies.[28]

Initially, sovereign immunity was an absolute bar to proceedings against a foreign state.[29] When a state asserted immunity before a court, the court lacked jurisdiction to proceed.[30] Sovereign immunity rested on the act of state doctrine: a national court may not adjudicate an act of a foreign government within the foreign state's own territory.[31] Over time, however, commercial and trade links penetrated the isolationist walls of state borders, and citizens of one state began to bear the consequences of actions by a second state.[32] National courts thus began making exceptions in trade disputes by distinguishing between the public powers of the state and the state's role as a private, commercial entity.[33] As a result, most states now embrace a "restrictive doctrine of immunity" that upholds immunity from suit only according to the former, official category of state behavior.[34] State behavior is divided into *acta jure imperii,* where immunity is accorded to official and sovereign activities, and *acta jure gestionis,* when states are treated as private entities with no immunity for commercial transactions.[35]

State sovereignty and sovereign immunity fall into the category of customary international law—"the general and consistent practices of states that they follow from a sense of legal obligation"[36] which, combined with treaties, forms the main source of international law.[37] State practice and

26. Bankas, *supra* note 17, at 34.

27. Fox, *supra* note 20, at 29.

28. Bankas, *supra* note 17, at 255; *see also* Controller and Auditor-General v. Sir Ronald Davison, [1996] 2 NZLR 278 (C.A.). Harold Koh, in his detailed exploration of transnational litigation in U.S. courts, explained that the three main justifications for sovereign immunity in American courts were comity, separation of powers, and judicial incompetence. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2347, 2356 (1991).

29. Bankas, *supra* note 17, at 21.

30. Fox, *supra* note 20, at 18.

31. Fiona McKay, *Civil Reparation in National Courts for Victims of Human Rights Abuse*, *in* Justice for Crimes Against Humanity 283, 299 (Mark Lattimer and Philippe Sands eds., 2003).

32. Bankas, *supra* note 17, at 36.

33. Fox, *supra* note 20, at 22.

34. *Id.* at 2.

35. David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 Am. J. Int'l. L. 194, 194 (2005).

36. Jack Goldsmith & Eric A. Posner, The Limits of International Law 23 (2005).

37. Janis, *supra* note 21, at 43.

statements of international organizations largely reflect the content of customary law.[38] A principle that is determined to be customary law becomes "binding on all [s]tates, with the exception of persistent objectors."[39] Excluding several states (including the United Kingdom) with statutes outlining immunity, states will generally accord other states immunity out of the belief that this is an unwritten but obligatory international rule.[40]

The fundamental basis for the immunity doctrine—that a state alone possesses the power to organize its internal affairs—gives the state the discretion to treat its citizens as it wishes. Herein lies the tension between a world of sovereign states and a world striving for the universal recognition of human rights norms: the existence of human rights norms requires a state to treat its citizens with a basic level of human dignity.[41] As Louis Henkin explains, "Human rights are universal: they belong to every human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system, or stage of societal development."[42] As such, the demands of human rights conventions and law reach inside state borders to dictate how a government must interact with its citizens. Michael Ignatieff aptly calls human rights "a language of moral intervention"[43] for this very reason.

In the context of the sweeping language of human rights, certain human rights principles are recognized as *jus cogens* peremptory norms of international law. *Jus cogens* norms are fundamental tenets of international law considered accepted by and binding on all states, from which no derogation is permitted.[44] Customary rules allow objectors to abstain from following the rule; *jus cogens* rules require objectors' obedience.[45] *Jus cogens* norms restrain state behavior[46] and only the emergence of another norm possessing the same character can modify them.[47] War crimes, crimes against humanity,

38. *Id.* at 48–51.

39. Human Rights Committee, International Law Association (British Branch), *Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad*, 2 Eur. Hum. Rts. L. Rev. 129, 130 (2001).

40. Oppenheim's International Law, *supra* note 19, at 342.

41. Alison Brysk, *Introduction: Transnational Threats and Opportunities*, *in* Globalization and Human Rights 1, 3 (Alison Brysk ed., 2002). Koh argues that "Tokyo and Nuremberg pierced the veil of state sovereignty and dispelled the myth that international law is for states only, re-declaring that individuals are subjects, not just objects, of international law." Koh, *supra* note 28, at 2358–59. The origins of this ideal, from a moral and ethical perspective, will be explored in section III.

42. Louis Henkin, *The Age of Rights*, *in* International Human Rights and Humanitarian Law, Treaties, Cases and Analysis 941, 941 (Francisco Forest Martin et al. eds., 2006).

43. Michael Ignatieff, Human Rights as Politics and Idolatry 19 (2001).

44. The Vienna Convention on the Law of Treaties defines a *jus cogens* or peremptory norm of international law as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 53, May 31, 1969, 1155 U.N.T.S. 331.

45. Human Rights Committee, *supra* note 39, at 130.

46. Pamela J. Stephens, *A Categorical Approach to Human Rights Claims:* Jus Cogens *as a Limitation on Enforcement?,* 22 Wis. Int'l L. J. 245, 265 (2004).

47. Vienna Convention on the Law of Treaties, *supra* note 44, art. 64.

and prohibitions on piracy, genocide, and slavery are all considered *jus cogens* norms of peremptory international law.[48] However, "there is very little agreement as to which other norms fall within the category of *jus cogens* norms," or how a norm reaches this level.[49]

Though some debate still exists, jurists and academics generally agree that the prohibition against torture has reached the status of a *jus cogens* norm.[50] The Ninth Circuit wrote, "[W]e conclude that the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens.*"[51] The House of Lords recognized the *jus cogens* nature of the torture prohibition in *Pinochet.*[52] The ICTY held that "[b]ecause of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules."[53]

Cases like *Jones* present the clash of the customary rule of sovereign immunity with the mandate that countries may never deviate from certain international human rights principles. With the birth of human rights as a cognizable movement, "the international community has recognized the existence of other norms that now compete with the sovereignty norm for primacy."[54] As a result, traditional concepts of sovereign immunity are under attack as never before. In the 1999 United Nations ("U.N.") general debate, held almost ten years before *Jones*, then-Secretary-General Kofi Annan heralded that "[s]tate sovereignty [is] being redefined by the forces of globalization and internal cooperation."[55] Bankas later wrote: "the conceptualisation of state equality is losing its irresistible force and the concept of

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48. Oppenheim's International Law, *supra* note 19, at 8.

49. Stephens, *supra* note 46, at 252.

50. Siderman De Blake v. Argentina, 965 F.2d 699, 717 (9th Cir. 1991). *But see* Stephens, *supra* note 46, at 249. Stephens explains that "[t]here is little agreement about the source of *jus cogens* norms." Much has been written about the utility of the *jus cogens* classification, and the difficulty of determining whether prohibitions like that on torture rise to the level of *jus cogens.* Several notable jurists, including Richard Posner, disagree that the prohibition of torture can never be derogated from: "If torture is the only means of obtaining the information necessary to prevent the detonation of a nuclear bomb in Times Square, torture should be used—and will be used—to obtain the information." Richard Posner, *The Best Offense*, The New Republic, Sept. 2, 2002, at 30.

Alan Dershowitz similarly posits that in the ticking time bomb scenario, if a terrorist knows the location of a bomb about to go off, the argument for torture is at its strongest, and may even be mandated. Sanford Levinson, *"Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11*, 81 Tex. L. Rev. 2013, 2024 (2003). Though these are important questions, I am not going to analyze them in this paper and instead will presume the validity of commonly understood *jus cogens* violations.

51. *Siderman De Blake,* 965 F.2d at 717.

52. R v. Bow Street Magistrate and others, ex parte Pinochet Ugarte [2000] 1 A.C. 147 (H.L. 1999) (appeal taken from Q.B.).

53. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 153 (Dec. 10, 1998).

54. Aceves, *supra* note 23, at 262.

55. International Human Rights in Context 584 (Henry J. Steiner & Philip Alston eds., 2000).

sovereignty is not as compelling as before."[56] Aceves reports that the "sovereignty norm . . . sits on a precarious perch."[57] For human rights norms to have primacy, a state must be held accountable for their violations, and doing so may require the intervention of a national court:

> The argument increasingly being advanced before National Judicial Authorities is that although restrictive immunity is still evolving and has not yet attained the character of customary international law, immunity should be denied in the case of death or personal injury resulting from blatant disrespect for human rights norms which have attained the character or statutes of *Jus Cogens* . . . e.g. the prohibition of torture, crimes against humanity and genocide.[58]

Human rights activists have successfully eroded the corners of immunity for international crimes of the gravest magnitude, such as torture, genocide, or crimes against humanity.[59]

Immunity still remains largely unimpeded for states brought before foreign courts in a *civil* capacity,[60] and this is where *Jones* arrives. The case pushes at the boundaries of immunity, asking not whether states receive immunity for international criminal claims, but whether immunity may continue to bar civil claims by the victims of those international crimes. Sovereign immunity that prevents a victim from seeking any restitution seems wholly at odds with universal human rights, and the petitioners in *Jones* asked the court to revisit the proper balance between the norms of immunity and human rights.

II. The House of Lord's Opinion in *Jones v. Saudi Arabia*

A. *The Lordship's Holding*

In *Jones*, the House of Lords unanimously ruled against revoking sovereign immunity. Lords Bingham and Hoffman wrote separate but similar opinions for the case, with the remaining Lordships concurring in these two judgments.

Lord Bingham's holding rested on several grounds. First, he rejected the petitioner's contention that the international prohibition of crimes like torture is of a higher status, and thus trumps, sovereign immunity.[61] Lord Bingham instead held that sovereign immunity operates as a procedural

56. Bankas, *supra* note 17, at 255.
57. Aceves, *supra* note 23, at 262.
58. Bankas, *supra* note 17, at 252.
59. Geoffrey Robertson, *Ending Impunity: How International Criminal Law Can Put Tyrants on Trial,* 38 Cornell Int'l L.J. 649, 667 (2005).
60. McKay, *supra* note 31, at 284.
61. Jones v. Saudi Arabia, [2006] UKHL 26, ¶ 27 (appeal taken from E.W.C.A).

rule regardless of the substantive claim before the court.[62] Next, he noted that nowhere does the Convention Against Torture provide for universal *civil* jurisdiction, nor does the U.N. Immunity Convention of 2004 provide exceptions to immunity for civil claims based on acts of torture.[63] Finally, and most importantly, Lord Bingham said he could identify "no evidence that states have recognized or given effect to international law" requiring universal jurisdiction over claims from breaches of peremptory norms.[64] As a result, he declined to exercise jurisdiction.

Lord Hoffman surveyed the decisions of many national courts before concluding that peer tribunals did not support the assertion of jurisdiction for *Jones'* claim.[65] He found that the immunity of the state extended to its agents—in this case, the individual police officials charged with torturing Jones and his co-petitioners.[66] Finally, Lord Hoffman's opinion argued that the proper place for the petitioners' claim was an international body or tribunal, rendering inappropriate the exercise of jurisdiction by national courts.[67]

A major stumbling block in the petitioners' case, and similar civil claims to come, is the United Kingdom's 1978 Sovereign Immunity Act, which provides states with immunity from suit in U.K. courts subject to a series of exceptions.[68] The Act further extends the state's immunity to anything that might affect the property, rights, or interests of the state, as well as any representatives of the state.[69] Both Lords Bingham and Hoffman found the existence of the Sovereign Immunities Act extremely persuasive in resolving the case. The petitioners conceded, as Lord Bingham noted, that the case did not qualify for any of the exceptions. Instead, the petitioners argued that the court must understand the Act in the context of the European Convention on Human Rights ("ECHR") Article 6,[70] which guarantees parties access to court, and Section 3 of the United Kingdom's Human Rights Act, which mandates that U.K. legislation be read to give full effect to ECHR rights.[71] The petitioners alleged that immunity was contrary to a peremptory norm of international law and therefore inapplicable to the case.[72] Lord Bingham found the Sovereign Immunity Act to be inviolable

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62. *Id.* ¶ 33.
63. *Id.* ¶¶ 25–26.
64. *Id.* ¶ 27.
65. *Id.* ¶ 48.
66. *Id.* ¶ 52.
67. *Id.* ¶ 74.
68. State Immunity Act of 1979, Ch. 33 (Eng.).
69. *Id.*
70. ECHR Article 6 states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Sept. 21, 1970, 213 U.N.T.S. 222.
71. Human Rights Act of 1998, Ch. 42 (Eng.).
72. Jones v. Saudi Arabia, [2006] UKHL 26, ¶ 17 (appeal taken from E.W.C.A).

and further noted that the U.N. Immunity Convention of 2004 similarly provided no exception for civil claims based on torture.[73]

B. Flaws in the Lordships' Opinions

Several flaws mark the Lordships' opinions. The opinions ignored recent decisions stating that torture can never be considered an official act for immunity purposes. The House of Lords overplayed the distinction between civil and criminal cases, refusing to import key principles from criminal decisions into the civil claim before them. The Lordships also overlooked recent international case law that allows civil claims for human rights abuses to transcend immunity.

1. *Torture is No Longer a Permissible Act of State*

The Lordships grounded their decision in the fact that torturous acts are only defined as torture when committed by a public official or an individual acting in an official capacity, rendering torture an act of state.[74] The petitioners argued that torture, as a violation of *jus cogens* peremptory norms of international law, can never be a permissible official act that generates state immunity.[75] Therefore, petitioners claimed, neither the Sovereign Immunities Act nor the U.N. Sovereign Immunities Convention should apply. The Lordships dismissed this argument with little discussion. Lord Bingham wrote, "It is, I think, difficult to accept that torture cannot be a governmental or official act, since under article 1 of the Torture Convention torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting in an official capacity."[76] Because torture is by definition committed by an official, by Bingham's reasoning, these heinous acts unquestionably rest under the umbrella of sovereign immunity.

This explanation suffers from two fatal shortcomings. One, the Lordships confused the use of "official" for purposes of defining torture with the understanding of official behavior that generates sovereign immunity. Increasingly, courts are defining official behavior for the purposes of immunity as only those acts that are legally sanctioned.[77] By this standard, only *permissi-*

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73. *Id.* ¶¶ 7–10, 26.

74. The Convention Against Torture defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a *public official or other person acting in an official capacity*." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, *opened for signature* Dec. 10, 1984, 108 Stat.382, 1465 U.N.T.S. 85.

75. *Jones,* [2006] UKHL 26, ¶ 14.

76. *Id.* ¶ 19.

77. Controller and Auditor-General v. Sir Ronald Davison, [1996] 2 NZLR 278 (C.A.).

ble state action is immune from suit in a foreign court. The Lordships failed to recognize this qualification for state immunity, and in doing so, committed a second significant error: overlooking the array of cases holding that torture may never be an official act for purposes of immunity.

As far back as the Nuremberg trials, international courts have operated under the assumption that certain behavior is not a legitimate act of state. The Charter of the International Military Tribunal for Nuremberg states that the official position of defendants "shall not be considered as freeing them from responsibility or mitigating punishment," expressly negating any sovereign immunity for individuals engaged in war crimes or crimes against humanity.[78] More recently, the charters for the ICTY and the International Criminal Tribunal for Rwanda ("ICTR") have declared that states may not torture individuals as part of their official policies and acts.[79] In *Prosecutor v. Furundzija*, the ICTY held that the "official" nature or policy of torture did not immunize torturers from punishment:

> What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle.[80]

A host of cases under the U.S. Alien Tort Claims Act have similarly invalidated the notion that torture can ever be a permissible official act. In the landmark case of *Filartiga v. Pena-Irala*, for example, the Second Circuit expressed "doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state."[81] Numerous other U.S. courts have reaffirmed the Second Circuit's understanding.[82]

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78. Charter of the International Military Tribunal art. 7, Aug. 8, 1945, 82 U.N.T.S. 279.

79. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, May 25, 1993, U.N. Doc. S/RES/827; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, Nov. 8, 1994, U.N. Doc. S/RES/955.

80. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 155 (Dec. 10, 1998).

81. Filartiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980). Koh argued that the Second Circuit's decision "reaffirmed the Nuremberg ideal: that torture (like genocide) is never a legitimate instrument of state power." Koh, *supra* note 28, at 2367.

82. *See, e.g.*, Hilao v. Estate of Fernando Marcos, 25 F.3d 1467 (9th Cir. 1994); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995); Cabiri v. Assassi-Gyimah, 921 F. Supp. 1189 (S.D.N.Y. 1996); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C.

A consensus is emerging: egregious violations of *jus cogens* peremptory norms cannot be official acts of states. The House of Lords itself has already found this to be the case. Noting the "bizarre results" that would ensue if torture were considered a legitimate official act, Lord Browne-Wilkinson queried in *Pinochet*, "How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?"[83] He ultimately found torture to be outside the official acts generating sovereign immunity.

The general rejection of torture as an official act demonstrates two things. One, it reflects the now nearly universal acceptance of the *jus cogens* character of the torture prohibition.[84] Two, and perhaps more importantly, holding that torture is not a legitimate act of state indicates the link between state immunity and an understanding of immunity tailored to its central purpose. Rather than giving blanket immunity to all actions that could arguably trace back to official sources, some courts now implicitly analyze whether an act is permissible act and, in the case of torture, deny immunity to actions that do not further the purpose of immunity: a peaceful, working international legal order.[85]

The Lordships took a step back from *Pinochet* and failed to do this in the *Jones* case, ignoring international precedent and coming to a result that undermines present efforts to rein in immunity. In rather circuitous reasoning, the Lordships dismissed the idea that torture could not be an official act purely based on the Torture Convention's definition of the act.[86] By that logic, then, when could the act of torture, or for that matter genocide, ever generate liability? The definition of torture should not absolve the perpetrators of liability and punishment as the Lordships did in *Jones.* The Lordships confused the use of the word "official" for the purposes of defining torture with the act of state doctrine, and failed to look at state immunity through a more purposive lens, inquiring into the nature of the activity and whether that activity serves the general purpose of immunity.

2. *The Independent Importance of Civil Liability*

The outcome of the *Jones* case illustrates the widening gap between criminal liability for torturers and civil reparations for their victims. The petitioners relied on the growing body of case law suspending immunity for

Cir. 1984). *See also* Letelier v. Chile, 502 F. Supp. 259 (D.D.C. 1980), discussed *infra* note 107 and accompanying text.

83. R v. Bow Street Magistrate and others, ex parte Pinochet Ugarte [2000] 1 A.C. 147 (H.L. 1999) (appeal taken from Q.B.).

84. Though many agree that the "compulsory nature of the prohibitions on unlawful killing and torture by the State is clear—these are non-derogable duties," *jus cogens* "is still in some respects a controversial topic in international law." Human Rights Committee, *supra* note 39, at 137. *See also supra* note 50 and accompanying text.

85. *See, e.g.*, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), 2002 I.C.J. 121 (Feb. 14) [hereinafter *Congo v. Belgium*].

86. Jones v. Saudi Arabia, [2006] UKHL 26, ¶ 19 (appeal taken from E.W.C.A).

criminal prosecutions of torturers, but the Lordships dismissed this reasoning as inapplicable to the petitioners' present civil claims.[87] For example, a key component of the petitioners' argument was the House of Lords' decision in the *Pinochet* case in 2000.[88] After Pinochet sought medical treatment in the United Kingdom in 1998, Spain issued an arrest warrant based on the myriad torture allegations leveled against the Senator. The U.K. Commissioner of Police accordingly issued the warrant, which Pinochet promptly moved to quash as contrary to the head of state immunity he enjoyed as Chile's former leader. His challenge ultimately reached the House of Lords.[89]

The House of Lords held that the torture allegations were outside the head of state immunity that Pinochet argued precluded extradition. Lord Brown-Wilkinson focused his inquiry on the narrow question of "whether the alleged organisation of state torture by Senator Pinochet (if proved) would constitute an act committed by Senator Pinochet as part of his official functions as head of state."[90] He answered no, citing the enormous legal loophole such a holding would create:

> [A]n essential feature of the international crime of torture is that it must be committed 'by or with the acquiescence of a public official or other person acting in an official capacity.' As a result, all defendants in torture cases will be state officials. Yet, if the former head of state has immunity, the man most responsible will escape liability while his inferiors (the chiefs of police, junior army officers) who carried out his orders will be liable. I find it impossible to accept that this was the intention.[91]

The *Pinochet* decision created an express exception to head of state immunity for criminal prosecutions of torture.

In *Jones*, the petitioners requested that the House of Lords again declare that torture could not be an official act for the purposes of immunity, this time in the context of a *civil* case.[92] The House of Lords squarely rejected this proposition, citing the difference between criminal and civil proceedings as rendering *Pinochet* inapplicable.[93] Lord Bingham wrote, "the distinction between criminal proceedings (which were the subject of universal jurisdiction under the Torture Convention) and civil proceedings (which

87. *Id.*

88. *Pinochet*, 1 A.C. 147.

89. *Id.* The House of Lords heard arguments in the Pinochet case three times. Its first decision was challenged, and consequently set aside, due to one of the Lord's close ties to Amnesty International, which intervened on the plaintiff's behalf.

90. *Id.*

91. *Id.*

92. Jones v. Saudi Arabia, [2006] UKHL 26, ¶ 19 (appeal taken from E.W.C.A).

93. *Id.* ¶ 14.

were not) was fundamental to that decision. This is not a distinction we could wish away."[94]

And with this, the House of Lords dismissed the *Pinochet* decision that had been heralded as providing a new chapter in seeking justice for torture survivors.[95] While the distinctions between civil and criminal proceedings should certainly not be ignored, they should not necessarily erase the fundamental message of *Pinochet*: some acts are not part of the official behavior that immunity is intended to protect. The House of Lords provided little justification for granting such importance to the civil-criminal distinction, and overlooked several reasons that they should extrapolate principles from the Pinochet decision.

That criminal sanctions exist for a particular wrong does not lift the need for accompanying civil liability. The two forms of liability coexist for separate, but complementary, purposes. Criminal liability provides the state—or, in this case, international legal order—with a mechanism to punish those who violate the principles society views as essential to maintaining a safe, cohesive community. The proper unit of analysis is the community, and the accused has breached his or her obligation to the state. Civil liability shifts the inquiry to the individual sufferer of the harm; here, the legal system tries to make a victim whole through the recovery of damages. The violator this time has breached his or her obligation to the individual victim, and civil sanctions concern the victim's well-being.

The two forms of liability work together and reinforce each other frequently. Both criminal and civil remedies "play an important declarative function in society."[96] Ideally, the holding of a civil or criminal case can even shape emerging international norms.[97] It is not unusual for a survivor or victim's family to seek civil damages after the state has prosecuted a criminal case against a defendant. Together, civil and criminal liability provide a holistic solution to a particular harm. When the criminal justice system is unable to provide a remedy for a crime, civil proceedings at least offer hope that the assailant will, quite literally, have to pay for his crime. This is precisely what Jones and his co-petitioners asked for in seeking damages from the Kingdom and the individual assailants.

International law has long recognized the right to an effective remedy for violations of human rights, as the U.N. Commission on Human Rights concluded several years ago.[98] The U.N. Basic Principles and Guidelines on the Right to Remedy and Reparations affirms that "adequate, effective and

94. *Id.* ¶ 32.

95. *See, e.g.*, Human Rights Watch, *supra* note 13.

96. Donald Francis Donavan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 Am. J. Int'l L. 142, 154 (2006).

97. Koh, *supra* note 28, at 2398.

98. McKay, *supra* note 31, at 285.

prompt *reparation* is intended to promote justice."[99] The Principles evince a concern for civil as well as criminal protection. The state, not the victim, controls criminal trials; a civil case channeled by the accuser provides a greater opportunity for empowerment and restoration.[100] Money damages can compensate the victim for emotional distress, lost wages, and bodily harm, and can fund the therapy necessary for healing.[101]

That the two forms of liability work closely together indicates that principles guiding criminal liability should not be so easily dismissed when it comes to civil cases. The key tenet of the *Pinochet* case is that some acts cannot be of the "official" nature necessary for state immunity. There is nothing inherently "criminal" about that principle. As a minority of the European Court of Human Rights recently explained:

> the distinction . . . between civil and criminal proceedings, concerning the effect of the rule of the prohibition of torture, is not consonant with the very essence of the operation of a *jus cogens* rule. It is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm . . . .[102]

The court provided little explanation as to why the distinction between criminal and civil liability, for the purposes of the *Pinochet* holding, is so sacrosanct. The Lords' dismissal of *Pinochet* as criminal, and therefore entirely inapplicable, seems more likely to stem from a reluctance to deal with the consequences of what might happen when immunity is lifted, as is explored later in this paper.

3. *Current Case Law and the Lordships' Decision*

Though a universal consensus has by no measure emerged, the strict sovereign immunity that the Lordships envisioned is hardly ironclad. Courts and commentators are recognizing that judges may, and in some cases urging them to, reject immunity in civil cases for acts contrary to international law. The United States has taken a leadership role in this realm, amending the Foreign Sovereign Immunities Act to exempt immunity in cases of torture when the act is committed by an official of a foreign state.[103] This

99. 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 ¶ (2)(C), U.N. Doc. 60/147 (Dec. 16, 2005) (emphasis added).

100. Van Schaack, *supra* note 13, at 156–57.

101. *Id.*

102. Al-Adsani v. the United Kingdom, [2001] Eur. Cr. H.R. 761, ¶¶ 1, 4 (2001) (Rozakis and Caflisch. J., dissenting).

103. Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7) (1997). The act creates an exception for immunity in cases where "money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act if such act or provision of material

provision, combined with the Alien Tort Claims Act[104] and the Torture Victim Protection Act,[105] has spawned dozens of civil claims for violations of international human rights.[106]

As a result, the United States has a breadth of case law focusing on the universal nature of the torture prohibition, a full exploration of which would consume the totality of this paper. In *Letelier v. Republic of Chile*, the D.C. District Court allowed families of assassinated Chilean government leaders to sue the Chilean government in the United States, holding that the suit was not barred. The court held that sovereign immunity was revoked because the act was "contrary to the precepts of humanity as recognized in both national and international law."[107] The Ninth Circuit found Argentina to have implicitly waived sovereign immunity by violating international law in torturing its citizens.[108]

Overseas, in *Ferrini v. Federal Republic of Germany*, the Italian Court of Cassation awarded damages in a tort action brought by an Italian citizen deported and enslaved during World War II. The court determined that "[t]he argument that no express human rights exception to state immunity exists in international law is flawed because respect for the inalienable rights of human beings has attained the status of a fundamental principle of the international legal order."[109] A persuasive minority of the European Court of Human Rights in *Al-Adsani v. United Kingdom* similarly argued that the torture prohibition "overrides any rule which does not have the same status," and that "the jurisdictional bar is lifted by the very interaction of the international rules involved."[110]

Finally, the ICTY viewed the torture prohibition as "particularly stringent and sweeping," requiring states to "put in place all those measures that may pre-empt the perpetration of torture."[111] The tribunal also emphasized that the obligation extends beyond state borders and creates a responsibility to non-citizens as well as to citizens.[112] Even a cursory overview of case law demonstrates that the ICTY, U.S. courts, Italian courts, members of the ECHR, and members of the House of Lords have all rescinded immunity for grave international crimes.

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support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency."

104. 28 U.S.C. § 1350 (2000).

105. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

106. Stephens, *supra* note 46, at 245. In *Argentine Republic v. Amerada Hess Shipping Corp.*, the U.S. Supreme Court held that a plaintiff could sue a sovereign, foreign state in U.S. court, although the "sole basis for obtaining jurisdiction" must be the Foreign Sovereign Immunities Act, not the Alien Tort Statute. 488 U.S. 428, 434 (1989).

107. Letelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980).

108. Siderman de Blake v. Argentina, 965 F.2d 699 (9th Cir. 1992).

109. Bianchi, *supra* note 12, at 244.

110. *Al-Adsani*, 2001-XI Eur. Ct. H.R. 85, 111–13 (Rozakis and Caflisch, J., dissenting).

111. *Furundžija*, Case No. IT-95-17/1-T, ¶ 148.

112. *Id.* ¶¶ 151–52.

The Lordships, by contrast, relied on the majority's reasoning in *Al-Adsani,* which was a closely decided case, and the International Court of Justice's decision in *Congo v. Belgium* to buttress their finding of immunity. In *Al-Adsani*, the European Court held that the United Kingdom was not obligated to waive immunity when a Kuwaiti citizen brought a torture suit against the Kuwaiti government.[113] Rather than holding that immunity could never be revoked for grave human rights abuses, the body only held that there was no firm acceptance that a victim *must* be entitled to pursue "civil claims for damages for alleged torture committed outside the forum State."[114] Nowhere, however, did the European Court bar a state from pushing past immunity, as the Lordships suggested.

The ICJ case also merits a second look, particularly since the Lordships rejected the applicability of criminal cases in most other circumstances, but used this criminal case to support its argument. Here, the ICJ invalidated a Belgian Arrest warrant for the Congolese Minister of Foreign Affairs because to arrest him would interfere with the effective functioning of his office.[115] Noting that a foreign minister must frequently travel overseas without inhibition, the ICJ

> conclude[d] that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity. . . protect[s] the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.[116]

The ICJ rested its decision not on the universality of state immunity, but on the benefits to international diplomacy and stability that comes from affording foreign ministers this immunity. The court examined immunity for what it could contribute to the international legal order rather than simply stopping the inquiry once Congo asserted that such immunity existed. These cases do not, when taken in sum, support a blanket protection of sovereign immunity, but demonstrate that it is tailored to and analyzed for individual situations, which the Lordships failed to do.

C. *Possible Implications of the Lordships' Decision*

The House of Lords decision in *Jones* contravened applicable case law and international understandings of torture. The holding also expressly undermined a prior decision by the same body that found torture to be an act of state for which immunity could never have been granted. Given this, rea-

113. *Al-Adsani*, 2001-XI Eur. Ct. H.R. at 103.
114. *Id.*
115. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 21 (Feb. 14).
116. *Id.* at 22.

sons outside the courtroom likely influenced the Lordships as much, if not more, as the legal briefs submitted.

Allowing *Jones* to proceed for allegations of extraterritorial torture might prompt thousands of similarly situated potential plaintiffs to theoretically flood the U.K. legal system, transforming England into the clearinghouse for civil claims that plaintiffs cannot adjudicate elsewhere. Second, the difficulty of enforcing findings against Saudi Arabia carries significant costs, both logistically and politically.[117] Enforcement would require great expenditures of British resources to collect money from Saudi Arabia. Third, a key component of the concept of state sovereignty is reciprocity: one state leaves another state alone in exchange for peace in the administration of domestic affairs.[118] If the United Kingdom asserted jurisdiction over Saudi Arabian interests, the principle of reciprocity would allow Saudi Arabia to do the same.

On a symbolic level, the House of Lords sent a loud and clear message that the United Kingdom owes no obligation to survivors of torture abroad. The Lords ignored the advice of Amartya Sen: "A foreigner does not need the permission of a repressive government to try and help a person whose liberties are being violated."[119] The Lordships hid behind the concept of sovereign immunity to avoid having to determine what obligations the United Kingdom had to Jones and the other survivors of torture.

Answering the above question requires deep ethical and moral reflection. Allowing torture survivors to turn to the United Kingdom[120] for suits against perpetrators outside British borders implies equal access to justice. Waiving sovereign immunity would demonstrate that survivors of atrocities by Saudi Arabia have just as much a right to restitution as do survivors of atrocities by the United States. The United Kingdom should be compelled to waive immunity and allow suit by the sheer fact that it can; as Peter Singer outlined in his famous 1972 essay on the Bangladesh famine, "if it is in our power to prevent something bad from happening, without sacrificing anything comparable" ourselves, it is our moral obligation to take that action.[121] Thus if suing the government of Saudi Arabia helps prevent another brutal session of fingernail pulling, waterboarding, or beating, the United Kingdom has a moral obligation to allow the suit. The second part of this paper, analyzing a revised version of sovereign immu-

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117. Fox, *supra* note 20, at 29.

118. Bankas, *supra* note 17, at 42.

119. Amartya Sen, *Human Rights and Asian Values*, The New Republic, July 14 & 21, 1997, at 33, 39, *available at* http://www.mtholyoke.edu/acad/intrel/sen.htm.

120. The United Kingdom had, historically, been seen as a comparative leader in the world of human rights. With the Human Rights Act, European human rights law became enforceable in U.K. courts, sending a symbolic message. Douglass Cassel, *The Globalization of Human Rights: Consciousness, Law, and Reality*, Nw. U. J. Int'l Hum. Rts., Spring 2004, at 2, 5.

121. Peter Singer, *Famine, Affluence, and Morality*, 1 Phil. & Pub. Aff. 229, 231 (1972).

nity, attempts to carve out a human rights-centered approach to immunity, allowing survivors access to restitution.

III. The Tensions Between Natural and Positive Law

The House of Lords' decision relied almost unilaterally on a discussion of positive international law—to the extent that it exists, a proposition many challenge[122]—rather than exploring the moral or ethical undertones to the decision they faced. This part will explore the moral foundations of human rights, whether a natural rights approach would challenge the Lordships' decision-making process, and the moral obligations of countries like the United Kingdom to victims of human rights abuses.

A. *Natural Law and the Philosophy of Human Rights*

The International Bill of Rights—the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, and the International Covenant for Economic, Social and Cultural Rights—prioritizes the dignity of humankind above all else. The preamble of each document holds that the "recognition of the *inherent dignity* and of the equal and inalienable rights of *all members of the human family* is the foundation of freedom, justice and peace in the world."[123] Such bold statements embrace the idea of pre-existing rights for all human beings that, in the view of some scholars, results in an innate inviolability of humankind.[124]

The legitimacy of human rights (and, by extension, their invocation in legal systems) largely relies on the ethical or moral underpinnings of the human rights system. Different scholars all appear to have their own definitions of human rights, yet a common strand—some notion of unassailable human integrity—runs through them all. Michael Perry would describe human rights as those stemming from the idea that "because every human being has inherent dignity, no one should deny that any human being has,

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122. There is also some debate as to whether international law is properly considered as between two states or between a state and an individual; many think that individual human beings are not the subject of international law. *See, e.g.*, Lea Brilmayer, *International Law in American Courts: A Modest Proposal,* 100 Yale L.J. 2277, 2293 (1991). Skeptics of considering international norms as law point out that there is no world government with police power and enforcement mechanisms, and without a means of enforcement, "norms cannot count as 'law.'" *Id.* Lea Brilmayer responds that any seeming disjuncture between domestic and international law is misplaced; in domestic law, "[a]ssassination of one's political opponents is out of bounds, as are torture and suppression of religious freedoms. There is nothing metaphysically suspect about recognizing comparable standards under international law." *Id.* at 2298.

123. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/180 (Dec. 12, 1948) (emphasis added); International Covenant for Civil and Political Rights preamble, Dec. 16, 1966, S. Ex. E, 95-2, 999 U.N.T.S. 171 (emphasis added); International Covenant for Economic, Social and Cultural Rights preamble, Dec. 16, 1966, 993 U.N.T.S. 3 (emphasis added).

124. Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground?*, 54 Emory L.J. 97, 101–03 (2005).

or treat any human being as if she lacks, inherent dignity."[125] Amartya Sen defines human rights as "articulations of ethical demands . . . . that . . . will survive open and informed scrutiny."[126] Professor Johan D. van der Vyver suggests that human rights are only those "rights and freedoms that are considered particularly fundamental to the existence of the individual as a human being and as a citizen within the social structures of the body politic."[127] Professor Brian Tierney offers that "natural rights or human rights are rights that inhere in person by reason of their very humanity."[128] Martha Nussbaum defines rights as entitlements to capabilities.[129] These definitions are only a few of many that continue in this tone.

Yet at their core, all of these definitions are built around the idea that there is something special about being human, conferring upon every human being a certain degree of dignity that can never be surrendered forcibly.[130] Compiling, sorting, and synthesizing these definitions produces an understanding of human rights as the dignity, impenetrable without the rule of law, a person derives simply by being human. This commonality demonstrates the search for a foundation. The broader human rights movement needs a deeper justification than simply the Universal Declaration or any one of a host of human rights treaties. Though the language and world of human rights as such is often considered a product of the atrocities of the Nazi regime, the idea that humanity's dignity is sacred is nothing new.

Before the world had human rights, the world relied on the force of natural law,[131] which emerged as far back as the first century B.C.[132] and expanded into the Roman legal system's *ius naturale*: the basic law common to all humankind, regardless of citizenship, purely by membership in the

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125. *Id.* at 102.

126. Amartya Sen, *Elements of a Theory of Human Rights,* 32 Phil. & Pub. Aff. 315, 320 (2004).

127. Johan D. van der Vyver, *Morality, Human Rights, and Foundations of the Law*, 54 Emory L.J. 187, 188–89 (2005).

128. Brian Tierney, *The Idea of Natural Rights—Origins and Persistence,* 2 Nw. U. J. Int'l Hum. Rts. 2, 2 n.2 (2004). Note that Tierney's definition essentially equates natural rights with human rights, a conflation that many scholars would disagree with; not all human rights are per se natural rights. Tierney explains:

> I have used the term [sic] "natural rights" and "human rights" indifferently. "Human rights" is preferred nowadays because this usage dissociates the idea of universal rights from the particular medieval context where the idea of natural rights first emerged. But the two terms have essentially the same meaning.

Id.

129. Martha C. Nussbaum, *Capabilities and Human Rights,* 66 Fordham L. Rev. 273, 275 (1997).

130. Some argue that the inherent dignity of humans does not automatically lead to the proposition that fundamental rights attain some "absolute standard of inviolability." Morgan Cloud, *Human Rights for the Real World,* 54 Emory L.J. 151, 155 (2005). Cloud argues that even the most fundamental human rights, such as the right to life, can be violated if the rule of law is followed, and even the commitment to the rule of law can be derogated from at times, such as in an imminent terrorist attack. *Id.* at 156–57; *see also supra* text accompanying note 50.

131. The history of natural law takes up volumes, and this paper does not provide an exhaustive discussion; however, thinking about human rights from the perspective of natural law helps build a foundation for the universality of some human rights when positive law fails.

132. Lloyd L. Weinreb, Natural Law and Justice 1 (1987).

human race.[133] Natural law theories reached new heights in the middle ages, when Catholic philosophers, most notably Saint Thomas Aquinas, conceptualized a system of natural law as the result of divine will.[134] Saint Augustine held that "a law cannot be present where there is no justice"[135] and "where true justice does not exist, the law also cannot be."[136] Natural law met new interpretations because social contract theorists believed natural rights—such as those to life, liberty, and property—to be the byproduct of a natural law, the protection of which was the sole mission of government.[137] Many, if not most, of these thinkers relied on the divine will of a higher being as a basis for certain objective truths about humanity.

After a brief decline in popularity in the late nineteenth century,[138] natural law experienced resurgence in the aftermath of the horrors of the Nazi regime. In this revival, however, the rhetoric of dignity and humanity earned the title of human rights: "It is commonplace to assume that human rights are nearly synonymous with natural rights . . . . Indeed, human rights cannot be understood apart from the evolutionary history of [the] concept[ ] . . . ."[139] However, the rebirth of the natural rights ideal has, for political and pragmatic reasons, generated one stumbling block for modern-day human rights activists. If human rights cannot be divorced from natural law and natural rights, then they necessarily cannot be divorced from the religious thinkers who laid their foundations. The proponents of human rights, however, seek to put forth a universal truth that does not divide across racial, ethnic, or religious lines; this is the modern human rights project. Aligning human rights with natural law prompts the question of whether human rights, too, rest on the divine will. Religious alliances, however, may not be politically savvy; convincing the House of Lords to accept a case because of a religious-based natural right requires a collapse of church and state that putting forth a secular natural right does not. Similarly, when trying to promote human rights across cultural and ethnic boundaries, avoiding a conflict with a state's dominant religion may be essential.

Consequently, human rights law needs a natural law that does not rely on religion. The intellectual ancestors of human rights, as noted above, may be faith-based. However, the human rights movement can choose the secular parts of natural law just as philosophers have chosen to embrace certain

133. ROSENBAUM, *supra* note 22, at 11.

134. *Id.*

135. Van der Vyver, supra note 127, at 192, *quoting* Aurelius Augustinus, DE LIBERO ARBITRIO 395 (William M. Green ed. Vindobonae (1956)) ("*Nam mihi lex esse non videtur, quae iusta non fuerit.*").

136. *Id.* at 192, *quoting* Aurelius Augustinus, DE CIVITATE DEI: LIBRI XI-XXII 688 ¶ 1 (Bernardus Dornbart and Alphonsus Kalb eds., Tunholti (1955)) ("*[U]bi ergo iustitia vera non est, nec ius potest esse.*").

137. ROSENBAUM, *supra* note 22, at 12.

138. Rosenbaum attributes its momentary "eclipse" to a variety of factors, including European nationalism and imperialism, attacks on natural law's abstract and formal character, and rejections of the liberal theory of the state. *Id.* at 21.

139. *Id.* at 4.

parts of Greek philosophy while rejecting the culture's reliance on slavery.[140] As Robert George, one of today's leading natural rights theorists, explains, "The natural law is, thus, a 'higher' law, albeit a law that is in principle accessible to human reason and not dependent on (though entirely compatible with and, indeed, illuminated by) divine revelation."[141] George's assessment insightfully describes the tension many human rights theorists face: although belief in a higher power is not *necessary* for a belief in natural law, belief in the divine makes it infinitely easier to provide a logical source for such rights. Michael Perry, for example, denies that natural law can exist apart from a belief in a god and is skeptical of a secular human rights system:

> The morality of human rights is, for many secular thinkers, problematic, because it is difficult—perhaps to the point of impossible—to align with one of their reigning intellectual convictions, what Bernard Williams called "Nietzsche's thought": "There is not only no God, but no metaphysical order of any kind . . . ."[142]

Perry's rather somber conclusion has negative implications for today's human rights movement, a movement frequently charged with Western imperialism and cultural domination.[143] Basing human rights on religion could be dangerous for some parts of the world (such as Saudi Arabia, the subject of this paper). The danger to a non-secular natural law is the charge of relativism.[144] It is certainly true that religious moralities ensure some degree of consensus; a shared mode of thinking can provide a baseline of natural "rights" to which everyone who subscribes to that particular religion can agree.[145] However, religious baselines can generate as much exclusion as they can build consensus. Regardless of the power of divine will to

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140. Importantly, many of the strongest defenders of human rights share a cultural and religious tradition. It is certainly no accident that Western and, more recently, Latin American countries have been able to rely on shared religious tradition to voice ethical and moral obligations. The power of liberation theology is a quintessential example of the importance of faith in shaping human rights and development movements. That there is a shared religious background, however, does not mean that the fundamental ideals cannot be packaged *without* a religious basis for countries and policymakers that may not share these same religious beliefs.

141. Robert P. George, *Natural Law, The Constitution, and The Theory and Practice of Judicial Review,* 69 Fordham L. Rev. 2269, 2269 (2001).

142. Perry, *supra* note 124, at 150, *quoting* Bernard Williams, *Republican and Galilean*, N.Y. Rev. Books 45, 48 (1990) (reviewing Charles Taylor, Sources of the Self: The Making of Modern Identity (1989)). Earlier in the essay he admits, "I doubt that a natural law morality of human rights can stand without theological support." *Id.* at 133.

143. Fernando R. Tesón, *International Human Rights and Cultural Relativism, in* The Philosophy of Human Rights 379, 390 (Patrick Hayden ed., 2001).

144. *Id.* at 380 ("A central tenet of relativism is that no transboundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable.").

145. *But see* Cloud, *supra* note 130, at 160. Cloud points out that many of the seemingly religious ideals of human rights are not wholly rooted in religious doctrine or scripture:

> [A] laundry list of allegedly inadequate secular equivalents to religious claims about the sacredness of the human being—'that all human beings are inestimably precious, that they are ends in themselves, that they are owed unconditional respect, that they possess inalienable

Robert George and Michael Perry, or St. Thomas Aquinas and St. Augustine before them, today's globalized world requires an arguably more objective[146] basis of belief. The human rights movement, for better or for worse, will hardly be able to convince Saudi Arabia of the validity of the right to be free from torture if such a right is linked to a particular religious conception of human integrity.

Human rights lawyers must focus on the purely ethical constructs of human rights, that there is something fundamental about humankind that deserves respect *regardless* of whether created by a divine will or evolution. There is certainly nothing inherently religious about this claim, particularly when understood in opposition to legal positivism, the idea that there is no *necessary* link between legal and moral demands.[147] The emphasis on necessary is important: legal positivists do not dispute that the law and morality frequently coincide, but they do not require that all laws reflect an underlying moral assumption.[148] The important contribution of positivism is to realize that natural law cannot always stand on its own to generate compliance, and, as such, natural law needs to be offered to policymakers as a viable source for positive law systems.

Natural law has certainly met its fair share of challenges in recent years, particularly given recent criticism that the human rights movement is the imposition of Western values on the rest of the world. Critics dispute the

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> rights, and, of course, that they possess inalienable dignity'—are secular ideas that can be as deeply held and as compelling as any religious belief. *Id.*

146. There is certainly a danger here, with the use of the word objective, of implying that religious natural rights are not objective. I use the word objective to respond to the criticisms, discussed *infra* text accompanying note 149, that natural law is entirely too subjective.

147. WEINREB, *supra* note 132, at 3. Legal positivism was very much in vogue in the early twentieth century, until the vagaries and atrocities of the Nazi regime exposed the dangers of adhering to morally dubious laws that met a legal positivist's definition of what a law is. In fact, the Nuremberg tribunals, in many ways, revived natural law to explain that there was some law outside the positive legal system that operated to render the Nazi's behavior criminal, even if the law of the state did not:

> [T]he law violated in [that] case did not derive from a system of positive law but from the conscience of all civilized men. The conviction that it was impossible to leave these horrible crimes unpunished, although they fell outside a system of positive law, has prevailed over the positivistic conception of the grounding of the law.

Ch. Perelman, *Can the Rights of Man be Founded? in* THE PHILOSOPHY OF HUMAN RIGHTS: INTERNATIONAL PERSPECTIVES 45, 47 (Alan S. Rosenbaum ed., 1980). Douglass Cassel also notes that under the positive law, if Germany had only slaughtered German Jews, the legal system would have no recourse: "how a country treated its own citizens within its own borders was generally a matter exclusively within its domestic jurisdiction." Cassel, *supra* note 120, ¶ 35.

148. Robert P. George, *Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition,* 46 AM. J. JURIS. 249, 251 (2001). However, to assume that legal positivists care little about the moral content of law is not quite accurate; "[l]egal positivists agree that positive law is an appropriate subject of moral inquiry and that a law inconsistent with overriding moral principles does not, simply because it is the law, obligate one to comply." WEINREB, *supra* note 132, at 99.

Even the most ardent proponents of natural law recognized that rooting their moral demands in the rule of law or legal tradition gave the widest appeal possible. According to Tierney, Las Cass "saw the need to defend Indian rights in terms of reason and law that could have the widest appeal. Indeed, his work is especially interesting . . . because he appealed overtly and frequently to the juridical tradition that undergirded the earlier development of natural rights theories." Tierney, *supra* note 128, ¶ 28.

objectivity of natural law; despite the allegation that natural law is the accumulation of ethical truths, common criticisms emerge that so-called objective truths are merely the subjective, biased feelings or emotions of their proponents.[149] In light of such concerns about relativity, Richard Rorty has urged human rights activists to abandon the project he calls "human rights foundationalism."[150] From this perspective, the goal for human rights theorists should not be to find a fundamental, natural law-like basis for their claims but should instead be to improve existing institutions.[151] Trying to reach a single agreement on the source of obligations distracts from the actual fulfillment of those obligations. It seems hard to reconcile the human rights movement with a lack of a foundation—particularly given the tenuous nature (at best) of international law. What motivates the human rights movement but the fundamental belief that there is something about humanity that deserves respect?[152] The human rights movement is, if anything, an effort to codify positive law according to higher ideals; the belief in these ideals is so strong that even after centuries of violations in different forms, individuals continue to seek greater ways to protect a core definition of rights. Understanding human rights as a form of natural law helps one see that human rights norms "form a floor below which international behavior should not fall."[153]

B. Positive Obligations Under Natural Law

Establishing the moral and ethical underpinnings of human rights, and understanding the movement as a modern incarnation of natural rights is helpful from an academic standpoint, but what does this mean for Ron Jones? The philosophical entitlement is only the first part of the inquiry; the more important question, in practical terms, is what understanding human rights through a natural law lens means in the modern courtroom. If there is something inherent about being human that makes human rights worth protecting, it naturally becomes the job of a just and legitimate judicial system to protect them.[154]

The case at hand illustrates the danger of relying on a positive law system, divorced from morality, to protect basic natural rights that are incident to being human and not only the product of a formalist legal system.

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149. Robert P. George, In Defense of Natural Law 2 (1999).

150. Perry, *supra* note 124, at 145.

151. Richard Rorty, Philosophy and Social Hope xvii (1999). Rorty himself admits that this has opened himself to the charge of moral or cultural relativism.

152. In responding to Rorty's claim, Tierney argues, "Surely in all societies people have preferred life to death, freedom to servitude, nutrition to starvation, dignity to humiliation. And human rights claims are one way of addressing these common needs and aspirations of all human beings." Tierney, *supra* note 128, ¶ 31.

153. Brilmayer, *supra* note 122, at 2298.

154. A legal positivist might dispute this point, but as discussed *supra* note 147 and in the accompanying text, most positivists tend to believe the law should relate to morality in some fundamental ways.

The deciding factor for the House of Lords was the positivist rule in favor of state sovereignty, which runs into two shortfalls: one, this ignores any ethical obligations under a natural law system, and two, overstates the degree to which state sovereignty is truly a positive law at all.[155] This section will analyze how courts should make decisions when faced with assertions of natural rights, even if the positive law has not yet codified them (or has not codified them to the extent necessary for full enforcement). The House of Lords, when it received Jones' case, should have balanced its ethical obligation—as Amartya Sen points out, human rights are ethical demands above all else[156]—against their perception of a positive law. After all, in the words of Robert George, "respect for the rule of law does not exhaust the moral obligations of rulers or officials . . . ."[157]

In deciding how to handle the *Jones* case, the separation between Immanuel Kant's concept of perfect and imperfect obligations is particularly instructive. Take, for example, the case of torture.[158] The obligation, in the face of the importance of freedom from torture for all, of a would-be torturer is obvious: not to torture a particular individual.[159] However, as Sen explains, the "perfectly specified demand not to torture anyone is supplemented by the more general, and less exactly specified, requirement to consider the ways and means through which torture can be prevented and then to decide what one should, thus, reasonably do."[160] The House of Lords' decision falls into the latter category, that of imperfect obligations: the responsibilities of those beyond the would-be torturer.

As a human right—and perhaps one of the most central human rights—the obligation not to torture is more than a legal obligation; it is an ethical obligation. That the right to be free from torture is a "significant ethical claim[ ]," and not a legal claim is "quite irrelevant to the discipline of human rights."[161] In other words, in the face of a human rights argument, the House of Lords was to make an ethical, not purely legal, decision. Instead, because the ethical command against torture was codified as a legal or semi-legal norm, the Lords forewent the moral inquiry under the guise of the legal discussion. This, in a legal system motivated by natural law, is a failure to meet an ethical obligation.

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155. Lon L. Fuller has identified eight aspects of the rule of law: prospectivity, absence of impediments to compliance by those subject to the law, the promulgation of rules, clarity, coherence with one another, constancy, generality of application, and congruence between official action and declared rule. George, *Reason, Freedom and the Rule of Law, supra* note 148, at 250. Though state sovereignty will be examined *infra* section IV(B), natural law and state sovereignty are arguably violations of the requirements for coherence and constancy, given changes in the application of the rule over time.

156. Sen, *Elements of a Theory of Human Rights*, *supra* note 126, at 320.

157. George*, supra* note 148, at 252.

158. Sen used the torture example in his essay, *Elements of a Theory of Human Rights,* which was helpful for thinking about this section. Sen, *supra* note 126, at 321–22.

159. *Id.* at 321.

160. *Id.* at 322.

161. *See id.* at 325.

I take as a given that the purpose of a legal system is to provide justice, rather than simply to provide the rules of capitalism or ensure efficient economic transactions.[162] A court must decide how to do so in the face of competing legal obligations (such as, in this case, state sovereignty). For a court, the difficulty of deciding when to intervene arises when one realizes that not all human rights are the proper bases for judicial intervention. Imperfect obligations require the judge to examine the importance of the right at hand, the extent to which he or she can make a difference, and whether others are going to act in the absence of his or her own action.[163] The ethical obligation, above all, is to *consider* whether one will act by evaluating such factors.[164] The obligation is to make a *reasonable* choice, which includes considerations of morality and justice.[165] The right to be free from torture is undoubtedly a law well-suited for litigation: the right to bodily integrity is of paramount importance in any hierarchy of human rights, penalizing perpetrators with civil damages not only recognizes the occurrence of a harm but may dissuade similar perpetration in the future when, particularly in the *Jones* case, other mechanisms have simply failed our victims.

The *Jones* case is one of many examples of how formalistic adherence to positive law can violate natural law tenets. Natural law, to British courts, is not as foreign as the *Jones* opinion would make it seem. English common law is close to a positive embodiment of natural law; it is "a body of law which is the fruit of (juristic) reason."[166] The common law tradition of the state contradicts such positive law adherence in the face of moral demands. Perhaps it was this very tradition that led to the *Pinochet* outcome. Regardless, the demands of natural law or human law would have required the House of Lords to exercise jurisdictions despite positive assertions of state sovereignty.[167]

A court choosing to assert jurisdiction based on some conception of natural rights would likely face criticisms that the court sought to impose

162. *See, e.g.*, van der Vyver, *supra* note 127, at 199. "The essence of the legal idea is justice, which in one of its many manifestations requires persons in authority to apply political power to protect basic human rights and fundamental freedoms of persons under their domain." *Id.* The debate over the correlation between a legal system and a system of ethics has a long and contentious history, and the best consensus is articulated by HLA Hart: "There is of course no simple identification to be made between moral and legal rights, but there is an intimate connection between the two, and this itself is one feature which distinguishes a moral right from other fundamental moral concepts." HLA Hart, *Are There Any Natural Rights?,* 64 Phil. Rev. 175, 177 (1955).

163. Sen, *supra* note 126, at 340. Sen explains this is "an acknowledgement that if one is in a plausible position to do something effective in preventing the violation of such a right, then one does have an obligation to consider doing just that." *Id.* at 340–41.

164. *Id.*

165. George, *supra* note 141, at 2276.

166. *Id.*

167. In this way, sovereign immunity and natural law are inconsistent, as is explored from a legal perspective *infra* section IV(B).

Western values worldwide.[168] Values are not neutral, and the post-modern world has certainly highlighted the appeal of moral relativism: that what is good for one part of the world is not necessarily good for another. This conflicts with human rights based on natural rights, which embrace universality. Human rights based on natural rights "embody core values. Among them are the dignity of all human beings, their equality of fundamental worth, and their need to live in community, with respect and empathy for others, but also with some measure of individual liberty. Historically, the West has no monopoly on these values."[169] Here, we need to separate the type of human right alleged and recognize that some things today called "human rights" are not necessarily natural rights. For example, the newly ratified U.N. Convention on the Rights of Persons with Disabilities guarantees a right to sport,[170] but this is not, to take the definition explored above, something so fundamental to human integrity that it cannot be taken away. Bodily integrity is an altogether different form of right, and tracing back to natural rights helps separate one right from another. Only those that could be understood as *natural*, as part of human dignity as it has been understood over time, should receive standing in court when the positive law and natural law collide.

Interpreting human rights through natural law establishes both the ethical power of the human rights movement and exposes the trouble of following positive law despite persuasive ethical demands. State sovereignty—largely a positive law concept built on practical, outdated concerns, without extensive ethical considerations—should not supersede ethical demands in a just legal system.

IV. A New Understanding of Immunity

For a court to make an ethical, not legal decision, it must be willing to reanalyze legal obligations, such as sovereign immunity, that challenge moral obligations. The decision in *Jones* points to the gap between legal and moral duties that exists for survivors of torture. Victims must either persuade states to conduct lengthy, expensive, and politically contentious prosecutions of alleged torturers, or they must accept that the atrocities they endured will go unrecognized. In civil cases, absolute state immunity for

168. Some theorists argue that human rights is inherently, necessarily, and permissibly Western. Brian Tierney notes that a presentation of human rights history is "necessarily . . . describing a Western construct." Tierney, *supra* note 128, ¶ 4.

169. Cassel, *supra* note 120, ¶ 9.

170. Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/67, art. 30(5), U.N. Doc. A/RES/61/611 (Jan. 24, 2007) ("States Parties shall take appropriate measures (a) To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels."). I do not wish to minimize the importance of this treaty and the promises it provides, but I do hesitate to elevate this protection to the same level as the prohibition on torture.

breaches of *jus cogens* norms ensures that perpetrators go unpunished and victims unprotected when criminal sanctions fail. In recognition of this legal black hole, there is a "growing acceptance that international law might permit the courts of one state to hear a civil action regarding serious human rights violations that took place in another."[171] Torture victims, and similarly situated individuals, should be able to recover civil reparations.[172] This section will analyze how courts should reinterpret the doctrine of sovereign immunity to allow victims of grave human rights abuses to seek reparations in foreign courts.

A. *Immunity in a New International Legal Order*

The rationale for providing individual reparations aligns with an international order increasingly concerned with protecting individuals. Historically, international law was concerned with mediating between co-equal, independent states.[173] The Westphalian system overlooked what happened within state borders so long as all states reciprocally recognized the sovereignty of others. Although the individual was not entirely lost—Grotius himself argued that the individual is the focal point of all law[174]—state primacy remained the best way to achieve the peace necessary to protect the individual.

This description no longer accurately depicts the international legal order.[175] Protecting the individual from abuse at the hands of the state is now central. Documents like the Universal Declaration of Human Rights, the Convention Against Torture, and the International Covenant of Civil and Political Rights demonstrate that the system now prioritize the sanctity of the individual over the sovereignty of the state; the state is no longer able to subject its citizens to whatever treatment it deems fit.[176] As Sen writes, "Since the conception of human rights transcends local legislation and the citizenship of the individual, the support for human rights can come from anyone—whether or not she is a citizen of the same country as the individual whose rights are threatened."[177]

Sen's description of human rights points to the degree to which human rights rely on an international, not purely national, system of enforcement. The Westphalian state does not fit a scheme designed to protect individuals regardless of their ethnicity or nationality. Richard Falk explains that "the

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171. McKay, *supra* note 31, at 287.

172. For analysis of the importance of reparations for torture victims, see *supra* section II(b)(3).

173. Fox, *supra* note 20, at 25.

174. Lyal Sunga, Individual Responsibility in International Law for Serious Human Rights Violations 149 (1992).

175. Certainly, borders are not irrelevant. The past century demonstrates that these borders have become less important and more porous, not that they no longer exist.

176. Jean-Marc Coicaud, *Human Rights in Discourse and Practice: The Quandary of International Justice*, *in* The Globalization of Human Rights 180 (Jean-Marc Coicaud et al. eds., 2003).

177. Sen, *supra* note 119.

state is simultaneously *too large* to satisfy human needs and *too small* to cope with the requirements of guidance needed by an increasingly interdependent planet."[178] Falk importantly points out that neither can an individual always access the state for help, nor the state necessarily guarantee aid when needed; an international community can address the problems that fall through the fingers of the state. Citizenship is no longer the core requirement for the enjoyment of particular rights.[179]

Globalization has only compounded the shift in attention from the state to the individual, and the international legal order has had to readjust to accommodate the rapid flow of immigration and emigration. Genocide, political instability, and economic upheaval have created a tide of migration across the planet.[180] The mass movement of people increases the degree to which foreign states are responsible for the human rights and well-being of strangers. Today, the specter of terrorism means that countries like the United Kingdom may bear the results of ignoring deplorable conditions of neighboring countries; the effects of human rights abuses will not be internalized to the abusing state.

In the case of grave human rights abuses, then, a unilateral focus on state prosecution of state criminality shifts attention away from the individual that human rights law has elevated over the past fifty years. Allowing for civil reparations helps restore focus on, and humanity to, the individual who raised the allegations in the first place. As Beth Van Shaack explains: "Civil suits provide a mechanism by which individual victims can initiate and control the legal process. They contribute toward the rehabilitation of victims, the deterrence of future abuses, and the enunciation of norms in ways that other forms of redress may not."[181] The individualized focus of a civil suit—individualized counsel, reparations, opportunities to rebuild—is entirely consistent with an international legal order that increasingly recognizes the importance of the individual.[182]

Universal jurisdiction for civil suits for individual human rights abuses ensures restitution or rehabilitation when other mechanisms fall short. The courts of the territory where the abuse occurred are often unwilling or unable to adjudicate claims stemming from violations of international law. Courts outside this territory may similarly be unwilling or unable to take

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178. Richard Falk, *The End of the World Order: Essays on Normative International Relations*, *in* INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW, TREATIES, CASES AND ANALYSIS 936, 938 (Francisco Forest Martin et al. eds., 2006).

179. Scholars like T. Alexander Aleinkoff argue that separating between citizen and alien is no longer appropriate, and that this distinction is "too binary." Sanford Levinson, Book Review, *Shards of Citizenship, Shards of Sovereignty: On the Continued Usefulness of an Old Vocabulary: Semblances of Sovereignty: The Constitution, the State, and American Citizenship,* 21 CONST. COMMENTARY 601, 605 (2004).

180. Gil Loescher, *Refugees: A Global Human Rights and Security Crisis*, *in* HUMAN RIGHTS IN GLOBAL POLITICS 229, 233 (Tim Dunne & Nicholas Wheeler eds., 1999).

181. Van Shaack, *supra* note 13, at 155.

182. Rosalyn Higgins, *Certain Unresolved Aspects of the Law of State Immunity,* 29 NETH. INT'L L. REV. 265, 271 (1982).

on the burden of criminal prosecution. And despite the proliferation of human rights treaties and institutions, individuals have recourse to few, if any, international or regional institutions in times of abuse.[183] In many cases, citizens cannot count on their domestic courts or on international institutions to remedy rights infringements, and in those situations, other states' courts can fill a much-needed gap in international adjudication.[184] An international system changes the traditional boundaries of the common good,[185] which an individual's state can no longer wholly secure.[186] As John Finnis explains,

> If it now appears that the good of individuals can only be fully secured and realized in the context of international community, we must conclude that the claim of the national state to be a complete community is unwarranted and the postulate of the national legal order, that it is supreme and comprehensive and an exclusive source of legal obligation, is increasingly what lawyers call a "legal fiction."

In recognition of this legal fiction and the broader community responsible for common good, all courts, regardless of their location, will thus have an important role to play in cases needing individualized restitution.

B. Sovereign Immunity and Human Rights Considerations

Despite the increasing recognition that civil reparations have a crucial role in addressing torture and similar abuses, principles of sovereign immunity frequently preempt claims, as was the case in *Jones.* The Lordships' vision of state sovereignty no longer resonates with a global order focused on human rights. A shift away from understanding immunity as an absolute, unyielding rule of law would allow petitioners to succeed. Restrictive forms of immunity are not as uncommon as the Lordships seemed to think they are, and are entirely justifiable under norms of international law.

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183. *Id.*

184. Douglass Cassel argues that domestic courts can play a support role, providing "jurisprudential guidance" to other courts. Cassel, *supra* note 120, at 65. Right now, he says, "we cannot count on effective national implementation," necessitating some degree of intervention by the international community. *Id.* at 62.

185. John Finnis defines the common good as "the set of conditions which enables the members of the community to attain for themselves reasonable objectives, or to realize reasonable for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively or negatively) in a community." John Finnis, Natural Law and Natural Rights 155 (1980) (*quoted in* Robert P. George, In Defense of Natural Law 235 (1999)).

186. George, *supra* note 185, at 235. George asserts that natural law theory, in today's world order, necessitates the development of a world government.

1. *Traditional Immunity was not Absolute*

The notion of sovereign immunity as an absolute, natural right is inconsistent with the historical understanding of immunity. Rosalyn Higgins argues that this vision of immunity is backwards: "It is sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to a basic rule of immunity."[187] The presumption is generally in favor of jurisdiction.[188] Historically, courts approached assertions of immunity by examining the purpose of the act in question, and would only accept immunity if the act had a pure state purpose.[189] Though jurists have largely invalidated this test in recent years by examining the nature, rather than purpose of the act, it demonstrates the initial flexibility of immunity.[190]

One of the most cited early codifications of sovereign immunity came from the U.S. Supreme Court in 1812. Under the orders of Napoleon, French officials seized a ship belonging to two Maryland citizens as the vessel sailed to Spain.[191] When the ship returned to an American port, the citizens attempted to reclaim it, but the district court presumed that it lacked jurisdiction.[192] Writing for the majority, Justice Marshall found that the ship was a national vessel commissioned by the state of France, and as such, enjoyed exemption from U.S. jurisdiction by virtue of sovereign immunity.[193]

Justice Marshall grounded his analysis in the purpose of sovereign immunity, and implied that the outcome would have been different France had used the ship for commercial purposes: "Nor can the foreign sovereign have any motive for wishing such an exemption. His subjects . . . are not employed by him, nor are they engaged in national pursuits."[194] However, when, for example, foreign ministers arrive in the United States on a diplomatic mission, the nature of the work justifies sovereign immunity:

> A sovereign committing the interests of his nation with a foreign power . . . cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.[195]

187. *Id.*
188. Donovan & Roberts, *supra* note 96, at 142.
189. *Id.* at 167.
190. *Id.*
191. The Schooner Exchange v. M'Faddon, 11 U.S. 116 (1812).
192. *Id.*
193. *Id.*
194. *Id.* at 144.
195. *Id.* at 139.

Even in the early nineteenth century, it was not possible to fully justify absolute immunity.

In fact, the emergence of a modern state embroiled in commercial transactions, as well as political and diplomatic affairs, captivated English judges decades before *Jones.* Lord Tom Denning, one of the most celebrated figures in English law, said in a 1958 speech in *Rahimtoola v. The Nizam of Hyderabad* that, "sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute . . . . Is it properly cognizable by our courts or not?"[196] Lord Denning rooted his comments in case law as early as 1820 that denied immunity to claims of sovereigns regarding ship accidents. For the Lordships of the nineteenth century, presence within the United Kingdom was enough for the court's jurisdiction over commercial state acts.[197] Courts in the late nineteenth and twentieth centuries misread the early case law and failed to draw a distinction based on the nature of an activity, as Lord Denning urged.[198] Even in the United Kingdom, "[h]istorically then, the absolute view is devoid of authority. The immunity of the sovereign was in fact a limited one."[199]

The ease with which states adopted the restrictive conception of immunity demonstrates that sovereign immunity is not a fundamental, inalterable right.[200] The restriction of immunity when trade and commercial activities crossed state boundaries implies that immunity can, and should, be modified for an ever-changing international order. This forces the question: "if contracts, why not torture?"[201] Just as "the adoption of this restrictive attitude to state immunity has been encouraged by the vast expansion of activities of the modern state in the economic sphere," recognition of human rights has "tended to render unworkable" an absolute rule.[202] The emergence of human rights norms and a globalized world are changes that may necessitate recognition of a new balance between law and sovereignty.[203]

196. Lakshman Marasinghe, *The Modern Law of State Immunity*, 54 MOD. L. REV. 664, 667 (1991).

197. *Id.*

198. *Id.* at 670.

199. *Id.* at 674.

200. Lee M. Caplan, *State Immunity, Human Rights, and* Jus Cogens: *A Critique of the Normative Hierarchy Theory,* 97 AM. J. INT'L L. 741, 754 (2003).

201. Koh, *supra* note 28, at 2365. He continues: "If a court could hold a foreign sovereign defendant in violation of a commercial contract without usurping the executive function, why couldn't it hold the same defendant in violation of a human rights treaty, or a clearly defined *jus cogens* norm against torture?" *Id.* at 2365–66. This is the basis for the Second Circuit's decision in *Filartiga,* discussed *supra* in text surrounding note 81, where the court compared the torturer to the commercial pirate or slave trader as an "enemy of all mankind." *Id.*

202. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 19, at 357.

203. JANIS, *supra* note 21, at 160.

2. *Immunity Based on the Nature of the Act*

The existing restrictions on sovereign immunity are based on a classification of the act as either official or commercial in nature. A human rights-centered sovereignty would add a third classification for acts contrary to *jus cogens* norms of international law. Under this system, only official acts that are both non-commercial and legal under the international order would receive immunity. This alteration incorporates the increasing recognition that torture is never a permissible state act. One commentator, urging for a similar reorganization of sovereignty, calls for a "theory of collective benefit," claiming that "international law requires state immunity only as to state activity that collectively benefits the community of nations."[204] This model more accurately takes into account the original purpose of sovereign immunity: to facilitate comity amongst states.[205]

Such a reconceptualization of immunity is consistent with existing law. The International Court of Justice's decision in *Congo v. Belgium* found the main rationale for upholding the foreign minister's immunity not to be blanket state sovereign immunity, but the *function* of the minister's work in the international order.[206] The court focused on the nature of his position, rather than the purpose of the particular act producing the arrest warrant. Both approaches produce the same result: immunity should be justified by the role it serves in the international order. Using somewhat differing reasoning, the Wellington Court of Appeal also found that refusing sovereign immunity was justified when the impugned activity breaches a fundamental principle of justice.[207] The basis for the Wellington Court's finding was less from the nature of the act and more from the inviolability of certain legal principles, but the message was the same: certain behavior cannot be considered official acts of state subject to immunity.

Others have argued that torture claims should trump assertions of sovereign immunity under the normative hierarchy theory. This approach identifies the competing norms at issue—in this case, human rights and state immunity—and determines whether "the fundamental character of [one]. . . is such as to place [it] on a higher rank with the consequence that they prevail over 'ordinary' international law."[208] Both the prohibition of torture and the promise of state immunity are customary rules of international law; however, because torture is a *jus cogens* obligation and immunity is not, immunity must fall to the torture prohibition when the two conflict.[209]

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204. Caplan, *supra* note 200, at 744.

205. *Id.* at 755.

206. *Id.*

207. Controller and Auditor-General v. Sir Ronald Davison, [1996] 2 NZLR 278 (C.A.).

208. Stefan Kadelbach, *Jus Cogens, Obligations Erga Omnes, and other Rules—the Identification of Fundamental Norms*, *in* The Fundamental Rules of the International Legal Order 25 (Christian Tomuschat & Jean-March Thouvenin eds., 2006).

209. *See* Fox, *supra* note 20, at 517; *see also* Caplan, *supra* note 200, at 741–42.

Normative hierarchy theory is a useful but incomplete way to approach situations when two fundamental international norms conflict. The theory rests on formalist distinctions between different sorts of international laws, between *jus cogens* and mere customary rules, between unbending obligations and those that do not bind states. This is important theoretically but limited practically; as many academics have noted, discerning the exact status of an international legal rule is far from simple: "oftentimes state practice is so diverse that it may be difficult or even impossible to find enough consistency of practice to warrant drawing a customary international legal rule from it."[210] Normative hierarchy theory may actually generate as much confusion as it aims to solve when claims of immunity are brought.

In another approach to sovereign immunity, Harold Koh argues that courts should approach civil claims for human rights abuses on a case-by-case basis, adjusting the controlling doctrines of "federal jurisdiction, civil procedure, and foreign sovereignty law to *target* separation of powers, judicial competence, and comity concerns as they arise."[211] Though his "doctrinal-targeting approach" is tailored for U.S. courts (clearly federalism doctrine is not an issue in U.K. courts, nor are separation of powers concerns of the same magnitude for the House of Lords as for the American judiciary), his case-by-case approach mandates considered application of sovereignty to see if its invocation is actually serving its purpose.[212] Koh would have a court ask whether the plaintiff is a member of the particular class protected by a treaty, the nature of a claim (and the degree to which it is too political for a court), and the identity of the defendant to determine whether comity, separation of powers, or judicial competency concerns arise. This analysis urges the same considerations described above to determine whether the commitment to sovereign immunity justified in a particular case. In cases of egregious human rights violations, Koh would argue that it is not.

Somewhat similar to Koh's approach, courts should evaluate each claim of sovereign immunity with an eye toward reconciling state immunity with its purpose. This is what led many states to abandon immunity for purely private or commercial functions of the state. Adjudicating claims related to trade did not challenge the peace and equality among states that sovereign immunity emerged to protect.[213] If torture can no longer be an official act under current law, then it must be a private act for immunity purposes as well. Adjudicating claims for breaches of *jus cogens* norms of international law safeguards and reinforces the justification for immunity, by forcing states into compliance with the international legal order. Accountability

210. Janis, *supra* note 21, at 53.
211. Koh, *supra* note 28, at 2382–83.
212. *Id.*
213. Oppenheim's International Law, *supra* note 19, at 357.

facilitates the international comity that gave birth to sovereign immunity in the first place.

States should and do care about ensuring that fellow countries follow the dominant rules of the international legal order, particularly in the case of *jus cogens* peremptory norms. Violations of *jus cogens* norms, such as waging an aggressive and unprompted war on a peer state, can directly threaten foreign states. More indirectly, these violations create refugee populations who are victims of torture and crimes against humanity, many of whom ultimately land on the streets of the United Kingdom, stretching the resources of host states. The aftermath of genocide, war crimes, and grave human rights abuses creates humanitarian emergencies that other states must coordinate and fund. Globalization enables criminal and terrorist activities to cross borders with ease.[214] In these ways, migration has changed how we think about human rights.[215]

In this self-interested but very real way, states like the United Kingdom have a concrete and particularized interest in preventing internationally devastating situations.[216] Civil liability is just one of many tools available that may stem the tide of grave human rights abuses, and it may have only a limited effect on torture. Nevertheless, when states do commit these crimes, they strain the ties of the international community, threatening the peace and stability that the international system is supposed to provide. This threat induced the Italian Court of Cassation to hold that "international crimes undermine the very foundations of international existence," and give other states the right to take measures to prevent them.[217] Civil suits could encourage states to consider international treaties when setting the standards of behavior to which their officials must adhere, influencing the evolution of new norms.[218] Moreover, even if civil suits fail to deter violence, they offer a degree of restoration that is unavailable elsewhere.

Punishment in foreign courts can be a disincentive for torture.[219] This is not to say that allowing civil claims in foreign courts will prevent or solve

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214. Alex Y. Seita, *Globalization and the Convergence of Values,* 30 Cornell Int'l L.J. 429, 431 (1997).

215. Jack Donnelly, *Human Rights, Globalizing Flows, and State Power*, *in* GLOBALIZATION AND HUMAN RIGHTS 230 (Alison Brysk ed., 2002).

216. Seita argues that countries like the United Kingdom, which have enjoyed many of the fruits of globalization by virtue of their position as industrialized democracies, have a special obligation to ensure that the benefits of globalization accrue to other countries. "The industrialized democracies have an essential, indispensable role in determining the policies and programs for globalization that will promote common values, balance competing values, solidify respect for the rule of law, and increase empathy among nations. This role is given . . . by a simple fact of economics. . . ." Seita, *supra* note 214, at 471.

217. Bianchi, *supra* note 12, at 244.

218. Koh, *supra* note 28, at 2398.

219. Importantly, Douglass Cassel notes that part of what is important about evolving human rights norms is their uncertainty and unpredictability. Cassel, *supra* note 120, ¶ 91. He explains:

> The risk to governments is further compounded by the constantly changing rules of the game. Standards are constantly ratcheted up, and ingenious new traps and penalties devised. The only certainty may be that whatever the costs to a government of human rights viola-

all instances of human rights abuse. To the contrary, it will make a limited dent on human rights abuses. However, the significance for the individual victim is substantial, even if imposing liability offers little deterrence. Adopting a particularized interest in how foreign states treat their citizens by penetrating immunity is consistent with facilitating comity among states. An absolute version of immunity is unnecessary; immunity can be tailored to recognize *jus cogens* norms without compromising—in fact, while augmenting—good foreign relations. A rule like this would demonstrate that immunity does "not apply to state conduct, e.g., the violation of the human rights of another state's citizens, which undermines the aim and purpose of the international legal order."[220]

3. *Criticisms*

Challenges will arise if jurisdiction widens, but these should be dealt with not by closing the door to jurisdiction, but by developing strict criteria.[221] In fact, many of these criticisms are no different for criminal cases, and courts have already considered them.[222] The first and most obvious criticism of a human rights-centered immunity, or the "theory of collective benefit," is the difficulty in distinguishing what violations sufficiently challenge the "collective benefit" to necessitate jurisdiction. All human rights violations are potentially detrimental to the collective benefit and threaten the interests of a foreign state. This could create a situation where, for example, the execution of juveniles in the United States prompts civil suits abroad.

This is where the distinction between *jus cogens* and non-peremptory norms of international law will prove useful. The importance of a *jus cogens* norm is that it is binding on all states regardless of explicit consent,[223] and all states can therefore be accountable for their violations. Limiting the exception to *jus cogens* violations ensures that courts exercise jurisdiction over foreign states only in cases of the most egregious violations, stymieing the value-laden and culturally sensitive discussions that can accompany issues like religious freedom or gender equality. Without the *jus cogens* modification, a human rights exception to sovereign immunity could potentially include infinite claims for breaches to environmental and economic norms.[224]

A related concern is the fear that universal civil jurisdiction will have no limitations and that all states will find themselves subject to liability in

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tions today, they may be higher tomorrow. Human rights enforcement is not so much a moving target as a moving marksman.

Id. ¶ 93.

220. Caplan, *supra* note 200, at 771.

221. Donovan & Roberts, *supra* note 96, at 157

222. Van Shaack, *supra* note 13, at 197.

223. Janis, *supra* note 21, at 65.

224. Fox, *supra* note 20, at 528.

another state.[225] Limiting the immunity exception to *jus cogens* norms helps ameliorate this concern. Experience with universal criminal prosecutions also helps here; the few convictions of grave human rights abusers demonstrate that these are norms that "are not at risk of overenforcement. . . . [T]he grant of jurisdiction has not been fully utilized for its purpose of ending impunity for serious violations of international law."[226]

Some feel that the existence of civil remedies is unnecessary in an age when states or heads of states can be criminally liable. This, however, misses the independent importance of civil adjudication, as discussed in section II(b)(ii). Civil jurisdiction allows victims to control the litigation and directly confront the perpetrator; victims can turn to civil claims when the state is unwilling or unable to prosecute. Damages compensate the victim, while criminal claims focus on punishing the perpetrator. Criminal trials do not obviate the need for civil claims. "It would be paradoxical if a victim of a human rights violation could exercise universal jurisdiction in a criminal context, but not obtain civil redress under the same basis of jurisdiction."[227]

A revised form of immunity will hardly undermine international comity. Many of the criticisms reflect the concern that international law does not belong in domestic court because it is different; international law is less law than diplomacy and politics, and judicial intervention would threaten the diplomatic channels upon which international harmony relies.[228] However, this is no different from the many other instances in which the judicial branch has the power to question the actions of the executive or the legislative branch. Some scholars further question the importance of immunity, arguing that appearing before a foreign court does not impair equality, independence, or dignity.[229] The consequences of a civil ruling are less threatening from a comity perspective; the remedy will only be money, and will result in less exceptional measures against a government.[230] In his concurrence to *Sosa v. Alvarez-Machain,* Justice Breyer emphasized that universal jurisdiction for civil claims is "consistent with principles of international comity."[231] He argued that "allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect."[232]

225. Donovan & Roberts, *supra* note 96, at 156.
226. *Id.*
227. Van Shaack, *supra* note 13, at 196.
228. Brilmayer, *supra* note 122, at 2279.
229. Oppenheim's International Law, *supra* note 19, at 342.
230. Van Shaack, *supra* note 13, at 196.
231. Sosa v. Alvarez-Machain, 542 U.S. 692, 762 (2004) (Breyer, J., concurring).
232. *Id.*

V. Conclusion

Ron Jones suffers from post-traumatic stress disorder.[233] There is still a week in the midst of the sixty-seven days of torture that he cannot recall because he was given a sedative that buried the memories.[234] Recovering damages in British court would not have brought back these missing days, and may not have fully funded the therapy needed to overcome PTSD. A judgment against Saudi Arabia, however, could have given Jones and the other survivors the global recognition that they had been wronged in a way the international community has said nobody should ever be harmed.

The Lordships' decision prioritized the customary rule of sovereign immunity over the *jus cogens* prohibition on torture. The reasoning was flawed in misunderstanding the definition of torture, in its emphasis on the division between civil and criminal proceedings, and in the dismissal of many persuasive cases from other jurisdictions. The real flaw in the Lordships' decision, however, is the ethical message that the decisions send: survivors of torture and other crimes, no matter how egregious, can find no restitution in the United Kingdom. In an era when the Universal Declaration of Human Rights promises that "all human beings are born free and equal in dignity and rights,"[235] the House of Lords prioritized the sanctity of the state.

The inability of survivors like Jones to find civil restitution demonstrates the need to revisit our understanding of state immunity in light of the overwhelming growth of the human rights field and its ethical demands. Principles of human rights determined to be inviolable, like the prohibition on torture or crimes against humanity, are no longer legitimate acts of the state in the eyes of numerous courts, and the shield of sovereign immunity cannot apply to them. If our international legal system gives some tenets the label of *jus cogens,* states must be willing and able to support that assertion by punishing those who violate these norms. And if criminal punishment is unattainable, civil liability provides a measure of deterrence, recognition, and restitution.

Without this, perpetrators may go forever unpunished and victims forever wounded. For Ron Jones, the lack of recognition by the U.K. court system was just another shock for him to bear. "They had won," he said of his torturers after his release.[236] And with the Lordships' recent decision brushing aside ethical obligations, the perpetrators of this abuse did, quite truly, win.

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233. Kelso, *supra* note 1.
234. *Id.*
235. Universal Declaration of Human Rights, *supra* note 123.
236. Kelso, *supra* note 1.