Zhang v Zemin (2008) 251 ALR 707

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Introduction

In *Zhang v Zemin*[1] the NSW Supreme Court was asked to consider a civil action for torture and other human rights abuses raised by a member of the Falun Gong movement, allegedly perpetrated by organs of the People's Republic of China ('PRC') in the territory of that State. In the statement of claim, the plaintiff named the defendants as former Chinese President Jiang Zemin, the '610 Office' (the government bureau charged with the control and suppression of the Falun Gong) and a senior member of the Communist Party of China, Luo Gan. The plaintiff requested that the Court enter a default judgment against the defendants, citing their lack of response to the statement of claim, at which point the Commonwealth Attorney-General intervened, issuing a certificate that affirmed the immunity of all defendants in accordance with s 40 of the *Foreign States Immunities Act 1985* (Cth) ('FSIA').

Justice Latham went on to determine that the defendants were all entitled to complete immunity from the civil jurisdiction of Australian courts according to the operation of the FSIA, and thus the Court could not entertain a substantive claim against them. The Court relied heavily on the English case of *Jones v The Kingdom of Saudi Arabia*[2] and based its conclusion on two premises. First, it was decided that acts of torture committed by the agents of a State must be attributed to the State itself when determining the application of sovereign immunity.[3] Second, it was concluded that relevant authorities suggest there can be no exception to State immunity for extra-territorial civil claims alleging acts of torture.[4]

Analysis: State immunity

1. Distinction between the State and its agents

Perhaps the most curious feature of the Supreme Court's judgment was the assumption that the acts of all three defendants necessarily became attributable to the PRC. The Court determined that as s 9 of the FSIA provides for the immunity of foreign States before Australian courts and as s 3 stipulates that the definition of a foreign State will encompass the head of State and the representative individuals and organs of that State, the defendants

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1 (2008) 251 ALR 707.

2 *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2007] 1 AC 270; (2006) 45 ILM 1108 ('Jones').

3 *Zhang v Zemin* (2008) 251 ALR 707, 710–14.

4 Ibid 714–15.

were entitled to immunity.[5] In arriving at this conclusion, the Court considered whether, by allegedly committing acts of torture, State representatives could be acting in their official capacity. It was concluded that because — under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Conduct or Punishment*,[6] to which both Australia and the PRC are parties — acts of torture can only be committed by, or with the consent or acquiescence of, public official or other persons acting in an official capacity,[7] such acts are *by definition* official acts to which State immunity will attach.[8]

As mentioned above, the Court in this instance was informed by the deliberations of Lords Bingham and Hoffman in *Jones*, in which it was similarly determined that the commission of acts of torture must have been in discharge of the State representative's official duties.[9] This principle has been debated rigorously in domestic and international jurisprudence. In fact, in its earlier and well-documented decision in the *Pinochet* case,[10] the House of Lords adopted the contrary position, asserting that torture could not be categorised as part of the accepted functions of the State.[11] The problem arises from the status of torture as *jus cogens*; that is, a peremptory norm of international law from which no derogation is permitted.[12] The corollary of this status is illustrated by the *Convention Against Torture*, which contemplates the exercise of universal jurisdiction over acts of torture[13] and demands that States ensure victims are entitled to redress and adequate compensation in domestic law.[14]

If *jus cogens* norms occupy a superior position in the hierarchy of international law, it appears contradictory to grant State immunity for violations of such norms. To do so puts Australia in breach of its international obligations under the *Convention Against Torture* for the failure to provide an effective remedy under domestic law. Accordingly, it is suggested that to comply with Australia's obligations, the Supreme Court should have determined that the acts of torture allegedly committed by the agents and organs of the PRC could not have been within the accepted functions of the State. Although the *Convention Against Torture* requires that acts of torture must be committed by State officials, it does not necessarily follow that they must therefore be acts of State. It is, rather, the commission of

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[5] Ibid 711–12.

[6] *Convention Against Torture and Other Cruel, Inhuman or Degrading Conduct or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

[7] *Convention Against Torture* art 1.

[8] *Zhang v Zemin* (2008) 251 ALR 707, 713.

[9] See *Jones* (2006) 45 ILM 1108, 1111 (per Lord Bingham).

[10] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No. 3)* [1999] 2 All ER 97 ('*Pinochet*').

[11] Ibid 113 (per Lord Browne-Wilkinson), 164 (per Lord Hutton).

[12] See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 53, which renders invalid any treaty provisions that conflict with *jus cogens* norms. On the relationship between *jus cogens* norms and State immunity, see H Fox, *The Law of State Immunity* (OUP: 2nd ed, 2008), 150–8.

[13] *Convention Against Torture* art 5(2). Note, however, that this provision is generally intended to be permissive and does not create obligations to exercise universal jurisdiction *per se*.

[14] *Convention Against Torture* art 14. This demand for States to provide an effective domestic remedy for violations of international instruments is mirrored elsewhere: *Universal Declaration of Human Rights*, GA Res 217A (III), 3rd sess, 183rd plen mtg, UN Doc A/810 (1948), art 8 (although it is important to recall the non-binding nature of the declaration); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 2(3) (entered into force 23 March 1976).

specified abuses under the guise of State authority which elevates them to torture.[15] Moreover, the contemplation by the *Convention Against Torture* of universal jurisdiction for torture suggests that it is intended to encompass acts by individuals, rather than acts of State that would attract immunity.[16] A disconnection between the State and its agents is possible and, indeed, necessary to effect Australian compliance with the *Convention Against Torture* while also situating the acts outside the regime of State immunity provided by the FSIA and customary international law.[17]

2. The nature of international law immunities

In response to the conflict mentioned above, it has been argued that as the enjoyment of immunity is a procedural concern, it will in effect be separated from any substantive considerations, such as those relating to *jus cogens* violations. Although this argument was not explicitly endorsed by the Supreme Court in *Zhang v Zemin*, it received the support of the House of Lords in *Jones*[18] and some attention in attendant commentary,[19] and establishes a means by which States can provide immunity to foreign State officials while effectively circumventing compliance with the *Convention Against Torture*. According to this reasoning, the application of State immunity to a particular individual or entity will not be decisive of legal responsibility for the act in question; rather it merely operates as a procedural bar rendering the court of the forum State unable to entertain the matter further.

Although this rationale has commanded some support in recent commentary and jurisprudence,[20] it is argued that it is misguided as it promotes an artificial distinction between procedural immunity and substantive international law when placed against the background of *jus cogens* violations. An alternative analysis suggests that because of the peremptory character of *jus cogens* norms, international law requires such norms to take precedence over all other legal rules, regardless of their preliminary character. Accordingly, the procedural issue of immunity would become appropriately fused with the substantive legality of the act itself.[21] To situate immunities outside the scope of substantive

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[15] See *Pinochet* [1999] 2 All ER 97, 164 (per Lord Hutton).

[16] See Rosanne van Alebeek, *The Immunities of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP: 2008).

[17] On the potential for an implied exception for jus cogens violations in the interpretation of the FSIA, see Richard Garnett, 'Foreign States in Australian Courts' (2005) 29 *Melbourne University Law Review* 704, 711–14.

[18] *Jones* (2006) 45 ILM 1108, 1120.

[19] On this distinction between substantive and procedural concerns, see eg, William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press: 3rd ed, 2007), 231; Fox, above n 12, 675–82.

[20] See the following decisions of the European Court of Human Rights, *Al-Adsani v United Kingdom* (2002) 34 EHRR 111; *Fogarty v United Kingdom* (2001) 34 EHRR 302. See also Fox, above n 12, 155–6.

[21] This position, integrating legal responsibility with questions of immunity, is supported by a number of commentators. See, eg, Jurgen Bröhmer, *State Immunity and the Violation of Human Rights* (Martinus Nijhoff Publishers: 1997), 149–50; Dapo Akande, 'The Application of International Law Immunities in Prosecutions for International Crimes', in Joanna Harrington, Michael Milde and Richard Vernon (eds), *Bringing Power to Justice? The Prospects of the International Criminal Court* (McGill-Queen's University Press: 2006), 59–60; Antonio Cassese, 'When May Senior Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case' (2002) 13 *European Journal of International Law* 853, 862–4.

consideration contradicts the alleged connection that those acts have with the State and the position of *jus cogens* in the architecture of international law.[22]

3. Universal civil jurisdiction for torture

A more persuasive resolution of the conflict between State immunity and the *jus cogens* status of torture lies in the division between civil and criminal jurisdiction. While it has been established that the *Convention Against Torture* allows domestic courts to exercise universal criminal jurisdiction over acts of torture,[23] the question of whether this establishes a possibility to exercise universal civil jurisdiction remains unclear.

In *Zhang v Zemin*, the Supreme Court concluded that 'there is no exception to foreign State immunity for civil proceedings alleging acts of torture committed in a foreign State'.[24] Although Justice Latham based her ruling on a number of cases in which such an expansive exercise of civil jurisdiction was rejected,[25] there is a body of jurisprudence to suggest otherwise. This principle has been successfully tested through prominent litigation in the United States[26] — to which the Court did not refer — under the *Alien Tort Statue*[27] and the *Torture Victim Protection Act*,[28] both of which allow for universal civil jurisdiction in respect of torture. Although this may have been supportive of the plaintiff's argument in *Zhang v Zemin*, its value as precedent is limited. The basis in statute for US claims of universal civil jurisdiction is at odds with the absence of such a regime in Australian law. Moreover, it seems that because the provision for universal civil jurisdiction is merely *permissive* under the *Convention Against Torture*,[29] its exercise will depend on the will of States to embed such mechanisms in their domestic law. There is, however, some support from Italian and Greek decisions suggesting that such jurisdiction may be founded without an express statutory framework and, furthermore, as a general exception that foreign States cannot enjoy immunity in civil proceedings in respect of *jus cogens* violations.[30]

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[22] See also Pietro Di Ciaccio, 'A Torturers Manifesto? Impunity through Immunity' in *Jones v The Kingdom of Saudi Arabia*' (2008) 30 *Sydney Law Review* 551, 557–8.

[23] It is important to recall that in the *Pinochet* case it was the very existence of such universal criminal jurisdiction to prosecute torture that persuaded the House of Lords to position the extra territorial acts of Pinochet within the jurisdiction of the court.

[24] *Zhang v Zemin* (2008) 251 ALR 707, 714.

[25] See, eg, *Jones* (2006) 45 ILM 1108; *Al-Adsani v Kuwait* (1995) 103 ILR 420 (Queen's Bench); *Bouzari v Islamic Republic of Iran* 71 OR (3d) 675; *Fang v Jiang* (HK AK CIV) 2004-404-5843, unreported, 21 December 2006 (High Court of New Zealand). Note that this position has also found support in the dicta of *Pinochet* [1999] 2 All ER 97, 178 (per Lord Millet), 166 (per Lord Hutton).

[26] See, eg, *Filártiga v Peña-Irala* 630 F 2d 876 (2d Cir 1980), in which it was determined that the *Alien Tort Statute* should be interpreted to encompass violations of 'well-established' and 'universally recognized' norms of international law, such as torture (at 888). Cf the relative confinement of this principle in *Sosa v Alvarez-Machain* 542 US 692 (2004).

[27] *Alien Tort Statute*, 28 USC § 1350 (2000), originally the *Judiciary Act of 1789*, ch 20 § 9(b), 1 Stat 73, 77.

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

[29] On the nature of the *Convention Against Torture* and its permission to exercise universal civil jurisdiction, see Donald Francis Donovan and Anthea Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100 *American Journal of International Law* 142, 150.

[30] *Ferrini v Repubblica Federale di Germania* (2004) 87 RDI 539 (Italian Corte di Cassazione); *Prefecture of Voiotia v Federal Republic of Germany* (2000), Case No 1/2000, Areios Pagos (Hellenic Supreme Court).

To argue that the application of State immunity will depend on the type of proceeding involved is ill-founded.[31] The *jus cogens* quality of torture and its superiority in the hierarchy of legal norms serve to articulate a rationale for the exercise of universal civil jurisdiction, just as it does for the criminal jurisdiction. It appears that according to the legislation implementing the *Convention Against Torture*, Australian law has conceived a potential for universal criminal jurisdiction over acts of torture.[32] While there may be certain divisions between domestic civil and criminal proceedings in terms of standards of proof and the substantive determinants of liability, it seems manifestly inconsistent to distinguish between the two for mere jurisdictional purposes.

While in international law the issue remains largely unresolved,[33] the foregoing examination confirms that there is an established body of literature and jurisprudence concerned with universal civil jurisdiction for torture. Importantly, there is an emerging mobilisation of political opinion in favour of making exceptions to State immunity in the context of serious human rights abuses.[34] The Supreme Court's analysis on this point was lacking in many respects. Rather than engaging with the full breadth of material, the Court was content with a laconic endorsement of the precedent that was in favour of its decision. Considering the wealth of debate in international law, the issue was certainly deserving of a more comprehensive examination.

Conclusion

The question of domestic remedies for extra-territorial human rights abuses remains a focus of much discussion. The decision in *Zhang v Zemin* has offered only a cursory consideration of what remains a disputed area of international law. However, the judgment is currently under review in proceedings before the New South Wales Court of Appeal. It will be interesting to see whether this results in a more extensive evaluation of international jurisprudence and the consideration of an exception to the FSIA.

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[31] This reasoning is founded on the irrelevance of the type of proceeding involved, see Donovan and Roberts, above n 29, 144. See also van Alebeek, above n 16, 243: 'It makes no sense to argue that the question whether an act qualifies as an act of State depends on the type of proceedings involved. When an individual can be prosecuted and convicted for the commission of a certain crime because the crime is not an act of State but an act *also* attributable to the individual personally, he can necessarily be ordered to pay damages from his personal estate to indemnify the victims of his crime in civil proceedings' (emphasis in original).

[32] See *Crimes (Torture) Act 1988* (Cth). Note that while this Act makes extra-territorial torture punishable as against non-Australian citizens, it requires the presence of that person in Australia to effect prosecution, see Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP: 2005), 89–90.

[33] In their joint separate opinion in the *Arrest Warrant* case, Higgins, Kooijmans and Buergenthal JJ lamented that '[w]hile this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally': *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3, [48].

[34] See discussion in Fox, above n 12, 749, where the author cites developments including the introduction of the Torture (Damages) Bill to the British Parliament and the report of the Secretary-General of the Council of Europe, which proposed that the Council establish 'clear exceptions to State Immunity in cases of serious human rights abuses'.