

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT**

CO/2242/04

IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW

THE QUEEN

On the application of

**MAZIN JUMAA GATTEH AL SKEINI
& OTHERS**

Claimants

v.

SECRETARY OF STATE FOR DEFENCE

Defendant

INTERVENTION SUBMISSION

BY

THE REDRESS TRUST

1. Introduction.

- 1.1. The Redress Trust ("REDRESS") is an international non-governmental organisation with a mandate to assist torture survivors to seek justice and reparations. It fulfils this mandate through a variety of means, including casework, law reform, research and advocacy. Over the past 12 years, it has accumulated a wide expertise on the rights of victims of torture both within the United Kingdom and internationally.
- 1.2. REDRESS regularly takes up cases on behalf of individual survivors and has wide experience with interventions before national and international courts and tribunals. At the domestic level, REDRESS assists lawyers representing survivors of torture seeking some form of remedy such as civil damages, criminal prosecutions or other forms of reparation including public apologies. At the international level, REDRESS represents individuals who are challenging the effectiveness of domestic remedies for torture and other forms of ill-treatment, including the scope and consequences of the prohibition of torture in domestic law, the State's obligation to

investigate allegations, prosecute and punish perpetrators, as well as the obligation to afford adequate reparations to the victims.¹

- 1.3. REDRESS, together with Amnesty International, The Medical Foundation for the Care of Victims of Torture and The Association of the Families of Disappeared Prisoners, was granted permission to intervene before the United Kingdom House of Lords in the matter of *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*². Recently, REDRESS intervened in the matter of the *Prosecutor v. Morris Kallon*³ at the Special Court for Sierra Leone on the applicability of the Lomé Accord amnesty to the Court's jurisdiction in light of the obligation of States to prosecute serious crimes under international law. REDRESS was also granted interested party status in the United Kingdom Court of Appeal (Civil Division) on appeal from the Queen's Bench Division of the High Court of Justice in the matter of *Ronald Jones v. The Ministry of Interior of Saudi Arabia and Lt. Col. Abdul Aziz*⁴, on the legal status of the prohibition of torture and the applicable remedies, as well as intervenor standing before the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*.⁵
- 1.4. REDRESS has had the opportunity of reading the Claimants' skeleton argument and endorses the submissions set out therein.

2. The interest of REDRESS in this case.

- 2.1. REDRESS' mandate is to ensure respect for the principle that survivors of torture and cruel, inhuman or degrading treatment and punishment, and their family members, have access to adequate and effective remedies and reparation for their suffering.
- 2.2. This case will address the right to reparations of the families of those whose fundamental rights – including the right to life and the right to protection from torture and cruel, inhuman or degrading treatment or punishment – may have been violated. It will also have a direct effect upon torture survivors' rights to reparations. At issue is the Government's resolve to investigate, and where sufficient evidence exists, to prosecute fundamental human rights violations, and the public perception that they are seen to be doing so. Equally, this case concerns the fundamental

¹ REDRESS recently represented a British national against the State of Philippines before the UN Human Rights Committee. The Applicant alleged that his conviction and time in death row amounted to a violation of art 7 of the International Covenant on Civil and Political Rights and that contrary to the Covenant obligation under art 2, no effective civil remedies were available in domestic law since it was not possible to sue the State (see *Albert Wilson v. Philippines*, Communication No. 868/1999, U.N. Doc.CCPR/C/79/D/868/1999 (2003)).

² [1998] 3 WLR 1456

³ SCSL-2004-15-AR72 (E)

⁴ CA ref: A2003/2155

⁵ See www.ararcommission.ca/eng/ruling01.pdf

right of victims and their families to know what has happened as part of a public process⁶ and the duty of the State to afford effective remedies and adequate reparation⁷.

- 2.3. The United Kingdom Government publicly pledged to the people of Iraq that in the event of military action, it would “support the Iraqi people in their desire for ... an Iraq which respects fundamental human rights, including freedom of thought, conscience and religion and the dignity of family life, and whose people live free from repression and the fear of arbitrary arrest.”⁸ Yet the Government argues in the present case that Iraqi people - even while in British custody - are not entitled to the protection of Article 3, encompassing the most fundamental of human rights. REDRESS invites the Court to reject the Government’s stance.

3. The primacy of the prohibition of torture has been universally recognised. The prohibition of torture has now clearly achieved the status of *jus cogens*.

- 3.1. The prohibition of torture is universally recognised. It is set out in all the major international instruments dealing with civil and political rights, including: Article 5 of the Universal Declaration of Human Rights 1948; Article 7 of the International Covenant on Civil and Political Rights 1966; the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment ; Article 3 of the European Convention on Human Rights; Article 5 of the American Convention on Human Rights; Article 5 of the African Charter on Human and Peoples’ Rights; and the Inter-American Convention to Prevent and Punish Torture. It is also prohibited by the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and the Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, and in national constitutions and domestic legislation throughout the world.
- 3.2. The UK is bound by various treaty obligations as well as norms of *jus cogens* to prohibit torture and cruel, inhuman or degrading treatment and punishment, to investigate such allegations effectively, and to provide reparations to victims. For example, article 14(1) of the UN Convention Against Torture states:

⁶ This right was specifically recognised by the United Nations Commission on Human Rights in a recent resolution on impunity, E/CN.4/Res/2001/70 of 25 April 2001, para 8, where it was noted that : “[The Commission on Human Rights] *Recognises that*, for the victims of human rights violations, public knowledge of their suffering and the truth about the perpetrators, including their accomplices, of these violations are essential steps towards rehabilitation and reconciliation, and urges States to intensify their efforts to provide victims of human rights violations with a fair and equitable process through which these violations can be investigated and made public and to encourage victims to participate in such a process.”

⁷ Principle 25(b) of the Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law establishes the right to “**Verification of the facts and full and public disclosure of the truth** to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others;” (E/CN.4/2000/62)

⁸ Vision for Iraq and the Iraqi People: A Paper Published by the UK Government, 16 March 2003, available at <http://www.number-10.gov.uk/output/page3280.asp>.

“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.”

3.3. The Government's regard to treaty obligations other than the European Convention on Human Rights may be material in public law to the lawfulness of his present stance (as was the case with the European Convention on Human Rights prior to the enactment of the Human Rights Act).

3.4. However, the international law context is also relevant to the preliminary issue as to the interpretation of the European Convention on Human Rights. In *Loizidou v. Turkey (merits)*,⁹ the European Court stated that:

“In the Court’s view, the principles underlying the Convention cannot be interpreted and applied in a vacuum. Mindful of the Convention’s special character as a human rights treaty, it must also take into account any relevant rules of international law when deciding on disputes concerning its jurisdiction pursuant to Article 49 of the Convention”. (para 43)

3.5. The prohibition of torture and cruel, inhuman or degrading treatment and punishment is absolute. In *Aksoy v Turkey*,¹⁰ the European Court of Human Rights noted that “Article 3, as the Court has observed on many occasions, enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.” The prohibition encompasses not only the obligation not to commit torture or cruel, inhuman or degrading treatment and punishment, but also the obligation to forestall and pre-empt any such acts.¹¹

3.6. The fight against terrorism does not affect the prohibition of torture and cruel, inhuman or degrading treatment and punishment. For example, the UN Committee Against Torture issued a statement on 22nd November 2001¹² where it reminded States parties to the Convention Against Torture of the non-derogable nature of most of the obligations undertaken by them in ratifying the Convention.

⁹ *Loizidou v Turkey (Merits)*, Application No. 15318/89, Judgment of 18 December 1996; ECHR Rep. 1996-IV, 2216; ILM 36 (1997), 438; 108 ILR 443.

¹⁰ para. 62

¹¹ *Prosecutor v. Furundzija* (10 December 1988, case no IT-95-17/1-T,(1999) 38 International Legal Materials 317), paras. 144 and 148.

¹² CAT/C/XXVII/Misc.7

3.7. In his report “Protection of human rights and fundamental freedoms while countering terrorism”, the Secretary General of the UN recalled that “respect for human rights should be seen as an essential part of an effective counter-terrorism strategy, not an impediment to it.”¹³

3.8. Explicitly regarding the current fight against terrorism, the Human Rights Chamber for Bosnia and Herzegovina stated in *Boudellaa*¹⁴ and subsequently in *Bemsayah* that:

“[...] the Chamber fully acknowledges the seriousness and utter importance of the respondents Parties obligation, as set forth in the UN Security Council resolution 1373 to participate in the fight against terrorism. The Chamber notes, however, that it is absolutely necessary to respect human rights and the rule of law while fighting terrorism. The international fight against terrorism cannot except the respondent Parties from responsibility under the Agreement, should the Chamber find that the hand-over of the applicant to US forces was in violation of Article 1 of Protocol No. 6 to the Convention or Article 3 of the Convention (see *Boudellaa and Others* idid, paras. 236 to 267).”¹⁵

3.9. It is well-established that the prohibition of torture and cruel, inhuman or degrading treatment and punishment has now achieved the status of *jus cogens* - in other words that it is a ‘peremptory’ and non-derogable norm of general international law, which holds the highest hierarchical position among other norms and principles.¹⁶ In *Furundzija*,¹⁷ the International Criminal Tribunal for the Former Yugoslavia stated:

“...because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or *jus cogens*, that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules.... Clearly the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.”

3.10. In *Pinochet* (No. 3)¹⁸ the House of Lords held that the *jus cogens* nature of the international prohibition on torture justified the extension of domestic criminal jurisdiction over acts of

¹³ Report of the Secretary General of the UN, “Protection of human rights and fundamental freedoms while countering terrorism” (A/58/266), 8 August 2003 (para. 55).

¹⁴ *Boudellaa and Others v Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina* (11 October 2002, case nos. CH/02/8679, CH/02/8689, CH/02/8690 AND CH/02/8691) paras. 236 to 267

¹⁵ *Bemsayah against Bosnia and Herzegovina* (4 April 2003, case no. CH/02/9499) para 182

¹⁶ The concept of obligation *erga omnes* and *jus cogens* is found in the International Court of Justice (ICJ)’s advisory opinion on *Reservations to the Convention on the Prevention and Punishment of Genocide*, 1951 ICJ Rep. 15 (May 28). The concept also finds support both in the ICJ’s *South West Africa* cases (Preliminary Objections) (*Ethiopia v. South Africa*; *Liberia v. South Africa*), 1963 ICJ Rep. 319 (Dec. 21) as well as from the *Case of the Barcelona Traction, Light and Power Co. Ltd.* (Belgium v. Spain), 1970 ICJ 3 (Feb. 5). Article 53 of the Vienna Convention on the Law of Treaties defines *jus cogens* norms as : « For the purposes of the present Convention, a peremptory norm of general international law (*jus cogens*) is 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 ».

¹⁷ *Furundzija*, *supra.*, paras 153-4.

¹⁸ Lord Browne-Wilkinson, *R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet* (No 3) [1999] 2 WLR 827.

torture wherever committed. Thus the special status of the substantive prohibition on torture has been directly responsible for the extension of a universal criminal jurisdiction over torture and cruel, inhuman or degrading treatment and punishment with the primary aim of eliminating safe havens for perpetrators. As stated by Lord Browne-Wilkinson, "... the objective was to ensure a general jurisdiction so that the torturer was not safe wherever he went."¹⁹

4. The prohibition of torture and cruel, inhuman or degrading treatment and punishment is universal. It follows that the UK's obligations which arise from the prohibition – to effectively investigate allegations, to prosecute those responsible where sufficient evidence exists, and to ensure redress including reparation to victims – require extraterritorial application to be effective. A purposive interpretation should accordingly be given to the phrase "within their jurisdiction" in Article 1 of the European Convention on Human Rights.

4.1. The fundamental nature of the prohibition of torture in international law informs questions of jurisdiction. As stated by the Human Rights Committee in *Delia Saldias de Lopez v. Uruguay*,²⁰ in relation to its interpretation of Article 2(1) of the International Covenant on Civil and Political Rights,²¹ "it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory". This case was cited with approval by the International Court of Justice, in its recent *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.²² The Court noted, in respect of the extraterritorial application of the International Covenant on Civil and Political Rights that, "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions," (para. 109) and having regard to the *travaux préparatoires*, "in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory." (para. 109)

4.2. There is a presumption that a State's human rights obligations are engaged wherever the State or its agents (military or civilian) 'exercise power and authority (jurisdiction or de facto

¹⁹ *ibid.*

²⁰ Communication no. 52/1979 (29 July 1981), U.N. Doc. CCPR/C/OP/1, para. 12.3

²¹ Article 2(1) of the ICCPR provides that "[e]ach State party... undertakes to respect and to ensure to all *individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant"(emphasis added).

²² *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Decision of 9 July 2004, Gen. List No. 131, paras. 108-111.

jurisdiction) over persons outside national territory’.²³ International jurisprudence has taken a purposive approach to the question of ‘within their jurisdiction’ and ‘effective control’. The United Nations Human Rights Committee noted that:

“The reference in Article 1 of the Optional Protocol to ‘individuals subject to its jurisdiction’ does not affect the above conclusion because the reference in that article is not to the place where the violation occurred but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred. Article 2(1) of the Covenant places an obligation on a State party to respect and to ensure rights ‘to all individuals within its territory and subject to its jurisdiction,’ but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. ... It would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”²⁴

- 4.3. Recently, the Human Rights Committee issued a General Comment on Article 2 of the Covenant.²⁵ It noted that “States Parties are required by Article 2, Paragraph 1 to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”
- 4.4. A similar approach was taken by the Inter-American Commission on Human Rights. In *Coard et al. v. United States*,²⁶ petitioners alleged that they had been mistreated in detention by US forces in Grenada, and the Commission determined that the phrase ‘subject to its jurisdiction’ “may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through acts of the latter’s agents abroad.” The Commission stated that that “[i]n principle, the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.”²⁷
- 4.5. This position was confirmed in respect of Guantanamo detainees. The Inter-American Commission on Human Rights noted, in respect of these detainees that “the determination of a state’s responsibility for violations of the international human rights of a particular individual

²³ T Meron, ‘Extraterritoriality of Human Rights Treaties’ (1995) 89 AJIL 78, pp. 80-81.

²⁴ *Lopez Burgos v. Uruguay* UN doc. A/36/40 (1981) 176 and *Casariago v. Uruguay* UN doc. CCPR/C/Op/1 (1984) 92 Views adopted in 1981], both used the cited language.

²⁵ General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant : 26/05/2004. CCPR/C/21/Rev.1/Add.13.], para. 10.

²⁶ Case 10.951, Report No.109/99, 29 September 1999, para. 37.

²⁷ *ibid.*

turns not on the individual's nationality or presence within a particular geographic area, but rather whether under specific circumstances, that person fell within the state's authority and control."²⁸

- 4.6. The United States Supreme Court in *Rasul v. Bush*,²⁹ referring to the jurisprudence at common law, noted that: "the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown'."
- 4.7. The evidence in the present case indicates that the UK exercises effective control of its sector of Iraq, as reflected by its acceptance of its status as occupying power. However, even where the perpetrator does not have effective control of the territory in which it commits human rights abuses, fundamental obligations such as the prohibition of torture and cruel, inhuman or degrading treatment and punishment under Article 3 should continue to apply.
- 4.8. In REDRESS' submission, that is the position in respect of the European Convention on Human Rights, as is demonstrated by the European Court's decision in *Ocalan v Turkey*. The applicant argued as follows:

"80. The applicant referred to the case-law of the Convention institutions in the cases of *Cyprus v. Turkey* (application no. 8007/77, Commission decision of 17 July 1978, Decisions and Reports (DR) 13, p. 85) and *Drozd and Janousek v. France and Spain* (judgment of 26 June 1992, Series A no. 240, p. 29, § 91) and submitted that Turkey was responsible for acts performed by its officials beyond its borders. He maintained that he had been arrested as a result of an operation that had been planned in Turkey, Italy, Greece and other States."

- 4.9. The Court noted that:

"84. In their observations of 7 January 2002 the Government affirmed, without further explanation, that, in the light of the Court's case-law in the case of *Bankovic and Others v. Belgium and 16 Other Contracting States* ((dec.) [GC], no. 52207/99, ECHR 2001-XII), their responsibility was not engaged by the applicant's arrest abroad".

- 4.10. The Court's assessment was as follows:

"93. As regards the responsibility of Turkey in the applicant's arrest, the Court reiterates its reasoning in the case of *Bankovic and Others* (cited above, §§ 59-60 and 67):

'As to the 'ordinary meaning' of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect,

²⁸ Decision of the Inter-American Commission on Human Rights to Adopt Precautionary Measures In Relation to Detainees in Guantanamo Bay, Cuba, 13 March 2002, at 2 [available at : <http://www1.umn.edu/humanrts/cases/guantanamo-2003.html>]

²⁹ *Rasul et al. V. Bush, President of the United States, et al.*, 542 U.S. ____ (2004), 28 June 2004, p. 14.

protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States...

'Accordingly, for example, a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to that State's and other States' territorial competence... In addition, a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence...

'...In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention.'

“In the instant case, the applicant was arrested by members of the Turkish security forces inside an aircraft in the international zone of Nairobi Airport. Directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the “jurisdiction” of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. The Court considers that the circumstances of the present case are distinguishable from those in the aforementioned *Bankovic and Others* case, notably in that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey (see in this respect the aforementioned decisions in the cases of *Illich Sánchez Ramirez v France* and *Freda v. Italy*).”

4.11. It is notable that, in *Bankovic*, the Court described the Governments’ position as follows:

“36. As to the precise meaning of ‘jurisdiction’, they suggest that it should be interpreted in accordance with the ordinary and well-established meaning of that term in public international law. The exercise of “jurisdiction” therefore involves the assertion or exercise of legal authority, actual or purported, over persons owing some form of allegiance to that State or who have been brought within that State’s control. They also suggest that the term “jurisdiction” generally entails some form of structured relationship normally existing over a period of time.

“37. They maintain that they are supported in this respect by the jurisprudence of the Court which has applied this notion of jurisdiction to confirm that certain individuals affected by acts of a respondent State outside of its territory can be considered to fall within its jurisdiction because there was an exercise of some form of legal authority by the relevant State over them. The arrest and detention of the applicants outside of the territory of the respondent State in the *Issa and Öcalan* cases (*Issa and Others v. Turkey*, (dec.), no. 31821/96, 30 May 2000, unreported and *Öcalan v. Turkey*, (dec.), no. 46221/99, 14 December 2000, unreported) constituted, according to the Governments, a classic exercise of such legal authority or jurisdiction over those persons by military forces on foreign soil.”

4.12. The stance taken by the Government in respect of Case No 13 is that

“The circumstances of claim 13 concern the death of an individual held for a short period in the custody of British armed forces, but within the territory and jurisdiction/ “legal space” of Iraq (cf *Bankovic v Belgium et al...*).”

4.13. In light of the above, the Government’s reliance upon *Bankovic* in this context would appear to be clearly misconceived.

4.14. If there is no effective investigation of acts committed (including those committed extraterritorially in areas under the UK's control) then the result is that acts of torture and/or cruel, inhuman or degrading treatment and punishment would go unredressed. It is especially ironic that the Government should deny liability under Article 3 for the torture of Iraqis in British custody when the UK has, as one of the occupying powers acting through the Coalition Provisional Authority, granted immunity to its armed forces from any liability under Iraqi law, and provided that British armed forces will instead operate under the exclusive jurisdiction of the UK.

5. The procedural obligations implied under Articles 2, 3 and 13 of the ECHR require that the United Kingdom conduct an 'effective' investigation. They underpin the prohibition of torture and make it *practical and effective*.

5.1. Article 13 of the ECHR guarantees the availability of a remedy to enforce the substance of the Convention rights and freedoms. The more serious the breach of such rights, the more pressing is the need for an effective remedy. In *Aydin v. Turkey*³⁰ the European Court considered the requirements of Article 13 specifically in relation to allegations of torture. It noted that given the fundamental importance of the prohibition of torture, where such conduct is alleged the requirements of an effective remedy are particularly strict. In such cases the notion of an effective remedy entails first, an effective investigation so that the substance of the complaint can be dealt with. This is essential to underpin the prohibition on torture and so make the prohibition itself practical and effective. Second, an effective remedy entails the granting of reparations and other form of appropriate relief where torture has been proved, such relief reflecting the exceptional gravity of the conduct complained of. Any investigation must be thorough and effective so that those who commit torture can be identified and punished. The Court recognised that no express provision exists in the Convention such as can be found in Article 12 of the Convention against Torture, which imposes a duty to proceed to a "prompt and impartial" investigation whenever there is a reasonable ground to believe that an act of torture has been committed. However, in torture cases these additional qualities of promptness and impartiality in an effective investigation are implicit in the notion of an effective remedy under Article 13.³¹

5.2. The *jus cogens* status of the prohibition of torture thus requires effective, prompt and thorough investigation of all allegations of possible torture. Without this, "the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the

³⁰ *Aydin v. Turkey*, 25 EHRR 251

³¹ *ibid*, para 103.

State to abuse the rights of those within their control with virtual impunity.”³² Consequently, in ensuring that rights are “practical and effective”, once a person falls into state custody, the State is responsible for his/her treatment, and in the absence of a satisfactory and convincing explanation as to how injuries and/or death were caused, its actions may be deemed to violate Article 2 and/or 3 of the Convention.. In *Selmouni v. France*³³ the Court noted that “where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention.” Similarly in *Aksoy v. Turkey*³⁴ and in *Aktas v. Turkey*³⁵ the Court held:

“Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in detention, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.”³⁶

- 5.3. As noted above, the duty to investigate is also recognised in the Convention against Torture. Article 12 provides: “Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” The Inter-American Court of Human Rights has on many occasions clarified the nature of the duty to investigate,³⁷ and has warned that the failure to do so “has led to a situation of grave impunity regarding the respective facts, a situation which constitutes an infringement of the aforementioned duty of the State. It is injurious to the victims, their next of kin and society as a whole, and fosters chronic recidivism of the human rights violations involved”.³⁸
- 5.4. For an investigation to be effective, it must be thorough³⁹, “capable of leading to the identification and prosecution of those responsible”⁴⁰, and “[determining] whether the force used in such cases was or was not justified in the circumstances”⁴¹. The State is obligated to actively and promptly pursue such investigations once the matter has come to its attention – it

³² *Labita v. Italy* at para.131

³³ (28 July 1999, § 87).

³⁴ *Aksoy v. Turkey*, (1997) 23 E.H.R.R. 553.

³⁵ *Aktas v. Turkey*, (2004) 38 E.H.R.R. 18 paras. 316-20

³⁶ *Aktas v. Turkey*, supra, para. 291.

³⁷ *Velasquez Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am Ct. H.R. (Ser. C) No. 4 (1988), para 176; Affirmed in *El Amparo Case*, Judgment of September 14, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 28 (1996), para. 61 of the judgement on reparations; *Suárez Rosero Case*, Judgment of January 20, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 44 (1999), para 79.

³⁸ *Caracazo Case*, Judgment of August 29, 2002, Inter-Am Ct. H.R., (Ser. C) No. 95 (2002) at para. 117.

³⁹ *Assenov v. Bulgaria* para. 104

⁴⁰ *Kaya v. Turkey*, para 87.

⁴¹ *Jordan v. The United Kingdom*, 4 May 2001, Para 107.

should not be left to the initiative of the victim or next of kin to press for a formal complaint.⁴² This is especially true when the State has relevant information at its sole disposal⁴³.

- 5.5. Investigations must be carried out by competent authorities who exhibit impartiality, independence and a judicial capacity to enable the institution of criminal proceedings. Whether a given investigation is sufficiently independent and impartial will depend on the individual circumstances of each case, however, “[f]or an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events”⁴⁴. This means not only a lack of hierarchical or institutional connection but also a practical independence⁴⁵.
- 5.6. The opportunity for the victims or next of kin to participate meaningfully in the investigation is a further dimension of ‘effectiveness’. The Inter-American Court recognised this in the *Caracazo* case⁴⁶, where it included among the rights of victims and their families, the right to “full access and the capacity to act during all stages and levels of said investigations.” The opportunity for meaningful participation forms part of the right of victims and family members to the truth, which is itself a norm of customary international law⁴⁷. The United Nations Special Rapporteur on the question of impunity of perpetrators has noted that “[i]rrespective of any legal proceedings, victims, their families and relatives have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim’s fate”⁴⁸. The European Court recently held: “In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests”⁴⁹. This need might be met in part where the family has an opportunity to challenge the account advanced by the alleged perpetrators, for instance through cross-examination of witnesses at an inquest⁵⁰. Victims and their families are also entitled to be kept informed of the progress of the investigation and the subsequent proceedings.

⁴² *Jordan*, para. 105; *Aktas* para. 299

⁴³ *Aksoy*, supra.

⁴⁴ *Jordan*, para. 106 See also *Güleç v Turkey* (1999) 28 E.H.R.R. 121, paras 81-82.

⁴⁵ *Finucane v. UK*, 1 July 2003, para. 68

⁴⁶ *Caracazo* Case, Judgment of August 29, 2002, Inter-Am Ct. H.R., (Ser. C) No. 95 2002 at para. 118.

⁴⁷ Report of the Meeting of Experts on Rights not Subject to Derogation during States of Emergency and Exceptional Circumstances, held in Geneva from 17 to 19 March 1995, reproduced in the report of the United Nations Special Rapporteur on the question of human rights and states of emergency, UN Doc. E/CN.4/Sub.2/1995/20, Annex I, para. 40, p. 57.

⁴⁸ UN Doc. E/CN.4/Sub.2/1997/Rev.1, Annex 1]. Princ 3.

⁴⁹ *McKerr v. United Kingdom*, 04 May 2001, para. 115; *Jordan v. United Kingdom*, supra., para. 109.

⁵⁰ *McCann v. UK*, para. 162.

In *Güleç v. Turkey*⁵¹ the European Court found a breach of Article 2 in part because the father of the victim was not informed of the decision not to prosecute.

- 5.7. A related but distinct feature of the procedural requirement is the exposure of an investigation to public scrutiny. In *Taylor, Crampton, Gibson and King v. UK* the European Commission of Human Rights referred to ‘the minimum requirement of a mechanism whereby the circumstances of a deprivation of life by the agents of a state may receive public and independent scrutiny’.⁵² The nature and degree of scrutiny required will depend on the circumstances of the case, but the need will be greater where the facts are unclear and/or disputed. The transparency of an investigation might be enhanced by holding proceedings in public or by publication of its results. In *Assenov v. Bulgaria* the Court referred to the requirement for sufficient public scrutiny of the investigation to ensure its legitimacy and “to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts.”⁵³
- 5.8. The families of victims who have died at the hands of State authorities may themselves become victims of violations of Article 3 of the European Convention, inasmuch as the authorities' reactions and attitudes to the situation when it is brought to their attention are lacking.⁵⁴ It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct. In *Timurtas v. Turkey* and *Kurt v. Turkey*, the Court found that the State had violated the Art 3 rights of family members after failing to respond to their complaints in relation to the deaths of their children or conduct effective investigations into the incidents.⁵⁵
- 5.9. Security considerations have been raised by governments in some cases as an excuse for the failure to conduct an effective investigation. Such considerations cannot be allowed to impede the responsible authorities from carrying out an effective investigation.⁵⁶ The duty to conduct an investigation is an obligation of means as well as result⁵⁷ and to that extent it is incumbent on the UK to take all reasonable investigatory measures in line with its international obligations. The exceptional seriousness of allegations of torture or unlawful killing underline the need for an exceptionally rigorous investigation within the bounds of what is reasonably achievable. So, for instance, as far as the collection of evidence is concerned:

⁵¹ (1999) 28 E.H.R.R. 121, para. 82

⁵² (1994) 79-A DR 127, 136

⁵³ *Assenov*, para 140.

⁵⁴ *Çakici v. Turkey* no. 23657/94, ECHR 1999-IV para 98

⁵⁵ *Timurtas v. Turkey* (2001) 33 E.H.R.R. 6, para. 98; *Kurt v. Turkey* (1999) 27 E.H.R.R. 373 paras. 130-134.

⁵⁶ See *Kaya v. Turkey* and the other South East Turkey cases cited in the Claimants' skeleton argument at paras 56-57. See also, on the inability to derogate from the duty to investigate, the decision of the Committee against Torture in *Blanco Abad v. Spain* CAT/C/20/D/59/1996 para. 8.2. See also CAT/C/SR.247 para. 32, 39 and 41.

⁵⁷ *Finucane v. UK*, para. 69

“[the authorities] must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death”;⁵⁸ and

“there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.”⁵⁹

5.10. In the present case the evidence suggests that one of the deceased, Mr Mousa, was tortured by British troops. He died by asphyxiation. No evidence has been served in rebuttal from those soldiers who held him in their custody. Where there is prima facie evidence of death by torture at the hands of British troops in Iraq, it is submitted in the light of the above that the Court must consider the following in determining whether the subsequent investigation was effective for the purposes of the ECHR:

- (i) Whether, as the victim’s family were promised by the SIB,
 - (a) an identity parade was held for Iraqi witnesses to identify those involved in the incident (due to be done in January 2004);
 - (b) forensic tests were conducted on clothing and objects in the vicinity of the incident (due to be completed by the end of January 2004);
 - (c) procedures have been put in place ‘to ensure that such events would not reoccur in the future’.⁶⁰
- (ii) Whether a full witness statement was ever taken from Mr Mousa’s father, who was a material eye witness, no statement having been taken from him as of 5 January 2004 and the SIB having indicated that a statement would only be taken if the account he gave at a meeting on that date was ‘new information’.⁶¹
- (iii) Whether witness statements were taken for the purpose of the investigation from all other material witnesses, including all those who were present at the hotel when Mr Mousa was detained (including Brigadier Moore) and all those who had any contact with him between his detention by the British Army and his death in their custody.

⁵⁸ *ibid.*

⁵⁹ *ibid.*, para. 71

⁶⁰ Meeting held on 5 January 2004, ex. RP1, p.10

⁶¹ *ibid.*, p.11

- (iv) Whether a full and rigorous investigation was conducted of the cause of Mr Mousa's death, providing a complete and accurate record of injury and objective analysis of clinical findings.
- (v) Whether the report of such investigation was ever communicated to Mr Mousa's wife, children and other family members and whether they were ever provided with an opportunity to comment on it.
- (vi) If any autopsy report was not communicated to Mr Mousa's family, whether the Government has ever provided any compelling explanation to them or anyone else as to why this was not done.
- (vii) Whether prompt and effective measures have been taken to ensure that those responsible for Mr Mousa's death are charged and prosecuted.
- (viii) Whether they and other Iraqi witnesses have been afforded any opportunity to challenge the accounts of those who might have been responsible for Mr Mousa's death.
- (ix) Whether Mr Mousa's family's concerns about the conduct of the investigation have been adequately addressed.
- (x) Whether in all other respects his family have been kept fully informed of the conduct and progress of the investigation and afforded all reasonable opportunities to participate in it.
- (xi) Whether there was sufficient public scrutiny and whether the investigation has been conducted sufficiently thoroughly and impartially to meet the requirements of Articles 2 and 3 of the ECHR.
- (xii) Whether, in the light of the investigation which was completed some three months ago, adequate steps have been taken to communicate the results of the investigation directly to Mr Mousa's family, to make public in Iraq the results of the investigation and to make such reparations as are necessary in the light of the investigation (see para. 6.2 below).

5.11. It is further submitted that, in circumstances where the alleged torture and unlawful killing occurred whilst Mr Mousa was in the direct and exclusive custody of British troops, it is for the Government to show that an effective investigation was conducted by reference to the above criteria.

6. These procedural obligations also include the right of the victim to substantive *reparations*.

6.1. The right to reparations where human rights are violated is generally recognised: see, for examples, the Universal Declaration of Human Rights (Article 8); the International Covenant on Civil and Political Rights (Articles 2(3); 9(5) and 14(6)); the International Convention on the Elimination of All Forms of Racial Discrimination (Article 6); the Convention on the Rights of

the Child (Article 39); the Convention against Torture (Article 14) and the Rome Statute for the International Criminal Court (Article 75). It also figures in regional instruments such as the European Convention on Human Rights (Article 5(5), 13 and 41); the American Convention of Human Rights (Articles 25, 63(1) and 68); the African Charter on Human and Peoples' Rights (Article 21(2)).

- 6.2. Reparations can take the form of restitution, compensation, rehabilitation, satisfaction and guarantees on non-repetition⁶². They are not limited to pecuniary damages but can also include measures with longer-term restorative aims, such as verification of the facts and full and public disclosure of the truth, apology, including public acknowledgement of the facts and acceptance of responsibility, and judicial and administrative sanctions against the persons responsible.⁶³
- 6.3. An effective investigation is only a first component of substantive reparations. Courts have recognised that it must be followed up by a criminal prosecution and other forms of redress, including civil remedies and/or acknowledgement of wrongdoing where appropriate. Ex gratia compensation schemes, which by definition operate without any public admission of wrongdoing, do not satisfy the obligation to provide reparation to victims. In *Osman v. UK*,⁶⁴ it was held that the State's obligations under Article 2(1) ECHR included '[a] primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.' The European Court of Human Rights has further recognised that criminal proceedings are not enough and that civil remedies must exist and be accessible to *complement* criminal sanctions. For example, in *Keenan v. UK*,⁶⁵ the European Court found that Article 13 ECHR was breached where the applicant could not obtain an adequate remedy for the death of her son in custody. "The Court considers that in the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as *part of the range of possible remedies.*" [emphasis added]
- 6.4. The right of a victim of human rights abuse to reparation for their loss and suffering derives from a fundamental principle of international law, as set out by the International Court of Justice in the *Chorzow Factory Case*,⁶⁶ that the breach of an engagement involves an obligation

⁶² Draft 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 (rev. 24 October 2003), E/CN.4/2004/57 10 November 2003, Appendix 1.

⁶³ *ibid.*

⁶⁴ (1998) 29 EHRR 245.

⁶⁵ (1998) EHRR 648.

⁶⁶ (Ger v Pol) (1928) PCIJ Sr A No 17 at47 (Sept. 13).

to make reparation in adequate form. This principle has been recognized by the International Law Commission in its draft *Articles on State Responsibility*.⁶⁷

- 6.5. The concept of ‘victim’ encompasses persons and collective groups of persons who suffered harm, including physical or mental injury, emotional suffering, economic loss or impairment of their fundamental legal rights, and may include, inter alia, dependants or a member of the immediate family or household of the direct victim to the extent that they suffered physical, mental, or economic harm.⁶⁸
- 6.6. The impact on the family members of direct victims who have been killed at the hands of State officials, particularly when there are allegations of deliberate wrongdoing, has been analysed by Dr Yael Danieli in the expert witness report annexed to these submissions. She has noted that such traumatic events impact not only on the lives of ‘direct victims’ but on immediate family members and, at times, successive generations. She has referred to the vicarious traumatisation or co-victimisation of family members, and the impact of trauma on family born after the event. She has noted that victims and their offspring who have been wronged by a government or society find it considerably more difficult to begin the healing process if the responsible individuals cannot be identified and punished for their crimes.
- 6.7. In her report, Dr. Danieli concludes that the contribution of the process of redress and the attainment of justice are understood as being critical to the healing of individual victims, as well as their families, societies and nations. Where the right to reparation is adequately respected, that process contributes to the sense of closure. Its essential components include re-establishing the victim’s value, power and dignity, rehabilitation, restoration and compensation and recognition and apology.
- 6.8. Thus, it is submitted, the right to reparations is an important aspect of both the substantive guarantee of protection against torture and the procedural rights arising whenever the substantive guarantee has failed.

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⁶⁷ “It is a principle of international law that the breach of an engagement involves an obligation to make reparation in adequate form. Every internationally wrongful act of a State entails the international responsibility of that State.” UN Doc A/CN.4/1.602/Rev.1 26 July 2001.

⁶⁸ Draft basic principles and guidelines, supra., Appendix 1, at para. 8.