Neutral Citation Number: [2014] EWCA Crim 1729

Case No: 2013/05698

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
Mr Justice Sweeney

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2014

Before :

LADY JUSTICE HALLETT DBE, VP CACD
LORD JUSTICE LLOYD JONES
and
MR JUSTICE GREEN

- -

Between :

KL	**Appellant**
- and -	
Regina	**Respondent**

- -
- -

James Lewis QC & Rachel Barnes (instructed by Kingsley Napley) for the Appellant
Bobbie Cheema QC & Kathryn Howard (instructed by Crown Prosecution Service) for the Respondent
Guglielmo Verdirame (appointed by the Treasury Solicitor) as amicus curiae.

Hearing dates : 25, 27 March & 29th July 2014

- -

Approved Judgment

Lady Justice Hallett DBE VP CACD :

1. This is the judgment of the court to which all members of the court have contributed.

Introduction

2. Colonel KL is a Nepalese citizen who is accused of engaging in acts of torture contrary to section 134, Criminal Justice Act 2003 at the Gorusinghe Army Barracks in Nepal in the spring of 2005. The complainants are two Nepali citizens Janak Raut and Karam Hussein who were both detained as suspected Maoists. At the time of his arrest Colonel KL was visiting relatives in England during a short break from his duties as a Senior Military Liaison Officer with the United Nations Mission in South Sudan (UNMISS).

3. This is an interlocutory appeal against the ruling of the trial judge Sweeney J. made on 29 October 2013 during a preparatory hearing.

4. On behalf of Colonel KL it is submitted that

   (1) He is entitled to immunity ratione materiae in respect of his official conduct.

   (2) He was at the time of his arrest and questioning entitled to immunity as a Senior Military Liaison Officer with UNMISS.

   (3) He has already been convicted and punished in Nepal under the criminal law of Nepal for the alleged acts of torture in relation to Janak Raut.

The judge rejected all three of the submissions.

The Facts

The complaint by Janak Bahadur Raut

5. A complaint was submitted to the District Court of Kapilvastu by Janak Bahadur Raut against Colonel KL pursuant to section 5(2) of the Torture Compensation Act 2053. The complaint alleged that Colonel KL was responsible for torturing the complainant at the Gorusinghe Army Barracks during the civil war which took place in Nepal from 1996 until 2006 and which involved an armed conflict between government forces and Maoist fighters. In his complaint Janak Raut stated that a patrol of armed security forces arrested him at his farm and took him to the Bindhyabasini Battalion headquarters, Chandruta. He was kept in a room, blindfolded, beaten by three or four soldiers for about four hours and electrocuted on his ear. During this time he lapsed in and out of consciousness. He was repeatedly told that he was about to be executed and he was deprived of food and water. He was forced to sign various documents which he was not allowed to read. He complained that this pattern of behaviour continued, periodically, over the next 17 days.

6. Eventually he was released to his family upon the condition that he appeared at the barracks on a daily basis and that he obtained permission from the commander at the barracks to leave his village. He was also required to sign a document waiving any right to make a complaint and he was told that he would be killed if he made any complaint regarding the torture inflicted upon him. In his statement he stated as follows:

> "As I was in need of medical treatment due to the torture, I went for treatment to Gorakhpur in India and to Kathmandu making sure that I would appear to the Respondent every 15th day. I was informed of being completely released and not to appear to the barracks on 2063/2/31 pursuant to the political change that took place in the country and the government's decision made on 2063/2/30 to grant release to the entire Maoist detainees, I got completely released from their detention then, and thus I present this complaint within statutory limitations set under section 5 of the Act, within 35 days from 2063/2/30."

7. The reference to section 5 of the Act is to the Torture Compensation Act 2053, to which we return later in this judgment. Paragraphs 5-9 of the complaint are relevant to an analysis of the judgment of the District Court. They state:

> "5. Article 14(4) of the Constitution of the Kingdom of Nepal has made a mandatory constitutional provision that no torture must be inflicted on a person detained in the course of investigation or trial and that any torture must be compensated if such torture is inflicted. Similarly, Article 7 of the ICCPR, 1996 and Article 1 of UNCAT, 1984 has prohibited torture by defining it as a criminal offence. Nepal has already ratified these conventions and they apply equivalent to Nepalese law according to the provision contained in section 9 of Treaty Act, 2047. Similarly, section 3(1) of the Act makes a clear provision that a person detained in the course of an investigation or inquiry or in any other manner must not be tortured. Nevertheless, severe torture and inhuman and degrading treatment was inflicted on me by the Respondents while I was in their custody. Consequently, I have suffered irreparable loss due to the problems I am having these days – I have pain my knee, back pain, problems with sleeping and sitting, loss of memory and anxiety attacks when I see army and police personnel.
>
> 6. Due to the physical and mental torture inflicted on me in the manner described above, I am undergoing regular medical treatment to date. The torture has left a severe impact on my mental, physical as well as intellectual state. Due to the Respondent's acts of inflicting severe physical and mental torture, contrary to the constitution as well as existing national and international legal provisions, I have

> suffered irreparable physical and mental loss. Thus, I make this complaint seeking order for compensation amounting Rs 100,000.00 pursuant to section 6(1) of Torture Compensation Act and the maximum compensation by assessing reasonably the physical and mental loss I have suffered now and am likely to suffer in the future; and for an order for necessary departmental action to the Defendant pursuant to section 7 of the Act.
>
> 7. This complaint comes under Summary Procedure Act, 2028.
>
> 8. Total fees Rs 89.00 – Rs 50 for the registration of this complaint, Rs 30 for the summons and Rs 9 for the photocopies – has been attached herewith.
>
> 9. The jurisdiction of this court applies to this case pursuant to Section 5(1) of Torture Compensation Act, 2053 and No. 29 of Chapter on Court Management."

The Judgment of the District Court of Kapilvastu

8. On 29 November 2007 District Judge Poudel in the District Court of Kapilvastu delivered judgment in favour of the complainant. In his judgment he recited the basic facts as set out above. He recorded that the evidence given by Colonel KL was to the effect that the complainant was involved in terrorist and destructive activities and that he was taken for interrogation by Joint Security Forces and was afterwards released. Colonel KL denied that the complainant had been subjected to any physical or mental torture. A witness for the complainant, however, gave evidence corroborating his version of events. He explained that when he went to the barracks to make enquiries in relation to the complainant he was told that Janak Bahadur Raut "might have died". Shortly thereafter the complainant was released.

9. The presiding judge identified three questions for the determination of the court. The first was whether the claim was statute barred. The second and third were in the following form:

> "2. Whether or not the act of inflicting torture constitutes an offence?
>
> 3. Whether or not the plaintiff is entitled to receive compensation as claimed in the plaint?"

10. In answering question 2 – whether the act of inflicting torture constituted an offence – the judge turned to both domestic religious beliefs and international practice. With regard to the former the judge stated that "we have accepted torture as a sin since long back". With regard to international practice he cited Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, Article 1 of the United Nations

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 ("Convention against Torture "), and the Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly on 9th December 1975.

11. The judge paid particular regard to the Convention against Torture which he found that Nepal had ratified and he observed that pursuant to section 9 of the Nepal Treaty Act 2047 provisions of a treaty to which Nepal has become a party apply "…as equivalent to Nepalese law". He then referred to section 3(1) of the Torture Compensation Act of Nepal 2053 which provided that any person who had been detained for the purpose of investigation, inquiry or trial or for any other person was not to be subjected to torture and that one who inflicted torture could also be liable to departmental action. In the light of the above the judge held that it could "… not be held that torture does not constitute an offence".

12. With regard to the third question (whether or not the complainant was entitled to compensation) the court rejected the evidence of the defence, including that of Colonel KL, that the complainant had not been tortured during his detention. The court referred to the extensive medical evidence produced by the complainant and found that the defendant had treated him contrary to the provisions of the Torture Compensation Act. He was therefore to be compensated in the sum of Rs 75,000 (a sum amounting to approximately £470) by the Government of Nepal. The reasons ended with the following statement:

> "…the Defendant K KL the then Battalion Commander of Shivadal Battalion Gorusinghe is to be referred for departmental action to the concerned body in accordance with the Torture Compensation Act, 2053 (BS) Article 7."

The orders of the court were

1. to notify the District Administration Office that the complainant was to receive compensation in the amount of Rs 75,000 from the Government of Nepal;
2. to notify Nepal Army Headquarters and the Ministry of Defence that K KL had been referred for departmental action pursuant to section 7 of the Torture Compensation Act;
3. to notify the defendant K KL he had 35 days within which to appeal;
4. to notify the Public Prosecutor's Office of the verdict.

13. Departmental action was taken against the defendant. In an order made pursuant to sections 62 and 105 of the Army Act 2063, Adjutant Major General Chand barred Colonel KL from promotion for one year pursuant to section 105(4) of the Army Act 2063.

The Complaint by Karam Hussein

14. The second complainant Mr Hussein was arrested on 14 April 2005 with eight or nine other men. They were taken to a special task force base camp. On the same day a protest was staged outside the base camp in support of Mr Hussein and the other men arrested. In consequence, all of the men were transferred to the

Gorusinghe Barracks on the afternoon of 14 April. They remained blindfolded and handcuffed. On arrival at the barracks Mr Hussein heard instructions being given by a person he presumed was in charge of the barracks to take statements from the detainees. If they did not co-operate they were to be killed. Mr Hussein, still blindfolded, was made to walk to a wooded area and to lie upon the ground. He was then asked questions about the Maoists and was beaten severely including upon the soles of his feet with either iron bars or wooden sticks. In consequence his ankle was broken. When the beating ceased he was unable to stand and he was dragged back to the holding area. The next day he was visited by an Army Doctor who examined him and gave him medication to relieve the pain. However he was questioned again about the Maoists a few days later and was beaten, once again, upon the soles of his feet, kicked and had cigarettes extinguished on his hands.

15. Mr Hussein complained that he was questioned repeatedly about the same thing every three days or so, each interrogation lasting for approximately 20 minutes. He stated that he was taken to see Colonel KL who interrogated him. During these bouts of questions he was not hit but Colonel KL would instruct his soldiers to take Mr Hussein away and beat him to encourage him to speak. After approximately six months Mr Hussein was transferred to the district prison at Taulihawa and subsequently to Kathmandu Central Prison. Whilst he was in the district prison at Taulihawa Mr Hussein asked his brother to file a case at the Appeal Court at Butwal in connection with his unlawful kidnapping and detention. The court ordered the district court at Taulihawa to release him. He was released but was rearrested immediately upon departing from the court and taken back to district police headquarters and returned to prison. Mr Hussein estimates that he was detained for a total of 14 months.

The commencement of criminal proceedings by the United Kingdom authorities

16. The allegations of torture were first brought to the attention of the United Kingdom authorities in 2009. A file was served by solicitors acting for Janak Raut and Karam Hussein. Police took witness statements from the complainants in November and December 2012.

17. On 3 January 2013 Colonel KL was arrested in Sussex. No prior notification of the intention to effect the arrest had been given to the government of Nepal. His detention was authorised at Hastings Police Station. At 07.57 Colonel KL was advised of his rights including the right to communicate with his embassy and he elected to call Colonel Ghimire the Military Attaché at the Embassy. Various attempts were made to contact Colonel Ghimire. At 09.12 the Embassy provided a mobile phone number for Colonel Ghimire and he was contacted. Colonel KL was told at 09.37 that Colonel Ghimire would contact him shortly. At 10.39 Colonel Ghimire rang the custody suite and shortly thereafter spoke with Colonel KL. Colonel Ghimire requested that a fax be sent to the Embassy confirming Colonel KL's arrest. This fax was sent at 11.16. Between 14.30 on 3 January and 11.19 on 4 January the police conducted eight interviews with Colonel KL.

18. At midday on 4 January 2013 the Foreign and Commonwealth Office informed the police that embassy staff wished to make a consular visit to Colonel KL. At 17.00 Mr Chhetri (Deputy Chief of Mission at the Embassy) and Colonel Ghimire attended the police station. The police explained the investigation process to them

and that Colonel KL was being interviewed accompanied by a legal representative. The police invited the embassy officials to speak to Colonel KL at the conclusion of his interviews. They declined because of other arrangements but asked that Colonel KL be given their regards and be told that they would see him soon.

19. On either 3 or 4 January the Attorney General gave his fiat for the prosecution of Colonel KL. At 19.19 on 4 January 2013 Colonel KL was charged with two counts of torture pursuant to section 134 Criminal Justice Act 1988. Shortly thereafter the police left a voicemail message for Mr Chhetri informing him that Colonel KL had been charged and would remain in custody to appear at Westminster Magistrates' Court the following morning.

20. On 5 January 2013 Colonel KL appeared at Westminster Magistrates' Court. Colonel Ghimire and another representative from the Embassy attended. Colonel KL was remanded in custody.

The request to the Secretary General of the United Nations to waive the immunity of Colonel KL

21. On 8 January 2013 Sir Mark Lyall Grant, the Permanent Representative to the United Kingdom Mission to the United Nations, wrote to Ms Patricia O'Brien, the Under Secretary-General for Legal Affairs, informing her that Colonel KL had been arrested on 3 January 2013 and had been charged with offences of torture and remanded in custody. He stated that the United Kingdom did not believe that the Convention on the Privileges and Immunities of the United Nations, 13 February 1946 ("the General Convention") had any application to this case.

22. On the same day, 8 January 2013, Ms Patricia O'Brien responded. She confirmed that Colonel KL did not enjoy immunity from legal process in respect of the alleged acts, which did not relate to the performance of his political functions as an expert on mission. She went on to point out that Colonel KL enjoyed immunity from personal arrest or detention. However, in the light of the facts of this case the Secretary General had waived Colonel KL's immunity from personal arrest or detention.

Legislative framework

The United Nations Convention against Torture

23. The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the General Assembly of the United Nations on 10 December 1984. 155 states are currently parties to the Convention, including Nepal and the United Kingdom. It provides in relevant part:

> "Article 1
>
> 1. For the purposes of this Convention, the term "torture" means 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

…

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

…

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.

…

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph I of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

…

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

…

Article 12

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.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. 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.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

…"

Criminal Justice Act 1988 ("CJA 1988")

24. Sections 134 and 135 of the CJA 1988 provide:

> "134 Torture.
>
> (1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.
>
> (2) A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if—
>
> (a) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence—
>
> (i) of a public official; or
>
> (ii) of a person acting in an official capacity; and
>
> (b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.
>
> (3) It is immaterial whether the pain or suffering is physical or mental and whether it is caused by an act or an omission.
>
> (4) It shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct.
>
> (5) For the purposes of this section "lawful authority, justification or excuse" means—
>
> (a) in relation to pain or suffering inflicted in the United Kingdom, lawful authority, justification or excuse under the law of the part of the United Kingdom where it was inflicted;
>
> (b) in relation to pain or suffering inflicted outside the United Kingdom—
>
> (i) if it was inflicted by a United Kingdom official acting under the law of the United Kingdom or by a person acting in an official capacity under that law, lawful authority, justification or excuse under that law;

> (ii) if it was inflicted by a United Kingdom official acting under the law of any part of the United Kingdom or by a person acting in an official capacity under such law, lawful authority, justification or excuse under the law of the part of the United Kingdom under whose law he was acting; and
>
> (iii) in any other case, lawful authority, justification or excuse under the law of the place where it was inflicted.
>
> (6) A person who commits the offence of torture shall be liable on conviction on indictment to imprisonment for life.
>
> 135 Requirement of Attorney General's consent for prosecutions.E+W+N.I.
>
> Proceedings for an offence under section 134 above shall not be begun—
>
> (a) in England and Wales, except by, or with the consent of, the Attorney General; or
>
> (b) in Northern Ireland, except by, or with the consent of, the Attorney General for Northern Ireland."

Ground 1: Immunity ratione materiae.

25. The principal authority in this jurisdiction on the relationship of the Convention against Torture and immunity ratione materiae is the decision of *the House of Lords in R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC 147 *("Pinochet (No. 3)").* In the present case both of the parties and the amicus curiae addressed in detail the precise basis of that decision. As their competing contentions were the foundation of many of the submissions which followed, it is necessary to start by examining that decision in order to determine its ratio decidendi which is, of course, binding on this court.

26. Spain sought the extradition of Senator Pinochet to Spain to face charges which included charges of torture. Senator Pinochet maintained that as a former head of State of Chile he enjoyed immunity ratione materiae in respect of his official acts performed while head of State. Six of the seven Law Lords who sat in *Pinochet (No. 3)* held that he did not enjoy immunity ratione materiae in respect of the allegations of torture performed in his official capacity which were said to have taken place when he was head of State. Each of the Law Lords in the majority delivered a detailed speech in which many different approaches to the issue were canvassed. As a result it is a task of some complexity to identify the ratio decidendi.

27. The earlier decision of the House of Lords in the same litigation, *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* [2000] 1 AC 61 *("Pinochet (No. 1)*"), was set aside by the House of Lords in *In Re Pinochet* [2000] 1 AC 119 (*"Pinochet No. 2"*) and, accordingly, is not of binding authority.

The decision of the majority in *Pinochet (No. 1)*, holding that Senator Pinochet did not enjoy immunity in respect of alleged acts of official torture, proceeds on the basis that such acts of torture cannot be regarded as within the official functions of a head of State. (See Lord Nicholls at p. 109B, Lord Steyn at p. 116D-F.) There are statements to similar effect in *Pinochet (No. 3).* Thus, for example, at p. 205A Lord Browne-Wilkinson asks rhetorically, "How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?" Similar statements appear in the speech of Lord Hutton at pp. 261F -262E, 263, 264B.

> "Therefore having regard to the provisions of the Torture Convention, I do not consider that Senator Pinochet or Chile can claim that the commission of acts of torture after 29 September 1988 were functions of the head of state. The alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime." (at p. 262D-E)

At p. 263E-F he makes clear that this is the basis of his decision.

28. On the other hand, Lord Hope in *Pinochet (No. 3)* rejected this approach as "unsound in principle" observing that the principle of immunity ratione materiae protects all acts which the head of state has performed in the exercise of the functions of government (at p. 242C). In any event, it is clear that it does not form the ratio decidendi of *Pinochet (No. 3).*

29. More recently in *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270 Lord Bingham identified an internal contradiction in this line of argument. He observed:

> "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. The claimants' argument encounters the difficulty that it is founded on the Torture Convention; but to bring themselves within the Torture Convention they must show that the torture was (to paraphrase the definition) official, yet they argue that the conduct was not official in order to defeat the claim to immunity." (at para. 19. See also Lord Hoffmann at paras. 88, 89, 93.)

30. We have come to the clear view that the ratio decidendi of *Pinochet (No. 3)* is to be found in a much narrower principle, namely that as between the States party to the Convention against Torture, the Convention excludes the operation of immunity ratione materiae. A number of the judges in the majority in *Pinochet*

(No. 3) pointed out that since the offence of torture in Article 1(1) was limited to acts of torture performed in an official capacity, every case would otherwise be met by a plea of immunity. The immunity would be exactly co-extensive with the offence created by the Convention. In these circumstances a clear majority concluded that the parties to the Convention against Torture must be taken to have decided that immunity ratione materiae should not be available in such cases. These views are expressed in different ways. However, whether it is said to be the result of an express agreement, an implied agreement or a waiver, the various formulations all share the core conclusion that the availability of immunity would be incompatible with the Convention against Torture and would defeat its purpose.

31. An analysis of *Pinochet No. 3* shows that four members of the court supported this view, although for slightly different reasons. Lord Browne-Wilkinson observed:

> "Finally, and to my mind decisively, if the implementation of a torture regime is a public function giving rise to immunity ratione materiae, this produces bizarre results. Immunity ratione materiae applies not only to ex-heads of state and ex-ambassadors but to all state officials who have been involved in carrying out the functions of the state. Such immunity is necessary in order to prevent state immunity being circumvented by prosecuting or suing the official who, for example, actually carried out the torture when a claim against the head of state would be precluded by the doctrine of immunity. If that applied to the present case, and if the implementation of the torture regime is to be treated as official business sufficient to found an immunity for the former head of state, it must also be official business sufficient to justify immunity for his inferiors who actually did the torturing. Under the Convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the State of Chile is prepared to waive its right to its officials immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention - to provide a system under which there is no safe haven for torturers - will have been frustrated. In my judgment all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.
>
> For these reasons in my judgment if, as alleged, Senator Pinochet organised and authorised torture after 8 December 1988, he was not acting in any capacity which gives rise to immunity ratione materiae because such actions were

> contrary to international law, Chile had agreed to outlaw such conduct and Chile had agreed with the other parties to the Torture Convention that all signatory states should have jurisdiction to try official torture (as defined in the Convention) even if such torture were committed in Chile. (at p. 205C-F)

32. This was also the basis of the speech of Lord Saville (at pp. 266D, 266H - 267B, 267F-G).

> "So far as the states that are parties to the Convention are concerned, I cannot see how, so far as torture is concerned, this immunity can exist consistently with the terms of that Convention. Each state party has agreed that the other state parties can exercise jurisdiction over alleged official torturers found within their territories, by extraditing them or referring them to their own appropriate authorities for prosecution; and thus to my mind can hardly simultaneously claim an immunity form extradition or prosecution that is necessarily based on the official nature of the alleged torture.
>
> Since 8 December 1988 Chile, Spain and this country have all been parties to the Torture Convention. So far as these countries at least are concerned it seems to me that from that date these state parties are in agreement with each other that the immunity ratione materiae of their former heads of state cannot be claimed in cases of alleged official torture. In other words, so far as the allegations of official torture against Senator Pinochet are concerned, there is now by this agreement an exception or qualification to the general rule of immunity ratione materiae.
>
> I do not reach this conclusion by implying terms into the Torture Convention, but simply by applying its express terms. A former head of state who it is alleged resorted to torture for state purposes falls in my view fairly and squarely within those terms and on the face of it should be dealt with in accordance with them." (p. 266H – 267D)

33. Lord Millett observed:

> "The definition of torture, both in the Convention and section 134, is in my opinion entirely inconsistent with the existence of a plea of immunity ratione materiae. The offence can be committed only by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No

> rational system of criminal justice can allow an immunity which is coextensive with the offence." (p. 277D-E)
>
> "My Lords, the Republic of Chile was a party to the Torture Convention, and must be taken to have assented to the imposition of an obligation on foreign national courts to take and exercise criminal jurisdiction in respect of the official use of torture. I do not regard it as having thereby waived its immunity. In my opinion there was no immunity to be waived. The offence is one which could only be committed in circumstances which would normally give rise to the immunity. The international community had created an offence for which immunity ratione materiae could not possibly be available. International law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose." (p. 278A-B)

34. Similarly, Lord Phillips concluded:

> "The only conduct covered by the Convention is conduct which would be subject to immunity ratione materiae, if such immunity were applicable. The Convention is thus incompatible with the applicability of immunity ratione materiae." (p. 290F)

35. This approach was expressly rejected by Lord Goff (dissenting), by Lord Hope (at p. 248 B-C) and by Lord Hutton (at p. 263E). Nevertheless, we have come to the clear view that this is the ratio decidendi of *Pinochet (No. 3).* This reading of *Pinochet No. 3* is supported by Lord Bingham in *Jones v. Saudi Arabia*:

> "The essential ratio of the decision, as I understand it, was that international law could not without absurdity require criminal jurisdiction to be assumed and exercised where the Torture Convention conditions were satisfied and, at the same time, require immunity to be granted to those properly charged. The Torture Convention was the mainspring of the decision, …" (at para. 19)

We also note that the International Court of Justice in the *Jurisdictional Immunities case (Germany v. Italy, Greece intervening)* (Judgment of 3 February 2012) considered that the rationale of the judgment of the House of Lords in *Pinochet (No.3)* was based upon the specific language of the Convention against Torture (at para. 97).

36. Miss Cheema QC, in her submission on behalf of the respondent accepted that this was the ratio of *Pinochet (No. 3).* However, she submitted that an examination of the speeches supports an alternative basis of the decision. This is based on the status of the prohibition on torture as a rule of jus cogens i.e. a peremptory norm of international law from which no derogation is permitted. In its most extreme

form it has been contended that this leads to the result that rules of immunity, whether ratione personae or ratione materiae must yield to the overriding force of the rule of jus cogens prohibiting torture. Miss Cheema points to the decision of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Furundzija* (Case No. IT-95-17/I-T10) and submits that loss of immunity must be a consequence of the jus cogens status of the prohibition on torture. While it is true that such reasoning does play a part in the speech of Lord Hope in *Pinochet (No. 3)* (at pp.247B-E, 260A, 261B, 264), we are unable to find any support for this approach in the other speeches. In our view, this line of reasoning certainly does not provide the basis of that decision. More recently, it has been rejected by the House of Lords in *Jones v. Saudi Arabia* (per Lord Bingham at paras. 22 et seq. and Lord Hoffmann at paras. 42 et seq.) by the International Court of Justice in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* ICJ Rep. (2002) 3, paras. 58, 78; *Armed Activities on the Territory of the Congo* (*Democratic Republic of Congo v Rwanda)* ICJ Rep. (2006) 6 at paras. 64 and 125; Jurisdictional Immunities of *the State (Germany v. Italy, Greece Intervening),* Judgment of 3 February 2012, at paras. 92-97 and by the European Court of Human Rights in *Al- Adsani v. United Kingdom* (2002) 34 EHRR 11.

37. In short, there is no conflict between such rules of jus cogens and the rules of customary international law which require national courts of one State to accord immunity to the acts of another State or its officials. The rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from substantive rules which have the status of jus cogens. The argument confuses substantive prohibitions on conduct with the distinct procedural question of whether a State or its officials may lawfully be subjected to the adjudicative jurisdiction of another State in respect of that conduct. In particular, a rule granting immunity from jurisdiction is not a derogation from the prohibition on torture. It cannot be characterised as condoning or authorising such conduct, nor can it absolve those responsible from liability.

38. This line of argument is to be distinguished from the argument that a new rule of customary international law had developed which would deny immunity ratione materiae in respect of activities which were international crimes. There is support for such a view in the speeches of Lord Hope, Lord Millett and Lord Phillips. We do not consider that this reasoning constitutes the ratio decidendi of *Pinochet (No. 3)* and, for reasons which will become apparent later in this judgment, we do not consider that it is necessary for us to address on this occasion the question whether, as a matter of customary international law and independently of the operation of the Convention against Torture, immunity ratione materiae would now be denied in cases of alleged torture. The relevant passages in the speeches are considered further below in the context of Mr. Lewis's submission as to the scope of the non-immunity.

39. We conclude therefore that the ratio decidendi of *Pinochet (No. 3)* turns on the application of the Convention against Torture which is incompatible with the survival of any immunity ratione materiae in respect of allegations of torture as defined in that Convention. Furthermore, we are not persuaded that any subsequent developments have called that ratio into question. On the contrary, we consider that it remains intact.

The scope of the non-immunity.

40. Mr. James Lewis QC on behalf of KL takes as his starting point the view that *Pinochet (No. 3)* turns on an implicit consensus on the part of the States party to the Convention against Torture that immunity should be excluded in this way. However, he submits that the operation of that exclusion is limited to cases in which the alleged acts of torture are on such a scale as to constitute crimes in international law. In this regard he points to the description of the offence created by Article 1(1):

> "For the purposes of this Convention, the term "torture" means 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

41. He contrasts this definition with the concept of torture which constitutes an international crime in customary international law. Here, he places particular reliance on the speech of Lord Hope who distinguished between an allegation of an isolated instance of torture committed in the course of governmental acts (239D) and an allegation of torture "on such a scale as to constitute an international crime … which offends against the public order of the international community" (246E). Lord Hope considered that it would be wrong to regard the Convention against Torture as having by necessary implication removed the immunity ratione materiae from former heads of state in regard to every act of torture of any kind which might be alleged against him falling within the scope of Article 1 (p. 246B). Rather, he considered that

> "once the machinery which [the Convention against Torture] provides was put in place to enable jurisdiction over such crimes to be exercised in the courts of a foreign state it was no longer open to any state which was a signatory to the Convention to invoke the immunity ratione materiae in the event of allegations of systematic or widespread torture committed after that date being made in the courts of that state against its officials or any other person acting in an official capacity" (at p. 247G-H).

42. On this basis, Mr. Lewis submits that the restriction of immunity ratione materiae established by *Pinochet (No. 3)* applies only to torture on such a scale as to constitute a crime contrary to international law. He further submits that this cannot have any application to the present case which involves two isolated allegations of torture.

43. The difficulty with this line of argument is that it overlooks the fact that Lord Hope did not subscribe to the approach which we consider (and which Mr. Lewis accepts) to be the ratio of the case i.e. that the parties to the Convention against Torture must be taken to have accepted that immunity ratione materiae would no longer be available in cases of torture contrary to Article 1. Accordingly, Lord Hope's reasoning does not qualify what we have identified as the basis of the decision. The following passage makes clear Lord Hope's rejection of that approach:

> "I would not regard this as a case of waiver. Nor would I accept that it was an implied term of the Torture Convention that former heads of state were to be deprived of their immunity ratione materiae with respect to all acts of official torture as defined in Article 1. It is just that the obligations which were recognised by customary international law in the case of such serious international crimes by the date when Chile ratified the Convention are so strong as to override any objection by it on the ground of immunity ratione materiae to the exercise of the jurisdiction over crimes committed after that date which the United Kingdom had made available." (p. 248B-D)

44. This passage and the earlier reference (at p. 247E-F) to the developments in *international law and the discussion of the jus cogens and erga omnes rules in Siderman de Blake v. Republic of Argentina* 26 F. 2d 699, 714-718 demonstrate that Lord Hope's reasoning was founded on the overriding effect of the jus cogens status of the prohibition of serious international crimes. Accordingly, the passage in Lord Hope's speech on which Mr. Lewis relies does not in our view have the effect of limiting the scope of the implied agreement or waiver by the parties to the Convention against Torture.

45. Furthermore, none of the other Law Lords in the majority limited the non-immunity to cases of systematic or widespread torture on such a scale as to constitute serious international crimes. Lord Hutton, who based his speech on the view that the commission of an act of torture is not a function of a head of state (p. 263E-F) expressly rejected the view that torture becomes an international crime only when it is committed or instigated on a large scale (at p. 264B). Lord Millett, in considering the issue of jurisdiction, drew a distinction between isolated offences of torture and those which constituted an attack on the international legal order, similar to the distinction drawn by Lord Hope.

> "In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly, they must be so serious and on such as scale that they can justly be regarded as an attack on the international legal order. Isolated offences, even if committed by public officials, would not satisfy these criteria." (at p. 275)

> "In my opinion, the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crime against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1973. For my own part, therefore, I would hold that the courts of this country already possessed extraterritorial jurisdiction in respect of torture and conspiracy to torture on the scale of the charges in the present case and did not require the authority of statute to exercise it. I understand, however, that your Lordships take a different view, and consider that statutory authority is required before our courts can exercise extraterritorial criminal jurisdiction even in respect of crimes of universal jurisdiction." (at p. 276 E-F)

46. However, there is nothing in his reasoning to suggest that in his view the non-immunity was limited to systematic or widespread torture. On the contrary, as we have seen, at p. 277 he subscribed to what we consider to be the majority view that no rational system of criminal justice can allow an immunity which is coextensive with the offence.

47. Similarly, it is correct that Lord Phillips considered that immunity ratione materiae cannot co-exist with international crimes and universal jurisdiction (at p. 289G). Having stated his view that the Convention against Torture was incompatible with the applicability of immunity ratione materiae he observed:

> "There are only two possibilities. One is that the states parties to the Convention proceeded on the premise that no immunity could exist ratione materiae in respect of torture, a crime contrary to international law. The other is that states parties to the Convention expressly agreed that immunity ratione materiae should not apply in the case of torture. I believe that the first of these alternatives is the correct one, but either must be fatal to the assertion by Chile and Senator Pinochet of immunity in respect of extradition proceedings based on torture." (at p. 290 F-G)

48. Even if Lord Phillips can be taken in this passage to be limiting torture as a crime contrary to international law to the cases of systematic or widespread torture identified by Lord Hope, we do not read this passage as suggesting that the loss of immunity was limited to cases where immunity had already been lost as a result of the development of customary international law. On the contrary, he appears to accept that, in any event, the advent of the Convention against Torture would have defeated any such immunity as between Contracting States because it was incompatible with that Convention.

49. We consider therefore that a majority of the House of Lords in *Pinochet (No.3)* accepted that the effect of the Convention against Torture was to render the immunity inapplicable in all cases of official torture as defined by the Convention.

The alleged failure of the United Kingdom to comply with procedural obligations under the Convention against Torture.

50. Mr. Lewis submits that, in any event, the failure of the United Kingdom to comply with its procedural obligations under the Convention against Torture has the effect that the Appellant continues to enjoy immunity ratione materiae in respect of these allegations. He puts this submission on two bases. First he submits that it is a condition for any implied waiver on the part of Nepal that the United Kingdom has complied with the Convention against Torture. Second, he contends that the failure by the United Kingdom to fulfil its procedural obligations under the Convention against Torture has had the effect of suspending the operation of the Convention between Nepal and the United Kingdom.

Non-justiciability.

51. Before addressing these submissions it is necessary to deal with a further submission on behalf of the Appellant. Mr. Lewis draws attention to the complaint made by the Prime Minister of Nepal in his letter of 17 January 2013 which expressly alleges a breach of the obligation under Article 6(3) (an allegation which is no longer pursued on behalf of the Appellant) and which states that the United Kingdom had not at that date reported, in accordance with Article 6(4), the findings of the preliminary inquiry to the Government of Nepal or indicated whether it intended to exercise jurisdiction. Mr. Lewis submits that a dispute has emerged on the international level between Nepal and the United Kingdom as a result of the breach by the United Kingdom of its obligations under the Convention against Torture and that that dispute on the international plane is not justiciable before the courts of this jurisdiction. Moreover, he points to the fact that, whereas section 134 of the CJA 1988 does implement the Convention against Torture in part by creating in municipal law an offence of universal jurisdiction, Article 6 of the Convention against Torture has not been implemented into municipal law within the United Kingdom. He submits that the judge erred in failing to conclude that the question whether the United Kingdom has complied with its obligations under the Convention against Torture is a non-justiciable question.

52. English law undoubtedly recognises a principle of non-justiciability to the effect that English courts will not adjudicate upon certain transactions of sovereign States in their international relations. The principle is one of judicial restraint or abstention, not one of discretion but one inherent in the judicial process. *(Buttes Gas and Oil Co. v. Hammer [1982] AC 888 per Lord Wilberforce at pp. 931G – 932B.)* The precise ambit of the principle is far from clear and it clearly admits of certain exceptions. In *Kuwait Airways Corporation v. Iraqi Airways Co. (Nos. 4 and 5)* [2002] 2 AC 883 the House of Lords demonstrated that this principle of non-justiciability must not be pressed too far. (See Lord Nicholls at paras. 25, 26, 29; Lord Steyn at paras. 113, 114; Lord Hope at paras. 139, 140.)

53. This principle is linked to a further principle of non-justiciability of certain issues relating to treaties which have not been implemented into municipal law in the United Kingdom. (See *J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry [1990]* 2 AC 418, in particular per Lord Oliver at pp. 499-500.) Here, once again, the scope of the principle is uncertain. It does not follow,

however, that a court must never look at or construe a non-implemented treaty. There are many examples of English courts examining and construing unincorporated treaty provisions in order to determine issues which arise incidentally. (See, for example, *Zoernsch v. Waldock* [1964] 1 WLR 675; *Nissan v. Attorney-General* [1970] AC 179, per Lord Reid at pp.206, 211, per Lord Morris at pp. 215-7, per Lord Pearce at pp. 225, 226; *Dallal v. Bank Mellat* [1986] QB 441 per Hobhouse J.) In recent years English courts have shown a much greater willingness to examine and interpret treaties which have not been implemented into municipal law, in particular in the area of human rights. (See, for example, A. *(FC) v. Secretary of State for the Home Department* [2005] 2 WLR 87, per Lord Bingham at paras. 19, 68; R. *(European Roma Rights Centre) v. Immigration Officer at Prague Airport* [2005] 2 WLR 1, per Lord Steyn at paras.44-5, per Baroness Hale at paras. 98-100.) In doing so they have applied the principles of interpretation of treaties developed in public international law and now formulated in the Vienna Convention on the Law of Treaties and have examined travaux préparatoires in order to ascertain the meaning. (Vienna Convention on the Law of Treaties, Articles 31-33; *R. (European Roma Rights Centre) v. Immigration Officer at Prague Airport* [2005] 2 WLR 1, per Lord Bingham at paras. 17, 18, 20; Lord Steyn at para. 43; Lord Hope at paras. 58, 61, 63; *Pinochet (No. 3)* per Lord Browne-Wilkinson at pp. 200G – 201A.)

54. A number of distinguished academic commentators have been critical of some of the wider judicial statements on the scope of the principle of non-justiciability relating to non-implemented treaties. (F.A. Mann, Foreign Affairs in English Courts, (1986), p. 92; Jennings (1990) ICLQ 513, 525; Collins, (2002) ICLQ 485) and there are indications that the issue of non-justiciability in the context of foreign relations now needs to be reconsidered by the Supreme Court in a suitable case. (See, for example, In *Re McKerr* [2004] 1 WLR 807 per Lord Steyn at paras. 48-50.)

55. However, this is not such a case. None of the issues which arise for consideration in the present case is within "the judicial no-man's land" where limitations inherent in the judicial function make those issues non-justiciable. Nor, in our view, does an examination of the text of Article 6 of the Convention against Torture involve any infringement of a principle of the non-justiciability of non-implemented treaties. *Pinochet (No. 3)* itself provides an example of a municipal court examining in detail the provisions of the Convention against Torture in order to determine, inter alia, whether the parties to that Convention had agreed that immunity ratione materiae should no longer be available between contracting States in respect of acts of torture committed in an official capacity. In doing so, the House of Lords went far beyond what would have been necessary simply to interpret the provision implemented into municipal law by section 134 of the CJA 1988. Furthermore, it did so notwithstanding the fact that the whole issue of immunity was at the heart of international disputes between Chile and the United Kingdom and between Chile and Spain. This is apparent from the opening submission of Mr. Lawrence Collins QC, as he then was, on behalf of the Government of Chile, that Chile was intervening "to defend its national sovereignty, to assert its interest in having the matters dealt with in Chile, to maintain the rule of law in Chile and to protect the national jurisdiction from outside interference contrary to international law, but not to defend the applicant's

acts as head of state" (at p. 172A-B). However, it does not appear to have occurred to anyone involved in that case that the consideration of such issues infringed any principle of non-justiciability. Similarly, in the present case the issues raised are justiciable.

The obligations imposed by Article 6 of the Convention against Torture

56. Article 6 provides in relevant part:

> "3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.
>
> 4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction."

57. Mr. Lewis accepts that there was compliance with the obligation under Article 6(3) in that the Appellant was assisted in communicating immediately with an appropriate representative of Nepal at its London embassy. However, he complains that the United Kingdom failed to comply with Article 6(4) in that it failed immediately to notify the State referred to in Article 5(1), i.e. Nepal, of the fact that he was in custody and of the circumstances which warranted his detention. Furthermore, it is said that the United Kingdom failed, contrary to Article 6(4) promptly to report to Nepal the findings in its preliminary inquiry and to indicate whether it intended to exercise jurisdiction. He says that this step should have been taken before the Appellant was charged. In this regard Mr. Lewis criticises the judge's finding that, given that the Nepalese embassy was notified of the Appellant's arrest, that representatives of the embassy attended at the police station while the Appellant was there, that at all times Nepal was funding the defence, that a substantial case summary was supplied to the defence on 24 January 2013 and that letters were sent to Nepal on 20 March 2013 and 1 May 2013, it was clear that there had been compliance with Article 6(4). Mr. Lewis submits that the contacts with the embassy following arrest were simply because he had asked for the embassy to be contacted and, in any event, the protocol of dealing with a foreign national is to notify his embassy of his arrest. It is said that the judge failed to distinguish between ordinary consular assistance rendered to an arrested person by representatives of his home State and the specific procedural obligations placed upon the arresting State by the Convention against Torture. In Mr. Lewis's submission the only communication between Her Majesty's Government and the Government of Nepal made purportedly to satisfy Article 6(4) was the letter from the Director of Public Prosecutions to the Prime

Minister of Nepal dated 1 May 2013. That letter, he says, was manifestly deficient.

58. Our attention has been drawn in this regard to three letters to the Government of Nepal.

(1) The first is a letter dated 20 March 2013 from Ms. Jane Stansfield of the Crown Prosecution Service. It is headed "Urgent Letter of Request: K KL. Offences: Torture." The letter is detailed and runs to 18 pages with two annexes. Its purpose is expressed to be to request assistance in relation to the criminal investigation and prosecution of the Appellant. It summarises the allegations giving rise to the charges. It states that it is alleged that, while Commanding Officer of the Gorusinghe Army Barracks in 2005 the Appellant was responsible for the torture of detainees within the barracks who were suspected of being Maoists. It explains that evidence had been obtained from Mr. Raut and Mr. Hussain and also from a fellow detainee Mr. Tufail Ahmad Khan. It then summarises the statements of those three witnesses. It requests information as to the Appellant's previous character and army record. It also asks whether any of the three witnesses has a criminal record. It then sets out in detail over a number of pages specific requests for assistance from the Ministry of Defence, the Prison Service, the Police Service and the Court Service. It seeks assistance in the form of obtaining statements from a number of individuals, including officials and doctors who have treated the alleged victims. We were told that no response to that letter has been received.

(2) The second letter is dated 1 May 2013 and is from the Director of Public Prosecutions to the Prime Minister of Nepal. It states that it is written in accordance with Article 6(4). It simply states that on 5 January 2013 the Appellant was charged with two offences contrary to section 134(1) Criminal Justice Act 1988. It set out in four lines each the particulars of the two alleged offences. It states that a trial date had been set for 5 June 2013 at Kingston Crown Court before Sweeney J. and adds:

> "As the case is now subject to judicial process I am unable to provide you with any further details of these charges."

(3) The third letter is from Ms. Stansfield to the Competent Authority, Nepal. It refers to the letter of 20 March 2013. It states that as a result of a number of developments no trial is due to take place until March 2014 and renews the request for assistance. Once again, we understand that no reply has been received to this letter.

59. On 17 January 2014 the Prime Minister of Nepal wrote to the Prime Minister of the United Kingdom. Although Sweeney J. was told something of the contents of that letter, the parties were not authorised to disclose it to the court. However, the letter was made available to us at the hearing of the appeal. The letter makes the following points.

(1) The Government of Nepal was disturbed to learn of the arrest of the Appellant, the Embassy having been notified not through official channels but by the Appellant's wife.

(2) The Appellant has been tried and penalised by a competent court in Nepal in respect of the alleged conduct in relation to Mr. Raut.
(3) The allegation made by Mr. Hussain has not been made to a competent authority or court in Nepal. If it is made, "necessary investigation and trial will be carried out in accordance with the domestic law".
(4) Contrary to article 6(3) of the Convention against Torture, the Appellant has not been assisted in communicating immediately with the nearest appropriate representative of Nepal.
(5) "I have further the honour to bring to your kind attention that the relevant UK authorities have not so far reported their findings of the preliminary inquiry to the Government of Nepal, and also not indicated whether they intend to exercise jurisdiction pursuant to Article 6(4) of the Convention."
(6) The Government of Nepal has no knowledge "of any prior notification given to the UN by the UK authorities for the waiver of immunity prior to his arrest. It points out that the Appellant was a serving officer with UNMISS. "We feel that neglect by the concerned authorities to prior inform the UN and the Government of Nepal has called into question the legality of the arrest and detention of Col. KL."
(7) It expresses the view that "as the case of Col. KL has already been tried and penalized by the competent and independent court of Nepal for the said offence under the domestic jurisdiction, it is not worthwhile to put him in "double jeopardy" while he is serving the cause of world peace under the UN Mission in South Sudan."

60. A further letter was sent from the Ministry of Foreign Affairs of the Government of Nepal to the British Embassy at Kathmandu on 25 March 2014, the first day of the hearing of this appeal. That letter makes the following points:

(1) It refers to the letter of 17 January 2013 which drew attention "to the seriousness of this matter at the highest political level" and requests Her Majesty's Government to take measures to facilitate the Appellant's immediate release.
(2) It refers to the status of the Appellant as a serving officer in UNMISS and states that his arrest was not in conformity with international practice. "As a serving officer in the UNMISS, he enjoys immunity from jurisdiction of the foreign courts until waiver is explicitly made by the UN or by the [Government of Nepal]. In this case waiver was made neither by the UN nor by the [Government of Nepal] prior to his arrest."
(3) There exists a mechanism in Nepal for dealing with such cases. Nepal has jurisdiction and is genuinely willing to investigate and prosecute the perpetrators of serious crimes. In these circumstance courts must restrain their exercise of universal jurisdiction. "It must be emphasized that only Nepal has jurisdiction over the offence and only the Nepalese authority can impart the full justice because of the direct link to the offence."
(4) The Appellant has been tried and penalized by a competent court of Nepal for the offence alleged in relation to Mr. Raut.
(5) Mr. Hussain has not filed any complaint in Nepal but it is open to him to do so.

61. We would draw attention to the following matters.

(1) The letter of 17 January 2013 alleges a breach of Article 6(3). However, Mr. Lewis, rightly in our view, does not maintain that there has been a breach of this provision. It is clear from the agreed chronology that following his arrest the Appellant was assisted in communicating immediately with the Embassy. He was arrested at 07.19 on 3 January 2013. At 07.57 he was advised of his rights including the right to communicate with the Embassy. He elected to call Col Ghimire, the Military Attaché. From 09.02 onwards a number of attempts were made to contact Col. Ghimire and messages were left. Col. Ghimire phoned the custody suite and spoke with the Appellant at 11.04 that morning.
(2) Neither letter alleges a breach of the obligation under Article 6(4) to notify Nepal that the Appellant was in custody.
(3) While both letters refer to the immunity of the Appellant as a serving officer in UNMISS, they do not refer to any immunity ratione materiae arising from the fact that the proceedings relate to acts alleged to have been committed in an official capacity.
(4) There is no request for the extradition of the Appellant.
(5) There is nothing in either letter to indicate that a decision has been taken to suspend the operation of the Convention against Torture between Nepal and the United Kingdom.

62. When the Appellant was taken into custody the Nepalese Embassy was immediately notified of the arrest and the circumstances which were said to warrant it. The procedure which was followed was that which would be followed when any foreign national is arrested. However, that does not prevent the notification from satisfying the obligations imposed under Article 6(4). It seems to us that Nepal was immediately notified of the fact of the Appellant's detention and the reasons for it.

63. So far as concerns the obligation under Article 6(4) promptly to report the findings of the preliminary inquiry and to indicate whether it proposes to exercise jurisdiction, we note that the purpose of the preliminary inquiry required by Article 6(2) was recently described by the International Court of Justice in the following terms:

> "In the opinion of the Court, the preliminary inquiry provided for in Article 6, paragraph 2, is intended, like any inquiry carried out by competent authorities, to corroborate or not the suspicions regarding the person in question. That inquiry is conducted by those authorities, to corroborate or not the suspicions regarding the person in question. That inquiry is conducted by those authorities which have the task of drawing up a case file and collecting facts and evidence; this may consist of documents or witness statements relating to the events at issue and to the suspect's possible involvement in the matter concerned." *(Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)* ICJ Rep. 2012, 422, para. 83)

64. It seems therefore that the purpose of the preliminary inquiry is to assist the State in whose territory the person is present in deciding whether or not to prosecute.

The duty under Article 6(4) promptly to report the findings of the preliminary inquiry is owed to those States referred to in Article 5(1) i.e. those States which have concurrent jurisdiction in respect of the alleged offences. In this case Nepal qualifies on all three grounds set out in Article 5(1). It may be assumed therefore that the purpose of this obligation is to keep those States informed as to how the investigation is proceeding. It may well enable the Article 5(1) States to decide whether or not to request the extradition of the suspect. In addition, the Convention against Torture includes a more general provision in relation to co-operation in Article 9(1) which provides that States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of offences of torture.

65. It appears from the scheme of Article 6 that the duty immediately to make a preliminary inquiry into the facts arises when a suspect is taken into custody or other measures are taken to ensure his presence in the jurisdiction. The description of the process by the ICJ cited above suggests that this may take some time. The obligation promptly to report the findings of the preliminary inquiry and to indicate whether it is intended to exercise jurisdiction arises when that inquiry is completed.

66. Mr. Lewis submitted that in order to comply with Article 6(4) the United Kingdom was required to report the findings of the preliminary inquiry to Nepal before the Appellant was charged. In support of this submission he points to section 88 of the Extradition Act 2003 which provides that where a person has been charged with an offence in the United Kingdom any extradition proceedings against him must be adjourned until the charge is disposed of or withdrawn or the proceedings are discontinued. Mr. Lewis submits that, once the Appellant was charged on 4 January, Nepal would be precluded from seeking the extradition of the Appellant and that accordingly any purported compliance with the duty to report on the preliminary investigation after charge would be ineffective because it would not enable Nepal to seek the Appellant's extradition.

67. We are unable to accept this submission. First, it is difficult to see how the preliminary inquiry could have been concluded prior to charge. Secondly, following charge, section 88 would not necessarily operate as a bar to extradition if a request were received from Nepal for the Appellant's extradition; it would be possible to discontinue the proceedings in the United Kingdom. Thirdly, there is, in any event, more than a touch of unreality about the submission. Nepal has not sought the extradition of the Appellant. Indeed, it is difficult to see how it could make such a request in relation to count 1 where it maintains that the Appellant has already been tried and punished for the matters alleged in this count.

68. The CPS letter of 20 March 2013 provided Nepal with an extremely detailed account of the case against the Appellant as it then stood. While it may be debatable whether this report was provided promptly after the conclusion of the preliminary inquiry, it seems to us that it may well have performed the function of the report required by Article 6(4). The fact that it was principally intended to be a letter of request does not, in our view, prevent it from performing this other function.

69. In these circumstances, we find it difficult to see that there has been any breach by the United Kingdom of its obligations under Article 6(4). However, it is not necessary for us to decide this point because of the clear view we have come to as to the consequences of any such breach if it were established.

The effect of any breach by the United Kingdom.

70. On behalf of the Appellant it is submitted, first, that Nepal cannot be taken to have waived immunity ratione materiae in respect of the Appellant in the circumstances of this case because the United Kingdom failed to comply with the procedural requirements of the Convention against Torture. He submits that if the true ratio decidendi of Pinochet (No. 3) is that a country by ratifying the Convention against Torture has impliedly waived its right to assert immunity ratione materiae in respect of the acts of its officials, it is a condition for a State party making such an implied waiver that the forum State exercising jurisdiction has complied with the Convention against Torture. It follows, he submits, that until Her Majesty's Government has complied with its obligations under the Convention against Torture, Nepal is entitled to assert immunity ratione materiae in respect of KL's actions as an army officer in Nepal in 2005.

71. The thrust of Mr. Lewis's complaint in this regard is that failure to comply with Article 6(4) is disruptive of the scheme of the Convention against Torture in that it prevents consideration of the hierarchy of jurisdictions contemplated by the Convention and, in particular, because it has denied Nepal any opportunity to seek the extradition of the Appellant. However, we consider that this argument does not reflect the scheme of the Convention against Torture for the following reasons:

(1) The ultimate purpose of the Convention against Torture is to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State. (Questions relating to the Obligation to Prosecute or Extradite, at para. 120)

(2) In circumstances where the suspect is present in the territory of a Contracting State the principal obligation on that State is that imposed by Article 7(1): either to extradite him or to submit the case to its competent authorities for the purpose of prosecution. Indeed, in Questions relating to the Obligation to Prosecute or Extradite, the ICJ expressed the matter as follows:

> "However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provision of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging his responsibility of the State." (at para. 95).

(3) Contrary to the submission of Mr. Lewis, in our view the Convention against Torture does not establish a hierarchy of possible jurisdictions or embody any principle of forum conveniens. While it is correct that, in any given case, it may be more convenient or effective to prosecute in one jurisdiction rather than another, for example because of the availability of evidence, this is no more than a reflection of the circumstances of the particular case.

(4) One of the purposes of the obligation to report under Article 6(4) is, no doubt, to enable other Contracting States to decide whether or not they wish to request extradition. However, there is no obligation under the Convention scheme to extradite a suspect to another Contracting State if the Contracting State where he is present decides to exercise jurisdiction itself. Furthermore, the exercise of jurisdiction under Article 5(2) is not dependent on the State assuming jurisdiction having refused extradition to an Article 5(1) State. In addition, there is no obligation to await a request for extradition to another Contracting State before exercising jurisdiction. The Contracting State in which a suspect is present has an unfettered choice as to whether to extradite or to submit the case to its competent authorities for the purpose of prosecution. Thus, Nowak and McArthur, United Nations Convention against Torture, A Commentary, (2008) state:

> "The State where the alleged torturer is present… has the choice of freely deciding whether to prosecute or extradite in accordance with bilateral or multilateral extradition treaties. Since no order or priority has been established among the various grounds of jurisdiction in Article 5, there is no legal obligation to extradite the alleged torturer to his or her State of nationality or to the State where the act of torture was committed." (at p. 317).

(5) We should add, with regard to the particular circumstances of this case, that Mr. Lewis submits that it is clear from the letter dated 17 January 2013 from the Prime Minister of Nepal "that Nepal would seek to try the applicant in Nepal on appropriate charges once it had considered the evidence identified in Article 6, had HMG complied with that article." However, we repeat that the fact remains that no request for the extradition of the Appellant has been made by Nepal and it is difficult to see how such a request could be made in respect of the charge in count 1, given that it is the position of Nepal that the Appellant has already been tried and convicted in respect of this matter in proceedings in Nepal. Given that Nepal does not seek to put the Appellant on trial for these charges, the United Kingdom is under a duty under the Convention to bring proceedings in this jurisdiction.

72. Furthermore, we are unable to see how the breach of Article 6(4) of which the Appellant complains could have the effect of reviving immunity ratione materiae. Mr. Lewis suggests that because of the procedural failures of the United Kingdom, Nepal cannot be taken to have waived the immunity of its official on this occasion. However, it does not appear to us that the removal of immunity ratione materiae from cases falling within the Convention against Torture operates at the level of an individual waiver in respect of each individual case. Rather,

participation by a State in the Convention against Torture system, by ratifying or acceding to the Convention, constitutes an acceptance that officials shall not be immune in respect of their official activities which fall within the scope of the Convention. Moreover, there is nothing in the scheme of the Convention to suggest that its operation (and in particular its rule of non-immunity) is in any way conditional on compliance with procedural obligations under the Convention.

73. In an alternative argument, Mr. Lewis relies on Article 60 of the Vienna Convention on the Law of Treaties which provides in material part:

> "Article 60
> Termination or suspension of the operation of a treaty as a consequence of its breach.
>
> …
>
> (1) A material breach of a multilateral treaty by one of the parties entitles:
> (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State; …
> (3). A material breach of a treaty, for the purposes of this article, consists in:
> (a) a repudiation of the treaty not sanctioned by the present Convention;or
> (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty."

74. Here, Mr. Lewis submits that the conduct of the United Kingdom was a violation of a provision essential to the accomplishment of the object or purpose of the Convention against Torture entitling Nepal, as a Contracting State specially affected by the breach, to suspend the Convention against Torture in the relations between Nepal and the United Kingdom. There are two major obstacles in the path of this argument. First, it is difficult to see that the alleged breach on the part of the United Kingdom would fall within Article 60(3). There has been no repudiation of the Convention against Torture by the United Kingdom. Moreover, having regard to the considerations set out above, we are unable to see that there has been a violation of a provision essential to the accomplishment of the object or purpose of the treaty. Secondly, there is no evidence before us to demonstrate that Nepal has taken the step of suspending the operation of the Convention against Torture between it and the United Kingdom. Certainly, neither of the letters from the Nepalese Government which we have been shown (dated 17 January 2013 and 25 March 2014 respectively) refers to any such suspension.

Immunity in customary international law.

75. In the light of the conclusion to which we have come on the basis of the Convention against Torture, it is not necessary for us to rule on Miss Cheema's alternative argument that, as a matter of customary international law, immunity ratione materiae is no longer available in cases of torture. We are content to leave that question for decision on another occasion.

Ground 2 – UN Immunity.

76. When the Appellant was arrested on 3rd January 2013, he was on leave from his appointment as a Senior Military Liaison Officer with the United Nations Mission

in South Sudan (UNMISS) and was visiting relatives in the south of England. His status as an expert of the United Nations has given rise to this further ground of appeal.

77. The Convention on the Privileges and Immunities of the United Nations, 13th February 1946 ("the General Convention") makes provision for the immunities and privileges. Article VI, section 22 provides in relevant part:

> "Experts … performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular, they shall be accorded:
>
> immunity from personal arrests or detention and from seizure of their personal baggage;
>
> in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations; …"

Article VI, section 23 provides in relevant part:

> "Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations."

78. The International Organisations Act 1968 provides that Her Majesty may by Order in Council make provision for the privileges and immunities of certain international organisations and, in particular, in respect of "persons employed by or serving under the organisation as expert or as persons engaged on missions for the organisation" (section 1(3)(c)). The United Nations and International Court of Justice (Immunities and Privileges) Order 1974, 1974 No. 1261, ("the 1974 Order") makes provision for the privileges and immunities of experts performing missions on behalf of the United Nations in terms which, it should be noted, differ from those of the General Convention.

> "17. Except in so far as in any particular case any privilege or immunity is waived by the Secretary-General, experts

> (other than officers of the United Nations) performing missions on behalf of the United Nations shall enjoy:-
>
> immunity from suit and legal process in respect of things done or omitted to be done by them in the course of the performance of their missions;
>
> during the period of their missions, including the time spent on journeys in connection with service on such missions, the like immunity from personal arrest or detention and the like inviolability for all paper and documents as is accorded to a diplomatic agent;
>
> during the period of their missions, including the time spent on journeys in connection with service on such missions, the like exemptions and privileges in respect of their personal baggage as in accordance with Article 36 of the 1961 Convention Articles [i.e. the Articles of the Vienna Convention on Diplomatic Relations, 1961 set out in Schedule 1 to the Diplomatic Privileges Act 1964] are accorded to a diplomatic agent."

79. The immunity from personal arrest or detention under Article 17(b) is assimilated to that of a diplomatic agent. Article 29 of the Vienna Convention on Diplomatic Relations, 1961, which is implemented into the law in force in the United Kingdom by the Diplomatic Privileges Act 1964, provides in relevant part:

> "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. …"

80. Article 31 provides in relevant part:

> "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. …"

81. Article 32 provides in relevant part:

> "1. The immunity from jurisdiction of diplomatic agents and of person enjoying immunity under Article 37 may be waived by the sending State.
>
> The waiver must always be express. …"

82. It is common ground that at the time of his arrest and detention the Appellant, in his capacity as a Senior Military Liaison Officer with the United Nations Mission in South Sudan (UNMISS) was an expert within the meaning of the 1974 Order. As such he enjoyed an immunity ratione materiae under Article 17(a) in respect of things done or omitted to be done by him in the course of the performance of his mission. However, this does not apply because the present proceedings do not relate to his activities on behalf of the United Nations. In addition he enjoyed under Article 17(b) immunity from personal arrest and detention "during the period of [his mission], including the time spent on journeys in connection with

service on such missions". This is an immunity ratione personae. It is a functional immunity intended to ensure that the activities of the expert on behalf of the United Nations are not impeded. This fact is underlined by Article VI, section 22 of the General Convention which provides that privileges and immunities are not granted for the personal benefit of the expert and which imposes a duty on the Secretary General to waive the immunity "where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations."

83. At the time of the Appellant's arrest, the police were not aware of the Appellant's appointment with UNMISS. He revealed that fact during his interviews. As a result, on 8th January 2013 Sir Mark Lyall Grant, the United Kingdom Permanent Representative to the United Nations, wrote to Ms. Patricia O'Brien, Under Secretary-General for Legal Affairs and the Legal Counsel to the United Nations explaining that the Appellant had been arrested, questioned and charged with offences of torture in relation to activities in Nepal in 2005. The letter stated:

> "In the course of his questioning, the UK authorities became aware that Colonel KL has been serving as a military observer in the UN Mission in the South Sudan (UNMISS). The United Kingdom is mindful of its obligations under the Convention on the Privileges and Immunities of the United Nations (the General Convention). However, given that Colonel KL's arrest and detention were in connection with matters that have no relation to his service in UNMISS and took place during a period outside that service, the United Kingdom does not believe that the General Convention applies in this case. If you have any observations or further information in this respect I should be grateful to receive the same."

84. On the same day Ms O'Brien replied:

> "As you note in your letter, Colonel KL is a military observer in the Untied Nations Mission in South Sudan (UNMISS). As such, Col. KL is entitled to the privileges and immunities under Articles VI and VII of the 1946 Convention on the Privileges and Immunities of the United Nations (the "General Convention"), to which the UK is a party. Pursuant to Article VI, Section 22(b) of the General Convention, Colonel KL enjoys "immunity from legal process of every kind" for "words spoken or written and acts done by [him] in the course of the performance of [his] mission". As the Government of the UK has provided he necessary information to OLA concerning the allegations against Colonel KL and sought our views on the matter, I wish to confirm that Colonel KL does not enjoy immunity from legal process in respect of the alleged acts, which do not relate to the performance of his official functions as an expert on mission."

> Pursuant to Section 22(a) of the General Convention, Colonel KL also enjoys "immunity from personal arrest or detention". I would note that in addition to its own interest in seeing justice done, the United Nations has an obligation, in accordance with Article V, Section 21 of the General Convention, to cooperate with the competent national authorities to facilitate the proper administration of justice. Section 23 of the General Convention further provides that "[T]he Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations".
>
> In light of the facts of this case, the Secretary-General has waived the immunity from personal arrest and detention enjoyed by Colonel KL."

85. There is, therefore, no doubt that the immunity ratione personae enjoyed by the Appellant under Article 17(b) has been waived. However, before Sweeney J. it was contended on behalf of the Appellant that the waiver of immunity was not retrospective and that therefore his arrest and detention had been unlawful. In particular it was submitted that his interviews, conducted when he was unlawfully imprisoned, amounted to a significant and serious breach of the Police and Criminal Evidence Act 1984 ("PACE") and the Codes of Practice thereunder, such that the judge, in the exercise of his discretion, should exclude all the interviews from the evidence at trial.

86. The judge rejected that submission. First, he considered it clear from the correspondence set out above that the Under Secretary-General was well aware that the Appellant had been arrested on 3 January 2013, questioned charged and remanded in custody on 5 January 2013. In these circumstances, he considered that the explicit waiver of the immunity "from personal arrest and detention enjoyed by Colonel KL" was retrospective. Moreover, in the circumstances of this case he could see nothing wrong in law in that course. Secondly, and in any event, the judge considered that this was self-evidently a case in which, had it been drawn to his attention prior to the Appellant's arrest, the Secretary-General would have waived immunity then. Accordingly, even if he was wrong on the retrospective effect of the waiver and assuming in the Appellant's favour significant and substantial breaches of PACE and the Codes of Practice, he did not consider that the admission of the interviews would have such an adverse effect on the fairness of the proceedings that justice required them to be excluded. The Appellant now appeals against that ruling.

The extent of the immunity

87. The first question for consideration in this regard is whether, quite apart from any subsequent waiver of immunity, the Appellant did enjoy immunity from arrest and detention at the time of his arrest and detention. Did the arrest and detention occur "during the period of [his mission], including the time spent on journeys in connection with service on such missions"?

88. On behalf of the Appellant, Mr. Lewis places at the forefront of his submissions on this point the view expressed by the Under Secretary-General for Legal Affairs in her letter of 8th January 2013. Contrary to the view expressed by the United Kingdom Permanent Representative in his letter, she states in terms that the Appellant is a military observer in UNMISS and as such is entitled to the privileges and immunities under Article VI and VII of the General Convention. This is a view to which we should attach considerable weight. In *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion of 29 April 1999, ICJ Rep. (1999)* 62, the International Court of Justice observed:

> "… the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that he Secretary-General has the authority and responsibility to inform the Government of a member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings.
>
> When national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts." (at paras. 60–61)

89. In addition, Mr. Lewis is able to point to the nature of the immunity as a functional immunity, intended to protect the performance of the functions of the United Nations by its agents, and to the fact that the Appellant's mission was ongoing and that his arrest prevented him from commencing his journey back to South Sudan as planned on 5 January 2013. Moreover, as the amicus curiae, Professor Verdirame, points out, the assimilation of the immunity in Article 17(b) to that of a diplomatic agent might suggest that it is intended to confer a wide immunity.

90. Mr. Lewis also relies on the Advisory Opinion of the International Court of Justice on *Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations*, 1989 ICJ 177. Mr. Mazilu, a Romanian national and resident, had been appointed as a member of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (a Sub-Commission of the UN Commission on Human Rights) which was asked to

prepare a report as Special Rapporteur. The Court considered the applicability of Article VI, Section 22 to this activity. It considered that Section 22, in its reference to experts performing missions for the United Nations, uses the word "mission" in a general sense and that while some experts have necessarily to travel in order to perform their tasks, others can perform them without having to travel. Accordingly, Section 22 is applicable to every expert on mission, whether or not he travels. It concluded that experts on missions can invoke these privileges and immunities against the States of which they are nationals or where they reside, in the absence of a reservation by the State concerned. The privileges and immunities of Articles V and VI are conferred with a view to ensuring the independence of international officials and expert in the interests of the United Nations and this independence must be respected by all States including the State of nationality and the State of residence. It concluded:

> "To sum up, the Court takes the view that Section 22 of the General Convention is applicable to persons (other than United Nations officials) to whom a mission has been entrusted by the Organization and who are therefore entitled to enjoy the privileges and immunities provided for in this Section with a view to the independent exercise of their functions. During the whole period of such missions, experts enjoy these functional privileges and immunities whether or not they travel. They may be invoked as against the State of nationality or of residence unless a reservation to Section 22 of the General Convention has been validly made by that State." (at para. 52)

91. Although paragraph 52 might, at first sight, appear to provide some support for the view that Section 22 is applicable to experts during the whole period of such missions, it is important to bear in mind that the ICJ was there concerned with a case in which the expert was performing that function in the State of his nationality and residence. It was not addressing a case in which an expert undertook a mission in another State and interrupted the performance of his mission in order to take leave in a third State.

92. Moreover, it does seem to us that there is considerable force in the submission by Ms. Cheema that the time spent by the Appellant on leave in Sussex, visiting his family, was not "during the period of" his mission. Similarly, it is difficult to see that at that time he was on a journey "in connection with service on such missions". Moreover, the analogy with a diplomatic agent drawn by Article 17(b) is unhelpful to the Appellant here. Article 40 of the Vienna Convention on Diplomatic Relations makes express provision for the case of a diplomatic agent who passes through or is in the territory of a third State "while proceeding to take up or to return to his post" or "when returning to his own country". In these circumstances the third State is required to accord him inviolability and such other immunities as may be required to ensure his transit or return. However, as Professor Eileen Denza points out (Diplomatic Law, 3rd Ed., at pp. 456-7):

> "The obligations imposed on transit States by Article 40 arise only where the beneficiary is in the course of direct passage to the receiving State or to the home State, though it is not essential that the passage should be between these two States. It was clearly established even before the Vienna Convention that if a diplomat made or broke his journey for purely personal reasons, such as a holiday, he could not claim any special status."

93. Here, she refers to *US v. Rosal* (US District Court, Southern District of New York, 191 F Supp 663; 31 ILR 389) a decision in 1960 which pre-dates the Vienna Convention and which turns on the position in customary international law. There the Guatemalan Ambassador to Belgium and The Netherlands was held not to be immune from prosecution for a narcotics offence on the ground that he had flown to New York on personal business and intended to fly to Paris and not back to his post. He was not therefore "within the rule of international law granting immunity to a diplomat en route between the official post and his homeland."

94. In these circumstances, we have difficulty in accepting the submission that the Appellant enjoyed immunity at the time of his arrest and detention. However, it is not necessary for us to make a decision on this point because of the clear view we have taken on the issue of waiver.

Waiver of immunity

95. The issue for consideration here is whether the Under Secretary-General's letter was effective to waive any immunity applying in the case of the Appellant under the General Convention with retroactive effect. It is convenient to consider first the position in international law before turning to consider such domestic authorities as there are on the issue.

96. On behalf of the Appellant, Mr. Lewis submitted that, as a matter of law, a waiver of immunity may not be given retroactive effect. However, Mr. Lewis was unable to refer to any authority, whether in international law or in domestic law, which supported that conclusion. On the contrary, we can see no reason in principle why waiver of immunity with retroactive effect should not be permitted. It seems to us that it must be open to States and to international organisations to waive their immunity with retroactive effect as they see fit. The question then becomes whether there was such an intention in a given case and, if so, whether any formalities have been satisfied.

97. In the present case we consider that, as the judge found, there was a clear intention on the part of the Under Secretary-General to waive immunity with retrospective effect. The wording of the Under Secretary-General's letter, read in the light of what she had been told by Sir Mark Lyall Grant about the history of the matter, makes that intention clear. As the judge pointed out, the Under Secretary-General was fully aware that the Appellant had been arrested on 3 January 2013 and questioned, charged and remanded in custody on 5 January 2013. Moreover, while the Under Secretary-General's letter proceeds on the basis that the Appellant was arrested at a time when he was entitled to immunity, it makes no complaint about what in fact occurred. If it had been the intention to waive immunity only with

prospective effect, she could be expected to have something to say about the violation. Furthermore, in the circumstances of this case it is difficult to see what legitimate purpose of the UN could be served by waiving immunity only with prospective effect. It seems clear that immunity was waived so as not to impede these proceedings. That is consistent with the duty of the Secretary-General.

98. Mr. Lewis then submits that, to the extent that the waiver of immunity may have been intended to have retroactive effect, it did not do so because it was not expressed to have that effect. Here he draws attention, once again, to the analogy drawn in Article 17(b) with the position of a diplomatic agent. He points to Article 32(2) of the Vienna Convention on Diplomatic Relations which provides that the waiver of immunity from jurisdiction of diplomatic agents must always be express. However, while Article 17(b) assimilates the immunity of an expert to that of a diplomatic agent, it does so simply to describe the immunity to be accorded; it is to be the like immunity from personal arrest or detention which is accorded to a diplomatic agent. We do not understand this provision to import the requirements of the Vienna Convention in respect of the formalities for waiver. Indeed, as the amicus curiae points out, the contrary intention is apparent in the scheme of the General Convention which the Order in Council implements. Article II of the General Convention, which deals with the immunity of the property and assets of the United Nations, states in Section 2 that a waiver must be express. There is no corresponding provision in Article VI which makes provision for the immunity of experts on missions for the United Nations. We consider that, had it been intended that any waiver of the immunity of an expert must also be express, there would have been an express provision to that effect in Article VI.

99. So far as municipal authorities are concerned, the only authority we were referred to in this regard is the decision of the Court of Criminal Appeal in *R. v. Madan* [1961] 2 QB 1. There, a clerk at the Indian High Commission who was entitled to diplomatic immunity under section 1, Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952 was charged with obtaining property by false pretences. At the committal proceedings he purported to waive his immunity. His diplomatic status became apparent before the court of trial, only after his conviction. Three months later the Indian High Commissioner waived the immunity. An appeal against conviction was allowed. The Appellant's purported waiver had been ineffective. Furthermore, as the waiver made by the High Commissioner did not purport to be retrospective, the Appellant had been subjected to proceedings without jurisdiction. Mr. Lewis draws attention, in particular, to the conclusion that "proceedings brought against somebody, certainly civil proceedings brought against somebody entitled to diplomatic immunity are, in fact, proceedings without jurisdiction and null and void, unless and until there is a valid waiver which, as it were, would bring the proceedings to life and give jurisdiction to the court." (at p. 7) However, the decision casts little light on the issue in the present case because it turns on the court's view that on its face the High Commissioner's letter did not purport to operate retrospectively.

100. For the reasons set out above, we consider that the waiver of immunity was intended to and did have retroactive effect, notwithstanding the failure of the Under Secretary-General to include in her letter an express statement to that effect. In light of this conclusion, we say nothing concerning the possible effect on

these proceedings had the Appellant's immunity not been effectively waived by the Under Secretary-General.

101. For these reasons the second ground of appeal is dismissed.

Ground 3: Autrefois convict

102. The issue of autrefois convict was presented to us somewhat differently from the way in which it was presented to Sweeney J. We had the benefit of the expert evidence of Professor Subedi and the excellent services of the amicus curiae Professor Verdirame.

103. At the first hearing of this appeal in March 2014 (then an application for permission to appeal and as such we granted leave to appeal), we expressed some concern that the court was being invited to reach conclusions on the nature of Nepalese legal proceedings without the assistance of an expert in Nepalese law and procedure. Although we were invited to proceed to hear the arguments we adjourned the hearing of the autrefois convict ground to enable the parties to make attempts to obtain expert evidence. We were informed subsequently that no available expert apart from Professor Subedi could be found. The prosecution were initially concerned about his being instructed because he was part of the Appellant's legal team in 2013 and was a signatory to the initial legal arguments submitted on the topic to Mr Justice Sweeney. When it proved impossible to find an alternative, they accepted Professor Subedi and an expert instructed by the Court and both sides submitted questions for him to answer on this issue.

104. Professor Subedi OBE is a Professor of International Law at Leeds University, a practising Barrister in England and Wales and an Advocate of the Supreme Court of Nepal. He has worked in the field of human rights for many years and is a former prosecutor in Nepal. He is also a United Nations Special Rappoteur for Cambodia. He drew upon his own experience and knowledge of the Nepalese system in providing an opinion for the court and he read the Torture Compensation Act, the judgment of the District Court and Adjutant Major General Chand's findings in the original Nepalese. It became apparent during the course of his evidence before us that there was more than one translation of the various documents in use and he was unhappy about the translations provided. We expressed our surprise and concern that an appeal could have reached us, after months of preparation, with no agreed translations of essential foreign documents. This should not have happened.

105. A dispute also arose between counsel as to the extent to which we were bound to accept the evidence of Professor Subedi. Mr Lewis posed the issue in Ground 3 in this way: has the Appellant been convicted by a court of competent jurisdiction? This, he argues, is a matter of foreign law and the court is not entitled to conduct its own researches or to construe a foreign statute. He relied upon two decisions of the Court of Appeal Civil Division *(Bumper Development Corporation v the Commissioner of Police of the Metropolis and others* [199]1 1 WLR 1362 and Harley v Smith [2010] EWCA Civ 78) for the proposition that, absent contradictory evidence, we were obliged to accept the opinion of Professor Subedi that the Appellant was convicted by a Nepalese court of competent jurisdiction.

106. We had our doubts about such a stark assertion. Professor Verdirame in his succinct but exceedingly helpful remarks, as amicus, put the matter beyond doubt. He referred us to a very helpful passage at 9-016 of the 15th Edition of Dicey Morris and Collins 'The Conflict of Laws'. Lord Collins observes:

> "If the evidence of the expert witness as to the effect of the sources quoted by him is uncontradicted, "It has been repeatedly said that the court should be reluctant to reject it", and it has been held that where each party's expert witness agrees on the meaning and effect of the foreign law, the court is not entitled to reject such agreed evidence, at least on the basis of its own research into foreign law. But while the court will normally accept such evidence it will not do so if it is "obviously false," "obscure", "extravagant," or "patently absurd," or if "he never applied his mind to the real point of law", or if "the matters stated by [the expert] did not support his conclusion according to any stated or implied process of reasoning"; or if the relevant foreign court would not employ the reasoning of the expert even if it agreed with the conclusion. In such cases the court may reject the evidence and examine the foreign sources to form its own conclusion as to their effect. Or, in other words, a court is not inhibited from "using its own intelligence as on any other question of evidence". Similarly, the court may reject an expert's opinion as to the meaning of a foreign statue if it is inconsistent with the text or the English translation and is not justified by reference to any special rule of construction of the foreign law".

The authority for the final observation, which is particularly pertinent here, is A/S *Tallinna Laevauhisus v Estonian State Steamship Line* (1947) 80 L1.L.R.99, 107 (CA).

107. Thus, we are not bound blindly to follow what an expert says simply because no expert is available to contradict him, especially where there are aspects to the expert's evidence which trouble the court. As Miss Cheema observed, much of the expert's evidence in this case was little more than the assertion of an opinion unsupported by authority or other evidence.

Principles of Autrefois Convict

108. Before embarking upon a consideration of the proceedings in Nepal it is worth re-stating the well known principles of autrefois convict as applied in England and Wales. The leading authority remains *Connelly v DPP* [1964] AC 1254. The precise scope of that judgement, including whether it is correct to view it (as most commentators do) as the leading authority, has been the subject of recent analysis by the Court of Appeal: *R v JFJ* [2013] EWCA Crim 569.

109. For present purposes the most elementary of the principles laid down in *Connelly* has not been subject to any major dispute: It is that a man should not be tried for a crime in respect of which he has previously been acquitted or convicted (autrefois acquit and autrefois convict). Either plea will only succeed where the later proceedings are for an offence which is the same as an earlier offence both in fact and law. The underlying rationale of autrefois convict is to prevent duplication of criminal punishment.

110. In this case the Appellant submits that he has already been convicted by virtue of the proceedings in Nepal and subjected to criminal sanction. The factual basis which underpins the present proceedings in this jurisdiction is the same as that which founded the Nepalese proceedings and the definition of torture which was relied upon by the Nepalese courts is the same definition as that which is in issue in this jurisdiction.

111. For the Appellant's plea of *autrefois convict* to succeed the following requirements must be met. First, the Appellant must have been tried and convicted in Nepal for the same crime as founds the charge in this jurisdiction. Second, he must have been convicted by a court of competent jurisdiction. Third, he must have been subjected in Nepal to a criminal punishment: *Richards v R* [1993] AC 217 (PC). If the accused cannot bring himself strictly within those requirements, the Court has a residual power to prevent unfairness and the abuse of its process.

112. The burden of establishing autrefois convict on the balance of probabilities is generally on the accused. However, on the facts here, Mr Lewis attempted to persuade us there should be no legal burden upon the Appellant, merely an evidential burden. It is said to be unfair on an accused to place upon him the burden of proving he has already been prosecuted and punished in a foreign jurisdiction. The prosecuting state is far better placed to investigate and secure co-operation than an individual. Miss Cheema retorted that this particular accused has been put to no disadvantage whatsoever. On the contrary, he has had the considerable assistance and support of the government of Nepal. She was prepared to concede that, in the interests of fairness, there may be circumstances where the court would bear very much in mind any difficulties faced by an accused in discharging the burden but this, she argued, is not such a case.

113. There is no authority for the proposition advanced by Mr Lewis that the burden of proof should shift to the prosecution where an accused claims he has been convicted in a foreign jurisdiction. We prefer to adopt Miss Cheema's suggested approach: namely that the legal burden remains on the Appellant but that the court must scrutinise the claim of autrefois convict with particular care in such circumstances.

The Nepalese legal system in general

114. With those observations in mind we begin with an un-contentious summary of the relevant parts of the Nepalese legal system as provided by Professor Subedi:

(1) The law and procedure is a blend of common law, civil law and Hindu law.
(2) There is a three tier court system: District Courts and Appeal Courts which exercise both civil and criminal jurisdictions and a Supreme Court.

(3) The Country Code (adopted in 1963) is a combined code for civil and criminal matters.
(4) Chapter 9 of the Country Code, for example, provides for a number of offences of assault and battery in familiar terms of liability, available defences and maximum penalties.
(5) Since 1963 the legal system has become largely adversarial albeit it retains some inquisitorial elements.
(6) In criminal trials the prosecutor may be the prosecution service or a private complainant who must prove guilt of a criminal offence beyond reasonable doubt.
(7) The public prosecutor will usually prosecute the more heinous crimes such as murder rape and arson.
(8) The Constitution recognises that no person shall be 'prosecuted or punished for the same offence in a court of law more than once'.

Specific provisions re torture.

115. Article 14(4) of the 1990 Nepalese Constitution prohibits torture or other cruel inhuman or degrading treatment in the following terms:

> "No person who is detained during investigation or for trial or for any other reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading treatment. Any person so treated shall be compensated in a manner as described by law."

116. Professor Subedi informed us that in 2007 the Interim Constitution mandated the enactment of two laws – one designed to make torture a specific criminal offence and one designed to compensate those subjected to torture. Nepal has not yet enacted a specific law making torture a punishable offence, but there are provisions of the Country Code which could be invoked to bring criminal charges against alleged torturers. They have not been invoked in this case and no charge has been brought under the Country Code by either the state or the complainant. Any prosecution would now be time barred. Thus, for the Appellant to establish autrefois convict he must rely upon the proceedings in the District Court under the Torture Compensation Act 1996 and/or the departmental action under the Army Act 2006.

Torture Compensation Act 1996

117. The Torture Compensation Act 1996 featured prominently in submissions. Professor Subedi described it as 'going a long way towards satisfying the second objective in the Interim Constitution', referred to above, to make provision for compensation of the victims of torture. We have been invited to use both a 'Refworld' translation of the Act and one which comes from the Nepali Law Commission. Professor Subedi produced a third.

The Preamble reads:

> "Whereas it is expedient to make arrangements for the payment of compensation to any person who is subjected to

> physical or mental torture or to cruel inhuman or insulting treatment while being detained……."

Section 3 prohibits torture and provides for medical examination of the detained. Section 4 provides for the payment of compensation by the state. A victim of torture has 35 days to file a complaint claiming compensation. The complaint will be heard in the District Court which must follow the Summary Procedures Act 1972 (an Act which provides for the prompt disposal of "small" criminal and civil cases by summary procedures). If the complaint is proved a maximum of Rs100,000 is payable by the state.

Section 7 is headed either "Action Against Persona (sic) involved in Torture" or "Prosecution of the Perpetrator". According to which translation you use, it reads:

> "In case it is proved that torture has been inflicted in the manner mentioned in this law, the district court shall order the appropriate agency to take departmental action according to the current law against the government employee who has inflicted torture."
>
> or
>
> "The District Court may pass the order to the concerned authority for taking the institutional action to be initiated in pursuance of the prevalent Nepalese law if any government official is proved to be involved in inflicting torture against any provisions of this Act"

118. Having read the original text in Nepalese, Professor Subedi (who in this instance had the support of the Crown) insisted that section 7 imposes a mandatory duty, rather than a power, on the Court to refer any proven acts of torture to the relevant government department for action against the official found responsible. Sections 8 and 9 provide for the determination of the amount of compensation and the execution of the decision. Section 10 authorises government lawyers to defend the government official alleged to have been involved in torture (as happened here). Section 12 states that the fact that a claim for compensation has been made under the Act does not prevent proceedings in a separate action. According to Professor Subedi, this means there is nothing to prevent a subsequent prosecution on the same facts.

119. Professor Subedi conceded that "at a first glance, the title 'Torture Compensation Act' may convey the message that this law is designed solely for compensating the victims of torture". However, he maintains that a more appropriate title would have been 'Torture Compensation and Punishment Act'. He claims that the Act does not merely prohibit torture and provide for compensation. Section 7 "speaks of prosecution/punishment of the person" responsible for inflicting the torture, leaving the way open for prosecution of the person involved and a possible prison sentence. Further, under Nepalese law the victim of torture has a number of options; making a claim for compensation is but one of them. Pursuant to Section

12 of the Act a victim could institute criminal proceedings under the Country Code, for example under Chapter 8 in respect of illegal detention.

120. These factors led Professor Subedi to the conclusion that the proceedings under the Torture Compensation Act may be hybrid in character and in this case were. He insists that the Kapilvastu District Court was exercising both a civil and criminal jurisdiction. The litigation began as a claim by Janak Raut for monetary compensation for alleged torture by Colonel KL, but the Court in fact concluded that (i) 'torture was a crime in Nepal' (ii) 'Colonel KL was guilty of the offence of torture' (iii) 'Janak Raut was entitled to compensation under the Torture Compensation Act', and (iv) 'Colonel KL should be punished by the Army Headquarters'. The proceedings therefore became criminal in nature and the Appellant was convicted by a court of competent jurisdiction of the criminal offence of torture – precisely the same offence and acts of torture alleged in count 1 of the present indictment.

121. Mr Lewis suggested we would find support for the Professor's conclusion in the fact that the District Court considered a specific submission on whether torture is an offence in Nepal. It found that it is. This he argued would only make sense if the District Court was exercising a criminal jurisdiction.

The Army Act 2006

122. The Act was not in force at the time of the alleged offences. Nevertheless we have been asked to consider its provisions because of the findings of Adjutant Major General Chand.

Chapter 7 of the Army Act relates to offences and Section 37 of that chapter provides:

> "If a person under the jurisdiction of this Act commits any of the acts as referred to in Sections 38 to 65 [Section 62 includes torture], it shall be considered to have committed an offence in accordance with this Act."

Section 62 makes special provisions for corruption, theft, torture and disappearance. It provides:

> "62. (1) To commit any acts which are defined as an offence of corruption, theft, torture and disappearance by prevailing law shall be deemed to have been committed the offence of corruption, theft, torture and disappearance.
>
> (2) There shall be a committee comprising of the following persons to conduct an investigation and inquiry into the offences provided in Sub-section (1):
>
> (a) Deputy Attorney General as designated by the Government of Nepal - Chairperson
>
> (b) Chief of legal section of the Ministry of Defence - Member

> (c) Representative of Judge Advocate General Department not below the rank of Major (Senani) - Member
>
> ……
>
> (4) The original jurisdiction to hear and dispose of the case as referred to in Sub-section (1) shall be on the Special Court Martial formed pursuant to Sub-section (1) of Section 119."

Chapter 8 provides for the formation and jurisdiction of Courts Martial for the trial and disposal of offences under Chapter 7. However, by virtue of s.68, offences under s.62 are specifically excluded from such Courts Martial. They must be dealt with by an Army Special Court Martial (consisting of a Judge of an Appellate Court, the Secretary of the Ministry of Defence, and the Chief of Prad Viwak).

Section 70 provides for "Double jeopardy"

> "Any person under the jurisdiction of this Act, after being subjected to trial, hearing and adjudication of an offence as referred in from Section 38 to Section 65 of this Act by the Court Martial or other court, or after being subjected to departmental action, shall not be subjected an action again for the same offence."

Section 101(1) sets out the general penalties that a Court Martial may impose, and s.101(2) sets out the maximum penalty for offences in Chapter 7.

Section 105 relates to Departmental Action:

> "105. (1) Notwithstanding anything contained in Chapter 8 and this Act, if the person of the following rank who falls under the jurisdiction of this Act commits an offence under this Act, one may, without convening a Court Martial, be subjected, taking into consideration the gravity of the offence, to the following departmental action by the following officer……
>
> (c) A Major General (Uparathi) or an officer of the similar rank or any other officer assigned by the Chief of Army Staff upon approval by the Government of Nepal may order one or more departmental actions mentioned below against a person of the rank of Lieutenant Colonel (Pramukh Senani) and officer below to this rank and Non-Commissioned Officers (Padik):
>
> (1) Subject to ultimatum (Nasihat),
>
> (2) Subject to warning (Chetawani),
>
> (3) Freezing of salary up to the recovery of losses,
>
> (4) Freezing of promotion u pto One year,

> (5) Removing (deducting) of seniority up to One year….
>
> (2) Prior to the order of departmental action as referred to in Sub-section (1), the concerned accused shall not be denied from the right to file an application for a trial by the Court Martial if he/she so desires."

123. Miss Cheema suggested to Professor Subedi that the first few words of section 105 (1) must contain a misprint or mistranslation and that they should read: "Notwithstanding anything contained in Chapter 8 of this Act". He disagreed and claimed that section 105 is very broad in its scope and allows for the kind of summary criminal procedure he says was adopted by Major General Chand.

124. The Professor did not address what seemed to us to be a relevant consideration in interpreting section 105, namely the use by the legislature of the words "taking into consideration the gravity of the offence". This phrase, in the context of the statute as a whole, suggests to us that the legislature intended section 105 and departmental action to be reserved for more minor offences. It seems unlikely that it intended to provide for a summary procedure in cases of torture for which section 62 requires a Special Court Martial.

125. Nevertheless Professor Subedi was satisfied that Major General Chand had the necessary jurisdiction under section 105 to take departmental action and that, in so doing, he was exercising a summary criminal jurisdiction. Further, having read the ruling in the original Nepalese, he was satisfied that Adjutant Major General Chand did not simply rely upon the verdict of the District Court. He maintained the officer formed his own judgement as to the Appellant's guilt and convicted him of an offence of torture under section 62 of the Army Act. This it was said qualified as a 'criminal service conviction under the Army Act'.

Conclusions on Ground 3

Torture Compensation Act

126. We are satisfied that the action in the District Court began and ended as a civil claim for compensation under the Torture Compensation Act against three defendants: the Appellant, the battalion and the police. The Appellant was represented by the local public prosecutor (which may seem a little strange to British eyes if these were thought to be both civil and criminal proceedings). Mr Raut sought compensation of Rs 100,000 (pursuant to section 6 (1) of the Act) to be payable by the Government and the "necessary" departmental action (pursuant to section 7). The three issues for the court were: was the claim made in time, did the act of inflicting torture constitute an "offence" and was the complainant entitled to compensation. The judge records his finding that the complainant was tortured and orders compensation to be paid by the state. He makes no mention of punishment for the Appellant for his involvement in a serious criminal offence. The Appellant is simply referred to his senior officers for departmental action, as dictated by section 7 of the Torture Compensation Act.

127. Nearly everything points to these having been civil proceedings yet the expert informs us they were mixed criminal and civil. We do not doubt Professor

Subedi's sincerity and desire to assist us but, with great respect to him, there seemed to us to be a number of inconsistencies and a significant degree of illogicality in his approach.

128. He has declared that Nepal has not enacted a specific law making torture a criminal offence; but he claims that the Appellant has been convicted of the specific offence of torture. He states that the District Court has used, as its vehicle, the Torture Compensation Act but the undoubted aim of the Act was to provide compensation for victims and it contains none of the elements one would expect to see in a criminal statute (of the kind, for example, that appear in the Country Code). He accepts that criminal proceedings were not brought under the Country Code, as they could have been, and that the District Court proceedings began as a civil claim against three defendants. He can point to nothing in the judgment of the District Court to indicate that the court distinguished in any way between the three defendants, finding the civil claim proved against two or three of them and a criminal offence proved against the Appellant. There is no reference to the court's applying the criminal standard of proof and or to its having considered its powers of punishment on conviction. Making all allowance for the fact these were Nepalese proceedings not British proceedings, Professor Subedi's opinion that the proceedings became both civil and criminal and the Appellant alone was convicted of a criminal offence seems somewhat improbable.

129. Further, Professor Subedi accepts that the concept of autrefois convict applies in Nepal (and is specifically enshrined in the Army Act). However, on his interpretation of the Act and the proceedings, section 12 has abolished the principle for offences of torture. The result, according to Professor Subedi, is that, despite a conviction for torture in the District Court, the Appellant remained liable to conviction of a criminal offence based on the same facts, under the Country Code and in a Court Martial. This too seems improbable. Miss Cheema did her best to put the obvious inconsistencies to the Professor but he would not acknowledge them.

130. We were forced to analyse the text of the documents for ourselves to form our own views on the nature of the proceedings (in the light of the only expert evidence available). We did not conduct our own researches.

131. The court's reasoning appears to be as follows; the defendants denied torturing the complainant but did not deny he was detained for 17 days. The complainant produced evidence of injuries. There was no record of any medical examination. Torture of a detainee is unlawful and "in any case under the Torture Compensation Act mere denial of torture is not sufficient." The proper procedures had not been followed during the complainant's detention. Accordingly the defendant or defendants had "treated the complainant Janak Raut contrary to the provision made by the Torture Compensation Act".

132. If, as we have been assured, the burden of proving guilt of a criminal offence is on the prosecutor and the standard is proof beyond reasonable doubt, and the Court was correct in asserting that "in any case under the Torture Compensation Act mere denial of responsibility is not sufficient", the Court cannot have been considering a criminal matter.

133. There are only two factors which would support the conclusion these were criminal proceedings: the fact that one of the issues to be determined was whether torture is an "offence" in Nepal and the fact the Appellant was referred for departmental action. Despite being pressed by Miss Cheema repeatedly, Professor Subedi could not suggest any others.

134. The word "offence" has to be seen in the context of the determination as a whole. For the reasons already given, to our mind, it could not possibly indicate a criminal offence on the facts here. It must have been used in the sense of an actionable wrong.

135. As for the prosecution and punishment of the Appellant under section 7, as it seems to us this is merely a way of ensuring that officials responsible for torture are disciplined by their relevant departments. It was not intended to act as a substitute for a criminal prosecution and punishment.

136. All other factors point to the proceedings under the Act being civil in nature. The Torture Compensation Act, as the Professor conceded, was designed to provide compensation for victims as one of two pieces of legislation. The other was intended to criminalise torture but was never enacted. The Preamble to the Torture Compensation Act makes reference to compensation only. The main body of the Act focuses almost exclusively on a civil claim for compensation.

137. There is nothing in the Act to suggest it was intended to make the grave offence of torture an offence, to set out the elements of the offence and to provide levels of punishment (as do the criminal provisions of the Country Code). The only reference to prosecution or possible punishment comes in section 7 which, as already indicated, provides for an official found responsible on a complaint of torture to be referred by the court to his home department for action by that department. It would be a curious criminal offence which gave the District Court power to convict of a serious offence but not the power to punish, forcing it to remit the case for punishment by a Government department.

138. We have borne very much in mind that we are considering a Nepalese statute and Nepalese procedure which may bear little resemblance to the statutes and procedure of England and Wales. However, with the benefit of the basic principles of Nepalese criminal law and procedure which are agreed, we have formed our own clear conclusion that the Torture Compensation Act proceedings were not criminal in nature.

Army Act proceedings

139. The fact that the District Court referred the matter to the Army for departmental action also assists in the interpretation of the Army Act proceedings.

140. We have no difficulty in accepting the proposition that a properly constituted Court Martial may constitute a court of competent jurisdiction. However, the jurisdiction of the Courts Martial system in this case, be it summary procedure or trial by full Court Martial, was never invoked. What was invoked was the power of the Army to discipline its soldiers. The proceedings before Adjutant Major General Chand bore no resemblance to criminal proceedings. There was no

special committee or special Courts Martial to investigate the allegation and hear the case as required by section 62. The Appellant was not represented before Adjutant Major General Chand and may not even have attended. There was no charge, no plea, no hearing, no evidence and no adjudication on the facts.

141. As the terms of the 'Departmental Action' itself make clear, this was simply the final stage of the District Court proceedings. Adjutant Major General Chand was not making his own findings; there was no basis for his doing so. He was reliant solely on the verdict of the District Court, as he repeatedly stated throughout the departmental action document.

142. Thus we are satisfied there was nothing remotely independent about the Army Act proceedings. They were entirely dependent upon the District Court findings. The proceedings were disciplinary in nature. The Major General may have made a passing reference to section 62 in his closing remarks but that was simply another added justification for the fact that the Army was taking action. It could not and did not amount to a finding that the Appellant had been found guilty to the relevant standard of a criminal offence of torture under section 62.

143. For these reasons, Ground 3 is also dismissed.

Conclusion.

144. The appeal on all grounds will be dismissed.

145. Finally, we wish to express our gratitude to the amicus curiae, Professor Verdirame, for the assistance he has provided to the court.