IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA264/2017
[2018] NZCA 307

BETWEEN	HAYLEY YOUNG Appellant
AND	ATTORNEY-GENERAL First Respondent
	MINISTRY OF DEFENCE (UNITED KINGDOM) Second Respondent

Hearing:	13 and 14 March 2018
Court:	Cooper, Brown and Williams JJ
Counsel:	J L Bates for Appellant A L Martin and T Burgess for First Respondent A S Butler and M W McMenamin for Second Respondent
Judgment:	13 August 2018 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the second respondent costs for a standard appeal on a band A basis and usual disbursements.

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REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] A protest by the United Kingdom Ministry of Defence (MOD(UK)) on the ground of state immunity to the jurisdiction of the New Zealand courts to hear and determine Ms Young's claim in respect of her alleged wrongful treatment by Royal Navy personnel in the United Kingdom was upheld in the High Court.[1] Had it

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1 *X v Attorney-General* [2017] NZHC 768, [2017] 3 NZLR 115 [High Court judgment].

been necessary to do so Simon France J would also have concluded that as a matter of forum conveniens the courts of England and Wales were the appropriate forum for Ms Young's claim against the MOD(UK).[2] Ms Young appeals those findings.

[2] The thrust of Ms Young's argument against recognition of state immunity as a jurisdictional bar, both in the High Court and in her notice of appeal, was that New Zealand should recognise a public policy based "iniquity exception" whereby state immunity is not upheld where the impugned activity breaches a fundamental principle of justice or some deep-rooted tradition of the forum state. Such an iniquity exception should extend to a case involving allegations of a breach of fundamental human rights provided that the case is substantially connected to the forum state and/or its interests.

[3] In this Court Ms Young's argument broadened to include the contention that a state immunity protest should not be upheld because New Zealand owes a non-derogable obligation to provide her with an effective remedy in the New Zealand courts for the wrongdoing she suffered in the United Kingdom at the hands of Royal Navy personnel. At the outset of his address Mr Bates captured Ms Young's case in this way:

> The appeal rests on this basis: that the appellant as a former officer of the Royal New Zealand Navy was in service for her country, serving her state. She remained subject to the de facto and de jure control of the New Zealand government, the New Zealand state itself, and to that end when she was harmed, albeit she was not in the territory of the state, she was subject to New Zealand's jurisdiction at the time. That means, Your Honours, in counsel's ultimate submission, that the appellant has a right to an effective remedy from within the New Zealand legal system.

[4] The obligation was said to arise through:

(a) the New Zealand Bill of Rights Act 1990 (NZBORA), which affirms the International Covenant on Civil and Political Rights (ICCPR);[3]

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2 At [58].

3 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

(b) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);[4]

(c) the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);[5]

(d) customary international law, as reflected in particular in the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation,[6] and the Draft Articles on State Responsibility.[7]

[5] Consequently in our view the broad issues raised by the appeal are:[8]

(a) Does New Zealand owe Ms Young an obligation to provide her with an effective remedy in the New Zealand courts for the alleged wrongdoing she suffered abroad at the hands of Royal Navy personnel:

(i) as a matter of domestic law under the NZBORA?

(ii) as a matter of international law because of the nature of the alleged wrongdoing involving arguable violation of Ms Young's fundamental rights?

(b) Should the Court dismiss the protest to jurisdiction by the MOD(UK) on the grounds that the alleged wrongdoing breached a fundamental principle of justice or some deep-rooted tradition of New Zealand which engages an iniquity exception to the state immunity doctrine?

(c) Are the courts of England and Wales or the High Court of New Zealand the more appropriate forum for Ms Young's claim against the MOD(UK)?

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4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

5 Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13 (opened for signature 1 March 1980, entered into force 3 September 1981).

6 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* GA Res 60/147, A/Res/60/147 (2005).

7 *Draft articles on responsibility of States for internationally wrongful acts* [2001] vol 2, pt 2 YILC 26.

8 Issue (a) is much more focused than the first of the agreed issues lodged in compliance with r 42A(1) of the Court of Appeal (Civil) Rules 2005, namely: "was the High Court correct to find that the [MOD(UK)] could successfully object to jurisdiction on the basis of state immunity?"

Factual background

[6] As in the High Court, for the purposes of this interlocutory appeal Ms Young's allegations are treated as capable of being established.[9] We gratefully adopt the succinct outline by Simon France J of the factual allegations:[10]

> [5] [Ms Young] joined the Royal New Zealand Navy in 2008 for work in a specialist technical area. She was selected for officer training and performed well. The Royal New Zealand Navy, along with many other countries, has a standing arrangement in place for some of their employees to receive further training from the Royal Navy. Selection is at the discretion of the Royal New Zealand Navy. [Ms Young] was offered and accepted one of those spots. Whilst posted to the Royal Navy, [Ms Young] was under the command of both the Royal Navy and Royal New Zealand Navy. She continued to be paid by the Royal New Zealand Navy and the expectation was that she would return there upon completion of her training.
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> [6] During the posting [Ms Young] spent time in a shore based training facility and some time on two Royal Navy ships. While at the training facility and on the ships, [Ms Young] claims that she was subjected to a culture of sexual harassment:
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> (a) Junior Ratings were allowed by superior officers to dare each other to "conquer" female service women by having sex with them. Rewards were offered;
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> (b) [Ms Young] received constant and unwanted approaches for sexual activity, and this occurred with the knowledge of superior officers, who did nothing despite knowing it was causing distress;
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> (c) male naval personnel conducted a survey in [Ms Young's] presence about who amongst their number wanted to have sex with her; and
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> (d) a particular officer made masturbating gestures in her presence.
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> [7] [Ms Young] also specifies two instances of physical assault (the first occurring on a particular UK navy ship, the second on a UK base). In the first a male naval officer placed his hand on her crotch whilst she ascended a ladder. In the second, a different male officer had sexual intercourse with her without her consent. These events occurred in 2009. No complaint to authorities was made at the time. All the personnel being complained about up to this point were members of the Royal Navy, and the events occurred overseas on British ships or land based facilities.
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> [8] After her training in the United Kingdom concluded, [Ms Young] took leave for personal travel before returning to the Royal New Zealand Navy. Upon returning, [Ms Young] was required to undertake a joining interview with a senior officer. She says that at that interview she complained of the

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9 Hence in the judgment we dispense with the practice of qualifying references to the wrongful conduct as "alleged".

10 The following passages are from the judgment as issued. The reported version contains minor factual differences.

> unsafe environment while posted overseas, including the sexual harassment. It is said the superior officer was dismissive and made inappropriate comments about such conduct, and her need to cope with it. [Ms Young] was posted to a Royal New Zealand Navy ship. Whilst on board she says she complained to superior officers on the ship about abusive language and lewd comments being directed towards her. She says she received an unsupportive response from a named officer who it is alleged also witnessed some of the events.
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> [9] The Royal New Zealand Navy ship [Ms Young] was aboard travelled to overseas ports. At one, [Ms Young] says an officer of the host nation's service forced her to compete in a drinking contest and subjected her to sexual harassment and assault.
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> [10] Eventually [Ms Young] was posted to a different Royal New Zealand Navy ship. She claims that on board that ship there continued to be incidents of harassment with unwanted sexual references. It is claimed male naval employees were encouraged to drink and to cheat on their partners.
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> [11] The stress of these cumulative events over the years, and what is said to be a lack of support, led [Ms Young] to resign. Claims are made about events that occurred during the period leading up to this. At one point [Ms Young] recorded her experiences in writing in a document entitled "My Story". She sent it to the officer who had suggested its publication. It was then, without her consent, forwarded to a number of naval personnel. [Ms Young] claims nothing, however, was done in response to the story.

[7] Ms Young's claims against the MOD(UK) relevant to the issues in this appeal are:[11]

(a) a breach of a duty of care to take all reasonable steps to ensure her safety while in the United Kingdom, the failures being evidenced by her being subjected to an intimidating, hostile or humiliating environment; and

(b) vicarious liability (jointly with the New Zealand Attorney-General (AGNZ)) for the tort of battery, namely the two physical assaults (being an indecent assault and a rape).

High Court judgment

[8] Ms Young served the proceeding on the MOD(UK) outside New Zealand without leave of the High Court. The MOD(UK) served a notice of appearance

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[11] As recorded by Simon France J in the High Court judgment, above n 1, at [12].

objecting to jurisdiction[12] which Ms Young then applied to have set aside.[13] Because the proceeding was served without leave being obtained, both the protest to jurisdiction and the application to set aside the appearance fell to be determined under r 6.29 of the High Court Rules 2016. Hence the onus was on Ms Young to establish that there was a serious issue to be tried on the merits, New Zealand was the appropriate forum for the trial and any other relevant circumstances which supported an assumption of jurisdiction.[14]

[9] Simon France J ruled that Ms Young's challenge to the MOD(UK)'s claim of state immunity could not succeed for the following reasons:[15]

(a) At common law there is no recognised exception to state immunity for allegations of breaches of fundamental human rights. State immunity is a rule of international law which does not recognise such an exception.

(b) This Court's decision in *Controller and Auditor-General v Davison*[16] which concerned the recognised commercial exception to state immunity did not empower the recognition of the asserted iniquity exception.

(c) If the proposed exception was available it would only be applicable in circumstances of more systemic state sponsored violations of human rights than those alleged by Ms Young.

(d) Acceptance of jurisdiction would not be consistent with the dignity of a foreign state. The claims made against the British government would require investigation into what happened on British warships and on British naval bases and would require inquiry into the internal policies and procedures of the Royal Navy.

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12 High Court Rules 2016, r 5.49(1).
13 Rule 5.49(5).
14 Rules 6.29(1)(a)(ii) and 6.28(5)(b)–(d).
15 High Court judgment, above n 1, at [47]–[50].
16 *Controller and Auditor-General v Davison* [1996] 2 NZLR 278 (CA).

[10] On the issue of appropriate forum, addressing the factors identified in *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*[17] the Judge found:[18]

- the liability conduct all occurred in the United Kingdom;
- the liability witnesses, other than Ms Young, resided in the United Kingdom;
- those witnesses would be compellable in the United Kingdom but not in New Zealand;
- the law of the United Kingdom would be the applicable law to the claim against the MOD(UK) for acts occurring in the United Kingdom; and
- the subject matter required an inquiry that was much better suited to a court of England and Wales.

[11] The Judge weighed Ms Young's claimed disadvantages in this manner:

> [56] The identified disadvantages [Ms Young] would suffer are the expense and difficulty of conducting proceedings in England, and the need for two court proceedings given the plaintiff is suing AGNZ in relation to the same events. I accept the former is a valid point but observe [Ms Young] has chosen, as of course is her right, not to avail herself of opportunities to alleviate the difficulties. The Royal Navy has referred the matter to the Royal Navy Police who would investigate if [Ms Young] wished to make a complaint, but she declines to do so.
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> [57] As for the need for two proceedings, and subject to any decisions made in relation to the AGNZ claims, I accept it is a factor but in the circumstances do not consider the choice of the plaintiff to also sue AGNZ in relation to these overseas events is sufficient to overcome the otherwise overwhelming conclusion that the Courts of England and Wales are the appropriate forum for the claims against MoD(UK).

[12] Before turning to address the issues identified, we consider that it is useful first to discuss in a preliminary way both the concept of state immunity and the significance of jurisdiction.

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17 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 at [45]–[46].

18 High Court judgment, above n 1, at [55].

State (or sovereign) immunity

[13] A convenient starting point reflecting the flavour of the competing perspectives in this appeal is found in the introduction to the Supreme Court decision in *Lai v Chamberlains*:[19]

> [1] Access to the Courts for vindication of legal right is part of the rule of law. Immunity from legal suit where there is otherwise a cause of action is exceptional. Immunity may be given by statute, as in New Zealand in respect of personal injuries where other, exclusive, redress is provided. An immunity may attach to status, such as of diplomats or heads of state. All cases of immunity require justification in some public policy sufficient to outweigh the public policy in vindication of legal right.
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> [2] Public policy is not static. So, for example, the immunities of the Crown have been progressively rolled back in response to changing attitudes as to where the public interest lies. And the wide immunity at common law for states and heads of state has been restricted and modified by modern legislation and judicial decisions, often under the influence of developing international law.

A rule of international law

[14] State immunity is a rule of international law which precludes the courts of the forum state from exercising adjudicative and enforcement jurisdiction in certain classes of case in which a foreign state is a party. Its rationale was explained by Cooke P in *Governor of Pitcairn and Associated Islands v Sutton*:[20]

> Sovereign immunity is a doctrine applying to sovereign states or, as it is sometimes expressed, independent sovereign states. In general at common law, reflecting international law, such a state will not be impleaded in the Courts of another country (in this instance New Zealand) against its will and without its consent; the exercise of jurisdiction is seen as incompatible with the dignity and independence of the foreign state.

[15] A useful elaboration on the basis of the doctrine is contained in a commentary of the International Law Commission cited by Sir Kenneth Keith in his separate opinion in the decision of the International Court of Justice (ICJ) in *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*.[21] Under the heading "Rational bases of State immunity" it was said:[22]

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19 *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 (footnotes omitted).

20 *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 (CA) at 428.

21 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99 at 165.

22 *Jurisdictional Immunities of States and their Property* [1980] vol 2, pt 2 YILC 137 at 156.

> The most convincing arguments in support of the principle of State immunity may be found in international law as evidenced in the usage and practice of States and as expressed in terms of the sovereignty, independence, equality and dignity of States. All these notions seem to coalesce, together constituting a firm international legal basis for State immunity. State immunity is derived from sovereignty. Between two co-equals, one cannot exercise sovereign will or authority over the other: *par in parem imperium non habet.*

The modification of state immunity

[16] The narrowing of state immunity noted in *Lai v Chamberlains* first involved the relaxation of the absolutist principle to a "restrictive" theory of state immunity whereby the commercial activities of states were no longer protected. In *Playa Larga (Owners of Cargo Lately Laden on Board) v I Congreso del Partido (Owners)* Lord Wilberforce explained the distinction between "jure gestionis" (translated as a "private act") and "jure imperii" (a "sovereign or public act").[23] The restrictive doctrine recognised state immunity only in respect of the latter. Hence a foreign state could sue,[24] and be sued, in the courts of a forum state in respect of private acts undertaken by the foreign state.

[17] However, subject to the recent developments discussed below, litigation involving the sovereign or public acts of a foreign state may only occur in the courts of a forum state with the agreement of the relevant state. Thus a foreign state may not initiate a claim in respect of a sovereign or public act in the court of a forum state, unless the forum state agrees to "unlock the door" of the forum state's court.[25] Correspondingly a foreign state may not be sued in the courts of a forum state in respect of a sovereign or public act unless the foreign state waives its entitlement to state immunity by a voluntary submission to the forum court's jurisdiction.[26]

[18] The last two decades in particular have witnessed what James Crawford describes as a persistent tension in the case law between the profile of state immunity and the principles of human rights.[27] Particularly in the context of torture it has been

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23 *Playa Larga (Owners of Cargo Lately Laden on Board) v I Congreso del Partido (Owners)* [1983] 1 AC 244 (HL) at 262.

24 *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 (CA) at [3].

25 *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (CA) at 173–175 per Cooke P.

26 *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2017] 3 WLR 957 at 969.

27 James Crawford *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012) at 505.

argued that immunity should not be recognised for the reason that the prohibition of torture is a peremptory norm or *jus cogens* which takes precedence over other rules of international law including the rules of state immunity.[28]

[19] In *The Law of State Immunity* Hazel Fox and Philippa Webb analyse the evolution of state immunity during the last 200 years utilising three models, the First and Second being the absolute and restrictive doctrines respectively.[29] It is the Third Model which is to the forefront of the argument advanced by Ms Young in this case.

[20] The context to the Third Model is explained in this way:[30]

> In the second half of the twentieth century and in particular since 1990, the scope of international law and the requirements of responsibility which it imposed appeared to be in a phase of radical expansion; this has been accompanied by a shift from the bilateralism of rights to a vertical hierarchy. The obligations of the State have extended to include those owed to the international community as a whole; and obligations owed to individuals have broadened through a network of human rights treaties. The desire to end impunity and to provide redress to victims has been expressed in the establishment of international criminal courts and tribunals and the exercise of universal jurisdiction by national courts. Such developments have suggested a concomitant restriction on the scope of State immunity. These developments were welcomed by proponents of the restrictive doctrine as heralding a further restriction of State immunity so as to permit claims to be brought in national courts against a State for injury committed, not solely in respect of commercial transactions, but in a wider field.

[21] However Fox and Webb suggest that, contrary to such expectations, the Third Model appears to be moving into a more exclusionary phase with the application of state immunity confined to a procedural plea in the presentation of a claim against a foreign state in a national court.[31] In assessing the Third Model they state:[32]

> This review of State practice may lead one to describe the Third Model as both regressive and exclusionary, a recognition that the time is not ripe for

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28 A peremptory norm or *jus cogens* is defined as a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted: Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 53.

29 Hazel Fox and Philippa Webb *The Law of State Immunity* (3rd ed, Oxford University Press, Oxford, 2013) at ch 2.

30 At 38.

31 At 38.

32 At 46.

> unilateral decisions of national courts to provide solutions to highly political claims.
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> The better view, however, is to treat the Second and Third Models as swings of a pendulum.

[22] We will return to consider the implications of the Third Model in our analysis of Ms Young's contention that on the basis of certain treaty obligations New Zealand is required to provide her with an effective remedy in New Zealand in respect of wrongdoing which occurred abroad.

Jurisdiction

[23] Jurisdiction has been described as a slippery word.[33] While as a matter of etymology it originally meant 'speaking the law', in essence it is now understood to mean the exercise of legal authority. In international law it refers to a state's competence to regulate the conduct of natural and juridical persons through all branches of government: legislative, executive and judicial.[34]

Jurisdiction of courts

[24] In the context of r 5.49 of the High Court Rules, the jurisdiction which is the subject of protest is the entitlement of a court to entertain a suit. If a valid claim to state immunity is made in respect of a claim concerning a sovereign or public act, the forum court has no jurisdiction over the proceeding. In *Garthwaite v Garthwaite*, where Diplock LJ advanced his classic expression of the meaning of jurisdiction,[35] his Lordship criticised an earlier description of jurisdiction in this way:[36]

> I think, with respect, that [Pickford LJ] defined the strict sense too narrowly, for it would not embrace the court's lack of jurisdiction to entertain a suit based upon the personality of a party, as, for instance, in the case of a suit against a foreign sovereign or ambassador.

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33 *T-Mobile (UK) Ltd v Office of Communications* [2008] EWCA Civ 1373, [2009] 1 WLR 1565 at [39] per Jacob LJ.

34 Crawford, above n 27, at 456.

35 Adopted by the Supreme Court in *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804 at [25].

36 *Garthwaite v Garthwaite* [1964] P 356 (CA) at 387. The description that Diplock LJ was criticising appeared in *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536 (CA) at 563 per Pickford LJ.

[25] Where a court has no jurisdiction over a proceeding, it necessarily follows that it has no power or discretion to entertain it. As Lord Bingham of Cornhill explained in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*:[37]

> Based on the old principle par in parem non habet imperium, the rule of international law is not that a state should not exercise over another state a jurisdiction which it has but that (save in cases recognised by international law) a state has no jurisdiction over another state. I do not understand how a state can be said to deny access to its court if it has no access to give. This was the opinion expressed by Lord Millett in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1588, and it seems to me persuasive.

[26] Of course it will be necessary from time to time for a court to exercise the threshold power to determine whether or not it has jurisdiction.[38] Having done so, if the court determines that it does not have jurisdiction, then the matter proceeds no further.

[27] It is important to recognise that such preliminary inquiry does not import any discretion to assume jurisdiction. State immunity is a mandatory rule of customary international law which defines the limits of a domestic court's jurisdiction.[39] It is not a "self-imposed restriction on the jurisdiction of [the] courts" but a "limitation imposed from without".[40]

Jurisdiction of states

[28] A second meaning of jurisdiction relates to the extent of the territory over which a state exercises authority and control. It is in this sense that the word is used in art 1 of the European Convention on Human Rights (ECHR) discussed in several of the authorities cited in argument.[41] It states:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention.

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37 *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270 at [14].

38 *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd*, above n 35, at [20].

39 *Benkharbouche,* above n 26, at [17].

40 *Holland v Lampen-Wolfe* [2000] 1 WLR 1573 (HL) at 1588 per Lord Millett.

41 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

[29] A state's jurisdictional competence under art 1 is primarily territorial. Save for exceptional cases, the engagement undertaken by a contracting state is confined to securing the listed rights and freedoms to persons within its own territory.[42] However as Lord Hope observed in *Smith v Ministry of Defence* the word "exceptional" is there not to set an especially high threshold for circumstances to cross before they can justify a finding that a state is exercising jurisdiction extraterritorially.[43]

[30] It has been recognised in English authorities that in certain circumstances a state's jurisdiction for the purposes of art 1 may extend to persons who are for the time being outside its territory. In *Smith* the United Kingdom Supreme Court held that the jurisdiction of the United Kingdom extended to securing the protection of art 2 of the ECHR (the right to life) to members of the armed forces when they were serving outside its territory. Hence at the time of the deaths of two British soldiers in Iraq they were within the jurisdiction of the United Kingdom for the purposes of art 2. This was not seen as inconsistent with the general principles of international law as no other state was claiming jurisdiction over them.

[31] With reference to the proposition that authorised agents of a state remain under its jurisdiction when abroad, Lord Hope observed:[44]

> It is plain, especially when one thinks of the way the armed forces operate, that authority and control is exercised by the state throughout the chain of command from the very top all the way down to men and women operating in the front line. Servicemen and women relinquish almost total control over their lives to the state. It does not seem possible to separate them, in their capacity as state agents, from those whom they affect when they are exercising authority and control on the state's behalf. They are all brought within the state's article 1 jurisdiction by the application of the same general principle.

[32] It is in this sense of the extraterritorial application of jurisdiction that Ms Young claims that, when serving as a New Zealand Navy officer in the United Kingdom, she was subject to New Zealand jurisdiction at the time. That is the reason why she contends that this is a case involving the application of "travelling"

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42 *Al-Skeini v United Kingdom* (2011) 53 EHRR 589 (Grand Chamber, ECHR) at [131].
43 *Smith v Ministry of Defence* [2013] UKSC 41, [2014] AC 52 at [30].
44 At [52].

fundamental human rights which includes the right to an effective civil remedy from within the legal system of New Zealand.

[33] However, the argument for Ms Young advocates an extension to the extraterritoriality exception. She contends that a victim's right to an effective remedy, from a competent authority of the state the victim was subject to when the human rights violation occurred, arises irrespective of who is ultimately responsible for that violation. She submits that the duty to supply an effective civil remedy is demonstrably a "nationalised one", and that the obligation to ensure the right to effective remedies from within the New Zealand legal system cannot be "outsourced".

[34] This asserted right, which is described as absolute and not capable of derogation or limitation, is said to trump the doctrine of state immunity.

Does New Zealand owe Ms Young an obligation to provide her with an effective remedy in the New Zealand courts for the wrongdoing she suffered abroad at the hands of Royal Navy personnel as a matter of domestic law under the NZBORA?

[35] Ms Young's contention that New Zealand owes her such an obligation is advanced on the premise that a purpose of the NZBORA is to affirm New Zealand's commitment to the ICCPR, art 2 of which relevantly states:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to *all individuals* within its territory and *subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
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> …
>
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have *an effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto *determined by competent judicial*, administrative or legislative *authorities*, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

(Emphasis added).

[36] Mr Bates' written submission in reply framed the proposition in this way:

> Parliament's enactment of the NZBORA which contains an affirmation of the ICCPR, and reinforced by all [State's] acceptance of the UN Basic Principles and Guidelines creates obligations on the New Zealand State to supply an effective national remedy to those who tenably maintain their fundamental human rights, which include the right to be free of cruel and degrading treatment, have been violated, and applies irrespective of who is ultimately responsible for the violation.

[37] While the primary response of the MOD(UK) is that the NZBORA has no application to it, Mr Butler also raised a pleading point that Ms Young's statement of claim does not allege any infringement of a right guaranteed by the NZBORA. Although Mr Bates' written submissions suggested that there was a pleaded allegation that Ms Young's "statutory human rights have been infringed", we consider Mr Butler's analysis of the pleading is correct. Nevertheless, the issues having been comprehensively argued, we proceed on the footing that an appropriate amendment can be made if required.

[38] The object of the NZBORA is to affirm, protect and promote human rights and fundamental freedoms "in New Zealand".[45] The NZBORA is specific as to its reach. Section 3 states:

> **3 Application**
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> This Bill of Rights applies only to acts done—
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> (a) by the legislative, executive, or judicial branches of the Government of New Zealand; or
>
> (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

[39] It is uncontroversial that a person whose legislatively affirmed rights under the NZBORA are infringed in New Zealand by an entity specified in s 3 is entitled to an

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[45] New Zealand Bill of Rights Act 1990, long title.

effective remedy in relation to that breach in the courts of New Zealand.[46] However the implications of the statute for acts performed abroad have yet to be authoritatively explored.

[40] Although the first limb of the long title refers to the protection of human rights and fundamental freedoms "in New Zealand", the NZBORA does not contain any express limitation to acts done within New Zealand. Andrew Butler and Petra Butler made the point that the avowed purpose would not be advanced if New Zealand officials could avoid the application of the NZBORA simply by conducting NZBORA-inconsistent acts offshore.[47] We consider that there is no reason in principle why the NZBORA should not be interpreted to apply to acts that would otherwise fall within the ambit of s 3 by reason only that they occur offshore.

[41] In interpreting the NZBORA with reference to potential extraterritorial application Paul Rishworth and others in *The New Zealand Bill of Rights* suggest two approaches:[48]

> The first is that the rights, being in the main conferred on 'everyone' or 'every person', are literally intended to benefit every person in the world, albeit that they will have practical 'bite' only when a person has some interaction with the Government of New Zealand. On this view they may be invoked in relation to acts carried out by agents of the New Zealand Government or public actors in other jurisdictions. The second and narrower approach is that although everyone has rights, they have them only against the New Zealand Government *acting as such*, and hence only in New Zealand and places where it asserts a territorial or personal jurisdiction.

[42] Ms Young's contention involves an extension of that second approach. We apprehend her claim to be that, for the duration of her service as a member of the New Zealand military forces, there is an assertion by the New Zealand Government of a personal jurisdiction over her and that such jurisdiction over her is maintained when she travels beyond New Zealand in the course of her military service. This reflects the approach in *Smith*.[49]

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46 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's case*].

47 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [5.16.3].

48 Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 114.

49 *Smith v Ministry of Defence*, above n 43.

[43] Assuming for the purpose of analysis the adoption in New Zealand of the extraterritorial jurisdiction recognised in *Smith*, it would follow that, if while on active service abroad Ms Young's NZBORA rights were infringed there by a person to whom the NZBORA applies, then she would be entitled to bring a proceeding in New Zealand and to obtain an effective remedy in the courts of New Zealand.

[44] However Ms Young's claim is a different one. Her complaint relates to actions which occurred beyond the territory of New Zealand by persons who were members of the military services of another state, that is the Royal Navy, who at the material time were subject to the authority and control of the MOD(UK).

[45] The MOD(UK) is not one of the three branches of the New Zealand Government. Nor by the activities of its service personnel undertaken in the United Kingdom did the MOD(UK) undertake any public act which it was authorised to do by New Zealand law. The expression in s 3(b) "by or pursuant to law" means by or pursuant to the laws of New Zealand.[50] Hence Mr Butler contends that the MOD(UK) is not an actor to whom the NZBORA applies.

[46] In our view that submission is sound and we accept it. The claims brought by Ms Young against the MOD(UK) which are the subject of this appeal are not claims against an entity within s 3. Mr Bates acknowledged in the course of argument that the NZBORA does not provide any basis for action against the MOD(UK). We would add that Ms Young's claim cannot derive validity, as her written submissions proposed, by seizing on the judgment currently under appeal as representing an "act done" by the judicial branch of the Government for the purposes of s 3.

[47] Our conclusion has significant implications for Ms Young's broad contention at [33] above. Her contention focuses on the references in art 2(1) of the ICCPR to "subject to its jurisdiction" and in art 2(3)(a) to the availability of "an effective remedy". This is illustrated by two passages from the summary in her written submissions:

> … the New Zealand state [has an] obligation to provide guaranteed effective civil remedies to the Appellant, which includes access to a competent

[50] *R v Matthews* (1994) 11 CRNZ 564 (HC) at 566.

> authority from within its own legal system, to hear and determine arguable violations of protected human rights, at a time the Appellant "was subject to" New Zealand's jurisdiction …
>
> The right to an effective remedy, from a competent authority of the State the alleged victim was subject to when the alleged violation of their human rights occurred, arises irrespective of who is ultimately responsible for that violation …

[48] Although non-specific as to a defendant, the claim in contemplation could only lie against the AGNZ. Consequently it would not give rise to a state immunity issue. However, given the manner in which the argument has evolved, we will address the point. Liabilities in respect of the New Zealand provisions can only arise in respect of s 3 actors. Ms Young's rights under the NZBORA may indeed travel with her to foreign climes but the liabilities which can arise in respect of breaches of rights affirmed in the NZBORA do not expand to include other categories of person who are not acting under or regulated by New Zealand law.

[49] One of the several ways in which Mr Bates submitted that *Smith* was apposite was "as to the affirmation of the positive nature of Convention rights, including the application of such Convention rights irrespective of who is ultimately responsible for causing the deaths".[51] The relevant convention right in *Smith* was art 2.1 of the ECHR, the right to protection of life. At issue was the substantive obligation[52] which required a state not to take life without justification and also, as Lord Hope explained, by implication to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practical, protect life.[53]

[50] Plainly enough the obligation to take such steps for the protection of life is not dependent upon the particular identity of the source of the threat. It is not an obligation limited to threats to life which emanate from the umbrella of the state itself. Hence, to adapt Mr Bates' submission, it applies irrespective of who may ultimately be the source of a threat to life.

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51 Underlining as in the written submission.

52 The case did not concern the procedural obligation implied into the article of a duty to investigate in order to make sure that the substantive right is effective in practice.

53 *Smith v Ministry of Defence,* above n 43, at [57].

[51] However it does not follow that where loss of life occurs the state has any obligation to provide a remedy against persons responsible for the loss of life who are not state agents. The point is apparent, we think, from the discussion in *R (Long) v Secretary of State for Defence* of the nature of the duty to investigate required by art 2:[54]

> 93. … the nature of the investigation required by article 2, where a duty to investigate arises, depends on the circumstances, including the nature of the substantive obligation of which there is a possible breach. As stated by Lord Phillips in *R (L) v Secretary of State for Justice* [2009] AC 588, para 31:
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> > The duty to investigate imposed by article 2 covers a very wide spectrum. Different circumstances will trigger the need for different types of investigation with different characteristics. The Strasbourg court has emphasised the need for flexibility and the fact that it is for the individual state to decide how to give effect to the positive obligations imposed by article 2.
>
> 94. There is a significant distinction in this respect between cases where the suspected breach is of a positive obligation to protect life and cases where state agents are suspected of unlawful killing. In cases of the latter type a key purpose of the investigation is to identify whether crimes have been committed and, if so, to prosecute and punish those responsible. Many of the authorities in which the article 2 investigative duty has been considered have been cases of this kind — for example, the *Jordan* case referred to above. Statements in those authorities about the need to identify and punish individuals must be seen in that context.

[52] We consider that provision of a remedy for the death of a citizen of a state by the identification and prosecution of individuals responsible is confined to such individuals over whom the state has jurisdiction. Consequently *Smith* is not authority for the proposition which Mr Bates seeks to draw from it.

[53] To conclude on this issue, the relevant obligation of the New Zealand state to provide an effective remedy in its courts relates only to liabilities which arise under the NZBORA. It does not extend to providing relief in relation to the actions of foreign persons or entities who are beyond the ambit of s 3 even in a proceeding against the AGNZ. It follows that Ms Young's proposition that the New Zealand state has an

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[54] *R (Long) v Secretary of State for Defence* [2014] EWHC 2391 (Admin). This observation is not the subject of consideration in the Court of Appeal decision: *R (Long) v Secretary of State for Defence* [2015] EWCA Civ 770, [2015] 1 WLR 5006.

obligation to provide an effective remedy under the NZBORA in the courts of New Zealand irrespective of the identity of the wrongdoer is not correct.

Does New Zealand owe Ms Young an obligation to provide her with an effective remedy in the New Zealand courts for the wrongdoing she suffered abroad at the hands of Royal Navy personnel as a matter of international law because of the nature of the wrongdoing involving arguable violation of Ms Young's fundamental rights?

[54] This issue mirrors the previous one, save that the obligation to provide Ms Young with an effective remedy in New Zealand is said to derive from international law, either by virtue of various treaties or as a matter of customary international law. We propose to discuss the customary law issue first because it provides a useful backdrop to the arguments based on particular treaties.

An obligation as a matter of customary international law

[55] Prominent in Mr Bates' oral argument was the decision of the European Court of Human Rights (ECtHR) in *Al-Adsani v United Kingdom*[55] which concerned the rejection on the ground of state immunity of Mr Al-Adsani's civil claim brought in England against the state of Kuwait for his maltreatment in Kuwait.[56] Mr Al-Adsani contended that his claim related to torture and that the prohibition of torture had acquired the status of a *jus cogens* norm in international law, taking precedence over treaty law and other rules of international law.

[56] Mr Bates placed emphasis on the powerful minority view that upholding the claim of immunity was a violation of Mr Al-Adsani's right of access to a court under art 6 of the European Convention. However, by the slimmest of margins (as he put it) the ECtHR held (by nine votes to eight) that there had been no violation of art 6, observing:

> 61. While the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not, as in *Furundzija* and *Pinochet*, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for

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55 *Al-Adsani v United Kingdom* (2001) 34 EHRR 273 (Grand Chamber, ECHR).

56 *Al-Adsani v Government of Kuwait (No 2)* (1996) 107 ILR 536 (CA). Leave to appeal to the House of Lords was refused.

> damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.

[57] An argument that the conclusion in *Al-Adsani* was wrong and that the reasoning of the minority should be preferred was rejected by the House of Lords in *Jones*.[57] It was there held that both the Kingdom of Saudi Arabia and its responsible officers were protected by state immunity in proceedings brought in England concerning claims of torture by members of the Saudi Arabian police. Lord Hoffmann observed that, while the prohibition on torture is undoubtedly a peremptory norm, the issue was whether such a norm conflicted with a rule which accords state immunity. He considered that the syllogistic reasoning of the minority in *Al-Adsani* simply assumed that it did.[58]

[58] Mr Bates also placed reliance on what he described as the ground-breaking decision of *Ferrini v Federal Republic of Germany* where, distinguishing *Al-Adsani*, the Italian Court of Cassation entertained a civil claim based on war crimes committed in 1944–1945 partly in Italy but mainly in Germany.[59] However in *Jones* Lord Hoffmann reasoned that *Ferrini* exhibited the same bare syllogistic reasoning of the minority in *Al-Adsani*. In response to an argument that *Ferrini* should be seen as giving priority to the values embodied in the prohibition of torture over the values and policies of the rules of state immunity, he said:[60]

> As Professor Dworkin demonstrated in *Law's Empire* (1986), the ordering of competing principles according to the importance of the values which they embody is a basic technique of adjudication. But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.

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57 *Jones,* above n 37.
58 At [43].
59 *Ferrini v Federal Republic of Germany* (2004) 128 ILR 658 (Italy, Court of Cassation).
60 *Jones,* above n 37, at [63].

[59] Similarly Lord Bingham observed that *Ferrini* could not be treated as an accurate statement of international law as generally understood, remarking that one swallow does not make a rule of international law.[61]

[60] The issue has more recently been explored in *Germany v Italy*, a number of passages from which were recited in the judgment of Simon France J. As Mr Martin for the AGNZ submitted, the ICJ there firmly rejected the argument that customary international law had developed to the point where a state is deprived of immunity for accusations of serious violations of international human rights law. The Court cited extensive state practice demonstrating that customary international law does not treat a state's entitlement to immunity as dependent upon "the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated".[62]

[61] Indeed the Court made clear that upholding the proposed exception to state immunity would present a broader logical problem:

> 82. At the outset, however, the Court must observe that the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem. Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature. Consequently, a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim.

[62] The approach of the ICJ was endorsed still more recently by the United Kingdom Supreme Court in *Belhaj v Straw* where Lord Mance stated:[63]

> 14. It follows that state immunity is a personal immunity, *ratione personae,* possessed by the state in respect of its sovereign activities (*acta jure imperii*) so far as these do not fall within any of the exceptions. When state immunity exists, the nature and gravity of the alleged misconduct are

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61 At [22].
62 *Germany v Italy,* above n 21, at [84]–[85].
63 *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964 at [14].

> irrelevant. Even the admitted illegality of the acts complained of "does not alter the characterisation of those acts as *acta jure imperii*": *Jurisdictional Immunities of the State* [2012] ICJ Rep 99, para [60] …

[63] The New Zealand courts look to international practice as illustrated in decisions of overseas courts and apply the established approach to immunity in New Zealand. Consistent with the clear direction provided in the authorities discussed, we reject Mr Bates' assertion (to the extent it was maintained) of the New Zealand state's obligation to provide to Ms Young a remedy in New Zealand courts for the conduct of the Royal Navy personnel in England founded on customary international law.[64]

An obligation under various treaties

[64] Ms Young's argument relies upon provisions in three treaties; the ICCPR, CAT and CEDAW. Article 2 of the ICCPR is noted in the previous discussion of the NZBORA-based contention.[65]

[65] The relevant CAT provision which Ms Young seeks to invoke is:

> **Article 14:**
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> 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. …[66]

[66] Ms Young also points to art 2 of CEDAW which materially provides that:

> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
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> …
>
> (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national

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64 Mr Butler drew attention to the analysis of *Germany v Italy* in Mr Bates' initial submission to the effect that "[the International Court of Justice] plainly rejected the hierarchical norms theory that *jus cogens* rules automatically 'trump' immunity," observing that it was an analysis which MOD(UK) affirmed.

65 At [35] above.

66 General Comment No 3 from the Committee against Torture states that the Committee considers that the term 'redress' encompasses the concept of effective remedy: United Nations Committee against Torture *General comment No 3 (2012): Implementation of article 14 by States parties* CAT/C/GC/3 at [2].

> tribunals and other public institutions the effective protection of women against any act of discrimination[.]

[67] As Mr Bates' submission stated:

> The nationalised right to an effective remedy for those claimants who alleged to have been harmed at a time they were subject to a State's jurisdiction (be they 'extra-territorial' infringements of human rights under the legal or de facto authority and control test, or local ones) has come about because of Post World [War] II treaties, which elevate the human rights of individuals such as the CAT, ICCPR, CEDAW etc, and create precise reciprocal obligations on the States. … These obligations, signed up to by all States, make it compellingly clear that New Zealand is obliged to supply an effective domestic remedy by inter alia, allowing access to a competent New Zealand authority to hear and determine her case against the [MOD(UK)], as the obligation applies irrespective of who is ultimately responsible for the alleged violations.

[68] Notwithstanding the references to a nationalised right to an effective remedy, we did not understand Mr Bates to contend that the three treaties relied upon provided for universal civil jurisdiction. In their discussion of that concept Fox and Webb observe:[67]

> A number of multilateral conventions also impose an obligation requiring State parties to exercise universal jurisdiction in respect of specific offences defined in the convention and provide an obligation *aut dedere aut judicare*[68] where an alleged offender is within the territory of a State Party; for extradition to the State where the violation was committed or to the State of the offender's nationality, or for prosecution in the national court of the State Party. A similar obligation has been claimed to exist in customary international law where a State has granted asylum to a person present in its territory accused of the commission of grave international crimes.
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> …
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> Universal jurisdiction has also potentially been restricted by the ICJ's ruling in the *Jurisdictional Immunities* case that the rules of State immunity are procedural in character. This establishes that for any such new development to effect a removal of immunity of a foreign State in proceedings in a national court, the requirement of a jurisdictional link, which indeed was already required in the Second Model in respect of proceedings relating to commercial transactions.

[69] The House of Lords made it clear in *Jones* that art 14 of the CAT does not provide for universal civil jurisdiction.[69] We do not consider that art 2 of either the

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67 Fox and Webb, above n 29, at 43–44.

68 This translates as an obligation to extradite or to prosecute.

69 *Jones,* above n 37, at [25].

ICCPR or CEDAW are different from art 14 in that respect. In our view the decision to refrain from contending for universal civil jurisdiction derived from these treaties was appropriate.

[70] Mr Bates' thoughtful argument combined two strands. The first was built on the rationale of the Third Model of state immunity, namely immunity as a procedural exclusionary plea, and the implications of treaty clauses which are expressed as providing effective remedies.[70] A second contention involved the proposition that the New Zealand courts had jurisdiction in this case because of Ms Young's then status as a New Zealand naval officer.

A procedural dimension of the right to a remedy

[71] To appreciate the structure of the first strand of argument it will be useful to revisit the *Germany v Italy* and *Jones* decisions. In *Germany v Italy* the second prong of Italy's argument rested on the premise that there was a conflict between *jus cogens* rules forming part of the law of armed conflict and according immunity to Germany.[71] Since *jus cogens* rules were said to always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law, and since the rule which accords state immunity before the courts of another state does not have the status of *jus cogens*, then the rule of immunity must give way.

[72] However the ICJ ruled that there was no conflict between the rules of *jus cogens* and the rules of state immunity as they address different matters:[72]

> The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.

As Fox and Webb observed, that ruling had a broader reach than the ICJ's decision to dismiss Italy's claim to war damage and reflected in some respects a general retreat from the expansive tendency of the Second Model.[73]

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70 Discussed above at [19]–[21].
71 *Germany v Italy,* above n 21, at [92].
72 At [93].
73 Fox and Webb, above n 29, at 39.

[73] Mr Bates' reply submission described the consequence in this way:[74]

> So, according to the ICJ, immunity is procedural and not a material defence. Therefore immunity bars a state from exercising its jurisdiction, but that does not affect the illegality of certain conduct in a substantive sense. The ICJ went on to establish that under current international law, there exists no procedural ancillary rule to the *jus cogens* norms relied upon (slave labour, extra judicial killings and crimes against humanity) demanding the revocation of state immunity. In other words, the purely substantive quality of *jus cogens* violations under which no derogation is permissible does not collide with the procedural rule of immunity. The two rules are 'passing ships in the night'.[75]

[74] An argument similar to Italy's had been advanced by the claimants in *Jones*, namely that the prohibition of torture was a peremptory norm or *jus cogens* which took precedence over other rules of international law, including the rules of state immunity.[76] Rejecting that contention Lord Hoffmann said:

> 44. The jus cogens is the prohibition on torture. But the United Kingdom, in according state immunity to the Kingdom [of Saudi Arabia], is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture. It is objecting in limine to the jurisdiction of the English court to decide whether it used torture or not. As Hazel Fox has said (*The Law of State Immunity* (2002), p 525):
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> > "State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of state immunity upon which a jus cogens mandate can bite."
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> 45. To produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles or perhaps requires states to assume civil jurisdiction over other states in cases in which torture is alleged. Such a rule may be desirable and, since international law changes, may have developed. But, contrary to the assertion of the minority in *Al-Adsani*, it is not *entailed* by the prohibition of torture.

[75] Mr Bates sought to distinguish both *Germany v Italy* and *Jones* on the basis that the right to an effective remedy upon which he relies incorporates not only a substantive but also a procedural dimension. His reply submission expressed the point in this way:[77]

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74 Underlining as in the written submission.
75 Footnotes omitted.
76 *Jones*, above n 37.
77 Underlining as in the written submission.

> Therefore, unlike the hierarchical norms theory, there is a collision with the assertion of the common law procedural immunity principle. They are not 'passing ships in the night', but in this case, there is a superior quality to the procedural right to an effective remedy and [it] is not even "ancillary". [The MOD(UK)] cannot rely on the dismissal of the hierarchical norms theory, as it has [no] application at all, and is not relied upon by the Appellant. As both the procedural and substantive aspects to a right to an effective national remedy are absolute, or, alternatively the essence of these rights/obligations cannot be negatived or denied completely, the derogable or non-absolute nature of the non-static procedural common law immunity principle must give way, and is 'trumped'. At the local level, translating this submission into domestic law, the Appellant points to a statutory or constitutional right to an effective remedy from within the New Zealand legal system, which cannot be negatived by the common law.

[76] The procedural/substantive distinction has proved a slippery one to apply.[78] As stated in *Fayed v United Kingdom*:[79]

> It is not always an easy matter to trace the dividing line between procedural and substantive limitations of a given entitlement under domestic law. It may sometimes be no more than a question of legislative technique whether the limitation is expressed in terms of the right or its remedy.

[77] We recognise that the right to an effective remedy is considered to incorporate a procedural element.[80] As Dinah Shelton observes:[81]

> The word 'remedies' contains two separate concepts, the first being procedural and the second substantive. In the first sense, remedies are the processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies or other competent bodies. The second notion of remedies refers to the outcome of the proceedings, the relief afforded the successful complainant.

[78] However it does not follow in our view that the presence of a procedural element in the treaty articles in question has the effect of "trumping" the application of the state immunity doctrine. As James Crawford concluded with an eye to Lord Hoffmann's dictum in *Jones*,[82] unless the relevant prohibition develops to include an ancillary procedural rule requiring the assumption of civil jurisdiction,

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78 Fox and Webb, above n 29, at 45–46.

79 *Fayed v United Kingdom* (1994) 18 EHRR 393 (ECHR) at 430.

80 The Committee against Torture has stated that the obligations of States Parties to provide redress under art 14 are two-fold, procedural and substantive: *General comment No 3,* above n 66, at [5].

81 Dinah Shelton *Remedies in International Human Rights Law* (3rd ed, Oxford University Press, Oxford, 2015) at 16.

82 At [74] above.

state immunity remains unaffected.[83] We do not consider that any of the treaty articles relied upon have that effect.

[79] We prefer the view advanced by Mr Butler that the content of the ICCPR, CAT and CEDAW does not remove the jurisdictional consequences of the doctrine of state immunity, where that doctrine properly applies. He argued that the reasoning in *Benkharbouche v Embassy of the Republic of Sudan* is applicable.[84] The United Kingdom Supreme Court there considered the relationship between state immunity and the right to access justice under art 6 of the European Convention of Human Rights and the right to an effective remedy under art 47 of the Charter of Fundamental Rights of the European Union.

[80] The Supreme Court stated:[85]

> International law is relevant to the operation of article 6 of the Human Rights Convention because, in accordance with article 31(3)(c) of the Vienna Convention on the Law of Treaties, the Human Rights Convention is interpreted in the light of "any relevant rules of international law applicable in the relations between the parties." It is therefore necessary to ask what is the relevant rule of international law by reference to which article 6 must be interpreted. The relevant rule is that if the foreign state is immune then, as the International Court of Justice has confirmed in *Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening)* [2012] ICJ Rep 99, the forum state is not just entitled but bound to give effect to that immunity. If the foreign state is not immune, there is no relevant rule of international law at all. What justifies the denial of access to a court is the international law obligation of the forum state to give effect to a justified assertion of immunity.
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> …
>
> A claim to state immunity which is justified in international law, would be an answer [both to a violation of article 6 of the Human Rights Convention and article 47 of European Union Charter of Fundamental Rights].

[81] Mr Butler submitted that the same principle of interpretation (art 31(3)(c) of the Vienna Convention on the Law of Treaties) applies in respect of the interpretation of the treaties which Ms Young suggests give rise to the effective remedy obligation, including the ICCPR. In *Sechremelis v Greece* the Human Rights Committee held that reliance upon state immunity to bar execution of a judgment obtained against Germany

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83 Crawford, above n 27, at 506.
84 *Benkharbouche,* above n 26.
85 At [34] and [78].

by victims of Second World War atrocities was not a violation of arts 2(3) and 14 of the ICCPR.[86]

[82] Hence the MOD(UK) contended that the High Court judgment does not, at international law, infringe any requirement to provide an effective remedy because the judgment was based on the international obligation to give effect to a justified assertion of immunity.

[83] The rejoinder of Mr Bates was that the reliance on *Benkharbouche* is misplaced. He acknowledged that the procedural right of access to a court is capable of being limited by state immunity, noting that both *Jones* and *Al-Adsani* are examples of the art 6 right yielding to state immunity. It was submitted that the Supreme Court in *Benkharbouche* decided that the State Immunity Act 1978 (UK) was not a reasonable restriction on the right to access a court and nor, axiomatically, on the right to an effective remedy under art 47. He contended *Benkharbouche* was not authority for the proposition that under the ICCPR the right to an effective remedy is derogable or its essence may be negatived completely.

[84] On this point it is necessary to return again to the majority opinion in *Al-Adsani* which explained the qualifications on the right in art 6 for a person to have a claim relating to the person's civil rights and obligations brought before a court:[87]

> The right of access to a court is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

[85] *Benkharbouche*, which concerned claims by employees at the Libyan and Sudanese embassies in London, is an example of an unjustified limitation.

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86 United Nations Human Rights Committee *Views: Communication No 1507/2006* CCPR/C/100/D/1507/2006 (25 October 2010) (*Sechremelis v Greece*).

87 *Al-Adsani v United Kingdom,* above n 55, at [53].

The Supreme Court there concluded that there was no basis in customary international law for the application of state immunity in an employment context to acts of a private law character. Hence s 4(2)(b) of the State Immunity Act was not justified by any binding principle of international law and did not apply to the employees' claims.[88] Article 6 was engaged by the refusal of the Employment Tribunal to exercise jurisdiction on the ground of purported lack of jurisdiction over Libya and Sudan.

[86] However the conclusion on the facts does not undermine MOD(UK)'s contention that *Benkharbouche* is authority for the proposition that a claim to state immunity which is justified in international law would be an answer to a claim of a violation of art 47 of the European Charter. Article 47 provides, so far as relevant, that:

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

For all intents and purposes it is identical to art 2(3) of ICCPR. We consider that *Sechremelis* stands for the same proposition with direct reference to art 2(3). We reject Mr Bates' contention that the MOD(UK)'s reliance on *Benkharbouche* is misplaced.

[87] To conclude on this issue, the authorities make clear that where the relevant offending conduct occurs outside the forum state's territory, the forum state will not have jurisdiction to entertain a civil claim for damages against a foreign state. It is apparent from the dictum in *Benkharbouche* that effective remedy provisions of the nature of art 47 as relied on by Ms Young cannot be invoked to require the forum state to assume jurisdiction.[89] This leads to a consideration of Ms Young's second strand of argument which focuses on the jurisdiction of the New Zealand state.

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88 Although s 4(1) provided that a state was not immune as respects proceedings relating to a contract of employment made between the state and an individual where the contract was made in the United Kingdom or the work was to be wholly or partly performed there, s 4(2)(b) stated that s 4 did not apply if at the time the contract was made the individual was neither a national of the United Kingdom nor habitually resident there. See [64]–[67] of *Benkharbouche,* above n 26.

89 See [80] above.

The extended jurisdiction argument

[88] Woven through Mr Bates' treaty-based submission was an argument which turned on the point that, when the wrongful conduct occurred in England, Ms Young was subject to the de facto and de jure control of the New Zealand state.[90] While this argument echoed the submission advanced in the NZBORA context,[91] Mr Bates confirmed that, if the NZBORA argument failed, the extended jurisdiction submission was advanced independently at New Zealand common law, presumably as informed by international law.

[89] Mr Bates developed the argument by contrasting the circumstances of Mr Al-Adsani and Mr Jones with those of Ms Young. The significance of the *Al-Adsani* decision arises from the difference in approach of the United Kingdom courts and the ECtHR. Unlike the United Kingdom position, reflected in the dictum of Lord Millett,[92] that the forum court's decision to uphold state immunity does not engage art 6 of the European Convention at all, the ECtHR does embark on the inquiry whether a violation of art 6 is established.[93] Having done so in *Al-Adsani*, the majority arrived at the same ultimate conclusion as *Jones*, but by the reasoning process that, because the *jus cogens* violation was caused outside the jurisdiction of the United Kingdom court, there was an absence of jurisdiction conferred upon the United Kingdom court to proceed with the hearing.

[90] Mr Bates submitted the critical distinction between the present case and *Al-Adsani* and *Jones* was the fact that, when Ms Young travelled abroad as a New Zealand service person, she remained subject to New Zealand's jurisdiction. He suggested that had Mr Al-Adsani or Mr Jones been a member of the United Kingdom armed services when the relevant conduct occurred in Kuwait and Saudi Arabia respectively, then the United Kingdom could well have been obliged to provide them with an effective remedy because at the time of the conduct they would have been within the jurisdiction of the United Kingdom.

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90 See [3] above.
91 See [42] above.
92 See [25] above.
93 The distinction is discussed in *Benkharbouche,* above n 26, at [30].

[91] The flaw in this argument is that it confuses the concept of a state's control (or jurisdiction) over service personnel with the concept of the territorial reach (or jurisdiction) of the state. The point which the ECtHR made in *Al-Adsani* was that the alleged torture of Mr Al-Adsani took place beyond the territorial reach of the United Kingdom in the territory of another state. The United Kingdom court would have no jurisdiction to entertain a claim against the state of Kuwait whether or not Mr Al-Adsani was a United Kingdom citizen.

[92] The fact that the victim of offending in a foreign state is not only a citizen of but also a person in the military service of the forum state does not alter the fact that the conduct occurred beyond the forum state's territorial jurisdiction. The forum state may indeed exercise control over and owe obligations to its service personnel while they are on service abroad. However the forum state does not have power or domain over the wrongdoers and, if they are officers of the foreign state, the foreign state itself.

[93] There was a suggestion in Mr Bates' submissions that the treaty provisions in question justified a different conclusion. For example it was said:

> The CEDAW 1979 has also expressly dealt with the issue on sexual harassment and violence in the workplace and the rights and obligations created under that Convention are similarly engaged in this case, again because [Ms Young] was subject to New Zealand's jurisdiction at the material time of the alleged harm. The [State's] full "due diligence" obligations including the obligation to supply an effective domestic remedy are engaged in consequence and apply extra-territorially if the jurisdiction test is met under the power and control test and irrespective of who is responsible for the violation.

[94] Such contentions, which reflect the same flaw of reasoning explained above, must also fail.

Should the Court dismiss the protest to jurisdiction by the MOD(UK) on the grounds that the alleged wrongdoing breached a fundamental principle of justice or some deep-rooted tradition of New Zealand which engages an iniquity exception to the state immunity doctrine?

[95] Although the recognition of an iniquity exception to the state immunity doctrine was Ms Young's primary argument in the High Court, that contention did not

have prominence in the argument before us. Consequently we address it relatively briefly.

[96] As Simon France J recognised, the crux of Ms Young's contention was founded on dicta in the judgment of Richardson J in *Controller and Auditor General v Davison.*[94] The central question in that case was whether New Zealand law might deny sovereign immunity status in respect of documents held by the Audit Office in New Zealand as auditor of the Cook Islands accounts under the constitution of the Cook Islands on the ground that the Cook Islands government was arguably party to transactions designed to abuse the tax system of New Zealand.

[97] In the High Court Mr Bates emphasised first the ability of the forum state (New Zealand) to decide whether to recognise state immunity in a particular case and secondly that such a decision is driven by public policy considerations.[95] With reference to the latter Richardson J commented:[96]

> … the public policy argument for requiring production by the Audit Office of the specified documents can be put very shortly. It is not a matter of the forum state simply preferring public policies underlying its domestic laws to those of the foreign state. Fundamental values must be at stake. Where the conduct of the foreign state is in question, refusal of a claim to sovereign immunity could be justified only where the impugned activity, if established, breaches a fundamental principle of justice or some deep-rooted tradition of the forum state.

[98] Observations concerning the recognition of a possible iniquity exception were obiter in *Davison* because the majority of the Court determined the case on an orthodox application of the state immunity doctrine in finding that it did not apply to the commercial activities of the Cook Islands Government. As Simon France J noted, there was a range of views on whether a broad principle of iniquity as affecting the traditional concept of sovereign immunity should be accepted. Henry J in *Davison* described it as debatable.[97]

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94 *Controller and Auditor General v Davison*, above n 16.
95 High Court judgment, above n 1, at [35].
96 At 305.
97 At 309.

[99] The view against recognition was advanced by Cooke P who considered that in the present era of civilisation and international law a court would be going too far if it were to allow a general exception of iniquity to the doctrine of sovereign immunity. He stated:[98]

> One can speculate that the law may gradually but steadily develop, perhaps first excepting from sovereign immunity atrocities or the use of weapons of mass destruction, perhaps ultimately going on to except acts of war not authorised by the United Nations. But this is [to] peer optimistically into the future far beyond the bounds of anything falling to be decided in the present judicial review proceedings. The maxim festina lente is in point, and while founding on public interest I prefer to confine the reasoning in this judgment to issues of tax avoidance or evasion under investigation by a national commission of inquiry.

[100] The development of the law of state immunity in the manner anticipated in *Davison* has not eventuated. Indeed, as Mr Martin for the AGNZ submitted, the foreshadowed exception has since been rejected by the House of Lords,[99] the High Court of New Zealand[100] and the ICJ.[101]

[101] We consider that Simon France J was correct to conclude that there is at common law no recognised exception to state immunity for allegations of breaches of fundamental human rights and that *Davison* does not empower the recognition of such an exception.[102]

Are the courts of England and Wales or is the High Court of New Zealand the more appropriate forum for Ms Young's claim against the MOD(UK)?

[102] Issues of forum non conveniens do not arise unless there are competing courts, each of which has jurisdiction (in the strict sense) to deal with the subject matter of the dispute. As Lord Scott of Foscote explained in *Tehrani v Secretary of State for the Home Department*, if one of the two competing courts lacks jurisdiction (in the strict sense) a plea of forum non conveniens could never be a bar to the exercise by the other

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98 At 290.
99 *Jones*, above n 37.
100 *Fang v Jiang* [2007] NZAR 420 (HC).
101 *Germany v Italy,* above n 21.
102 High Court judgment, above n 1, at [47].

court of its jurisdiction.[103] Hence our consideration of this issue necessarily proceeds on an assumption that our conclusions on the prior issues are erroneous.

[103] No issue is taken with the applicable principles recognised and applied by Simon France J. Nor was it suggested that any relevant consideration had been overlooked. Rather, the emphasis in Mr Bates' submissions on appeal is that New Zealand is the appropriate forum for the entirety of Ms Young's litigation against both the AGNZ and the MOD(UK) and those circumstances warrant an assumption of jurisdiction in respect of the latter.

[104] Mr Bates argued that, as the High Court is already investigating events in the United Kingdom in connection with the case against New Zealand for negligence without offending comity, it is unreasonable and unfair to separate the case against the MOD(UK) for hearing and determination in a different court. He submitted that Ms Young would be extremely disadvantaged in the task of demonstrating the extent to which each state discharged its negative or positive obligations to provide to her a place of work free from degrading treatment, gender discrimination and torture, and the appropriate share of liability to each state for local damage, if the case had to be split between two different jurisdictions, even assuming she could afford to do so. He observed that it could also give rise to the prospect of conflicting rulings on fact and law.

[105] Justice Simon France recognised the validity of both the expense and duality of proceedings factors.[104] With reference to the former he noted that, as was her right, Ms Young had chosen not to avail herself of opportunities to alleviate the difficulties. The Royal Navy had referred the matter to the Royal Navy Police who were willing to investigate if Ms Young wished to make a complaint but she declined to do so.

[106] So far as the implications of dual proceedings in different jurisdictions were concerned, the Judge did not consider that in the circumstances Ms Young's decision to sue the AGNZ in relation to the overseas events was sufficient to overcome what he

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103 *Tehrani v Secretary of State for the Home Department* [2006] UKHL 47, [2007] 1 AC 521 at [67].
104 See [11] above.

regarded as the otherwise overwhelming conclusion that the Courts of England and Wales were the appropriate forum for the claims against the MOD(UK).

[107] We agree with his conclusion based on the five factors he identified, in particular the non-compellability of relevant witnesses who reside in the United Kingdom.[105] They could not be compelled to give evidence in New Zealand because the prohibition on compulsion of Crown officers or servants in s 9(4) of the Evidence (Proceedings in Other Jurisdictions) Act 1975 (UK) applies.

[108] Although it was not a factor which weighed in the High Court's consideration of the forum conveniens issue, we consider it appropriate to note that the AGNZ proposed a hybrid process whereby the New Zealand proceedings would be stayed pending determination of issues in the courts of England and Wales and the AGNZ would accept service and waive sovereign immunity in the United Kingdom. In our view that proposal would significantly reduce the disadvantage associated with two proceedings in different jurisdictions. However it is not an available option because, as the Judge noted, Ms Young made it plain she would only proceed against the United Kingdom Government if she was able to do so in the courts of New Zealand.

Result

[109] The appeal is dismissed.

[110] The appellant must pay the second respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Brown & Bates Ltd, Napier for Appellant
Crown Law Office, Wellington for First Respondent
Russell McVeagh, Wellington for Second Respondent

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[105] High Court judgment, above n 1, at [55].