



Canadian Centre for International Justice
Centre canadien pour la justice internationale



STATEMENT BY JAYNE STOYLES TO THE SUBCOMMITTEE ON INTERNATIONAL
HUMAN RIGHTS OF THE HOUSE OF COMMONS STANDING COMMITTEE ON
FOREIGN AFFAIRS AND INTERNATIONAL DEVELOPMENT

Membres distingués de la comité, je vous remercie pour cette opportunité de discuter une question d'énorme importance pour le Canada et qui a une grande possibilité de rendre la justice pour les survivants de violations des droits de la personne d'Iran, et de prévenir ces types de violations dans le futur.

Distinguished members of the Committee, I want to thank you for the opportunity to speak to you today about a very important issue: the need to reform the *State Immunity Act* and, more specifically, how the issue of immunity has prevented victims of torture in Iran from obtaining justice. I am the Executive Director of the Canadian Centre for International Justice, which is based here in Ottawa. The CCIJ is a charitable organization that works with survivors of torture, genocide and other atrocities to seek redress and bring the perpetrators of these crimes to justice. I am a lawyer and previously directed the global campaign to establish the International Criminal Court. I want to quickly introduce my colleagues who will join this discussion and are part of the CCIJ network. Mark Arnold is a Toronto lawyer specializing in civil litigation who has, in recent years, turned his attention to pursuing justice in Canadian courts for human rights abuses committed abroad. He represented Houshang Bouzari, a torture survivor from Iran now living in Canada, in a lawsuit against the government of Iran (I want to point out that Mr. Bouzari is also with us today). François Larocque is a professor of law at the University of Ottawa. He has studied the issue of immunity for many years and intervened in the Bouzari case on behalf of the non-profit organization Canadian Lawyers Association for

International Human Rights. He is also involved in two ongoing cases concerning the *State Immunity Act*.

As you have heard, the family of Zahra Kazemi continues to wait for justice. In 2003, Ms. Kazemi, a Canadian citizen, was tortured in an Iranian prison for doing nothing more than taking pictures of a demonstration. Her injuries show that during her torture, Iranian officials sexually abused her and broke several bones, including her skull. Those injuries, of course, eventually killed her. In the nearly six years since her death, no one has been held accountable. In fits and starts, and under heavy international pressure, the Iranian regime has admitted some responsibility but no one has been convicted in the case. Her family, understanding all too well the futility of the investigation in Iran, filed suit in Montréal against the government of Iran and three Iranian officials. Iran's government now argues it is immune from the lawsuit under the *State Immunity Act*. The Court will decide that issue later this year.

There are several differences that distinguish Ms. Kazemi's case from a previous, unsuccessful attempt to hold Iran accountable for torture, but there is at least a likelihood that her lawsuit will also fail because of the restrictive language with which the *State Immunity Act* is written. This speculation on my part is based largely on the case of Houshang Bouzari. In 1993 and 1994, Mr. Bouzari was imprisoned, beaten, whipped, shocked and subjected to mock executions over nearly eight months. As a previous employee in Iran's oil sector, he had been retained by a consortium of companies seeking to develop oil resources in Iran. He was tortured because he refused to concede to demands for a bribe from the son of Iran's president. A few years after Iranian officials released Mr. Bouzari, he and his family moved to Canada. His lawsuit in Ontario against the government of Iran, however, failed. Even though Iran did not defend the case, the Ontario Court of Appeal ruled that the *State Immunity Act* provided Iran

protection from lawsuits involving torture. Leave to appeal the decision to the Supreme Court of Canada was denied.

The practical result of Mr. Bouzari's case is that residents of Canada who are or were tortured in Iran – as in other repressive countries – cannot get justice. Mr. Bouzari certainly cannot return to Iran to file suit there, and the investigation of Ms. Kazemi's death in Tehran clearly shows the impossibility of an impartial process. The plaintiffs in these two lawsuits live in Canada, making it unlikely that a court in any other country would take jurisdiction over their cases. Canadian courts, therefore, became the last resort. As a result of the dismissal of his case in Ontario, Mr. Bouzari has been completely denied justice and there is a risk that the same could happen to Ms. Kazemi's family. I should add that Maher Arar's lawsuit against the governments of Syria and Jordan was likewise dismissed on the same immunity grounds. If Ms. Kazemi's suit is not permitted to go forward, this will likely close Canadian courts permanently to survivors of torture.

The principle of state immunity is, at its heart, about respect for sovereignty. Immunity generally prevents the courts of one nation from sitting in judgment of another country's official or "sovereign" actions. It is also intended to prevent disruptions in diplomatic relations where courts may come to conclusions that differ from the pronouncements of the government of the day. Today, however, most nations acknowledge that they should not be immune for everything, particularly when they are engaged in activities that are not at their core "sovereign" acts. Canada's *State Immunity Act*, passed in 1982, reflects this "restrictive" approach to immunity. Although the *State Immunity Act* begins with the presumption that foreign governments are immune in Canadian courts, the Act sets out exceptions for which immunity will not be granted. For example, foreign states are not immune from civil liability for commercial activities nor are

they immune for any death, bodily injury or property damage that occurs in Canada. These exceptions apply because the underlying activities are not deemed to be sovereign in nature. Equally, the international community now considers torture an act that is not appropriate for any sovereign to undertake. In the hierarchy of international law, the prohibition against torture is at the top, the international equivalent of a constitutional norm. It binds all nations, and no country is entitled to employ torture no matter what the circumstances. Torture is not an act that should be immunized.

The current barrier created by the language of the *State Immunity Act* in civil lawsuits is compounded by the fact that justice is largely unavailable in criminal cases as well. In the nine years since the *Crimes Against Humanity and War Crimes Act* was passed to empower Canadian criminal courts to try suspects accused of committing atrocities abroad, the Canadian government has prosecuted only one person. A similar provision of the Criminal Code concerning torture sits unused. The federal War Crimes Program tasked with pursuing these cases has not received a funding increase at any time during its ten-year existence. Of the four government departments in the Program, we understand that the two assigned to the investigation and prosecution of criminal cases, the RCMP and Department of Justice, receive only an approximate 8% of the Program's funding. The Canada Border Services Agency and Citizenship and Immigration Canada, which focus on exclusion and removal of alleged war criminals with no regard to the need for justice, receive the lion's share of the budget. This funding imbalance has very real, practical consequences for the RCMP and Justice; it appears that only one criminal prosecution at a time may be possible. Given that there may be at least 1500 alleged torturers and war criminals living in Canada, it is almost impossible to imagine the Program using these

extremely limited resources to pursue a case, like Ms. Kazemi's, in which the individuals responsible are outside Canada's borders.

As a result of its use of the *State Immunity Act* to deny torture survivors a remedy, Canada is also currently in breach of its legal obligations under the Convention Against Torture. Article 14 of the treaty requires parties to provide redress and compensation to survivors of torture. After the Bouzari decision, the United Nations Committee Against Torture, the body charged with overseeing the proper implementation of the Convention, conducted a periodic review of Canada's compliance with the treaty. Committee members were well aware of the Bouzari case and they rejected the Canadian government's argument that countries are only required to provide compensation for torture that occurred within their own borders. Instead, the Committee made clear in its final report that Article 14 requires states to provide redress to *all* survivors of torture, regardless of where the torture occurred. The Committee noted Canada's "absence of effective measures to provide civil compensation to victims of torture in all cases," and recommended that Canada should "review its position under Article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture."

By amending the *State Immunity Act*, Canada can also begin providing deterrence against future human rights abuses. Such deterrence will only come about through a robust system combining criminal and civil penalties and holding accountable both individuals and governments.

I understand there will be concerns that such a step will open the metaphorical floodgates, swamping Canadian courts with lawsuits about human rights abuses that occurred overseas. However, the judicial system already has checks in place to reject any cases not properly before the courts. In all cases, judges must assure themselves that a lawsuit has a "real

and substantial” connection to the province in which they sit. In Mr. Bouzari’s case, the primary connection to Ontario was his residence in the province at the time he filed suit. The Court of Appeal did not decide whether this was sufficient for jurisdiction because it dismissed the case on immunity grounds but it did say that the connection was “very tenuous.” Only because no remedy was available in Iran was the issue “not easy.”

Even if a “real and substantial” connection exists with a Canadian province, a lawsuit will only proceed if Canada is the best forum. If another country is in a better position to hear a case, perhaps due to the location of witnesses and evidence, and if that country protects due process rights, a Canadian court can dismiss the lawsuit. As a result, Canadian courts will only take on those cases in which Canada is both the best forum and the last resort. Removing immunity for torture will not suddenly make Canadian courts a watchdog overseeing the internal workings of other countries or require them to pry into all areas of a foreign government’s business. Rather, it will permit inspection in a small number of cases concerning the most abhorrent actions imaginable when the nations responsible are unable or unwilling to do so. This also limits disruption to the smooth flow of foreign diplomacy. In fact, the denunciation of torture in Iran through the courts would be directly in line with Canada’s policy toward Iran. Canada has taken a lead role in passing resolutions at the United Nations General Assembly denouncing Iran’s human rights practices, including one at the end of 2008.

The position we are advancing today is not new or novel. The issue has been studied and debated extensively over a number of years. Last November, the CCIJ hosted a workshop about civil litigation in Canadian courts for torture and other atrocities. The workshop brought together experts from across Canada, including both practitioners and academics. The participants agreed that there is a strong need for reform of the *State Immunity Act*. Several years

earlier, the International Human Rights Clinic at the University of Toronto law school, in conjunction with a host of experts, produced a recommended amendment to the *State Immunity Act* that was eventually introduced as legislation. We have provided each of the Members a copy of that proposed amendment which may serve as a starting point for a new bill. There have also been discussions on other types of amendments to the Act some of which have been presented as private Members' bills.

Such a system is workable. The United States allows victims of torture and other atrocities to sue individuals who are responsible for those crimes. Those lawsuits have hardly overwhelmed the system and, in fact, courts have proven fully capable of dismissing or trimming down legally-deficient claims. Although the U.S. laws cannot generally be used against governments, Congress did create an explicit exception to its *Foreign Sovereign Immunities Act* to allow lawsuits against a handful of countries, including Iran. Similarly, there is a global trend toward removing immunity for torture and other atrocities in the civil context.

The international community overwhelmingly agrees torture is illegal in all circumstances and abhorrent in a modern society. By providing immunity to regimes that commit torture, Canada is failing not only in its obligations under the Convention Against Torture but also in its moral duty to provide refuge and hope to victims. Amendment of the *State Immunity Act* would allow Canada to stand clearly on the side of the survivors rather than the torturers. It would also provide a very concrete way for this Committee to make a contribution to the prevention of the kinds of extreme violations of international human rights that you have been hearing about in the course of your investigation of the situation in Iran. Thank you. Je vous remercie beaucoup.