



SUPREME COURT OF CANADA

CITATION: Kazemi Estate v. Islamic Republic of Iran,
2014 SCC 62

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BETWEEN:

Estate of the Late Zahra (Ziba) Kazemi and Stephan (Salman) Hashemi
Appellants

and

**Islamic Republic of Iran, Ayatollah Sayyid Ali Khamenei, Saeed Mortazavi,
Mohammad Bakhshi and Attorney General of Canada**
Respondents

- and -

**Canadian Lawyers for International Human Rights, Amnistie internationale,
Section Canada francophone, Redress Trust Ltd., Canadian Association of
Refugee Lawyers, British Columbia Civil Liberties Association, Canadian Bar
Association, Canadian Civil Liberties Association, Canadian Centre for
International Justice, David Asper Centre for Constitutional Rights,
International Human Rights Program at the University of Toronto Faculty of
Law and Iran Human Rights Documentation Center**
Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and
Karakatsanis JJ.

REASONS FOR JUDGMENT: LeBel J. (McLachlin C.J. and Rothstein, Cromwell,
(paras. 1 to 171) Moldaver and Karakatsanis JJ. concurring)

DISSENTING REASONS Abella J.
(paras. 172 to 231)

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KAZEMI ESTATE v. IRAN

**Estate of the Late Zahra (Ziba) Kazemi and
Stephan (Salman) Hashemi**

Appellants

v.

**Islamic Republic of Iran, Ayatollah Sayyid
Ali Khamenei, Saeed Mortazavi, Mohammad Bakhshi
and Attorney General of Canada**

Respondents

and

**Canadian Lawyers for International Human Rights,
Amnistie internationale, Section Canada francophone,
Redress Trust Ltd., Canadian Association of Refugee
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2014 SCC 62

File No.: 35034.

2014: March 18; 2014: October 10.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Public International Law — Sovereign immunity — Civil proceedings initiated in Quebec against Iran, Iranian head of state and two state officials in relation to alleged torture and death of Canadian citizen in Iran — Whether proceedings are barred, in whole or in part, by application of State Immunity Act — Whether international law requires State Immunity Act to be interpreted to include exception in cases of torture — Whether immunity extends to foreign public officials acting in their official capacity — Whether torture may constitute an official act of a state — State Immunity Act, R.S.C., 1985, c. S-18, s. 3(1)

Constitutional law — Charter of Rights — Bill of Rights — Right to security of person — Right to a fair hearing — Sovereign immunity — Civil proceedings initiated in Quebec against Iran, Iranian head of state and two state officials in relation to alleged torture and death of Canadian citizen in Iran — Proceedings barred by application of s. 3(1) of State Immunity Act — Whether s. 3(1) of State Immunity Act inconsistent with s. 2(e) of Bill of Rights or infringes s. 7 of Charter — State Immunity Act, R.S.C., 1985, c. S-18, s. 3(1) — Canadian Bill of Rights, R.S.C. 1985, App. III, s. 2(e) — Charter of Rights and Freedoms, s. 7

K, a Canadian citizen, visited Iran in 2003 as a freelance photographer and journalist. She was arrested, detained and interrogated by Iranian authorities. During her detention, she was beaten, sexually assaulted and tortured. She later died as the result of a brain injury sustained while in the custody of Iranian officials. Despite requests made by K's son, H, that her remains be sent to Canada for burial, she was buried in Iran. Although a report commissioned by the Iranian government linked members of the judiciary and the Office of the Prosecutor to K's torture, only one individual was tried. That person was acquitted following a trial marked by a lack of transparency. In short, it was impossible for K and her family to obtain justice in Iran.

In 2006, H instituted civil proceedings in Quebec seeking damages on behalf of himself and his mother's estate against the Islamic Republic of Iran, its head of state, the Chief Public Prosecutor of Tehran and the former Deputy Chief of Intelligence of the prison where K was detained and tortured. H sought damages on behalf of K's estate for her physical, psychological, and emotional pain and suffering as well as damages for the psychological and emotional prejudice that he sustained as the result of the loss of his mother. Both H and the estate also sought punitive damages. The Iranian defendants brought a motion in Quebec Superior Court to dismiss the action on the basis of state immunity. In response, H and K's estate raised certain exceptions provided in the *State Immunity Act* ("SIA"), and challenged the constitutionality of certain provisions of that Act.

The Quebec Superior Court dismissed the constitutional challenge to the *SIA*, allowed the defendants' motion to dismiss the action with respect to the claim brought by K's estate but dismissed the motion with respect to the recourse sought by H personally. The court held that the *SIA* exhaustively captures the law of state immunity and that there are no unwritten exceptions to state immunity at common law, in international law, or in international treaties that would allow the claims to proceed. However, it found that H's personal action could potentially fall within a statutory exception to state immunity applicable to proceedings relating to personal injury that occurs in Canada. The Quebec Court of Appeal dismissed the estate's appeal and allowed the Iranian defendants' appeal with respect to H's claim.

At issue in this appeal is whether the Islamic Republic of Iran, its head of state and the individuals who allegedly detained, tortured and killed K in Iran are entitled to immunity by operation of the *SIA*. The resolution of that issue rests on the scope of the *SIA*, the impact that the evolution of international law since the *SIA*'s adoption might have on its interpretation, and whether the Act is constitutional. An overarching question, which permeates almost all aspects of this appeal, is whether international law has created a mandatory universal civil jurisdiction in respect of claims of torture, which would require Canada to open its courts to the claims of victims of acts of torture that were committed abroad. Moreover, this Court is asked to determine whether torture may constitute an official act of a state and whether public officials having committed acts of torture can benefit from immunity.

Held (Abella J. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and **LeBel**, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.: Neither H nor K's estate may avail themselves of a Canadian court in order to sue Iran or its functionaries for the torture that K endured. Furthermore, the challenges brought by the appellants based on s. 2(e) of the *Canadian Bill of Rights* and s. 7 of the *Charter* should be dismissed.

State immunity is not solely a rule of international law, it also reflects domestic choices made for policy reasons, particularly in matters of international relations. Canada's commitment to the universal prohibition of torture is strong. However, Parliament has made a choice to give priority to a foreign state's immunity over civil redress for citizens who have been tortured abroad. That policy choice is not a comment about the evils of torture, but rather an indication of what principles Parliament has chosen to promote.

In Canada, state immunity from civil suits is codified in the *SIA*. That Act is a complete codification of Canadian law as it relates to state immunity from civil proceedings. It provides an exhaustive list of exceptions to state immunity and it does not contain an exception to immunity from civil suits alleging acts of torture committed abroad. For that reason, reliance need not, and indeed cannot, be placed on the common law, *jus cogens* norms or customary international law to carve out additional exceptions to the immunity granted to foreign states pursuant to the *SIA*. Although there is no doubt that the prohibition of torture has reached the level of a

peremptory norm, the current state of customary international law regarding redress for victims of torture does not alter the *SIA*, nor does it render it ambiguous.

H seeks to avail himself of the “personal or bodily injury” exception to state immunity set out at s. 6(a) of the *SIA*. If H’s psychological suffering is captured by the personal injury exception to state immunity set out at s. 6(a), his claim would be allowed to proceed. However, when the words of s. 6(a) are examined in conjunction with the purpose of the Act, it becomes apparent that the exception applies only where the tort causing the personal injury or death has occurred in Canada. It does not apply where the impugned events, or the tort causing the personal injury or death, did not take place in Canada. Accordingly, H’s claim is barred by the *SIA* because the alleged tort did not “occur in Canada”. His claim is also barred by the *SIA* on the further ground that the “personal or bodily injury” exception does not apply where the injury allegedly suffered by the plaintiff does not stem from a physical breach of personal integrity. Only when psychological distress manifests itself after a physical injury will the exception to state immunity be triggered. In the present case, H did not plead any kind of physical harm nor did he claim to have suffered an injury to his physical integrity.

A further issue to be determined is whether the respondents M and B are immune from legal action by operation of the *SIA*. Section 3(1) of the *SIA* provides that a “foreign state” is immune from the jurisdiction of any court in Canada. The definition of “foreign state” at s. 2 of the *SIA* includes a reference to the term

“government”. The absence of an explicit reference to “public officials” in the *SIA* requires that the term “government” be interpreted in context and against the backdrop of international law. Following such an exercise, it becomes clear that public officials must be included in the meaning of “government” as it is used in the *SIA*. States are abstract entities that can only act through individuals. Excluding public officials from the meaning of government would completely thwart the purposes of the *SIA*, as allowing civil claims against individual public officials would require Canadian courts to scrutinize other states’ decision-making as carried out by their public officials. Accordingly, public officials, being necessary instruments of the state, are included in the term “government” as used in the *SIA*. However, those public officials will only benefit from state immunity when acting in their official capacity.

The acts of torture allegedly committed by M and B have all the bearings of official acts, and no suggestion was made that either of these public officials were acting in their personal capacity or in a way that was unconnected to their roles as state functionaries. The heinous nature of these acts of torture does not transform the actions of M and B into private acts, undertaken outside of their official capacity. By definition, torture is necessarily an official act of the state. It is the state-sanctioned or official nature of torture that makes it such a despicable crime. There continues to be very strong support for the conclusion that immunity from civil suits extends to public officials engaging in acts of torture, and it is not yet possible to conclude that either a consistent state practice or *opinio juris* to the contrary effect exists. As a

result, given that M and B were public officials acting in their official capacity, they are captured by the term “government” found at s. 2 of the *SIA*. By virtue of that statute, they are immune from the jurisdiction of Canadian courts.

Parliament has given no indication whatsoever that Canadian courts are to deem torture an “unofficial act” and that a universal civil jurisdiction has been created allowing foreign officials to be sued in our courts. Creating this kind of jurisdiction would have potentially considerable impact on Canada’s international relations. This decision is to be made by Parliament, not the courts.

The *SIA* withstands constitutional scrutiny despite the fact that it prevents H and his mother’s estate from suing Iran or its functionaries in Canada for the torture that K endured. The challenge brought by the appellants based on s. 2(e) of the *Bill of Rights* should be dismissed as that provision is not engaged in the present case. Section 2(e) guarantees fairness in the context of proceedings before a Canadian court or a tribunal. It does not create a self-standing right to a fair hearing where the law does not allow for an adjudicative process. Accordingly, in order to engage s. 2(e), a court or tribunal must properly have jurisdiction over a matter. As previously discussed, the existence of state immunity means that no jurisdiction exists in Canada to adjudicate the appellants’ claims.

Similarly, the appellants’ challenge of the *SIA* pursuant to s. 7 of the *Charter* must fail. Insofar as it prevents victims of torture or their next of kin from finding closure by seeking civil redress, it is arguable that s. 3(1) of the *SIA* might

cause such serious psychological prejudice that the security of the person is engaged and violated. However, it is not necessary to decide whether s. 3(1) of the *SIA* engages the security of the person interest under s. 7 of the *Charter* because that provision of the *SIA* does not violate any principles of fundamental justice.

Not all commitments in international agreements amount to principles of fundamental justice. When a party points to a provision in an international treaty as evidence of a principle of fundamental justice, a court must determine (a) whether there is significant international consensus regarding the interpretation of the treaty, and (b) whether there is consensus that the particular interpretation is fundamental to the way in which the international legal system ought to fairly operate. The absence of such consensus weighs against finding that the principle is fundamental to the operation of the legal system. Although the appellants argue that art. 14 of the *Convention Against Torture* requires Canada to ensure that a civil remedy be available to victims of torture committed in foreign countries and allege that this obligation is a principle of fundamental justice within the meaning of s. 7, they have not argued, let alone established, that their interpretation of art. 14 reflects customary international law, or that it has been incorporated into Canadian law through legislation. There appears to be no consensus that art. 14 should be interpreted in the manner the appellants suggest. In fact, the language of art. 14 as well as the interpretation of that provision by some party states and by international and domestic judicial authorities support a conclusion that art. 14 ensures redress and compensation for torture committed within the forum state's own territorial jurisdiction.

While the prohibition of torture is certainly a *jus cogens* norm from which Canada cannot derogate and is also very likely a principle of fundamental justice, the peremptory norm prohibiting torture has not yet created an exception to state immunity from civil liability in cases of torture committed abroad. At this point in time, state practice and *opinio juris* do not suggest that Canada is obligated by the *jus cogens* prohibition on torture to open its courts so that its citizens may seek civil redress for torture committed abroad. Consequently, failing to grant such access would not be a breach of the principles of fundamental justice.

In conclusion, the *SIA*, in its present form, does not provide for an exception to foreign state immunity from civil suits alleging acts of torture occurring outside Canada. Consequently, a foreign state and its functionaries cannot be sued in Canadian courts for acts of torture committed abroad. This conclusion does not, however, freeze state immunity in time. Parliament has the power and the capacity to change the current state of the law on exceptions to state immunity, just as it has done in the past, and to allow those in situations like H and his mother's estate to seek redress in Canadian courts.

Per Abella J. (dissenting): The doctrine of sovereign immunity is not entirely codified under the *State Immunity Act*. The only individuals expressly included in the definition of a "foreign state" are "any sovereign or other head of the foreign state . . . while acting as such in a public capacity". There is no reference to public officials apart from heads of state. That silence creates an ambiguity as to

whether the *State Immunity Act* applies to lower-level officials. Resolving that ambiguity is assisted by reference to customary international law and the significant development of the principle of reparation under public international law.

The prohibition on torture is a peremptory norm — *jus cogens* — under international law. That means that the international community has agreed that the prohibition cannot be derogated from by any state. The question then is how can torture be an official function for the purpose of immunity under international law when international law itself universally prohibits torture? This poses challenges for the integrity of international law and leaves this Court with a choice about whether to extend immunity to foreign officials for such acts.

Under international law generally, the protection for and treatment of individuals as legal subjects has evolved dramatically. With that evolving protection has come the recognition of a victim's right to redress for a violation of fundamental human rights. The claims for civil damages brought by K's estate and her son H are founded on Canada's and Iran's obligations under international human rights law and the *jus cogens* prohibition against torture. These claims must be situated in the context of the significant development of the principle of reparation under public international law throughout the twentieth century. At its most fundamental, the principle of reparation means that when the legal rights of an individual are violated, the wrongdoer owes redress to the victim for harm suffered. The aim of the principle of reparation is restorative.

While early international criminal proceedings did little to recognize victims' rights, several international courts now recognize victims' rights to reparation against individual perpetrators of international crimes. This shift is, in part, the result of the recognition of the principle of reparation as a general principle of international law in the enabling treaties and statutes of these courts. The treatment of immunity for civil claims should not be different from that for criminal proceedings.

The development and international acceptance of the principle of reparation demonstrates that an individual's right to a remedy against a state for violations of his or her human rights is now a recognized principle of international law. There is also growing acceptance that *jus cogens* violations such as torture do not constitute "official acts" justifying immunity for individual state officials.

The purpose of the *Convention Against Torture* is consistent with a broad obligation to protect victims' rights to remedies for torture regardless of where it occurred. The *Convention* established a shared commitment to "make more effective the struggle against torture . . . throughout the world". On a plain reading, Article 14 imposes an obligation on state parties to ensure that all victims of torture from their countries can obtain "redress and ha[ve] an enforceable right to fair and adequate compensation". The text provides no indication that the "act of torture" must occur within the territory of the state party for the obligation to be engaged. If a state undertakes to ensure access to a remedy for torture committed abroad, this necessarily implicates the question of the immunity of the perpetrators of that torture.

In the face of the universal acceptance of the prohibition against torture, concerns about any interference with sovereignty which may be created by acting in judgment of an individual state official who violates this prohibition, necessarily shrink. The very nature of the prohibition as a peremptory norm means that all states agree that torture cannot be condoned. Torture cannot, therefore, be an official state act for the purposes of immunity *ratione materiae*.

Under customary international law, there is a distinction between the blanket immunity *ratione personae* of high-ranking individuals such as the head of state, and the immunity *ratione materiae* for former heads of state and lower-ranking officials which applies only in respect of official acts performed for or on behalf of the state. These doctrines recognize the unique role and responsibility of heads of state. At present, state practice reveals a palpable, albeit slow trend in the international jurisprudence to recognize that torture, as a violation of a peremptory norm, does not constitute officially sanctioned state conduct for the purposes of immunity *ratione materiae*.

In light of the equivocal state of the customary international law of immunity, the long-standing international acceptance of the principle of reparation manifested in Article 14 of the *Convention Against Torture*, and almost a century of increasing international recognition that human rights violations threaten global peace and stability, there is no reason to include torture in the category of official state conduct attracting individual immunity. Equivocal customary international law

should not be interpreted so as to block access to a civil remedy for what is unequivocally prohibited.

The *State Immunity Act* therefore does not apply to M and B. They are not immune from the jurisdiction of Canadian courts and the claims against them should be allowed to proceed.

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By LeBel J.

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No. IT-95-17/1-T, December 10, 1988, aff'd Case No. IT-95-17/1-A, July 21, 2000; *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298; *Goodyear Tire and Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610; *R. v. Finta*, [1994] 1 S.C.R. 701; *Alcom Ltd. v. Republic of Columbia*, [1984] 1 A.C. 580; *Daniels v. White*, [1968] S.C.R. 517; *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (1984); *Island of Palmas Case (Or Miangas), United States of America v. Netherlands*, Award (1928), II R.I.A.A. 829; *Castle v. United States Department of Justice (Attorney General)* (2006), 218 O.A.C. 53; *Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168; *R. v. Clarke*, 2014 SCC 28; *Prosecutor v. Blaškić* (1997), 110 I.L.R. 607; *Jaffe v. Miller* (1993), 13 O.R. (3d) 745; *Samantar v. Yousuf*, 560 U.S. 305 (2010); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Yousuf v. Samantar*, 699 F.3d 763 (2012); *Matar v. Dichter*, 563 F.3d 9 (2009); *Belhas v. Ya'alon*, 515 F.3d 1279 (2008); *Ye v. Zemin*, 383 F.3d 620 (2004); *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 S.C.R. 866; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Case of Tibi v. Ecuador* (2004), Inter-Am. Ct. H.R. (Ser. C) No. 114; *Case of Bámaca Velásquez v. Guatemala* (2002), Inter-Am. Ct. H.R. (Ser. C) No. 91; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571;

Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27, [2007] 2 S.C.R. 391; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *Fang v. Jiang*, [2007] N.Z.A.R. 420; *Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441.

By Abella J. (dissenting)

Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] 1 S.C.R. 3; *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147; *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269; *Jaffe v. Miller* (1993), 13 O.R. (3d) 745; *Case Concerning the Factory at Chorzów* (1928), P.C.I.J. Ser. A, No. 17; *Godínez-Cruz v. Honduras*, July 21, 1989 (Reparations and Costs); *Yousuf v. Samantar*, 699 F.3d 763 (2012); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99; *Jones*

v. United Kingdom, Nos. 34356/06 and 40528/06, ECHR 2014; *Xuncax v. Gramajo*, 886 F.Supp 162 (1995); *Cabiri v. Assasie-Gyimah*, 921 F.Supp 1189 (1996); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422; *Jones v. Ministry of the Interior of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270; *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675.

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Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), U.N. Doc. A/10034 (1975), art. 3.

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APPEAL from a judgment of the Quebec Court of Appeal (Morissette, Wagner and Gascon J.J.A.), 2012 QCCA 1449, [2012] R.J.Q. 1567, 265 C.R.R. (2d) 265, 354 D.L.R. (4th) 385, [2012] AZ-50886272, [2012] Q.J. No. 7754 (QL), 2012 CarswellQue 8098, reversing in part a decision of Mongeon J., 2011 QCCS 196, 330 D.L.R. (4th) 1, 227 C.R.R. (2d) 233, [2011] AZ-50714217, [2011] Q.J. No. 412 (QL), 2011 CarswellQue 488. Appeal dismissed, Abella J. dissenting.

Kurt A. Johnson, Mathieu Bouchard, Audrey Boctor and David Grossman, for the appellants.

No one appeared for the respondents the Islamic Republic of Iran, Ayatollah Sayyid Ali Khamenei, Saeed Mortazavi and Mohammad Bakhshi.

Bernard Letarte and René LeBlanc, for the respondent the Attorney General of Canada.

Christopher D. Bredt and Heather Pessione, for the *amicus curiae*.

Jill Copeland and Emma Phillips, for the intervener the Canadian Lawyers for International Human Rights.

François Larocque and Alyssa Tomkins, for the intervener Amnistie internationale, Section Canada francophone.

Written submissions only by *Azim Hussain, Rahool P. Agarwal* and *Maureen R. A. Edwards*, for the intervener Redress Trust Ltd.

Written submissions only by *Daniel Sheppard* and *Tamara Morgenthau*, for the intervener the Canadian Association of Refugee Lawyers.

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Written submissions only by *David Matas, Monique Pongracic-Speier* and *Noemi Gal-Or*, for the intervener the Canadian Bar Association.

Christopher A. Wayland and *Simon Chamberland*, for the intervener the Canadian Civil Liberties Association.

John Terry and *Sarah Shody*, for the intervener the Canadian Centre for International Justice.

John Norris and *Carmen Cheung*, for the interveners the David Asper Centre for Constitutional Rights and the International Human Rights Program at the University of Toronto Faculty of Law.

Babak Barin and *Payam Akhavan*, for the intervener the Iran Human Rights Documentation Center.

The judgment of McLachlin C.J. and LeBel, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. was delivered by

LEBEL J. —

I. Introduction

[1] The death of Ms. Zahra Kazemi in Iran was nothing short of a tragedy. In an attempt to seek relief and redress, Ms. Kazemi's son and only child, Stephan Hashemi, instituted an action for damages on behalf of himself and his mother's estate against the Islamic Republic of Iran, its head of state, and two of its government officials. Mr. Hashemi and his mother's estate have appealed to this Court for a ruling that those who allegedly detained, tortured and killed Ms. Kazemi not be entitled to immunity by operation of the *State Immunity Act*, R.S.C. 1985, c. S-18 ("SIA" or "Act"), in order that their underlying claims be allowed to proceed.

[2] Despite the tragic fate of Ms. Kazemi, the current state of the law does not allow the appellants to sue the respondents for damages in a Canadian court. Foreign states, as well as their heads of state and public officials, are immune from civil suit in Canada except as expressly provided in the *SIA*. The *SIA* does not withdraw immunity in cases alleging acts of torture committed abroad. Put differently, the Parliament of Canada has chosen to embrace principles of comity and state sovereignty over the interests of individuals wishing to sue a foreign state in

Canadian courts for acts of torture committed abroad. I conclude that this choice is not contrary to international law, the *Canadian Bill of Rights*, R.S.C. 1985, App. III (“*Bill of Rights*”), or the *Canadian Charter of Rights and Freedoms*. Accordingly, I would dismiss the appeal.

II. Facts

[3] The facts, taken as true in the court of first instance, are horrific.

[4] Zahra Kazemi, a Canadian citizen, visited Iran in 2003 as a freelance photographer and journalist. On or about June 23, 2003, Ms. Kazemi went to take photographs of individuals protesting against the arrest and detention of their family members outside the Evin prison in Tehran. During that time, Ms. Kazemi was ordered arrested and detained by Mr. Mortazavi, Tehran’s Chief Public Prosecutor. She was detained in the very prison that she was photographing.

[5] During her time in custody, Ms. Kazemi was not permitted to contact counsel, the Canadian embassy, or her family. She was interrogated by Iranian authorities. She was beaten. She was sexually assaulted. She was tortured.

[6] Eventually, some time prior to July 6, 2003, Ms. Kazemi was taken from the prison and transferred to a hospital in Tehran. She was unconscious upon her arrival. She had suffered a brain injury. Other injuries included a fractured nose, a crushed eardrum, strip-like wounds on her back and the back of her legs, fractured

bones and broken nails on her hands and toes, and extensive trauma on and around her genital area.

[7] While Ms. Kazemi was in hospital, no attempt was made by the Iranian authorities to notify Canadian consulate officials or Ms. Kazemi's family members of her condition. Even after Ms. Kazemi's mother, a resident of Iran, was unofficially informed that her daughter was in hospital, she was largely forbidden from having contact with her. However, with the knowledge that her daughter was hospitalized, Ms. Kazemi's mother and other members of her family in Iran began to contact Canadian consular officials and Ms. Kazemi's son.

[8] On or about July 10, 2003, Canadian officials visited the hospital in which Ms. Kazemi was receiving care. Doctors informed these officials that Ms. Kazemi was medically brain dead and had no expectation of recovery. During this time, Ms. Kazemi's son and mother attempted to obtain independent medical assistance for Ms. Kazemi and to arrange for her transport to Canada for further treatment. Despite their wishes, the medical staff at the hospital removed Ms. Kazemi from life support and pronounced her dead. On July 12, the Iranian government officially announced Ms. Kazemi's death through the Islamic Republic News Agency. A later report confirmed that Ms. Kazemi had died as a result of sustaining a blow to the head while in custody.

[9] After her death, the Iranian government ordered an autopsy. In doing so, the government did not consult with Ms. Kazemi's family. Further, officials did not

release the results of the autopsy to Ms. Kazemi's family or Canadian officials. Following the autopsy, Ms. Kazemi was buried in Iran, despite her son's requests that her remains be sent to Canada for burial.

[10] In late July, the Iranian government commissioned an investigation into Ms. Kazemi's death. Despite a report linking members of the judiciary and the Office of the Prosecutor to Ms. Kazemi's torture and subsequent death, only one individual, Mr. Reza Ahmadi, was tried. The trial was marked by a lack of transparency. Mr. Ahmadi was acquitted. In short, it was impossible for Ms. Kazemi and her family to obtain justice in Iran.

[11] In June 2006, Mr. Hashemi moved to institute proceedings in the Superior Court of the Province of Quebec on his own behalf and in his capacity as liquidator for the estate of his mother. Mr. Hashemi brought proceedings against (1) the Islamic Republic of Iran, (2) Iran's head of state, the Ayatollah Sayyid Ali Khamenei, (3) Saeed Mortazavi, the Chief Public Prosecutor of Tehran, and (4) Mohammad Bakhshi, the former Deputy Chief of Intelligence of the Evin Prison. The action sought: (a) \$5,000,000 for the estate of the late Zahra Kazemi as a result of her physical, psychological, and emotional pain and suffering, plus \$5,000,000 in punitive damages, and (b) \$5,000,000 for the psychological and emotional prejudice caused to Mr. Hashemi personally by the loss of his mother, plus \$2,000,000 in punitive damages.

[12] The defendants, named as respondents in this appeal, brought a motion to dismiss the action on the basis of state immunity. The defendants appointed counsel and took part in the litigation in the Superior Court and in the Court of Appeal in order to argue the absence of jurisdiction of Canadian courts. They were not represented in the appeal to this Court.

[13] Mr. Hashemi and Ms. Kazemi's estate responded to the motion to dismiss both by raising exceptions provided in the *SIA* and by challenging the constitutionality of certain provisions of the *SIA*.

[14] The motion to institute proceedings, the motion to dismiss, and the matter of the constitutionality of the Act were decided by Mongeon J. of the Quebec Superior Court on January 25, 2011.

III. Relevant Statutory Provisions

[15] As was the case before the lower courts, the constitutionality of ss. 3 and 6 of the *SIA* is at issue in this appeal. The following provisions are relevant to this appeal:

State Immunity Act, R.S.C. 1985, c. S-18

2. In this Act

...

“foreign state” includes

(a) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,

(b) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and

(c) any political subdivision of the foreign state;

3. (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.

(2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.

...

5. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to

(a) any death or personal or bodily injury, or

(b) any damage to or loss of property

that occurs in Canada.

IV. Judicial History

A. *Quebec Superior Court, 2011 QCCS 196, 330 D.L.R. (4th) 1*

[16] In the Superior Court, Mongeon J. addressed four main issues:

- 1) Are there any unwritten exceptions to state immunity which might allow the plaintiffs' action to proceed?
- 2) Assuming that the *SIA* is constitutionally valid, can the plaintiffs invoke the exception to immunity under s. 6(a) of the *SIA*?
- 3) Does the *SIA*, assuming that it is constitutionally valid, grant immunity to the defendants Mr. Mortazavi and Mr. Bakhshi?
- 4) If the claim cannot proceed against all the defendants, are the barring provisions of the *SIA* constitutionally valid?

[17] In response to the first issue, Mongeon J. concluded that that the *SIA* exhaustively captures the law of state immunity. In his view, all of the legal principles surrounding state immunity, and all of the exceptions to state immunity, are expressly contained in the Act (para. 48). In Mongeon J.'s opinion, based on current case law and the wording of the *SIA*, no unwritten exceptions to state immunity at common law, in international law, or in international treaties would allow the plaintiffs' claims to proceed.

[18] With regard to the exception to immunity found in s. 6(a) of the *SIA*, Mongeon J. drew a distinction between the claim of Ms. Kazemi's estate and her son's claim. While the bodily injuries of Ms. Kazemi were suffered in Iran, Mr. Hashemi suffered his injuries in Canada. As a result, Mongeon J. held that Ms. Kazemi's estate could not raise the exception to state immunity under s. 6(a). However, he concluded that Mr. Hashemi's personal action could potentially fall within that exception. Relying on *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269, Mongeon J. acknowledged that mental distress could be considered a "personal . . . injury" within the meaning of the Act if the alleged injury manifested itself physically. In Mongeon J.'s view, if Mr. Hashemi could prove that the psychological trauma he suffered affected his physical integrity, or was equivalent to "nervous shock", the exception set out at s. 6(a) would apply and the defendants would be deprived of immunity (para. 92). As a result, Mongeon J. was not prepared to summarily dismiss Mr. Hashemi's case against the defendants.

[19] Next, Mongeon J. considered whether the *SIA* grants immunity to the individual defendants Saeed Mortazavi and Mohammad Bakhshi. He addressed the issue of whether "employees of the state acting in their capacity as employees" were included in the statutory definition of "foreign state" (para. 105). In his view, granting immunity to a governmental department, yet withholding immunity from its functionaries, "would render the *State Immunity Act* ineffective and inoperative" (para. 112). Mongeon J. concluded that the immunity provisions of the *SIA* should

apply to the individual defendants regardless of the nature of the acts they are alleged to have committed.

[20] Finally, Mongeon J. addressed the constitutionality of the *SIA*. In particular, he considered whether s. 3(1) of the *SIA* contravenes sections 2(e) and 2(a) of the *Canadian Bill of Rights* and ss. 7 and 9 of the *Charter*.

[21] Mongeon J. concluded that s. 2(e) of the *Bill of Rights* does not create a right to recourse where the law does not otherwise provide for such recourse. Rather, in his view, s. 2(e) merely ensures that when a hearing procedure is foreseen, it will be conducted fairly before an administrative body or tribunal. Having found that the plaintiffs did not have the right to sue a foreign authority except as provided by the exceptions of the *SIA*, Mongeon J. held that s. 2(e) did not assist them.

[22] Mongeon J. also determined that the plaintiffs' claim under s. 2(a) of the *Bill of Rights* had no merit. In his view, the *SIA* did not "authorize" Ms. Kazemi's detention. The *SIA* only prevents the plaintiffs from claiming damages in Canada in the aftermath of such detention.

[23] Mongeon J. then went on to consider the *Charter*. In his view, the causal connection between the plaintiffs' suffering and the action of the Canadian government was insufficient. He found that the application of the *SIA* did not cause the breach of Mr. Hashemi's or Ms. Kazemi's s. 7 *Charter* rights.

[24] In the result, Mongeon J. allowed the defendants' motion to dismiss the action with respect to the estate of Ms. Kazemi but dismissed the motion with respect to the recourse sought by Mr. Hashemi personally.

B. *Quebec Court of Appeal, 2012 QCCA 1449, [2012] R.J.Q. 1567*

[25] The Quebec Court of Appeal dismissed the appeal of the estate of Ms. Kazemi and allowed the defendants' appeal with respect to Mr. Hashemi's claim. Morissette J.A., writing for a unanimous court, addressed the same issues as those determined by Mongeon J.

[26] Morissette J.A. rejected the argument made by Mr. Hashemi and the estate that the language of the *SIA* is ambiguous because current customary international law, which has evolved subsequent to the enactment of the statute, recognizes exceptions to state immunity that are not included in by the Act (para. 40). In the view of Morissette J.A., the language of the statute was clear and unambiguous: the only exceptions to state immunity recognized in Canada are those that are explicitly set out in the *SIA* (para. 42). Further, relying on the recent case of *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99 ("*Germany v. Italy*") before the International Court of Justice ("I.C.J."), Morissette J.A. confirmed that there is no rule of customary international law which overrides state immunity for serious international crimes, even when there are no alternative means for securing redress (para. 55). Finally, on this issue, Morissette J.A. added that art. 14 of the *Convention Against*

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (“CAT”) and the Committee against Torture’s interpretation of that article offered no assistance to the appellants. In his view, art. 14 was largely ambiguous, and the Committee against Torture’s interpretation of the Article did not have the force of law (paras. 57-59).

[27] Morissette J.A. made two further conclusions pertaining to s. 6(a) of the SIA. First, he rejected the argument that, for the exception in s. 6 to apply, the tortious act causing the injury must necessarily have occurred in Canada. Rather, the s. 6 exception could apply where the acts causing the injury had taken place in a foreign state but where the injury manifests itself in Canada. However, Morissette J.A. ultimately found that s. 6(a) was of no assistance to Mr. Hashemi because that section requires the claimant to have suffered “a breach of physical integrity, not simply psychological or psychic integrity” (para. 82 (emphasis deleted)). Mr. Hashemi suffered no such injury.

[28] Next, Morissette J.A. considered whether the defendants Mr. Mortazavi and Mr. Bakhshi should benefit from state immunity. In his view, Mongeon J. was correct in concluding that “individual agents of a foreign state” are granted immunity by the Act (para. 93). He also rejected the argument that the treatment of Ms. Kazemi at the hands of the foreign officials was so egregious that those actions could not fall under the umbrella of “official activity” which attracts immunity (para. 97). In his

view, the concept of torture itself necessarily involves the acquiescence or direction of those in an official capacity or position of authority.

[29] Morissette J.A. then went on to consider the constitutionality of the *SIA*. At the Court of Appeal, Mr. Hashemi and the estate challenged the constitutionality of s. 3(1) of the *SIA* only in relation to s. 2(e) of the *Bill of Rights* and s. 7 of the *Charter*. Morissette J.A. rejected their *Bill of Rights* argument, confirming as Mongeon J. had before him, that 2(e) does not “creat[e] a self-standing right to a fair hearing” (para. 109). Morissette J.A. similarly dismissed the s. 7 argument, determining that an alleged violation of the “liberty interest” claimed by Mr. Hashemi (the ability to bring a civil suit against Iran in the forum of his choice) did not render s. 3(1) of the *SIA* unconstitutional. In his view, there was no s. 7 violation (para. 120).

[30] Mr. Hashemi and Ms. Kazemi’s estate appealed the decision of the Quebec Court of Appeal to this Court. Although named as respondents, the Islamic Republic of Iran, the Ayatollah Sayyid Al Khamenei, Saeed Mortazavi and Mohammad Bakhshi did not present written or oral arguments. The Attorney General of Canada was represented at the appeal but presented argument only on some of the issues. *Amicus curiae* was appointed to address issues raised by the appellants on which the Attorney General of Canada took no position.

V. Issues

[31] The following constitutional questions were stated:

- 1) Is s. 3(1) of the *State Immunity Act*, R.S.C. 1985, c. S-18, inconsistent with s. 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c. 44?
- 2) If so, is s. 3(1) of the *State Immunity Act*, R.S.C. 1985, c. S-18, inoperable by reason of such inconsistency?
- 3) Does s. 3(1) of the *State Immunity Act*, R.S.C. 1985, c. S-18, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?
- 4) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

[32] The answers to those questions can be found in the interpretation of the *SIA*. Essentially, the Court is being asked to determine the scope of the *SIA*, the impact that the evolution of international law since the *SIA*'s adoption might have on its interpretation, and whether the Act is constitutional. An overarching question, which permeates almost all aspects of this case, is whether international law has created a mandatory universal civil jurisdiction in respect of claims of torture which would require states to open their national courts to the claims of victims of acts of torture that were committed outside their national boundaries.

[33] For clarity, I have broken the case down into five core issues:

- 1) Is s. 3(1) of the *SIA* a complete codification of state immunity from civil suits in Canada? Does international law render s. 3(1) ambiguous or otherwise require it to be interpreted to implicitly include an exception to state immunity in cases of torture?

- 2) Does the exception to state immunity set out at s. 6(a) of the *SIA* apply to Mr. Hashemi's claim?
- 3) Are the respondents Mr. Mortazavi and Mr. Bakhsi entitled to immunity by virtue of the *SIA*?
- 4) If there is no exception for torture in the *SIA*, is s. 3(1) of that Act inconsistent with s. 2(e) of the *Bill of Rights*? If so, is s. 3(1) inoperable by reason of such inconsistency?
- 5) If there is no exception for torture in the *SIA*, does s. 3(1) of that Act infringe s. 7 of the *Charter*? If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

VI. Analysis

A. *Background*

(1) State or Sovereign Immunity

[34] Functionally speaking, state immunity is a “procedural bar” which stops domestic courts from exercising jurisdiction over foreign states (J. H. Currie, *Public International Law* (2nd ed. 2008), at p. 365; H. Fox and P. Webb, *The Law of State*

Immunity (3rd ed. 2013), at pp. 38-39; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3, at para. 60; *Germany v. Italy*, at para. 58). In this sense, state immunity operates to prohibit national courts from weighing the merits of a claim against a foreign state or its agents (Fox and Webb, at p. 82; F. Larocque, *Civil Actions for Uncivilized Acts: The Adjudicative Jurisdiction of Common Law Courts in Transnational Human Rights Proceedings* (2010), at pp. 236-37).

[35] Conceptually speaking, state immunity remains one of the organizing principles between independent states (*R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 43). It ensures that individual nations and the international order remain faithful to the principles of sovereignty and equality (Larocque, *Civil Actions for Uncivilized Acts*, at p. 236; C. Emanuelli, *Droit international public: Contribution à l'étude de droit international selon une perspective canadienne* (3rd ed. 2010), at p. 294). Sovereignty guarantees a state's ability to exercise authority over persons and events within its territory without undue external interference. Equality, in international law, is the recognition that no one state is above another in the international order (*Schreiber*, at para. 13). The law of state immunity is a manifestation of these principles (*Hape*, at paras. 40-44; Fox and Webb, at pp. 25 and 76; *Germany v. Italy*, at para. 57).

[36] Beyond sovereign equality, other justifications for state immunity are grounded in the political realities of international relations in an imperfect world. One

justification is that because it is “practical[ly] impossib[le]” to enforce domestic judgments against foreign states, domestic courts are not truly in a position to adjudicate claims in the first place (Fox and Webb, at p. 31). In this sense, it is counterproductive for a court to review the decisions of foreign states when doing so risks rupturing international relations without providing much hope of a remedy (*ibid.*; C. Forcese, “De-immunizing Torture: Reconciling Human Rights and State Immunity” (2007), 52 *McGill L.J.* 127, at pp. 133-34).

[37] Two other justifications for state immunity are comity and reciprocity (Forcese, at p. 135; *Al-Adsani v. United Kingdom* (2002), 34 E.H.R.R. 273, at para. 54). Just as foreign states do not want to have their executive, legislative or public actions called into judgment in Canadian courts, so too Canada would prefer to avoid having to defend its actions and policies before foreign courts.

[38] State immunity plays a large role in international relations and has emerged as a general rule of customary international law (*Jones v. United Kingdom*, Nos. 34356/06 and 40528/06, ECHR 2014, at para. 89; Fox and Webb, at p. 2). To be considered customary international law, a rule must be supported by state practice as well as *opinio juris*, an understanding on the part of states that the rule is obligatory as a matter of international law: *Hape*, at para. 46; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, at para. 207. The I.C.J. has confirmed that the principle of state immunity meets both of these requirements (*Germany v. Italy*, at

paras. 55-56). Given the presence of both state practice and *opinio juris*, it is now settled and unequivocal that immunity is more than a courtesy; it has a firm place in the international legal landscape (Fox and Webb, at p. 2).

[39] The content of state immunity has evolved over time. In its earliest incarnation, state immunity was understood to be a complete and absolute bar on the ability of one state to subject another to any scrutiny (Fox and Webb, at p. 26). This absolute prohibition is thought to have derived from the historical personal imperviousness of “monarchs and their representatives” (Larocque, *Civilized Actions for Uncivilized Acts*, at p. 238). Over time, this immunity was transferred to the nation state as the head of state came to embody the state itself (*ibid.*). Any subjection of a foreign state to domestic courts was seen as incompatible with sovereign equality (J. H. Currie, C. Forcese, J. Harrington and V. Oosterveld, *International Law: Doctrine, Practice and Theory* (2nd ed. 2014), at pp. 539-41; *Re Canada Labour Code*, [1992] 2 S.C.R. 50, at p. 71).

[40] In the wake of the Second World War, the idea that a state and its officials could be immune from criminal proceedings appeared particularly incongruous in view of the atrocities that had been committed. The Nuremberg International Military Tribunal, 82 U.N.T.S. 279, in particular through art. 8 of its Charter, laid the foundations for a new approach to restricting state immunity in criminal proceedings. That approach has been evolving ever since.

[41] In parallel, the complete bar on bringing civil proceedings against a foreign state in domestic courts has also gradually relaxed. State immunity, once referred to as absolute immunity, slowly came to be qualified as “restrictive” immunity (Currie, Forcese, Harrington and Oosterveld, at p. 541). This transition was in part due to the greater role that states began to play in commercial and financial matters, and is reflected in the well-known distinction between the *acta imperii* of a state (acts of a governmental nature) and its *acta gestionis* (acts of a commercial nature) (Currie, at pp. 371-73; P. Ranganathan “Survivors of Torture, Victims of Law: Reforming State Immunity in Canada by Developing Exceptions for Terrorism and Torture” (2008), 71 *Sask. L. Rev.* 343, at p. 350). As the international community began to accept that not all acts or decisions of states were quintessentially “sovereign” or “public” in nature, but that, at times, states behaved as “private” actors, the idea of an absolute bar on suing a foreign state became obsolete (Larocque, *Civil Actions for Uncivilized Acts*, at pp. 239-41; Currie, Forcese, Harrington and Oosterveld, at p. 541; Fox and Webb, at p. 32). Many states, including Canada, have legislated this version of restrictive immunity through a commercial activity exception to state immunity (*SIA*, s. 5; *Re Canada Labour Code*, at p. 73; *Schreiber*, at para. 33; *Kuwait Airways Corp. v. Iraq*, 2010 SCC 40, [2010] 2 S.C.R. 571, at paras. 13-17).

[42] In Canada, state immunity from civil suits is codified in the *SIA*. The purposes of the Act largely mirror the purpose of the doctrine in international law: the upholding of sovereign equality. The “cornerstone” of the Act is found in s. 3 which

confirms that foreign states are immune from the jurisdiction of our domestic courts “except as provided by th[e] Act” (*Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 (C.A.), at para. 42; *SIA*, s. 3). Significantly, the *SIA* does not apply to criminal proceedings, suggesting that Parliament was satisfied that the common law with respect to state immunity should continue governing that area of the law (*SIA*, s. 18).

[43] When enacting the *SIA*, Parliament recognized a number of exceptions to the broad scope of state immunity. Besides the commercial activity exception, canvassed above, Canada has chosen to include exceptions to immunity in situations where a foreign state waives such right, as well as for cases involving: death, bodily injury, or damage to property occurring in Canada; maritime matters; and foreign state property in Canada (*SIA*, ss. 4, 6, 7 and 8; Currie, at pp. 395-400; Emanuelli, at pp. 346-49; J.-M. Arbour and G. Parent, *Droit international public* (6th ed. 2012), at pp. 500-8.3).

[44] In 2012, Parliament amended the *SIA* to include an additional exception to state immunity for certain foreign states that have supported terrorist activity (Arbour and Parent, at pp. 508.1-8.3). Under this new legislative regime, a foreign state may be sued in Canada if (1) the act that the state committed took place on or after January 1, 1985 and (2) the foreign state accused of supporting terrorism is included on a list created by the Governor in Council (s. 6.1 *SIA*; Library of Parliament, *Legislative Summary: Bill C-10* (2012), at s. 2.2.2.1). Although no

argument concerning the nature or constitutionality of the terrorism exception was advanced before this Court, it is nonetheless relevant to the case at hand. If nothing else, it reveals that Parliament can and does take active steps to address, and in this case pre-empt, emergent international challenges (Ranganathan, at p. 386), thereby reinforcing the conclusion, discussed below, that the *SIA* is intended to be an exhaustive codification of Canadian law of state immunity in civil suits. I also note in passing, with all due caution, that when the terrorism exception bill, was before Parliament, it was criticized on numerous occasions for failing to create an exception to state immunity for civil proceedings involving allegations of torture, genocide and other grave crimes (*Legislative Summary: Bill C-10*, s. 2.1.4). Indeed, Private Member Bill C-483 proposed to create such an exception but it never became law. More broadly, the amendment to the *SIA* brought by Parliament in 2012 demonstrates that forum states (i.e. states providing jurisdiction) have a large and continuing role to play in determining the scope and extent of state immunity.

[45] It follows that state immunity is not solely a rule of customary international law. It also reflects domestic choices made for policy reasons, particularly in matters of international relations. As Fox and Webb note, although immunity as a general rule is recognized by international law, the “precise extent and manner of [the] application” of state immunity is determined by forum states (p. 17). In Canada, therefore, it is first towards Parliament that one must turn when ascertaining the contours of state immunity.

(2) Torture

[46] As discussed below, in drafting the *SIA*, Canada has made a choice to uphold state immunity as the oil that allows for the smooth functioning of the machinery of international relations. Canada has given priority to a foreign state's immunity over civil redress for citizens who have been tortured abroad. This policy choice is not a comment about the evils of torture, but rather an indication of what principles Parliament has chosen to promote given Canada's role and that of its government in the international community. The *SIA* cannot be read as suggesting that Canada has abandoned its commitment to the universal prohibition of torture. This commitment is strong, and developments in recent years have confirmed it.

[47] In 2002, in the case of *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, although there were "compelling indicia" to confirm that the prohibition of torture had reached peremptory status, the Court did not make a binding statement to this effect (paras. 62-65). Twelve years later, our Court cannot entertain any doubt that the prohibition of torture has reached the level of a peremptory norm (a peremptory norm, or *jus cogens* norm is a fundamental tenet of international law that is non-derogable: Currie, at p. 583; Emanuelli, at pp. 168-69; *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, art. 53).

[48] There are a number of multilateral instruments which explicitly prohibit torture (see *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N.

Doc. A/810, at 71 (1948), art. 5; *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 3452 (XXX), U.N. Doc. A/10034 (1975), art. 3; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, art. 3; *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, art. 7; and generally the United Nations *CAT*). International jurisprudence also recognizes the prohibition of torture as a non-derogable norm (see Ranganathan, at pp. 381-82). For instance, the House of Lords in the case of *Jones v. Ministry of the Interior of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270, concluded that “there is no doubt that the prohibition on torture” is a peremptory norm (para. 43; see also *Al Adsani v. United Kingdom*, at para. 61; *Prosecutor v. Anto Furund’ija*, Case No. IT-95-17/1-T, December 10, 1998 (International Criminal Tribunal for the former Yugoslavia), *aff’d* Case No. IT-95-17/1-A, July 21, 2000).

[49] The prohibition of torture is a peremptory international norm. But, in Canada, torture is also clearly prohibited by Conventions and legislation. Canada is a party to the *CAT*, which has been in force for over twenty years. The *CAT* serves many purposes. In part, it defines torture (art. 1), and requires that state parties take legislative and administrative measures to prevent acts of torture (arts. 2, 3 and 4), investigate potential acts of torture believed to have been committed on its territory (art. 12), and provide means by which victims of torture may obtain redress (art. 14).

[50] I note in passing that, unlike my colleague Justice Abella, I cannot interpret art. 14 of the *CAT* as requiring Canada to implement a universal civil jurisdiction for acts of torture. The *Travaux Préparatoires* leading to the signing of the *CAT* do not clearly suggest a purposeful abandonment by party states of the territoriality restriction which at one point was contained in the draft language of art. 14. Indeed, the change in the language which led to the removal of the territoriality restriction appears to have been prompted by a suggestion made by the United States which sought to harmonize art. 14 with the definition of torture contained at art. 1 by broadening its language (U.N. Commission on Human Rights, *Summary prepared by the Secretary-General in accordance with Commission resolution 18 (XVIII)*, U.N. Doc. E/CN.4/1314, at para. 45). The European Court of Human Rights reached the same conclusion recently, albeit for different reasons (*Jones v. United Kingdom*, at para. 208).

[51] Torture is also a criminal offence in Canada. Section 269.1 of the *Criminal Code* states that “[e]very official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.”

[52] If the Canadian government were to carry out acts of torture, such conduct would breach international law rules and principles that are binding on Canada, would be illegal under the *Criminal Code*, and would also undoubtedly be

unconstitutional. As was held in *Suresh*, the adoption of the *Charter* confirmed Canada's strict opposition to government-sanctioned torture. In particular, torture is blatantly contrary to s. 12 of the *Charter*. The Court stated:

A punishment is cruel and unusual if it "is so excessive as to outrage standards of decency": see *R. v. Smith*, [1987] 1 S.C.R. 1045, at pp. 1072-73, *per* Lamer J. (as he then was). It must be so inherently repugnant that it could never be an appropriate punishment, however egregious the offence. Torture falls into this category. The prospect of torture induces fear and its consequences may be devastating, irreversible, indeed, fatal. Torture may be meted out indiscriminately or arbitrarily for no particular offence. Torture has as its end the denial of a person's humanity; this end is outside the legitimate domain of a criminal justice system As such, torture is seen in Canada as fundamentally unjust. [para. 51]

Torture is also likely contrary to s. 7 of the *Charter*.

[53] Canada does not condone torture, nor are Canadian officials permitted to carry out acts of torture. However, the issue in the present case is not whether torture is abhorrent or illegal. That is incontestably true. The question before the Court is whether one can sue a foreign state in Canadian courts for torture committed abroad. The answer to that question lies in the interpretation of the *SIA*, and its interaction with international law, the *Charter* and the *Bill of Rights*.

B. *Section 3(1) of the State Immunity Act*

- (1) Is Section 3(1) of the *State Immunity Act* a Complete Codification of State Immunity from Civil Proceedings in Canada?

[54] In my view, the *SIA* is a complete codification of Canadian law as it relates to state immunity from civil proceedings. In particular, s. 3(1) of the Act exhaustively establishes the parameters for state immunity and its exceptions.

[55] There is academic support for the view that the *SIA* is not truly exhaustive, and that despite the express language found in s. 3(1), the common law and international law necessarily inform its interpretation (F. Larocque, “La *Loi sur l’immunité des États* canadienne et la torture” (2010), 55 *McGill L.J.* 81, at pp. 92-93). In Professor Larocque’s opinion, nothing in the Act expressly excludes the application of the common law (p. 94). In his view, to understand the *SIA* as a comprehensive code without consideration of the common law is to freeze state immunity in time, and to foreclose its development in line with international norms (pp. 100-2).

[56] With all due respect, I am of the view that the *SIA* provides an exhaustive list of exceptions to state immunity. For that reason, reliance need not, and indeed cannot, be placed on the common law, *jus cogens* norms or international law to carve out additional exceptions to the immunity granted to foreign states pursuant to s. 3(1) of the *SIA*. The *SIA*, in its present form, does not provide for an exception to foreign state immunity from civil suits alleging acts of torture occurring outside Canada. This conclusion does not freeze state immunity in time. Any ambiguous provisions of the Act remain subject to interpretation, and Parliament is at liberty to develop the law in line with international norms as it did with the terrorism exception.

[57] Certain of the interveners rely on a statement made in *Kuwait Airways Corp.* as evidence that the evolution of common law may have led to new exceptions to the principles of immunity from jurisdiction (see *Kuwait Airways Corp.*, at para. 24). This reliance is misplaced. In *Kuwait Airways*, the only conclusion was that, in that particular case, it was unnecessary to determine whether the *SIA* is exhaustive “or whether the evolution of international law and of the common law has led to the development of new exceptions to the principles of immunity from jurisdiction and immunity from execution” (*ibid.*). The time has now come to answer that question.

[58] In my opinion, the words of s. 3(1) of the *SIA* completely oust the common law and international law as a source of potential exceptions to the immunity which it provides. The plain and ordinary meaning of the words “except as provided by this Act” is that it is the Act, and the Act alone, that may provide exceptions to the immunity granted pursuant to s. 3(1) of the *SIA* (*Bouzari*, at para. 57). Words as explicit as “except as provided by this Act” demonstrate that Parliament intended for the legislation to displace the common law (*Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, at p. 1319). I cannot think of words that could be more “irresistibl[y] clea[r]” (*Goodyear Tire and Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614).

(2) Does International Law Render Section 3(1) Ambiguous or Otherwise Require it To Be Interpreted to Include an Exception to State Immunity in Cases of Torture?

[59] A number of interveners argue that s. 3(1) of the Act is ambiguous and should therefore be interpreted in accordance with the common law, the *Charter* and international law. The intervener the Canadian Civil Liberties Association submits that the *SIA* is ambiguous because it does not clearly extend to cases involving alleged breaches of *jus cogens* norms (factum, at paras. 8-10). The British Columbia Civil Liberties Association (“BCCLA”) similarly asserts that s. 3 of the Act is ambiguous (factum, at para. 8). The intervener Amnistie Internationale, Section Canada Francophone argues that s. 3 of the Act only shields foreign states with respect to their [TRANSLATION] “public acts”, acts which do not include torture (factum, at para. 1).

[60] The current state of international law regarding redress for victims of torture does not alter the *SIA*, or make it ambiguous. International law cannot be used to support an interpretation that is not permitted by the words of the statute. Likewise, the presumption of conformity does not overthrow clear legislative intent (see S. Beaulac, “‘Texture ouverte’, droit international et interpretation de la Charte canadienne”, in E. Mendes and S. Beaulac, eds., *Canadian Charter of Rights and Freedoms* (5th ed. 2013), at pp. 231-35). Indeed, the presumption that legislation will conform to international law remains just that — merely a presumption. This Court has cautioned that the presumption can be rebutted by the clear words of the statute

under consideration (*Hape*, at para. 53-54). In the present case, the *SIA* lists the exceptions to state immunity exhaustively. Canada's domestic legal order, as Parliament has framed it, prevails.

[61] Even if an exception to state immunity in civil proceedings for acts of torture had reached the status of a customary rule of international law, which, as I conclude below, it has not, such an exception could not be adopted as a common law exception to s. 3(1) of the *SIA* as it would be in clear conflict with the *SIA* (*Hape*, at para. 36). Moreover, the mere existence of a customary rule in international law does not automatically incorporate that rule into the domestic legal order (L. LeBel and G. Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002), 16 *S.C.L.R.* (2d) 23, at p. 35). Should an exception to state immunity for acts of torture have become customary international law, such a rule could likely be *permissive* — and not *mandatory* — thereby, requiring legislative action to become Canadian law (*Hape*, at para. 36; dissenting reasons of La Forest J. in *R. v. Finta*, [1994] 1 S.C.R. 701, at pp. 734-35; LeBel and Chao, at p. 36; G. van Ert, *Using International Law in Canadian Courts* (2nd ed. 2008), at pp. 218-23).

[62] Further, the reading of "except as provided by", which indicates an exhaustive list, is in line with the purpose and scheme of the legislation. A complete codification of state immunity that ousts the common law and international law, and

provides specific exceptions, in no way frustrates the goals of sovereign equality, reciprocity and comity.

[63] The above is not to suggest that international law and the common law may never be used to *interpret* the *SIA*. On the contrary, to borrow Lord Diplock's words, the provisions of the *State Immunity Act* fall to be construed against the background of those principles of public international law that are generally recognized by the family of nations (*Alcom Ltd. v. Republic of Columbia*, [1984] 1 A.C. 580, at p. 597). Thus, if certain provisions of the *SIA* were genuinely ambiguous or required clarification, it would be appropriate for courts to look to the common law and international law for guidance (*Schreiber*, at para. 50; *Daniels v. White*, [1968] S.C.R. 517, at p. 541). However, the plain language of s. 3(1) read alongside the purpose of the Act eliminates the possibility of relying on the common law or international law to find new exceptions to state immunity. I therefore find that the Court of Appeal was correct in its conclusion that the *SIA* contains a complete code of exceptions to immunity (paras. 38-42). I now turn to the interpretation and application of the *SIA* to the case at hand.

C. *Section 6(a) of the State Immunity Act*

[64] Although the appellants have not directly appealed Morissette J.A.'s interpretation of s. 6(a) of the *SIA*, it is necessary to determine the true scope of the legislation before analysing its constitutionality. If Mr. Hashemi's psychological suffering is captured by the personal injury exception to state immunity set out at

s. 6(a), he will have no reason to argue that the statute is unconstitutional, although the estate's constitutional challenge may proceed. The Court therefore intends to discuss the meaning of s. 6(a) and whether Mr. Hashemi is entitled to rely on the exception that it sets out.

[65] The *amicus*, in his supplementary submissions, argues that the s. 6(a) "personal or bodily injury" exception to state immunity cannot be engaged in this case. According to the *amicus*, the exception at s. 6(a) does not apply where the alleged events that caused the personal injury or death did not take place in Canada. In the alternative, the *amicus* submits that the "personal or bodily injury" exception at s. 6(a) does not apply where the alleged injury is not a physical injury. Thus, Mr. Hashemi's allegations of psychological harm would not fall within the scope of s. 6(a).

[66] A number of interveners made submissions regarding the proper interpretation of "personal or bodily injury" under s. 6(a) of the Act. The BCCLA argues that s. 6(a) should be interpreted broadly to include psychological injury. In its view, psychological integrity is an integral part of one's physical integrity (factum, at para. 22). In the same vein, Canadian Lawyers for International Human Rights ("CLAIHR") submits that the Quebec Court of Appeal erred in holding that serious psychological trauma suffered in Canada cannot come within the exception to state immunity found at s. 6(a) of the *SIA*. In CLAIHR's view, the Court of Appeal's attempt to distinguish physical injuries from psychological injuries is inconsistent

with s. 15 of the *Charter*. Further, CLAIHR points to recent medical research suggesting that there is no distinction between psychological and physical injuries. Finally, CLAIHR argues that *Schreiber* is not a full answer to the issues in this case.

[67] Given the above arguments, the Court is being presented with two questions. First, is it necessary for the tort or civil delict which caused the death or personal injury to have occurred in Canada in order for the exception to immunity to apply? If not, is it possible for Mr. Hashemi's allegations of psychological harm to fit within the definition of "personal or bodily injury" under s. 6(a) of the Act?

[68] For ease of reference, the wording of s. 6(a) reads as follows:

A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to . . . any death or personal or bodily injury . . . that occurs in Canada.

[69] Upon first reading, the wording of s. 6(a) could be interpreted in one of two ways. For the exception to be engaged, the Act requires either (1) that the injury manifest itself in Canada, even where the acts causing the death or injury occurred outside Canada, or (2) that the acts causing injury or death occur within Canada. The wording of s. 6(a) is not nearly as clear as the language of s. 3(1) discussed earlier with respect to the exceptions.

[70] However, when the words of s. 6(a) are examined in conjunction with the purpose of the Act, it becomes apparent that the second interpretation of s. 6(a) is far

more tenable. As stated above, the purpose of the Act is to ensure that the underlying rationales for the doctrine of state immunity are upheld in Canada. If the statute were read in the manner proposed by certain of the interveners, an individual could be involved in an incident in a foreign country or be engaged in an altercation with agents of a foreign government while in that state's territory, have his or her injuries manifest themselves only upon returning to Canada, and then, once in Canada, institute proceedings against the foreign state for the extraterritorial incident. Even if the claim were not a meritorious one, a foreign state might nonetheless need to defend itself in Canada against this kind of claim. Such a situation would put the foreign state's decisions and actions in its own territory directly under the scrutiny of Canada's judiciary — the exact situation sovereign equality seeks to avoid.

[71] Further, interpreting s. 6(a) as requiring solely the injury or death to have occurred in Canada would lead to absurd results. It would mean that two individuals could suffer the exact same treatment in a foreign country, but the ability to bring a civil suit would be determined solely on the jurisdiction where each individual's injuries manifest themselves. Bork J. of the United States Court of Appeals for the District of Columbia considered a provision analogous to s. 6 in the case of *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (1984), and addressed this absurdity. Section 1605(a)(5) of the *Foreign Sovereign Immunities Act of 1976*, Pub. L. 94-583, 90 Stat. 2891, 28 U.S.C. (“FSIA”), § 1605 (a) (5), reads:

A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in [cases where money] . . . damages are sought

against a foreign state for personal injury or death, . . . occurring in the United States and caused by the tortious act or omission of that foreign state.

In determining that parents of a hostage held in Tehran could not sue Iran in American courts for emotional and mental distress suffered by them in the United States, Bork J. wrote:

Indeed, [the proposed interpretation] would have the result that had one hostage died in Tehran and another been released and died in the United States, both deaths being due to injuries inflicted while they were held hostage, the district court would have jurisdiction over the second suit but not over the first. Such results would deprive the statute of any policy coherence. [p. 843]

Indeed, this kind of distinction would be arbitrary and irrational, and cannot have been the intention of Parliament (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 310-12).

[72] By contrast, an interpretation of s. 6(a) that requires the tort causing the personal injury or death to have occurred in Canada upholds the purposes of sovereign equality without leading to absurd results. It accords with the theory of sovereign equality to allow foreign states to be sued in Canada for torts allegedly committed by them within Canadian boundaries. As explored above, sovereignty is intimately tied to independence. State independence relates to the “exclusive competence of the State in regard to its own territory” (*Island of Palmas Case (Or Miangas)*, *United States of America v. Netherlands*, Award (1928), II R.I.A.A. 829, at

p. 838; Fox and Webb, at p. 74). If a foreign state is committing torts within Canadian controlled boundaries, Canada has the competence (derived from its independence) to bring the foreign state within Canada's adjudicative jurisdiction. There would thus be a sufficient connection with the forum state to justify bringing the foreign state's actions under Canadian scrutiny. In this way, the territorial tort exception to state immunity maintains an appropriate balance between "the principles of territorial jurisdiction and state independence" (Larocque, *Civil Actions for Uncivilized Acts*, at p. 258). It enables a forum state to exercise jurisdiction over foreign states within its borders without allowing the forum state to "sit in judgment of extraterritorial state conduct" (*ibid.*). It should be noted, though, that, according to a recent I.C.J. decision, the territorial tort exception does not apply to torts allegedly committed by armed forces acting in times of conflict (*Germany v. Italy*, at para. 78; Fox and Webb, at p. 462).

[73] I am therefore in agreement with the *amicus* with regard to s. 6(a) of the *SIA*. The "personal or bodily injury" exception to state immunity does not apply where the impugned events, or the tort causing the personal injury or death, did not take place in Canada. In coming to this conclusion, I endorse the statements from the Ontario Court of Appeal in both *Bouzari* (at para. 47) and *Castle v. United States Department of Justice (Attorney General)* (2006), 218 O.A.C. 53, at para. 7, in which that court decided that s. 6 was meant to provide an exception for torts taking place on Canadian soil. Indeed, this seems to be the general international consensus

surrounding legislated tort exceptions (see H. Fox, “State Immunity and the International Crime of Torture”, [2006] *E.H.R.L.R.* 142, at p. 155).

[74] However, even if the alternative interpretation of s. 6(a) were accepted, Mr. Hashemi’s circumstance would still not fall within the exception to state immunity. The “personal or bodily injury” exception to state immunity does not apply where the alleged injury does not stem from a physical breach of personal integrity.

[75] In *Schreiber*, our Court confirmed that “the scope of the exception in s. 6(a) is limited to instances where mental distress and emotional upset were linked to a physical injury” (para. 42). Only when psychological distress manifests itself after a physical injury will the exception to state immunity be triggered. In other words, “some form of a breach of physical integrity must be made out” (at para. 62).

[76] Contrary to the submissions made by the intervener CLAIHR, *Schreiber* was neither incorrectly decided nor is the principle derived from *Schreiber* inapplicable to the case at hand. I come to these conclusions for a number of reasons.

[77] First, in order to maintain coherence with the civil law, it is necessary to interpret “*dommages corporels*” in the French version of s. 6(a) of the *SIA* as requiring physical harm (*Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168, at paras. 100-1). Second, considering the lack of ambiguity in the French wording of the provision, there is no need to resort to *Charter* values to interpret s. 6(a) (see *R. v. Clarke*, 2014 SCC 28, at para. 15). Finally, although the

facts in *Schreiber* were indeed different, the Court in that case did turn its mind to situations analogous to the present case. The Court noted that when torture involves “physical interference” with the person, *that* individual will have experienced a “*préjudice corporel*” regardless of signs of physical injury to the body (*Schreiber*, at para. 63). The “*préjudice corporel*” will not, however, extend to those who, although close to the victim, experienced a “*préjudice moral*” with no physical breach.

[78] It is my view, then, that *Schreiber* is good law and perfectly applicable to the case at hand. Even if current medical research maintains that it is often difficult to distinguish between physical and psychological injuries, I agree with the *amicus* that “[t]he fact that psychological trauma may cause physiological reactions does not alter the fact that no [physical] injuries have been pleaded as having been suffered by Mr. Hashemi” (supplemental factum, at para. 30). Mr. Hashemi did not plead any kind of physical harm or any injury to his physical integrity. Therefore, his claim is barred by the statute on two grounds. First, the alleged tort did not “occu[r] in Canada” within the meaning of the *SIA*. Second, Mr. Hashemi has not claimed any “*dommag[e] corpore[l]*” which could potentially have brought him within the exception stated at s. 6(a), had the tort occurred in Canada.

D. *Applicability of the State Immunity Act to Public Officials Mr. Bakhshi and Mr. Mortazavi*

[79] The final issue relating to statutory interpretation is whether Saeed Mortazavi and Mohammad Bakhshi are immune from legal action by operation of the

SIA. The resolution of this issue hinges on answering three questions, namely: (1) Are public officials acting in their official capacity included in the term “government” as it is used in the *SIA*? (2) Were Mr. Mortazavi and Mr. Bakhshi acting in their official capacity in their interactions with Ms. Kazemi? and (3) Can acts of torture be “official acts” for the purposes of the *SIA*? In my view, the above questions must be answered in the affirmative, with the result that Mr. Mortazavi and Mr. Bakhshi are immune from civil suit in the underlying claim pursuant to s. 3(1) of the *SIA*.

(1) Are Public Officials Acting in Their Official Capacity Included in the Term “Government” As It Is Used in the *State Immunity Act*?

[80] Section 3(1) of the *SIA* provides that a “foreign state” is immune from the jurisdiction of any court in Canada. “Foreign state” is defined in s. 2 as follows:

“foreign state” includes

(a) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,

(b) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and

(c) any political subdivision of the foreign state;

[81] The appellants submit that the courts below erred in holding that the *SIA* extends to all state officials acting within the scope of their duties. They argue that the only beneficiaries of immunity under the Act are the legal entity of the foreign state

and the sovereign or other head of state when acting in a public capacity. In their view, unless foreign officials claim diplomatic or consular immunity, they will be subject to common law immunities and the private international law rules of every province.

[82] The *amicus* takes the position that all foreign public officials acting in their official capacity (i.e., civil servants, government employees, functionaries, etc.) fall within the purview of the term “government” under s. 2 of the *SIA*. The *amicus* notes that although “government” is not defined in the *SIA*, the use of the term elsewhere in the Act supports an interpretation of “government” that includes individual public officials. Further, the term “government” under the *Charter* and in other contexts includes public officials.

[83] According to the intervener Redress Trust Ltd. (“Redress”), immunity for torture should not extend to foreign public officials. In its opinion, under international law, individual perpetrators of torture cannot avoid accountability for their wrongful conduct by hiding behind their official status. In its view, permitting the appellants’ claim does not undermine the principle of state immunity any more than what is already allowed by the principle of individual criminal responsibility of state officials under international criminal law.

[84] On the plain wording of the Act, it is unclear which actors Parliament intended to capture when it included the term “government” in the definition of “foreign state”. The term “government” is capable of referring to many different

entities and individuals, including but not limited to: legislatures, the executive, entities receiving government funding and which are subject to government control, and public officials. The absence of an explicit reference to “public officials” in the Act requires that the term “government” be interpreted in context, and, as previously mentioned, against the backdrop of international law.

[85] At the outset, I note that the definition of the term “foreign state” at s. 2 of the *SIA* is open-ended, as indicated by the use of the word “includes”. When this statutory language is placed in context, in conjunction with the purpose of the Act, it becomes clear that public officials must be included in the meaning of “government” in s. 2 of the *SIA*. The reality is that governmental decisions are carried out by a state’s servants and agents. States are abstract entities that can only act through individuals. Significantly, s. 14(1)(c) of the Act provides that a certificate issued by the Minister of Foreign Affairs as to whether a person or *persons* are to be regarded as the head or government of a foreign state is conclusive evidence of any matter that is stated in it. It is difficult to conceive of a reason for which “persons” might be regarded as “government” under the Act if not to be provided immunity pursuant to s. 3(1).

[86] This contextual interpretation, dictated by common sense, is further supported by the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (2004) (not yet in force), which defines “State” as including “representatives of the State acting in that capacity” (art. 2(1)(b)(iv)). It is also

supported by international jurisprudence, reflecting a growing consensus on this issue in a number of jurisdictions: see *Jones v. United Kingdom*, at paras. 96 and 202; *Prosecutor v. Blaškić* (1997), 110 I.L.R. 607, at p. 707; *Jones v. Ministry of the Interior of Saudi Arabia*, at paras. 30 and 65-69.

[87] Excluding public officials from the meaning of government would completely thwart the purposes of the *SIA*. I agree with the following statement of the European Court of Human Rights:

Since an act cannot be carried out by a State itself but only by individuals acting on the State's behalf, where immunity can be invoked by the State then the starting point must be that immunity . . . applies to the acts of State officials. If it were otherwise, State immunity could always be circumvented by suing named officials.

(*Jones v. United Kingdom*, at para. 202)

[88] Within Canada itself, the Ontario Court of Appeal noted in *Jaffe v. Miller* (1993), 13 O.R. (3d) 745, that public officials were not included under the Act:

To avoid having its action dismissed on the ground of state immunity, a plaintiff would have only to sue the functionaries who performed the acts. In the event that the plaintiff recovered judgment, the foreign state would have to respond to it by indemnifying its functionaries, thus, through this indirect route, losing the immunity conferred on it by the Act. [p. 759]

[89] The appellants argue that a civil suit against the two individual respondents — even if it were successful — would not necessarily lead to an award of damages against the state, and therefore Iran would not necessarily suffer any

financial loss. In their view, the proceedings against Mr. Mortazavi and Mr. Bakhshi would have the effect of jeopardizing only the personal patrimony of those two individuals (A.F., at para. 167).

[90] Even if the appellants were correct in their contention, a matter of which I am not convinced, their argument is premised on a misunderstanding of the purposes of state immunity. Avoiding both the enforcement of an award of damages against a state and the state's indemnification of its agents are but two of the many purposes served by state immunity. In practice, suing a government official in his or her personal capacity for acts done while in government has many of the same effects as suing the state, effects that the *SIA* seeks to avoid. Allowing civil claims against individual public officials would in effect require our courts to scrutinize other states' decision making as carried out by their public officials. The foreign state would suffer very similar reputational consequences, could be forced to defend itself in Canada, and could still potentially suffer the same costs than if it were found liable itself (if, for example, the individual defendants attempted to obtain indemnification from the state domestically). In *Jones v. Ministry of the Interior of Saudi Arabia*, Lord Bingham reached the same conclusion while considering a slightly different argument:

It is, however, clear that a civil action against individual torturers based on acts of official torture does indirectly implead the state since their acts are attributable to it. Were these claims against the individual defendants to proceed and be upheld, the interests of the Kingdom [of Saudi Arabia] would be obviously affected, even though it is not a named party.
[para. 31]

[91] The appellants also rely on the U.S. Supreme Court decision in *Samantar v. Yousuf*, 560 U.S. 305 (2010) (“*Samantar*”), to argue that the *SIA* does not apply to public officials. In *Samantar*, victims of torture in Somalia sought damages from Mohamed Ali Samantar, the former Prime Minister of Somalia. The question before the U.S. Supreme Court was whether the *FSIA* provided immunity to an individual sued for actions taken in his official capacity. The court interpreted the *FSIA*, and concluded that the definition of “foreign state” does not include an official acting on behalf of the foreign state. Thus, the court held that foreign official immunity is governed by the common law.

[92] *Samantar* is distinguishable from the present case. The decision in *Samantar* hinged on the specific language found at § 1603 of the *FSIA*. A number of differences between Canadian and U.S. legislation render *Samantar* inapplicable to the case at hand. First, as the *amicus* points out, the *FSIA* does not contain a definition of “foreign state” which includes “government”, the precise word our Court is tasked with interpreting in the instant case. Second, in the *FSIA*, when Congress intended to refer to officials, it did so expressly. The express mention of officials in some parts of the *FSIA* but not in the definition of “foreign state” indicates that Congress did not intend to include officials in the broader definition of “foreign state” under § 1603. Unlike the *FSIA*, express reference to officials can be found nowhere in the *SIA*. Therefore, the statutory interpretation argument of “implied exclusion”, which was helpful to the U.S. Supreme Court in *Samantar*, cannot be made in our case (see generally Sullivan, at p. 244).

[93] Given the above, I conclude that public officials, being necessary instruments of the state, are included in the term “government” as used in the *SIA*. That being said, public officials will only benefit from state immunity when acting in their official capacity. This conclusion leads me to the question of whether the individual respondents were acting in their official capacity when they allegedly tortured Ms. Kazemi so as to render them immune from civil proceedings in Canada.

(2) Were Mr. Mortazavi and Mr. Bakhshi Acting in Their Official Capacity When Carrying out the Torture of Ms. Kazemi?

[94] The appellants’ pleadings state that Mr. Mortazavi, the Chief Public Prosecutor for Tehran, ordered, oversaw, and actively participated in Ms. Kazemi’s torture. The pleadings further state that Mr. Bakhshi, in his former role as the Deputy Chief of Intelligence for Evin prison, interrogated, assaulted and tortured Ms. Kazemi. Moreover, the facts as pleaded state that Ms. Kazemi’s ordeal occurred on government premises, namely in the prison and in the military hospital, and that Ms. Kazemi was at all times under government control, even, sadly, after her death. The news of Ms. Kazemi’s death was reported by a government agency. In short, based on the allegations alone, the acts committed by Mr. Mortazavi and Mr. Bakhshi have all the bearings of official acts, and no suggestion was made that either of these public officials were acting in their personal capacity or in a way that was unconnected to their roles as state functionaries.

[95] Though the acts allegedly committed by Mr. Mortazavi and Mr. Bakhshi shock the conscience, I am not prepared to accept that the acts were unofficial merely because they were atrocious. The question to be answered is not whether the acts were horrific, but rather, whether the acts were carried out by the named respondents in their role as “government”. The heinous nature of torture does not transform the actions of Mr. Mortazavi and Mr. Bakhshi into private acts, undertaken outside of their official capacity. On the contrary, it is the state-sanctioned or official nature of torture that makes it such a despicable crime.

[96] Unsurprisingly, the very definition of torture contained in the *CAT* requires that it be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity” (art. 1). For clarity, and to address my colleague Justice Abella’s concern, it is the official nature of the conduct which gives rise to torture, and not the opposite. In this sense, I am of the view that torture is an official act in the circumstances of the present case. Support for this conclusion can be found in the reasoning of Lord Bingham and Lord Hoffman in the case of *Jones v. Ministry of the Interior of Saudi Arabia*, upheld as sound by the European Court of Human Rights. I agree with Lord Bingham that, by definition, torture is necessarily an official act of the state. He wrote:

It is, I think, difficult to accept that torture cannot be a governmental or official act, since under article 1 of the Torture Convention torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting in an official capacity. [para. 19]

Lord Hoffman noted that if certain governmental acts are “official enough” to come under the *CAT*, they are also “official enough” to attract immunity (para. 83).

[97] I generally agree. It is logically difficult for the appellants to simultaneously claim that the acts done to Ms. Kazemi fall within the definition of torture and thereby engage the protection of art. 14 of the *CAT*, but that the acts are not official enough to trigger immunity. I would, however, note that wilful blindness by a state to the activities of private individuals or groups carried out for the benefit of that state may be a rare case where torture may meet the official definition in art. 14, but where state immunity would not necessarily be conferred on the individuals committing the acts. But, that is not the case before us.

[98] As a result, the *SIA* applies to Mr. Mortazavi and Mr. Bakhshi. Given that they were public officials acting in their official capacity, Mr. Mortazavi and Mr. Bakhshi are captured by the term “government” found at s. 2 of the *SIA*. By virtue of that statute, they are immune from the jurisdiction of Canadian courts.

(3) Can Acts of Torture be “Official Acts” for the Purposes of the *State Immunity Act*?

[99] The intervener the Canadian Centre for International Justice (“CCIJ”) submits that *jus cogens* violations, such as acts of torture, can never constitute

“official conduct” under international and common law. The CCIJ therefore implicitly invites this Court to construe the term “government” as excluding public officials engaging in acts of torture. Unlike certain interveners who call for a blanket exception to state immunity in cases of torture, the exception proposed by the CCIJ would apply only to public officials.

[100] My colleague Justice Abella’s dissent appears to echo in part the CCIJ’s submissions. As I understand it, my colleague suggests that the meaning of “government” in s. 2 of the *SIA* must be construed in accordance with customary international law. According to my colleague, the right to reparation for violations of human rights and the non-official nature of acts done in violation of *jus cogens* are two rules of customary international law which together call for a construction of “government” that excludes government officials conducting acts of torture. With respect, this conclusion is based on a number of arguments that are inconsistent with the current state of relevant law, including customary international law.

[101] As far as the right to reparation is concerned, I find no evidence in the cases reviewed by my colleague demonstrating the existence of a rule of customary international law to the effect that courts have universal civil jurisdiction to hear civil cases alleging acts in violation of *jus cogens*. On the contrary, most of these cases have affirmed state immunity in civil proceedings alleging acts of torture. However, even if such a rule of customary international law existed, it would have to be weighed against other rules of customary international law and, namely the rule of

state immunity. As the I.C.J. found in a similar context, I see no contradiction in the co-existence of a right to reparation and state immunity (*Germany v. Italy*, at paras. 92-96).

[102] Further, my colleague Justice Abella concludes that states are moving towards the proposition that government officials are not immune from civil suits for torture. Her reasons point to the equivocal state of the customary international law of immunity for violations of *jus cogens* norms as an indication that public officials may be sued in our domestic courts for torture committed aboard (para. 3). But customary international law is, by its very nature, unequivocal. It is not binding law if it is equivocal. In the absence of consistent state practice one way or another, and of *opinio juris* as to the binding effect of a state practice, no rule of customary international law is established. The “state of flux” of international law pertaining to official immunities for *jus cogens* violations is such that it may not be used to interpret domestic legislation or the common law in the same manner that courts might employ customary international law (see, for example, *Hape*, at para. 39). As a result, the presumption of conformity cannot be considered in construing the terms of the *SIA* (discussed in *Hape*, at paras. 53-54). With respect, international jurisprudence is at best “equivocal” concerning this area of the law. There is still very strong support for the conclusion that immunity from civil suits extends to public officials engaging in acts of torture, and it is therefore not possible to conclude that either a consistent state practice or *opinio juris* to the contrary effect exists (*Jones v. Ministry*

of the Interior of Saudi Arabia; Jones v. United Kingdom; Germany v. Italy; Democratic Republic of Congo v. Belgium; Al-Adsani v. United Kingdom).

[103] While an exception to immunity for *jus cogens* violations exists in the criminal context, no such exception has developed in the civil context. My colleague Justice Abella as well as Breyer J. of the United States Supreme Court take issue with this distinction, essentially arguing that the existence of universal criminal jurisdiction contemplates the existence of universal civil jurisdiction as well (*Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), at pp. 762-63). In my view, principled grounds justify the distinction between the exception to immunity in the civil versus the criminal context. These include the “long pedigree” of exceptions to immunity in criminal proceedings, and the “screening mechanisms” that are available to governments in criminal suits as compared to civil suits (see generally C. A. Bradley and L. R. Heffler, “International Law and the U.S. Common Law of Foreign Official Immunity” (2010), *Sup. Ct. Rev.* 213, at pp. 247-48).

[104] Whether or not these distinctions are convincing as a matter of policy is of secondary importance. The fact of the matter is that Canada has expressly created an exception to immunity for criminal proceedings, and has stopped short of doing so for civil suits involving *jus cogens* violations (*SIA*, s. 18; a similar exception also exists in the United Kingdom’s *State Immunity Act 1978*, c. 33, s. 16(4)). Much like the I.C.J., I am convinced that the fact that universal criminal jurisdiction exists has no bearing in the present case (*Germany v. Italy*, at para. 87). The two types of

proceeding are seen as fundamentally different by a majority of actors in the international community (*Jones v. Ministry of the Interior of Saudi Arabia*, at paras. 20 and 32).

[105] Further, there is a significant practical difficulty in allowing an exception to state immunity in civil suits alleging acts of torture committed abroad. Unlike the exceptions that are expressly set out in the *SIA* and which rely on preliminary or ancillary facts, an exception based on violations of *jus cogens* would require a judge seized of a matter raising allegations of torture to inquire into the merits of the claim at a preliminary stage regardless of whether those allegations are grounded in fact. In effect, a foreign defendant would be forced to mount a defence against the substance of a claim alleging acts of torture merely to obtain a determination of whether he or she is immune from suit. This clearly defeats the purpose of state immunity, namely to bar a court from hearing a case on its merits *in limine*. In theory, the same practical difficulty applies to criminal proceedings involving violations of *jus cogens*. However, the decision to bring criminal charges against a foreign state official is made based on the strength of investigations and legal opinions. In practice, this filters out vexatious charges.

[106] While the Fourth Circuit United States Court of Appeals has recently decided that torture cannot be qualified as an official act for the purposes of immunity (*Yousuf v. Samantar*, 699 F.3d 763 (2012) (“*Samantar II*”) (appeal pending)), that case is of little weight in light of conflicting jurisprudence from other Circuits and the

pending appeal of that decision to the Supreme Court of the United States (*Matar v. Dichter*, 563 F.3d 9 (2nd Cir. 2009); *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Circuit 2008); *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004)). Moreover, *Samantar II* was decided in the context of a very different legislative and governmental backdrop. The court in that case expressly stated that Congress's enactment of the *Torture Victim Protection Act of 1991*, Pub. L. 102-256, 106 Stat. 73, was "instructive" in reaching its determination (p. 774). The court also gave "substantial weight" to the Statement of Interest issued by the State Department suggesting that the court should deny the foreign defendant immunity (p. 773). Essentially, the court relied heavily on governmental intentions when deciding to deny immunity.

[107] In the case at hand, Canada has no equivalent to the *Torture Victim Protection Act of 1991* that would create a cause of action for torture committed abroad, nor have we been presented with a statement of any sort from the government suggesting that Mr. Mortazavi and Mr. Bakhshi should be denied immunity. Parliament has given no indication whatsoever that the courts are to deem torture an "unofficial act" and that a universal civil jurisdiction has been created allowing foreign officials to be sued in our courts. Creating this kind of jurisdiction would have a potentially considerable impact on Canada's international relations. This decision is to be made by Parliament, not the courts.

[108] I further note that the development of the common law should be gradual and that it should develop in line with norms accepted throughout the international

community. As was determined in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, “[c]ertainty in the law requires that courts follow and apply authoritative precedents. Indeed, this is the foundational principle upon which the common law relies” (para. 38). The common law should not be used by the courts to determine complex policy issues in the absence of a strong legal foundation or obvious and applicable precedents that demonstrate that a new consensus is emerging. To do otherwise would be to abandon all certainty that the common law might hold. Particularly in cases of international law, it is appropriate for Canadian courts only to follow the “bulk of the authority” and not change the law drastically based on an emerging idea that is in its conceptual infancy (*Jones v. United Kingdom*, at para. 213). The “bulk of the authority” in this situation confirms that a “[s]tate’s right to immunity may not be circumvented by suing its servants or agents instead” (ibid.).

[109] Given the definition of torture outlined above and the lack of evidence of an exception to state immunity for a *jus cogens* violation, I hold that it is possible for torture to be an official act. I agree with Lord Hoffman in *Jones v. Ministry of the Interior of Saudi Arabia* that “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” or by the forum state (para. 63).

[110] This therefore confirms that neither Mr. Hashemi nor Ms. Kazemi’s estate may avail themselves of a Canadian court in order to sue Iran or its

functionaries for Ms. Kazemi's torture and death. The next question becomes whether the *SIA*, as interpreted, withstands constitutional scrutiny.

E. *The State Immunity Act and the Canadian Bill of Rights*

[111] Section 2(e) of the *Bill of Rights* provides that "no law of Canada shall be construed or applied so as to . . . deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations".

[112] The appellants argue that, as a quasi-constitutional statute, the *Bill of Rights* should be given a liberal and purposive interpretation. The appellants submit that the *SIA* does not extinguish substantive rights, but rather creates a procedural bar, and that this procedural bar is incompatible with the fairness guarantees contained in s. 2(e) of the *Bill of Rights*.

[113] The Attorney General of Canada argues that the *Bill of Rights* only protects rights that existed when it was enacted in 1960. At that time, foreign states enjoyed absolute immunity. Since, in 1960, there was no right to sue a foreign state for tortious acts committed abroad, the appellants' argument that s. 2(e) of the *Bill of Rights* guarantees an ability to sue cannot succeed.

[114] The Attorney General of Canada further submits that, in any event, s. 2(e) of the *Bill of Rights* does not provide a right of access to courts or a right to sue, but is

merely a procedural right to natural justice within an existing adjudicative process. Where no existing process is in place or where, as here, Canadian courts are statutorily barred from exercising adjudicative jurisdiction, s. 2(e) does not apply.

[115] The Iran Human Rights Documentation Center (“IHRDC”) submits that the appellants cannot obtain a fair hearing in Iran, and as such, the *SIA* contravenes s. 2(e) of the *Bill of Rights*. In its view, this Court’s jurisprudence and international law maintain that a fair hearing requires an independent judiciary not subject to political influence or outside pressure. The IHRDC submits that Iran lacks this impartial and independent judicial system.

[116] I agree with the Attorney General of Canada that the challenge based on s. 2(e) of the *Bill of Rights* should be dismissed on the basis that s. 2(e) does not create a self-standing right to a fair hearing where the law does not otherwise allow for an adjudicative process. Instead, s. 2(e) guarantees fairness in the context of a hearing before a Canadian court or a tribunal.

[117] In *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40, the Court held that s. 2(e) of the *Bill of Rights* did not impose a duty upon Parliament to provide a hearing to veterans prior to the adoption of legislation that would affect their financial interests. The Court concluded that “[the *Bill of Rights*] protections are operative only in the application of law to individual circumstances in a proceeding before a court, tribunal or similar body” (para. 61). Thus, s. 2(e) was

found to only apply in the context of a proceeding before a court or tribunal; it does not create a right to a hearing where none otherwise exists by operation of law.

[118] To engage the right to a fair hearing guaranteed by s. 2(e), a court or tribunal must properly have jurisdiction over a matter. State immunity is a procedural bar that blocks the exercise of jurisdiction before a hearing can even take place. Therefore, it is irrelevant that a person's substantive claim has not been extinguished. The existence of state immunity means that regardless of an underlying substantive claim and of its merits, no jurisdiction exists in Canada to adjudicate that claim. Similarly, the applicability of state immunity does not depend on the impartiality of the judicial system of the foreign state. The jurisdictional bar exists notwithstanding the lack of fair proceedings or of an impartial judicial structure in the foreign state. Section 2(e) of the *Bill of Rights* does not operate to remove this type of jurisdictional prohibition. Rather, s. 2(e) guarantees a fair procedure only when a process is already in place in Canada to determine individuals' rights.

[119] For that reason, *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, does not assist the appellants in this case. In *Singh*, the Court was tasked with determining whether the procedures for adjudicating refugee status contained in the *Immigration Act, 1976*, S.C. 1976-77, c. 52, were in accordance with s. 7 of the *Charter* and s. 2(e) of the *Bill of Rights*. Although three of the six judges who took part in that judgment concluded that the adjudicative procedures were in conflict with s. 2(e), it should be stated that access to an adjudicator was already

foreseen within the framework of the *Immigration Act, 1976*. By contrast, in the case at hand, no access to a method of resolution exists. State immunity prohibits that access. Much more analogous to the present situation is the case of *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 S.C.R. 866.

[120] In *Amaratunga*, the Court upheld the principles set out in *Authorson* in the context of jurisdictional immunity of international organizations. In that case, a former employee sued an international organization for wrongful dismissal in the Nova Scotia Supreme Court. The organization successfully claimed immunity from the action under the *Northwest Atlantic Fisheries Organization Privileges and Immunities Order, SOR/80-64*. The Court concluded that the organization was entitled to immunity from the wrongful dismissal claim and that s. 2(e) of the *Bill of Rights* was not infringed. The Court relied on *Authorson* and the *Quebec Court of Appeal* decision in the present appeal:

As for the *Canadian Bill of Rights*, the “right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations” recognized in s. 2(e) does not create a substantive right to make a claim. Rather, it provides for a fair hearing if and when a hearing is held. (See also *Islamic Republic of Iran v. Hashemi*, 2012 QCCA 1449, [2012] R.J.Q. 1567, at para. 109; *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40, at paras. 59-61.) . . .

...

The fact that the appellant has no forum in which to air his grievances and seek a remedy is unfortunate. However, it is the nature of an immunity to shield certain matters from the jurisdiction of the host state’s courts. [Emphasis added; paras. 61 and 63.]

The same holds true in the instant case. Section 2(e) of the *Bill of Rights* does not apply to this situation. It offers protection only if and when a hearing is held.

F. *The Charter and the Constitutionality of the State Immunity Act*

[121] The final question to be determined on this appeal is whether s. 3(1) of the *SIA* infringes s. 7 of the *Charter*. In the following part of my reasons, I first consider whether the appellants have established that the impugned law imposes limits on security of the person, thus engaging s. 7. I then consider whether any such limits on security of the person are in violation of the principles of fundamental justice.

(1) Security of the Person

[122] The appellants argue that s. 3(1) exacerbates trauma because it bars an individual from seeking redress after they or a family member has been tortured. This aggravation of the trauma exceeds the threshold required to trigger a security of the person interest. In oral argument, the appellants posited that, when torture is being carried out “with impunity”, there can be no doubt that a victim or a family member of a victim, a person of reasonable sensibility, would feel psychological distress beyond the ordinary anxiety caused by the vicissitudes of life (transcript, at pp. 13-14).

[123] The Attorney General of Canada responds that s. 7 of the *Charter* is not engaged because Mr. Hashemi alleges only that he has suffered psychological harm flowing from the torture suffered by his mother and the inability to seek redress in Iran, and not harm resulting from his inability to sue Iran whilst in Canada. In addition, the Attorney General of Canada points out that there is no evidence to show that a prohibition on civil proceedings hampers the rehabilitation of victims of torture (factum, at para. 98). Finally, the Attorney General posits that the harm suffered by Mr. Hashemi was neither “profound [nor] serious” as is required by s. 7 (para. 101).

[124] The intervener Redress takes the position that international law supports Mr. Hashemi’s claim that s. 3(1) of the *SIA* has operated to cause him psychological trauma. Redress submits that a substantial body of international jurisprudence supports the position that denying an effective remedy for torture causes psychological harm. In its view, this denial of redress is so psychologically harmful to victims and their next of kin that s. 7 of the *Charter* is engaged.

[125] State action may engage security of the person when that action has an impact on an individual’s psychological integrity (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, and *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307). In *G. (J.)*, Chief Justice Lamer wrote, that in order to engage the security of the person,

the impugned state action must have a serious and profound effect on a person’s psychological integrity. The effects . . . must be assessed objectively, with a view to their impact on the psychological integrity of a

person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety. [Emphasis added; para. 60.]

[126] As Bastarache J. noted in *Blencoe*, when psychological integrity is at issue, two requirements must be met in order to trigger the right to security of the person. First, the psychological prejudice that an individual experiences must be serious. Second, there must be a sufficient causal connection between the psychological prejudice and the actions of the state so that the harm may be said to result from state action (*Blencoe*, at para. 57).

(a) *Does the Inability to Seek Civil Redress Impose Serious Psychological Prejudice on Victims of Torture and Their Immediate Families?*

[127] It is suggested that laws that prohibit victims of torture and their immediate family members from seeking redress through civil proceedings may be seen as having harmful psychological effects. In this case, Mr. Hashemi's mother was beaten, was sexually assaulted, and died in Iran. Due to the *SIA*, Mr. Hashemi cannot seek civil redress in Canada for these atrocities. The question is: does the effect of s. 3(1) of the *SIA* cause a victim of torture or their next of kin such serious harm so as to engage the s. 7 security of the person interest?

[128] Although it would be preferable to have this evidence admitted through properly qualified experts at the trial level, I am prepared to accept as a general proposition for the sake of argument alone that impunity for torture can cause significant psychological harm to victims of torture and their family members. This position finds support in international jurisprudence.

[129] The Inter-American Court of Human Rights has made a number of statements regarding the effect of impunity on victims of torture or their next of kin. One of the strongest of such statements is found in *Case of Tibi v. Ecuador* (2004), Inter-Am. Ct. H.R. (Ser. C) No. 114, in which Cançado Trindade J. noted in his separate opinion:

Impunity worsens the psychological suffering inflicted both on the direct victim and on his or her next of kin and other persons with whom he or she lived. Actually, it causes new psychosocial damage. Covering up what happened, or indifference regarding the criminal acts, constitutes a new aggression against the victim and his or her next of kin, disqualifying their suffering. The realization of justice is, therefore, extremely important for the rehabilitation of the victims of torture (as a form of reparation), since it attenuates their suffering, and that of their beloved ones, by recognizing what they have suffered. [para. 33]

(See also *Case of Bámaca Velásquez v. Guatemala* (2002), Inter-Am. Ct. H.R. (Ser. C) No. 91, at paras. 64-65.)

[130] While it is not clear that a lack of civil redress due to state immunity is tantamount to impunity, it is not an exaggeration to say that the interest in finding closure after suffering torture touches upon the core of human dignity. If an inability

to seek civil redress prohibits victims of torture or their next of kin from finding closure, I accept that it causes them serious psychological harm.

(b) *Is there a Sufficient Causal Connection Between the Alleged Harm and the State Action?*

[131] While the most severe and immediate source of the psychological harm suffered by Mr. Hashemi in the instant situation is undeniably the torture suffered by Ms. Kazemi in Iran, this would not necessarily eliminate any contributory role of Canada to Mr. Hashemi's suffering. As we stated in *Bedford*, "[a] sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant" (para. 76; see also *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 21).

[132] In terms of causation, this case presents many similarities to *Bedford*. In *Bedford*, the Attorneys General of Canada and Ontario argued that "the source of the harm [was] third parties — the johns who use and abuse prostitutes and the pimps who exploit them" (para. 84). The Court dismissed that argument and stated:

It makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against those risks. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence. [para. 89]

[133] In this case, the Attorney General of Canada argues that Iran, not Canada, caused the immediate harm suffered by Ms. Kazemi and Mr. Hashemi due to both the torture Iranian officials inflicted and Iran's ineffective justice system. However, it is irrelevant whether the torture in Iran is the immediate source of the harm suffered by Mr. Hashemi. If evidence properly introduced at trial demonstrated that the *SIA* deprives people whose family members have been tortured of the ability to heal from the trauma that they have experienced, the Canadian state might, nonetheless, have sufficiently contributed to causing serious psychological harm. Therefore, for the purpose of engaging s. 7, the fact that the foreign state caused the original violence would not necessarily diminish the role of the Canadian state in impeding the healing of Canadian victims of torture or their family members.

[134] Based on the above analysis, it is arguable that s. 3(1) of the *SIA* might cause such serious psychological prejudice that the security of the person is engaged and violated. But, in any event, I do not find it necessary to decide whether s. 3(1) of the *SIA* engages the security of the person interest under s. 7 of the *Charter*, given my conclusion (discussed below) that the operation of s. 3(1) does not violate any principles of fundamental justice.

(2) Principles of Fundamental Justice

[135] In order to conclude to a breach of s. 7 of the *Charter*, it must be demonstrated that a principle of fundamental justice has been violated due to the application of s. 3(1) of the *SIA* to the claims at issue.

[136] The appellants argue that given (a) Canada's domestic laws on torture, (b) Iran's failure to deliver justice to the appellants, and (c) Canada's international law obligations by virtue of art. 14(1) of the *CAT*, the blanket immunity provided by the *SIA* in this particular case is incompatible with principles of fundamental justice. The appellants submitted in oral argument that art. 14 requires Canada to ensure that a civil remedy be available to victims of torture committed in foreign countries and that this obligation is a principle of fundamental justice within the meaning of s. 7 (transcript, at p. 15).

[137] The respondent the Attorney General of Canada argues that the appellants adopt an erroneous approach to s. 7 of the *Charter* by failing to identify a specific principle of fundamental justice that has been violated by Canadian state action in this case. The respondent submits that international law does not support the appellants' reading of art. 14 of the *CAT* and that, in interpreting art. 14 in this matter, the appellants are effectively asking our Court to recognize a new, substantive principle: the right to a civil remedy in Canada for victims of torture. He further submits that the claimed right to a civil remedy in Canada for victims of torture does not meet the criteria for a new principle of fundamental justice.

[138] For ease of reference, art. 14 of the *CAT* reads:

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

[139] In order for a rule or principle to be a principle of fundamental justice, “it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person” (*R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 113).

[140] There is no consensus that art. 14 should be interpreted in the manner the appellants suggest. In fact, although conflicting views have been vigorously advanced, the interpretation of art. 14 by some party states and by international and domestic judicial authorities support the respondent’s contention that art. 14 ensures redress and compensation for torture committed within the forum state’s own territorial jurisdiction.

[141] First, both the United States and Canada have taken the position that art. 14 does not require ratifying states to provide civil remedies for torture committed in foreign countries. When the U.S. provided notice of its ratification of the *CAT* in 1994, it expressed its understanding “that Article 14 requires a state party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that state party” (*Jones v. Ministry of the Interior of Saudi Arabia*, at para. 20). As the Attorney General and the *amicus* point out, Canada has also confirmed that art. 14 establishes an obligation to ensure redress where an act of torture took place within the state’s own jurisdiction — not where the torture

occurred outside the forum state (United Nations, *Review of Canada's Sixth Report on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2012) (online), at para. 339). Although the interpretation of an article by a limited number of party states is non-determinative of that article's meaning, there is no evidence that the majority of signatories interpret art. 14 in the manner that the appellants contend (M. Nowak and E. McArthur, with the contribution of K. Buchinger et al, *The United Nations Convention Against Torture: A Commentary* (2008), at pp. 492 and 502).

[142] Further, national and international jurisprudence heavily favours the Attorney General's interpretation of the *CAT*. In fact, neither the appellants nor the interveners have identified a single court or international tribunal that has interpreted art. 14 in the way they suggest.

[143] In *Jones v. Ministry of the Interior of Saudi Arabia*, one of the issues before the House of Lords was whether the U.K. was required to provide legal redress under art. 14 of the *CAT*. The House of Lords concluded:

Secondly, article 14 of the Torture Convention does not provide for universal civil jurisdiction. It appears that at one stage of the negotiating process the draft contained words, which mysteriously disappeared from the text, making this clear. But the natural reading of the article as it stands in my view conforms with the US understanding noted above, that it requires a private right of action for damages only for acts of torture committed in territory under the jurisdiction of the forum state. This is an interpretation shared by Canada, as its exchanges with the Torture Committee make clear. The correctness of this reading is confirmed when comparison is made between the spare terms of article 14 and the much

more detailed provisions governing the assumption and exercise of criminal jurisdiction. [para. 25]

[144] As stated above, the European Court of Human Rights recently confirmed this decision: *Jones v. United Kingdom*. That court noted that no decision of the I.C.J. or of any international arbitral tribunal had interpreted art. 14 as requiring ratifying states to provide civil remedies for torture committed abroad (para. 208).

[145] Furthermore, the appellants' interpretation of art. 14 is not necessarily supported by the language of that provision. It is true that art. 14 does not expressly state that there is a territorial limit on a state's obligation to provide civil recourse for torture. As the appellants point out, this can be contrasted with other provisions of the *CAT* which create obligations limited to the "territory under [the state's] jurisdiction" (see, for example, art. 12). However, the wording of art. 14 can also be contrasted with art. 5(1)(c), which expressly grants a state universal criminal jurisdiction when the victim of torture is a national of that particular state and the state deems the establishment of jurisdiction appropriate (see Larocque, *Civil Actions for Uncivilized Acts*, at p. 261). I am therefore not convinced that the absence of an express territorial limit can be determinative of the meaning of art. 14.

[146] Finally, the appellants rely on comments made by the United Nations Committee against Torture, a committee established to monitor and report on states' compliance with the *CAT*. The intervener the Canadian Bar Association urges the Court to place heavy reliance on the Committee's comments. The Committee has

clearly expressed the view that art. 14 requires states to provide a means of redress to all victims of torture, regardless of where the torture was committed. For example, in its *General comment No. 3 (2012): Implementation of article 14 by State parties* (online), released in December 2012, the Committee stated:

The Committee considers that the application of article 14 is not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party. The Committee has commended the efforts of States parties for providing civil remedies for victims who were subjected to torture or ill-treatment outside their territory. This is particularly important when a victim is unable to exercise the rights guaranteed under article 14 in the territory where the violation took place. Indeed, article 14 requires States parties to ensure that all victims of torture and ill-treatment are able to access remedy and obtain redress.

...

Similarly, granting immunity, in violation of international law, to any State or its agents or to non-State actors for torture or ill-treatment, is in direct conflict with the obligation of providing redress to victims. When impunity is allowed by law or exists de facto, it bars victims from seeking full redress as it allows the violators to go unpunished and denies victims full assurance of their rights under article 14. The Committee affirms that under no circumstances may arguments of national security be used to deny redress for victims. [paras. 22 and 42]

[147] In my view, despite their importance, the Committee's comments should not be given greater weight than the pronouncements of state parties and judicial authorities. If anything, the Committee's comments only indicate that there is an absence of consensus around the interpretation of art. 14. When a party points to a provision in an international treaty as evidence of a principle of fundamental justice, a court must determine (a) whether there is significant international consensus regarding the interpretation of the treaty, and (b) whether there is consensus that the

particular interpretation is fundamental to the way in which the international legal system ought to fairly operate (*Malmo-Levine*, at para. 113; *Suresh*, at para. 46). The absence of such consensus weighs against finding that the principle is fundamental to the operation of the legal system. As indicated above, when it comes to art. 14, no such consensus exists.

[148] Further, while the Committee's comments may be helpful for purposes of interpretation (see *Suresh*, at para. 73), they do not overrule adjudicative interpretations of the articles in the *CAT* (*Jones v. Ministry of the Interior of Saudi Arabia*, at para. 23). At best, they form part of a dialogue within the international community where no consensus has yet developed on an interpretation of art. 14 that would recognize the existence of a mandatory universal civil jurisdiction for acts of torture committed outside the boundaries of contracting states.

[149] Even if we were to adopt the appellants' interpretation of art. 14 and there was international consensus on this issue, it must be noted that the existence of an article in a treaty ratified by Canada does not automatically transform that article into a principle of fundamental justice. Canada remains a dualist system in respect of treaty and conventional law (Currie, at p. 235). This means that, unless a treaty provision expresses a rule of customary international law or a peremptory norm, that provision will only be binding in Canadian law if it is given effect through Canada's domestic law-making process (*Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 69;

Capital Cities Communications Inc. v. Canadian Radio-Television Commission, [1978] 2 S.C.R. 141, at pp. 172-73; Currie, *Public International Law*, at p. 235). The appellants have not argued, let alone established, that their interpretation of art. 14 reflects customary international law, or that it has been incorporated into Canadian law through legislation.

[150] It is true that the *Charter* will often be understood to provide protection at least as great as that afforded by similar provisions in international human rights documents to which Canada is a party (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at pp. 348-49, *per* Dickson C.J. dissenting). In my view, however, this presumption operates principally as an interpretive tool in assisting the courts in delineating the breadth and scope of *Charter* rights (see *Health Services and Support*, at paras. 71-79; also Beaulac, at pp. 231-39). International Conventions may also assist in establishing the elements of the *Malmo-Levine* test for recognition of new principles of fundamental justice (see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 10). But not all commitments in international agreements amount to principles of fundamental justice. Their nature is very diverse. International law is ever changing. The interaction between domestic and international law must be managed carefully in light of the principles governing what remains a dualist system of application of international law and a constitutional and parliamentary democracy. The mere existence of an international obligation is not sufficient to establish a principle of fundamental justice. Were we to equate all the

protections or commitments in international human rights documents with principles of fundamental justice, we might in effect be destroying Canada's dualist system of reception of international law and casting aside the principles of parliamentary sovereignty and democracy.

[151] That being said, I am prepared to accept that *jus cogens* norms can generally be equated with principles of fundamental justice and that they are particularly helpful to look to in the context of issues pertaining to international law. Just as principles of fundamental justice are the "basic tenets of our legal system" (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503), *jus cogens* norms are a higher form of customary international law. In the same manner that principles of fundamental justice are principles "upon which there is some consensus that they are vital or fundamental to our societal notion of justice" (*Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 590), *jus cogens* norms are customs accepted and recognized by the international community of states from which no derogation is permitted (*Bouzari*, at paras. 85-86; *van Ert*, at p. 29).

[152] This recognition, however, does not bolster the appellants' argument. While the prohibition of torture is certainly a *jus cogens* norm from which Canada cannot derogate (and is also very likely a principle of fundamental justice), the question in this case is whether this norm extends in such a way as to require each state to provide a civil remedy for torture committed abroad by a foreign state.

[153] Several national courts and international tribunals have considered this question, and they have consistently confirmed that the answer is no: customary international law does not extend the prohibition of torture so far as to require a civil remedy for torture committed in a foreign state. I agree with these courts and tribunals that the peremptory norm prohibiting torture has not yet created an exception to state immunity from civil liability in cases of torture committed abroad.

[154] In *Germany v. Italy*, the I.C.J. considered whether Germany could benefit from state immunity in respect of its violations of international humanitarian law in Italy during the Second World War. The court observed that there was a substantial body of state practice which demonstrated that customary international law did not consider a state's entitlement to immunity as being dependent upon the gravity of the act of which it was accused or the peremptory nature of the rule which it was alleged to have violated (paras. 89-91).

[155] In *Jones v. United Kingdom*, the European Court of Human Rights reviewed judicial decisions from around the world, and concluded:

In recent years, both prior to and following the House of Lords judgment in the present case, a number of national jurisdictions have considered whether there is now a *jus cogens* exception to State immunity in civil claims against the State

However, it is not necessary for the Court to examine all of these developments in detail since the recent judgment of the International Court of Justice in *Germany v. Italy* . . . — which must be considered by this Court as authoritative as regards the content of customary international law — clearly establishes that, by February 2012, no *jus cogens* exception to State immunity had yet crystallised. [paras. 197-98]

[156] Similarly, in *Fang v. Jiang*, [2007] N.Z.A.R. 420, the High Court of New Zealand agreed with the House of Lords in *Jones v. Ministry of the Interior of Saudi Arabia* and held that there was no exception to state immunity claims in situations of torture.

[157] Taking the above as indicative of lack of state practice and *opinio juris*, I must conclude that Canada is not obligated by the *jus cogens* prohibition on torture to open its courts so that its citizens may seek civil redress for torture committed abroad. This is not the meaning and scope of the peremptory norm. Consequently, failing to grant such access would not be a breach of the principles of fundamental justice. However, I agree with the I.C.J. in *Germany v. Italy* that “recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation” (para. 93).

[158] The David Asper Centre for Constitutional Rights (“DAC”) and the International Human Rights Program (“IHRP”) submit that s. 3(1) of the *SIA* is unconstitutional to the extent that it prevents access to an effective remedy for gross human rights violations. They argue that it is a principle of fundamental justice that “where there is a right, there must be a remedy for its violation” (factum, at para. 6).

[159] While I agree that “where there is a right, there must be a remedy for its violation” is a legal maxim, I cannot accept that it necessarily constitutes a principle of fundamental justice. While rights would be illusory if there was never a way to

remedy their violation, the reality is that certain rights do exist even though remedies for their violation may be limited by procedural bars. Remedies are by no means automatic or unlimited; there is no societal consensus that an effective remedy is always guaranteed to compensate for every rights violation.

[160] Substantive rights are frequently implemented within a framework of procedural limitations. There are numerous examples of substantive rights with procedural limitations in Canada. For instance, Canadians have a right to be free from defamation or libel, but in order to sue in Canada, the plaintiff must prove that there is a real and substantial connection between the alleged tortious action and the forum (*Breedon v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666). Further, Canadians have a right to be free from assault, but in order to sue for consequential relief, they must bring their claim within a specified period of time (see, for example, the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, ss. 4 and 10).

[161] Similarly, individuals have a right to be free from torture, but state immunity is a procedural bar which prevents an individual from bringing a civil claim against a foreign state. State immunity regulates a state's exercise of jurisdiction over another foreign state, which is a procedural matter. This regulation is distinct from the substantive law which would determine whether the alleged acts of torture were lawful (*Germany v. Italy*, at para. 93; Fox and Webb at p. 21).

[162] The interveners the DAC and the IHRP have failed to establish that there is consensus that people must always have a right to an effective remedy and that this

is necessary to the functioning of the legal system (factum, at paras. 17 and 20). As indicated above, there are many examples in Canadian law where remedies are subordinated to other concerns in appropriate contexts. Society does not always deem it essential that the right to a remedy “trump all other concerns in the administration of justice” (*Canadian Foundation for Children, Youth and the Law*, at para. 10).

[163] Similarly, there is no evidence of a consensus that the particular remedy requested in this instance (a civil action in domestic courts for human rights violations committed abroad) is necessary to the proper functioning of the international legal system. Although my colleague Justice Abella and many interveners point to international instruments touting the importance of effective remedies, these instruments are not consistently interpreted as ensuring access to domestic courts to pursue civil actions for torture committed abroad to the detriment of all other interests. Indeed, it is clear that, in the international community, the right to a civil remedy will give way to procedural bars that are crucial to the functioning of sovereign equality such as state immunity (see, for example, *Germany v. Italy*, at paras. 82 and 84).

[164] Further, I have difficulty accepting that the maxim “where there is a right, there must be a remedy for its violation” discloses a manageable standard as required by *Malmo-Levine*. The DAC and the IHRP rely on this Court’s decisions in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 and *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, in attempting to

define the term “a remedy”, or more precisely “an appropriate and just remedy”. Our Court found that “an appropriate and just remedy” will (1) meaningfully vindicate the rights and freedoms of the claimants, (2) employ means that are legitimate within the framework of our constitutional democracy, (3) be a judicial remedy which vindicates the right while invoking the function and powers of the court, and (4) be fair to the party against whom the order is made (*Doucet-Boudreau*, at paras. 55-58).

[165] While these are helpful guiding principles, they are not concrete enough to guarantee a predictable result. Determining whether a remedy will truly compensate for a violation of one’s rights is an intensely personal and subjective matter. What will vindicate the violation of one person’s rights will not come close to satisfying another individual.

[166] Much like the notion of “the best interests of the child” discussed in *Canadian Foundation for Children, Youth and the Law*, the idea of “an appropriate and just remedy” and “meaningful vindication” to properly compensate for a rights violation

is inevitably highly contextual and subject to dispute; reasonable people may well disagree about the result that its application will yield It does not function as a principle of fundamental justice setting out our minimum requirements for the dispensation of justice.

(*Canadian Foundation for Children, Youth and the Law*, at para. 11)

[167] For these reasons, I conclude that while the application of s. 3(1) of the *SIA* in cases of torture may engage security of the person, no identifiable principle of fundamental justice has been violated. As a result, s. 3(1) of the *SIA* does not violate s. 7 of the *Charter*.

VII. Conclusion

[168] With regard to exceptions to state immunity, Professor H. H. Koh famously asked, “if contracts, why not torture?” (“Transnational Public Law Litigation” (1991), 100 *Yale L.J.* 2347, at p. 2365). The answer is simple. Parliament has decided as much.

[169] State immunity is a complex doctrine that is shaped by constantly evolving international relations. Determining the exceptions to immunity requires a thorough knowledge of diplomacy and international politics and a careful weighing of national interests. Since the introduction of the *SIA*, such a task belongs to Parliament or the government, though decisions and laws pertaining to international affairs may be subject to constitutional scrutiny under the *Charter*. In this sense, there is no *Charter* free zone and the courts may have to play a part, as they have done in the past (*Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441; *Canada (Prime Minister) v. Khadr*. It is not, however, this Court’s task to intervene in delicate international policy making.

[170] Parliament has the power and the capacity to decide whether Canadian courts should exercise civil jurisdiction. Parliament has the ability to change the current state of the law on exceptions to state immunity, just as it did in the case of terrorism, and allow those in situations like Mr. Hashemi and his mother's estate to seek redress in Canadian courts. Parliament has simply chosen not to do it yet.

[171] Given the above reasoning, I would dismiss the appeal without costs and answer the constitutional questions as follows:

- 1) Is s. 3(1) of the *State Immunity Act*, R.S.C. 1985, c. S-18, inconsistent with s. 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c. 44?

No.

- 2) If so, is s. 3(1) of the *State Immunity Act*, R.S.C. 1985, c. S-18, inoperable by reason of such inconsistency?

It is not necessary to answer this question.

- 3) Does s. 3(1) of the *State Immunity Act*, R.S.C. 1985, c. S-18, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

No.

- 4) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

The following are the reasons delivered by

ABELLA J. —

[172] The prohibition on torture is a peremptory norm — *jus cogens* — under international law. That means that the international community has agreed that the prohibition cannot be derogated from by any state.¹ The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S. 85, was adopted by the United Nations General Assembly in 1984 and came into force in 1987. It is an international human rights instrument aimed at the prevention of torture and other cruel, inhuman, and degrading treatment or punishment around the world. The *Convention Against Torture* did not create the prohibition against torture, but was premised on its uncontroversial and universal acceptance.

[173] State practice is evolving over whether torture can qualify as official state conduct. The evolution emerges from the following conundrum: how can torture be an official function for the purpose of immunity under international law when international law itself universally prohibits torture (see *R. v. Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147 (H.L.) (“*Pinochet No. 3*”). It seems to me that the legal fluidity created by this question and the challenges it imposes for the integrity of international law leave this Court with a choice about whether to extend immunity to foreign officials for such acts.

[174] In light of the equivocal state of the customary international law of immunity, the long-standing international acceptance of the principle of reparation manifested in Article 14 of the *Convention Against Torture*, and almost a century of

¹ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3

increasing international recognition that human rights violations threaten global peace and stability, I see no reason to include torture in the category of official state conduct attracting individual immunity. Equivocal customary international law should not be interpreted so as to block access to a civil remedy for torture, which, at a *jus cogens* level, is unequivocally prohibited. As a result, and with great respect, I do not agree with the majority that the defendants Saeed Mortazavi and Mohammad Bakhshi are immune from the jurisdiction of Canadian courts.

Analysis

[175] The doctrine of sovereign immunity limits a state's power to submit a foreign state to the jurisdiction of its courts. This limit is "the natural legal consequence of the obligation to respect the sovereignty of other States": Antonio Cassese, *International Law* (2nd ed. 2005), at p. 98 (emphasis deleted). Like the theory of sovereignty itself, the international law of state immunity has evolved significantly over the last century. What was once considered absolute is now recognized to be nuanced and contextual.

[176] In Canada, the doctrine of state immunity historically developed and was applied by Canadian courts under the common law and in accordance with customary practice. The formerly complete procedural bar once imposed by the doctrine has become increasingly restricted. As LeBel J. recognized in *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269,

[o]ver the years, the general principle of sovereign immunity has been attenuated somewhat, and certain exceptions to the general rule have emerged. Some authors have interpreted the emergence of exceptions to sovereign immunity as evidence of a new, restrictive immunity. [para. 15]

[177] Before 1982, Canadian courts had generally adhered to a theory of absolute state immunity, but in some cases adopted an increasingly restricted form of immunity determined by the subject matter of the state conduct in question. In light of the diverging practices in domestic courts at the time, Parliament enacted the *State Immunity Act*, R.S.C. 1985, c. S-18, whose purpose was to bring clarity by codifying the common law on the immunity of foreign states.

[178] The *State Immunity Act* sets out the following general rule for the immunity of a foreign state in Canadian courts:

3. (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.

[179] By its own terms, then, the theory of state immunity codified by the *State Immunity Act* through s. 3(1) is restricted through several internal statutory limitations. The immunity of a foreign state may be limited, for instance, by waiver (s. 4); in proceedings relating to the commercial activity of the foreign state (s. 5); in proceedings relating to death, personal injury or property damage that occurs in Canada (s. 6); in certain maritime proceedings (s. 7); and in respect of certain property located in Canada (s. 8).

[180] In 2012, Parliament amended the *State Immunity Act* to limit the immunity of a foreign state in proceedings against it in connection with its support for terrorism (s. 6.1).

[181] The doctrine of sovereign immunity is not entirely codified under the *State Immunity Act*. Section 18 specifies that the Act “does not apply to criminal proceedings or proceedings in the nature of criminal proceedings”. Accordingly, the *State Immunity Act* only addresses the circumstances in which Canadian courts are procedurally barred from taking jurisdiction over a foreign state in proceedings outside the criminal context.

[182] While section 3(1) of the *State Immunity Act* outlines the immunity of a “foreign state”, s. 2 defines it as follows:

“foreign state” includes

(a) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,

(b) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and

(c) any political subdivision of the foreign state;

[183] “Agency of a foreign state” and “political subdivision” are defined as follows:

“agency of a foreign state” means any legal entity that is an organ of the foreign state but that is separate from the foreign state;

“political subdivision” means a province, state or other like political subdivision of a foreign state that is a federal state.

[184] The only individuals expressly included in the definition of a “foreign state” are “any sovereign or other head of the foreign state . . . while acting as such in a public capacity”. There is no reference to public officials apart from heads of state. As the General Counsel for the Constitutional and International Law Section of the Department of Justice said in speaking to the Standing Committee on Justice and Legal Affairs: “[T]his proposed act deals with states, not with individuals” (*Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 60, 1st Sess., 32nd Parl., February 4, 1982, at p. 32).

[185] The Ontario Court of Appeal was of the view in *Jaffe v. Miller* (1993), 13 O.R. (3d) 745, that the silence in the *State Immunity Act* on the immunity of lower-level individual officials who work for and on behalf of the state means that the common law determines when immunity applies to lower level officials:

The fact that the Act is silent on its application to employees of the foreign state can only mean that Parliament is content to have the determination of which employees are entitled to immunity determined at common law. It will be a matter of fact for the court to decide in each case whether any given person performing a particular function is a functionary of the foreign state.

. . . *There is nothing in the State Immunity Act which derogates from the common law principle that, when acting in pursuit of their duties, officials or employees of foreign states enjoy the benefits of sovereign immunity.* [Emphasis added; pp. 759-60.]

[186] At the very least, the silence creates an ambiguity as to whether the *State Immunity Act* applies to lower-level officials. Resolving that ambiguity is assisted by reference to customary international law (Jutta Brunée and Stephen J. Toope, “A Hesitant Embrace: The Application of International Law by Canadian Courts” (2002) 40 *Can. Y.B. Intl’ L.* 3, at pp. 50-51). Under customary international law, there is a distinction between the blanket immunity *ratione personae* of high-ranking individuals such as the head of state, and the immunity *ratione materiae* for former heads of state and lower-ranking officials which applies only in respect of official acts performed for or on behalf of the state. These doctrines recognize the unique role and responsibility of heads of state. Immunity *ratione personae* shields individuals in the state’s highest positions of authority and, in so doing, preserves their ability to carry out the governance of the state. Immunity *ratione materiae*, on the other hand, confers immunity on foreign officials for acts performed while in office only if they are official acts performed on behalf of the state (John H. Currie, Craig Forcese, Joanna Harrington and Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory* (2nd ed. 2014), at pp. 554-55).

[187] For a practice to become custom, its observance must be seen by states to be obligatory (Currie, Forcese, Harrington and Oosterveld, at p. 116, citing James L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th ed. 1963), at pp. 59-60). In my view, in determining whether the claims in this case are barred by immunity, we should consider what the international community has said about individual redress for gross violations of peremptory norms.

[188] Under international law generally, the protection for and treatment of individuals as legal subjects has evolved dramatically. And with that evolving protection has come the recognition of a victim's right to redress for a violation of fundamental human rights. The claims for civil damages brought by Zahra Kazemi's estate and her son Stephan Hashemi are founded on Canada's and Iran's obligations under international human rights law and the *jus cogens* prohibition against torture. These claims must be situated in the context of the significant development of the principle of reparation under public international law throughout the twentieth century. At its most fundamental, the principle of reparation means that when the legal rights of an individual are violated, the wrongdoer owes redress to the victim for harm suffered. The aim of the principle of reparation is restorative.

[189] This principle is foundational in domestic legal systems. One of the justifications advanced for tort law, for example, is the "obligation of reparation", which Professor Stephen R. Perry describes as the theory of corrective justice ("The Moral Foundations of Tort Law" (1992), 77 *Iowa L. Rev.* 449, at pp. 450-51, citing Neil MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy*, chapter 11, "The Obligation of Reparation" (1982)). Professor Ernest Weinrib writes that "corrective justice is the justificatory structure that renders tort law intelligible from within" ("The Special Morality of Tort Law" (1989), 34 *McGill L.J.* 403, at p. 413). The principle of reparation is of course not unique to tort law and underlies many legal processes.

[190] The principle of reparation is also well established in public international law and has been extensively reviewed in the academic literature: see Andrea Gattini, “Reparations to Victims”, in Antonio Cassese, ed., *The Oxford Companion to International Criminal Justice* (2008), at 487; Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (2010); Riccardo Pisillo Mazzeschi, “Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview” (2003), 1 *J.I.C.J.* 339; Liesbeth Zegveld, “Victims’ Reparations Claims and International Criminal Courts: Incompatible Values?” (2010), 8 *J.I.C.J.* 79.

[191] As the Permanent Court of International Justice stated in the 1928 *Case Concerning the Factory at Chorzów* (1928), P.C.I.J. Ser. A, No. 17:

The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that *reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.* [Emphasis added; p. 47.]

[192] The Inter-American Court of Human Rights explained it as follows in 1989:

It is a principle of international law, which jurisprudence has considered “even a general concept of law,” that every violation of an international obligation which results in harm creates a duty to make adequate reparation. Compensation, on the other hand, is the most usual way of doing so (*Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21 and *Factory at Chorzów*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29; *Reparation for*

Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184).

Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.

...

Indemnification for human rights violations is supported by international instruments of a universal and regional character. The Human Rights Committee, created by the International Covenant of Civil and Political Rights of the United Nations, has repeatedly called for, based on the Optional Protocol, indemnification for the violation of human rights recognized in the Covenant (see, for example, communications 4/1977; 6/1977; 11/1977; 132/1982; 138/1983; 147/1983; 161/1983; 188/1984; 194/1985; etc., Reports of the Human Rights Committee, United Nations). The European Court of Human Rights has reached the same conclusion based upon Article 50 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

(*Godínez-Cruz v. Honduras*, July 21, 1989 (Reparations and Costs), at paras. 23, 24 and 26)

[193] Historically, reparations under public international law were limited to interstate reparations for violations of the laws of nations. It has increasingly been recognized, however, that individuals too are entitled to reparation for violations of individually held rights under international law (see Dwertmann, at p. 22; Gattini; Mazzeschi).

[194] While early international criminal proceedings did little to recognize victims' rights, several international courts now recognize victims' rights to reparations against individual perpetrators of international crimes. This shift is, in part, the result of the recognition of the principle of reparation as a general principle of international law in the enabling treaties and statutes of these courts and the advocacy of victims' rights organizations and scholars since the 1960s. The movement became all the more pronounced in the aftermath of widespread atrocities in the 1990s and influenced the drafters of the *Rome Statute of the International Criminal Court*, U.N. Doc. A/Conf. 183/9, July 17, 1998, to "ensure victims a greater role in proceedings before the ICC than before any other international tribunal" (Charles P. Trumbull IV, "The Victims of Victim Participation in International Criminal Proceedings" (2008), 29 *Mich. J. Int'l L.* 777, at p. 780). Incorporating victims' rights into international criminal proceedings is now viewed by many as a significant mechanism of transitional justice and a means of advancing reconciliation.

[195] The right of individuals to reparation is most evidently established under international human rights law. Reparations are a "secondary" right, deriving from the violation of a recognized legal right (Zegveld, at pp. 82-3). It is, as a result, not surprising that the expansion of international human rights law protecting the rights of individuals has generated corresponding rights to "remedy, both substantive and procedural, for individuals suffering injury from unlawful conduct by state authorities" (Zegveld, at p. 83).

[196] Individuals are also granted a remedial right in numerous international human rights conventions: *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), Article 8; *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, Articles 2 and 9 to 14 (entered into force March 23, 1976), Article 2; *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195 (entered into force January 4, 1969), Article 6; *Convention Against Torture* (entered into force June 26, 1987), Article 14; *Convention on the Rights of the Child*, 1577 U.N.T.S. 3 (entered into force September 2, 1990), Article 39; and *International Convention on the Protection of the Right of All Migrant Workers and Members of Their Families*, G.A. Res. 45/158 of December 18, 1990 (in force July 1, 2003), Articles 15, 16(9), 18(6) and 83. Regional human rights treaties have also established an individual right to a remedy for violations of the rights protected under the treaties (Articles 5(5) and 13 of the *European Convention on Human Rights*, 213 U.N.T.S. 221; and Articles 10 and 25(1) of the *American Convention on Human Rights*, 1144 U.N.T.S. 123).

[197] The United Nations General Assembly has provided significant guidance on victims' rights to reparations under international law. The General Assembly first recognized victims' rights to access to justice and redress in 1985 (*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, G.A. Res. 40/34, November 29, 1985). And, in the 1990s, Theo van Boven and M. Cherif

Bassiouni each produced U.N. reports recommending comprehensive guidelines on victims' rights.²

² Commission on Human Rights, *Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Mr. M. Cherif Bassiouni, submitted pursuant to Commission on Human Rights resolution 1998/43*, U.N. Doc. E/CN.4/1999/65; Commission on Human Rights, *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117*, U.N. Doc E/CN.4/Sub.2/1996/17.

[198] Building on these recommendations and on the developments in the international human rights Conventions listed in the previous paragraph, in 2005, the General Assembly adopted the *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*, G.A. Res/60/147, U.N. Doc. A/Res/60/147, December 16, 2005. This resolution recognizes a state's obligation to provide access to justice and effective remedies, including reparations, to victims of serious or gross human rights and humanitarian law violations. It defines reparations as including "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition"³ and provides that reparations be proportional to the gravity of the violation and harm suffered. The Preamble emphasizes that the resolution does not *create* a right to reparation, but merely identifies methods for the "implementation of *existing legal obligations* under international human rights law. . . ."

[199] As all this shows, an individual's right to a remedy against a state for violations of his or her human rights is now a recognized principle of international law.⁴

[200] The as yet unsettled question remains, however, whether state immunity denies victims of torture access to a civil remedy. Jurisprudentially, like Polaroid photographs, the picture is becoming clearer, but it still lacks focus.

³ *Basic Principles and Guidelines*, at para. 18.

⁴ For a detailed review of the evolution of victims' rights under international law, see M. Cherif Bassiouni, "International Recognition of Victims' Rights" (2006), 6 *Hum. Rts. L. Rev.* 203.

[201] In the context of civil proceedings, American courts have concluded that acts in violation of *jus cogens* cannot constitute official sovereign acts. In *Yousuf v. Samantar*, 699 F.3d 763 (2012) (appeal pending) (“*Samantar II*”), the Court of Appeal for the Fourth Circuit considered whether Mohamed Ali Samantar, a former high-level government official from Somalia who was a resident in the United States, could benefit from immunity for alleged acts of torture, arbitrary detention and extrajudicial killing committed in Somalia. Traxler C.J. concluded that under international law, “officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant’s official capacity” (p. 777). Because *jus cogens* violations are not legitimate state acts, the performance of such an act does not qualify as an “official act” justifying immunity *ratione materiae*.

[202] This conclusion was further supported by Congress’s enactment of the *Torture Victim Protection Act of 1991*, Pub. L. 102-256, 106 Stat. 73 (*TVPA*) which created an express private right of action for individuals victimized by torture. Although no similar legislation exists in Canada, Congress’s enactment of the *TVPA* serves as further evidence of state practice confirming that *jus cogens* violations are not official acts which are entitled to immunity *ratione materiae*. The Senate Report about the *TVPA* explained that “because no state officially condones torture or extrajudicial killings, few such acts, if any, would fall under the rubric of ‘official actions’ taken in the course of an official’s duties” (No. 249, 102nd Cong., 1st Sess. (1991), at p. 6).

[203] At the International Court of Justice (“I.C.J.”), in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p.3, Judges Higgins, Kooijmans and Buergenthal referred to the growing acceptance in the academic literature, state practice and international jurisprudence that *jus cogens* violations do not constitute “official acts” for the purpose of immunity *ratione materiae*:

It is now increasingly claimed in the literature (see for example, Andrea Bianchi, “Denying State Immunity to Violators of Human Rights”, 46 *Austrian Journal of Public and International Law* (1994), pp. 227-228) that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform (Goff, J. (as he then was) and Lord Wilberforce articulated this test in the case of *I^o Congreso del Partido* (1978) QB 500 at 528 and (1983) AC 244 at 268, respectively). This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public State acts. The same view is gradually also finding expression in State practice, as evidenced in judicial decisions and opinions. (For an early example, see the judgment of the Israel Supreme Court in the *Eichmann* case; Supreme Court, 29 May 1962, 36 *International Law Reports*, p. 312.) See also the speeches of Lords Hutton and Phillips of Worth Matravers in *R. v. Bartle and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet (“Pinochet III”)*; and of Lords Steyn and Nicholls of Birkenhead in “*Pinochet I*”, as well as the judgment of the Court of Appeal of Amsterdam in the *Bouterse* case (Gerechtshof Amsterdam, 20 November 2000, para. 4.2.) [para. 85]

[204] More recently, however, the I.C.J. in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*,⁵ in addressing the scope of state immunity under customary international law with respect to *jus cogens* violations, concluded that its availability was not dependent on the gravity of the unlawful act which the state is alleged to have committed. Significantly, however, it made clear

⁵ Judgment, I.C.J. Reports 2012, p. 99.

that it was only considering immunity for acts committed by the state, specifically emphasizing that it was not considering the availability of immunity for individual state officials:

[T]he Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case. [para. 91]

[205] The availability of state immunity for *jus cogens* violations rests on the underlying rationale that such immunity is necessary to allow the government to continue functioning in its own territory. By declining to extend the reach of its conclusion to individual foreign officials, the I.C.J. implicitly acknowledged that immunity *ratione materiae* in civil proceedings can be developed on a different trajectory than state immunity (Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd ed. 2013), at p. 569).

[206] The evolutionary nature of the law of immunity for torture was recognized most recently in *Jones v. United Kingdom*, Nos. 34356/06 and 40528/06, ECHR 2014. Four individuals had started civil proceedings in the United Kingdom against the Ministry of Interior of the Kingdom of Saudi Arabia and against individual state officials, acting as agents of Saudi Arabia, for alleged incidents of torture.

[207] The European Court of Human Rights extensively reviewed the international jurisprudence, noting that state practice on the question of immunity *ratione materiae* for incidents of torture was “in a state of flux” (para. 30). It recognized the existence of “some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials” because torture was not lawfully within the scope of official authority (para. 213; see, e.g., *Samantar II* as well as *Xuncax v. Gramajo*, 886 F.Supp. 162 (D. Mass. 1995), and *Cabiri v. Assasie-Gyimah*, 921 F.Supp 1189 (S.D.N.Y. 1996)). Nevertheless, it was of the view that there was not yet sufficient international support for denying immunity to individual defendants against a *civil* claim based on torture.

[208] This decision, however, does not foreclose the possibility that torture is beyond the protection of immunity *ratione materiae*. What it manifestly *does* support is the recognition that, at present, state practice is evolving. The evolution, in my view, reveals a palpable, albeit slow trend in the international jurisprudence to recognize that torture, as a violation of a peremptory norm, does not constitute officially sanctioned state conduct for the purposes of immunity *ratione materiae*.

[209] I have some difficulty, therefore, understanding why the treatment of immunity for civil claims should be different from that for criminal proceedings. As Judge Kalaydjieva said in her dissenting opinion in *Jones v. United Kingdom*:

Like Lord Justice Mance [at the Court of Appeal] I find it difficult to “accept that general differences between criminal and civil law justifi[y] a distinction in the application of immunity in the two contexts”, especially in view of developments in this field, not least following the findings of the House of Lords in the case of *Pinochet (No. 3)* that there would be “no immunity from criminal prosecution in respect of an individual officer who had committed torture abroad in an official context.” I also find it “not easy to see why civil proceedings against an alleged torturer could be said to involve a greater interference in the internal affairs of a foreign State than criminal proceedings against the same person” and also “incongruous that if an alleged torturer was within the jurisdiction of the forum State, he would be prosecuted pursuant to Article 5(2) of the Convention against Torture and no immunity could be claimed, but the victim of the alleged torture would be unable to pursue any civil claim”. [pp. 62-63]

[210] This is only reinforced by the fact that many jurisdictions permit civil recovery against perpetrators in the context of criminal proceedings. As Ben Batros and Philippa Webb write, “the criminal courts of many states, including Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg and The Netherlands, combine civil and criminal proceedings, allowing victims to be represented, and to recover damages, in the criminal proceeding itself”: “Accountability for Torture Abroad and the Limits of the Act of State Doctrine: Comments on *Habib v. Commonwealth of Australia*” (2010), 8 *J.I.C.J.* 1153, at p. 1169.

[211] Accordingly, while it can be said that customary international law permits states to recognize immunity for foreign officials, as evidenced in *Jones v. United Kingdom*, it also does not *preclude* a state from denying immunity for acts of torture, as exemplified in *Pinochet (No. 3)* and *Samantar II*.

[212] In my view, this conclusion is reinforced by the steps the international community has taken towards ensuring individual accountability for the commission of torture under the *Convention Against Torture*.

[213] The purpose of the *Convention Against Torture* is consistent with a broad obligation to protect victims' rights to remedies for torture regardless of where it occurred. The *Convention* established a shared commitment to "make more effective the struggle against torture . . . throughout the world", as the Preamble states. In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, the I.C.J. described the purpose of the *Convention's* obligations as *erga omnes partes*, that is, all state parties have an interest in complying with them:

As stated in its Preamble, the object and purpose of the Convention is "to make more effective the struggle against torture . . . throughout the world". The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. . . . All the States parties "have a legal interest" in the protection of the rights involved (*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). These obligations may be defined as "obligations *erga omnes partes*" in the sense that each State party has an interest in compliance with them in any given case. [para. 68]

[214] Of particular relevance, Article 14 of the *Convention Against Torture* states:

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

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

[215] On a plain reading, Article 14 imposes an obligation on state parties to ensure that all victims of torture from their countries can obtain “redress and ha[ve] an enforceable right to fair and adequate compensation”. The text provides no indication that the “act of torture” must occur within the territory of the state party for the obligation to be engaged. If a state undertakes to ensure access to a remedy for torture committed abroad, this necessarily implicates the question of the immunity of the perpetrators of that torture.

[216] The absence of any territorial dimension to the provision is significant. When the parties to the *Convention Against Torture* wished to limit their obligations to their respective territorial jurisdictions, they did so expressly. The obligations imposed by Articles 2(1), 5(1)(a), 5(2), 11, 12, 13 and 16 of the *Convention*, for example, are limited or modified by the words “*in any territory under its jurisdiction*” (Harold Hongju Koh, “Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application to Situations of Armed Conflict”, U.S. Department of State, January 21, 2013, at pp. 16-20).

[217] The drafting history of Article 14 further suggests that the absence of territorial limits in it are revealing. While the Netherlands had proposed to include the words “committed in any territory under its jurisdiction”, this phrase was deleted from the text without any indication from either the *Travaux Préparatoires* or the commentary as to why: Manfred Nowak and Elizabeth McArthur, with the contribution of Kerstin Buchinger et al., *The United Nations Convention Against Torture: A Commentary* (2008), at para 15.

[218] This has led some to suggest that the omission of the territorial limits was a mistake or an oversight: see Andrew Byrnes, “Civil Remedies for Torture Committed Abroad: An Obligation under the Convention against Torture?”, in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 537, at pp. 546 and 548. But even accepting that the omission of any territorial limit to Article 14 was an error, there are international procedures which set out how such a mistake could have been rectified. Article 40 of the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, governs the circumstances in which an amendment to a multilateral treaty can be made, and Article 79 sets out the appropriate procedures to be followed for the correction of an error in the text of a treaty. To date, no amendment or correction has been made to Article 14.

[219] Further confusion has arisen because of the declaration by the United States upon the ratification of the *Convention Against Torture* in October 1994, stating that its consent was conditional on the following “understanding”:

(3) That it is the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

(United Nations Treaty Collection, Status on *Convention Against Torture* (online), at p. 7)

[220] The House of Lords said in *Jones v. Ministry of the Interior of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270, that “[n]o one has ever objected to that statement of understanding by the United States” (para. 57). But Germany had indicated in 1996 that the United States’ “understanding” was a non-binding declaration:

On 26 February 1996, the Government of Germany notified the Secretary-General that with respect to the . . . understandings under II (2) and (3) made by the United States of America upon ratification “*it is the understanding of the Government of the Federal Republic of Germany that [these understandings] do not touch upon the obligations of the United States of America as State Party to the Convention.*”

(Emphasis added; United Nations Treaty Collection, Status of *Convention Against Torture* (online), at fn 26)

[221] State parties to a treaty are not *presumed* to agree with a declared interpretation merely because they have not expressed an objection (International Law Commission’s *Guide to Practice on Reservations to Treaties*, submitted to the U.N. General Assembly in 2011 (online), at paras. 2.9.8.-2.9.9). At best, therefore, the impact of the United States’ “understanding” is inconclusive.

[222] Subsequent state practice and the views of the Committee Against Torture further confirm that Article 14 does not embody a “mistake”, or that it is merely understood to be territorially limited. In any event, the United States’ position has shifted since the ratification of the *Convention Against Torture*, as evidenced by the enactment in 1991 of the *TVPA*, which provides a cause of action in s. 2(a) for the recovery of damages from “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation” subjects an individual to torture or extrajudicial killing. This led François Larocque to write that

whatever weight the US executive “understanding” of Article 14 might have had upon ratification of the CAT in 1990, it was almost certainly superseded by the statements of both houses of Congress when they enacted the *TVPA*. *In their 1991 reports accompanying the TVPA bill, both the House of Representatives and the Senate explicitly noted that the TVPA was primarily intended to implement the Article 14 obligation to provide civil jurisdiction over torture. . . .* [I]n its report, the Senate Committee on the Judiciary stated that “this legislation will carry out the intent of the CAT This legislation will do precisely that — by making sure that torturers and death squads will no longer have a safe haven in the United States. [Emphasis added.]

(Civil Actions for Uncivilized Acts: The Adjudicative Jurisdiction of Common Law Courts in Transnational Human Rights Proceedings (2010), at pp. 262-63)

[223] The views of state parties to the *Convention Against Torture* confirm Larocque's observation. The governments of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland submitted their views on Article 14 in an *amicus* brief to the Supreme Court of the United States in the case *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), by expressing that the TVPA "was passed by Congress to implement, in part, the Convention Against Torture and Other Cruel, [Inhuman] or Degrading Treatment or Punishment, which had been ratified by the United States".

[224] The opinion of the *Convention Against Torture's* Committee against Torture is also instructive. The Committee consists of "ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity" (Article 17). All state parties to the *Convention* are required under Article 19(1) to report to the Committee "on the measures they have taken to give effect to their undertakings under this Convention", and the Committee is mandated under Article 19(3) to "make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned". I agree with the intervener the Canadian Bar Association that the Committee's expertise lends support to the weight of its interpretation (see Michael O'Flaherty, "The Concluding Observations of United Nations Human Rights Treaty Bodies" (2006), 6 *Hum. Rts. L. Rev.* 27; International Law Association, Committee on International Human Rights Law and Practice, *Interim report on the impact of the*

work of the United Nations human rights treaty bodies on national courts and tribunals (2002) (online).

[225] Notably, the Report of the Committee against Torture commended the United States in 2000 for the “broad legal recourse to compensation for victims of torture, whether or not such torture occurred in the United States of America” (U.N. Doc. G.A. A/55/44 (2000), at para. 178).

[226] In 2005, on the other hand, the Committee expressed concern about the absence of effective measures in Canada to provide civil compensation to victims of torture “in all cases” (United Nations, Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention*, U.N. Doc. CAT/C/CR/34/Can, July 7, 2005, at para. 4(g)). These concerns were expressed shortly after the Ontario Court of Appeal, in *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 , concluded that the *State Immunity Act* precludes access to a civil remedy for acts committed by foreign states, notwithstanding Article 14 of the *Convention Against Torture* (see Jennifer Besner and Amir Attaran, “Civil liability in Canada’s courts for torture committed abroad: The unsatisfactory interpretation of the State Immunity Act 1985 (Can)” (2008), 16 *Tort L. Rev.* 150, at p. 160). In 2012, the Committee reiterated its concern about Canada’s failure to fully implement Article 14:

The Committee remains concerned at the lack of effective measures to provide redress, including compensation, through civil jurisdiction to all

victims of torture, *mainly due to the restrictions under provisions of the State Immunity Act* (art. 14).

The State party should ensure that all victims of torture are able to access remedy and obtain redress, wherever acts of torture occurred and regardless of the nationality of the perpetrator . . . [Emphasis added.]

(Consideration of reports submitted by States parties under article 19 of the Convention, U.N. Doc. CAT/C/CAN/CO/6, June 25, 2012, at para. 15)

[227] It is important to note that the plaintiff's claim in *Bouzari* was against the Islamic Republic of Iran, not against individual officials. *Bouzari* addressed only the extent to which Article 14 requires state parties to deny a "foreign state" immunity in civil proceedings in Canada arising out of torture committed abroad.

[228] All this demonstrates that customary international law no longer *requires* that foreign state officials who are alleged to have committed acts of torture be granted immunity *ratione materiae* from the jurisdiction of Canadian courts. This interpretation is not only consistent with the text and purposes of Article 14 of the *Convention Against Torture*, it also finds growing expression in the practice of state parties to that treaty.

[229] The denial of immunity to individual state officials for acts of torture does not undermine the rationale for the doctrine of immunity *ratione materiae*. In the face of universal acceptance of the prohibition against torture, concerns about any interference with sovereignty which may be created by acting in judgment of an individual state official who violates this prohibition necessarily shrink. The very

nature of the prohibition as a peremptory norm means that all states agree that torture cannot be condoned. Torture cannot, therefore, be an official state act for the purposes of immunity *ratione materiae*. That the *Convention Against Torture* defines its scope by reference to the fact that torture itself is necessarily carried out by the state and its officials does not detract from this universal understanding, or predetermine whether immunity must be extended to such conduct.

[230] I am therefore in agreement with Breyer J.'s concurring opinion in *Sosa v. Alvarez-Machain* that assuming civil jurisdiction over torture committed abroad will not impair the objectives sought to be protected by comity:

Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior. . . . That subset includes torture, genocide, crimes against humanity, and war crimes. . . .

The fact that this procedural consensus exists suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity. That is, allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. . . . [Citations omitted; pp. 762-63.]

[231] As a result, in my view, the *State Immunity Act* does not apply to Mortazavi and Bakhshi, and the proceedings against them are not barred by immunity *ratione materiae*.

Appeal dismissed without costs, ABELLA J. dissenting.

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